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Question We've Been Asked – Goods and Services Tax – Whether a Racing Syndicate or Partnership Can be a Registered Person – PUB00280

Introduction

1. The New Zealand Law Society appreciates the opportunity to comment on the *Question We've Been Asked – Goods and Services Tax – Whether a Racing Syndicate or Partnership Can be a Registered Person – PUB00280* (the QWBA).

2. The QWBA outlines the Commissioner's view on whether or not a horse racing syndicate or partnership, whose activities are limited to the ownership (or leasing) of one or more horses to race and the racing of those horses, can be registered for goods and services tax (GST).

3. The views of the Commissioner set out in the QWBA, while focusing on syndicates and partnerships, are also stated to be equally applicable to an individual, a trust, a company or any other entity.[1] The Law Society is therefore concerned that some of the analysis adopted by the Commissioner in the QWBA could have wider application in relation to other activities carried on by taxpayers who do not meet the criteria specified in paragraphs 5 and 27 of the QWBA, and restrict or prevent those activities from being taxable activities.

Comments

4. For the reasons set out below, the Law Society does not agree with the Commissioner's view that, in the absence of the taxpayer being able to establish the criteria set out at paragraph 5 of the QWBA (and reiterated at paragraph 27), the racing of horses as a standalone activity by a racing syndicate or partnership is a private recreational pursuit or hobby, and is therefore excluded from the definition of a taxable activity.[2]

5. Section 6(1) of the Goods and Services Tax Act 1985 (the GST Act) provides that registration is available (or required) only if a person carries on, or intends to carry on, a taxable activity.

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1 *Question We've Been Asked – Goods and Services Tax – Whether a Racing Syndicate or Partnership Can be a Registered Person – PUB00280*, paragraph 2

2 Ibid., at paragraphs 5 and 6.

6. A taxable activity is defined in section 6(1)(a) of the GST Act as:

> "*Any **activity** which is carried on continuously or regularly by any person, **whether or not for a pecuniary profit**, and involves or **is intended to involve**, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club."* [emphasis added.]

7. Section 6(3) of the GST Act excludes from the term "taxable activity" an activity that is carried on essentially as a private recreational pursuit or hobby.

8. The QWBA states:

> *"In the Commissioner's view the activity of horse racing (as a standalone activity) will be a taxable activity where the taxpayer can establish all of the following matters:*
>
> - *The activity of the syndicate or partnership is organised to achieve a pecuniary profit, and it operates in a systematic fashion that on an objective assessment appears to materially reduce the element that luck plays in whether prize money is won, and*
> - *A significant amount of time is involved in performing the activity undertaken by the manager of the syndicate or partnership …, and*
> - *The syndicate or partnership is formed not for the personal interest or pleasure of the participants, but for the purpose of making a profit from the activity, and it is operated in that manner."*[3]

9. Paragraph 6 of the QWBA states:

> *"The Commissioner's view is that, in the absence of these circumstances, the racing of horses as a standalone activity by a racing syndicate or partnership is a private recreational pursuit or hobby. Therefore, it is excluded from the definition of taxable activity and the syndicate or partnership cannot be registered for GST."*

10. The Law Society considers that the stipulation of a list of criteria that must be present in order for the syndicate or partnership to establish that it is carrying out a taxable activity goes beyond the wording of section 6(1) of the GST Act.

11. The absence of the above factors is more relevant to determining whether or not the activity carried on by the syndicate or partnership is essentially being conducted as a private recreational pursuit or hobby as opposed to a taxable activity. In other words, where the above identified elements are present the activity is less likely to have the essence of a private recreational pursuit or hobby, and more likely to have the essence of a business.

12. The Law Society considers that the test of whether or not an activity is being carried on as a taxable activity or excluded on the basis of section 6(3) of the GST Act should be the same for all taxpayers. The requirement for certain criteria to be present for a particular type of taxpayer carrying on a particular activity (i.e. syndicates/partnerships carrying on horse racing as a standalone activity) as a matter of policy, goes beyond the scope of section 6(1) of the GST Act.

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[3] At paragraphs 5 and 27 of the QWBA.

13. The position taken in the QWBA also appears to be at odds with the Commissioner's view set out in *Tax Information Bulletin Volume 6 No 14, June 1995* (the TIB) where the Commissioner identified a number of factors that are taken into consideration in determining whether or not an activity is a taxable activity or a hobby. These factors can be broadly categorised as follows:

- The reasons for conducting the activity;
- The time input into the activity; and
- The structure of the activity.

14. The Commissioner concluded in the TIB that the following were more likely to indicate a taxable activity:

- Where pleasure or enjoyment was a secondary (as opposed to predominant) reason for conducting the activity.
- Where the taxable activity is conducted with a degree of continuity as opposed to a hobby which is undertaken part-time.
- Where the following "business" characteristics were present:
    i. frequent supplies;
    ii. business-like nature of operation;
    iii. some form of structure/organisation;
    iv. a reasonable level of financial investment.

15. The above are listed as being indicative, not prerequisites, of a taxable activity. There is no reference to a requirement that any of the above must be present. The TIB notes that "*no one factor by itself is conclusive. The weight given to each factor depends on the facts of the particular situation*." The TIB makes clear that there is also no requirement to achieve pecuniary profit: "*The intention to make a profit is not a necessary ingredient of a taxable activity."*

16. The Commissioner's proposed position under the QWBA is at odds with the position taken in the TIB. The Commissioner seeks to impose a list of criteria that must be established by a syndicate/partnership whose activities are limited to horse racing before the syndicate/partnership is eligible to register for GST, rather than outline a number of factors that would be more likely to demonstrate that the syndicate/partnership is eligible to register for GST.

17. It was stated in the headnote of *Case N27* that:

> *"A 'taxable activity' under the Goods and Services Act was not the same as a 'business' under the Income Tax Act 1976 or as observed by Richardson J in Grieve v C of IR (1984) 6NZTC 61,682. Although in terms of the Income Tax Act a business does involve the intention to make a pecuniary profit, such a prerequisite is expressly excluded from the definition of a taxable activity in the Goods and Services Act and is not a necessary ingredient of the activity."* [4]

[4] *Case N27* TRA No 90/229 December No 13/91

18. Therefore, while a taxable activity includes a business, it is not a necessary prerequisite that a business be conducted in order for an activity to be a taxable activity.

19. Section 6(3)(aa) of the GST Act provides that: "*the term **taxable activity** shall not include in relation to any person not being a natural person, any activity which, if it were carried on by a natural person, would be carried on essentially as a private recreational pursuit or hobby.*" The QWBA refers to how the courts have in the past determined the distinction between a private recreational pursuit or hobby and the activity of a business by considering the object of the activity in the mind of the taxpayer. The courts have drawn a distinction between activities, the object of which is to profit as a means of earning a living, and those where the object is the pursuit of a pastime which is not organised towards the end of making a profit as a means of earning a living.

20. By taking the criteria that would generally be applied in determining whether or not a particular activity is being carried on as a business, the Commissioner has taken the view (for the reasons specified in paragraph 25 of the QWBA) that a racing syndicate or partnership (whose activity is limited to ownership (or leasing) and racing of horses) is carried on essentially as a private recreational pursuit or hobby and is not a taxable activity. This is because the essence of the activity (in the Commissioner's view) will most often be the personal interest or pleasure derived from seeing the horse compete in, and potentially win, races.

21. The Law Society acknowledges that where an activity is conducted as a business it is less likely to be carried on essentially as a private recreational pursuit or hobby. However, where a taxpayer is unable to establish that the activity is being conducted as a business (or that the factors in paragraphs 5 and 27 are present), it does not necessarily follow that the activity is a private recreational pursuit or hobby (and thus non-taxable).

22. With reference to the reasons identified for the Commissioner's view at paragraph 25 of the QWBA, the Law Society notes that many clubs and associations, particularly clubs or associations associated with sporting endeavours, do not operate or have the objective of operating as a business. The focus of these entities is often on encouraging and promoting various pursuits or activities which are enjoyed by the members of the club or association. Further, the purpose of the club or association is often to promote activities which are for many of its members a hobby. The lack of business objective does not however preclude the club or association from being eligible to register for GST. But if one applies the criteria set out in paragraph 25 of the QWBA to a sports club or association, the club or association would also most likely be precluded from being eligible to register for GST on the basis that it was not carrying on a taxable activity.

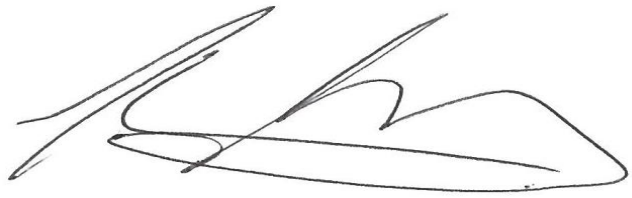
23. The Law Society considers that the criteria stipulated in paragraphs 5 and 27 of the QWBA go beyond the requirements of section 6(1) of the GST Act as they seek to impose a requirement to establish that the activity is being conducted for pecuniary profit. Further, the QWBA is inconsistent with the Commissioner's position taken in the TIB which distinguishes between a taxable activity and a private recreational pursuit or hobby.

24. The Law Society recommends that the QWBA be redrafted to outline the factors that the Commissioner considers are *most likely* to be indicative of a racing syndicate or partnership conducting a taxable activity rather than stipulating a list of criteria that must be present.

Conclusion

25. 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's convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967 / jo.holland@lawsociety.org.nz).

Yours faithfully



Kathryn Beck
President