Inland Revenue
Te Tari Taake

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKAWĀ

Accommodation provided to an employee

Decision date | Rā o te Whakatau: 7 August 2024

Issue date | Rā Tuku: 20 November 2024

TDS 24/21

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Subjects | Kaupapa

GST, PAYE, whether accommodation provided to an employee

Taxation laws | Ture tāke

Legislative references are to the Income Tax Act 2007 (ITA), Goods and Services Tax Act 1985 (GSTA) and Tax Administration Act 1994 (TAA).

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer was a company that supplied accommodation to an Employee as part of meeting its health and safety obligations. This was an obligation imposed by the contract of employment between the Taxpayer and Employee.
2. The Taxpayer leased the accommodation from Company B. The Employee and their partner were directors of Company B. The Employee's partner owned 100% of Company B. The Employee owned the majority of the Taxpayer.
3. A portion of the accommodation was available to the Employee solely for personal use with the remainder used by the Taxpayer for business purposes and accommodation of other staff from time to time.
4. Customer and Compliance Services of Inland Revenue (CCS) considered the accommodation was provided free of charge to the Employee and PAYE should have been paid on the value of the accommodation. In addition, CCS said the accommodation was a commercial dwelling and GST output tax should have been returned by the Taxpayer.
5. The Taxpayer argued it did not provide accommodation to the Employee. The Taxpayer said that Company B allowed the Employee to reside at the Property and the lease was for other business purposes.
6. CCS considered the value of the accommodation for income tax and GST purposes should have been determined based on the rent the Taxpayer paid Company B under the lease. The Taxpayer argued that if it was found it had provided accommodation to the Employee, the value of the accommodation for income tax and GST purposes should be based on the market rental value (which was a lower figure).
7. Various disputes documents were issued by the Taxpayer and CCS with the matter eventually being referred to the Tax Counsel Office (TCO) for adjudication.

Issues | Take

8. The main issues considered in this dispute were:
   - whether the Taxpayer had provided the Employee with accommodation
   - whether the accommodation provided was "in relation to" and "in connection with" the Employee's employment
   - the value of accommodation for income tax purposes
   - the value of the supply of accommodation for GST purposes
9. There was also a preliminary issue on the onus and standard of proof.

Decisions | Whakatau

10. TCO concluded that:
    - The Taxpayer had provided accommodation to the Employee.
    - The accommodation provided was "in relation to" and "in connection with" the Employee's employment.
    - The value of the accommodation for income tax purposes was the market rental value, reduced to take account of the part used for work purposes.
    - The value of the accommodation for GST purposes was the market rental value, reduced to take account of the part used for work purposes.

Reasons for decisions | Pūnga o ngā whakatau

Preliminary issue | Take tōmua: Onus and standard of proof

11. Except for proceedings relating to evasion or similar act or obstruction, the onus of proof is on the taxpayer to show that an assessment is wrong, why it is wrong, and by how much it is wrong.[1] However, if the taxpayer proves, on the balance of probabilities, that the amount of an assessment is excessive by a specific amount, the taxpayer's assessment must be reduced by the specific amount.[2]

[1] Section 149A(2) of the TAA. See also *Case V17* (2002) 20 NZTC 10,192, *Accent Management Ltd v CIR* (2005) 22 NZTC 19,027 (HC), and *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

[2] Section 138P(1B) of the TAA.

12. The standard of proof required is the balance of probabilities.[3]

13. It is appropriate that the same onus and standard of proof be applied in the disputes process as in challenge proceedings. TCO considered whether the Taxpayer has discharged the onus of proof in the context of the issues raised by the parties in the dispute, based on the documentary evidence put before it.

Issue 1 | Take tuatahi: Whether the Taxpayer supplied accommodation to the employee

14. CCS stated it was the lease agreement between the Taxpayer and Company B that had allowed the Employee to reside at the accommodation. The Taxpayer said that the lease was subject to an existing right of the Employee, granted by Company B, to occupy the accommodation.

15. TCO considered this was a matter of contractual interpretation:

- The aim is to ascertain the meaning which the document would convey to a reasonable person having regard to the background knowledge available to the parties at the time of the contract.[4]
- The contractual language must be interpreted within its overall context, broadly viewed.[5] While context is a necessary element of the interpretive process, the text remains centrally important. The ordinary and natural meaning of the language used will be a powerful indicator of what the parties meant.
- Evidence of prior negotiations and subsequent conduct objectively proving what the parties intended the words to mean may be relevant.[6]
- Caution must be taken when reading words as having an effect different from their literal meaning or being of no effect.
- Depending on the nature, formality, and quality of the drafting of the contract, more or less weight can be given to wider context in interpreting the objective meaning of the language used.[7]

[3] *Yew v CIR* (1984) 6 NZTC 61,710 (CA), *Case Y3* (2007) 23 NZTC 13,028, and *Case X16* (2005) 22 NZTC 12,216.

[4] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

[5] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand & Anor* [2014] NZSC 147

[6] *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696

[7] *Starrenburg & Anor v Mortre Holdings Ltd* (2004) 21 NZTC 18,696 (CA)

- More weight can be given to the implications of rival constructions by reaching a view as to which is more consistent with business common sense. The possibility that one party had agreed to something that with hindsight did not serve their interest must also be considered.[8]

Application

16. The terms of the lease showed that the Taxpayer leased the entire accommodation and were consistent with the Taxpayer having provided the Employee with accommodation there during the period of the lease. Additionally, invoices that were issued by Company B to the Taxpayer included a description for the accommodation which were consistent with the Taxpayer having leased the entire house.

17. TCO noted that Company B may have previously allowed the Employee to use the accommodation. However, during the period of the lease, the accommodation was leased to the Taxpayer and was not available for Company B or the Employee to otherwise use.

Issue 2 | Take tuarua: Whether the accommodation was provided "in relation to" and "in connection with" employment

18. In s CE 1 of the ITA the value of accommodation provided to a person in relation to their employment is income of the person.

19. CCS argued that the accommodation had been provided "in relation to" and "in connection with" the Employee's employment. The Taxpayer argued that the accommodation was provided in relation to its health and safety obligations and not in relation to the employment status of the Employee and that the employment agreement did not provide for accommodation.

20. TCO noted that Commissioner's view was that "in relation to" and "in connection with" have similar meanings and the words can have a very wide meaning. In an employment context, the Commissioner considered a benefit is provided "in connection with" employment where the employment is a substantial reason for the provision of the benefit.[9]

[8] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1,173,

[9] Binding Ruling BR Pub 09/02: Federal Insurance Contributions (FICA) – Fringe Benefit Tax (FBT) Liability, *Tax Information Bulletin* Vol 21, No 4 (June 2009): 2.

21. TCO said that in providing the accommodation, the Taxpayer had been meeting its obligations ensuring the health and safety of its employees and providing a work environment without risk. This was something the Taxpayer was required to do under the Employee's employment contract.

22. TCO found that the Employee's employment was a substantial reason for providing accommodation during the period of the lease. This had been provided "in relation to" or "in connection with" their employment, so the value of accommodation was income of the employee.

Issue 3 | Take tuatoru: Value of the accommodation for income tax

23. As TCO found that the Taxpayer provided the Employee with accommodation, TCO had to determine the value of the accommodation.

24. CCS said that the value should be determined in reference to s CE 1B(3) of the ITA, being the amount of rent paid by the Taxpayer. The Taxpayer said this should be determined under s CE 1B(1) of the ITA, being the market rental value of that accommodation.

25. To support its argument the Taxpayer referred to the Commissioner's Statement **CS 16/02 Determining "Market Rental Value' of Employer-Provided Accommodation**. The Commissioner considers that:

    - The "market rental value" is the rental that would be paid if similar accommodation in a comparable location, subject to similar conditions, was rented on an arm's length basis between non-associated parties.
    - The amount actually paid to a third party as consideration under an arm's length rental arrangement is the "market rental value" of the accommodation.
    - It is open to the employer to adopt a reasonable valuation basis including a valuation from a registered valuer.
    - Apportionment may be appropriate where part of the accommodation is used "wholly or mainly" for work purposes related to the employee's employment.

26. TCO noted that s CE 1B(3) applied where an employer paid an employee's accommodation expenditure. Section CE 1B(3) did not apply where an employer provided accommodation directly to an employee.

27. TCO found that the Taxpayer had provided the accommodation directly to the Employee and s CE 1B(1) applied and that the value of the accommodation was determined based on the market rental value of the accommodation.

28. The Taxpayer had obtained a registered valuation to determine the market rental value of the accommodation, which was lower than the amount in the lease between the Taxpayer and Company B. This valuation used CS 16/02 as the basis for determining the market rental value. This included making adjustments, such as: disturbance caused by work around the accommodation, time movement and availability of rooms.

29. The Taxpayer said part of the accommodation was used for work purposes and proposed an adjustment be made for this. TCO accepted that, based on the evidence, an adjustment should be made.

30. TCO found that the value of the accommodation was the market rental value of the accommodation, calculated by the registered valuer and reduced to take account of the part of the accommodation used for work purposes.

Issue 4 | Take tuawhā: Value of the accommodation for GST

31. Like the valuation issue above, TCO had to determine the value of the supply of accommodation for GST purposes.

32. CCS argued that the value was based on the rent the Taxpayer paid to Company B (s 10(2)(a) of the GSTA). The Taxpayer argued that the value was based on the open market value of the supply (s 10(3) of the GSTA) as an associated supply.

33. Neither party disputed that the Employee was associated with the Taxpayer meaning that the definition of "associated supply" applied (s 2(1) of the GSTA), being "a supply for which the supplier and recipient are associated persons."

34. TCO determined that the relevant supply for GST purposes was the accommodation the Taxpayer provided to the Employee. Under s 10(2)(a) of the GSTA, to the extent the consideration for the supply is in money, the value of the supply is the amount of the money. As the Taxpayer supplied the accommodation to the Employee for no consideration (in money or otherwise) this provision did not apply.

35. TCO agreed with the Taxpayer that the value of the supply was determined under s 10(3) as the open market value of the accommodation calculated by the registered valuer. This was reduced to take account of the part of the accommodation used for work purposes.