

Issues Paper

A Public Rulings Unit discussion document on tax interpretative issues

No. 11: Whether remuneration paid to an employee in cryptocurrency is subject to PAYE or FBT

20 June 2018

**Office of the Chief Tax Counsel
Public Rulings Unit
Inland Revenue**

Issues Paper No 11 – A Public Rulings Unit discussion document

What is a Public Rulings Unit issues paper?

As Inland Revenue's Public Rulings Unit, we develop and publish public statements interpreting current tax laws.

When sufficient uncertainty exists, it helps us to hear from interested parties before we prepare any public statement. An issues paper sets out Inland Revenue's initial views on how the relevant tax laws apply and requests feedback from interested parties. An issues paper is intended to stimulate discussion and allows us to gain a better understanding of the issues, including practical concerns affecting taxpayers.

The matters considered in an issues paper and the feedback received about it may form the basis of a future public statement. A draft public statement would be issued for public consultation in the usual manner.

What is the status of issues papers?

Issues papers from the Public Rulings Unit represent Inland Revenue's initial views only.

Taxation officers, taxpayers or practitioners may not rely on issues papers. Only finalised public statements represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

How can you help?

Let us know what you think by 3 August 2018

We want to know what you think about our initial views presented in this issues paper.

Generally, we want to know:

- whether you think the initial interpretation of the relevant tax law is correct
- whether you have practical concerns about the interpretation
- whether you think the result is correct from a tax policy perspective or whether the tax law needs changing
- your ideas on how to administer the tax laws.

Specific questions also appear in the body of this issues paper.

Email your feedback to Public.Consultation@ird.govt.nz by 3 August 2018, quoting reference **IRRUIP 11**.

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1. Introduction

- 1.1 The use of cryptocurrencies and the blockchain technology that underlies them is becoming increasingly common. As a result, Inland Revenue is being asked to clarify the tax treatment of various types of cryptocurrency transactions and arrangements.
- 1.2 Cryptocurrencies have no special tax rules. Therefore, it is necessary to apply existing legislation. As the technology is both novel and rapidly evolving, this application can be difficult. Inland Revenue is working on advice for applying the law to cryptocurrency. As part of that work, we are also considering whether the current law taxes cryptocurrency transactions appropriately.
- 1.3 Some of our initial advice is on our website.¹ As the Public Rulings Unit, we are considering various issues where the application of the current law is less certain. This issues paper discusses one such issue: whether remuneration paid to an employee in cryptocurrency is subject to pay as you earn (PAYE) or fringe benefit tax (FBT). It is intended that further issues papers or draft public statements will be issued for consultation in due course.
- 1.4 All legislative references in this issues paper are to the Income Tax Act 2007 unless otherwise stated.

Purpose of this issues paper

- 1.5 It is becoming more common for employees (particularly those working in cryptocurrency-related industries) to receive regular remuneration in cryptocurrency. Inland Revenue has been asked whether cryptocurrency paid in those circumstances is taxable to the employee (PAYE) or payable by the employer (FBT).
- 1.6 The answer is not clear. Therefore, this issues paper seeks your feedback on Inland Revenue's initial views on how the tax laws apply. We are also interested in hearing how employers are currently treating these payments. As cryptocurrency is relatively new technology, we are also interested in feedback on how (from a policy perspective) these payments should be treated.

Scope of this issues paper

- 1.7 The analysis in this issues paper considers salary and wage earners, not self-employed taxpayers.
- 1.8 The paper also focuses on the situation where the employee is regularly receiving part of their remuneration in cryptocurrency (not one-off situations or

¹ Inland Revenue, *Cryptocurrency and Tax* (Inland Revenue, 2018, www.ird.govt.nz/campaigns/2018/cryptocurrency-tax.html (accessed June 2018)).

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where bonuses may be provided in cryptocurrency). However, similar considerations may apply to bonuses.

- 1.9 The analysis assumes the cryptocurrency being provided is readily convertible and not subject to any “lock-up” conditions where the employee is unable to access it for a period. Different considerations may apply in these situations.

Summary of what we think – remuneration in cryptocurrency will be subject to PAYE

- 1.10 Our initial view is that, where an employee is paid part of their regular remuneration in cryptocurrency, this will be subject to PAYE. As such the FBT rules will not apply.
- 1.11 In summary, the main reasons for this view are:
- There are two ways in which an agreement to pay an employee in cryptocurrency could be structured. The first way is as an agreed deduction from the employee’s gross salary or wages. In this case, the employee has derived the full amount of their salary or wage before the agreed deduction. Therefore, the full salary or wage is subject to PAYE.
 - The second way is as a reduction in calculating the employee’s gross salary or wages (also known as a “salary sacrifice”).
 - For a valid salary sacrifice, the employee must have no right under the employment contract to receive the relevant part of the salary in money instead of cryptocurrency.
 - To be taxable to the employee in this circumstance, the payment in cryptocurrency must be “salary or wages”. It is not clear whether the ordinary meanings of “salary” and “wages” are wide enough to include such payments.
 - Usually salary and wages are payments made in money. However, s 6 of the Interpretation Act 1999 requires legislation to be interpreted in light of modern circumstances. Given this, our tentative view is that regular remuneration paid in cryptocurrency can be considered salary or wages. Therefore, the PAYE rules will apply.
- 1.12 FBT does not apply where an amount is subject to PAYE.

Questions for discussion

This issues paper presents Inland Revenue's initial views only.

Let us know what you think. Your feedback may be about our initial interpretation, practical concerns, the policy outcome or how to administer the tax laws.

In particular, we welcome your feedback on the following questions:

- Does regular remuneration paid to an employee in cryptocurrency fit within the ordinary meaning of salary and wages?
- From a policy perspective, how should regular remuneration paid in cryptocurrency be taxed?
- How are employers treating these payments?
- What compliance difficulties might arise if payments in cryptocurrency were subject to PAYE or FBT?

2. Issues

- 2.1 An agreement to pay an employee in cryptocurrency could be structured in two ways. The first way is as an agreed deduction from the employee's gross salary or wages (where the employee's after-tax remuneration is, in effect, being traded for a payment of cryptocurrency). It is well settled law that the employee is subject to PAYE on the full amount in this situation.
- 2.2 The second way is as a reduction in calculating the employee's gross salary or wages (also known as a salary sacrifice).
- 2.3 Issue 1 (see section 3) considers:
- when a salary sacrifice arrangement will be valid; and
 - how the provision of cryptocurrency will be treated when a salary sacrifice arrangement is not valid.
- 2.4 Issue 2 (see section 4) considers whether cryptocurrency received under a valid salary sacrifice arrangement is subject to PAYE or FBT.

3. Issue 1 – salary sacrifice arrangements

- 3.1 Where a taxpayer is provided with a benefit as part of their remuneration package, it is first necessary to consider the contractual relationship between the employer and the employee. This is the case for both cryptocurrency and other types of benefits.
- 3.2 Where there is no valid salary sacrifice (that is, the benefit is provided as an agreed deduction from the employee's gross salary or wages), then PAYE will be payable.
- 3.3 The following analysis sets out how to determine when an arrangement is a valid salary sacrifice agreement.

What we think – how to determine whether a salary sacrifice is valid

- 3.4 The leading case on salary sacrifice arrangements is the House of Lords decision in *Heaton v Bell* [1970] AC 728. *Heaton* concerned an arrangement where an employee could enjoy the use of a car provided by the employer if they accepted "an amended wage base" consisting of a "weekly wage reduction". The majority of the House of Lords held that the sums payable by the employee under the scheme were an agreed deduction from the employee's net wage rather than a reduction in calculating the gross wage. Therefore, the sums payable were part of the employee's remuneration and taxable to the employee. This was not a salary sacrifice arrangement.
- 3.5 Determining whether an employee has entered into an effective salary sacrifice arrangement involves a consideration of the true nature of the agreement between the employer and the employee. Lord Morris described this as follows (at 747-748):

It is necessary, in the first place, to decide as to the true interpretation of the agreement subsisting at the relevant time between the taxpayer and his employers. When he joined the car loan scheme did he vary his terms of employment by agreeing to accept a reduced wage or did he agree that from his wage there would be deducted such sum as represented the sum payable to him in respect of his hiring of a car. ... The quest must be to find the realities of the arrangements that were agreed.

- 3.6 Lord Morris went on to conclude (at 750):

In my view, there can be no doubt that the Respondent obtained from his employers the right to use a car on terms which involved that he should pay to them whatever was from time to time an appropriate hire charge. As a matter of convenience, he agreed that his payment was to be set off or deducted week by week from the amount which by his labour he had earned and which his employers therefore owed him. To dress that up as a wage reduction seems to me to be fanciful. The terms and conditions relating to the method of computing the taxpayer's earnings were in no way changed.

- 3.7 Similarly, Lord Upjohn stated (at 760):

In my opinion, and with all respect to the judgments in the Courts below, I think it is clear that the legal result of the transaction between the parties was that the

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Respondent was agreeing to a retention or deduction or, if you like, a reduction from the wages earned by him, and clearly due to him in cash, for the pleasure of have a motor car supplied to him for his personal use on very advantageous terms.

...

But having ascertained the real nature of the transaction one cannot, in my opinion, disguise it by using camouflaged clothing. Here the whole essence of the employment of the taxpayer was as a machine minder at a weekly wage. If he so wished he could have part of his wages applied in providing for his own personal use, quite unconnected with the affairs of the employers, a motor car ... Dress that up how you will, I hope a court would not be deceived by the disguise.

3.8 And Lord Diplock stated (at 763):

In my view, the overwhelming inference is that the true agreement between him and the company was that the wages constituting the consideration for his services under his contract of employment should remain unchanged but that the company should be entitled each week to recoup themselves out of his wages, but not from any other source, the amount of his liability to them under his collateral agreement for the hire of the car. This inference is not, in my view, weakened by the fact that this debit against the wages credited to him was made before arriving at a figure described as 'taxable gross wage' and that the amount subsequently deducted for P.A.Y.E. is calculated on this latter figure. Whether or not both parties thought that Mr. Bell could escape liability for income tax upon the amount debited against his wages is nihil ad rem aut regem. What this appeal is about is whether they were right in so thinking. In my view, they were not.

3.9 A similar conclusion was reached in the Canadian case *Watts v MNR* 61 DTC 592. In *Watts*, an employee contracted for the payment of a monthly sum by her employer directly to her housekeeper and baby-sitter. The judge held that the amount the employer paid to the housekeeper was assessable to the employee as being "made pursuant to the direction of" the employee, so was taxable to the employee.

3.10 *Heaton* was distinguished in *Co-operative Insurance Society Ltd v Commissioners of Customs and Excise* (1992) VATTR 44. In that case employees had the choice to enter into a scheme whereby their employer provided them with a car. Those employees who entered into the scheme signed type B contracts, which provided for a lesser salary than the employee would be entitled to under the type A contracts, as well as the provision of the car. An existing employee who chose to change from a type A to a type B contract signed an agreement amending the terms and conditions of their employment contract.

3.11 The issue was whether the salary foregone was "consideration" in money for the use of the car. The Value Added Tax Tribunal stated (at 58):

in our judgment the fact that the employee could have obtained a higher salary by entering into or remaining subject to a different contract of employment under which he would not have been provided with a car is immaterial. In our judgment, except in relation to the mileage charges, a Type B contract is not a *Heaton v Bell* case, where the employee pays for the use of his employer's goods by deduction from his gross salary, but it is a *Goodfellow* case, where the use of the employer's goods is taken into account in fixing the employee's gross salary, and the salary remains the same whether or not the employee uses the goods. In our judgment the distinction between the two cases is real, substantial, clear and sound.

3.12 A similar issue was considered in *Goodfellow v The Commissioners* (1986) VATTR 119. That case involved an employer (an hotelier) who provided certain employees with accommodation and/or meals. Each employee could elect

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whether to receive accommodation or meals and their wages were set according to their choice. The issue was whether the employees gave any monetary consideration for the accommodation and meals provided to them.

- 3.13 The remuneration provided in the employment agreements was calculated in accordance with the Wages (Licensed Residential Establishment and Licensed Restaurant) Orders 1981 and 1982. The Orders set out the minimum rates of pay for workers where full board and lodging or meals at work are not made available. Paragraphs 4 and 5 of each order also set out the minimum rates of pay for workers where full board and lodging or meals at work were provided.
- 3.14 The tribunal found that the remuneration in the employee's contract was set subsequent to (and in light of) the allowed reductions for board and meals. Therefore, the remuneration foregone was not consideration for the provision of accommodation or meals. The tribunal stated (at 124):

In our opinion, the question for our determination is whether those employees of the Appellants to whom full board and lodging or meals were provided gave any consideration in money for the goods and services so provided. **We regard that question as one of fact to be decided having regard to the contracts of employments entered into between the Appellants and the employees.** We accept both on that aspect and generally on all other aspects the evidence given by Mr Goodfellow at the hearing of this appeal. Accordingly we hold that, when an applicant for employment by the Appellants had indicated whether or not he wished to be provided with full board and lodging or meals or neither, he was told that his weekly wages or remuneration would be the appropriate amount calculated on such basis in accordance with the provisions of the Order under the Wages Councils Act 1979.... The calculations accordingly involved additions to, and subtractions from, the basic minimum wages under paragraph 4 of the Order. **But to our mind, such additions and subtractions were steps in the calculation of the amount of the weekly wages or remuneration reached at the end of the exercise.** [Emphasis added]

- 3.15 And (at 125):

In our opinion, it follows from the foregoing findings of fact that it was not agreed between the Appellants and their employees that full board and lodging or meals would be provided in consideration of the reductions in their weekly wages or remuneration... Therefore we take the view that the reductions permitted by paragraph 5 of the Order for the time being in force are not to be regarded as the consideration for the supplies of the goods or services involved in the provision of full board and lodgings or meals by the Appellants.

What we think – without a valid salary sacrifice arrangement, PAYE will be payable on the full salary

- 3.16 These cases show that it is necessary to carefully consider the employee's employment agreement to determine whether a valid salary sacrifice has been entered into. In the context being considered here, for a valid salary sacrifice, the employee must have no right under their employment contract to receive the relevant part of their salary in money instead of cryptocurrency. An agreement that provides for a deduction made against the gross salary of the employee before it is credited is not sufficient to constitute the required salary reduction. In the absence of a valid salary sacrifice arrangement, PAYE will be payable on the full salary.

4. Issue 2 – whether cryptocurrency received under a valid salary sacrifice is subject to PAYE or FBT

- 4.1 Assuming that a valid salary sacrifice has been entered into, it is necessary to consider whether the cryptocurrency received is subject to PAYE or FBT.
- 4.2 The first step is to consider whether the payment is subject to PAYE. This is because, to the extent that an employment-related benefit is taxable to an employee, it will not be a fringe benefit (s CX 4). Therefore, if the provision of cryptocurrency to an employee falls within the PAYE rules, PAYE will apply even if the FBT rules would also otherwise apply.
- 4.3 Broadly speaking, following the introduction of FBT, payments in money are subject to PAYE and non-monetary benefits are subject to FBT. However, there are exceptions. Consequently, it is still necessary to consider whether a non-monetary payment (such as cryptocurrency) is assessable income.

What we think – whether the payment is subject to PAYE

- 4.4 Section CE 1 sets out the “amounts” that are treated as employment income. Relevantly, these include “salary”, “wages,” “allowances” and “any other benefit in money”:

CE 1 Amounts derived in connection with employment

Income

- (1) The following amounts derived by a person in connection with their employment or service are income of the person:
- (a) **salary or wages or an allowance, bonus, extra pay, or gratuity:**
 - (b) expenditure on account of an employee that is expenditure on account of the person:
 - (bb) the value of accommodation referred to in sections CE 1B to CE 1E:
 - (c) *[Repealed]*
 - (d) a benefit received under a share purchase agreement:
 - (e) directors’ fees:
 - (f) compensation for loss of employment or service:
 - (g) any other benefit in money.

[Emphasis added]

- 4.5 The situation being considered is an employee receiving part of their regular remuneration in cryptocurrency. Therefore, the potentially relevant part of s CE 1 is “salary or wages”.²
- 4.6 It could be argued that the reference in paragraph (g) to “any other benefit in money” supports the view that the paragraphs that come before it were

² Inland Revenue’s view is that cryptocurrency is not “money” (see [4.13] for further discussion of this). Therefore, s CE 1(1)(g) is not relevant in this case.

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intended to be limited to benefits in money. However, the fact s CE 1(1) includes benefits that are not in money (for example, the value of employer-provided accommodation) tends to suggest that this is not the case.

4.7 Also, “amount” “includes an amount in money’s worth” (s YA 1). Therefore, s CE 1 is drafted widely enough to include amounts derived that are “money’s worth” (but not money). However, for cryptocurrency (which is money’s worth) to be included, it must also be “salary or wages”.

4.8 “Salary or wages” is defined in s RD 5:

RD 5 Salary or wages

Meaning

(1) Salary or wages—

(a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and

(b) includes—

(i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; and

....

4.9 Neither “salary” nor “wages” is further defined in the Act, so it is necessary to consider their ordinary meanings.

4.10 “Salary” is relevantly defined in the *Concise Oxford English Dictionary* (Oxford University Press, 12th ed, 2011) as:

a fixed regular payment made usually on a monthly basis by an employer to an employee, especially a professional or white-collar worker.

4.11 “Wage” is similarly defined as:

a fixed regular payment for work, typically paid on a daily or weekly basis.

4.12 *Deputy Commissioner of Taxation v Applied Design Development Pty Ltd (in liq)* 2002 ATC 4,193 considered the ordinary meaning of “salary” and “wage”. Mansfield J defined the terms in the following way (at 4,195):

Of particular importance in the present application is the absence of statutory definitions of the words “salary” or “wage”. In the absence of statutory definitions, meaning should be given to those words according to the ordinary meaning conveyed by the text of the provision, and taking into account their context in the legislative scheme and the objects of the Act. The words “salary” and “wage” denote an amount of money payable, the consideration for which is the performance of work or services. That meaning is reflected in the definitions provided for the terms in the Oxford English Dictionary, 2nd ed:

Salary: fixed payment made periodically to a person as compensation for regular work.

Wage: a payment to a person for services rendered.

I adopt those definitions in the determination of these proceedings.

4.13 The hallmarks of salary and wages were also discussed in a case on the meaning of “allowance”. In *Stagg v IRC* [1959] NZLR 1252 the Supreme Court referred to the ordinary meaning of an allowance as “sums of money”. The provision in question read:

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All salaries, wages or allowances (whether in cash or otherwise) including all sums received or receivable by way of bonus, gratuity, extra salary, or emolument of any kind, in respect of or in relation to the employment of the taxpayer.

- 4.14 Hutchison ACJ held that the normal meaning of “allowances” was coloured by the words “salary” and “wages” and was to be read consistently with, or in light of, those words. His Honour considered that the characteristics of salaries that have bearing on the meaning of “allowances” were that they are:
- in relation to an employment or service;
 - payable under the contract of service and not as a gratuity (although this factor was affected by the later part of the paragraph that included some gratuities within “salaries, wages, or allowances”);
 - paid in money (although this factor was affected by the words “whether in cash or otherwise”, which meant non-cash allowances could be paid as long as they were convertible); and
 - paid periodically.
- 4.15 In summary, this suggests salary and wages are generally considered to be regular payments of money to an employee in return for work undertaken. Where an employee has agreed to receive part of their regular remuneration in the form of cryptocurrency, then most of these requirements would be met. The payments would be regular amounts received in return for work undertaken. Cryptocurrency can have many of the characteristics of money; for example, the types of cryptocurrencies we are considering here are readily transferable mediums of exchange, divisible, fungible, durable and hard to counterfeit.
- 4.16 However, cryptocurrency is not “money” as commonly understood (at least not at the present time). In particular, because cryptocurrency is not issued by any government, it is not legal tender anywhere. Further, although acceptance of certain cryptocurrencies as payment for goods and services is increasing, it is not “generally accepted” as payment. Given the extreme volatility experienced to date, there are also issues around cryptocurrency’s ability to be a store of value.
- 4.17 Notwithstanding that cryptocurrency is not “money” in the technical sense, it remains to be considered whether the terms “salary” and “wages” in s CE 1 are wide enough to include payments in cryptocurrency. Clearly, at the time “salary” and “wages” were first referred to in the Income Tax Act, Parliament would not have contemplated payments of cryptocurrency being within the scope of salary and wages as cryptocurrency did not exist.
- 4.18 However, s 6 of the Interpretation Act 1999³ provides for an ambulatory approach to statutory interpretation:
- an enactment applies to circumstances as they arise.
- 4.19 This requires old legislation to be interpreted as applying to modern circumstances, that is, the:⁴

³ Section 6 replaced s 5(d) of the Acts Interpretation Act 1924.

⁴ J Burrows and J Fogerty (presenters) “Statutory Interpretation” (New Zealand Law Society seminar, 2011).

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- new developments to which the Act is to be applied are within the mischief that the Act was meant to cure; and
- words of the Act, albeit by liberal interpretation, are capable of covering these new developments.

4.20 Or, put another way:⁵

The Court's task in deciding such cases is to remain faithful to the original Parliamentary intent, yet to produce a result that is workable in the different world of today.

4.21 This interpretive approach has been used where technological developments or changes in the way society views something have made old legislation outdated. For example, in *R v Walsh* [2007] 1 NZLR 738, the Court of Appeal applied s 6 of the Interpretation Act 1999 to interpret the meaning of "false document" taking into account the digital age.⁶ In *R v Misic* [2001] 3 NZLR 1 the Court of Appeal held that a computer program and disk were documents for the purposes of s 229A of the Crimes Act 1961.

4.22 Originally, the concept of salary and wages would have been limited to payments in physical notes and coins. Later on, payment may have been made by cheque. Now payment is likely to be made by direct credit to an employee's bank account. As such the concept of salary and wages has shifted over time with different payment methods. Cryptocurrency and the blockchain on which it is based have been around since 2009. Cryptocurrency has become more widely used in recent times. The question is whether the ordinary meanings of "salary" and "wages" are now wide enough to encompass payments in cryptocurrency.

What we think – whether the payment is subject to FBT

4.23 The alternative argument is "salary" and "wages" should be interpreted narrowly and, consequently, PAYE will not apply. If a payment of cryptocurrency is not subject to PAYE, it will be subject to FBT. Section CX 2 defines "fringe benefit":

CX 2 Meaning of fringe benefit

Meaning

- (1) A fringe benefit is a benefit that—
- is provided by an employer to an employee in connection with their employment; and
 - either—
 - arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or
 - is an unclassified benefit; and
 - is not a benefit excluded from being a fringe benefit by any provision of this subpart.

⁵ Bigwood, R (ed) *The Statute Making and Meaning* (LexisNexis, 2004).

⁶ The Supreme Court (*R v Walsh* [2007] 2 NZLR 109) later held that such an interpretation was not necessary

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- 4.24 In the situation being considered, a payment of remuneration in cryptocurrency is a “benefit”, and it is provided by an employer in connection with their employee’s employment. Cryptocurrency is not specifically provided for in the FBT legislation. Therefore, it would be an “unclassified benefit” under s CX 37 (being a benefit not referred to in any of ss CX 6 to CX 16). Lastly, no provision in subpart CX would exclude a payment of cryptocurrency from being a fringe benefit in the situation being considered.
- 4.25 As noted above, s CX 4 provides that, to the extent to which a benefit in connection with employment is assessable income, it will not be a fringe benefit. Therefore, FBT will apply only if PAYE does not.
- 4.26 The primary argument for FBT applying is that the scheme of the Income Tax Act suggests that payments in money are subject to PAYE and non-monetary payments are subject to FBT (except where specifically provided for).
- 4.27 As seen above, the FBT rules are widely drafted to include any type of benefit whether specifically referenced or not (subject to some specific exclusions).
- 4.28 The PAYE rules apply to “PAYE income payments”, which for employees is defined as a payment of “salary or wages” or an “extra pay”. “Salary or wages” is defined in s RD 5. Most of the items listed are payments that would generally be expected to be made in money. These include salary, wages, allowances, bonuses, commissions, gratuities, and various benefit, grant and compensation payments. However, employer-provided accommodation under s CE 1(1)(bb) is also expressly included.
- 4.29 Similarly, “extra pay” is defined in relation to payments that would generally be made in money. However, it also includes a benefit under certain share purchase agreements.
- 4.30 It can be seen from this that the Act broadly distinguishes between monetary and non-monetary payments to employees with the former being subject to PAYE and the latter to FBT. The reference in s CE 1(1)(g) to “any other benefit in money” is also consistent with this. However, this distinction is not absolute with some non-monetary benefits being included in the PAYE rules. It is less clear whether non-monetary benefits that are not expressly included could also be subject to PAYE. Section RD 6 seems to contemplate this possibility. It provides timing and valuation rules for non-monetary benefits. Relevantly, it applies to:

RD 6 Certain benefits and payments

When this section applies

- (1) This section applies when an employee receives—
- (a) a benefit treated as income under section CE 1(1)(bb) (Amounts derived in connection with employment); or
 - (b) another benefit in kind that is included in their salary or wages; or**
 - (c) 1 or more of the following payments:
 - (i) a superannuation payment:
 - (ii) a pension:
 - (iii) a retiring or other allowance:
 - (iv) an annuity; or

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- (d) a benefit under section CE 2(2) and (4) (Value and timing of benefits under share purchase agreements) in relation to which the employer has made an election under section RD 7B.

[Emphasis added]

- 4.31 As well as including the specific non-monetary benefits (employer provided accommodation and benefits under share purchase schemes) s RD 6 also provides for other benefits in kind that are included in an employee's salary or wages. This suggests there may be other situations where non-monetary benefits are included in an employee's salary and wages for PAYE purposes. However, it is not clear when this will be the case.
- 4.32 The original predecessor to s RD 6 (s 9 of the Income Tax Assessment Act 1957) was introduced at the same time as the PAYE rules. The wording of the original subsection was:

9 Benefits and superannuation and other payments deemed to be salary and wages—

- (1) Where in respect of his employment an employee receives a benefit referred to in section eighty-nine of the principal Act⁷, **or any other benefit in kind which is included in his salary or wages**, or receives a payment by way of superannuation, pension, retiring allowance, or other allowance, or annuity which is included in salary or wages as defined in section two of this Act, the value of the benefit (whether in money or otherwise) or, as the case may be, the amount of the payment shall be deemed to accrue from day to day, and accordingly in each case the amount so accrued for any days in a pay period of the employee shall be deemed to be his salary or wages for the pay period, or, as the case may be, part of his salary or wages for the pay period. [Footnote and emphasis added]

"Salary or wages" was relevantly defined as meaning "salary, wages, or allowances (whether in cash or otherwise)". Consistent with the current legislation, the value of accommodation was also included in the definition. The wording has remained broadly similar through to the Income Tax Act 2007.

- 4.33 There is limited contemporaneous material discussing what "other benefits in kind" s 9 of the Income Tax Assessment Act 1957 was intended to cover. During the second reading of the Income Tax Assessment Bill 1957, Hon. Mr Watts explained clause 9 of the Bill as follows (8 October 1958 314 NZPD 2,894):

Under clause 9 any benefits in kind, for example, the value of a free house, or free meat, or other benefits of that type, are to be taxed at the end of each pay period. If the employee is paid weekly he will also pay on the value of his benefits for the week. Where superannuation is paid and is treated as salary and wages it will be deemed to have accrued from day to day over the period for which it is paid.

- 4.34 Many of the taxable benefits that would have been subject to PAYE when s 9 of the Income Tax Assessment Act 1957 was enacted will now be subject to PAYE. However, the fact s RD 6(1)(b) is included in the current legislation suggests some non-monetary benefits (other than those specifically mentioned in other paragraphs of s RD 6(1)) may come within the definition of "salary or wages".

⁷ Section 89 of the Land and Income Tax Act 1954 included in "assessable income" the value of any employer-provided board, lodging and house allowances.

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- 4.35 The fact a hard and fast distinction between monetary and non-monetary benefits was not intended is implicit in the Hansard discussion ((18 December 1984) 460 NZPD 2,723) from the first reading of the Income Tax Amendment Bill (No 2) 1985 (which introduced FBT):

The final category of benefit to be taxed [after company cars, employer provided transport and low interest loans] includes all other fringe benefits, subject to an exemption for certain types of benefit. That category covers all free, subsidised, or discounted goods and services that are provided to an employee by reason of his or her employment. **The specific exemptions cover a range of benefits that under existing law are taxable to the employee** or are exempt for income tax purposes or would be exempt if provided by the employer in cash. [Emphasis added]

- 4.36 This can be compared with, for example, the Australian legislation where the distinction between monetary and non-monetary benefits is a lot clearer. The Australian Tax Office has issued Tax Determination TD 2014/28, which provides that the provision of bitcoin to an employee is a "property fringe benefit" and subject to FBT⁸. Under the Australian legislation, "non-cash benefits" (being property or services in any form except money) are excluded from being salary or wages. Therefore, the payment of remuneration in cryptocurrency (which is property, but not money) will be subject to FBT not the Australian equivalent of PAYE.
- 4.37 More recently, the Australian Tax Office has added advice on the relevance of salary sacrifice arrangements. Whether cryptocurrency payments are subject to the equivalent of PAYE or FBT depends on whether there has been a valid salary sacrifice:⁹

Paying salary or wages in cryptocurrency

Where an employee has a valid salary sacrifice arrangement with their employer to receive cryptocurrency as remuneration instead of Australian dollars, the payment of the cryptocurrency is a fringe benefit and the employer is subject to the provisions of the Fringe Benefits Tax Assessment Act 1986.

In the absence of a valid salary sacrifice agreement (for example, where the employee requests that salary or wages they have already earned be paid as cryptocurrency instead), the employee is considered to have derived their normal salary or wages and the employer will need to meet their pay as you go obligations on the Australian dollar value of the cryptocurrency it pays to the employee.

Conclusion – remuneration in cryptocurrency will be subject to PAYE

- 4.38 It is unclear on the face of the legislation whether an employee who regularly receives a part of their normal remuneration in cryptocurrency is subject to PAYE or whether FBT applies. Both views are arguable.

⁸ Australian Tax Office, "Tax Determination – Fringe benefits tax: is the provision of bitcoin by an employer to an employee in respect of their employment a property fringe benefit for the purposes of subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*?" (TD 2014/28).

⁹ Australian Tax Office, "Paying salary or wages in cryptocurrency", *Tax Treatment of Cryptocurrencies* (Australian Government, 2018, www.ato.gov.au/general/gen/tax-treatment-of-crypto-currencies-in-australia---specifically-bitcoin/#PayingSalaryorWagesinCryptocurrency (accessed 18 June 2018)).

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- 4.39 Broadly, the scheme of the Act is that consideration in money is subject to PAYE whereas non-monetary benefits are subject to FBT. Cryptocurrency is not money in the technical sense (although it shares some of the characteristics of money). This might suggest that payments in cryptocurrency should be subject to FBT. However, the distinction between monetary and non-monetary payments is not hard and fast. Statutory exceptions make some non-monetary benefits (such as employer-provided accommodation) subject to PAYE. Further, the PAYE rules are drafted widely enough to potentially include some other non-monetary payments.
- 4.40 Ultimately, the issue seems to turn on whether regular payments in cryptocurrency come within the ordinary meaning of salary or wages. The answer to this is not certain. While a regular payment received in cryptocurrency has many of the hallmarks of salary and wages, historically salary and wages have been payments in money. However, s 6 of the Interpretation Act 1999 requires legislation to be interpreted as applying to modern circumstances. While not free from doubt, Inland Revenue's tentative view is that the concepts of "salary" and "wages" are wide enough to encompass regular payments in cryptocurrency. Consequently, our view is that these payments are subject to PAYE.
- 4.41 Because the payments are subject to PAYE, the FBT rules will not apply.
- 4.42 If this conclusion is incorrect and the PAYE rules do not apply, FBT would apply and the cryptocurrency would be treated as an unclassified benefit. In that case, the usual FBT rules relating to calculations, valuations and return periods would apply.

5. Closing comments

- 5.1 The purpose of an issues paper is to stimulate discussion and invite feedback from interested parties. This paper represents Inland Revenue's initial views only.
- 5.2 We are interested in your feedback on the analysis in this issues paper, in particular on:
- whether regular remuneration paid to an employee in cryptocurrency comes within the ordinary meaning of salary and wages.
 - how employers are currently treating these payments
 - any compliance difficulties that taxpayers are facing
 - whether PAYE or FBT treatment is more appropriate from a policy perspective.
- 5.3 As noted above, taxation officers, taxpayers or practitioners may not rely on issues papers. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

Draft items produced by the Office of the Chief Tax Counsel represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form these items may not be relied on by taxation officers, taxpayers, and practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.