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WEEKLY COMMENT: FRIDAY 5 OCTOBER 2012

1. This week I look at two recent GST cases heard by the Supreme Court of New Zealand and the High Court of Australia: *Thompson v Commissioner of Inland Revenue* [2012] NZSC 36, (2012) 25 NZTC ¶20-125 ("*Thompson*") and *Commissioner of Taxation v Qantas Airways Limited* [2012] HCA 41 ("*Qantas*"). The cases are not similar in terms of the facts or the issues discussed: the New Zealand case, *Thompson*, is concerned with GST de-registration in New Zealand, and the Australian case, *Qantas*, concerned the meaning of a "supply for consideration" for Australian GST purposes.

2. The cases are similar in two important respects: both cases involved the non-payment of GST by the taxpayer based on an ambiguous interpretation of the relevant taxing provision, and in both cases the taxpayer failed: GST was held to be payable. Mr. Thompson could not be de-registered as long as he continued to collect GST and contemplate transactions that would exceed the registration threshold. Qantas had to pay the GST it collected to the ATO because a supply – a promise to carry a passenger - was made when the fare was paid.

GST de-registration principles in New Zealand: *Thompson*

3. I touched on the GST de-registration rules in last week's *Weekly Comment*: The rules for cancellation of registration are contained in s. 52 of the GST Act.

4. Under s. 52(1), a registered person ceases to be liable to be registered *at any time* where the Commissioner is satisfied that in the 12 months beginning from that time taxable supplies will not exceed the registration threshold.

5. When a registered person ceases to carry on all taxable activities:

   (a) Section 52(3) requires that the Commissioner be informed within 21 days and the Commissioner will cancel the person's registration from the last day of the taxable period in which all taxable activities ceased; or

   (b) The Commissioner may, under s. 52(5) and (5A), even if not notified, cancel the person's registration:

      (i) From the last day of the taxable period in which he is satisfied that all taxable activities have ceased; or

      (ii) From the date of the person's registration if he is satisfied that no taxable activities were in fact carried on.

6. In *Thompson*, Mr. Thompson was personally GST-registered in respect of just over 200 hectares of land in Rolleston that was leased out at a rental that was in excess of $30,000, the GST registration threshold at the time. He filed returns on a 6-monthly basis with the taxable periods ending on 31 January and 31 July and returned GST on the rent.

7. Mr. Thompson applied for de-registration under s. 52(1) from 30 November 1999, on the grounds that taxable supplies in the subsequent 12-month period would not exceed the registration threshold. At the same time a company associated with him, Armagh investments Limited ("Armagh"), was registered for GST in anticipation of the company acquiring some or all of the Rolleston land. However, Mr. Thompson continued to collect GST on the rent until June 2000. It was only then that the company was retrospectively interposed between Mr. Thompson and the lessee and GST was no longer paid to Mr. Thompson.

8. The Rolleston land was sold in 3 instalments:

   (a) 49 hectares were sold to a company associated with a Mr. Holsbrugh under a contract made in December 1999. The deposit was paid on 8 February 2000 and settlement occurred in June 2000.

   (b) 15 hectares were sold Armagh under an agreement for sale and purchase dated 31 March 2000. The price was $810,000 but this was not paid but remained owing under an acknowledgment of debt, which was not executed until September 2000, although backdated 31 March 2000. Armagh claimed an input tax credit.

   (c) The balance of the land was sold to Armagh under an agreement for sale and purchase dated 29 September 2000 for a consideration of $2 million.

9. The Commissioner re-instated Mr. Thompson's registration up until 31 January 2001 and assessed him for output tax in relation to all 3 sales.

10. The Supreme Court noted that under s. 52, the entitlement to de-register rests on a forward-looking assessment that the taxpayer's supplies for the succeeding 12 months will not exceed the threshold.

11. The proviso to s. 52 states that the Commissioner shall not cancel the registration of any registered person if there are reasonable grounds for believing that the registered person will carry on any taxable activity at any time within 12 months from the date of cessation. In this regard:

    (a) Business assets retained by the taxpayer at de-registration are subject to output tax under section 5(3).

    (b) Assets sold at the termination of a taxable activity are deemed to be carried out in the course or furtherance of the taxable activity under section 6(2).

12. The Court of Appeal in *Lopas v Commissioner of Inland Revenue* (2006) 22 NZTC 19,726 (CA) held that s. 52 requires an assessment of all likely taxable supplies and *did not exclude any sales of the capital assets used in the running of the business which occurred as a result of the cessation or winding down of the business operation*.

13. In *Lopas*, The Court of Appeal held that s. 51(1)(c) (under which asset sales relating to ending or reducing an activity are ignored for the purpose of determining if the registration threshold will be exceeded), was not applicable to de-registration. The court stated at [49] that:

    "Those de-registering are, on the other hand, already in the GST net and are seeking to be removed from it. In such circumstances, there is no compelling reason to exclude any taxable supplies from the calculation that are *in contemplation* in the period after de-registration from the threshold calculation. Absent de-registration, such supplies (including those dealt with in s 6(2) of the GST Act) would be subject to GST." (emphasis added by the Supreme Court)

14. The Supreme Court, in considering whether Mr. Thompson should have been de-registered, and if so, when, noted that s. 52(2) provides for what, in a sense, are two decisions:

    (a) The first is the decision to cancel registration, which turns on an assessment of future turnover. This decision should be made as at the first date on which it could have been safely predicated (with the benefit of all relevant information) that supplies for the succeeding 12 months would be less than the threshold.

    (b) The second decision is as to the effective date of de-registration. Under section 52(2) the default date is the last day of the then current tax period. But the Commissioner can fix another date.

15. In relation to the second decision, the Supreme Court could see no justification for an effective de-registration date which preceded Mr. Thompson's June 2000 regularisation of his GST affairs. Therefore on that basis the earliest de-registration date was 31 July 2000. Therefore, the land sold to Mr. Holsbrugh as the first instalment was subject to GST.

16. In relation to the first decision, the Supreme Court held that future land sales that were in contemplation need to be included in determining whether the threshold would not be breached for the purposes of de-registration:

    (a) Under s. 6(2), anything done in connection with the termination of the taxable activity is a taxable supply and therefore must be included in determining whether the threshold would be breached.

    (b) In Mr. Thompson's case it could not be predicated as at 31 July 2000 that there would not be a sale of the balance of the land with the next 12 months. Therefore, Mr. Thompson could not be de-registered on 31 July and the land sold to Armagh as the second and third instalments were subject to GST.

17. The Supreme Court made the following comments which "may be of assistance should issues arise in the future as to the application of s. 52":

    (a) Section 52 means what it says and there's no point in trying to paraphrase it.

    (b) The section requires the Commissioner to be satisfied as to a negative (that turnover will not exceed the threshold). This involves an objective, forward-looking assessment, not one controlled by hindsight.

    (c) The test will not be satisfied when transactions which would result in the turnover being exceeded are either:

        (i) Being implemented at the proposed de-registration date; or

        (ii) Planned to occur (or contemplated as likely to occur) in the course of the succeeding 12 months.

    (d) Finally the test will probably be satisfied only where the taxpayer can show a settled intention that such transactions will not take place.

Supply for a consideration in Australia

18. In the *Qantas* case, Qantas collected GST on airfares sold to passengers, but some passengers failed to show up for their flights. The case concerned whether the GST collected on such fares that were either non-refundable or simply not refunded should be paid to the ATO. Qantas maintained that if the passenger did not show up for the flight, there was no supply, and

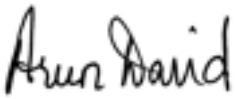
therefore, no GST liability. The majority in the High Court of Australia disagreed. Even in the dissenting judgment, Heydon J noted at paragraph 47 that:

"(Qantas') position does have a superficially unattractive feature. (Qantas) seeks to acquire money paid by passengers who intended or expected that it would end up in the hands of the (Commissioner of Taxation) not those of (Qantas)".

19. But the basis for the majority decision was not that money was owed to the ATO. The issue was whether there had been a 'supply for a consideration' in terms of Australian GST legislation even if passengers failed to show up and take their flights. The Full Federal Court had previously held, in Qantas favour, that the actual travel was the relevant supply and that if it did not occur, there was no taxable supply.

20. The Full Federal Court based their judgment on *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] HCA 22, (2008) 236 CLR 342. That case concerned whether GST was payable in relation to deposits that had been forfeited when the underlying real property transactions had not proceeded. However, the majority in the High Court stated that *Reliance* provided no support for Qantas' case because the High Court had reversed the Full Federal Court decision and found in favour of the Commissioner that a contract to transfer real property was concerned with the transfer of the title or estate of the vendor, rather than merely the parcel of land itself.

21. In Qantas' case the High Court found on the facts that Qantas had sold a "promise to use best endeavours to carry the passenger" rather than the actual carriage of the passenger. This was a taxable supply for which the consideration, the fare, was received.



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