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Exposure draft INS0109: Goods and Services Tax – GST and Retirement Villages

Introduction

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the above draft interpretation statement: Goods and Services Tax – GST and Retirement Villages.

2. The Law Society agrees with the analysis and conclusions reached by the Commissioner in the Exposure draft, except to the extent raised in paragraph 3 below.

3. The Law Society does not agree with the conclusions reached by the Commissioner at paragraphs 171 to 175, and paragraph 190 of the Exposure Draft, that regard could be had to a "long-term plan" that extends beyond an adjustment period (as defined pursuant to section 21G(2) of the Goods and Services Tax Act (GST Act)) for the purposes of determining any input tax deduction upon acquisition.

4. It is the view of the Law Society that as a consequence of section 21A, and for the reasons set out below, the decisive factor in determining any input tax deduction on acquisition (pursuant to sections 20(3C), 20(3G), 20(3H) and 21G(1)(b) of the GST Act) is the intended actual use of the goods or services in making taxable supplies during the relevant adjustment period.

5. All legislative references below are to the GST Act unless otherwise specified.

Comments

6. Registered persons are entitled to deduct input tax pursuant to section 20(3) and 20(3C) to the extent to which GST is incurred on goods or services acquired for making taxable supplies.

7. In determining the extent to which goods or services are used for making taxable supplies, registered persons must estimate, at the time they acquire the goods or services, how they intend to use the goods or services in making taxable supplies (section 20(3H) and 21G(1)(b)).

8. At paragraph 171 of the Exposure Draft, the Commissioner states:

> "A retirement village operator may have a **long-term plan** that extends beyond the first adjustment period. **The Commissioner considers that an operator's estimate of how they "intend to use" the goods or services can include such a plan (if it provides a fair and reasonable result).** The Commissioner also considers that the intended "use" can be to hold the relevant good or service available for making taxable supplies (where that provides a fair and reasonable result). **Where a retirement village operator has a well-developed business**

> **plan to develop a retirement village in stages, then the Commissioner considers that it will provide a fair and reasonable result to take into account the overall plan (when estimating intended use).** [. . .] **This remains the case where the execution of the full plan spans more than one adjustment period** [. . .]" (emphasis added)

9. However, section 21A prescribes that following the end of an adjustment period, a taxpayer is required to determine the percentage difference between the "percentage actual use" and the "percentage intended use". If there is a difference, then an adjustment will be required to be made for the relevant adjustment period. Generally, the adjustment period will be for a period of 12 months only[1].

10. At paragraph 190 of the Exposure Draft, the Commissioner states in reference to the application of "percentage actual use" in section 21A that:

> "[. . .] The Commissioner considers that where the input tax deduction was determined according to a long-term plan, an adjustment will only need to be made if the relevant good or service is used inconsistent with the plan or the plan changes. . ."

11. It is the view of the Law Society that the Commissioner's view is inconsistent with the definition of "percentage actual use" as defined pursuant to section 21G(1)(a). Specifically, the definition provides:

> "a) **percentage actual use**, for a registered person and an adjustment period,-
>
> (i) means the extent to which the goods or services are **actually used by the person for making taxable supplies**; and
>
> (ii) is calculated for the period that starts when the goods and services are acquired and finishes at the end of the relevant adjustment period; and
>
> (iii) is expressed as a percentage of total use:" (emphasis added)

12. While the Law Society agrees with the Commissioner's statement at paragraph 174 that the legislative purpose of the GST Act supports the view that the apportionment rules are aimed at accurately estimating the intended use on acquisition, the Law Society notes that this legislative purpose does not appear to be fully encapsulated in the statutory language of section 21A and 21G(1)(a), which refer only to the actual use of goods or services being used by the person for making taxable supplies, and not to availability for future intended use.

13. In order to demonstrate the application of section 21A and 21G(1)(a), we refer to the example outlined by the Commissioner at paragraph 171 of the exposure draft:

> "[…] For example, a retirement village operator may have a well-developed business plan to build a retirement village where 30% of the units meet the definition of "dwelling" and 70% of the units meet the definition of "commercial dwelling". Under the plan the operator first builds the units that meet the definition of "dwelling" and at a later stage builds the units that meet the definition of "commercial dwelling". **In this case the operator could apportion on the basis of a 30% exempt/70% taxable split on any goods or services acquired for both taxable and exempt purposes.** This remains the case where the execution of the full plan spans more than one adjustment period" (emphasis added)

[1] The first adjustment period starts on the date of acquisition of the goods or services, and ends at least 12 months after the acquisition date that corresponds to the taxpayers balance date pursuant to section 21B(2)

14. Using the example above, if we assume that at the time of acquisition a future intended taxable use of 70% was taken into account in claiming an input tax deduction, then at the end of the first adjustment period sections 21A and 21G(1)(a) will require an adjustment to reflect the actual use of the units as being 100% exempt, if only the units which satisfy the definition of "dwelling" have been erected during that time. The statutory language and the requirement to focus on the actual use of the goods or services therefore makes it impossible to sustain a 70% input tax deduction beyond the end of the initial adjustment period based on the future intended "long-term plan" in these circumstances.

15. For the reasons outlined above it is therefore the Law Society's view that in determining the intention of a taxpayer, the use of a long-term plan will only be relevant to the extent to which it will be achieved during a specific adjustment period. To ignore the application of the actual use of any goods or services in the relevant adjustment period and instead seek to apply the provisions based on future long term intended use is not consistent with the statutory language employed in section 21A.

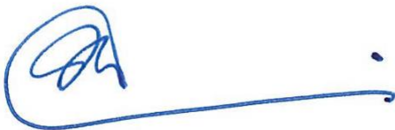
Recommendation

16. The Law Society recommends that the Commissioner amend her Exposure draft to reflect that fact that a long-term plan is only relevant in determining a taxpayer's intention for a specific adjustment period. Any input tax deduction claimed for the relevant adjustment period must reflect the actual use of goods and services acquired for making taxable supplies.

Conclusion

16. This submission was prepared with assistance from the Law Society's Tax Law Committee. If you wish to discuss this further please do not hesitate to contact the committee convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967, jo.holland@lawsociety.org.nz).

Yours faithfully



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