Inbound tour operators and collecting, and remitting, GST

A draft practical compliance guideline (PCG 2018/D7) deals with the requirement for "inbound tour operators" to collect and remit GST.

An inbound tour operator is an Australian entity that enters into agreements with non-residents to arrange the supply of Australian tour packages (that can include accommodation and non- accommodation components).

Whether GST is required to be remitted on these supplies depends on whether they are acting as an agent or principal. If they act as an agent of the non-resident, any commission charged to the non-resident will be GST-free as it is an export.

If they act as principal, the entire supply (which includes mark-up or a profit margin) may be subject to GST as they are providing the service to be used in Australia.

Under this draft PCG, an inbound tour operator can assume they are an agent, if:

- there is a written agreement is in place with the non-resident, which authorises the inbound tour operator to act as agent

- any agreement with an Australian product provider acknowledges that the operator acts as authorised agent for the non-resident and that the contract is between the non-resident and the product provider

- the non-resident is either aware of the commission or fee they pay for the agency services, or ex pressly allows the inbound tour operator to retain (as commission or fee) the difference between a purchase price and the amount negotiated with the product provider

- any fee charged by the inbound tour operator if the non-resident cancels a booking cannot exceed the sum of the commission or fee

- the inbound tour operator is able to give the non-resident details of transactions entered into on the non-resident's behalf, including a breakdown of the prices of all transactions, and
  the inbound tour operator does not adopt a different position for income tax purposes.

The ATO understands that an operator, having acted as an agent for a non-resident in arranging an Australian tour package, may also provide other services while the non-resident tourist is in Australia. The ATO considers that in providing these other services and/or products, you may act as a principal.

These other services or products may include but are not limited to:

- meeting and greeting tourists on arrival in Australia
- customer assistance while tourists are in Australia including amending tourist itinerary
- bus / transit services
- guided tours (for example walking or shopping tours)
- provision of gifts.

The provision of these other services or products by you as a principal may be subject to GST.

It is therefore possible for income to not be wholly GST-free if it relates to both supplies of arranging services (GST-free) and supplies of other products or services (subject to GST).

In these circumstances an operator may need to apportion a commission to taxable and non-taxable parts in accordance with GSTR 2001/8.

More than a 'mere tweak': Small business CGT concession changes will tighten eligibility

The legislation Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018 has just recently passed both houses in Canberra, which among other measures also makes changes to the long-established small business CGT concessions.

The legislation's explanatory memorandum (scroll down to page 13 of this PDF of the EM) spells out the incumbent basic conditions for the concessions to apply, but adds additional conditions that apply only where the CGT assets concerned are shares in a company or interests in a trust.

"We finally have some long-feared changes to the small business CGT concessions," says tax policy specialist Ken Mansell, but adds that it is limited to certain assets only. "If it is not a share or a unit, there are no changes."

The more significant change in the new measures, Ken says, and one that practitioners will need to press home to their clients, is the requirement to "look through" to the object entity. "If I am selling shares or units, one of the questions I need to ask is if I am a small business entity or if I pass the maximum net assets test," he says. "But under the new rule I also have to ask if the object entity, being the entity that I own shares or units in, is a small business entity or passes the maximum net assets test."

He explains this by drawing on an example used in the EM:

Karen carries on a small consulting business as a sole trader. She is a CGT small business entity (according to the general rules) for the 2019-20 income year.

Karen also owns 30 per cent of the shares in Big Pty Ltd, a large private company with annual turnover in excess of $20 million in both the 2018-19 and 2019-20 income years. The net value of Big Pty Ltd's CGT assets exceeds $100 million throughout this period.

On 1 October 2019, Karen sells her shares in Big Pty Ltd. She would not be eligible to access the Division 152 CGT concessions for any resulting capital gain.

Even if Karen satisfies the other basic conditions for relief, she cannot satisfy the new condition. Big Pty Ltd is not a CGT small business entity in the 2019-20 income year. It also does not satisfy the maximum net asset value test in relation to the capital gain, as its net assets exceed $6 million immediately prior to the CGT event happening (being in excess of $100 million for the entire income year).

If the object entity does not pass these tests, the small business CGT concessions do not apply to the sale of the shares or units in the object entity. Again, this may be best explained using the example supplied in the EM:

George carries on a small gardening business. George is a CGT small business entity for the 2019-20 income year.

George holds all of the units in G Trust, a trust that holds a number of investments in other entities but which does not carry on a business. The total value of the investments held by G Trust also means that it does not satisfy the maximum net asset value test.

On 17 February 2020, George sells the units it holds in G Trust. George is not eligible to access the Division 152 CGT concessions for any resulting capital gain.

Even if George satisfied the basic conditions for relief, he cannot satisfy the new condition as G Trust is not a CGT small business entity (as it does not carry on a business) and does not satisfy the maximum net asset value test.

“When working out if the object entity is a CGT small business entity or satisfies the maximum net asset value test, the turnover or assets of entities that may control the object entity are disregarded,” Ken says, adding that this ensures that the outcomes for taxpayers do not depend upon the income or assets of third parties.

“Further, for these purposes (and only these purposes), an entity is treated as controlling another entity if it has an interest of 20% or more, rather than 40% or more,” Ken says. “This means that more entities are considered to be ‘connected with’ one another for the purpose of this test and need to count the assets or turnover of the other entity towards their aggregate turnover or the total net value of their CGT assets.”

Other technicalities

Another change is that the taxpayer must have carried on business just prior to the CGT event happening. “This ensures that entities do not benefit from this concession where the relevant business activities are too ‘remote’ to justify the entity receiving a concession for business activities,” Ken says. “However, this requirement does not apply to taxpayers that satisfy the maximum net asset value test in relation to the CGT event.”

For the sale of shares and units, there is also a technical change to the “active asset” test. “There is an additional new condition that requires that, to pass the active asset test, for the lesser of 7.5 years or at least half the period a taxpayer has held the share or interest, at least 80% of the sum of the:

- total market value of the assets of the object entity (disregarding any shares in companies or interests in trusts); and
- total market value of the assets of any entity (a later entity) in which the object entity had a small business participation percentage of greater than zero, multiplied by that percentage,

must have related to assets that are:

active assets; or
cash or financial instruments that are inherently connected with a business carried on by the object entity or a later entity."
"In effect, when selling a share or a unit, the active asset test in is modified to adopt a look-through approach," Ken says. "Rather than treating shares or interests as active assets based on the activities of the underlying company, the modified test looks through such membership interests to include the proportionate amount of the value of the assets of other entities to which the interests relate.

"And remember, it only includes a percentage of the later entity assets based on ownership," he says. "Also remember, any asset of a later entity will not be an active asset if the later entity is not either a small business entity or passes the maximum net assets test AND the taxpayer has a 20% or greater ownership of."

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