

DIRECTORS' FEES AND GST

PUBLIC RULING—BR Pub 05/13

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 00/11 which was published in *Tax Information Bulletin* Vol 12, No 11 (November 2000). BR Pub 00/11 applied until 31 March 2005. BR Pub 05/13 applies on 1 April 2005 for an indefinite period.

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Laws

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Ruling applies in respect of sections 6(3)(b), 8, and 57(2)(b).

The Arrangement to which this Ruling applies

The Arrangement is the engagement, occupation, or employment of a person as a director of a company. The engagement may either be by direct contract between the director and the company for whom the person acts as a director, or by a third party appointing, or agreeing to provide, a director to a company.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- If a natural person is engaged as a director and the services are not undertaken as part of carrying on the person's own taxable activity, the engagement will be excluded from the term "taxable activity" due to the application of section 6(3)(b). The proviso does not apply as the services are not supplied as part of carrying on the person's taxable activity.
- If a natural person is engaged as a director as part of carrying on his or her taxable activity, the proviso to section 6(3)(b) will apply and the services will be deemed to be supplied in the course or furtherance of that taxable activity. If the person is registered for GST or is liable to be registered for GST, the person will be required to account for GST on the fees received for the supply of the directorship services.

- If a natural person is contracted by a third party to take up an engagement as a director of a company and the person has not accepted the directorship as part of carrying on a taxable activity:
 - the engagement of the natural person as a director will be excluded from the term “taxable activity” due to the application of section 6(3)(b). The proviso does not apply as the services are not supplied as part of carrying on the person’s taxable activity;
 - the provision by the third party of the services of the natural person director does not fall within the provisions of section 6(3)(b), as the third party has not been engaged as a director of a company. If the third party is registered for GST or is liable to be registered for GST, that third party will be required to account for GST on the fees received for the supply of the person’s services as a director of the company under section 8.
- If a natural person is contracted by a third party to take up an engagement as a director of a company and the engagement is part of carrying on the person’s taxable activity:
 - the engagement of the natural person director will fall within the proviso to section 6(3)(b) and the services will be deemed to be supplied in the course or furtherance of the taxable activity;
 - the provision by the third party of the services of the director does not fall within the provisions of section 6(3)(b), as the third party is not engaged as a director of a company. If the third party is registered for GST or is liable to be registered for GST, that third party will be required to account for GST on the fees received for the supply of the person’s services as a director of the company under section 8.
- If an employee, as part of his or her employment, is engaged as a director of a third party company by way of a contract between his or her employer and the third party company:
 - the engagement of the employee will fall within the provisions of section 6(3)(b) and is therefore excluded from the term “taxable activity”. The proviso to the section does not apply as the services are not supplied as part of carrying on a taxable activity of the employee;
 - the provision by the employer of the services of a director does not fall within the provisions of section 6(3)(b), as the employer is not engaged as a director of a company. If the employer is registered for GST or is liable to be registered for GST, that employer will be required to account for GST on the fees received for the supply of the employee’s services as a director of the company under section 8.

- If an employee is engaged by a third party company to be a director of that company, where: the employee is required to account to the employer for the director's fees received; there is no contract between the employer company and the third party company; and where the employee does not undertake the services as part of carrying on his or her own taxable activity:
 - the engagement as director will be excluded from the term "taxable activity" due to the application of section 6(3)(b). The proviso does not apply as the services are not supplied as part of carrying on the person's taxable activity;
 - if the employer is registered for GST or is liable to be registered for GST, the employer is required to account for GST on the consideration received for the supply of services to the employee under section 8, i.e. permitting the employee to be a director.
- If a partner in a partnership accepts an engagement as a director of a company as part of the partnership's business:
 - the activity of the partner, in accepting the engagement as a director, falls within the provisions of section 6(3)(b) and is therefore excluded from the term "taxable activity". The proviso to the section does not apply as, although the partner may be carrying on the taxable activity of the partnership, the services are deemed to be supplied by the partnership in terms of section 57(2)(b);
 - the provision by the partnership of the services of the director does not fall within the provisions of section 6(3)(b), as the partnership is not engaged as a director of a company. The partnership will be required to account for GST on the fees received for the supply of the partner's services as a director of the company as it is considered to be part of the normal taxable activity of the partnership.

The period for which this Ruling applies

This Ruling will apply on 1 April 2005 for an indefinite period.

This Ruling is signed by me on the day of 2005.

Susan Price
Senior Tax Counsel

COMMENTARY ON PUBLIC RULING BR Pub 05/13

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 05/13 (“the Ruling”).

Background

Section 6 defines the term “taxable activity” for the purposes of the Act. Under section 6(1), a person conducts a taxable activity when all the following characteristics are present:

- There is some form of activity.
- The activity is carried on continuously or regularly.
- The activity involves, or is intended to involve, the supply of goods and services to another person for a consideration.

Section 6(3) provides certain exclusions from the term “taxable activity”. Under section 6(3)(b), the activities of a salary and wage earner or of a person in receipt of directors’ fees are excluded from the term.

Under the proviso to section 6(3)(b), if a person in carrying on a taxable activity accepts any office, any services supplied by that person in holding that office are deemed to be supplied in the course or furtherance of that taxable activity. Therefore, if a GST registered sole trader who, in carrying on his or her taxable activity, takes on a company directorship, the proviso applies and GST is chargeable on the directors’ fees paid.

Public Information Bulletin (PIB) 164 issued in August 1987 contained an item titled “GST on Directors’ Fees”. The item concerned the circumstances in which directors’ fees did and did not attract GST. The item listed indicators that could be used in identifying the correct GST treatment to be applied to directors’ fees. These indicators were:

1. Directors’ fees paid to directors personally, and retained by them.

Not subject to GST—excluded from the meaning of taxable activity by section 6(3)(b).

2. Directors’ fees paid to directors personally, but applied by them to their partnership or business income, where the partnership or business is a registered person.

Subject to GST—subject to the proviso to section 6(3)(b).

3. Directors' fees paid directly to director's partnership or company, where that partnership or company is a registered person.

Subject to GST—a normal taxable supply.

In July 1988 the Department issued PIB 175 containing, at page 26, a further item “GST on Directors’ Fees”, restricting the policy set down in PIB 164. The item advised that the proviso to section 6(3)(b) applies only to a sole trader, e.g. an accountant (being a registered person) who, in carrying on his or her taxable activity, is appointed a director of a company. The statement said that directors’ fees paid to a partner in a partnership or to a shareholder, director, or employee of another company are not therefore subject to GST. The reason given for this interpretation was that, in terms of the Companies Act 1955, a director could only be a natural person. Therefore, directors’ fees either paid to directors on behalf of their companies or partnerships, or paid direct to the company or partnership for directorship services carried out by their employees or partners, do not attract GST under this policy.

In September 1996 Inland Revenue published an interpretation statement in *Tax Information Bulletin* (TIB) Vol 8, No 4 on “Tax deductions from directors’ fees paid to GST registered persons”. This interpretation statement is also relevant to the subject matter of this Ruling, even though it deals with tax deductions under the Income Tax Act 1994. The statement says, at page 3, that if an employee is acting as a director of a company on behalf of another company, the directors’ fees paid are for services rendered by the employer company. Regulation 4(2) of the Income Tax (Withholding Payments) Regulations 1979 (“the Regulations”) states that payments for work done or services rendered by a company are not withholding payments. Therefore, tax deductions are not required to be made from the payments. Similarly, if a company pays directors’ fees to a partnership account in return for the partner performing partnership services, the fees are business income of the partners and the Commissioner will not require tax deductions to be made under section NC 13 of the Income Tax Act 1994. Therefore, if it is the company or partnership that is providing the services of its employee or partner as a director, the question arises as to whether GST should be charged on these services as they would normally be supplied in the course or furtherance of a taxable activity of the company or partnership.

In September 2000 Inland Revenue published public binding ruling BR Pub 00/09 in TIB Vol 12, No 9 to replace the policy items on “GST on Directors’ Fees” contained in PIBs 164 and 175. Inadvertently, BR Pub 00/09 contained an application period that could be seen to be retrospective, as the period of the ruling issued was effective from 1 April 2000 to 31 March 2005. As the ruling was intended to apply prospectively, BR Pub 00/09 was withdrawn in November 2000 in TIB Vol 12, No 11 and BR Pub 00/11 was issued in its place for the period 26 October 2000 to 31 March 2005.

This ruling, with similar content, replaces BR Pub 00/11, which expired 31 March 2005, and is effective on 1 April 2005 for an indefinite period.

Legislation

Section 2(1) defines the words “person”, “registered person” and “unincorporated body” as follows:

“Person” includes a company, an unincorporated body of persons, a public authority, and a local authority:

“Registered person” means a person who is registered or is liable to be registered under this Act:

“Unincorporated body” means an unincorporated body of persons, including a partnership, a joint venture, and the trustees of a trust:

Section 6 states:

- (1) For the purposes of this Act, the term “taxable activity” means—
 - (a) 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:
 - (b) Without limiting the generality of paragraph (a) of this subsection, the activities of any public authority or any local authority.
- (2) Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.
- (3) Notwithstanding anything in subsections (1) and (2) of this section, for the purposes of this Act the term “taxable activity” shall not include, in relation to any person,—
 - (a) Being a natural person, any activity carried on essentially as a private recreational pursuit or hobby; or
 - (aa) 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; or
 - (b) **Any engagement, occupation, or employment under any contract of service or as a director of a company:**

Provided that where any person, in carrying on any taxable activity, accepts any office, any services supplied by that person as the holder of that office shall be deemed to be supplied in the course or furtherance of that taxable activity; or...

(Emphasis added)

Section 8(1), dealing with the imposition of goods and services tax, states:

Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 12.5 percent on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after the 1st day of October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

Section 57(2), dealing with unincorporated bodies, states:

- (2) Where an unincorporated body that carries on any taxable activity is registered pursuant to this Act,—
- (a) The members of that body shall not themselves be registered or liable to be registered under this Act in relation to the carrying on of that taxable activity; and
 - (b) **Any supply of goods and services made in the course of carrying on that taxable activity shall be deemed for the purposes of this Act to be supplied by that body, and shall be deemed not to be made by any member of that body; and**
- ...
- (Emphasis added)

Section 151(3) of the Companies Act 1993 states:

A person that is not a natural person cannot be a director of a company.

Application of the Legislation

Section 8(1) provides that GST is charged on the supply (but not an exempt supply) in New Zealand of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person.

Therefore, one of the determining features in ascertaining whether there is a liability to account for GST, is the existence of a “taxable activity”. Another determining feature is whether the person is a “registered person”.

Section 6(1) defines a “taxable activity” as an activity that is carried on continuously or regularly, and involves or is intended to involve, the supply of goods and services to another person for a consideration. The section also includes within the term “taxable activity” the activities of any public or local authority.

Under section 6(2), anything done in connection with the commencement or termination of a taxable activity is deemed to be carried out in the course or furtherance of that taxable activity.

Paragraphs (a), (aa), (b), (c), and (d) of section 6(3) exclude from the term “taxable activity” such activities as hobbies, employment under a contract of service and engagement as a director of a company, certain Government-type and local authority appointments, and the making of exempt supplies.

The proviso to paragraph (b) states that if a person, in carrying on a taxable activity, accepts any office, services supplied by that person in holding that office are deemed to be supplied in the course or furtherance of that taxable activity. Therefore, if a person is carrying on a taxable activity, and accepts an engagement as a company director in carrying on **that** taxable activity, the proviso will apply.

If it is established that a taxable activity is in existence after applying section 6, the question of whether the person is liable to account for GST will depend on the application of the remaining criteria set down in section 8. One of these criteria is whether the person is a “registered person”, i.e. whether the person is registered for GST or is liable to be registered for GST, which includes whether the taxable activity threshold amount in section 51 has been satisfied.

Section 57(2)(b) provides that where an “unincorporated body”, which by definition under section 2(1) includes a partnership, carries on a taxable activity, any supply of goods and services made as part of carrying on that taxable activity are deemed to be supplied by the partnership and not by any of the partners.

Section 151(3) of the Companies Act 1993 provides that only a natural person can be a director of a company.

The following scenarios illustrate how section 6(3)(b) is applied in respect of a person engaged as a director of a company, i.e. whether a taxable activity is in existence. It is important to note that the Ruling itself deals specifically with section 6(3)(b). If it is established that an activity does not fall within the exclusion from a “taxable activity” set down in that section, the remaining criteria under section 8 must be applied in order to determine the existence of a liability to account for GST.

Finally, it should be mentioned that it is the contractual relationship between the parties, founded on a genuine basis, that determines the GST treatment of the relevant transactions (*Wilson & Horton v CIR* (1995) 17 NZTC 12,325).

A. Personal capacity

A natural person is engaged as a director of a company in that person’s personal capacity and not as part of carrying on any taxable activity.

The activity of this person falls within the provisions of section 6(3)(b) in that it involves a person who is engaged as a director of a company. The activity is therefore excluded from the term “taxable activity”. The proviso does not apply, as the person has not accepted the engagement as part of carrying on a taxable activity.

B. Carrying on a taxable activity

A natural person is engaged as a director of a company as part of carrying on that person’s taxable activity.

The activity of this person falls within the provisions of section 6(3)(b) in that it involves a person who is engaged as a director of a company. The activity is therefore *prima facie* excluded from the term “taxable activity”. However, as the person has accepted the engagement as part of carrying on a taxable activity, the proviso deems the services to be supplied in the course or furtherance of that taxable activity. If the person is registered for GST or is liable to be registered for GST, the person will be required to account for GST on the fees received for the supply of the directorship services.

C. Person contracted as a company director

A natural person is contracted by a third party to take up an engagement as a director of a company. The person is not undertaking the directorship as part of carrying on

any taxable activity. The third party invoices the company for its services in providing it with a director.

The engagement of the person as a director of a company is excluded from the term “taxable activity” under section 6(3)(b). The proviso to the section does not apply as the services are not supplied as part of carrying on the person’s taxable activity. The provision by the third party of the services of the director does not fall within the provisions of section 6(3)(b) as the third party is not engaged as a director of a company. Provided the third party is registered for GST, or is liable to be registered for GST, that party will be required to account for GST on the fees received for the supply of the services of the person as a director of the company.

D. *Person contracted as a company director in carrying on a taxable activity*

A natural person, as part of carrying on a taxable activity, is contracted by a third party to take up an engagement as a director of a company. The third party invoices the company for providing the services of the director, who in turn invoices the third party for his or her services.

The engagement of the person as a director of a company is prima facie excluded from the term “taxable activity” under section 6(3)(b). However, as the person has accepted the engagement as part of carrying on his or her taxable activity, the proviso to the section deems the directorship services to be supplied in the course or furtherance of his or her taxable activity. The natural person’s liability for GST will therefore depend on satisfying the remaining requirements of section 8. The provision by the third party of the services of the director does not fall within the provisions of section 6(3)(b) as the third party is not engaged as a director of a company. Provided the third party is registered for GST, or is liable to be registered for GST, that party will be required to account for GST on the fees received for the supply of the person’s directorship services.

E. *Employee engaged as director*

An employee of an employer is engaged as a director of a third party company as part of the person’s employment duties.

The engagement of this person as a director of a company is excluded from the term “taxable activity” under section 6(3)(b). The proviso to the section does not apply as the person has not accepted the directorship as part of carrying on a taxable activity—the person is merely carrying out his or her employment duties. The provisions of section 6(3)(b) do not apply to the employer who is supplying the services of its employee as the employer is not engaged as a director of a company. Provided the employer is registered for GST or is liable to be registered for GST, that party will be required to account for GST on the fees received for the supply of the services of the person as a director of the company.

F. *Employee required to pay over directors’ fees to employer*

Sometimes an employee is permitted to accept directorships of third party companies provided that the employee accounts to the employer for the fees received. This might occur with family companies. In this type of scenario there would not be a contract between the employer and the third party company.

In this situation, the engagement of the person as a director of a company is excluded from the term “taxable activity” under section 6(3)(b). The proviso to the section does not apply as the person has not accepted the directorship as part of carrying on a taxable activity. The employer company, provided it is registered for GST or liable to be registered for GST, will be required to account for GST on the supply of services by the employee. These services could best be described as allowing the employee to undertake directorship duties in work time or permitting the employee to be a director.

G. Partner in a partnership engaged as a director

A partner in a partnership accepts an engagement as a director of a company as part of the partnership’s business.

The engagement of this person as a director of a company is excluded from the term “taxable activity” under section 6(3)(b). The proviso to the section does not apply as, although the partner may be carrying on the taxable activity of the partnership, the services are deemed to be supplied by the partnership in terms of section 57(2)(b). Therefore, the partner is not required to account for GST on the supply of the directorship services. Section 6(3)(b) does not apply in the case of the partnership as the partnership is not engaged as a director of a company. The partnership supplies the services of one of its partners to the company as part of its taxable activity. The partnership will therefore be required to account for GST on the fees received for the supply of the partner’s directorship services.

Examples

Example 1

Taxpayer A, who is not registered for GST, is a partner in a firm of chartered accountants. Company B engages taxpayer A as a director, and pays him fees for his services. Taxpayer A’s appointment as a director is not connected with his involvement in the partnership nor has he accepted the directorship as part of carrying on a taxable activity. He retains the fees, having received them in his personal capacity.

Taxpayer A is engaged as a director of a company, an activity that is excluded from the term “taxable activity” by section 6(3)(b). The proviso to the section does not apply, as taxpayer A is not providing directorship services as part of carrying on a taxable activity. Taxpayer A is not required to account for GST on the fees received for directorship services.

Example 2

Taxpayer B is a human resources consultant in business on her own. She is registered for GST. She accepts a company directorship as part of carrying on her taxable activity, and receives fees for her services.

Taxpayer B's engagement as a director is *prima facie* excluded from the term "taxable activity" in terms of section 6(3)(b). However, as she has accepted the engagement as part of carrying on her taxable activity, the proviso to the section deems the directorship services to be supplied in the course or furtherance of her taxable activity. She should therefore account for GST on the fees she is paid.

Example 3

A GST-registered financial management company supplies the services of one of its specialist employees as a director of another company. Directors' fees are paid to the company for the services provided.

The engagement of the employee as a director is excluded from the term "taxable activity" under section 6(3)(b). The proviso does not apply as the employee has not accepted the office as part of carrying on a taxable activity. Therefore, the employee is not required to account for GST on the supply of the directorship services. Section 6(3)(b) does not apply to the activity of the management company as that company is not engaged as a company director. The fees are paid in consideration of the management company providing the services of one of its employees to the other company. This is a supply in the course or furtherance of a taxable activity of the management company and that company will be required to account for GST on the fees received for this supply.

Example 4

A partner of a GST-registered legal partnership is elected on to the board of directors of a client company as a representative of the partnership. The partnership is providing legal advice to the company, which in turn pays fees into the partnership's account.

The engagement of the partner as a director of a company falls within the provisions of section 6(3)(b) and is therefore excluded from the term "taxable activity". The proviso to the section does not apply as, although the partner may be carrying on the taxable activity of the partnership, the services are deemed to be supplied by the partnership in terms of section 57(2)(b). Therefore, the partner is not required to account for GST on the supply of the directorship services. The provisions of section 6(3)(b) do not apply to the partnership as it is not engaged as a director of a company. The partnership will therefore be required to account for GST on the fees it receives from the company.

Example 5

A GST-registered accountant in business on his own is contracted by a consulting firm to take up an engagement as a director of a company with the object of monitoring the company's financial systems.

The engagement of the accountant as a director of a company is excluded from the term “taxable activity” under section 6(3)(b). However, as the person has accepted the engagement as part of carrying on his taxable activity, the proviso to the section deems the directorship services to be supplied in the course or furtherance of his taxable activity. The accountant will therefore be required to account for GST on the fees he receives in respect of these services. The provision by the consulting firm of the services of the accountant does not fall within the provisions of section 6(3)(b) as the firm is not engaged as a director of a company. Provided the consulting firm is registered for GST or is liable to be registered for GST, it will be required to account for GST on the fees received for the supply of the directorship services of the accountant.

Example 6

Company A agrees to one of its employees taking up a directorship position with Company X on the proviso that the employee hands over the directors’ fees payable to the employee by Company X. There is no contract between Company A and Company X.

The engagement of the employee as a director is excluded from the term “taxable activity” under section 6(3)(b). The proviso does not apply as the employee has not accepted the office as part of carrying on a taxable activity. Therefore, the employee is not required to account for GST on the supply of the directorship services. If Company A is registered for GST or is liable to be registered for GST, it is required to account for GST on the supply of services, i.e. permitting the employee to be a director of Company X.