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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.

Kalmen Datt and Mark Keating*

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 results with what would have been the situation in New Zealand (NZ).

The first is *Travelex Ltd v Commissioner of Taxation*¹(Travelex). This case considered the GST characterisation of a supply of foreign currency on the departures side of the Customs barrier at Sydney International Airport for use overseas. The issue here was whether the supply of such currency was both a financial supply (input taxed)² and GST free. If this question was answered in the affirmative the taxpayer would be entitled to input tax credits in relation to the acquisitions made to make these GST free supplies. This case was dependant on the meaning to be ascribed to the term 'rights' when used in section 38-190(1) item 4 of the *A New Tax System (Goods and Services tax) Act 1999* (the GST Act).

The second is *Commissioner of Taxation v American Express Wholesale Currency Services Pty Limited*³. This case considered how to characterise late payment fees

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¹ *Travelex Ltd v Commissioner of Taxation* [2010] HCA 33.

² The NZ equivalent of input taxed supplies are exempt supplies whilst the NZ equivalent of GST free supplies are zero rated supplies. These terms are used interchangeably depending on the GST regime of the country being considered.

³ *Commissioner of Taxation v American Express Wholesale Currency Services Pty Limited* [2010] FCAFC 122

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 currency on the facts of the case GST free, French CJ and Hayne J held that the supply of the foreign currency was a supply of a right to use in the foreign country. They concluded that currency is no more than a 'token' and that such 'currency has value only because of the rights that attach to it.' As Travelex had transferred all the rights that attached to the currency, this constituted a supply of rights within the scope of section 38-190(1).

Heydon J concurring (at paragraph 47) said:

The legal substance of the transaction was the supply of rights. The rights supplied were the rights enjoyed by the holder of the currency as created by the statute law of Fiji. The handing over of the pieces of paper constituted, evidenced, and was not capable of disaggregation from, the supply of rights. Apart from those rights, the pieces of paper had little value.

From the majority judgments in *Travelex* it would appear that for the purposes of section 38-190(1) item 4 the nature of the right obtained is immaterial. French CJ and Hayne J noted (at paragraph 27) that:

⁴ This section provides that the supply of a right is GST free if the rights are for use outside Australia; or the supply is to an entity that is not an Australian resident and is outside Australia when the thing supplied is done.

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.

Catterall⁵ 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 themselves separate things, within the meaning of the GST Act, which can be transmitted independently of the supply of the thing owned. The minority therefore concluded that the supply was not one in relation to a right.

⁵ Catterall M, Travelex — is it right to call money a right?, 07 October 2010 Australian Tax Week 7 October 2010

2.1.3 Decision impact statement

The Commissioner has issued a decision impact statement⁶ 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 place 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):⁸

Where it is evident that the currency is to be used overseas, the rights that attach to the currency are for use outside Australia.

These statements indicate that the purpose of the purchaser may be relevant to determining the GST treatment of a supply. It may therefore apply to other instances where the intentions of the purchaser should be taken into account under the relevant provisions. Crennan and Bell JJ in their dissenting judgment agreed with the majority on this aspect of the case.

Potentially, this signifies that the particular subjective intention of the purchaser in some instances could be determinative of the correct GST treatment of a supply. It further raises the question of how suppliers are to ascertain their customers' purposes to enable them to account correctly for the GST on particular supplies. However, French CH and Hayne J dismissed these practical problems (at paragraph 36):

It may be accepted that, as the Solicitor-General submitted, there may be practical difficulties in administering the relevant provisions of the Act where the use to be made of the rights turns on the recipient's intention. Those difficulties, however, do not provide any basis for reading down those

⁶ Released 23 December 2010:

<http://law.ato.gov.au/atolaw/view.htm?docid=%22LIT%2FICD%2FS79of2010%2F00001%22>.

⁷ Decision impact statement Travelex Ltd v Commissioner of Taxation:

<http://law.ato.gov.au/atolaw/view.htm?Docid=LIT/ICD/S79of2010/00001> accessed 27 January 2011.

⁸ At [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 courts have previously expressed divergent views as to the relevance of the intention of the purchaser in categorising a supply. For instance, the purpose of the buyer has often been considered when determining how to interpret the meaning of the phrase 'residential premises to be used predominantly for residential accommodation' in section 40-65 GST Act.⁹

The article now turns to the *American Express* case.

2.2 American Express

American Express (Amex)¹⁰ carries on the business inter alia as an issuer of charge and credit cards to customers to enable them to acquire goods and services without having to make simultaneous payment at the time of acquisition. Payment for these acquisitions has to be made by customers to Amex within a fixed time. The charge card conditions provide for payment of an identified amount as 'liquidated damages' if payments to Amex were not made on time. The credit card conditions provide for a 'late payment fee.' Amex in part made taxable supplies and as such, it was entitled to input tax credits on acquisitions to make these supplies. At issue in the appeal was whether these 'damages' and 'fees' (hereafter jointly referred to as Late Payment Fees) should be taken into account in determining the proportion of Amex's input taxed supplies in relation to its total supplies.

Amex used a methodology determined by the Commissioner in GSTR 2000/22 to calculate its entitlement.¹¹ This method for calculating the input tax credit entitlement was based on dividing revenue derived from input taxed supplies by total revenue. In submitting their Business Activity Statements Amex did not include these fees as revenue from its input taxed supplies. The issue was whether Amex was entitled to omit the fees from the calculation.

In the court of first instance, the Commissioner contended the supply of a charge or credit card was an input taxed supply, and that the Late Payment Fees were consideration for that supply. The case was conducted by both parties on this basis. The supply of both types of card and associated entitlements was said to comprise the supply of an interest under a debt, credit arrangement or right to credit, being one definition of the term financial supply in the GST Regulations. The Commissioner asserted that the Late Payments Fees were consideration for financial supplies which

⁹ There have been a number of decisions in the Federal Court that have reached conflicting decisions on this aspect. Compare for example *Toyama Pty Ltd v Landmark Building Developments Pty Ltd* [2006] NSWSC 83 and *Sunchen Pty Ltd v Commissioner of Taxation* [2010] FCA 21 and *Marana Holdings Pty Ltd v Federal Commissioner of Taxes* [2004] FCAFC 307. The problem raised by these various cases may have been put to rest by the full bench decision in *Sunchen Pty Ltd v Commissioner of Taxation* [2010] FCAFC 138.

¹⁰ Although these disparate activities were carried on by separate companies nothing turned on this.

¹¹ GSTR 2000/22 has since been replaced by Goods and Services Tax Ruling GSTR 2006/3. Although the formula used by the taxpayer was contained in a ruling, and accepted by both parties as being correct, the Commissioner did not make a determination as to the methodology to be used in such cases as prescribed by section 11-30 (5) of the GST Act.

were input taxed. Amex contended they were damages for breach of contract, and not consideration. The primary Judge found for the taxpayer.

On appeal to the full bench of the Federal Court the Commissioner was granted leave by Kenny and Middleton JJ to extend the grounds of appeal to contend that the proper question was not whether the Late Payment Fees were consideration for the making of financial supplies, but simply whether they constituted revenue derived from the making of financial supplies. The central question, now, according to the Commissioner was whether, in applying the formula, the fees are 'revenue derived from input taxed supplies' and therefore be included in both the numerator and denominator of the formula.

The majority noted that the central question in the case concerned the relationship between the Late Payment Fees and the making of Amex's supplies, and the proper classification of those supplies under the GST Act. They noted that three questions had to be answered to enable a decision to be reached. These were the following.

- Is the right to present the credit or charge card as payment (without having immediately to part with money) an 'interest' as defined in the GST Regulations? Is that right something 'recognised at law or in equity as property in any form'? (Regulation 40.5.02)
- If so, is the interest of a kind mentioned in regulation 40-5.09(3) namely an interest in or under a 'credit arrangement or right to credit'?
- If the answer to the forgoing were in the affirmative was the interest an interest in or under a payment system? This question was important as GST regulation 40.5.12 excluded from the concept of financial supplies interests in or under a payment system. If a supply is mentioned both in GST regulation 40.5.09 as being a financial supply and GST regulation 40.5.12 as not being such a supply the later takes precedence in terms of GST regulation 40.5.08 (2).

Each question is considered separately below.

2.2.1 Is the right to present the credit or charge card as payment (without having immediately to part with money) an 'interest'?

The majority noted that GST Regulation 40.5.02 to the GST Act provides that an interest is anything recognised at law or in equity as property in any form. The majority, relying on the various judgments handed down in *Yanner v Eaton*¹² gave a broad meaning to the word 'interest.' In doing so they held that the word 'property' in the definition can be applied to different kinds of relationships between a person and a subject matter, and can be understood as referring to the degree of power that is recognised in law as power permissibly exercised over the thing. As such they concluded (at paragraph 148) that:

Cardholders agreeing to the terms gain a bundle of rights in relation to the card, the most important of which is the right to present the card as payment and incur a corresponding obligation to pay Amex at a later date. This is sufficient to constitute an interest under the broad definition of 'interest' in

¹² *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351.

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 and accrue interest as a result. There was a dispute, however, on the issue of a charge card. On this latter issue the majority held that (at paragraph 154):

As Stone J observing in considering the *Bankruptcy Act 1966* (Cth), in which 'credit' is undefined, '[b]roadly speaking, the term ['credit'] means the provision of funds either directly to the person obtaining the credit or to a third party provider of goods and services to that person subject to the obligation of the person obtaining credit to pay at a later time': see *Fitzgibbon v Inspector General in Bankruptcy* (2000) 180 ALR 475 at 479 [15]. This is the interest supplied by Amex Intl to charge card customers. Whilst, as the respondents say, one must focus on the 'contractual arrangement', the focus is on the entire contractual arrangement considered contextually and as a whole.

As a result they found the supply of the right to use a charge card was a supply of an interest in or under a credit arrangement or right to credit within the meaning of regulation 40.5.09 of the GST Regulations. Dowsett J agreed with the majority on the meaning of 'credit.' However even though these supplies are financial supplies they would be excluded from that definition by regulation 40.5.12 if they were supplies in or under a payment system. It is this final question to which this article now turns.

2.2.3 Are these supplies in or under a payment system?

The dictionary to the GST regulations defines 'payment system' as 'a funds transfer system that facilitates the circulation of money, including any procedures that relate to

the system.’ The majority held (at paragraph 174) that a cardholder obtains the ability to initiate Amex’s provision of payment to a third party (the merchant) in exchange for an obligation to pay Amex at a later date but the GST scheme does not evidence an intention that such an interest count as an interest in a payment system. They explained why (at paragraphs 180 et seq) in the following terms:

A merchant who agrees with Amex Intl to accept its cards as payment from customers has a right to receive payment from Amex Intl in accordance with the procedures governing the system. It was not suggested that a cardholder has any legal right to enforce the procedures which ultimately result in payment to the merchant, and a cardholder would have no apparent interest in doing so. Once the cardholder has presented the card and the card has been accepted by the merchant, what happens next is not the cardholder’s concern. Even assuming Amex Intl operates a payment system, it does not seem to us that it supplies cardholders with an interest, enforceable at law or equity, in or under that system.

As support for the above conclusion the majority referred to GST Regulation 40.5.09(3), that provides that the supply of an interest in or under a credit arrangement or right to credit is a type of financial supply. The court reasoned if GST Regulation 40.5.12 were to apply to supplies to charge card and credit cardholders, there would be no room for the operation of this provision. They noted that is a well-established rule of statutory interpretation that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.

The court accepted that GST regulation 40.5.08¹³ was intended as a "tie-breaker" provision. However, the fact that the regulations include a "tie-breaker" provision to address potential inconsistencies does not mean that the Court should avoid resolving inconsistencies where possible or treat apparent inconsistencies as intentional. Rather, the sensible interpretation, and the one compelled by principles of statutory construction, is that both regulation 40.5-09 and 40.5-12 are to operate fully, and the "tie-breaker" provision is only intended to address unforeseen and irresolvable inconsistencies that might subsequently arise. The potential inconsistency here is avoided by an available construction under which the interests supplied by Amex to cardholders fall within Regulation 40.5-09 but not Regulation 40.5-12.

Another basis for their conclusion was that if the supplies in question were not input taxed supplies, they would have to be treated as taxable supplies. If they were, then the respondents, and other credit card companies, would be required to charge and pay GST on membership fees and similar payments received from cardholders. Such an outcome would drastically transform the operation and administration of these kinds of credit facilities and be inconsistent with the intent behind the GST regime to

¹³ This provides:

- (1) For subsection 40-5 (2) of the Act, a supply is a financial supply if the supply is mentioned as:
 - (a) a financial supply in regulation 40-5.09; or
 - (b) an incidental financial supply in regulation 40-5.10.
- (2) However, if a supply is mentioned in regulations 40-5.09 and 40-5.12, the supply is not a financial supply.

exclude tax on what are clearly financial services. The final question was answered negatively.

By virtue of the answers reached to the three questions posed the majority found in favour of the Commissioner.

2.2.4 Leave to appeal to the High Court

The taxpayer sought leave to appeal to the High Court. This application was referred to a five-judge panel to determine and was finalised on 4 May 2011. The grounds on which the application was founded are described below.

First was the meaning given to “property” by the majority in the Federal Court. Amex¹⁴ submitted that the learned judges delivering the majority judgment in the Federal Court had misconstrued the provisions of the GST ACT by ignoring the distinction between property and personal rights. Counsel for the applicant noted that in sections 9-5 and 9-10, which deal with taxable supplies and the meaning of supply, the word “interest” or “property” is not mentioned. The concept of financial supplies on the other hand is specifically limited to property. The consequence of this is that to have a taxable supply one does not need to supply property but for a financial supply one does. The rights given by Amex were contractual in nature and did not possess the attributes of property. The respondent Commissioner in its written submissions said:

The concept invoked is one of identifying that which is protected by law or equity; personal rights, including those which are personal to the holder and (before termination) those which are terminable at will, may be "property" for this purpose.¹⁵

The next ground was directed towards the question whether the Late Payment Fees were part of a payment system as described in Regulation 40.5.12 and, as such, not a financial supply. De Wijn QC on behalf of Amex submitted that the majority proceeded on the assumption that the payment system that was being supplied had to be property. This, in his submission, was incorrect because it only has to be property to be a financial supply, not to be a taxable supply and regulation 40.5.12 refers to taxable supplies. If the supply fell under regulation 40.5.12 then the supply is not a financial supply and there is no need to consider whether the regulation 40.5.09 applies.

In addition the submission was made that to describe a payment system as being one that excluded the payer is incorrect and difficult to accept.¹⁶ Counsel for Amex said that:¹⁷

¹⁴ Transcript of application for leave to appeal in the Amex case:
<http://www.austlii.edu.au/au/other/HCATrans/2011/26.html> accessed 25 February 2011. See also the applicants written submissions:
http://www.hcourt.gov.au/assets/cases/s238-2010/american-express_app-sub.pdf accessed 15 April 2011.

¹⁵ Respondents written submissions at paragraph 10:
http://www.hcourt.gov.au/assets/cases/s238-2010/American-Express_Res.pdf accessed 15 April 2011.

¹⁶ Ibid.

¹⁷ Ibid.

In particular, the majority fell into error by using Schedule 8 as examples of property – that is one of the things they hook their decision on – when, in fact, they were examples of taxable supplies, in this case being the supply of an interest under a payment system which, of course, did not need to be property. That very conclusion of the majority throws up the mismatch which we referred to in our submissions.

The next point was that where there is an election made to defer payment in the case of credit cards there is no supply of credit for consideration as cardholders pay on the due date on receipt of a monthly statement. If they pay late it was conceded there was a charge for interest. In relation to the charge cards if there was a default and there was a requirement to pay liquidated damages that would not convert the sale of goods into an input tax supply because the liquidated damages are by way of damages. They are not consideration for any supply.¹⁸ In its written submissions it was stated that (at paragraph 27):

Amex supplies the right to present the card on the terms set out in the cardholder agreement. The corresponding obligation incurred by the cardholder for the "right to present the card" is to pay Amex on the due date. Amex does not supply the cardholder's obligation to pay Amex.¹⁹

The applicant submitted that there was a fundamental error in the way the majority interpreted the legislation. The submission states (at paragraph 35):

The majority fundamentally misunderstood the critical question posed by the legislation. They incorrectly perceived the question to be whether Amex "supplies cardholders with a property interest" in "a payment system": FC [173]. This fundamental misunderstanding is perhaps explained by confusing what is required under r 40-5.09 with what is required under r 40-5.12. The former requires the supply of a property interest (with the result that the supply of the property interest which is a financial supply will not be a taxable supply), the latter does not *require* such a supply. If the thing supplied comes within the items described in the table to r 40-5.12 it will be a taxable supply regardless of whether it constitutes a property interest. This critical difference between the two clauses was simply not appreciated.²⁰

The proposed appeal raises fundamental issues about the GST and particularly how one is to interpret the financial supply provisions contained in the GST Regulations. On 5 May 2011 the High Court consisting of French CJ, Gummow, Hayne, Heydon and Kiefel JJ refused the application for leave to appeal. The short judgment of the court handed down by the Chief Justice *inter alia* stated:

Having regard to the way in which the applicants chose to conduct their cases at trial this case, in our opinion, is not a suitable vehicle in which to explore

¹⁸ A challenge was also made to the grant of the application for leave to amend the grounds of appeal by the Commissioner but this is beyond the scope of this article.

¹⁹ Applicants written submissions:

http://www.hcourt.gov.au/assets/cases/s238-2010/american-express_app-sub.pdf accessed 15 April 2011.

²⁰ *Ibid.*

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 *Travellex* 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 Travellex

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 *Travellex* case (whether an indisputably financial service²⁵ 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 the NZ GST Act. By contrast with the rather nebulous wording under consideration in *Travellex*, the rights that can be zero-rated in NZ are only those relating to intellectual property, confidential information

²¹ Transcript of application for leave to appeal:

<http://www.austlii.edu.au/au/cases/cth/HCA/Trans/2011/114.html>

²² *Waverley Council v Commissioner of Taxation* [2009] AATA 442.

²³ See also ATO ID 2008/116 *Goods and Services Tax: GST and credit card surcharge for payment of an Australian tax, fee or charge which is to the same effect*.

²⁴ See s 14(1B)(a) NZ GST Act.

²⁵ The exchange of currency is a financial service under s 3(1)(a) NZ GST Act.

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 between the GST treatment of the exchange of the foreign currency and the service of supplying that currency. This distinction was recognised by at least one Australian commentator who noted:²⁹

It is also worth noting that the High Court regarded the supply in question as being solely the supply of foreign currency, rather than the supply of a currency exchange service. While the supply of foreign currency was clearly for use outside Australia, the currency exchange service occurred in Australia.

The supply of currency services anywhere in New Zealand, including in departure lounges to departing passengers, therefore cannot be zero-rated.³⁰

From a New Zealand perspective, the entire case seems to have arisen from loose drafting of Section 38-190(1) of the GST Act, particularly the nature and scope of the “rights” to be given GST-free status. Such an open-ended term obviously invites taxpayers to test its boundaries, as the taxpayer did in *Travelex*. However, a more carefully targeted definition of those rights, as in the NZ GST Act, would have clearly identified what rights were properly zero-rated. Given the underlying policy of all GST regimes to exempt all types of financial services to consumers, such a provision would almost certainly have excluded the supply of foreign currency.

3.2 American Express

Again the *American Express* decision is curious from a New Zealand perspective for the complex statutory framework and extended judicial analysis necessary to conclude whether or not Late Payment Fees paid in respect of a credit or debit card constitute the supply of financial services. The question of whether the customer had acquired

²⁶ See s 11A(1)(n) and (4) NZ GST Act .

²⁷ See s 11A(2) NZ GST Act

²⁸ Under s 11(A)(1)(f) and/or (j) NZ GST Act.

²⁹ See Catterall M, *Travelex — is it right to call money a right* Australian Tax Week, 2010 No 40, 7 October 2010.

³⁰ In contrast to the ATO’s Decision Impact Statement, which now appears to accept that the supply of foreign currency anywhere in the country may in some instances be GST-free, and not merely supplies from bureaux operating past the customs departure point.

“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 interest charges. In particular, the charge card agreements stipulated the fees were liquidated damages whereas the credit card agreements described them as late fees. That designation of those fees by the parties was neither a sham nor mislabelling. From its analysis of the respective contracts, the Full Federal Court also accepted that the fees were not a charge of ‘interest’. Notwithstanding this the majority of the Full Federal Court concluded those fees were nevertheless “revenue derived from” the making of financial supplies.

The case turned on the arguably commonsense approach as to whether the fees were revenue derived by Amex from the card facilities. The majority of the Full Federal Court found they were. However, that conclusion appears to overlook the careful distinction drawn in the contract that the fees were simply penalties payable for breach of the contract and therefore were not themselves a financial supply.

The distinction between the underlying contract and amounts payable for breach of that contract has repeatedly been made in New Zealand. The New Zealand Inland Revenue Department (IRD) has released an updated version of Interpretation Statement IS3387 - *GST Treatment of Court Awards and Out of Court Settlements*,³¹ which clearly stipulates GST must be considered separately for the supply made in the underlying contract and any payment or damages payable as a result of breach of that contract. That policy acknowledges the obligation to pay damages will result from a wrongful act by one party and:

The Commissioner considers that the appropriate focus is whether the payment is for any supply that has been made, and not the action that gave rise to the award. ... When a payment is made ... and it is consideration for a taxable supply (or an adjustment to a consideration for a taxable supply) this will be taxable. If the payment is made for compensation or damages it is not taxable.

The policy ultimately emphasises:

the importance of the distinction between payments and receipts made in the course of a taxable activity and the requirement these are linked to supplies in order for GST liability to arise. Loss may be suffered in connection with a supply. Where payments are compensatory, and relate to loss, the nexus is with the loss, rather than the supply that caused the loss.³²

³¹ The current policy was published in October 2002, updating an earlier policy issued in Tax Information Bulletin (TIB) Vol 1, No 11, June 1990

³² The policy cites two cases in support of this reasoning: *Montgomerie v CIR* (2000) 19 NZTC 15,569 (CA) (involving partial recovery by a liquidator); and *Case S77* (1996) 17 NZTC 7,483 (involving allegations of negligence).

The distinction between the underlying obligation and the subsequent penalty for non-payment of that obligation has also been recognised for income tax purposes, even where the subsequent penalty is specifically described as ‘interest’. In *C of IR v Buis*³³ the taxpayer was successful in an action to recover unpaid workers’ compensation under New Zealand’s Accident Compensation regime (ACC). The taxpayer received unpaid compensation from previous years plus an award for ‘interest’ from the date the payments were originally due. Tax was obviously payable upon the workers’ compensation³⁴ but the taxpayer disputed the taxability of the ‘interest’.

Interest is normally taxable income.³⁵ However, the definition of ‘interest’³⁶ specifically requires the payment be made ‘in respect of or in relation to money lent.’³⁷

As the ‘interest’ paid by ACC was in respect of its underpayment, and not as a result of money lent by the taxpayer, France J ruled the payment did not fall within the scope of that section and thus was free of tax:³⁸

The payment is not made because the claimant has loaned the money, or because the claimant has been deprived of its earning potential. It is made in a sense because the claimant is a “victim” of an inadequate processing of his or her claim. It is payment made because of default on the part of the payer, not because of anything at all done by the payee.

Under the relevant statutory ACC scheme ‘interest’ paid to a successful claimant because weekly compensation is paid late is in the nature of a fine. It is not intended to compensate for the period of non-payment and is not taxable under ordinary concepts. IRD have accepted the general effect of this decision that a penalty for late-payment is not ‘interest’ under the statutory regime.³⁹

This New Zealand treatment of interest for breach of contract or as a penalty for late payment certainly would sit uneasily with the conclusion reached by the Full Federal Court in *Amex*. Instead, it appears the Full Federal Court’s determination to interpret GST as a ‘practical business tax’ may have resulted in it overlooking the distinction between the GST effect of the underlying financial supply of the credit and charge card, and the fees charged to customers for non-payment.

For instance, the leading New Zealand case on how financial transactions should be interpreted under the revenue Acts is *Marac Life Assurance Ltd v C of IR*.⁴⁰ In that

³³ (2005) 22 NZTC 19,278 (HC), upholding the TRA decisions in Case W54 (2004) 21 NZTC 11,508 and Case W58 (2004) 21 NZTC 11,548.

³⁴ Under s CF1 NZ Income Tax Act 2007.

³⁵ Under s CC4 NZ Income Tax Act 2007.

³⁶ Under s YA1 Income Tax Act 2007.

³⁷ In Australia the same position appears to be the case. See for example the statement by the High Court in a unanimous judgment in *Federal Commissioner of Taxation v Myer Emporium Ltd* [1987] HCA 18; (1987) 163 CLR 199 where the following statement was made (at paragraph 35):

“Interest is regarded as flowing from the principal sum (*Federal Wharf Co. Ltd. v. Deputy Federal Commissioner of Taxation* [1930] HCA 30; (1930) 44 CLR 24, at p 28) and to be compensation to the lender for being kept out of the use and enjoyment of the principal sum”.

³⁸ (2005) 22 NZTC 19,278, at [54]

³⁹ See QB 09/03: Decisions on application of section CA 1(2) — common law interest and income under ordinary concepts. Note, however, that contrary to the *Buis* decision, NZ IRD maintains that such payments may constitute “income under ordinary concepts” under s CA1 NZ Income Tax Act 2007.

⁴⁰ *Marac Life Assurance Ltd v C of IR* [1986] 1 NZLR 694 (CA).

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 policy. Not surprisingly the IRD contested that treatment and sought to deny the tax benefits obtained by investors under the policies.

The Court of Appeal unanimously rejected the Commissioner's arguments. The court's examination of the parties' contract confirmed that it complied with the legal form for a life insurance policy and therefore the terminology used in that contract was correct. As a result the Court refused to over-ride that agreement:⁴¹

[The parties] are free to enter into whatever lawful financial arrangements will suit their purposes. They cannot be treated as having entered into a different arrangement which would or might have achieved somewhat similar economic advantages and whether or not they ever had that alternative in contemplation. If Marac life bonds are policies of life insurance that is the end of the inquiry.

Accordingly the Court directed that the tax consequences must be determined according to the legal form of the agreement between the parties and not according to the economic results achieved or the overall economic consequences.

The reasoning in the *Marac* case has been adopted and applied in a number of GST cases. The most recent application of this principle in GST is the unanimous Court of Appeal decision in *CIR v Gulf Harbour Development Ltd.*⁴² This case concerned the GST treatment of the sale of participatory securities in a company that operated a golf course and country club. Membership to the country club and access to its facilities was granted as a right of share ownership. As the ownership and transfer of 'participatory securities' is a financial service,⁴³ the company treated the sale of these shares to members as GST exempt.⁴⁴ The consequence of this treatment was that membership and operation of the country club remained exempt for GST. The IRD contested this treatment on the grounds the shares were merely a device to obtain a favourable GST treatment and did not reflect the practical or economic reality of the agreement between the parties.

The Court of Appeal rejected Inland Revenue's argument on the grounds it called for an 'economic as opposed to a legal substance' approach to statutory interpretation that

⁴¹ At 705.

⁴² (2004) 21 NZTC 18,915 (CA)

⁴³ As defined in s 3(2) NZ GST Act 1985.

⁴⁴ Under s 14(1)(a) NZ GST Act 1985.

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.⁴⁵

It is also undeniable that the rights to membership arose exclusively from that equity security. As Mr McKay submitted, no independent source or origin of those rights exists. Membership rights are as inherent in these shares as a dividend right normally is. ... Everyone who buys a share in a company buys it to acquire the rights attaching to that share. A share is in all cases a “vehicle” for acquisition of the rights attached to it. The fact that in this case the rights attached to the shares were rights to membership in the country club does not alter what one is acquiring. It may well be that, in marketing the shares, rather more emphasis was placed on “membership of the golf club” than on the “share” element... But that did not matter.

It appears the Full Federal Court simply concluded that, as the fees were payable under the card agreement, they were revenue derived from the provision of the charge or credit card – rather than as liquidated damages payable for default by the cardholder, as specified in the contract. While those fees became payable under the terms of the contract under which the cards were originally supplied, that alone would not normally dictate its GST treatment. It is therefore questionable whether damages paid for breach of contract would constitute “revenue derived from” that contract.⁴⁶

3.3 Relevance of the Purchaser’s Purpose When Determining Correct GST Treatment of Supply

A significant aspect of the *Travellex* decision was the comments that the GST treatment of a supply may sometimes be determined by the purpose of the purchaser. Again, this issue has been considered by New Zealand courts when considering the correct GST treatment. For instance, in the *Gulf Harbour* case, part of IRDs argument was that purchasers had no interest in the participatory securities but only acquired them for the purpose of obtaining membership of the country club. Again, this argument was rejected, the court stating simply:

How the offer was marketed and why people purchased the shares are irrelevant.

That view has been consistently applied by New Zealand courts when analysing the GST treatment of a supply. Another example is *Auckland Institute of Studies Ltd v CIR*,⁴⁷ where the court had to determine whether a company supplying tuition services in New Zealand to foreign students could zero-rate part of its tuition fees to account for all ancillary services provided to those students prior to their arrival in this country. The company claimed that some students would have been unable to enrol for its courses without receiving those ancillary services and therefore should be entitled to treat such services as separate, zero-rated supplies. The Court rejected that argument on a number of grounds but in doing so advised that the correct GST treatment of any supply must be determined according to ‘the view of the objective consumer’ and not by reference to the purposes of individual customers.

⁴⁵ At [24] – [26].

⁴⁶ Statement IS3387 - GST Treatment of Court Awards and Out of Court Settlements

⁴⁷ (2002) 20 NZTC 17,685

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 residents. Such an approach would have imposed obligations on the publisher to ascertain the purpose of each customer placing an advertisement, something that was both impractical and would have led to uncertainty in the operation of the Act. Rejecting that argument Penlington J concluded:

This exemption, if construed as the Commissioner contends, would cause inconvenience and difficulties in its operation. At times it would be unworkable and impractical. It is unlikely Parliament intended this result. The supplier of the services in New Zealand ... would be placed in a position of having to make an inquiry into and an assessment in every case of the possible benefits which might arise from the contract without having any guiding criteria. The supplier would be dependent on such information as might be made available to it from the [recipient] and on such local information as it has available about the subject matter of the services. Often, as it was pointed out in the argument, there will be no time to make the assessment and in cases of doubt it will often be impractical and indeed sometimes impossible to take legal or accounting advice because of time constraints. ... [These practical problems] in my view strongly points to the absence of such a requirement that the supplier should make this kind of inquiry and assessment. The Act is a taxing statute. Its terms should be explicit and unambiguous.

This New Zealand approach follows the stance taken by UK courts under the VAT legislation. For instance, in *British Railways Board v C & E Commrs*⁴⁹ all judges emphasised that it was irrelevant what "the motive or intention of the person receiving the service" might be. Accordingly, the Australian approach is at odds with the normal operation of GST as a transaction tax based on the nature of the supply and not according to the purpose of individual purchasers. As foreseen by the majority in *Travellex*, that approach is likely to cause unnecessary uncertainty and administrative difficulties for both taxpayers and the ATO. It is therefore remarkable that the High Court would have adopted this interpretation.

4. CONCLUSION

The High Court's judgment in *Travellex* significantly extends the scope of the supply of rights under Div 38-190(1), almost certainly beyond what was originally intended. What are clearly financial supplies made to persons in Australia may now be GST-

⁴⁸ (1995) 17 NZTC 12,325 (CA)

⁴⁹ [1977] 1 WLR 588

free, which appears contrary to the underlying policy of the regime to treat such supplies as input taxed. As noted by one commentator:⁵⁰

It is also worth noting that the High Court regarded the supply in question as being solely the supply of foreign currency, rather than the supply of a currency exchange service. While the supply of foreign currency was clearly for use outside Australia, the currency exchange service occurred in Australia. This approach to analysing the supply is quite different from that adopted in other GST/VAT jurisdictions

This would have accorded with the NZ approach.

More importantly, the majority decision in *Travelex* now permits suppliers to consider the use or purpose of the recipient when determining the correct GST treatment. In effect, the subjective aims of that purchaser may now be relevant to classifying that supply – yet provides no guidance on how the purchaser’s purpose should be determined. Despite the Commissioner pointing to the administrative difficulties this approach poses for both taxpayers and the ATO, the High Court found in some instances the purchaser’s purpose may be determinative. It will be interesting to see how this approach operates in practice

Likewise, the Full Federal Court decision in *American Express* appears to ignore the distinction between the underlying contract and any damage payable for breach of that contract. While fees charged by Amex arose out of the financial service of a credit or charge card, and therefore in substance fell within the definition of financial supply, they were not payable simply as a result of that supply but directly because of their failure to pay the agreed amount by the due date.

It would seem that the views of the New Zealand courts may be of some interest to the High Court when the issues raised about the interpretation of the Financial Supply provisions is finally ventilated. Certainly, the full bench decision does not sit easily with the way in which identical transactions would be treated in New Zealand which, in the author’s opinions, has the purest GST regime possibly in the world.

⁵⁰ M Catterall, “Travelex — is it right to call money a right?” Australian Tax Week, 2010 No 40, 7 October 2010