CHARTERED ACCOUNTANTS
AUSTRALIA + NEW ZEALAND

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: FRIDAY 20 MAY 2016

1. The *Taxation (Annual Rates for 2016-17, Closely Held Companies, and Remedial Matters) Bill* ("the Bill") was introduced on 3 May. It includes the GST law changes proposed in *GST – Current issues – An officials' issues paper* (the "GST Issues Paper") released by Inland Revenue last September.

2. I commenced looking at the proposed GST law changes week-before-last. This third week I look at the time of supply when the consideration is unknown, agents acting for purchasers, services performed in relation to boats and aircraft exported under their own power, application of the non-resident registration rules to services received by a registered person, application of the non-resident registration rules to imported goods, goods moved offshore by GST-registered non-residents and the GST grouping of limited partnerships.

Time of supply when consideration is unknown

3. Section 9(6) of the GST Act applies when goods are supplied under an agreement, other than an agreement to hire, and the goods or part of them are appropriated under that agreement by the recipient in circumstances where the whole of the consideration is not determined at the time they are appropriated. The supply takes place at the earlier of the time any payment under the agreement is due or is received or the time at which an invoice relating to the supply is issued by the supplier or the recipient.

4. Officials identified three areas of concern:

   (a) The rule is limited in application to goods that are supplied under an agreement, whereas, the same issue can arise in relation to supplies of services, for example, where the full consideration depends on the services performed and is not known at the time of supply;

   (b) The rule only applies when the goods are received under an agreement, whereas a supply could be triggered in other ways at a time when the consideration is not known;

   (c) The current rules require there to be only a single invoice issued, however if the recipient requests a tax invoice when the full consideration is not known, this creates problems with the invoicing rules.

5. Proposed revised s. 9(6), in cl. 308 of the Bill will apply to any supply made under an agreement where the whole of the consideration for the supply is not determined at a time when an invoice for a part of the consideration is issued by the supplier or recipient or when a payment, not relating to an invoice, of a part of the consideration is due or received. In such cases, the supply is deemed to take place at that time, to the extent of the part of the consideration.

6. The amendment is to come into force on the date the Bill is enacted. However, cl. 308(2) provides that the rule will apply retrospectively if a person has applied new s. 9(6) correctly in an earlier GST return.

Agents acting for purchasers

7. The current rule that allows an agent and a principal to "opt out" of the agency rules applies only to an agent who makes supplies on behalf of their principal. The supply to the recipient is regarded as having been made by the agent, with a separate supply being made by the principal to the agent.

8. This rule does not apply to an agent who makes purchases on behalf of their principal. The purchase is regarded as being made by the principal. Officials have recognised that the compliance costs may be high.

9. Proposed new s. 60(2B) in cl. 326 of the Bill states that when a principal and their agent agree in writing, either in relation to a particular supply or for a type of supply, that the rule in s. 60(2B) is to apply, the supply by a person (the third party supplier) is treated for the purposes of the Act as 2 separate supplies: from the person to the agent, and from the agent to the principal.

10. In addition, an amendment to s. 26 in cl. 320 of the Bill prevents the agent from claiming a bad debt deduction if the principal has not repaid them. Apparently this is because there is currently no provision for an agent to claim a bad debt deduction when not paid by the principal (as there is no taxable supply from the agent to the principal) and the amendment is not designed to affect that situation.

11. These amendments will come into force on the date of enactment.

Services performed on boats and aircraft exported under their own power

12. At present, the supply of goods and services can be zero-rated if supplied in relation to:

    (a) Goods that have been entered for export by the supplier; or

    (b) Temporary imports.

13. However, at present, goods and services supplied in relation to a boat or aircraft that is to be exported under its own power by the recipient cannot be zero-rated. The supply of the boat or aircraft itself is zero-rated under s. 11(1)(i). Officials have addressed this anomaly with a number of amendments to s. 11 in cl. 310 of the Bill as follows:

    (a) First, s. 11(1)(k) is being amended so that goods will be zero-rated if supplied in the course of repairing, renovating, modifying or treating boats and aircraft for which the supply was zero-rated under s. 11(1)(i);

    (b) Second, a proposed new s. 11A(ib) will allow services that are supplied directly in connection with goods to which section 11(1)(i) applies;

    (c) Third, a proposed amendment to s. 11(8) will allow the Commissioner to extend the 60-day period if the Commissioner is satisfied, upon the written application of the supplier, that the export of the boat or aircraft within the period is or has been prevented by circumstances that are beyond the control of the supplier and the recipient or that relate to supplies to which s. 11(1)(k) or s. 11A(1)(ib) applies – i.e. the delay is due to the supply of zero-rated goods and services before the boat or aircraft is exported under its own power.

Non-resident registration rules – services received by a registered person

14. Officials have identified a legislative mismatch inadvertently created between s. 54B(1)(c) and s. 11A(2)(b).

15. Section 11A(2)(b) provides that a New Zealand supplier cannot zero-rate a supply to a non-resident if "it is reasonably foreseeable, at the time the agreement is entered into, that [the ultimate recipient] will not receive the performance of the services in the course of making taxable or exempt supplies", so that supplies to a non-resident such as education services cannot be zero-rated if the non-resident on-sells such services to students in New Zealand.

16. Section 54B allows non-resident businesses to register for New Zealand GST in order to claim input deductions for certain business expenditure. 54B(1)(c) prevents a non-resident from registering if their taxable activity involves "a performance of services in relation to which it is reasonably foreseeable that the performance of the services will be received in New Zealand by a person who is not a registered person".

17. Section 54B(1)(c) is supposed to reflect the prohibition in s. 11A(2)(b), so that a non-resident business cannot register and claim back the GST charged by a New Zealand supplier under s. 11A(2)(b). However, because s. 54B(1)(c) refers only to "a person who is not a registered person" it would allow a non-resident business to register and claim back the GST charged under s. 11A(2)(b) for services supplied to a NZ sole trader who, although GST-registered, may be receiving the supply in a private capacity.

18. Therefore, effective from the date of enactment, cl. 324(2) of the Bill provides for a change of the wording in s. 54B(1)(c) by replacing the words "who is not a registered person" with "other than in the course of making taxable or exempt supplies" so that a non-resident cannot register and claim back GST if the supply by the non-resident is to a registered person in NZ who enjoys the supply in a private capacity.

Non-resident registration rules – imported goods

19. Officials have identified another legislative mismatch between the "base maintenance provisions" in s. 20(3LB) and s. 20(3LC) and the non-residents' registration requirement in s. 54B(1)(b) that input tax must be likely to exceed $500 in the first taxable period after registration.

20. Sections 20(3LB) and 20(3LC) apply when a non-resident who is registered under s. 54B acts as the importer of supplies made to a New Zealand resident. The non-resident is not allowed to claim an input tax deduction for the GST paid on importation. Instead, the New Zealand recipient is treated as the person who paid the GST on importation for the purposes of claiming an input tax deduction.

21. The requirement for the input tax to exceed $500 in the first taxable period could result in there being no ability to register for GST for a non-resident supplier who pays GST only on importation of goods into New Zealand. This is because the GST paid on importation is treated as paid by the NZ recipient under ss. 20(3LB) and 20(3LC).

22. If the non-resident supplier cannot register for GST under s. 54B, the NZ recipient of the supply cannot be treated as having paid the GST on importation. The effect is that neither the non-resident supplier nor the NZ recipient can claim the input tax deduction. If the NZ supplier is a registered person, this means that business-to-business supplies are taxed with GST, which goes against the policy basis for GST.

23. Therefore, effective from the date of enactment, s. 54B(1)(b) is being amended by cl. 324(1) of the Bill, so that the requirement to meet the $500 threshold in order to register is being

removed for a non-resident who expects to only pay GST on importation of goods that are supplied to another person.

Goods moved offshore by GST-registered non-residents

24. A non-resident who is registered under the ordinary registration rules (i.e. not registered under s. 54B) can only deduct input tax to the extent that goods and services are used to make taxable supplies in New Zealand. When the supplier is a non-resident, the goods supplied must be in New Zealand at the time of supply, or the services supplied must be physically performed in New Zealand by a person who is in New Zealand at the time the services are performed.

25. When a non-resident who is registered under the ordinary rules imports goods into NZ, GST is paid on importation and deducted as input tax. If the non-resident subsequently exports the same goods – for example, because they are surplus to requirements for supplies in NZ, the goods are no longer used to make taxable supplies, and the input tax deduction for GST charged on importation will be clawed back under the apportionment rules.

26. Officials have stated in the GST Issues Paper that this is inconsistent with the purpose of GST as it results in GST being imposed on consumption outside NZ.

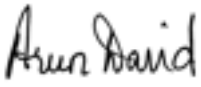
27. Therefore, effective from the date of enactment, a new s. 21(2)(ab) is to be inserted by cl. 315(1) of the Bill under which a non-resident does not have to make an adjustment if input tax was incurred on the importation of goods that are subsequently exported in the adjustment period and either disposed of in the adjustment period or held at the end of the adjustment period.

Grouping limited partnerships

28. Limited partnerships registered under the *Limited Partnerships Act 2008* are companies for GST purposes under the definition of "company" in s. 2 of the GST Act. Under s. 55(1) they are only able to be grouped if they are part of a "group of companies" for the purposes of s. IC 3 of the *Income Tax Act 2007*. However, a limited partnership is not generally a company for income tax purposes. Therefore, it is questionable whether they can be grouped for GST purposes.

29. Section 55(8) is a general grouping provision that applies to allow other entities to form a GST group if two or more registered persons exercise sufficient control over a collection of entities. This is achieved by application to the Commissioner and allows collections of, for example, trusts to register as a group. However, s. 55(8) specifically excludes "companies" from its ambit.

30. Therefore, effective from the date of enactment, s. 55(8) is to be amended by cl. 325(2) of the Bill so that if the members of a group of 2 or more registered persons include a person that is not a company or is a limited partnership and the Commissioner is satisfied in relation to the members of the group that the common control requirements of s. 55(8) are met, the group of registered persons can be treated as a group for GST purposes.



Arun David, Director,
DavidCo Limited