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INTERPRETATION STATEMENT: IS XX/XX

GOODS AND SERVICES TAX – GST ON IMMIGRATION SERVICES

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this statement.

Contents

Scope of this statement

1. This Interpretation Statement applies where:

   - a non-resident, situated outside New Zealand, receives a supply of immigration services from a New Zealand–based immigration advisor for the purpose of obtaining a residency visa; and
   - the non-resident comes to New Zealand during the period that the immigration services are performed.

2. Immigration services can include many different types of services. The scope of this Interpretation Statement is limited to visa application services provided to a non-resident individual. This Interpretation Statement does not consider:

   - services other than visa application services (eg, it does not consider the position where services are provided to a person to help them find employment in New Zealand); or
   - visa application services provided to a company on behalf of an individual.

Summary

3. This Interpretation Statement considers whether a supply of visa application services can be zero-rated under s 11A(1)(k) when a non-resident visa applicant visits New Zealand during the visa application process.

4. GST is typically charged at 15% on services supplied in New Zealand (standard-rated). However, in certain circumstances GST will be charged at 0% (zero-rated). The amount of GST charged on a supply is determined at the time of the supply.

5. Visa application services may be zero-rated under s 11A(1)(k). To zero-rate under s 11A(1)(k), the recipient of the supply must be a non-resident and outside New Zealand at the time the services are performed.

6. The focus of this Interpretation Statement is the requirement that the visa applicant be outside New Zealand at the time the services are performed. In most cases, if the visa applicant comes to New Zealand during the visa application process, then the entire supply of services will need to be standard-rated. With some sorts of supplies it may be possible to apportion the different parts of a supply and charge different rates of GST. However, this is unlikely with visa application services because in most cases the necessary distinction will not exist between the different parts of the supply to make it reasonable to separate them.

7. The exception is where periodic payments are made for the services. A single supply may be treated as successive supplies if there are periodic payments under s 9(3)(a). The Commissioner considers that for payments to be considered "periodic" they would need to have the following characteristics:

   - The payments need to be recurring and made at regular, fixed intervals. The payments must form a pattern of recurrence.
   - The intervals between payments do not have to be of exactly the same duration.
   - The payments do not need to be for precisely the same amount.
   - The payments are made as part of the regular course of events and not on isolated occasions.

- The payments need to arise from an antecedent obligation. (Section 9(3)(a) will apply only where the periodic payments are set out in an agreement or enactment.)

The Commissioner's view is also that two payments could not sensibly or commercially be regarded as periodic.

8. If the supply of visa application services is deemed to be successively supplied, then each part of the supply will be treated as if it were a separate supply. The correct GST rate needs to be determined for each successive supply. Only the successive supplies where the visa applicant is in New Zealand will be standard-rated. The other successive supplies will be zero-rated.

9. There are two further requirements for s 11A(1)(k) to apply. The first is the services cannot be supplied in connection with any New Zealand land or moveable personal property situated in New Zealand (other than as specified). The second is the services cannot be an acceptance of an obligation to refrain from carrying on a taxable activity to the extent that the activity would have occurred within New Zealand. These two factors are unlikely to be relevant in the situation covered by this Interpretation Statement.

10. Examples are included at the end of this Interpretation Statement.

Introduction

11. Visa application services can be provided to a non-resident in three situations:

- The first is where the non-resident remains outside New Zealand while any services are being provided by the immigration advisor. In that case, the services provided by the advisor will be zero-rated under s 11A(1)(k).
- The second is where the non-resident is in New Zealand while the services are being provided by the immigration advisor. In that case, any services provided by the advisor will be standard-rated.
- The third is where the non-resident comes to New Zealand during the period in which the services are being provided by the immigration advisor.

12. The focus of this Interpretation Statement is the third situation.

Visa application process

13. Visa applicants can apply for a visa themselves or they can use an advisor. Immigration New Zealand (INZ) is the New Zealand government agency that issues visas to those wishing to immigrate to, or work in, this country. Applicants for a skilled migrant or investor visa must provide information to INZ about their background and qualifications. This part of the process is called an 'Expression of Interest'. It is a self-assessment by the applicant to establish eligibility and is based on a points system. If the applicant achieves a certain number of points, INZ invites the applicant to apply formally for a visa. This part of the process is called an 'Invitation to Apply' and is a formal verification by INZ of the applicant's eligibility.

14. Not all visa applications require this two-stage process. Some visas allow for a residence application to be submitted directly. Examples include an investor plus visa, a student visa, a work to residence visa and a visitor visa. An investor category applicant must file a detailed business plan with INZ.

15. If INZ approves a skilled migrant or investor visa application by issuing an approval in principle, the applicant must pay a migrant levy to INZ. The applicant then has a limited time to visit a New Zealand representative office outside

New Zealand to have the applicant's home country passport stamped with the visa. The applicant has a further time limit in which to come to New Zealand for the designated purpose.

Immigration service contracts

16. A registered immigration advisor or a lawyer may supply immigration services to help a person obtain a visa. No standard contract for providing immigration services to overseas clients exists. Advisors or lawyers may choose to provide their services in a variety of ways with different conditions and payment options. A written contract is usually involved. The form of the contract will usually determine the GST implications of the supply bargained by the parties: *Wilson & Horton Ltd v CIR* (1995) 17 NZTC 12,325 (CA); *Chatham Island Enterprises Trust v CIR* (1999) 19 NZTC 15,075 (CA); *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC); and *CIR v Motorcorp Holdings Ltd* (2005) 22 NZTC 19,126 (CA).

17. Some visa applicants may come to New Zealand during the process. However, there is no common pattern among applicants. Their reasons for coming to New Zealand may or may not relate to the services or involve direct contact with the advisor.

Analysis

18. To determine whether a supply of visa application services can be zero-rated under s 11A(1)(k), the following questions need to be considered:

- When is a supply of visa application services zero-rated under s 11A(1)(k)?
- Is it possible to apportion a supply of visa application services?
- Are the services provided under an agreement that provides for periodic payments?

19. This statement will also consider what needs to be done if GST is later found to be payable.

When is a supply of visa application services zero-rated under s 11A(1)(k)?

20. A supply of goods and services is charged at the rate of 15% on a supply in New Zealand of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person: ss 2(1) "taxable supply", 5 and 8(1).

21. The existence and nature of any supply is usually determined by the contract: *Wilson & Horton Ltd v CIR*, *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685 (HC) and *CIR v Gulf Harbour Development Ltd* (2004) 21 NZTC 18,915 (CA).

22. However, under s 11A a supply of services may be charged at the rate of 0% in certain circumstances. The only subsection relevant to the supply of exported visa application services is subs (1)(k). Section 11A(1)(k) provides that a supply of services will be zero-rated where:

> (k) subject to subsection (2), the services are supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed, not being services which are—
>
> (i) supplied directly in connection with—
>
> (A) land situated in New Zealand or any improvement to the land; or
>
> (B) moveable personal property, other than choses in action or goods to which paragraph (h) or (i) applies, situated in New Zealand at the time the services are performed; or

(ii) the acceptance of an obligation to refrain from carrying on a taxable activity, to the extent that the activity would have occurred within New Zealand; or

23. Subsection (2) is not relevant to the present facts. Accordingly, four requirements must be satisfied for the services to be zero-rated:

- The recipient of the supply must be a non-resident at the time the services are performed.
- The recipient must be outside New Zealand at the time the services are performed.
- The services cannot be supplied in connection with any New Zealand land or moveable personal property situated in New Zealand (other than as specified).
- The services cannot be an acceptance of an obligation to refrain from carrying on a taxable activity to the extent that the activity would have occurred within New Zealand.

24. The first requirement is that the recipient must be a non-resident. The requirements for residency are set out in s 2(1) of the Act and s YD 1 of the Income Tax Act 2007 (ITA 2007). As the recipient is seeking a visa to come and live in New Zealand, it is assumed the residency requirements will not have been satisfied. The scope of this Interpretation Statement has been limited to situations where the recipient is a non-resident.

25. The scope of the Interpretation Statement has also been limited to visa application services. So the exceptions for services supplied directly in connection with land or moveable personal property and for services which are restraints (provided for in s 11A(1)(k)(i) and (ii)) are not relevant.

26. Therefore the main issue is whether the second requirement, that the person is outside New Zealand at the time the services are performed, is satisfied. The Commissioner considers the requirement to be "outside New Zealand" will be satisfied by a lack of physical presence in New Zealand.

27. The second requirement also specifies the person who receives the services must be outside New Zealand "at the time the services are performed". Understanding when the services are performed is therefore a crucial step in determining whether a supply can be zero-rated.

When are the services performed?

28. The phrase "at the time the services are performed" could mean:

- the point in time when the person starts providing the services; or
- the period during which the person provides the services; or
- the point in time when the services are completed.

29. The Commissioner considers the phrase refers to the period during which a person provides the services. This is because:

- The more natural meaning of the words "at the time the services are performed" refers to the whole performance of the services.
- This interpretation is consistent with the destination principle, one of the key principles underlying the Act. The destination principle focuses on where the services are consumed to determine how they are treated for GST purposes. Applying this principle, the taxation of the services should be determined for the period in which the services are consumed.

- This interpretation is more consistent with the purpose of the exception in s 11A(3) for a minor presence in New Zealand by a company or unincorporated body.

30. Each of these reasons is considered in more detail below.

Ordinary meaning

31. The *Shorter Oxford English Dictionary on Historical Principles* (6th ed, Oxford University Press, New York, 2007) defines "time" and "perform" to mean:

> **time ► I 1** A finite extent of continued existence, e.g. the interval between two events, or the period during which an action or state continues; a period referred to in some way.
> **II** Time when: a point in time; a space of time treated without ref. to duration.
>
> **perform 1** *verb trans*. Carry out, fulfil (a command, promise, undertaking etc.). **2 a** *verb trans*. Execute, accomplish, do, (any action, operation, or process undertaken or ordered). ► **b** *verb intrans.* Do or carry out any action, operation, or process undertaken or ordered; do (*badly*, *well*, etc.).

32. The word "time" can mean either a passage of time or a definite point in time. To "perform" can either mean to carry out or do something, or to fulfil or accomplish something.

33. 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. However, 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).

Destination principle

34. Before enactment of the Act, a discussion document was prepared entitled *Administration of the Goods and Services Tax Act* (Government discussion document, Policy Advice Division of Inland Revenue, March 1985). The document stated at paragraph 32:

> **Place of Supply**
>
> 32. For goods or services supplied by registered persons to be subject to the GST, the supply must take place, or be deemed to take place, in New Zealand. ... The place of supply of services will, in general, be the place where the supplier of the service is based. **Provision will be made to ensure that the GST is not levied on services performed in New Zealand for recipients outside New Zealand.** This means that the following services will not be subject to the GST:
>
> ...
>
> - advertising and **professional services**, and transfers and assignments of rights, **provided to a recipient outside New Zealand**. [Emphasis added]

35. In 1999, the Act was reviewed. One of the areas the review considered was exported services. The resulting report, entitled *GST: A Review* (Government discussion document, Policy Advice Division of Inland Revenue, March 1999), restated the broad purpose of the Act:

> **The destination principle**
>
> 9.3 The broad aim of GST is to tax at a single rate all final consumption that takes place in New Zealand. This is known as the "destination principle" and means that all supplies of goods and services in New Zealand, regardless of whether they are supplied to New Zealand residents or tourists, are taxed at the standard rate of 12.5 percent [now 15%].

36. Therefore, under the destination principle supplies of goods and services are taxed in the jurisdiction where the goods and services are consumed: see also *GST and Imported Services: A challenge in an electronic commerce environment* (Government discussion document, Policy Advice Division of Inland Revenue, June 2001). The destination principle is reflected in ss 8 and 11A. Section 8 levies GST on a supply (except an exempt supply) in New Zealand of goods and services in the course or furtherance of a taxable activity. Section 11A zero-rates supplies of services that are consumed outside New Zealand.

37. The destination principle means that a supply of services consumed in New Zealand is standard-rated and a supply of services consumed overseas is zero-rated under s 11A. Section 11A(1)(k) treats consumption as occurring outside New Zealand if the person receiving the supply is non-resident and outside New Zealand when the services are performed. By implication, consumption in New Zealand takes place if the person is resident in New Zealand or physically present in New Zealand when the services are performed. Residency for individuals is measured by physical presence and by enduring ties (the latter referred to as having a permanent place of abode; s 2(1) of the Act and s YD 1 of the ITA 2007).

38. As Parliament's purpose is to impose GST on consumption in New Zealand, it is unlikely Parliament intended "at the time the services are performed" to refer to the point in time when the services started. It is unlikely Parliament intended a person who was outside New Zealand at the precise moment the services started, but in New Zealand for the remaining period the services were being provided, would be considered to have consumed the services outside New Zealand.

39. Similarly, Parliament's purpose to impose GST on consumption in New Zealand is not met if the visa application services are treated as being performed only at the point in time at which they 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. The Commissioner considers the visa application services are performed, and consumption occurs, during the entire period in which those services are being provided.

40. However, 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.

Exception for minor presence

41. Section 11A(3) also supports the conclusion that the phrase "at the time the services are performed" in s 11A(1)(k) refers to the period during which the services are being performed. Section 11A(3) provides:

> (3) For the purpose of subsection (1)(k), (1)(l) and (1)(ma), and subsection (1)(n) as modified by subsection (4)(b), outside New Zealand, for a company or an unincorporated body that is not resident, includes a minor presence in New Zealand, or a presence that is not effectively connected with the supply.

42. This section provides an exception to the requirement in s 11A(1)(k) that the recipient of the supply must be outside New Zealand at the time the services are performed. The exception only applies to non-resident companies or unincorporated bodies who have a minor presence in New Zealand or a presence that is not effectively connected with the supply. This exception does not apply to natural persons.

43. There would not seem to be much need for this exception if the words "at the time the services were performed" referred to a single point in time. If the words refer to a single point in time, and if the company has a minor presence on any other day, then the services would still be zero-rated and the company would not need to rely on the exception to maintain zero-rating. The minor presence exception would apply only if the company had a presence in New Zealand on the one day the services were taken as having been performed. The need to legislate for the exception is more consistent therefore with the words meaning the whole period during which the services are performed.

44. There is some support for this analysis in the discussion of the amendments made by the Taxation (Remedial Matters) Act 1989 in *Tax Information Bulletin* Vol 11, No 9 (October 1999). Under the heading "GST – Treatment of exported services", the new s 11(2B) (now s 11A(3)) is discussed and the following example given (at 14):

> **Example 6**
>
> A New Zealand advertising firm is asked by an Australian company to prepare a media campaign for a new product that the company wants to release first in Australia and then in New Zealand. The New Zealand firm is responsible for coming up with ideas and implementation of the campaign.
>
> As the services are supplied to a non-resident who is outside New Zealand they may be zero-rated under [section 11A(1)(k)]. If a staff member of the non-resident company came to New Zealand for a short period to facilitate the implementation of the media campaign this should not affect the zero-rating of the services because the presence of a [sic] the staff member would generally be considered to constitute a minor presence in terms of [section 11A(3)].

45. The example suggests that "at the time the services are performed" means during the planning and implementation of the campaign. The staff member's presence in New Zealand is effectively connected with the supply of those services but their presence is minor, so zero-rating is not lost.

46. Accordingly, it seems more likely that in enacting s 11A(3) Parliament intended to address the situation where a non-resident company or unincorporated body has a minor presence in New Zealand during the time services are performed.

Conclusion

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

Is it possible to apportion a supply of immigration services?

48. For a supply to be zero-rated under s 11A(1)(k) a person must be both physically absent from New Zealand and a non-resident during the period in which the services are being performed. So if a person enters New Zealand during the period in which the services are being performed, does that mean the whole supply must be standard-rated or can the supply be apportioned into zero-rated and standard-rated parts?

49. The Commissioner's view is that, on the facts outlined in this Interpretation Statement, it will generally not be appropriate to apportion the supply for the reasons explained below.

No apportionment available under ss 5(14) and 10(18)

50. Sections 5(14) and 10(18) specifically deal with apportioning parts of a supply. However, neither section is applicable in this case.

51. Section 5(14) provides:

> (14) If a supply is charged with a tax under section 8, but section 11, 11A, 11AB, 11B, or 11C requires part of the supply to be charged at the rate of 0%, that part of the supply is treated as being a separate supply.

52. Section 5(14) applies only after it has been decided that a supply can be apportioned into zero-rated and standard-rated parts under a substantive provision. (See IS 08/01, "GST - role of section 5(14) of the Goods and Services Tax Act 1985 in regard to the zero-rating of part of a supply", *Tax Information Bulletin* Vol 20, No 5 (June 2008): 8). The wording of s 5(14) is inconsistent with the provision applying before reference has been made to the specific zero-rating provisions. The purpose of s 5(14) is not to apportion a supply, but to deem the apportioned part of a supply to be a separate supply.

53. Section 10(18) provides:

> (18) Where a taxable supply is not the only matter to which a consideration relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

54. Section 10(18) is also not a general apportionment provision: *CIR v Coveney* (1995) 17 NZTC 12,193 (CA). Section 10(18) applies where a part of a supply is taxable and a part of the supply is not. Section 10(18) cannot apply to apportion a supply that has a zero-rated part and a standard-rated part because both parts are taxable. (A zero-rated supply is still a taxable supply; it is just taxed at 0%.)

No relevant apportionment words in s 11A(1)(k)

55. Subparagraph (ii) of s 11A(1)(k) contains the apportionment words "to the extent that". Subparagraph (ii) stipulates that those services outlined in the substantive part of the provision are not entitled to zero-rating if they are supplied in connection with the acceptance of an obligation to refrain from carrying on a taxable activity, *to the extent that* the activity would have occurred within New Zealand.

56. By contrast, the substantive part of s 11A(1)(k) (that states that services can be zero-rated if they are supplied to a non-resident who is outside New Zealand at the time the services are performed), contains no apportionment language. Parliament could have chosen to insert apportionment words into the substantive part of the section, but did not do so. Apportionment words appear in other paragraphs in s 11A: paras (b), (c), (ma), and (o) and ss (4).

57. The lack of any words of apportionment in the substantive part of the section suggests that Parliament did not intend for there to be an ability to apportion a supply under s 11A(1)(k).

No general ability to apportion on these facts

58. The courts have held there is a general ability to apportion zero-rated parts of a supply under the Act where, on the facts, there is a true distinction between parts of a supply. This general ability to apportion is not reliant on ss 5(14) and 10(18) or apportioning words in the specific provision.

59. Tipping J in *CIR v Smiths City Group Ltd* (1992) 14 NZTC 9,140 (HC) and Hansen J in *Auckland Institute of Studies Ltd v CIR* suggest there is a general ability to apportion zero-rated parts of a supply. In *Auckland Institute of Studies* Hansen J stated at [25]:

> **Principles of apportionment**
>
> [25] Tipping J derived some assistance from s 10(18) in considering the apportionment of zero-rated and standard rated supplies in *C of IR v Smiths City Group Limited* (1992) 14 NZTC 9,140, the only New Zealand case to have considered the issue. It concerned the sale of a commercial property, part of which was dedicated to use as a car sales yard, the balance being unused land. The parties claimed the transaction to be zero rated as the business supplied was a going concern. In the course of an appeal against the finding of the Taxation Review Authority that

the one-third of the property comprising bare land should not be zero rated, *Tipping* J said at p 9,144:

> "If an apportionment or severance argument is raised **the Authority must decide as a matter of fact and degree whether there is in the transaction under scrutiny a sufficient distinction between the allegedly different parts to make it reasonable to sever them and apportion accordingly**."

As to the basis on which an apportionment should take place, he said:

> "The only assistance, on the material to which I was referred, seems to derive from sec 10(18) which, as earlier noted, provides that where a taxable supply is not the only matter to which a consideration relates the supply shall be deemed for such part of the consideration as is properly attributable to it. That of course relates to the distinction between a supply which is taxable and one which is not. It would seem logical however to apply the same approach to a supply which is in part liable **for tax at the standard rate and is in part zero rated."** [Emphasis added]

60. This suggests the general approach to apportioning zero-rated and standard-rated parts of a supply is similar to the ability under s 10(18) to apportion taxable and non-taxable supplies.

61. Hansen J went on to consider several UK VAT cases and then summarised the principles as follows at [36]:

> I take the following key principles from this review of the authorities:
>
> (a) In determining whether a supply may be apportioned for GST purposes, it is necessary to examine the true and substantial nature of the consideration given to determine whether there is a sufficient distinction between the allegedly different parts to make it reasonable to sever them and apportion them accordingly.
>
> (b) The enquiry is to determine whether one element of the transaction (or consideration given) is a necessary or integral part of another or whether it is merely ancillary to or incidental to that other element.
>
> (c) A service will be ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.

62. Therefore, there is a general ability to apportion zero-rated parts of a supply from the standard-rated parts. However, this ability to apportion is restricted to circumstances where, as a matter of fact and degree, a sufficient distinction exists between the different parts of the transaction (or consideration) to make it reasonable to separate them.

63. It may be possible in certain circumstances to separate the parts of a supply based on the hours worked or the nature of the work done and the amount charged for such work. However, a sufficient distinction must exist between the different parts to make it reasonable to separate them.

64. Such a distinction is unlikely to be present in the circumstances outlined in this Interpretation Statement. Generally all of the services are performed as part of one supply − the supply of services to facilitate obtaining a visa.

Services provided under an agreement that provides for periodic payments

65. Another possible way that a supply of services may be treated as separate supplies, so that standard-rating applies to some parts and zero-rating to other parts, is under s 9(3)(a). Under that section a single supply may be treated as successive supplies if the services are supplied under an agreement which provides for periodic payments.

66. Section 9(3)(a) provides:

> (3) Notwithstanding anything in subsection (1) or subsection (2), —
>
> (a) where goods are supplied under an agreement to hire, or where services are supplied under any agreement or enactment which provides for periodic payments, they shall be deemed to be successively supplied for successive parts of the period of the agreement or the enactment, and each of the successive supplies shall be

> deemed to take place when a payment becomes due or is received, whichever is the earlier:

67. Section 9(3)(a) applies to "services … supplied under any agreement ... which provides for periodic payments". Where there are periodic payments, under s 9(3)(a) the services are treated as being successively supplied for successive parts of the period of the agreement. Each of the successive supplies will have a separate time of supply. At each successive time of supply it is necessary to determine the correct GST rating to apply to the relevant successive supply. If the requirements of s 11A(1)(k) are satisfied for one instance of a successive supply, then that supply must be zero-rated. If the requirements of s 11A(1)(k) are not satisfied for a successive supply, then that supply must be standard-rated.

What is the effect of s 9(3)(a)?

68. There are potentially two ways that s 9(3)(a) can be interpreted.

69. The first is that s 9(3)(a) treats the successive supplies of visa application services as being a single supply, with the payments being either entirely standard-rated or entirely zero-rated, depending on whether the non-resident applicant was inside or outside New Zealand at the time of the first payment. This argument is based on s 9(3)(a) being no more than an extension of the mechanics of s 9(1). It is arguable that Parliament's purpose with s 9 was to create a series of rules that determined the time of a supply. Section 9(3)(a) is therefore part of s 9 for the purpose of providing time of supply rules and it does not create separate supplies. The outcome of this interpretation is that s 9(3)(a) does no more than determine when the tax is payable in respect of a successive supply: *CIR v Capital Enterprises Ltd*. The timing of any tax payable under the single supply would not affect its rating.

70. The second interpretation is that s 9(3)(a) moves beyond timing to deem a single supply to be "successive supplies" with each successive supply being standard-rated or zero-rated depending on whether the non-resident visa applicant was inside or outside New Zealand at the time of each successive supply.

71. Support for this interpretation can be found in the plain language of s 9(3)(a). Section 9(3)(a) contains the word "deemed" twice. It deems the payments to be "successively supplied for successive parts of the period of the agreement" and it also deems the supplies "to take place when a payment becomes due or is received, whichever is the earlier". This suggests that s 9(3)(a), in deeming a supply to be made up of successive supplies, moves beyond time of supply to create a series of supplies. Under such an approach the successive supplies should be considered separately from the original supply as if they were single supplies.

72. The view in the commentary on the GST rate change released in 2010 is that under s 9(3)(a) the applicable rate of GST is determined at the time of supply for each successive supply: see "*Changes to the Goods and Service Act 1985 to help businesses transition to the new GST rate: A special report from the Policy Advice Division of Inland Revenue (10 August 2010)" Tax Information Bulletin* Vol 22, No 10 (November 2010): 72:

> **Option of general time of supply or successive supplies rule**
>
> The second instance arises because some suppliers of what are arguably successive supplies (for example, utilities and phone line rentals) account for GST on the basis of when the invoice is issued rather than when payment is due or received. **Technically, the GST rate on a successive supply should be determined by when the payment is due or received rather than when the invoice is issued.** Under normal circumstances this makes no difference but with a rate change some suppliers are uncertain about whether a September

> invoice, for example, would need to be charged at 12.5% or at 15% as this could be dependent on whether the customer paid or was required to pay before 1 October. [Emphasis added]

73. The GST Advisory Panel website (<www.gstadvisory.govt.nz/content/how-do-i-determine-which-gst-rate-use-125-or-15-over-transition-period> accessed 8 February 2012) seemed to take the same approach:

> The rule in s.(9)(3)(a) as set out above varies from the general time of supply rule by providing that where services are successively supplied, then each such successive supply shall be deemed to take place when any payment becomes due or is received, which ever (sic) is the earlier.
>
> This recognises that where services are supplied over time, and are paid by way of instalments, it is more appropriate to recognise the time of supply for GST purposes as the earlier of the date when each payment is either due, [or] it is paid.

74. Further, commentary on the introduction of s 9(3)(aa) in *Public Information Bulletin* No 150 (July 1986) stated that :

> The amending legislation now also **deems a separate supply to occur** in respect of contracts which provide for the periodic or progressive supply of goods and which also provide for progress payments related directly to the degree of performance of the contract. [Emphasis added]

75. While, s 9(3)(aa) does not deal with the same issue as s 9(3)(a), the issues are similar. As a result, it is arguable that the commentary from the *Public Information Bulletin* applies to both paragraphs.

76. This interpretation is also consistent with the destination principle. As mentioned above, under the destination principle, supplies of goods and services are taxed in the jurisdiction where they are consumed. If the first interpretation is accepted this would mean that taxpayers could lock-in zero-rating even when the non-resident applicant comes to New Zealand simply because they were outside New Zealand when the first payment was made. This outcome would be inconsistent with Parliament's purpose.

77. Similar concerns would arise if Parliament wanted to change the GST rate. Under the first interpretation, taxpayers who are making payments under a long-term contract (possibly spanning years) could continue to apply an earlier GST rate simply because the first payment was made at the lower rate.

78. It is therefore the Commissioner's view that s 9(3)(a) is more than just a timing provision. It has the effect of deeming a single supply to be successive supplies with each successive supply being standard-rated or zero-rated depending on whether the non-resident visa applicant was inside or outside New Zealand at the time of supply.

What are periodic payments?

79. Section 9(3)(a) applies to periodic payments. "Periodic payments" is not a defined term in the Act. Therefore it is necessary to consider the following to assist with its interpretation:

- The ordinary meaning of the term "periodic payments".
- How the courts have interpreted "periodic payments" or similar phrases.
- Statutory context.

Ordinary meaning

80. The *Shorter Oxford English Dictionary on Historical Principles* (6th ed, Oxford University Press, New York, 2007) defines "periodic" to mean:

> **periodic** …**2** Characterized by periods; recurring or reappearing at regular or any intervals (of time or space); intermittent;

81. It also defines "regular", "recur" and "intermittent" to mean:

> **regular** … **A** *adjective.* **3** Characterized by the presence or operation of a definite principle; steady or uniform in action, procedure, or occurrence; *esp* recurring or repeated at fixed times, recurring at short uniform intervals.
>
> **recur** … **5** Of an event, fact, state, etc.: occur or appear again, periodically, or repeatedly.
>
> **intermittent**… **A** *adjective.* That ceases for a time; occurring at intervals; not continuous.

82. Accordingly, "periodic" has two ordinary meanings:

- recurring at regular intervals;
- recurring intermittently.

83. Based on the definition of "regular", regular intervals may be, but need not be, uniform intervals. Further, the ordinary meanings do not mention a minimum number of recurrences for something to be periodic.

84. In summary, the term "periodic" has various possible ordinary meanings. The meanings range from requiring regular payments to payments made intermittently. Accordingly, the ordinary meaning of the term "periodic" in s 9(3)(a) indicates it could apply to either regularly recurrent payments or intermittently recurrent payments.

Case Law

85. The term "periodic payments" has not been judicially considered in the context of s 9(3)(a). However, that term and similar words have been considered in other contexts. The consideration of similar words may be useful in determining the meaning of "periodic payments" in s 9(3)(a).

New Zealand Cases

86. There are three New Zealand decisions of relevance: *Case L67* (1989) 11 NZTC 1,391 (TRA), *Blackledge & Ors (Centrepoint) v Social Security Commission & Anor* (HC Auckland CP 81/87, 17 February 1992) and *McElroy v Director-General of Social Welfare* (1992) 9 FRNZ 366 (FC). *Case L67* considers the meaning of "periodic supply" and "periodic payment", whereas *Blackledge* and *McElroy* consider whether services were supplied periodically, as opposed to whether payments are periodic. The Commissioner does not believe that "periodic" would necessarily take on a different meaning depending on whether it relates to services, supplies or payments. The word itself is not a term of art; it is the ordinary meaning that is of importance in interpreting s 9(3)(a).

87. In *Case L67* a taxpayer sold some sections of land at auction. Deposits were paid and the taxpayer returned GST on the amount of those deposits, not on the full purchase price of the sections (the remainder of the purchase price was due on settlement). The issue before the court was whether GST was payable on the full purchase price of the sections at the time of sale at auction or on settlement. The taxpayer argued, amongst other things, that the land was supplied progressively to the purchasers under s 9(3)(aa)(i), so that each supply was deemed to take place whenever any payment became due or was received, or an invoice was issued.

88. This argument failed for a number of reasons. However, the Commissioner's submission that, even if there was a supply of a good, the payments were not "paid in instalments or periodically and in relation to the periodic or progressive supply of those goods" is relevant here.

89. Barber DJ discussed counsel for the Commissioner's submission as follows (at 1,397):

> Mr Panckhurst then submitted that even if an equitable estate were "a good" and the transfer of such an equitable estate were "supply" as defined by the Act, consideration is not paid, in

> the present instance, in relation to such supply and therefore the necessary relationship contemplated by sec 9(3)(aa)(i) does not exist. In other words, he submitted that the requirements of the subsection as to the mode of supply, and the relation of payment thereto, still need to be met; and he submitted that the present case does not fit within these requirements. He referred to the definition of "progressively" in the *Oxford English Dictionary* as including:
>
> > "in a progressive manner; in the way of progression or progress; by continuous advance; step by step; gradually; successively; ..."
>
> That Dictionary gives the following definition of "periodically":
>
> > "at regularly recurring or definite intervals ... from time to time; every now and then."
>
> **Mr Panckhurst submitted that the terms "periodically" and "progressively" envisage a number of stages and a pattern of recurrent supply which do not sit easily with the passing of two different interests in the same stage.** He submitted that, in the context of the section, those terms envisage the transfer of similar goods over a period of time, not the passing of different interests in the same goods, namely, the intangible chose in action and a legal interest. [Emphasis added.]

90. Barber DJ concluded (at 1,397):

> I agree with the submissions and arguments put forward on behalf of the respondent. The method of sale of sections by the objector cannot be regarded as a progressive or periodical supply of goods for which payment is in instalments or periodically and in relation to the periodic or progressive supply of those goods. There is no consideration for the initial passing of an equitable estate to the purchaser. The deposit is 10% of the purchase price of the section and is paid as a part payment of that total price. The deposit is not "the consideration for that supply" or the consideration for any supply, it is part of the total consideration for the supply of a parcel of land. There is no relationship between the value of each of the two steps in the transaction, namely deposit and value of the agreement, and final payment and value of the title. There is no sufficient relationship between payments and each step.
>
> There is no progressive or periodical supply of a good because the initial creation of an equitable estate is a chose in action which, by definition, is not a good.
>
> I do not think it matters that different interests (equitable and legal estates) are involved at different stages. **However, only two steps are involved. The transaction cannot sensibly or commercially be regarded as a progressive or periodical supply of anything. There is no gradual, or step by step, approach of supply — only two steps**. [Emphasis added.]

91. Barber DJ agreed with the submission that the term "periodic" envisages a number of stages and a pattern of recurrent supply. Although *Case L67* only discusses "periodic" in s 9(3)(aa)(i), not s 9(3)(a), the Commissioner's view is that a discussion about the meaning of "periodic" in this paragraph is relevant to an inquiry into the meaning of that same word in a neighbouring paragraph of the same subsection.

92. In *Blackledge* Tompkins J was asked to decide whether the provision by a trust of food, clothing and shelter was income under s 3 of the Social Security Act 1964. The definition of "income" included "services supplied periodically…". His Honour concluded that "periodically" meant "regularly over a period, not on only isolated occasions" (at 26).

93. *McElroy* also concerned the interpretation of s 3 of the Social Security Act 1964 and the phrase "periodical payments of money". Inglis J applied the decision in *Blackledge* and held that "periodical" and "periodically" did not mean "recurring at regular periods or intervals in the sense of once a week or once a month but rather as meaning happening as part of the regular course of events and not happening …on isolated occasions" (at 369-70).

94. *Case L67* also confirms that two steps could not commercially or sensibly be regarded as "periodical", because in that case there was not a gradual step by step approach to supply. (See also the decisions of the Court of Appeal in *CIR v Parsons (No. 2)* [1968] NZLR 574, 586 and the Labour Court in *New Zealand (with exceptions) Woollen Mills, etc, IUOW v Cavalier Bremworth Limited* (1990) 3

NZELC 97,664. The context was different in both cases; however, each reached the view that payments made on only two occasions could not be considered "periodic".)

95. In summary, the New Zealand cases tend to indicate that "periodic" or "periodically" mean the following:

- Step by step, gradual.
- Pattern of recurrence.
- Regularly over a period, not on isolated occasions.
- Not recurring at regular periods or intervals, in the sense of once a week or once a month, but happening as part of a regular course of events.

The cases also suggest that two payments could not sensibly or commercially be regarded as "periodic".

United Kingdom Cases

96. *Jones v Ogle* (1872-73) L.R. 8 Ch. App. 192 [CA] considered the meaning of the phrase "periodical payments in the nature of income" in s 2 of the Apportionment Act 1870. Selbourne LC held (at 198):

> …they must be payments which are made periodically, recurring at fixed times, and not merely variable periods, or in the exercise of the discretion of one or more individuals, but from some antecedent obligation.

97. *Russell Vaught v Tel Sell UK Limited* [2005] EWHC 2404 (QB) also concerned s 2 of the Apportionment Act 1870. This case suggests a periodic payment must be one which falls due at predetermined intervals, the amount of which is fixed at the outset and does not vary.

98. Ward LJ in *BJ Rice & Associates (A firm) v Commissioner of Customs and Excise* [1996] BVC 211 [CA], considered the meaning of a similar phrase, "payable periodically", in a similar context to s 9(3)(a). Ward LJ concluded that "payable periodically" means at regular intervals rather than irregular intervals. However, this decision may be of limited value for a number of reasons. First, Ward LJ's comments were obiter. The definition of "payable periodically" was not an issue the court needed to decide. Further, he was attempting to draw a distinction between two different concepts in the United Kingdom VAT legislation – "payable periodically" and "from time to time". This distinction is not present in the New Zealand legislation. Arguably, the existence of the phrase "from time to time" influences and limits the interpretation that can be given to "payable periodically".

99. These United Kingdom cases tend to suggest that "periodical payments" recur at fixed, predetermined intervals and must stem from some antecedent obligation.

Canadian Cases

100. The Canadian courts have also considered the meaning of the phrase "periodic payment". In *No 427 v Minister of National Revenue* 57 DTC 291 (Tax Appeal Board), the court was asked to consider whether a payment was a "periodic payment" under the definition of "income" in the Income Tax Act 1952. Chairman W.S Fisher Q.C held (at 294):

> I am of the opinion that it is not necessary for all of the payments to be identical in order to qualify them as periodic payments, so long as they are specifically provided for in the decree and occur periodically, that is, at fixed times, and so long as they arise from some antecedent obligation – (in this case, the former relationship of husband and wife) – and are not payable at variable periods which can be varied at the discretion of individuals….

101. In *R v Jean Guay* 75 DTC 5044 (Federal Court of Canada) the court concluded that "periodic payments" do not need to take place at intervals of equal duration. "Periodic" suggests "something which recurs from time to time but not necessarily at precise or regular intervals" (at 5,047).

102. The Canadian cases suggest that "periodic payments":

- Recur from time to time, but not necessarily at precise, equal or regular intervals.
- Do not need to be for identical amounts.
- Occur at fixed times from an antecedent obligation.

Summary of the case law

103. While no definitive statement exists in the case law on the meaning of the term "periodic payments", some consistent themes emerge. The New Zealand cases suggest the term means payments made as part of the regular course of events and not on isolated occasions. *Case L67* suggests a pattern of recurrence is required and that two payments would not be enough. The United Kingdom cases suggest the payments (both the intervals and the amount) should arise from an antecedent obligation and occur at pre-determined fixed times. The Canadian courts suggest the payments do not need to be identical or made at intervals of equal duration, but they must take place at fixed times and arise from an antecedent obligation.

Statutory context

104. In trying to understand the meaning of "periodic payments" in s 9(3)(a), it is useful to consider the surrounding sections of the Act to see whether they can provide any statutory guidance as to the intended meaning.

Section 9(1)

105. The clearest contextual indication regarding the minimum number of payments required to be "periodic" is found in s 9(1). Under s 9(1), the time of supply is triggered on the receipt of "any payment" in respect of a supply. "Any payment" obviously contemplates a part payment. The part payment may take the form of an initial deposit or instalment of the consideration for the supply. However, if "periodic payments" were to be interpreted to include every situation where two payments were made, then the scope of the general time of supply rule in s 9(1) would be significantly reduced. It seems unlikely that Parliament would have intended this outcome.

106. For example, the consideration for a supply might be payable by way of a 10% deposit with the balance of the consideration payable in a lump sum on performance of the services. Section 9(1) triggers the time of supply for the entire supply when the deposit is paid. In *CIR v Dormer* (1997) 18 NZTC 13,446 (HC), Salmon J said (at 13,457-13,458):

> Section 9 of the Act provides that a supply is made at the time "any payment is received by the supplier" if an invoice has not been issued at that time. The words "any payment" include the payment of a deposit: *Case* R11 (1994) 16 NZTC 6,062. Accordingly, a supplier who is a "registered person" will take into account, in fixing the amount of the deposit under the contract, that he or she may have to account to the Commissioner for GST from the time the deposit is received.

107. It seems more consistent with s 9(1) that s 9(3)(a) does not apply to supplies involving the payment of deposits with the balance paid later in a lump sum. Accordingly, if only two payments are provided for in a contract for visa application services, the Commissioner considers it unlikely the payments are

periodic payments. If that is the case then the visa application services will not be successive supplies under s 9(3)(a).

Section 9(3)(aa)

108. Section 9(3)(aa) is part of the same subsection as s 9(3)(a). Therefore the words used in para (aa) may be interpretively relevant to words used in para (a).

109. Section 9(3)(aa) provides:

> (3) Notwithstanding anything in subsection (1) or subsection (2), —
>
> ...
>
> (aa) where and to the extent that—
>
> (i) goods are supplied progressively or periodically pursuant to any agreement or enactment which provides for the consideration for that supply to be paid in instalments or periodically and in relation to the periodic or progressive supply of those goods; or
>
> (ii) goods and services supplied directly in the construction, major reconstruction, manufacture, or extension of a building or an engineering work are supplied pursuant to any agreement or enactment which provides for the consideration for that supply to become due and payable in instalments or periodically in relation to the progressive nature of that construction, manufacture, or extension—
>
> those goods and services shall be deemed to be successively supplied, and each such successive supply shall be deemed to take place whenever any payment in respect of that supply becomes due, is received, or any invoice relating only to that payment is issued, whichever is the earlier:

110. Unlike s 9(3)(a), ss 9(3)(aa)(i) and (ii) use the words "progressively" and "progressive" as well as "periodically". It could be argued that in both ss 9(3)(a) and 9(3)(aa) "periodic" should therefore be treated as having a meaning distinct from the meaning of "progressive". The *Shorter Oxford English Dictionary on Historical Principles* (6th ed, Oxford University Press, New York, 2007) defines "progressive" to mean "[p]roceeding by stages in a series; successive".

111. This definition suggests a progressive supply would be a single supply made in a number of stages. Arguably, if "progressive" is intended to capture supplies related to the progress of the delivery of that supply, then "periodic" should be limited to agreements for regular on-going payments, where payments are due at particular times unrelated to delivery of the supply.

112. However, the contrary view can also be argued. "Periodic" is used in several places in s 9(3)(aa) and, in fact, the order of "periodic" and "progressive" is reversed in one place. "Periodic" is also contrasted with "instalment". Section 9(3)(aa)(ii) applies to periodic payments or instalments paid "in relation to the progressive nature of that construction, manufacture, or extension", envisaging that it is possible to have a periodic payment made in relation to the progressive nature of construction. These features of the wording suggest it was not intended to be read in a highly technical way, but that the two words "periodic" and "progressive" mean the same thing or at least have a degree of overlap. Under this interpretation, where "progressive" and "periodic" have the same or similar meaning, it is arguable that a "periodic" payment could take place at irregular intervals depending on the stages and steps in the progressive supply and that these irregular intervals could still be considered "periodic".

113. On balance, it is difficult to draw any definitive conclusion on the meaning of "periodic" from considering the words in s 9(3)(aa).

Statutory context summary

114. Section 9(1) suggests that two payments would not be sufficient to constitute "periodic". Section 9(3)(aa) does not provide enough guidance on the meaning of "periodic" to reach any clear conclusions.

Conclusions on the meaning of "periodic payments"

115. Drawing from the ordinary meaning, case law and statutory context, a number of characteristics may be identified that suggest what a periodic payment is:

- The payments need to be recurring and made at regular, fixed intervals. Recurring payments at irregular intervals may also suffice, but that will depend on the other characteristics of the payments as to whether they can be said to be truly "periodic".
- The payments must form a pattern of recurrence.
- The payments do not need to be for precisely the same amount.
- The payments are made as part of the regular course of events and not on isolated occasions.
- The payments need to arise from an antecedent obligation. (Section 9(3)(a) will apply only where the periodic payments are set out in an agreement or enactment.)

Two payments could not sensibly or commercially be regarded as periodic.

Treatment of successive supplies

116. As has been explained above, the operation of s 9(3)(a) has the effect of treating the successive supplies as if they were separate supplies. At each successive time of supply, the correct GST rate must be determined for the relevant supply. If visa application services are supplied under an agreement which provides for periodic payments, ss 9(3)(a) and 11A(1)(k) apply as follows:

- If the visa applicant is outside New Zealand when the first time of supply is triggered, the immigration advisor can zero-rate the first payment. If the visa applicant stays outside New Zealand the subsequent successive supplies can also be zero-rated.
- The services are deemed to be supplied for the relevant successive parts of the period of the agreement. The periods may relate to steps in the process, such as the application for the Expression of Interest and the application for the Invitation to Apply. The time of supply for each of the successive supplies is the earlier of when a payment becomes due or is received for that supply.
- The correct GST rate for each successive supply must be determined. If the visa applicant is outside New Zealand during the period in which the services are performed for a successive supply, then that supply would be zero-rated. If the visa applicant is in New Zealand at any point during the performance of the services for the successive supply, then the supply must be standard-rated.
- If a successive supply is initially zero-rated but the visa applicant comes to New Zealand during the performance of the supply, that supply will need to be standard-rated. The provisions discussed at [117] to [129] will need to be considered.

What needs to be done if GST is later found to be payable?

117. If a non-resident comes to New Zealand during the period that the visa application services are being performed and apportionment (as explained at [48]

to [64] above) and s 9(3)(a) do not apply, then the GST treatment of the payment for the supply may need to be changed.

118. For example, an applicant makes a one-off payment to an immigration advisor for a supply of visa application services. The supply is zero-rated because it is assumed the requirements of s 11A(1)(k) will be satisfied and the applicant will remain outside New Zealand during the period the services are being performed. However, if the applicant comes to New Zealand during this period, the entire supply will have to be standard-rated. The immigration advisor may have already returned the payment on the basis that the supply is zero-rated. The treatment of the supply and the payment will therefore need to be changed. The immigration advisor will have to pay additional GST as a result. This section discusses what needs to be done to account for the additional GST.

119. There are three options if the supply subsequently has to be standard-rated:

- In some circumstances, s 25 will allow the immigration advisor to issue a debit note to the visa applicant to reflect the increased GST.
- If the increased GST is less than $500, the immigration advisor can include it in a subsequent GST return.
- Otherwise, the immigration advisor has to notify the Commissioner of the error by submitting sufficient details to enable the Commissioner to amend the assessment.

120. The three options are discussed in more detail below.

Section 25

121. Section 25 may apply where there has been a change in the consideration for a supply. In some circumstances, the change in the rate of GST chargeable on a supply will result in a change in the amount of consideration. Whether the consideration changes will depend on whether the contract provides that the consideration will increase if the GST payable increases. If the contract says the amount payable is a particular amount "plus GST" and the rate of GST increases from 0% to the standard rate, then the consideration will change too and s 25 will apply. Conversely, if the contract says the consideration, including GST, is a particular fixed amount, then an increase in the rate of GST will not result in a change to the consideration and s 25 will not apply. If the requirements of s 25 are satisfied, then the immigration advisor may be able to issue a debit note to the visa applicant reflecting the increase in consideration.

122. This view is based on the following sections in the Act. Section 25 provides (as relevant):

> **25 Credit and debit notes**
>
> (1) This section shall apply where, in relation to the supply of goods and services by any registered person,—
>
> ...
>
> (b) the previously agreed consideration for that supply of goods and services has been altered, whether due to the offer of a discount or otherwise; or
>
> ...
>
> and the supplier has—
>
> (d) provided a tax invoice in relation to that supply and as a result of any 1 or more of the above events, the amount shown thereon as tax charged on that supply is incorrect; or
>
> (e) furnished a return in relation to the taxable period for which output tax on that supply is attributable and, as a result of any 1 or more of the above events, has accounted for an incorrect amount of output tax on that supply.

123. Paragraph (b) applies where the previously agreed consideration for a supply of goods and services has been altered, whether due to the offer of a discount or otherwise. "Consideration" is defined in s 2(1):

> **consideration**, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body

124. Section 10(2) provides that the consideration is the aggregate of the value of the supply and the GST charged. Therefore, the consideration includes the GST. If the contract is worded so that a change in GST would result in a change of consideration, s 25(1)(b) will be triggered. Such a result may be caused by the standard-rating of a supply that had previously been zero-rated.

125. When s 25 applies, a debit note could be issued to the visa applicant to reflect the change in the GST rating of the supply. The immigration advisor would then need to account for the increased GST in the return for the taxable period in which the debit note was issued. No use of money interest would normally be payable as the extra GST would be due only once the debit note had been issued.

Section 113A of the Tax Administration Act 1994

126. Alternatively, if the additional GST is less than $500 for a single return, then the additional GST may be included in a subsequent return under s 113A of the Tax Administration Act 1994 (TAA). The requirements of s 113A will need to be satisfied.

Amended return

127. There is no specific statutory procedure if the requirements of s 113A of the TAA or s 25 of the Act are not satisfied. Instead, the immigration advisor would have to notify the Commissioner of the error by submitting sufficient details to enable the Commissioner to amend the assessment pursuant to s 113 of the TAA. (See para 33 of SPS 07/03 "Request to amend assessments" *Tax Information Bulletin* Vol 19, No 5 (June 2007): 11.)

128. Use of money interest would normally apply from the return period in which the original GST liability arose.

Summary

129. Section 25 may apply to reverse the incorrect zero-rating of a supply. However, s 25 will not apply in all circumstances. If the additional GST is less than $500 for a single return and the requirements of s 113A of the TAA are satisfied, then the additional GST may be included in a subsequent return. If neither s 25 nor s 113A of the TAA apply, then the immigration advisor would have to notify the Commissioner of the error by submitting sufficient details to enable the Commissioner to amend the assessment.

Conclusion

130. A supply of visa application services may be zero-rated under s 11A(1)(k) where the supply is:

- to a person who is a non-resident at the time the services are performed;
- to a person who is outside New Zealand at the time the services are performed;
- not supplied in connection with any New Zealand land or moveable personal property (other than as specified) situated in New Zealand;

- not an acceptance of an obligation to refrain from carrying on a taxable activity to the extent that the activity would have occurred within New Zealand.

131. If there is only one payment for the supply of visa application services and the visa applicant comes to New Zealand during the period that the services are being performed, then the supply will have to be standard-rated. Different parts of the supply can be apportioned only where, as a matter of fact and degree, a sufficient distinction exists between the different parts to make it reasonable to separate them. This is considered unlikely in the present circumstances.

132. However, if the visa applicant comes to New Zealand during the visa application process, the whole supply might not need to be standard-rated. This occurs if the single supply of visa application services is treated as successive supplies under s 9(3)(a). A single supply may be treated as successive supplies if there are periodic payments. The Commissioner considers certain characteristics will need to be present for a payment to be "periodic". If there are periodic payments, each of the successive supplies will have a separate time of supply. At each successive time of supply, the correct GST rate must be determined for the relevant supply. The correct rate for each successive supply will be determined by whether the recipient is in New Zealand at any time during the performance of that supply. If the requirements of s 11A(1)(k) are satisfied, then the supply must be zero-rated. If the requirements of s 11A(1)(k) are not satisfied, then the supply must be standard-rated.

133. If the visa applicant comes to New Zealand during the period that the services are being performed (and apportionment and s 9(3)(a) do not apply), then the GST treatment of the payment for the supply may need to be changed. The provisions discussed at [117] − [129] above would need to be considered.

Examples

134. The following examples have been included to help explain the application of the law. The examples used reflect the current immigration processes. In the event these processes change, provided the changes are not material, the substantive results would remain the same. However, if the changes are more fundamental, then the matter would need to be further considered and a different outcome might apply.

135. As noted at [23] above, there are four requirements that must be satisfied before a supply of visa application services can be zero-rated under s 11A(1)(k). The following examples only consider the requirement that the person be outside New Zealand when the services are performed. For the purposes of the examples, the other requirements are assumed to have been satisfied.

Example 1 – Applicant remains outside New Zealand for the entire visa application process

136. Rafa lives in Pakistan. She enters into a contract with a New Zealand–based immigration advisor to help her apply for a skilled migrant visa. She remains outside New Zealand for the entire visa application process. The supply of visa application services will be zero-rated.

Example 2 – Applicant signs contract outside New Zealand and remains outside New Zealand for the entire visa application process

137. Katerina lives in Sweden. She wants to immigrate to New Zealand under a skilled migrant visa. She comes to New Zealand to meet with an immigration lawyer. Katerina has some initial discussions with her lawyer and then returns home to

Sweden. She signs the lawyer's contract in Sweden and remains outside New Zealand for the entire visa application process.

138. The supply of visa application services will be zero-rated as Katerina was outside New Zealand during the time the services were performed.

Example 3 – Applicant has a "GST inclusive" contract and enters New Zealand during the visa application process

139. Oscar lives in Ireland and wants to immigrate to New Zealand. He enters into a contract with a New Zealand–based immigration advisor to assist him in obtaining an investor visa. The contract provides that there is one lump sum payment for the services provided by the advisor. The payment is to be made after the visa has been granted. The contract provides that the price is "GST inclusive if any". Oscar comes to New Zealand during the visa application process to look at housing and schooling for his family.

140. Since there is only one payment, and Oscar has come to New Zealand during the process, the entire supply will have to be standard-rated. Given the contract provides that the price is "GST inclusive if any", the immigration advisor will have to account for GST. The tax fraction will need to be applied to the GST inclusive amount to see how much GST is included in the price. With the GST rate at 15% the tax fraction is 3/23.

Example 4 – Applicant has a "plus GST if any" contract and enters New Zealand during the visa application process

141. Felix lives in Spain. He wants to immigrate to New Zealand under a skilled migrant visa. He enters into a contract with a New Zealand–based immigration lawyer to assist in obtaining the visa. The contract provides for a one-off payment at the start of the services. The price is "plus GST if any". During the visa application process, Felix comes to New Zealand to talk to his lawyer about the visa application process. As a result, the entire supply must be standard-rated. The change in the GST rate increases the consideration payable under the contract.

142. The advisor can issue a debit note to Felix under s 25 to reflect the increased consideration. The advisor has to account for the increased GST in the return for the taxable period in which the debit note is issued.

Example 5 – Applicant has "GST inclusive" contract and enters New Zealand during the visa application process. GST difference is less than $500.

143. Diego lives in Mexico. He wants to immigrate to New Zealand under a skilled migrant visa. He enters into a contract with a New Zealand–based immigration lawyer to assist in obtaining the visa. The contract provides for a one-off payment of $3,000 at the start of the services. The price is "GST inclusive if any". During the visa application process, Diego comes to New Zealand to look at houses, so the entire supply must be standard-rated. Applying the tax fraction to the GST inclusive price of $3,000 the GST on the supply comes to $391.30. With the GST rate at 15% the tax fraction is 3/23.

144. As the difference in the amount of GST is less than $500, the lawyer may be able to include the additional GST in a subsequent return under s 113A of the Tax Administration Act 1994.

Example 6 – Applicant has "GST inclusive" contract and enters New Zealand during the visa application process. GST difference is greater than $500.

145. James lives in South Africa. He enters into a contract with a New Zealand–based immigration lawyer to assist in obtaining an investor visa. The contract provides for a one-off, up-front payment of $7,000. The price is "GST inclusive if any". During the visa application process, James comes to New Zealand to talk to his lawyer about the visa application process and so the entire supply must be standard-rated.

146. There is no specific statutory procedure because the difference in the amount of GST to be paid is greater than $500. Instead, the lawyer would have to notify the Commissioner of the error by submitting sufficient details to enable the Commissioner to amend the assessment for the period in which the original payment was made. Use of money interest would normally apply from the return period in which the original GST liability arose.

Example 7 – Applicant has contract which provides for monthly payments. Applicant enters New Zealand during the visa application process

147. Hua lives in China. She wants to immigrate to New Zealand under the investor category. She needs help applying for an investor visa so she enters into a contract with a New Zealand–based immigration advisor. The advisor estimates the visa will take nine months to obtain. The contract provides for monthly payments. Hua remains outside New Zealand during the six months it takes to prepare and file the Expression of Interest. It then takes three months from February to the end of April for the Invitation to Apply to be prepared and processed. Hua comes to New Zealand for a week during March.

148. The immigration advisor will need to determine the correct GST treatment for each of the monthly successive supplies. The advisor will need to determine for each month whether Hua is in, or will be in, New Zealand. In the current case, the immigration advisor will have to account for GST at the standard rate on the successive supply during the month that Hua is in New Zealand. For all the monthly successive supplies that Hua remains outside New Zealand, the supplies will be zero-rated.

Draft items produced by the Office of the Chief Tax Counsel represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form these items may not be relied on by taxation officers, taxpayers, and practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

References

Related rulings/statements

IS 08/01 "GST - role of section 5(14) of the Goods and Services Tax Act 1985 in regard to the zero-rating of part of a supply" *Tax Information Bulletin* Vol 20, No 5 (June 2008): 8

SPS 07/03 – Request to amend assessments, *Tax Information Bulletin* Vol 19 No 5 (June 2007): 8

Subject references

Apportionment
Goods and services tax
Immigration services
Meaning of "periodic payment" and "at the time the services are performed"
Non-resident
Successive supplies
The destination principle
Time of supply
Visa application services

Legislative references

Goods and Services Tax Act 1985; ss 2, 5, 8, 9, 10, 11, 25
Income Tax Act 2007, s YD 1
Tax Administration Act 1994, ss 113, 113A

Case references

Auckland Institute of Studies Ltd v CIR (2002) 20 NZTC 17,685 (HC)
BJ Rice & Associates (A firm) v Commissioner of Customs and Excise [1996] BVC 211
Blackledge & Ors (Centrepoint) v Social Security Commission & Anor (HC Auckland CP 81/87, 17 February 1992)
Case L67 (1989) 11 NZTC 1,391 (TRA)
Chatham Island Enterprises Trust v CIR (1999) 19 NZTC 15,075 (CA)
CIR v Capital Enterprises Ltd (2002) 20 NZTC 17,511 (HC)
CIR v Coveney (1995) 17 NZTC 12,193 (CA)
CIR v Dormer (1997) 18 NZTC 13,446 (HC)
CIR v Gulf Harbour Development Ltd (2004) 21 NZTC 18,915 (CA)*CIR v Motorcorp Holdings Ltd* (2005) 22 NZTC 19,126 (CA)
CIR v Parsons (No. 2) [1968] NZLR 574 (CA)
CIR v Smiths City Group Ltd (1992) 14 NZTC 9,140 (HC)
Jones v Ogle (1872-73) L.R. 8 Ch. App. 192 [CA]
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Public Trustee v McKay (Minister of Health) & Anor [1969] NZLR 995 (CA)
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Wilson & Horton Ltd v CIR (1995) 17 NZTC 12,325 (CA)

Other references

Administration of the Goods and Services Tax Act (Government discussion document, Policy Advice Division of Inland Revenue, March 1985)

GST: A Review (Government discussion document, Policy Advice Division of Inland Revenue, March 1999)

"GST – treatment of exported services" *Tax Information Bulletin* Vol 11, No 9 (October 1999): 12

GST and Imported Services: A challenge in an electronic commerce environment (Government discussion document, Policy Advice Division of Inland Revenue, June 2001)

Appendix – Legislation

Goods and Services Tax Act 1985

1. Section 5(14) provides:

> **5. Meaning of term "supply"**
>
> (14) If a supply is charged with a tax under section 8, but section 11, 11A, 11AB, 11B, or 11C requires part of the supply to be charged at the rate of 0%, that part of the supply is treated as being a separate supply.

2. Section 9(1) provides:

> **9 Time of supply**
>
> (1) Subject to this Act, for the purposes of this Act a supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier or the recipient or the time any payment is received by the supplier, in respect of that supply.

3. Section 9(3) provides:

> **9 Time of supply**
>
> (3) Notwithstanding anything in subsection (1) or subsection (2),—
>
> (a) where goods are supplied under an agreement to hire, or where services are supplied under any agreement or enactment which provides for periodic payments, they shall be deemed to be successively supplied for successive parts of the period of the agreement or the enactment, and each of the successive supplies shall be deemed to take place when a payment becomes due or is received, whichever is the earlier:
>
> (aa) where and to the extent that—
>
> (i) goods are supplied progressively or periodically pursuant to any agreement or enactment which provides for the consideration for that supply to be paid in instalments or periodically and in relation to the periodic or progressive supply of those goods; or
>
> (ii) goods and services supplied directly in the construction, major reconstruction, manufacture, or extension of a building or an engineering work are supplied pursuant to any agreement or enactment which provides for the consideration for that supply to become due and payable in instalments or periodically in relation to the progressive nature of that construction, manufacture, or extension—
>
> those goods and services shall be deemed to be successively supplied, and each such successive supply shall be deemed to take place whenever any payment in respect of that supply becomes due, is received, or any invoice relating only to that payment is issued, whichever is the earlier:

4. Section 10(18) provides:

> **10 Value of supply of goods and services**
>
> (18) Where a taxable supply is not the only matter to which a consideration relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

5. Section 11A(1)(k) provides:

> **11A Zero-rating of services**
>
> (1) A supply of services that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> (k) subject to subsection (2), the services are supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed, not being services which are—
>
> (i) supplied directly in connection with—
>
> (A) land situated in New Zealand or any improvement to the land; or

(B) moveable personal property, other than choses in action or goods to which paragraph (h) or (i) applies, situated in New Zealand at the time the services are performed; or

(ii) the acceptance of an obligation to refrain from carrying on a taxable activity, to the extent that the activity would have occurred within New Zealand; or

6. Section 11A(3) provides:

11A Zero-rating of services

(3) For the purpose of subsection (1)(k), (1)(l) and (1)(ma), and subsection (1)(n) as modified by subsection (4)(b), **outside New Zealand**, for a company or an unincorporated body that is not resident, includes a minor presence in New Zealand, or a presence that is not effectively connected with the supply.

7. Section 25(1) provides:

25 Credit and debit notes

(1) This section shall apply where, in relation to the supply of goods and services by any registered person,—

(a) That supply of goods and services has been cancelled; or

(aa) The nature of that supply of goods and services has been fundamentally varied or altered; or

(ab) section 11(1)(mb) was incorrectly applied to the treatment of the supply, so that the supply was either zero-rated when it should not have been, or not zero-rated when it should have been; or

(b) The previously agreed consideration for that supply of goods and services has been altered, whether due to the offer of a discount or otherwise; or

(c) The goods and services or part of those goods and services supplied have been returned to the supplier,—

and the supplier has—

(d) provided a tax invoice in relation to that supply and as a result of any 1 or more of the above events, the amount shown thereon as tax charged on that supply is incorrect; or

(e) furnished a return in relation to the taxable period for which output tax on that supply is attributable and, as a result of any 1 or more of the above events, has accounted for an incorrect amount of output tax on that supply.

Tax Administration Act 1994

8. Section 113A provides:

113A Correction of minor errors in subsequent returns

(1) This section applies for the purposes of this Act and the Goods and Services Tax Act 1985 when—

(a) a person has provided a return in which the assessment of their liability for income tax, fringe benefit tax, or goods and services tax contains 1 or more minor errors; and

(b) the error was caused by a clear mistake, simple oversight, or mistaken understanding on the person's part; and

(c) for a single return, the total discrepancy in the assessment that is caused by the error is $500 or less.

(2) The Commissioner may allow the person to correct the error in the next return that is due after the discovery of the error.

(3) For the purposes of subsection (1)(c), the liability the person has for income tax, fringe benefit tax, or goods and services tax is treated separately.