DavidCo Limited
CHARTERED ACCOUNTANTS

Level 2, Shortland Chambers
70 Shortland Street, Auckland
PO Box 2380, Shortland Street
Auckland 1140
T +64 9 921 6885
F +64 9 921 6889
M +64 21 639 710
E arun.david@davidco.co.nz
W www.davidco.co.nz

WEEKLY COMMENT: WEDNESDAY 9 MAY 2012

1. I enjoy reading documents produced by the Office of the Chief Tax Counsel. For the most part, the documents tend to be illuminating beyond the subject matter being addressed and they are generally easily readable and quite informative. Moreover, there are often wider implications than those canvassed in the documents. However, I may not necessarily agree with all of the conclusions reached.

2. Today I discuss a single topic: the draft Interpretation Statement on *GST and Immigration Services* (deadline for comment was 11 April) and in particular, the meaning of the phrase "at the time the services are performed". In dealing with this apparently innocuous subject, Inland Revenue has attempted to put some flesh around the bones of one of GST's most contentious skeletons: the zero-rating rule for services provided to non-residents.

3. The discussion below is divided into the following sections:

   - What the draft Interpretation Statement (the "IS") is about
   - The Commissioner's view
   - Problems with the Commissioner's view
   - A different point of view

Zero-rating of visa application services

4. The draft Interpretation Statement (the "IS") concerns the circumstances in which visa application services provided to a non-resident can be zero-rated under section 11A(1)(k) of the GST Act. That section requires services to be zero-rated when supplied to a non-resident who is *outside New Zealand at the time the services are performed*.

5. The main focus is on the meaning of the phrase "at the time the services are performed". If the entire supply cannot be zero-rated, the subsidiary questions addressed are:

   (a) Whether the supply can be apportioned into standard-rated and zero-rated parts; and

   (b) The implications of the time of supply rule for periodic payments in section 9(3).

The Commissioner's view

6. The IS states:

   "The Commissioner considers that the phrase "at the time the services are performed" refers to the period *during* which the person provides the services."

7. The basis for this viewpoint is that:

   (a) Parliament could not have referred to the time at which a person starts to provide the services; and

   (b) It is consistent with the "destination principle": which is that services consumed in New Zealand should have GST charged at the standard rate; and

   (c) Parliament could not have meant the time at which the services are completed: it is inconsistent with the destination principle to treat consumption as occurring outside New Zealand if a person is in New Zealand for the entire period the services are being provided, except for the day the services are completed; and

   (d) Arguably, the more natural meaning of the words "are performed" refers to the whole period during which services are performed. At any point during that period, it would be true to say the services "are (being) performed". If instead the words had been "at the time the services *have been* performed", arguably it would have been more open to conclude that the intended meaning was the point in time when the services were completed; and

   (e) The exception in section 11A(3) for a minor presence in New Zealand by a company or incorporated body lends support to the view that presence in New Zealand *during* performance of the services is the correct criterion.

8. However, the Commissioner concedes that:

   (a) Care must be taken in interpreting statutory words based on tense: *Public Trustee v McKay (Minister of Health) & Anor* [1969] NZLR 995 (CA) and *R v Lewis & Anor* [1975] 2 NZLR 490 (CA).

   (b) There may be other types of supply where services are performed, and consumption occurs, only on the completion of the services. In those circumstances, subject to any other requirements of the Act being met, if the non-resident recipient is outside New Zealand when the services are completed, the supply will be zero-rated. In giving effect to the destination principle, the nature of the particular supply must be determined to establish where consumption occurs.

Problems with the Commissioner's view

9. The IS contains a fundamental principle close to the beginning: "The amount of GST charged on a supply is determined at the time of the supply". The problem, though, is the relationship between the concept of the "time of supply" and the "time at which the services are performed".

10. The disconnect between the "time the services are performed" and the time of supply, as set out in the IS, gives rise to problems:

    (a) What if the non-resident temporarily comes to New Zealand while the services are being performed?

    (b) What if the services are billed in instalments?

    (c) What if the services are billed in advance?

11. The IS resolves these questions in a confusing way that is inconsistent with the GST Act:

    (a) If the non-resident comes to New Zealand at any time during the performance of the services, the charge for the entire service must be standard-rated, as there is no basis for apportionment (in the case of visa application services).

    (b) Services billed in instalments are deemed to be a series of separate supplies under section 9(3)(a) and should be either zero-rated or standard-rated depending on whether the non-resident is present in New Zealand or not at any time during the performance of each successive supply.

    (c) Services billed in advance and zero-rated should be re-billed as standard-rated if the non-resident comes to New Zealand while the services are being performed.

A different point of view

12. By using the phrase "at the time the services are performed" Parliament referred to the *time of supply:* the point at which the supply is made for the purpose of the charge to tax, and there is an entitlement to bill and the services are consumed. The tax liability (a standard-rate or a zero-rate of GST), should be able to be determined "at the time". If Parliament had meant "during the time the services are performed" it would have said so.

13. Zero-rating services consumed by a non-resident outside New Zealand at the completion of the services is consistent with the destination principle, regardless of presence in New Zealand while the services were being performed. Arguably there could be no consumption until the services were capable of being consumed. However, if there is consumption of the services in New Zealand, at, for example, a partially completed phase, then zero-rating would not apply to such services.

14. A *supply* of services takes place when "the services are performed". There can be no supply until the services are completed. This interpretation is consistent with English legislation and with sections 84 and 84B of the GST Act itself.

15. The English legislation, as referred to in *Customs and Excise Commissioners v Faith Construction Ltd* (and others) [1989] BTC 5121 states at section 4(3):

    …. A supply of services shall be treated as taking place at the time (for the purpose of the charge to tax) when the services are performed" (unless a tax invoice is issued earlier or payment is received).

16. Section 84 of the GST Act (which is concerned with distinguishing between supplies made before and after 1 October 1986 when GST was introduced) defines "time of performance" in section 84(1) as meaning:

    "(b) In relation to a supply of services, the time when the services are performed."

17. It is clear from the overall focus of section 84 that this is a reference to when the services are completed: the time of supply. It is analogous to the way a supply of goods is dealt with in the same section. The time of supply of goods under section 84 was discussed in *C of IR v White Heather Caravans Limited* (1992) 14 NZTC 9,113 (CA).

18. The same applies to section 84B (which is concerned with supplies made before and after the introduction of the rule imposing GST on imported services). Section 84B(2) states:

"[Time of supply] A supply of services that satisfies subsection 1(a) is made at the time the services are performed."

19. This interpretation is not inconsistent with the requirement, in section 11A(1)(k)(i)(B), that zero-rating does not apply to services in connection with moveable personal property "situated in New Zealand at the time the services are performed". The property either is in New Zealand at the time of supply or it is not.

20. *Case T54* (1998) 18 NZTC 8,410 was correctly decided, albeit on a confusing basis. The Commissioner argued a videotape made as part of a supply of services constituted moveable personal property in New Zealand at the *time during which* the services were performed. Barber DCJ (somewhat confusingly, in my view) stated at p 8,414:

    "The resultant video cassette did not come into existence until after the relevant services had been performed. It was not situated inside New Zealand at the time the services are performed"

21. However, the case was correctly decided, as the videotape was created as part of the service and, in that sense, could not have been the type of moveable personal property situated in New Zealand contemplated in section 11A(1)(k).

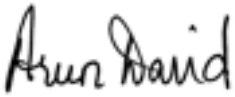
22. Section 9(3), which deals with successive supplies, is a time of supply rule. The same reasoning as above apples to services performed progressively and billed for periodically. If the non-resident is outside New Zealand at the time of supply – i.e. the time the services are performed – the services must be zero-rated. The service would be consumed outside New Zealand in that case.

23. The minor presence exception could relate to a continuing presence in New Zealand, albeit without a fixed or permanent establishment, without any sales or taxable activity. The exception also encompasses a presence other than a minor presence if that presence is not effectively connected with the supply. Therefore the explanation in the IS that the exception would not be needed if the words "at the time the services are performed" referred to a single point in time does not make sense.

24. Apportionment is not contemplated in the opening words to section 11A(1)(k) because the non-resident either is, or is not, outside New Zealand at the time the services are performed – i.e. at the time of supply when the charge to tax is determined.

25. Services billed in advance cannot be zero-rated because the requirements of section 11A(1)(k) will not be satisfied: the services are not performed, so the requirement that the non-resident be outside New Zealand at that time has not been met. (However, the Commissioner appears prepared to concede this in circumstances where it may be warranted).

26. Temporary absences in order to avoid GST would be covered by the anti-avoidance rules.



Arun David, Director, DavidCo Limited