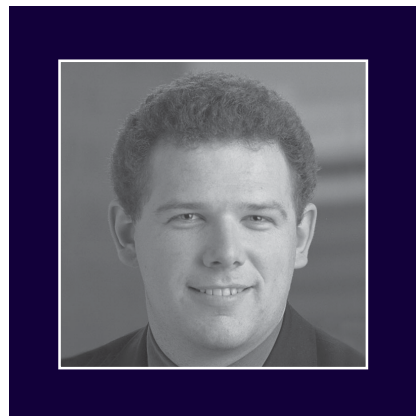




GST reporting – retaining the benefit of the statute bar provisions

“It can be difficult to justify tax positions taken several years ago, particularly where the corporate memory has faded...”



Graeme Olding – Senior Solicitor

An Inland Revenue audit can be a very stressful experience. It can be difficult to justify tax positions taken several years ago, particularly where the corporate memory has faded through staff movements and structural changes.

However, a recent case highlights the need for clients to examine their GST reporting processes to ensure that they do not give the Inland Revenue grounds to reassess them for further tax – after the statutory period for amendments has passed.

Time bars

The Tax Administration Act 1994 (the Act) recognises the importance of providing certainty to taxpayers and contains time bars that limit the period in which the Commissioner can amend the amount of tax payable by a taxpayer.

For both income tax and GST, **the limit is**

four years after the period in which the taxpayer files the relevant return. However, section 108A(3) of the Act provides that the GST time bar will not apply to prevent an assessment where:

“... the Commissioner is of the opinion that a taxpayer has knowingly or fraudulently failed to make a full and true disclosure to the Commissioner of all the material facts necessary to determine [the amount of GST payable]...”

A recent High Court decision provides a timely reminder of the importance of making full disclosure to the Commissioner when filing tax returns in order to be able to claim the benefit of section 108A.

How to apportion mixed supplies

In *Auckland Institute of Studies v C of IR* (2002) 20 NZTC 17,685, the Commissioner sought to reassess for GST dating back over six and a half years.

The taxpayer was a private educational institute providing tuition services to overseas students. The assessments related to the zero-rated status of “assistance services” provided by the taxpayer to new overseas students. The students were charged a global fee for “tuition, assistance with various pre-arrival matters, and related services.”

The case is significant as it is only the second time that the New Zealand courts have considered how to apportion mixed

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Willy Sussman - Partner

supplies (the other case being *C of IR v Smiths City Group Limited* (1992) 14 NZTC 9,141). The court relied heavily on apportionment principles established in British VAT cases to the effect that whether there is a single composite supply or multiple supplies must be considered from the point of view of the recipient, ie. does the purported service constitute an aim in itself, or is it simply a means of better enjoying the principal service supplied.

Applying this principle, the court held that there was a single supply of tuition services by the taxpayer, and the supply was not zero rated. It then considered whether it was appropriate for the Commissioner to assess the taxpayer outside the four-year time period.

In the Commissioner’s opinion

Although the taxpayer had treated the assistance services as zero-rated, it had omitted all reference to this income in its GST return. In the Commissioner’s opinion, the taxpayer knew it was not making full disclosure when it filed its return.

On considering the words in section 108A(3), the court noted that:

1. The critical issue is whether the Commissioner was honestly of the opinion that the taxpayer knowingly failed to make full and true disclosure of all material facts.
2. The onus of proving that the opinion was not honestly held is on the taxpayer.
3. In order to challenge successfully the decision of the Commissioner to assess or reassess outside the four-year period, the taxpayer must show:
 - (a) the Commissioner did not honestly hold the opinion;
 - (b) the Commissioner misdirected himself as to the legal basis on which the opinion was to be formed;
 - (c) the opinion was one that was not reasonably open to the Commissioner based on the information available to him.

The Commissioner formed his view based on the taxpayer's GST returns and the associated working papers. This evidence, together with the Commissioner's knowledge that zero-rating of these services had been an ongoing issue for the taxpayer, was enough for the Commissioner to properly form an opinion regarding non-disclosure.

Ultimately, the court found that the Commissioner had only reached the view that it was seriously arguable that the taxpayer had knowingly not made full disclosure and that this fell short of having an opinion, which connoted a higher standard of belief. Accordingly, the point was remitted back to the Commissioner for reconsideration.

Zero-rated supplies

The judgment proceeds from the basis that the omission of the zero-rated supplies from the relevant GST returns was a failure to make disclosure of material facts necessary to determine the amount of GST payable. This position is understandable given that the Commissioner was contending (and the court agreed) that the supplies in question were in fact standard rated.

The more interesting question is whether the Commissioner can rely on non-disclosure of correctly zero-rated supplies to avoid the operation of the time bar provisions. For example, if the Commissioner discovers that a second-hand goods input tax credit was

incorrectly allowed to a taxpayer some five years ago, can the Commissioner rely on the fact that the taxpayer may have omitted a (correctly) zero-rated export from its return to apply section 108A(3) and disallow the input tax credit?

Some passages of the judgment would tend to support that view. However, it must be remembered that *Auckland Institute* is a case involving zero-rated supplies that were in fact standard rated.

The wording of section 108A(3) requires that the omission must be of "material facts necessary to determine the amount of GST payable". Is information about zero-rated supplies necessary to determine the amount of GST payable?

In our view, the answer is no. Zero-rated supplies, by definition, do not result in a liability to pay GST. Information about such supplies is required on the prescribed GST return, but this in itself does not confer any special status on the inquiry.

Certainly, information about zero-rated supplies is valuable from a compliance point of view and enables the Commissioner to check whether the taxpayer is correctly characterising supplies. However, if the supply is truly zero-rated then it is irrelevant in determining the GST liability of the taxpayer – there is no GST payable on zero-rated supplies.

"The more interesting question is whether the Commissioner can rely on non-disclosure of correctly zero-rated supplies to avoid the operation of the time bar provisions."



Graeme Smaill - Partner



“The real danger in excluding zero-rated supplies from a return is that one or more of those supplies may in fact be standard rated.”

So, is it important to fully disclose all zero-rated supplies when filing a GST return? Definitely. The real danger in excluding zero-rated supplies from a return is that one or more of those supplies may in fact be standard rated.

By not disclosing the existence of the supply on the return, the Commissioner could form the opinion (as he purported to do in the *Auckland Institute* case) that the taxpayer has knowingly failed to make disclosure of a material fact (being the existence of the supply thought to be

zero-rated but actually standard rated). *Auckland Institute* suggests that such an omission could provide grounds for the Commissioner to assess the taxpayer for further tax despite more than four years having passed since the relevant return was filed.

We would recommend that clients who make zero-rated supplies take this opportunity to review their reporting processes to ensure that they are correctly disclosing these supplies in their GST returns.

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