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Travelex and American Express: A Tale of Two Countries – The Australian and New Zealand Treatment of Identical Transactions Compared for GST.

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Abstract
This article deals with the vexing question of the characterisation of supplies. In doing so it looks at two recent Australian cases on this issue – Travelex Ltd v Commissioner of Taxation and Commissioner of Taxation v American Express Wholesale Currency Services Pty Limited. After reviewing the decisions and considering their implications from an Australian perspective, the paper describes how New Zealand would deal with identical fact scenarios.

1. INTRODUCTION

This article deals with the vexing question of the characterisation of supplies. In doing so it looks at two recent Australian cases on this issue and then compares the

charged to the holders of both credit and charge cards for late payment of their monthly account. This case turned on the interpretation of the financial supply rules in terms of the GST Act read with the GST regulations.

Section 1 of this paper reviews those decisions. Section 2 considers each of the above cases and their implications from an Australian perspective. Section 3 describes how NZ would deal with the identical fact scenarios. Section 4 sets out the authors' conclusions.

The article now considers each of the *Travelex* and *American Express* cases.

2 THE CASES

2.1 Travelex

This is a matter that came before the High Court. The facts of the case were simple. An employee of Travelex acquired foreign currency from it on the departures side of the customs barrier at Sydney International Airport for use overseas. It was common cause that the supply of foreign currency was a financial supply and accordingly input taxed.

The issue for determination by the High Court was whether the supply was also a supply of rights for use outside Australia and as such GST free under section 38-190 (1) item 4 of the GST Act.[4] If the answer was in the affirmative then Travelex would be entitled to claim input tax credits on acquisitions made with a view to making these GST free supplies. The question was whether the supply of the foreign currency was a supply of rights.

2.1.1 The Majority View

On the issue whether the supply of foreign

> Because the supply is a supply of property in the currency, the supply is a supply 'in relation to' the rights that attach to the currency, without which property in the currency would be worthless.

Catterall[5] noted in his commentary on the case that:

> In drawing the conclusion that a supply of money involved a supply of rights, they rejected the Commissioner's contention that those rights were only incidental to possession of the currency. With an implicit reference to the oft-quoted notion of GST as a "practical business tax" they noted that their findings did not amount to any "juristic disaggregation and classification of rights" that fails to reflect "the practical reality of what is in fact supplied" (in the words of Edmonds J in the Federal Court). Further, because s 38-190 requires only that there be a supply in relation to rights, they rejected the submission that those rights had to be of a particular nature or have a particular content.

2.1.2 The Minority View

Crennan and Bell JJ delivering a minority judgment took a different approach. They were of the view that in interpreting the GST Act and its regulations the task was to determine a clear legislative intention to either impose or exempt a supply from taxation. In determining if the supply of money was a supply of a right/s as envisaged by the GST Act they looked for guidance to section 9-10 (2) (e) of the GST Act which provides that a supply includes a creation, grant, transfer, assignment or surrender of any right. The basis of their reasoning was that to understand (at paragraph 95):

> the use of each of the terms "goods", "real property", "rights" and "services", in the table in s 38-190(1), requires consideration of the use of those same terms as set out in s 9-10(2), and consideration of any relevant statutory definitions in s 195-1. Both sections are contextually important for construing s 38-190. If the terms "goods", "real property", "rights" and "services" were to have different meanings in the legislation, depending on whether they were being used in the context of imposing tax, or in the context of indicating GST-free status, that fact would need to emerge clearly from the legislation. The overall structure of the legislation, in the absence of indications to the contrary, favours construing consistently terms which are repeated in the legislation.

As such the right must be transmissible by the supplier. They concluded that the holder or owner of bank notes has certain rights that are the incidents of ownership of the corporeal item – the bank notes or coins. A supplier of such corporeal items will not necessarily know what incidents of ownership an acquirer will exercise. Rights that are the incidents of ownership of a thing are not themselv0011 Tbf085 T3ea[(not w]TJ16la
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2.1.3 Decision impact statement

The Commissioner has issued a decision impact statement[6] on this judgment. The Commissioner states the effect of the High Court judgment is that the expression 'a supply that is made in relation to rights' covers the supply of a thing (other than goods or real property) such as foreign currency where the thing supplied only has value because of rights that attach to it and those rights are transferred.

The Commissioner also accepted, correctly it is submitted, that if a supply of foreign currency conversion takes places in Australia it is GST-free, whether or not it takes place in the departure lounge or elsewhere if the foreign currency is for use outside Australia. Whether the foreign currency is for use outside Australia in any particular transaction would be a question of fact.[7]

2.1.4 Intention of the purchaser relevant for GST supplies?

The majority of the High Court considered that the intended use of a supply by the purchaser was relevant to its correct GST treatment. The majority judgments simply took it for granted that the intended use of the currency by the customer while travelling overseas demonstrated that the supply was for export. Haydon J concluded (at paragraph 56) that:

> The rights evidenced by the currency were for use outside Australia: Mr Urquhart acquired the currency with the intention of spending it in Fiji, and that intention was confirmed by the fact that he did spend it there.

Likewise, French CJ and Hayne J noted (at paragraph 35):

> provisions, or for reading the connecting expression "in relation to" in a way that departs from the construction which has been identified. Difficulties in deciding whether the supply is "for use outside Australia" do not bear upon what is meant by a supply "in relation to" rights.

This approach is significant because the c

> the GST regulations.This reasoning recognised the central feature of the rights supplied to cardholders, being immediate access to goods or services charged on the card in return for their promise to repay Amex at the end of each month. They concluded that the first question be answered in the affirmative.

Dowsett J, delivering a dissenting judgement, was of the view that it was necessary to distinguish between legal or equitable property on the one hand and personal contractual rights on the other when considering the definition of an interest in GST regulation 40.5.02. He stated (at paragraph 31) that the relationship between Amex and a cardholder no doubt involves substantial contractual rights, but contractual rights are not necessarily property. He concluded that the cardholder was a bailee. As such he found (at paragraph 39) that:

> These rights and obligations seem generally to be personal rather than proprietary. Certainly, nothing supplied to the cardholder is capable of being assigned, and the relevant arrangements are determinable at will. The American Express facilities are no doubt quite complex. To the extent that they are capable of being "owned", the owner is, presumably, American Express . A cardholder acquires no interest in them, but rather a contractual right to utilize their services.

He concluded there was no supply by Amex of an interest as envisaged by GST regulation 40.5.02.

2.2.2 Was the interest supplied by Amex an interest in a credit arrangement or right to credit?

It was common cause between the parties that the supply of credit cards involves a right to credit, as a cardholder may elect to pay less than the entire balance on the card assi64 Tw[(9(.0

the system.’ The majority held (at paragr

> questions about the proper construction and application of regulation 40-5.12 made under the Act.[21]

The result of this decision is that important issues around the interpretation of the Financial Supplies provisions in the GST legislation still need to be clarified by the High Court. Pending that decision the view of the majority before the full bench of the Federal Court stands.

As will be seen below New Zealand does not have the same problems with its legislation.

Interestingly in *Waverley Council v Commissioner of Taxation* [22] the issue was whether an administration fee charged by the taxpayer for credit card payments should be subject to GST. The Tribunal held it should not be taxable as the fee was simply part of the payment the customer makes for accessing the credit facility and therefore should be treated GST-free on the same grounds as the other part of the payment. Accordingly, the administration fee was not subject to GST.[23] This finding is not in conflict with the majority view in *American Express.*

The article now turns to a consideration of how the NZ GST regime would deal with similar transactions.

3. NEW ZEALAND TREATMENT OF FINANCIAL SUPPLIES THAT INCORPORATE FINANCIAL SERVICES

Although obviously decided under the particular (and sometimes peculiar) statutory provisions of the Australian GST legislation, the fundamental questions in both the *Travelex* and *American Express* cases are pertinent to the operation of the New Zealand *Goods and Services Tax Act* 1985. However, as discussed below, the decisions reached by New Zealand courts in identical cases would not necessarily be the same.

3.1 Travelex

As under the Australian regime, the New Zealand *Goods and Services Tax Act* 1985 ("NZ GST Act") also stipulates that where a supply is both an exempt financial service and a zero-rated supply, then the zero-rating provisions should prevail.[24] Accordingly, the general issue in the *Travelex* case (whether an indisputably financial service[25] should nevertheless be zero-rated) could potentially arise.

Like Australia, the supply of certain rights for use outside of NZ can also be zero-rated. However, unlike the equivalent Australian provision, the nature of those 'rights' is much more narrowly defined under

and trade secrets. [26] Other types of rights, including rights in respect of other types of real and personal property, cannot be zero-rated under the New Zealand regime.

While the definition of 'money' in the NZ GST Act also includes foreign currency, the kind of 'rights' in respect of that currency that required such detailed examination in *Travelex* simply would not arise under the New Zealand regime. Instead, the NZ GST Act makes it clear that GST will not apply (whether as standard-rated, zero-rated or as an exempt financial service) on the supply of currency itself. Only the *service* of supplying that currency (in practice, the commission charged to customers on that supply) are caught under the NZ GST Act and is treated as an exempt supply under s 3(1) NZ GST Act. Furthermore, if that service is physically performed in New Zealand to a person who is also physically present in the country, it would not qualify for zero-rating.[27] It is only if the supply took place outside New Zealand (i.e., from an exchange booth operated by a New Zealand taxpayer in another jurisdiction), would it qualify for zero-rating.[28]

Interestingly, the Australian High Court appears to have ignored the distinction

"an interest" under the credit card agreement simply does not arise in New Zealand. In that respect the decision is a product of the uniquely complex statutory regime applying to financial supplies under the Australian GST regime.

Nevertheless, *American Express* is interesting from a New Zealand-perspective for its consideration of the extent to which the nomenclature given by the parties in their contracts to various supplies governs its GST treatment. In particular, Amex was careful to specify in its contract with customers that the Late Payment Fees were not

case Marac took advantage of tax concessions granted to life insurance policies by issuing investments called 'life bonds'. The bonds were issued for a lump sum amount and carried 'bonuses' equating with market interest rates that mirrored debt investments. However, the bonds incorporated a small element of life insurance, which effectively required Marac to repay the original lump sum plus all bonuses for the whole period of the investment immediately upon the death of the investor. This 'mortality risk' element represented only 0.5% of the amount subscribed by each holder.

In economic terms the investment constituted a fixed term loan that was repayable with interest upon maturity – but the specific contractual terms conformed in all respects to definition of a life insurance po

is generally impermissible in a tax context. Most importantly, citing the *Marac* case, the court refused to over-ride the actual agreement entered into between the parties.

Likewise, in *Wilson & Horton Ltd v CIR*[48] the Court of Appeal rejected as impractical any interpretation of the Act that required a supplier's GST treatment to depend upon having to determine the direct or indirect purpose of each customer. There a newspaper publisher had treated as zero-rated all advertising placed by non-residents, even if that advertisement may also have provided an ancillary benefit to New Zealand residents. IRD contested that zero-rated treatment on the grounds the publisher should have determined whether and to what extent each advertisement would benefit