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WEEKLY COMMENT: FRIDAY 5 JULY 2013

1. I continue with GST this week, and look at Public Rulings Unit Issues Paper No. 7 *Bodies Corporate – GST Registration* (the "Bodies Corporate IP"), which was issued on 8 May of this year, and for which submissions were requested by 18 June 2013.

Bodies corporate GST registration

2. The Bodies Corporate IP runs to 39 pages and includes discussion of a number of important GST cases. The basic premise is that the High Court decision in *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147 is wrong, sets an incorrect precedent. In that case, the High Court held that there was no taxable activity and therefore the body corporate was not required to register for GST.

3. A body corporate looks after common property in apartment blocks. The body corporate is a separate legal entity from the owners, who are its members. It establishes funds to cover required and optional expenditure and levies the owners for the amounts needed.

4. The *Taupo Ika Nui* case was decided under the *Unit Titles Act 1972*. This has been replaced by the *Unit Titles Act 2010*. One potentially relevant difference is that under the 2010 Act common property of a unit title development is owned by the body corporate on behalf of the proprietors, who are the beneficial owners. Under the 1972 Act proprietors owned the common property as tenants in common.

A body corporate makes supplies to the owners

5. Contrary to the decision in *Taupo Ika Nui*, the Commissioner considers that a body corporate supplies services to owners. In Taupo Ika Nui, the TRA had first held in *Case* S34 (1995) 17 NZTC 7,228 that the body corporate was conducting a taxable activity and supplied services for a consideration. However, based on apparently conflicting facts, the High Court decided that there was no supply of services for a consideration.

6. The key facts in *Taupo Ika Nui* were that the body corporate operated a timeshare resort that comprised 28 units and was owned by 850 proprietors. The body corporate employed fulltime staff. It invoiced the proprietors for the annual maintenance contributions to maintain a fund for administrative expenses.

7. The High Court found that *Taupo Ika Nui* merely arranged for services to be performed. There was no consideration as there was no element of reciprocity: the body corporate merely collected the contributions from its members and passed them on. This was

apparently despite the factual finding in the TRA that the body corporate employed its own staff.

8. The case of *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Commissioners* [1998] UKHL 50, [1999] 1 All ER 385 involved an apartment building. The tenants paid annual contributions to a maintenance fund, which employed its own staff and was looked after by a trustee. The judgment was that there was a supply for a consideration from the maintenance fund to the tenants as the fund employed its own staff and did not contract with outsiders. The House of Lords contrasted two situations:

   (a) Where a person paid another for services performed by that other person; and

   (b) Where a person paid another to arrange for a third party to provide the services: in this case the "supply" is the "arranging of services" and if a fee is paid for arranging the services, that will be consideration for a taxable supply.

9. The argument in the Bodies Corporate IP is that a body corporate in New Zealand has certain statutory obligations to its tenants under the *Unit Titles Act 2010*, and it cannot merely arrange for services to be performed by third parties: the services have to be performed by the body corporate – either by engaging its own staff, or by engaging third party contractors. The body corporate has a responsibility to the owners.

10. The conclusion in the Bodies Corporate IP is that a supply is made by a body corporate to the owners. This is despite the common property being deemed to be owned by the body corporate under the *Unit Titles Act 2010*, because the owners retain the beneficial ownership.

There is a consideration for the supplies to the owners

11. The conclusion in the Bodies Corporate IP is that the levies paid by owners to the body corporate are paid "in respect of" the services supplied by the body corporate, and are consideration for the supplies made by the body corporate.

12. The most relevant points for current purposes in the definition of "consideration" in s. 2(1) of the *Goods and Services Tax Act 1985* ("the GST Act") are stated as being:

    (a) The payment need not be voluntary; and

    (b) The payment must be "in respect of", "in response to" or "for the inducement of" the supply.

13. The Court of Appeal decision in *Turakina Maori Girls College Board of Trustees and others v CIR* (1993) 15 NZTC 10,032 is discussed. At issue was whether payments by parents to the proprietors constituted consideration for supplies made to the parents by the proprietors. The proprietors were held to be making supplies to parents even though there were statutory obligations to use the funds in the way intended, and the character of the use the funds were put to – paying interest on debt, for example – did not alter the nature of the supply by the proprietors.

14. The Court of Appeal decision in *CIR v NZ Refining Co Limited* (1997) 18 NZTC 13,187 is discussed next. The case is authority for requiring the consideration to be linked to the supply. In *NZ Refining*, it was held that compensation paid by the Crown did not have a sufficient relationship with the taxpayer's supplies to the oil companies – it was merely a form of funding for the taxpayer's taxable activity. This case is distinguished on the basis that

the funds did not flow from the recipient of the supplies, as they do in the case of funds from owners to a body corporate.

15. A third Court of Appeal decision discussed is *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075. At issue was whether the trustees of a trust, established to promote the wellbeing of the Chatham Islands community, provided supplies to the Crown for which the settlements by the Crown were consideration. It was held that the settlement of moneys on a trust was really just the set-up of a trust, and it was conceptually unsound to say the trustees of a voluntary settlement supply services to the settlor or the beneficiaries by simply performing the terms of the trust. The argument in the Bodies Corporate IP is that the analogy with bodies corporate is not strong, because *Chatham Islands* was a case of putting an entity in funds, as opposed to paying for supplies.

16. The High Court decision in *Pacific Trawling Limited and another v Chief Executive of the Ministry of Fisheries and another* (2005) 22 NZTC 19,204 is held to be authority for the propositions that:

    (a) A statutory liability, as in the case of obligations arising under the *Unit Titles Act 2010*, can give rise to GST: deemed value payments for by-catch paid by fishers to the Ministry were held to be consideration for a supply by the Ministry of certain rights; and

    (b) There can be a wide link between the supply and the consideration: the supply to the fisher was very intangible.

17. The High Court decision in *Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23,979 concerned the GST treatment of passenger levies charged by the airport to raise funds for the development of facilities. The case is held to be authority for the propositions that:

    (a) A fee imposed by a statutory authority can still be consideration for a supply; and

    (b) The way the consideration is used by the supplier does not affect the fact that a supply has been made to the recipient.

18. There are a number of United Kingdom VAT cases discussed:

    (a) In *Carlton Lodge Club v CEC* [1974] STC 507, it was held that a club that served liquor to members made a supply of goods and services, although the club could not be distinguished from its members as a separate legal entity.

    (b) In *Manor Forstal Residents Society Limited v The Commissioners; New Ash Green Village Association Limited v The Commissioners* (1976) VATTR 63, it was held that the first taxpayer was a corporate body distinct from its members that used its subscriptions, which became its own property, to provide facilities to its members. (The second taxpayer was held not to be in business under the UK legislation, and therefore not subject to VAT.)

    (c) In *Durham Aged Mineworkers' Homes Association v CEC* [1994] STC 553, payments made between parties under an agreement to share costs were not consideration for supplies made by either of the parties.

    (d) In *Eastbourne Town Radio Cars Association v Customs and Excise Commissioners* [2001] UKHL 19 payments made by members relating to their share of expenses were held to be consideration for supplies made by the association, because each member's share was based on the total expenses for all members (and not just on services provided to that member) and there was more than a mere contractual arrangement for jointly obtaining

goods and services and sharing expenses: there was an association, and the service provided was in accordance with the rules of the association.

19. A relevant Australian case is discussed: *Body Corporate, Villa Edgewater CTS 23092 v FCT* [2004] AATA 425, 2004 ACT 2056. The case concerned an apartment complex in Queensland and members paid contributions into sinking and administration funds. As in New Zealand, the body corporate was responsible for the common property that was owned by the owners as tenants in common. The AAT concluded that the body corporate was a separate legal entity and the arrangement was not just an internal transfer of funds. Contributions by the owners were consideration for services provided by the body corporate and the supplies were held to be subject to GST.

Conclusions and implications of conclusions

20. The conclusion in the Bodies Corporate IP is that a body corporate supplies services to the owners for a consideration, and conducts a taxable activity. Therefore, there will be a liability to register for GST if the value of supplies exceeds the GST threshold of $60,000.

21. This conclusion is not undermined by the fact that that the services arise from a statutory obligation. This is supported by the decisions in *Turakina Maori Girls College*, *Pacific Trawling*, *Rotorua Regional Airport* and *Villa Edgewater*.

22. The case law, apart from *Taupo Ika Nui*, supports registration on the basis that the levies charged to owners are consideration for supplies made to the owners. This is supported by *Nell Gwynn*, *Eastbourne Town Radio Cars*, *Manor Forstal* and *Villa Edgewater*.

23. The circumstances are not similar to *NZ Refining* or *Chatham Islands*, where the consideration was not linked to the supply.

24. The only conflicting authority is the only New Zealand case that is right on point: *Taupo Ika Nui*. The conclusion in the Bodies Corporate IP is that the case was wrongly decided.

25. The IP includes a diagram contrasting 3 situations:

    (a) Where the owners of the property engage external contractors directly, and there is no interposed body corporate: the cost to the owners is the GST-inclusive cost charged by the contractors.

    (b) Where external contractors are engaged by an interposed body corporate that is not GST-registered, the amount charged to the body corporate is the GST-inclusive cost charged by the external contractors, and this cost is passed on to the owners by levies that reflect the GST-inclusive cost.

    (c) Where external contractors are engaged by an interposed body corporate that is GST-registered, the amount charged to the body corporate is the GST-inclusive cost charged by the external contractors; the body corporate can claim an input tax deduction that is offset by the GST output tax charged to the owners; the cost to the owners will reflect the GST-inclusive cost charged by the external contractors.

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