

23 October 2020

Public Consultation
Inland Revenue
Wellington

By email: PublicConsultation@ird.govt.nz

Re: PUB00327: draft Interpretation Statement – Goods and Services Tax – GST and Agency

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the exposure draft Interpretation Statement *PUB00327: Goods and services tax – GST and agency (draft IS)*.

Comments from the Law Society’s Tax Law Committee are set out below.

Scope of this statement

The draft IS begins by stating that it:

considers whether a person is acting as an agent or as a principal for the purposes of the Goods and Services Tax Act 1985 (the Act). It is primarily concerned with the application of ss 60(1) and (2) and identifies features that indicate when an agency relationship will exist in relation to a supply.

The greater part of the draft IS is dedicated to outlining the legal concept of agency, with reference to case law (and including some 15 pages of case summaries), from which [32] states that the Commissioner “has identified a series of features that indicate the existence of an agency relationship”. It is then stated, at [33], that “For GST purposes, the Commissioner considers that there are two essential features of an agency relationship” (underlining added); we assume – and it should be confirmed in the draft IS whether it is the case – that the Commissioner considers that those essential features (being “authority and consent”) are the same for other tax purposes.

General statements at [2], [13] and [93]

At [2], [13] and [93], the draft IS states that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply. However, as noted at [94], for instance, the GST Act contains provisions that permit or require an agency relationship to be ignored and the GST consequences that follow. Accordingly, the statements at [2], [13] and [93] could usefully be prefaced with wording to the effect that “the general, but not exclusive, rule is” that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply.

Consent

As noted above, consent is one of the two features that the Commissioner considers essential to an agency relationship. However, the draft IS's discussion of consent in this context at [39] and [40] is too brief.

At [39] and [40], it is stated that consent to an agency relationship may be express or implied and that consent may be inferred from conduct even if the parties do not think they are acting as agent and principal and have expressly said they are not.

That consent may be implied or inferred, even when expressly denied, indicates that the concept of this essential feature deserves further discussion.

The Appendix case summaries of *R34* and *Garnac Grain* do not contain that further discussion. In the case summary of *R34*, at [176] it is stated that "The TRA agreed with the Commissioner that the agency relationship is one of consent rather than contract." While this is how the submission for the Commissioner was initially summarised by the TRA, the point of the submission (as the TRA immediately went on to explain) was that an agency relationship can be found to exist, as a matter of contract, notwithstanding a contractual clause disclaiming such a relationship or indeed the absence of knowledge as to "the true state of affairs" (in the words of the TRA). Accordingly, the phrase "consent rather than contract" may mislead, first by understating the complexity of consent in this context, and second by contrasting consent with contract, when consent may be grounded on the actual contractual relationship.

Further, the only other case identified as bearing on the nature of consent that is mentioned is the House of Lords' *Garnac Grain* case (which was referred to in *R34*). However, the Appendix case summary at [208] to [210] does not expand on the concept of consent, with it merely stated at [210] that "The House of Lords held there was no agency relationship because [A] had not consented to [C] acting on its behalf."

Features that strongly indicate an agency relationship: [43]

The opening sentence of [43] could usefully be redrafted as "The Commissioner considers the following features strongly indicate the existence of a principal/agency relationship between persons A and B in respect of a transaction", (new words underlined) with the features redrafted as follows (so as not to prejudice the existence of an agency relationship):

- The documentation supports an agency relationship between Person A and Person B
- Person B receives a commission from Person A
- Person B does not obtain a legal interest in any property it obtains for Person A
- Person A assumes the risk in the transaction
- A contract made by Person B with a third party in the exercise of its authority is enforceable by and against Person A
- Person B is not liable to pay the debt of Person A
- Person A reimburses Person B for expenses

Ownership of property – an agent does not obtain a legal interest in any property it obtains as agent

At [52] – [54], the draft IS states, unequivocally, that an agent does not obtain a legal interest in the principal’s goods or property and that title passes directly between the principal and third party. However, at [86] it is stated that “an agent does not typically hold title to the principal’s property” (underlining added), although no further explanation is provided.

What is problematic about the discussion of agency and ownership, is that an agency relationship cannot be excluded where the agent holds legal title to property. Such title may be held in another capacity, say as bailee or bare trustee, but we are not aware of any legal rule that prevents a person holding legal title to property to be holding that title as agent (if authorised by the principal). Accordingly, a person’s holding of legal title, may be only a neutral factor in determining whether there is an agency relationship. Similarly, and as [162] indicates, the retention of title can also be a neutral factor.

Sections 60(1A) and (1AB) – agent treated as making the supply for non-resident principal

[97] states that “Sections 60(1A) and (1AB) allow a New Zealand-resident agent acting for a non-resident principal who supplies distantly taxable goods or remote services to New Zealand customers, to agree with the principal to treat the agent as making the supplies.” Example 4 (following [97]) is provided as an example of such an agreement. However, the second paragraph of Example 4 states that, following the agreement, “Otto is required to register and return GST on behalf of The Fit Corporation for supplies made to New Zealand customers ...” (underlining added). The underlined words are not consistent with s 60(1AB), which provides only that the principal and agent agree that the agent is treated as making the supply in the course of a taxable activity carried on by the agent, and [97] does not suggest that the agent’s registration and filing is “on behalf of” the non-resident principal.

Section 60(6) – agent treated as principal when receiving goods on behalf of a non-resident principal for import or export

In Example 6, it would be appropriate, for completeness, to refer to the GST (zero-rating) treatment of the supplies by Vlad (as shipping agent) to Ivan (the Russian ship owner).

Section 60(1C) – separate supplies of distantly taxable goods and remote services

We suggest that the introductory paragraph [108], concerning supplies of distantly taxable goods and remote services through marketplaces, is deleted as it is confusing and potentially misleading.

[109] needs to be amended in some respects. First, where the underlying supplier is New Zealand resident, sections 60C or 60D may apply only where it is remote services, and not distantly taxable goods, that are supplied by that person through a non-resident marketplace.

Second, [109] should note that sections 60C and 60D may also apply where a GST registered non-New Zealand resident makes supplies (whether or remote services or of distantly taxable goods) through a non-resident marketplace.

Further, [109] should note that section 60C does not override the agency relationship in all cases (see sections 60C(2B) and (2C)), while section 60D(2) contains conditions before the operator of an

approved marketplace is treated as the supplier, including the exercise of the Commissioner's discretion.

While the draft IS refers the reader to the more detailed discussion in a Tax Information Bulletin, we consider that [109] should be redrafted so that the reader does not draw incorrect inferences as to the scope of sections 60C and 60D.

Sections that deem an agency relationship to exist

At [111] – [113] (and also at [95]), the draft IS states that sections 58 and 59 deem an agency relationship to exist where one might not necessarily exist at common law. This is questioned.

Section 58

In respect of section 58, although it uses the defined terms "agency period" and "specified agent", during the agency period in which the taxable activity of an incapacitated person is carried on by a specified agent, the specified agent (and not the incapacitated person) is treated as being the registered person carrying on the taxable activity, i.e. the GST Act treats the specified agent as if it is the principal and effectively ignores any agency relationship. So section 58 is not deeming an agency relationship to exist, but is deeming any agency relationship that might exist as if it did not exist (and indeed, as if the incapacitated person did not exist during the agency period). As stated in Tax Information Bulletin 7.6 (December 1995), "section 58 deems specified agents who carry on the taxable activity of incapacitated persons to be doing so as registered persons in their own right."¹

The same Tax Information Bulletin notes that "Under the proviso to section 20(3), the specified agent may seek input tax deductions relating to prior periods. Alternatively, a specified agent may file an amended return for the period to which the input tax claim relates. The Commissioner accepts that in both cases specified agents are acting on behalf of the incapacitated person in administering that person's GST rights and obligations for the pre-agency period."² It is only in respect of the pre-agency period that, for GST purposes, the specified agent is treated as agent of the incapacitated person.

Further, it is not necessarily the case that every specified agent is, at common or general law, an agent of the incapacitated person. For example, the common law presumption was that a receiver appointed by a deed or agreement is the agent of the secured party appointing the receiver, and not the agent of the debtor company. Under the Receiverships Act 1993, the presumption has been reversed and a receiver appointed privately pursuant to a deed or agreement is the agent of the debtor company unless the deed or agreement provides otherwise. By contrast, a Court-appointed receiver is answerable to the Court alone.

Section 59

Turning to section 59, if a person carries on a taxable activity "for and on behalf of a principal" who is an "absentee" (as defined in section 59(1)), the draft IS does not explain in what sense the GST Act is deeming that person to be an agent. The draft IS does not explain how the common or general law might characterise the relationship as other than an agency relationship where, to quote [20], a person (the agent) is authorised by another person (the principal) to act on their behalf to create or affect the legal relations between the principal and a third party.

¹ IRD Tax Information Bulletin: Volume Seven, No.6 (December 1995), at p13.

² Note 1, at p14.

Further, section 59 requires the person carrying on the taxable activity for the absentee to make GST returns and be liable for GST charged or levied under the GST Act. That filing obligation and those GST liabilities do not support the statements at [95] and [111] that section 59 deems an agency relationship to exist for GST purposes since, as the draft IS states elsewhere, generally supplies made by or to an agent are, for GST purposes, deemed to be made by or to the principal – with the principal (not the agent) having the obligation to account for GST or having the right to claim a GST input tax deduction. Instead, the section 59 filing obligation and GST liabilities override any agency relationship (and the usual operation of section 60), and effectively treat the agent as carrying on the taxable activity as principal.

Time of supply

At [119] there is a cross-reference to [75], which should be corrected to [73].

Further assistance

We trust Inland Revenue will find these comments helpful. If you do wish to discuss them, please do not hesitate to contact the Tax Law Committee convener Neil Russ, through the Law Society's Law Reform Adviser, Emily Sutton (Emily.Sutton@lawsociety.org.nz).

Yours faithfully



Herman Visagie
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