IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-2524

	UNDER	The Declaratory Judgments Act 1908 and the Goods and Services Tax Act 1985
	BETWEEN	ROTORUA REGIONAL AIRPORT LIMITED Plaintiff
	AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 1 April 2009

Appearances: R J Cullen for the plaintiff
H Hancock and C Curran-Tietjens for the defendant

Judgment: 12 November 2009 at 9.30 am

JUDGMENT OF MALLON J

Contents

Introduction

[1] The plaintiff (RRAL) operates the Rotorua Airport. Since 1 October 2002 it has charged a $5 levy on passengers over the age of five years departing from the airport. That levy (which is called a development levy) is used to pay for the development of facilities at the airport. In this proceeding RRAL seeks a declaration that goods and services tax (GST) is not payable on the development levy.

[2] Under the Goods and Services Tax Act 1985 (the GST Act), GST is payable on the consideration paid in respect of a supply of goods or services. RRAL contends that the development levy is a charge authorised by legislation (akin to a tax) levied to fund future facilities rather than consideration paid by passengers for services supplied by RRAL. The defendant (the Commissioner) contends that RRAL is charging departing passengers for the use of its existing airport facilities, and as such the development levy is consideration for the supply of services, and the use to which RRAL puts the funds that are gathered is not relevant.

The charge

Arrangements with passengers

[3] Departing passengers at the airport are required to make payment of the development levy at a specific counter in the airport and are given an adhesive ticket to attach to their boarding pass. Upon leaving the terminal to board their aircraft, the boarding pass is checked for the ticket to ensure that the charge has been paid. The departing passenger is then permitted to leave the terminal and board the aircraft.

[4] To ensure that the development levy is paid, a sign located in the main airport area and beside the place where the charge must be paid states:

> Airport Development Levy
>
> $5
>
> All passengers departing Rotorua Airport are required to pay a development levy of $5.

[5] A second sign, hanging beneath a sign indicating where departure gates 1-4 are located, states:

> Passengers please note: Prior to boarding, all departing passengers are required to purchase an airport development levy ticket.

[6] A sign above the counter where the levy is paid states:

> The funds generated by the airport development levy are applied to the construction of new facilities at Rotorua Regional Airport.

[7] The Air New Zealand Conditions of Carriage also alert passengers to their responsibility to pay any charges imposed by the airport operator.

Reason for levy

[8] The reason for the development levy is summarised in RRAL's application for a binding ruling from the Commissioner (see below [25]):

> Over an extended period of time, it had become apparent to RRAL that significant development of airport assets was required in order for RRAL to service the Rotorua community and tourism industry effectively. Significant developments were required in order to facilitate the continued growth in the region's tourism industry, and to stem the reduction in passenger numbers by allowing for the introduction of domestic jet and international services.
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> …
>
> Due to the level of development required, and the significant costs involved …, RRAL was unable to service the developments from existing funds. RRAL did not have the required equity or financial resources to secure the required development loan from a commercial lender.
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> …
>
> As a result of the unique shareholding structure in place at the time that consultation and planning began, i.e. 50% [Council] ownership and 50% private shareholding, RRAL was severely limited in its choice of funding options. … In order to mitigate this, and for the above stated reasons, [the Council] embarked on acquiring 100% ownership of RRAL. Upon the completion of this process, [the Council] made a $1.5 million equity contribution to RRAL. [The Council] also made a loan facility of $3.5 million available to RRAL, on full commercial terms. This loan facility was later increased to $4.5 million, and again to $15 million, with funds only drawn down as and when required to fund development projects.
>
> As RRAL did not have the financial capability or the required equity to service the development loan from [the Council], a user-funded component

> was essential in order for the project to be completed. As such, the development levy was introduced, effective 1 October 2002.

[9] From 1990 to 30 June 2005 RRAL owned, operated and maintained the Rotorua airport and all of the airport assets. From 2002 RRAL has been wholly owned by the Rotorua District Court (the Council). In 2005 RRAL sold the airport's infrastructure assets to the Council, which in turn leased these back to RRAL on a long term basis. These arrangements enabled further capital development of the airport without the need for RRAL to borrow further funds for such capital development.

[10] Clause 3 of the lease between the Council and RRAL requires RRAL to pay a monthly rent as well as "an amount equal to the Nett Airport Development Levy plus GST" collected by RRAL in respect of each preceding calendar month. The "Nett Airport Development Levy" is defined in clause 1.1 to mean "the Airport Development Levy less any reasonable costs [not exceeding 20%] incurred by the Lessee on the collection of the Levy from departing passengers [and the accounting for same to the Lessor]". The "Airport Development Levy" is defined as the development levy charged by RRAL under s 4A of the Airport Authorities Act 1966.

[11] Clause 6 deals with the development levy, including as follows:

> 6.2 The parties further acknowledge that the purpose of [RRAL] in continuing to charge the Airport Development Levy is to raise funds to assist the development of [the Council's] Infrastructure Assets by incorporating within [RRAL's] rental payment obligation an amount equal to the Nett Airport Development Levy collected by [RRAL]. Notwithstanding that [the Council] is now the owner of such Assets, the parties acknowledge that only [RRAL] (in its capacity as an airport company as defined in the Airport Authorities Act 1966) has the legal power under the Act to charge the Airport Development Levy.
>
> 6.3 [The Council] agrees to separately account for that portion of the Initial Rent and Annual Rent that it receives from [RRAL] equal to the amount of the Nett Airport Development Levy sum included in such rental payments and to apply such amounts towards further development of the Airport and/or payment of interest and/or repayments of principal in respect of borrowings raised to fund the development of the Airport.

[12] Thus it was agreed that the Council would undertake development activities in relation to the airport infrastructure assets and that, in consideration for such an

undertaking, RRAL would pay the Nett Airport Development Levy (being the development levy less costs of collection) to the Council. The Council would use the Nett Airport Development Levy to effect the further development, including by using the funds to discharge borrowing obligations for such development.

Use of funds from levy

[13] RRAL banks the development levy into a special purpose, interest bearing bank account. RRAL retains twenty percent of each levy to cover the costs of collection. As to the remainder, at the start of each financial year (1 July) RRAL estimates the development levies it will collect for the year and advises the Council. The Council then bills RRAL monthly for one twelfth of that estimated amount, which RRAL pays from its general account. At year end the estimate for the year is matched to actual receipts of the development levy, the Council is advised and it submits a bill for the correct equalised amount for the final month of the year. Transfers are made from the special savings account into which the development levies are paid to RRAL's other accounts to cover the payments of the Nett Airport Development Levy to the Council and the costs of collection.

[14] Mr Guerin, the Chief Executive of the Council, confirms that the Council does not use the Nett Airport Development Levy funds for paying for any operational expenses of or at the airport but rather to pay for development work. He says that the Council has committed to expanding the airport to facilitate trans-Tasman flights as part of its investment in core tourism and event infrastructure. He says that the airport's long term future depends on its capability to accommodate larger jet aircraft. To compete for and secure opportunities to establish trans-Tasman services, the airport infrastructure (runway, taxiway, apron, terminal building, internal roading and parking) requires significant upgrading and development. Work in progress includes the lengthening of the runway.

Airport Authorities Act

[15] RRAL is an airport authority for the purposes of the Airport Authorities Act 1966. The development levy has been charged under s 4A of the Airport Authorities Act. That s 4A provides, as relevant:

4A Charges

(1) Subject to section 4B, every airport company may, notwithstanding the provision of any regulations in force under section 38 or section 100 of the Civil Aviation Act 1990, set such charges as it from time to time thinks fit for the use of the airport operated or managed by it, or the services or facilities associated therewith.

(2) Any charges set under this section may be charged to persons or classes of persons owning or operating aircraft, or to persons or classes of persons using or otherwise enjoying the benefit of the airport, services, or facilities, or to any other persons.

[16] Under s 2, a charge "includes a fee or due and also includes rent payable under any lease".

[17] As to an airport authority's power to improve and maintain airport facilities, s 4(1) of the Airport Authorities Act provides:

4 Additional powers of airport authorities

(1) In the exercise of its powers under section 3, and any other powers which it has, any airport authority may from time to time—

(a) Improve, maintain, operate, or manage an airport, whether or not the airport was established under this Act:

(b) Improve, maintain, operate, or manage an airport which has been added to, improved, or reconstructed by Her Majesty, or by some other authority, body, or person since the establishment of the airport:

(c) Establish, improve, maintain, operate, or manage an airport on any land, whether or not the land is wholly or partly owned by the airport authority:

(d) Improve, add to, alter, or reconstruct any airport or any part of an airport maintained or operated by the airport authority:

(e) Establish, operate, or manage, or cause to be established, operated, or managed at airports, refreshment rooms, book stalls, booking offices, travel agencies, and such other facilities as may be considered necessary:

(f) Enter into and carry out any agreement or arrangement necessary for the exercise of any power or function conferred on the airport authority by this Act.

GST legislation

[18] Under the GST Act a registered person is required to return or pay to the Inland Revenue Department (Inland Revenue) the net difference between GST "output" tax on taxable supplies of goods and services less GST "input" tax on goods and services it acquires in conducting its taxable activities.

[19] Section 8(1) of the GST Act provides for GST to be charged in accordance with the Act, at the rate of 12.5 percent, on the supply of goods and services in New Zealand by registered persons in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

[20] Goods are defined in s 2 as meaning all kinds of personal or real property but not choses in action or money. Services are anything which is not goods or money. The term "supply" is defined in s 5 (as relevant) as meaning all forms of supply.

[21] Section 6(1) of the Goods and Services Act defines "taxable activity" in the following terms:

> (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.

[22] The value of the supply (as referred to in s 8) is to be determined in accordance with the provisions of s 10. As relevant, s 10(2) provides that the value of a supply of goods or services shall be such amount as, with the addition of the tax charged, is equal to the aggregate of the consideration for the supply (if the consideration is in money) or the open market value of that consideration.

[23] Consideration is defined as including "any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the

inducement of, the supply of any goods and services, whether by that person or by any other person" (s 2).

The GST treatment of the development levy

[24] From the inception of the development levy RRAL included the amounts charged under the development levy in calculating its output tax. RRAL says that the development levy was introduced within a "very short time-frame" and no consideration was given to the application of GST. However, RRAL subsequently reconsidered that assumption when the arrangements for the Council to purchase the infrastructure assets were entered into.

[25] As a result, on 20 January 2006, RRAL's accountants sought a binding ruling from the Commissioner under s 91E of the Tax Administration Act 1994 that the development levy was not consideration for a taxable supply of goods or services, and was therefore not subject to GST. Between March 2006 and September 2007 correspondence ensued between RRAL's accountants and Inland Revenue. On 14 December 2006 (confirmed on 30 August 2007) Inland Revenue indicated that, based on the information provided by RRAL, the development levy was considered to be a compulsory charge in consideration for a service relating to RRAL's taxable activity as an airport operator and is therefore subject to GST. It was said:

> Passengers cannot depart from the airport (and proceed to their aircraft) unless the $5 fee is paid. It is, therefore, our view that this development levy is consideration paid for a service (including the right to depart from the airport) with the funds generated from this payment merely being applied to the construction/development of new facilities at Rotorua Airport. It is not simply a charge paid for the construction/development of new facilities at the airport. We consider that there is a direct nexus between the development levy, a supply and RRAL's taxable activity of providing services to air transport. Accordingly, we have reached the view that the development levy is consideration for the supply of goods or services under section 8(1) of the Act, and, therefore, subject to GST.

[26] After some further correspondence between Inland Revenue and RRAL, and in accordance with the procedures followed in binding ruling applications that will be unsuccessful, the application for a ruling was withdrawn by RRAL on 19 November 2007.

Declaration sought

[27] On 17 November 2008 RRAL filed its statement of claim in this proceeding for a declaratory judgment pursuant to s 3 of the Declaratory Judgments Act 1908. The declaration sought is that a payment by a departing passenger of the development levy to RRAL is not consideration for a taxable supply of goods and services by RRAL to the departing passenger, or to any other person, in terms of s 8 of the GST Act.

My assessment of the competing position

[28] The issue is whether the development levy, which is charged under s 4A of the Airport Authorities Act, is consideration for a service supplied. If it is, then GST is payable. If it is not, then GST is not payable.

Scope of s 4A

[29] Part of the submissions before me focussed on the scope of s 4A. The Commissioner submitted that the levy is consideration for a service because RRAL is empowered under s 4A(1) of the Airport Authorities Act only to make a charge for use of facilities and not for the development of new facilities. He says that although the levy may be applied to the development of facilities, it is a charge for passengers' use of the existing facilities (a supply of services). The Commission submits that "for the use of" in s 4A(1) qualifies both the words "the airport operated or managed by it" and the words "the services or facilities associated therewith" in that section. The Commissioner's position is explained in Inland Revenue's letter to RRAL of 22 March 2006:

> The last clause of section 4A(1) of the Airport Authorities Act 1966 refers to "or the services or facilities associated therewith". This clause does not make sense unless read in conjunction with the second-to-last clause of section 4A(1) – "set such charges as it from time to time thinks fit for the use of the airport operated or managed by it". Why is it not possible to read the phrase "…for the use of" (from the second-to-last clause) as applying to the last clause, such that it (the last clause) can be read "<u>for the use of</u> the services or facilities associated therewith", as opposed to merely reading the

> word "for" (from the second-to-last clause) as applying to the last clause? …
>
> Even if merely the word "for" can be read into the last clause of section 4A(1), could it not be argued that charges imposed "for" services/facilities are imposed for the use of those services/facilities (i.e. that this is implicit in the reference to "for" the services/facilities that the charges are "for" the use of those services/facilities), as opposed to being imposed for the cost of providing those services/facilities? This is especially so in light of the fact that there is nothing in section 4A stating explicitly that the charges can be imposed for the cost of providing those services/facilities. (emphasis in original)

[30] The Commissioner considers his interpretation is supported by s 4A(2). He says that the charge is imposed on "persons or classes of persons using or otherwise enjoying the benefit of the airport, services or facilities". The Commissioner contrasts s 4A with s 4. The Commissioner submits that s 4A is relatively confined in application and is not intended to enable airport companies to impose charges to establish, improve, alter, add to, or reconstruct the airport.

[31] In response, RRAL submits that there is a plain and ordinary reading of s 4A(1) and that it is inappropriate to read words in. It says that the Commissioner's construction would require the Court to read the section as follows:

> every airport company may … set such charges as it from time to time thinks fit for the use of the airport operated or managed by it, or [for [the use of]] the services or facilities associated therewith.

[32] RRAL says that it is grammatically incorrect to say that charges are imposed "for the use of services" (rather than "for services").

[33] In its application for a binding ruling, RRAL asserted that the charge was imposed under s 4A(2) on "any other persons". RRAL now accepts that, in terms of s 4A(2), the charge is imposed on a class of persons, being departing passengers "using or otherwise enjoying the benefit of the airport, services, or facilities". However, RRAL submits that s 4A(2) indicates that charges under s 4A(1) may also be charged to persons who are not using the airport such that s 4A(2) cannot properly be used as an interpretation device to limit the scope of s 4A(1).

[34] The meaning of s 4A is to be ascertained from its text and in the light of its purpose. Looking first at the text, s 4A is divided into what may be charged (s 4A(1)) and who may be charged (s 4A(2)). As to what may be charged, in my view, on a plain reading of s 4A(1), "for the use of" does not qualify the last clause so that it is intended to read "for the use of the services or facilities associated" with the airport. If that were intended it would have been clearer for the words "for the use of" to have been repeated in the last clause. As it is, the section reads naturally as permitting charges for the use of the airport and charges for the services or facilities associated with an airport. Nor, in my view, does a plain reading of the section require that those services or facilities be in existence at the time that the charge is imposed. Charges are imposed "for" services or facilities when they are imposed to develop those services or facilities.

[35] As to who may be charged, the phrase "any other persons" in s 4A(2) indicates that charges may be imposed on persons other than those who own or operate aircraft, or who use or otherwise enjoy the benefit of the airport, services, or facilities. This supports a reading of s 4A(1) that permits the imposition of charges other than for the use of the services or facilities.

[36] Turning to the text of s 4A(1) in its context, in my view, the words "operated or managed" are used in s 4A(1) to define the airport in respect of which the airport authority may impose charges ("the airport operated or managed by it"), rather than to limit the power to impose charges to the airport as it then is, and not any improvements or development that may be desired. That an airport authority is empowered by s 4 to improve an airport (as well as to operate and maintain it) supports an interpretation that it can charge for improvements.

[37] The parties did not refer to any other section in the Airport Authorities Act as bearing on the interpretation of s 4A. In correspondence with the Inland Revenue RRAL referred to s 4C. That section imposes consultation obligations on specified (larger) airport companies to consult with their substantial customers in relation to capital expenditure above a stated value. This recognises that capital expenditure may be required and that this may affect its customers. While not directly bearing on whether the s 4A charges may be imposed other than "for the use of" the airport and

associated services and facilities, it is consistent with an interpretation of s 4A(1) that charges may be made for the development of facilities.

[38] The purpose of the Act is stated as being "to consolidate and amend the Local Authorities Empowering (Aviation Encouragement) Act 1929 and its amendments and to confer powers on certain local authorities and other persons in respect of airports". This does not therefore shed any light on the meaning of s 4A.

[39] The Commissioner has referred to an extract from Hansard as supporting its interpretation of s 4A. That extract is from the speech of the Minister introducing the Bill which contained what was to become s 4A. The Commissioner refers to the Minister stating in that speech that airport companies would have "the means to set charges for airport users that reflect the cost of providing the facilities in question" ((3 June 1986) 471 NZPD 1849). However in my view that places too much emphasis on one line from one speech about what was intended.

[40] In that speech the Minister also noted that the basic thrust of the Bill was to reconstitute joint venture airports as airport companies under companies legislation (at 1849). This was to facilitate airports' ability to operate in a more efficient and competitive manner, as well as to enable airport development. The Minister noted that "an airport company may charge fees, levy dues from airport users, borrow money as management thinks fit, and acquire, hold and dispose property as it sees fit" (at 1851). Subsequently, at the second reading of an amending Bill (which also contained what was to become s 4A), the Minister commented that the objective of the Bill was to "protect against the possibility of monopoly pricing by airport companies, and to protect consumers' interests" ((6 March 1997) 558 NZPD 728). The Minister continued:

> In introducing this Bill the Government's intention was to strengthen the requirements for airport companies to consult with their customers before setting prices and to introduce a specific information disclosure regime for monopoly services.

[41] Empowering airport authorities to impose levies on departing passengers for future development of the airport is not inconsistent with enabling airports to operate efficiently and competitively nor protecting consumers' interests.

[42] There is nothing therefore in the context of s 4A which indicates that the words in s 4A should be given other than their plain meaning. Overall, my view is that s 4A permits the imposition of charges on airport users, for services and facilities they are not using, such as facilities yet to be developed.

Is there a service supplied for the levy

[43] Regardless of whether RRAL has the power to charge departing passengers for future facilities, it is necessary to determine whether the development levy is in fact paid for the supply of services.

[44] The Commissioner says that, as a matter of fact, RRAL is supplying services in return for the levy. The Commissioner notes that departing passengers may not board the aircraft unless they have paid the development levy. As such, the Commissioner submits that the development levy is imposed in return for those passengers having physical use of the airport's facilities and the right to depart the airport to board their flight.

[45] The Commissioner refers to departing passengers being given a receipt after paying the charge which must be attached to their boarding pass. He says that this receipt is a "ticket" giving the passengers access to the aircraft. He refers to the sign stating that departing passengers are required to purchase an airport development levy "ticket" and a similar statement on RRAL's website. The Commissioner submits that the word "ticket" carries a connotation of some right to access or use being given to the ticket holder. Reference is made to the Concise Oxford Dictionary definition of "ticket" as "a piece of paper or card giving the holder a right to admission to a place or event or to travel on public transport". Reference is also made to the dictionary definition of, "purchase" as meaning "to buy something" and, the Commissioner submits, assumes reciprocity – money is paid in return for something.

[46] The Commissioner submits that the use of the words "ticket" and "purchase" are inconsistent with RRAL's submission that the charge is only paid for the capital

development of the airport and supports the view that departing passengers are paying the charge in return for services.

[47] The Commissioner submits that the manner in which the funds are applied is irrelevant in determining whether there is a supply of goods or services. RRAL could have instead applied the development levy to fund the airport's ongoing costs in supplying current services and facilities which would free up other funds to pay for future development. The Commissioner says that it therefore does not matter that RRAL chooses to apply the funds received from the development levy directly to the future development of the airport.

[48] RRAL characterises the development levy as akin to a tax, authorised by and arising from the legislation, that it then uses to fund airport developments. It says that it is not a contracted charge on departing passengers for their use of the airport. Rather it is simply a stand-alone levy, for the benefit of future passengers that will use the facilities when developed, that the law permits RRAL to charge. It submits that calling the receipt for the payment a "ticket" and the payment of the levy a "purchase" does not create the supply of a thing by RRAL.

[49] RRAL submits that a person has the right to board and travel on an aircraft from his or her purchase of a plane ticket from the relevant airline. It says that it has no special statute-based authority (in s 4A or otherwise) to prevent a departing passenger who does not pay the development levy from boarding the aircraft. However, via its rights as the owner/lessor of private property, RRAL can (in its discretion) deny such a person access to the runway to board. RRAL says that if it chooses to do this it is simply a means of enforcing the payment of the development levy – it does not mean that the payment is in consideration for the departing passengers' right to use the runway. As to this, the RRAL wrote to the Commissioner (on 27 July 2007) as follows:

> The airport's refusal to allow a departure until the development levy is paid is merely a simple, practical method of ensuring payment of the levy.
>
> The refusal to allow departure is analogous to the lien where a creditor has a possessory right over a debtor's goods as a way to enforce or encourage payment of an amount due under contract. The creditor essentially holds the

> goods to ransom, but has the right to obtain payment of the debt, regardless of the lien and even if it does not hold goods.
>
> Once the debt is paid, the goods are no longer subject to the lien, and must, therefore, be released, but the payment is of the debt … and not the *release* of the goods.

[50] In assessing the competing positions I start with the established propositions as to the scope of s 8(1) (see *Databank Systems Ltd v Commissioner of Inland Revenue* [1989] 1 NZLR 422 (CA) at 431; *Commissioner of Inland Revenue v New Zealand Refining Company Limited* (1997) 18 NZTC 13,187 (CA) at 13,193; *Chatham Islands Enterprise Trust v Commissioner of Inland Revenue* (1999) 19 NZTC 15075 (CA) at 15,079 and 15,081; *Marac Life Assurance Ltd v Commissioner of Inland Revenu*e [1986] 1 NZLR 694 (CA) at 706; and *Commissioner of Inland Revenue v Gulf Harbour Development Ltd* [2005] 2 NZLR 162 (CA) at [16] and [27]):

a) GST is levied in respect of "supplies". It is therefore a tax on transactions rather than receipts or turnover.

b) GST is charged on the supply of a good or service. Whilst services are broadly defined to mean anything which is not goods or money, to be a service there must be a "thing" to be within the statutory word of "anything".

c) Although the consideration need not be paid by the recipient of the services, there must be a nexus between the consideration on which the GST impost will arise and the supply of goods or services.

d) The nomenclature used by the parties is not decisive. Nor are the economic or other consequences. What is crucial is the ascertainment of the legal rights and duties which are actually created by the transaction into which the parties entered.

[51] Applying these principles, it is necessary to look at the legal arrangement between RRAL and departing passengers to determine if consideration is paid for the supply of something. The use of the terms "ticket" and "purchase" is not

determinative of the actual legal nature of the transaction. Similarly, as RRAL accepts, there is nothing magic in the term "levy" because some statutory charges will in fact be for the supply of something.

[52] For example, in *Pacific Trawling Limited & Anor v Chief Executive of the Ministry of Fisheries & Anor* (2005) 22 NZTC 19,204, the statutory requirement to pay for by-catch that was retained by a fisher attracted GST. Another example is the fire service levy component of an insurance contract. Legislation deeming this to be subject to GST was enacted on an "avoidance of doubt" basis. The commentary in relation to the Taxation (Base Maintenance and Miscellaneous Provisions) Bill, which brought in this deeming provision, was as follows:

> An amendment *clarifies* that GST is payable on amounts paid to the New Zealand Fire Service Commission by way of the fire service levy.
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> …
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> The amendment to section 5 of the Goods and Services Tax Act 1985 *confirms* that payment of the fire service levy is consideration for a supply of goods and services by the New Zealand Fire Service Commission.
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> …
>
> *When Parliament gives an entity the right to collect amounts from the public (other than as a fine or interest penalty) in order to fund its activities, GST should apply.* The amendment is consistent with this policy intent and clarifies that the New Zealand Fire Service Commissioner provides goods and services to both the Crown and the general public in consideration for amounts received by way of the fire service levy. (emphasis added)

[53] Because the focus is on the legal relationship between RRAL (as the supplier) and passengers (as the payer of the levy), I agree with the Commissioner that the use to which the funds are in fact put is not relevant. For the same reason I consider that the explanation for the charge in the lease documentation ("to raise funds to assist the development of [the Council's] Infrastructure Assets") and the arrangements between the Council and RRAL as to how RRAL is to account to the Council for the levy are not particularly relevant either.

[54] The legal nature of the relationship is that airport authorities are authorised by statute to charge users of its airport. Departing passengers are users of the airport. They use the airport to gain access to their plane. The facilities for this are supplied

by RRAL. Passengers are required to pay the development levy. If they do not, RRAL can deny them passage to the plane. They can do this because the passengers are on RRAL's premises. The payment of the levy therefore enables departing passengers to access the plane. There is a nexus (or reciprocation) between the payment and the service. It is consideration "in respect of" or "in response to" the supply of services. RRAL having received that consideration for its services can apply it, via the Council, to fund improvements.

[55] I have reviewed the cases the parties have put before me to support their respective positions. I consider that the development levy is not similar to the payments made by the Crown to the refining company in *New Zealand Refining Company* nor to the trust in *Chatham Island Enterprises Trust.* In both of these cases the Crown was contributing funding which assisted or enabled the recipient of the funds to carry out its activities. But the recipients were not supplying services to the Crown and their activities were independent of the Crown's funding commitments (albeit in the latter case subject to the terms of the trust).

[56] Nor is the development levy similar to the administration and maintenance levies paid by the registered proprietors of a time share resort to their body corporate in *Taupo Ika Nui Body Corporate v Commissioner of Inland Revenue* (1997) 18 NZTC 13,147 (HC). There was no element of reciprocity in that case because the body corporate simply collected the funds and passed them on. Here, although it might be said that RRAL simply collects the charge and passes it on (less twenty percent to cover its collection costs) to the Council, it is collecting that charge from passengers to whom it is supplying services.

[57] Although there are some differences, a closer comparison is with *Turakina Maori Girls College Board of Trustees & Ors v Commissioner of Inland Revenue* (1993) 15 NZTC 10,032 (CA). In that case the issue was whether attendance dues, which under the Education Act 1989 were able to be charged to parents or caregivers of enrolled children at integrated schools, were consideration for a taxable supply. The Crown supplied the education, but the taxpayer proprietors had responsibilities in relation to capital works and improvements and other charges associated with the school's land and buildings used in the education of the students. They were also

responsible for determining and maintaining the special character of the school. The Court of Appeal considered that the attendance dues were payments made to secure the enrolment of the pupil in a school for which the proprietors provided the buildings and ensured the special character. The supply of these things was held to be the taxable service.

[58] RRAL for its part acknowledges a "broad and superficial" similarity between the development levy and the dues in *Turakina Maori Girls College Board of Trustees*. RRAL submits, however, that here there is no supply of a good or service by RRAL to which the payment of the development levy relates; it is simply a charge that the legislation permits RRAL to make. I do not agree. RRAL is supplying its facilities, the use of which enables the passenger to board the plane.

[59] In *Case P78* (1992) 14 NZTC 4,523 the issue was whether international airport dues, passenger service charges and quarantine rubbish disposal charges qualified as zero-rated supplies under the GST Act. The focus was on whether the charges were "directly in connection with" overseas travel, in which case they would be zero-rated under the terms of the legislation. The issue of whether the charges were consideration for supplies was not expressly considered. Because the case turned on the meaning of "directly in connection with" and there are some factual differences it does not really assist in this case.

[60] I consider that the cases do not support a different view than that which I have taken of the legal relationship between RRAL and departing passengers in respect of the development levy (refer [54] above). I conclude that the development levy is consideration for a taxable supply of a service in terms of s 8 of the GST Act.

Result

[61] RRAL's application for declaratory relief is declined.

Mallon J

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