INTERPRETATION STATEMENT

Income tax and GST – Treatment of meal expenses

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This statement covers the income tax and GST treatment of meal expenses incurred by self-employed persons. It also discusses the treatment of meal allowances paid to employees to illustrate the differences with the treatment of self-employed persons, and also the treatment of entertainment expenditure for the same reason.

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

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Summary

1. The main focus of this interpretation statement is the deductibility of meal expenses by self-employed persons. But in considering that issue the statement also considers the treatment of employees. In general, self-employed taxpayers cannot deduct meal expenses for income tax purposes. This is because:

   - In a broad sense expenditure on the necessities of life (meals, clothing, shelter etc) could be described as incurred by a person in deriving their assessable income for the purposes of the general permission in s DA 1 (*Hunter v CIR* (1989) 11 NZTC 6,242 at 6,258);
   - However, the Act denies a deduction for an amount of expenditure or loss to the extent to which it is of a private or domestic nature (the "private limitation", s DA 2(2));

- An outgoing is of a private or domestic nature if it is "exclusively referable to living as an individual member of society and domestic expenses are those relating to the household or family unit" (*CIR v Haenga* (1985) 7 NZTC 5,198 at 5,207);
- Food is in the private or domestic category (*Hunter* at page 6,257, *Case E80* (1982) 5 NZTC 59,421); and
- There are limited circumstances where amounts expended on food may be deductible, such as where the requirements of a taxpayer's business imposed extra meal costs because of a remote working location or unusual working hours (*Case F117* (1984) 6 NZTC 60,125, discussed below from [28]).

2. This conclusion means there is a difference between self-employed taxpayers' meal expenses compared to:
   - Employees receiving meal allowances or reimbursements while performing their duties (deductible expenditure to the employer, exempt income of the employee, not subject to FBT); or
   - "Self-employed" persons incorporating a closely-held company and becoming an employee to receive the same treatment as any other employee.

3. These differences reflect the different legal arrangements in existence in these fact situations, and these different arrangements do give rise to significant legal effects. For example, there are differences in terms of personal liability, application of tax regimes (such as dividends, FBT), and so on. There is also a difference with the treatment of entertainment expenditure.

4. In the GST context, where meal expenses are of a private or domestic nature for income tax purposes, and non-deductible, input tax on the expenses cannot be deducted for GST purposes. The main reason for this is that goods and services used for private and domestic purposes are not used for making taxable supplies.

Introduction

5. The principal legislative provisions involved with the income tax issue are the general permission (s DA 1) and the private limitation (s DA 2(2)). For GST, the relevant sections of the Goods and Services Tax Act 1985 ("the GST Act") are ss 20(3) and 20(3C) dealing with the claiming of input tax.

6. For income tax the principal issue is whether a self-employed person's meal expenses are deductible, and if so in what circumstances. This statement will also compare the tax treatment of a self-employed person with the treatment of an employee receiving a

meal allowance and consider the effect of the entertainment expenditure regime on the deductibility of meals.

7. For GST, the principal issue is whether input tax incurred on meals by a self-employed person is deductible, in whole or in part.

Income tax deductibility

8. The deductibility of expenditure on meals is governed by the general permission and the private limitation.

> **DA 1 General permission**
>
> *Nexus with income*
>
> (1) A person is allowed a deduction for an amount of expenditure or loss, including an amount of depreciation loss, to the extent to which the expenditure or loss is—
>
> (a) incurred by them in deriving—
>
> (i) their assessable income; or
>
> (ii) their excluded income; or
>
> (iii) a combination of their assessable income and excluded income; or
>
> (b) incurred by them in the course of carrying on a business for the purpose of deriving—
>
> (i) their assessable income; or
>
> (ii) their excluded income; or
>
> (iii) a combination of their assessable income and excluded income.
>
> **DA 2 General limitations**
>
> …
>
> *Private limitation*
>
> (2) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is of a private or domestic nature. This rule is called the private limitation.

Cases on the general principles

9. New Zealand courts have provided general principles for applying both the general permission and the private limitation (or their predecessor sections before they were known by such terms).

10. A good starting point for considering the general permission is the approach taken in the Court of Appeal decisions of *CIR v Banks* (1978) 3 NZTC 61,236 and *Buckley and Young Limited v CIR* (1978) 3 NZTC 61,271. In both cases the decisions of the Court were delivered by Richardson J. In *Banks* at page 61,240 his Honour said a deduction is available only where expenditure has the necessary relationship both with the taxpayer concerned and with the gaining or producing of assessable income. Relationship with the taxpayer is not sufficient as the prohibitions for deductions for capital expenditure and private and domestic expenditure make clear. The Court found there must be the statutory nexus between the expenditure and the assessable income of the taxpayer claiming the deduction.

11. *Banks* touched on the question of the character of the expenditure, which was also addressed in *Buckley and Young* at page 61,274 by Richardson J:

> …The heart of the inquiry is the identification of the relationship between the advantage gained or sought to be gained by the expenditure and the income earning process. That in turn requires determining the true character of the payment. It then becomes a matter of degree and so a question of fact to determine whether there is a sufficient relationship between the expenditure and what it provided or sought to provide on the one hand, and the income earning process on the other, to fall within the words of the section (*C. of I.R. v Banks* (1978) 3 NZTC 61,236, 61,242).

12. The private limitation has been the subject of several court decisions including the Court of Appeal decision in *CIR v Haenga* (1985) 7 NZTC 5,198 and the High Court decision of *Hunter v CIR* (1989) 11 NZTC 6,242.

13. In *Haenga* the taxpayer, an employee of New Zealand Railways, was obliged (by statute) to make contributions to the Government Railways Welfare Society. The taxpayer claimed a deduction for the expenditure, which the Commissioner denied. The Court of Appeal upheld the decisions of the TRA and the High Court that the expenditure was deductible. Richardson J, at page 5,206, considered that in some circumstances it may be helpful to focus on the essential character of expenditure, but not always:

> …In some circumstances it is helpful to focus on the essential character of an outgoing in the sense of its being incidental and relevant to the gaining or producing of the assessable income. But not always, for some expenses such as rates, repairs and travel costs are not inherently or even prima facie of either an income related or non-income related character. In other cases to label the character of the activity as private may be misleading, for example, where accommodation and meals are obtained away from home. Further analysis is required.

14. After observing that it is a matter of degree and so a question of fact to determine whether there is a sufficient nexus between the expenditure and the income earning process his Honour said (at page 5,206):

> The legal answer is complicated where, as here, the asset or advantage in respect of which expenses are incurred may serve private and income earning purposes. Thus expenses of travelling between home and work and expenses of child care have conventionally been regarded by the Courts as a private matter, a form of consumption. Inasmuch as they are a prerequisite to the earning of income it is arguable that they are incurred in the gaining of the assessable income. **But depending on one's perspective a similar argument could even be advanced to justify deduction of outlays on such basic items as essential food, clothing and shelter which may be said to maintain and enhance the physical and psychological wellbeing of the individual, and in turn his or her ability to perform his employment. In one sense then any such expenditure has a relation to the purpose of earning income, even if it is described as an ordinary living expense. But it is not to be expected that the Legislature ever contemplated such an erosion of the income tax base in respect of employment income; and with careful emphasis on the character of the expenditure incurred the Courts have denied the notion that an expense properly characterised as consumption is incidental and relevant to the derivation of income merely because it is necessary in that sense** (*Lodge v FC of T* 72 ATC 4174 at p 4176 (1972) 128 CLR 171 at p 175; *Lunney v FC of T* (1957-8) 100 CLR 478). On this approach deduction may be refused in this class of case where the expenditure is of a private nature and sec 105(2)(b) and sec 106(1)(j) raise essentially the same considerations. In such a case the exclusion of expenditure made on private matters comes from the requirement of the first limb of sec 104 (and sec 105(2)(b)) which limits deductions to expenditure incurred in gaining assessable income, and the express exclusion in sec 106(1)(j) may be regarded as having been inserted by way of precaution or emphasis (*Handley v FC of T* 81 ATC 4165 at p 4174 (1981) 148 CLR 182 at p 200).
>
> (Emphasis added.)

15. At page 5,207 his Honour said that the private limitation (then s 106(1)(j) of the Income Tax Act 1976) could be regarded as having been inserted in the Act by way of precaution or emphasis. In other words, the exclusion of expenditure made on private matters comes first from the requirement that deductions be limited to expenditure incurred in gaining assessable income. Further on page 5,207 his Honour went on to discuss what is meant by an outgoing of a private nature:

> An outgoing is of a private nature if it is exclusively referable to living as an individual member of society and domestic expenses are those relating to the household or family unit.

16. McGechan J in *Hunter* returned to the question of the denial of deductions for expenditure of a "private or domestic" nature. This arose in the context of

unreimbursed relocation expenses incurred by the taxpayer during a promotion and transfer as a police officer. The deduction claimed was denied and McGechan J upheld this decision of the Commissioner.[1]

17. At pages 6,256 to 6,262 of the judgment, his Honour considered the question of whether expenditure was private or domestic. At page 6,256 his Honour referred to Richardson J's observations in *Haenga* in looking at the policy behind the denial of private or domestic expenditure:

> I look first for statutory intention. The policy underlying prohibition of deduction of expenditure of a private or domestic nature is obvious enough. It is to overcome openings otherwise available, as a matter of logic, and to protect an important tax base from undue erosion. I refer generally to the observations of Richardson J in *C of IR v Haenga* (1985) 7 NZTC 5,198 at pp 5,205 to 5,207; [1986] 1 NZLR 119 at pp 127-128. **If sec 105(2) and cl 8 stood unqualified, they could permit deduction of expenditure on matters such as food, clothing, medical expenses, travel, and shelter. All, in a broad sense, would be incurred in gaining assessable income, or for the purposes of employment. One does not gain assessable income, or hold employment if starving to death, or dying from disease or exposure. On a sine qua non approach, the logic would be unanswerable. ... The policy solution is prohibition of so-called personal or domestic expenditure. To say food, clothing, or shelter or the like is an essential requirement for the purposes of gaining an income might remain logical, but it is not generally to be legal. A line is to be drawn, placing beyond the pale that which "properly" is expenditure of a personal or domestic nature. No statutory definition is given. Obviously, there will be borderline cases involving line drawing. The Courts are expected to do so in a manner which promotes this statutory object.**
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> (Emphasis added.)

18. Having considered the underlying statutory policy for the prohibition, McGechan J went on to consider authority, and specific examples of expenditure which courts have considered to be private and domestic including food (at pages 6,256-7):

> I turn to authority. Traditionally, at least until recently, a conservative approach has been taken. A few examples in cognate areas will illustrate. Child minding expenses may well be a pre-requisite to the earning of income, but generally have been rejected for reasons including labelling as "private or domestic" eg *Lodge v FCT* (1972) 128 CLR 171 at p 176. Food, whether ordinary or exceptional to meet taxpayer needs, may be essential for a

[1] McGechan J's decision in *Hunter* relating to relocation expenses was overturned by the Court of Appeal in *Hunter v CIR* (1990) 12 NZTC 7,169 on the basis that the expenditure was incurred solely for the purpose of, and as a condition of, employment and there was no private or domestic element. However, the Court of Appeal did not dispute the law applied by McGechan J and did not discuss meal expenses (as McGechan J had in the High Court). As such, the discussion from the High Court judgment is still usefully retained for his Honour's comments on meal expenses.

> taxpayer to earn, but is regarded as in the personal or domestic category; eg Case K82 (1988) 10 NZTC 648 [also known as TRA *Case 35* (1988) 12 TRNZ 444] (distinguishing at NZTC p 650; NZLR p 446 business entertainment)....

TRA cases on meal expenses

19. Meal expenses have specifically been dealt with by the TRA in a number of cases. A good starting point is the decision of Judge Barber in *Case E80* (1982) 5 NZTC 59,421. This decision undertook a comprehensive summary of the law relating to the deductibility of meal expenses. The taxpayer in question was an owner-driver of a furniture removal van who worked for a cartage contracting company. In undertaking his services, the taxpayer would at times have to stay overnight away from his home and take a number of meals "on the road". The taxpayer claimed that the meals were necessary items of expenditure incurred in producing his income.

20. From page 59,424 onwards Judge Barber discussed a number of authorities from Australia, the United Kingdom, and New Zealand on the deductibility of meal expenses. The predominant theme from these cases was that meal expenses are non-deductible as a private expense. One exception (referred to in cases discussed at page 59,245) was the meal expenditure incurred in business entertaining. (This is discussed from [71] in the context of New Zealand's statutory regime for entertainment expenditure in subpart DD.)

21. At pages 59,428 to 59,429 his Honour concluded:

> In my view there is no necessary relationship between the expenditure by O on meals and the earning of O's income. The meals were purchased by O in order to live and not to perform O's job. The expenditure was not incidental and relevant to the earning of income but was incidental and relevant to O's physical sustenance. Although the expenditure was made in the course of O's cartage jobs the expenditure was not in my view, made in the course of earning income. The expenditure was necessary for living rather than for earning income. Hence as a matter of degree I find that there is no sufficient relationship between the expenditure and what it provided and the income earning process.
>
> ...
>
> I find no grounds for distinguishing between meals eaten at home and meals eaten "out of town" except perhaps where extra cost is incurred due to the taxpayer being required by his employment to eat "out of town". Although O stated in evidence that he was involved in extra cost when purchasing meals on his cartage trips, no evidence was given as to the amount or quantum of this extra cost. Nor was there any evidence that extra cost was incurred for the purpose of employment.

> I can understand and accept that there may well have been extra cost. It seems to me that, despite some dicta to the contrary in the meal cases, there may well be a sufficient statutory nexus between the extra cost of such meals and the income earning process if the quantum of the extra cost could be proved. ...

22. Judge Barber referred to a possible sufficient nexus between the "extra cost" of some meals (due to their being eaten "out of town") and the income earning process. This will be discussed later in relation to another TRA case (*Case F117*). Judge Barber's comprehensive review of case law in *Case E80* included discussion of a couple of earlier TRA cases where deductibility was also denied on the "private or domestic nature" ground – *Case A12* (1974) 1 NZTC 60,088 and *Case B14* (1975) 1 NZTC 60,108. In *Case A12* a polytechnic tutor who was required to work late twice a week was refused deductibility of meal expenses for those nights he had to work late. Similarly, in *Case B14* a lecturer (at both a polytechnic and a university) was required to work late a couple of nights per week (until 7.30pm). He was unable to claim meal expenses for those evenings.

23. Judge Barber again denied meal expenses to a taxpayer in *Case P1* (1992) 14 NZTC 4,001. The taxpayer in this case was a member of an "informal partnership" of scriptwriters. The three members of the group would meet up, at the home of any one of them, to write a comedy script for a television programme. At around lunchtime they would travel to a restaurant where they would have (to quote Judge Barber) "a moderate amount of good food and wine". The bill for the lunch was divided equally between them and the taxpayer was seeking to deduct his share of the bill for a number of these lunches. Part of the taxpayer's argument was that if he had been at home working on his other writing commitments, he would have had a very modest lunch of negligible cost.

24. Judge Barber drew a careful distinction between the cost of meals to a person in their own capacity and the cost of meals incurred as entertainment expenditure. Where lunch costs were a cost of entertaining others (such as clients, customers, or employees) they might have been deductible entertainment expenditure[2]. In such a case the private benefit to the payer of the meals is regarded as incidental to the business purpose of the meal expenditure. But this was not an example of that.

25. At page 4,004 Judge Barber began his reasoning with a very strong statement of principle:

> Expenditure on food (or liquor) is not intrinsically non-deductible. However, expenditure on food for oneself, merely as sustenance, will always be private expenditure and non-

[2] This case predated the 1993 introduction of the limitation on entertainment expenditure which is discussed from [71].

> deductible. Nevertheless, in the course of business or the seeking of income, there are many variations on the theme that expenditure on food (and wine or liquor) may assist business. This type of expenditure can usually be termed "entertainment expenditure". It would be a misnomer to refer to the objector's expenditure as "entertainment expenditure", because it was not spent to entertain anybody; but it seems to have been put to the respondent's Department under that concept. Entertainment expenditure, normally, is the cost to a taxpayer of entertaining others in the course of an income earning process for the genuine purpose of that process.

26. At pages 4,008 to 4,009 his Honour weighed up the conflicting arguments in favour and against deductibility and concluded that the lunches were not deductible:

> …However, on reconsidering the evidence of the objector overall, I must find as a fact that, while the lunches did create an inspirational environment which greatly assisted the script writing activity and assisted the journalists to meet deadlines and time was not lost during lunch breaks, the actual expenditure on food and liquor was made by the objector journalist to nourish and relax himself as a human being. The fact that in the course of partaking that nourishment, and enjoying that relaxing period, he and his associates continued working does not convert private expenditure on food to business expenditure.…
>
> I appreciate the objector's evidence that the prime purpose of the meals was not to eat with business being incidental, but to continue business with the eating being incidental. In my view, the problem is still that the expenditure on food was not to facilitate business, but to refuel and relax as a human being. I accept that the lunches were a continuation of the working process but this does not convert private expenditure into business expenditure in this case.

27. In short, the expenditure was primarily for the sustenance of the taxpayer which is generally a matter of a private nature. There was an insufficient link to the taxpayer's income earning process for deductibility. This is the general approach or position that Judge Barber took to meal expenses. However, there are a number of cases where he or other TRA judges found in favour of taxpayers being able to deduct meal expenses. Some of these are now discussed.

28. *Case F117* (1984) 6 NZTC 60,125 concerned an actress who claimed, among other things, meal expenses. These meal expenses were described as "extra" expenses because of the hours of work or the requirements of her work. The actress's film set was often in the countryside so that there was often only one available eating place with food at a higher price than normal. Judge Barber summarised the situation at page 60,129 saying that "often she must stay at hotels in other cities or in another country but due to irregular filming or rehearsal hours cannot be expected to find food away from the hotel". Further:

> …Her meal allowance is modest and she now seeks some of the excess cost over that allowance. Her point is that generally when seeking a meal late at night only the more expensive meals are available when she is working away from her home. Sometimes when working in home territory her preferred home meal is spoiled by unexpected and irregular work commitments. Accordingly late at night or during a short and irregular meal break, the only practical meal to obtain is one which costs more than the normal cost of living.

29. This context of meals being consumed "away from home" calls to mind Richardson J's caveat in *Haenga* (at page 5,206). That was where His Honour said that to label the character of the activity as necessarily private may be misleading, for example meals obtained away from home. And *Case F117* (a case involving meals obtained away from home), in allowing deductions for meals demonstrates that point.

30. At page 60,129 Judge Barber explained why he considered the claim was deductible; and in this context it was important that the claim was only for extra costs:

> …I am satisfied on the balance of probabilities that the claim has been properly quantified by O's oral evidence that it relates only to extra food costs required by unusual working conditions. The claim for meals has been brought about by the circumstances under which O works as an actress. In my view there is a sufficient nexus in this case between excess expenditure on meals and O's income earning process. The only contrary approach could be that sustenance is caused by O being human, but this case involves the extra cost of sustenance caused by the nature of O's job…

31. His Honour considered that the case was consistent with his decision in *Case E80*.

32. The decision in *Case F117* can therefore be explained on the basis that the expenditure in question (the "extra" expenditure) was only incurred as a result of the taxpayer's income earning process and the peculiarities of her occupation. But for the demands or requirements of her occupation the taxpayer would not have been put to that extra cost for her meals.

33. A case where meal deductions were allowed, but which seems inconsistent with the cases previously discussed, is *Case H82* (1986) 8 NZTC 567. This case involved a

university lecturer who attended a conference in Brisbane in his capacity as an employee of the university and attended another conference in Sydney in a separate capacity as a self-employed consultant. For the Brisbane conference his employer paid most of his expenses. However, for the Sydney conference he was obliged to pay his own expenses. These included an amount of $160 that he incurred in treating his friends (with whom he was staying) to dinner in appreciation of hospitality they had given him.

34. The TRA (Judge Moore) quickly found that the portion of the $160 that related to his friends' meals was private expenditure and not deductible. But the taxpayer's own meal expenses were in a different category. The taxpayer had argued that while he was away in Sydney at the conference his household expenses (including the cost of providing family meals) continued. At page 572 of the decision Judge Moore set out his understanding of the reason for the expenditure:

> The objector's expenditure on meals in the course of the Sydney conference was incurred not because the objector needed to eat but because he had good professional reasons for attending the conference and did so. Some of his work (from which he had derived income that year) was in a competition conducted in conjunction with the conference. Attendance at Sydney was not only normal participation in a professional conference but created an opportunity for the objector to exploit the business advantages inherent in having an entry in such a competition. Had the objector not attended the conference he would still have eaten but would not have had to incur the cost of meals in Sydney.

35. He drew a distinction between meal costs incurred in a taxpayer's own home compared to meal costs incurred while living away from home for income earning purposes (at pages 572-3):

> Although it is not determinative it seems to me that there is a significant difference between a claim for the cost of meals consumed at a time when the taxpayer is living in his own home (albeit not eating there on the particular occasion) and the cost of meals incurred whilst temporarily living away from home for income earning purposes. Such a distinction would not necessarily assist a taxpayer who has jobs in two different places because in effect he may have taken on a commitment to have two sets of domestic expenditure.

36. His Honour also contrasted the treatment of a self-employed taxpayer with the position of an employee receiving an allowance, and also the anomalous or unreal consequences of denying the deduction to the taxpayer:

> [page 573]
>
> Meal allowances, that is payments to employees of fixed sums of money when more than certain hours are worked, such payments being for the purpose of enabling the

employee to purchase a meal, have long been accepted by the respondent as non-taxable allowances. If expenditure on meals were always of a private or domestic nature the non-taxable nature of such allowances would be difficult to justify. It is not a situation in which an employer pays for something (eg, the costs of shifting house) that would be private expenditure if the employee paid. Meal allowances are provided for in many industrial awards and are a cash payment. There is no requirement that the employee actually use such an allowance to purchase a meal.

[page 574]

It does not necessarily follow that the rules for self-employed taxpayers are or should be the same as those for employees. There are many distinctions, some of which might be seen to favour one group, some the other. In the context of the general proposition that the cost of meals must always be an expense of a private or domestic nature, the treatment within the scope of the taxation system of payments to employees for meals is relevant. Recently fringe benefit tax has been introduced to cope with what were seen as some undesirable aspects of the provision of tax-free benefits for employees but that is not a matter which need concern me here, apart from noting that the legislation has not prohibited the provision of various tax-free benefits to employees but has imposed a particular form of tax on the employer.

I am satisfied that the objector is correct when he refers to the treatment of his claim as being anomalous in the context of the conferences he attended. A self-employed person is in one sense an employee and an employer in the same person. The proposition that such a person can go to a conference with a member of his staff, they have a meal together, the employer pays for both, the employee's meal is tax deductible but the employer's meal is not, seems to me to have a degree of commercial unreality which is approaching the comic. Many persons who are in reality self-employed operate through the medium of small private companies and so avoid this particular type of problem.

37. His Honour concluded that the taxpayer’s share of meal costs in relation to the Sydney conference were deductible. The costs were a part of the expenditure incurred in gaining or producing the taxpayer’s taxable income. The difficulty with this case is that it is contrary to the earlier TRA decision of *Case E80*. It is also a challenging case as, unlike the taxpayer in *Case F117*, the extra expense of meals (at the restaurant) was not imposed on the taxpayer by the circumstance of his work but by his own decision to treat his friends to dinner as a sign of appreciation for their hospitality.

38. Another decision that allowed deductibility but, with respect, seems out of step with most of the case law, is Judge Barber’s decision in *Case T16* (1997) 18 NZTC 8,095. In this case, a couple shifted to a new city where they bought a new home. They retained their former home which they rented out. In carrying out their rental activity, they travelled back to their former city of residence to find a suitable tenant. The visits included cleaning and maintaining the property, selecting tenants, and acquiring

furniture for them. They claimed various expenses in doing so, including meals and accommodation. The Commissioner did not dispute the deduction of accommodation costs but did deny the meal expenses.

39. The Commissioner's counsel referred to earlier decisions of Judge Barber in *Case E80* and *Case P1* as support for denying the deduction of meal expenses. However, his Honour allowed the expenditure and put forward the treatment of the accommodation expenses as one of the reasons for this result. At page 8,099 he said:

> I note that the respondent did not dispute deductibility for the associated cost of accommodation for the objector and members of his family. Those accommodation expenses related to the said trips to the first city in connection with the letting activity and were incurred on the same dates as the respective meal expenses. Presumably, the respondent's rationale is that the accommodation expenditure would not have been incurred unless overnight travel had been undertaken in the course of the letting activity. It seems to me that such a rationale must also apply to the meal expenditure. Also, it seems rather pinpricking to, somehow, calculate what the cost of the relevant meals for the objector (and, where appropriate, his wife and/or daughter) might have been at their home in the second city and then deduct that from the sum to be deducted for meal expenditure. I think that aspect is de minimis but may have some significance regarding the partaking of alcohol — although there is a large mark-up in the cost of alcohol in a restaurant or hotel compared with cost for home consumption.

40. On the same page he further explained why he considered the meal expenses had a sufficient link to the income earning process to be deductible:

> It seems to me that had it not been necessary for the objector (with family members) to travel to the first property to deal with its maintenance and letting, then the meal expenditure would not have been incurred. To put the matter another way, it seems to me that the meal expenditure is sufficiently linked with the letting business, or the income earning process of letting, to be a part of the overall letting activity and therefore deductible as a revenue expense of the gaining of rent.

41. This reasoning is, with respect, not convincing. To say the meal expenditure would not have been incurred in the absence of the need to travel to the rental property is out of step with the case law that has found meal expenses to be an outgoing exclusively referable to living as an individual member of society. It appears that Judge Barber has focused solely on whether the general permission was satisfied without considering whether the private limitation applied.

42. There is arguably a distinction between accommodation expenditure and meal expenditure in the circumstances of this case. Accommodation, in the sense of the person's home, is essentially a fixed cost that is incurred irrespective of the use of the home. Costs such as mortgage repayments and interest, local authority rates,

insurance premiums, fixed daily costs for energy connections (etc) mean that a person has a daily cost in owning a home (a similar analysis applies for persons who rent a home). Therefore, where a person has to travel for an income earning process and incurs accommodation expenditure (such as hotel or motel accommodation) then that cost is ***in addition to*** the existing cost of accommodation the person is incurring for their home. In the absence of the travel for the income earning process the extra accommodation costs would not have been incurred.

43. Meals are different. A meal consumed in a location different to the person's usual place of residence is consumed in substitution for the meal they would have consumed in their usual location. For example, if a family is on holiday staying in a motel and prepares and consumes their evening meal at that place, it is not necessarily an additional cost incurred over and above the cost of the meal being prepared in their usual location. This is because a meal in their usual location is not being prepared and consumed at all. Another way of describing it (contrary to the view of Judge Barber in *Case T16*) is that the meal expenditure would have been incurred ***even if*** overnight travel had not been required for the income earning activities. In the example here, the family would have had to eat wherever they were based. The nature of meals being inherently private does not seem to have been considered.

44. Even in the case of accommodation there is analogous TRA case authority to the effect that accommodation would not be deductible, contrary to the decision in *Case T16*. See, for example, *Case G57* (1987) 7 NZTC 1,251 where short-term accommodation expenditure incurred to allow a taxpayer to attend to his mussel farm was not deductible. Also in *Case M128* (1990) 12 NZTC 2,825 longer-term accommodation expenditure incurred by a taxpayer working away from his family home in a different location was not deductible. In both cases meals consumed while away from home were also non-deductible.

45. However, case law provides for the possibility of deductions where the circumstances of the income earning process mean the taxpayer incurs extra costs over and above normal. *Case F117* is an example of this. Another possible example could be where a taxpayer has limited accommodation options. Perhaps the only reasonable accommodation in the vicinity of the location of the income-earning process is not self-catering or is not near a supermarket such that it is not realistic to expect a person to be able to prepare their own meals. In such a case the costs of purchasing meals may be greater than normal and therefore the extra cost deductible.

46. The sorts of factors which would lead to the deductibility (in whole or in part) of meal expenses requires some sort of objective justification. The taxpayer's personal preference will not be enough. For example, choosing to stay in a hotel without self-catering facilities (and thus having to pay for purchased meals) when other accommodation options are available will not be enough. So too, choosing not to

prepare a person's own meal just because they are away from their home is not sufficient reason of itself to make a meal deductible. There must be something external to the taxpayer imposing these extra costs of the sorts discussed in the previous paragraph. In this context it is considered that the decision in *Case T16*, to the extent it suggests anything to the contrary, is out of step with the earlier court and TRA decisions.

47. The deductibility of meal expenses by self-employed persons, as can be seen from the above discussion, is not affected by whether the travel is "travel on business". Perhaps obviously if the travel was not related to the business there would be no deductibility – it would just be private travel. But even "travel on business" is not enough to give rise to deductibility of meals by the self-employed except in the limited circumstances discussed above.

Summary of the law on deductibility of meal expenses

48. In general, meal expenses incurred by a self-employed person are non-deductible because they are of a private or domestic nature. The only exception for which there is convincing authority (*Haenga* in conjunction with *Case F117*) is where the income earning process of the taxpayer requires extra meal expenses in which case that extra element will be deductible. It is considered that case law suggesting any wider deductibility, particularly TRA cases *Case H82* and *Case T16*, are inconsistent with the higher authority.

Allowances and other employee-type considerations

49. As discussed above (at paragraph 36), the TRA in *Case H82* seemed strongly influenced to allow deductibility for meals of a self-employed person by looking at the tax treatment of the meal expenses incurred by persons other than self-employed persons. In that case Judge Moore looked at the treatment of employees receiving allowances or having a meal purchased for them by their employer. He also considered a person operating through a "small private" company who is "in reality self-employed". Given these factors influenced the TRA in *Case H82* they are worth considering here.

Allowances

50. In *Case H82* meal allowances (paid in circumstances where more than certain hours were worked) were said to have been long accepted by the Commissioner as non-taxable allowances. The Act now exempts a number of types of meal allowances. Section CW 17C(1) provides that an amount an employer pays to or on behalf of an employee for a meal when the employee is working overtime is exempt income.

> **CW 17C Payments for overtime meals and certain other allowances**
>
> *Exempt income: overtime meals*
>
> (1) An amount that an employer pays to or on behalf of an employee for a meal for the employee when the employee is working overtime is exempt income of the employee.

51. Section CW 17C(2) exempts certain sustenance allowances but this subsection is relatively narrow and can be left out of the discussion here.

52. Section CW 17CB(1) provides that when the employment duties of an employee require them to work away from their employer's workplace, expenditure that the employer incurs for or on behalf of the employee for a meal for the employee is exempt income. "Expenditure" includes a reimbursement payment or a meal allowance.

> **CW 17CB Payments for certain work-related meals**
>
> *Exempt income*
>
> (1) When the employment duties of an employee require them to work away from their employer's workplace, expenditure that the employer incurs for or on behalf of the employee for a meal for the employee is exempt income of the employee. For these purposes, expenditure includes a reimbursement payment or a meal allowance.
>
> *Inclusions: work-related events*
>
> (2) For the purposes of subsection (1), a meal includes—
>
> (a) food and drink that the employee consumes as part of a working meal arranged as part of or as an alternative to a formal meeting for business discussions:
>
> (b) food and drink that the employee consumes at a conference or training course:
>
> (c) light refreshments in the form of snack foods such as biscuits and fruit, or liquid refreshments such as tea, coffee, water, or similar refreshments, provided for the employee, but only if—
>
> (i) their employment duties require them to be away from their employment base for most of the day; and
>
> (ii) the employer would normally provide the refreshments to the employee on the day; and
>
> (iii) it is not practicable for the employer to provide the refreshments on the day.

> *Inclusions: meals when travelling on business*
>
> (3) For the purposes of subsection (1), a meal also includes food and drink that the employee consumes when their employment duties require them to travel in the performance of those duties.

53. The remainder of s CW 17CB provides the detailed rules around this, including what is meant by a "meal" (s CW 17CB(2)) and meals when travelling on business (s CW 17CB(3)).

54. "Meals" includes, by virtue of s CW 17CB(2)(c), light refreshments in the form of snack foods such as biscuits and fruit, or liquid refreshments such as tea, coffee, water, or similar refreshments, provided for the employee, but only if:

    - their employment duties require them to be away from their employment base for most of the day; and
    - the employer would normally provide the refreshments to the employee on the day; and
    - it is not practicable for the employer to provide the refreshments on the day.

55. Section CW 17CB(3) provides that, for the purposes of subsection (1), a meal also includes food and drink that the employee consumes when their employment duties require them to travel in the performance of those duties.

56. Section CW 17CB(5) provides that the time limit for such meal expenses is a maximum of three months, except for expenditure under subsection (2) (light and liquid refreshments) where there is no such limit. The implication is that a wide range of expenditure on meals can be paid or reimbursed by an employer tax-free to their employee when the employee is required to work away from their employer's workplace. The only limit is the three-month maximum for an employee working away from their employer's workplace.

57. The expenses incurred by the employer in such circumstances would be deductible expenditure to the employer under s DA 1. Furthermore, s CX 5(1) provides that to the extent to which a benefit that an employer provides to an employee in connection with their employment is exempt income, the benefit is not a fringe benefit.

> **CX 5 Relationship with exempt income**
>
> *Exempt income not fringe benefit*
>
> (1) To the extent to which a benefit that an employer provides to an employee in connection with their employment is exempt income, the benefit is not a fringe benefit.

58. As a result of these provisions it is important in the employer/employee context to know what it means to be working away from an employer's workplace, and what it is to travel in the performance of an employee's duties.

59. Inland Revenue has two published items of particular relevance to the question of travel "on work". The first is IS3448 *Travel by motor vehicle between home and work – deductibility of expenditure and FBT implications* (*Tax Information Bulletin* Vol 16, No 10 (November 2004)). The second is Operational Statement OS19/05 *Employer-provided travel from home to a distant workplace – income tax (PAYE) and fringe benefit tax* (*Tax Information Bulletin* Vol 32, No 1 (February 2020)). Neither of these statements concerns the treatment of meal expenses but they do address whether travel between home and work is private travel/expenditure or business/work-related travel/ expenditure. These concepts are relevant for the purposes of the exemptions in s CW 17CB. The law is well summarised at paragraphs 19 to 24 of the 2019 Operational Statement:

> 19. The general rule is that home-to-work travel is private expenditure as it is expenditure to get to work and reflects the employee's personal choice as to their home location. The two main reasons for this rule are that the:
>
> - cost of home-to-work travel is predominantly determined by the private choices of the employee (where to live, how to get to work);
> - expense of commencing work is distinguished from expenses while "on work", and employees are expected to bear the cost of commencing work.
>
> 20. This means the starting point is that employer-provided travel from home to work is private expenditure and would not be deductible to the employee (if employees could claim deductions). This is the case even if the employee's travel is funded by the employer or the employee's attendance at the workplace is required by the employer.
>
> 21. **The courts have recognised exceptions to this general rule. The cases relating to deductibility of travel expenditure between home and work have identified four broad factual situations where travel between home and work is regarded as business or work-related travel. These situations are where:**
>
> - **a vehicle is essential for transporting goods or equipment necessary for the performance of employment duties at the home and elsewhere;**
> - **the taxpayer carries on an "itinerant occupation" (that is, the taxpayer does not work from a fixed work place, and the home is the taxpayer's base of operations;**

- **the taxpayer is required to be accessible at their home for employment duties and is required to undertake travel in response to emergency calls;**
- **the travel is "on work" travel between two workplaces, one of which is also the taxpayer's home.**

22. It can be seen from the cases that for home-to-work travel to be deductible, the employee must actually undertake work at home.
23. It is not sufficient to establish that the home is or can be a workplace. For expenditure to be deductible, the need for the work to be performed at the home, and, therefore, the need for the travel, must arise from the nature of the work and not from the personal choice or personal circumstances of the taxpayer.
24. **In addition, the actual travel must be travel undertaken in the course of performing work (that is, the travel is "on work"). If that is the case, then the cost of that travel is not private expenditure of the employee; rather, it is expenditure that would be deductible if employees were not otherwise prevented from claiming deductions.** This means the employer does not have to deduct PAYE in respect of the reimbursement or allowance, and the employee is not liable for income tax on the payments.

(Emphasis added.)

60. Much of this material is not of direct relevance because the deductibility of meals is not concerned with home to work travel. But the associated notion of travelling "on work" is definitely relevant. What is meant by travel "on work" was discussed at pages 35 to 36 of IS3448 in the November 2004 TIB. The interpretation statement says that the four exceptions to the non-deductibility of travel between home and work relate to situations where travel can be regarded, in some sense, as travel in the course of performing work ***rather than*** travel in order to commence work or travel from work.
61. The interpretation statement summarises the general position around travel "on work" at page 36:

> Therefore, generally travel from a taxpayer's home to the taxpayer's place of work (or to make the first business call of the day) and travel between the last business call of the day and the home would be private use, being travel to enable the taxpayer to commence work or after work has finished. Travel between the place where the first business call is made and the taxpayer's work base, or to make subsequent business calls, would be business use, being travel in the course of performing work.

62. Operational Statement OS19/05 also specifically covers one-off or very occasional travel:

> **One-off or very occasional travel**
>
> 43. Inland Revenue considers that one-off or very occasional travel from home to a distant location for work (when required by the employer) can be treated as not taxable on an incidental or de minimis basis. For example, attendance at a two-day conference at a distant location.
>
> 44. This approach will apply to employees who work at an office of their employer located in their hometown as well as employees who work all the time from their home.

63. Accordingly, an employee travelling on his or her employer's business who receives a meal allowance or reimbursement is treated as receiving exempt income, and such an amount is not a fringe benefit. The employer can still deduct the cost of the allowance or reimbursement as a business expense.

64. This is in contrast to the treatment of the same type of expense incurred by a self-employed person (except in the limited circumstances discussed above for the previous issue).

65. The other two circumstances considered by Judge Moore in *Case H82* are discussed next (as mentioned above at paragraph 49).

Employer paying for meals for themselves and an employee

66. The first of these was the case of an employer paying for a meal for himself or herself and for an employee, when working away from their home base, and only being able to take a deduction for the meal expense of the employee and not their own meal. Judge Moore described this as having "a degree of commercial unreality which is approaching the comic".

67. As a matter of legal principle these different treatments are not anomalous. One is an expense incurred on an employee, and like wages or salary and other employee expenses, has a nexus with their business; s DA 1(1)(b)(i). The other expense is the employer's own personal meal expense which has regularly been found to be of a private or domestic nature.

Closely-held companies

68. The second circumstance considered by Judge Moore in *Case H82* was a case of a "self-employed" person operating through a "private company". His Honour thought

that "many persons who are in reality self-employed operate through the medium of small private companies and so avoid this particular type of problem". By this it is assumed that Judge Moore meant that the company was able to deduct the cost of meals it reimburses for an "employee" (the person who is "in reality" self-employed).

69. Again, as with the first circumstance, as a matter of legal principle the difference between a self-employed person and an incorporated closely-held company is not anomalous. The company is a separate entity and expenditure it incurs in paying employee expenses has a nexus with their business; s DA 1(1)(b)(i). The fact that the company is in effect the alter ego of a self-employed person who has incorporated their activity is not relevant as a matter of legal principle.

70. It is noted that although the company can take a deduction for the cost of allowances or the provision of meals, the payment of an allowance to an employee or the provision of a meal may be taxable income to the employee or subject to FBT (as the case may be). Even where expenditure is deductible to the company, the requirements discussed above for exempting income or being outside of the scope of FBT still must be satisfied. This does not extend to private meal expenditure unconnected to work.

71. If the company is a look-through company under subpart HB of the Act then the income and expenses of the company are treated as the income and expenses of the owners of the look-through company (ss CB 32B and DV 22 of the Act). This means that a deduction for meal expenditure allowed to a "normal" company would most likely not be allowed as a deduction for the owner of a look-through interest in a look-through company as it would be private in nature.

Entertainment Expenditure

72. The other issue referred to in the TRA cases is the question of entertainment expenditure. The treatment of entertainment expenditure is covered by subpart DD of the Act. The regime was originally enacted as s 106G of the Income Tax Act 1976 with general application from 1 April 1993.

> **DD 1 Entertainment expenditure generally**
>
> *When this subpart applies*
>
> (1) This subpart applies when, in deriving income, a person incurs expenditure on entertainment that provides both a private and a business benefit.
>
> *No deduction (with exception)*

> (2) The person is denied a deduction for expenditure that they incur on the forms of entertainment set out in section DD 2, except for 50% of the amount that they would have been allowed in the absence of this subsection.
>
> *Meaning of limitation rule*
>
> (3) Limitation rule means the rule described in subsection (2).
>
> *Link with subpart DA*
>
> (4) This section overrides the general permission.

73. Section DD 1(1) sets out the basic principle of the regime which relates to when, in deriving income, a person incurs expenditure on entertainment that provides both a private and a business benefit. The "limitation rule" is described in s DD 1(2). A person is denied a deduction for expenditure they incurred on entertainment set out in s DD 2 ***except for*** 50 percent of the amount they ***would have been allowed*** in the absence of the subsection. This requires that the expenditure would meet the general permission in section DA 1 by having a sufficient nexus to deriving income or carrying on a business for the purpose of deriving income.

74. In *Case P1* (which was decided before the entertainment expenditure regime was enacted), Judge Barber discussed the deductibility of entertainment expenditure as a general proposition. This is relevant because the limitation rule applies to the expenditure that the taxpayer would have been able to deduct in the absence of s DD 1(2). At pages 4,008-9 his Honour said:

> Obviously, it would only require fairly minor adjustments to the facts to create deductibility. For instance, if it had been necessary or appropriate for the journalists to entertain others as they partook these luncheons, that cost would have been deductible entertainment expenditure. Then, they would probably have been unable to progress their script writing work because they would have been devoted to the entertainment and promotion of other business aspects. **Strictly speaking, even in that entertainment situation, the normal cost of the taxpayer's own meal, whatever "normal cost" might be, is an ingredient of the expenditure which is non-deductible. In practice, that element is not normally isolated, presumably, because even the respondent regards it as de minimis. Also, it would hardly be worthwhile for the respondent to deny deductibility to the payer of the expenditure in that respect, because the respondent would need to isolate that taxpayer's own meal expenditure and then apportion it between his (or her) normal luncheon expenditure and the excess on each occasion for which deductibility is sought. As I said in the above extracts from *Case K82*, any private benefit to the payer is regarded as incidental to the business purposes of the meal expenditure.**
>
> (Emphasis added.)

75. This suggests that a strict legal approach would be to remove a self-employed person's meal expenditure before applying the 50% limitation on expenditure. However, Judge Barber commented that the practice was not to isolate this element of the expenditure because it is *de minimis*. It also might be considered a double exclusion of the private element of expenditure. That is, if the TRA were to exclude the taxpayer's own meal expenditure in such a situation on the basis of the private limitation, and then apply the limitation rule to the remaining expenditure (and the limitation rule is designed to exclude the private benefit of entertainment expenditure) then they would have, in a sense, excluded the private benefit of meals twice. However, it must be acknowledged that there is a level of uncertainty about this in the legislation.

76. Section DD 1(4) provides that s DD 1 overrides the general permission. That is, even if the general permission had been satisfied by the entertainment expenditure it will be denied (to the extent of 50%) based on the limitation rule in subpart DD.

77. Section DD 2 describes the expenditure to which the limitation rule applies. It includes corporate boxes, holiday accommodation, pleasure craft, food and drink expenditure off premises, and food and drink expenditure on premises in certain circumstances (which are more limited compared to food and drink expenditure off premises).

> **DD 2 Limitation rule**
>
> …
>
> *Entertainment off premises*
>
> (5) The limitation rule applies to deductions for expenditure on food and drink that a person provides off their business premises.
>
> *Entertainment on premises*
>
> (6) The limitation rule applies to deductions for expenditure on food and drink that a person provides, other than light refreshments such as a morning tea and whether or not guests are present,—
>
> (a) on their business premises at a celebration meal, party, reception, or other similar social function:
>
> (b) in an area of the premises that at the time is reserved for senior employees to use and is not open to all the person's employees working in the premises.

78. Section DD 4(1) provides that the limitation rule does not apply to a deduction for expenditure on food and drink consumed by a person while travelling on business or for their employment duties. However, there are limits to this exclusion.

> **DD 4 Employment-related activities**
>
> *Business travel expenditure*
>
> (1) The limitation rule does not apply to a deduction for expenditure on food or drink consumed by a person while travelling in the course of business or for their employment duties. However, the limitation rule applies if—
>
> (a) the travel is mainly for the purpose of enjoying entertainment; or
>
> (b) the food or drink is consumed at a meal or function involving an existing or potential business contact as a guest; or
>
> (c) the food or drink is consumed at a celebration meal, party, reception, or other similar social function.

79. Section DD 4(3) provides that the limitation rule does not apply to a deduction for expenditure of an amount that is exempt income under ss CW 17B, CW 17C, and CW 17CB (the latter two of which have been dealt with above).

80. Section DD 4(1) refers to the limitation rule not applying to a deduction for expenditure on food or drink consumed by a person while travelling on business (subject to the condition set out in paragraphs (a) to (c) of s DD 4(1)). It is arguable this may extend to a self-employed person, as they can be travelling in the course of business. However, even if s DD 4 did apply such that the limitation rule did not apply to the self-employed person, they still face the difficulty of having to overcome the private limitation.

81. It is difficult to draw much guidance from the treatment of entertainment expenditure. It might be said that it would be anomalous to allow a 50 percent deduction of entertainment expense where a person (other than a self-employed person) incurs entertainment expenditure, but only allow 50 percent of the net entertainment expenditure (that is, entertainment expenses less private or domestic expenditure) when a self-employed person incurs the expenditure. This might be seen as denying private expenditure twice. However, s DA 2(2) denies private expenditure and s DA 2(7) provides that each of the general limitations in s DA 2 override the general permission. Therefore, any potential deduction in s DA 1 is overridden either by the private limitation or by the limitation rule in subpart DD (and see s DD 1(4) too).

Goods and Services Tax

82. The GST input tax treatment of the meal expenses of the self-employed person follows the income tax deductibility of such expenses. That is, where it was concluded that the

meal expenses were of a private or domestic nature for income tax purposes, and non-deductible, input tax on the expenses would also not be deductible for GST purposes.

83. The deductibility of input tax for GST purposes is dependent on at least three things[3]:

- There is an amount of "input tax" as defined in s 3A of the GST Act;
- The person is a registered person for GST purposes, which requires they have a taxable activity; and
- Being able to satisfy the test in s 20(3C) of the GST Act.

> **3A Meaning of input tax**
>
> (1) **Input tax**, in relation to a registered person, means—
>
> (a) tax charged under section 8(1) on a supply of goods or services acquired by the person:
>
> (b) tax levied under section 12(1) on goods entered for home consumption under the Customs and Excise Act 2018 by the person:
>
> (c) an amount determined under subsection (3) after applying subsection (2).

84. For there to be "input tax" for a registered person in the usual case of s 3A(1)(a), means there must be "tax charged under s 8(1) on a supply of goods and services acquired by the person". This would very often be the case for meal expenses as most suppliers of meals would be registered persons who will be charging GST.

85. The self-employed person must be a registered person in order to deduct input tax.

> **20 Calculation of tax payable**
>
> …
>
> (3) Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period—
>
> (a) in the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19, the amount of the following:
>
> (i) input tax in relation to the supply of goods and services (not being a supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies), made to that registered person during that taxable period:

[3] There are also administration requirements like holding a valid tax invoice (see s 20 of the GST Act).

> (ia) input tax in relation to the supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:
>
> (ii) input tax invoiced or paid, whichever is the earlier, pursuant to section 12 during that taxable period:
>
> (iii) any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b); and
>
> …
>
> (3C) For the purposes of subsection (3), and if subsections (3D) or (3L) do not apply,—
>
> (a) input tax as defined in section 3A(1)(a) or (c) may be deducted to the extent to which the goods or services are used for, or are available for use in, making taxable supplies:
>
> (b) input tax as defined in section 3A(1)(b) may be deducted to the extent to which the goods are used for, or are available for use in, making taxable supplies other than—
>
> (i) the delivery of the goods to a person in New Zealand:
>
> (ii) arranging or making easier the delivery of the goods to a person in New Zealand.

86. The test in s 20(3C) is that, for the purposes of s 20(3) of the GST Act, input tax may be deducted to the extent to which the goods or services are used for, or are available for use in, making taxable supplies. Consuming meals in one's private capacity is not using goods or services in making taxable supplies.

87. The TRA case of *Case P5* (1992) 14 NZTC 4,034 supports the view that input tax cannot be claimed for goods to the extent that they have been acquired for private or domestic use. *Case P5* concerned the old "principal purpose" test for deducting input tax[4]. However, the TRA's analysis at page 4,037 can also be applied to the new test for deducting input tax:

> **The essential problem faced by the objector, in my view, is that his main use of the vehicle was to travel from his home on the farm to his chartered accountancy practice. There can be no doubt that such type of travel is not in the course of any business or taxable activity, but is for the purpose of getting the objector from his home to his office as a chartered accountant. The law is clear that the nature of such travel is private rather than business.** This is because the travel is not in the

[4] "Input tax" meant the tax charged on the supply of goods and services made to a person where those goods and services were acquired for the principal purpose of making taxable supplies.

> course of any business but is aimed at conveying a person to the site where his business activity will commence that day.
>
> (Emphasis added.)

88. At page 4,038 the TRA concluded as follows:

> I find that the vehicle was not used for the principal purpose of making taxable supplies, and, therefore, in this case, was not acquired for that purpose. Accordingly, the input claimed is not allowable.

89. Although the case relates to the previous test for "input tax" (an all or nothing test for the initial deduction of "input tax") the conclusion would also support the view that private use of goods or services would not be used for making taxable supplies.

90. In the limited circumstances where meal expenses are deductible, on the basis the expenses are not of a private or domestic nature, then similar reasoning would allow for GST input tax deductions. That is, if the meal expenses satisfy the general permission as being incurred in the course of carrying on a business for the purpose of deriving assessable income, then the goods or services are used for making taxable supplies. Such circumstances are relatively rare.

91. If the meal expenditure is subject to the entertainment expenditure regime, then the person is deemed to have supplied entertainment with a value equal to the amount of the deduction prevented under ss DD 1 and DD 2: ss 21I(4), (4B) and (5) of the Goods and Services Tax Act 1985. This effectively means that input tax is only allowed to the extent that the entertainment expenditure regime does not apply.

Examples

92. The following examples are intended to show how the law applies.

Example 1 – Meal expenses of self-employed persons

Rob is a self-employed engineer who specialises in repairing and maintaining complex machinery and manufacturing premises. He is based in Auckland, where most of his work takes place, but he also regularly travels up to Northland and down to the Waikato and Bay of Plenty to undertake specialist repairs. On occasions he has travelled further afield when required. Rob has a small office/workshop where he stores spare parts and consumables, and where his wife works doing the admin work for the business. The office has enough space for tea and coffee facilities and a microwave.

Variation 1 – Travel around town

Rob has a busy day travelling between three client sites in South Auckland, which is a fair distance from his office on the North Shore. As a result, he does not return to his office/workshop from the beginning of the day until the end of the day as it is not practical to do so. During the day, he buys takeaway coffee on a couple of occasions and also picks up lunch from a bakery near to where he is working. Rob asks if he can claim his coffee and lunch expenses as they were incurred in undertaking his income-earning process.

Rob is unable to deduct his expenses as they are expenses of a private and domestic nature. Consistent with *Case E80* and *Case P1* these expenses were incurred to enable Rob to live rather than to earn income in the required statutory sense for s DA 1(1). The requirements of the job did not impose expenditure on Rob that would not have existed but for the job.

Variation 2 – Travel on business

The next day Rob has two jobs lined up in Rotorua. Due to the distance it takes to get to Rotorua and back, and the length of time taken to undertake the work, Rob does not make it back to Auckland until 9pm. As well as picking up a couple of cups of coffee and lunch (as in Variation 1) Rob eats his evening meal in Rotorua rather than waiting to get home. He asks whether any of his meal and drinks expenses are deductible.

Again, Rob is unable to deduct these expenses as they are expenses of a private and domestic nature. They relate to living as an individual member of society (*Haenga*),

and both *Case A12* and *Case B14* support non-deductibility. However, as Judge Barber recognized in *Case E80*, extra costs may be incurred when a taxpayer is required by their work to eat "out of town". Evidence will need to be provided to indicate that such extra costs had been incurred and the quantum of such costs.

Variation 3 – Overnight travel on business

The next week Rob has two days' work in Hawkes Bay requiring him to stay a couple of nights away from home. He pays for breakfast at his motel, incurs expenditure on drinks and lunch during his working day, and eats out at a restaurant both nights he is away from his home. Is any of Rob's expenditure deductible?

On the face of it none of the meal and drinks expenditure is deductible because it is of a private and domestic nature. Rob may argue that being away from home has imposed an extra cost on him. However, his choosing to have his evening meal at a restaurant does not make Rob's working conditions sufficiently unusual as described by Judge Barber in *Case F117* when he said the taxpayer could claim extra food costs. The result is also consistent with the TRA decision in *Case G57*.

Variation 4 – Remote travel on business

A month later Rob is required to work for a couple of days on some machinery in a very remote part of New Zealand, where the only accommodation is not self-catering, and there are no supermarkets within reasonable travelling distance in any case. Rob is required to take his meals at the hotel he is staying at. Is any of Rob's expenditure deductible?

While the starting point is that meal expenditure is of a private and domestic nature, these circumstances are like those Judge Barber described in *Case F117*. Rob can argue that the cost of meals here reflects the extra food costs required by the unusual working conditions he finds himself in. The extra meal costs have a sufficient nexus with the earning of Rob's income from fixing the machinery in the remote location, and there are no practical and realistic alternatives for accommodation and meals. Accordingly, the extra cost of the meals over and above Rob's normal expenditure would be deductible. Rob calculates he would normally spend $15 on his evening meal, so any cost above this is deductible.

Variation 5 – Employee expenses

Rob employs Esther to help with the workload in his business. Esther has two days' work in Hawkes Bay requiring her to stay a couple of nights away from home. Pursuant to the terms of her employment contract, Rob reimburses Esther for her meal

expenses and also pays her a daily amount for light and liquid refreshments. How should Rob treat the payments to Esther for meals?

As an employee expense Rob, will be able to deduct the amounts he is obliged to pay Esther under the employment contract. The private limitation will not apply to this expenditure. Rob should also treat the payments to Esther as exempt income either under section CW 17CB(2) (for the light and liquid refreshments) or section CW 17CB(3) (for reimbursements for meals).

Example 2 – Meal expenses of employees

Darlene is also an engineer who specialises in repairing and maintaining complex industrial machinery. She is employed by Fix It Quik Limited. Her place of work is Fix It Quik Limited's work premises in Upper Hutt, but most of her work is undertaken at the premises of the customers of Fix It Quik Limited. As such she only spends time at her work premises at the beginning and end of the day, and if she needs to pick up spare parts or consumables during the day.

Variation 1 – employee allowances

Darlene has a full day travelling between five client sites in Wellington, a good distance from Fix It Quik Limited's office in Upper Hutt. She does not check back into the office until the end of her working day. During the day she has bought a couple of takeaway coffees, and also buys lunch at a lunch bar near where she is working. Fix It Quik Limited pays Darlene a daily allowance of $15.00 to cover the costs of "light refreshments" and "liquid refreshments" which she would be able to enjoy if she was working at Fix It Quik Limited's premises. The payment is for those days when she is working off premises. How should Fix It Quik Limited and Darlene treat this payment?

Section CW 17CB allows payments for certain work-related meals to be exempt income. The payment can include a reimbursement payment or a meal allowance. Under s CW 17CB(2)(c) a "meal" includes light refreshments in the form of snack foods such as biscuits and fruit, or liquid refreshments such as tea, coffee, water, or similar refreshments.

Under s CW 17CB(5) there is no time limit on expenditure incurred for meals covered by s CW 17CB(2) (for other meals there is a three month time limit). Accordingly, for Darlene the daily payments received are exempt income. For Fix It Quik Limited the expenditure is deductible as an expense incurred in the course of carrying on a

business of deriving their assessable income (s DA 1(1)(b)). The private limitation does not apply to a company, so even though the expenditure relates to an employee's "meals" the expenditure is not denied under the private limitation.

Variation 2 – employee reimbursements

The next day Darlene has two jobs in Taihape. Due to the distance to get to Taihape and back and the length of time taken to undertake the work, Darlene does not get back home until 9pm. As well as buying a couple of cups of coffee and lunch (as in Example 1, Variation 2) Darlene eats her evening meal in Palmerston North rather than waiting to get home. Fix It Quik Limited's work policy is to cover all meal costs when employees are sent on such "out of town" jobs. How should Darlene and Fix It Quik Limited treat the reimbursement payments for meals, light refreshments, and liquid refreshments?

For Darlene, as in Variation 1, any payments for coffee and light refreshments will be exempt income under s CW 17CB(2). The payment for lunch will be exempt income under s CW 17CB(3) ("meals when travelling on business"), and the payment for dinner is exempt income under either s CW 17C(1) (payment for overtime meals) or under s CW 17CB(3) for the same reason as the payment for lunch. For Fix It Quik Limited the expenditure is deductible for the same reasons as in Variation 1, and similarly the private limitation does not apply to deny the deduction.

Variation 3 – employee travelling out of town on business

The next week Darlene is sent to Timaru for two days (and two nights) to service and repair some machinery. While she is in Timaru she stays at a motel with full kitchen facilities. Fix It Quik Limited reimburses Darlene for her meals while she is in Timaru according to company policy, and also pays a daily amount for light refreshments and liquid refreshments. Darlene claims reimbursement for lunch and dinner, and she eats out rather than preparing her own meals at the motel. How should Darlene and Fix it Quik Limited treat the payments for meals, light refreshments, and liquid refreshments?

For Darlene, as in Variations 1 and 2, any allowance she receives for coffee and light refreshments will be exempt income under s CW 17CB(2). The reimbursements for lunch and dinner will be exempt income under s CW 17CB(3). If Darlene is just working normal hours while in Timaru the payments she receives will not come within the rules for overtime meals under s CW 17C(1). For Fix It Quik Limited the expenditure is deductible for the same reasons as in Variations 1 and 2, and similarly the private limitation does not apply to deny the deduction.

Variation 4 – employee's remote travel on business

A month later Darlene is required to spend a couple of nights on a remote offshore island to repair and maintain machinery. The only accommodation at the island is a luxury resort. There is no self-catering accommodation and no supermarkets on the island. Darlene is paid an allowance for light refreshments and liquid refreshments and is reimbursed for the cost of all meals. How should Darlene and Fix It Quik Limited treat the payments for meals, light refreshments, and liquid refreshments?

There is no difference in this example from Variation 3. The reimbursing payments and allowances are exempt for Darlene and the payments are deductible to Fix It Quik Limited.

Example 3 – Entertainment expenditure for self-employed

Variation 1 – providing hospitality for clients

Rob is finding that his market for machinery repair and maintenance in Auckland is under threat from a newcomer in the form of Fix It Quik Limited. Rob decides he needs to work harder on maintaining customer loyalty and begins taking the key people at his most important clients out to dinner. Every Wednesday night he takes one group out for dinner and drinks. Rob asks if he can claim a deduction for the expense of providing this hospitality to his clients.

Rob's deduction of expenses will be subject to the entertainment expenditure regime in subpart DD of the Act. The expenditure is covered by the regime by virtue of s DD 2(5) (deductions for expenditure on food and drink that a person provides off their business premises). The operative rule for entertainment expenditure is in s DD 1(2). This provides that the person is denied a deduction for expenditure that they incur on entertainment except for 50% of the amount that they would have been allowed in the absence of s DD 1(2). But for the entertainment expenditure rules Rob would have been allowed a deduction for the hospitality expenditure he has incurred (treating the private benefit of a meal to Rob as incidental to the business purpose, *Case P1)*. Therefore, section DD 1(2) allows Rob to claim 50% of the full meal expenditure incurred in taking his clients out for dinner.

If Rob had just been eating out by himself, he would not have been able to deduct any amount of the meal expenditure. It may seem anomalous that by eating out with business contacts he is, in effect, able to deduct 50% of his meal. However, the

limitation rule means that Rob is unlikely to be in a better overall position under the entertainment expenditure regime as he will be denied 50% of the deduction he would have otherwise been allowed for the expenditure incurred for his customers.

Variation 2 – providing hospitality to friends

On a Friday night Rob often gets together with a group of other self-employed persons from the business park where his office/workshop is located. They go to a local bar and have a few drinks and often a meal too. Rob's friends Brent and Richard have been struggling financially recently as a result of a downturn in business so Rob shouts them a meal at the bar, and also pays for a round of drinks for them and the rest of the group. Rob asks if he can claim a deduction for the expense of providing these meals and drinks. He also asks if the entertainment expenditure regime applies.

Rob cannot deduct the cost of providing meals to his two friends (and himself) and for shouting a round of drinks to the group. Such expenditure has no nexus to either deriving his income or to carrying on his business for the purpose of deriving income. It is a private expense and does not satisfy the general permission.

As for the entertainment expenditure regime, because the expenditure would not have been allowed in the absence of section DD 1(2) there is no ability to claim 50% of the expenditure under that regime.

Example 4 – Entertainment expenditure for employers

Fix It Quik Limited realises that to break into the lucrative Auckland machinery repair market it needs to "wine and dine" the key people at certain industrial plants. Darlene is sent to Auckland to introduce herself to some of these key people and to take them out for dinner and drinks. Can Fix It Quik Limited deduct all the costs of the hospitality provided?

The limitation rule in s DD 1(2) of the entertainment expenditure regime applies in the same way for Darlene and Fix It Quik Limited as it did for Rob in Example 3. The expenditure on the meals and drinks is entertainment expenditure under s DD 2(5) and only 50% of the expenditure is allowed by s DD 1(2). Section DD 4(1) provides that the limitation rule does not apply for expenditure on food or drink consumed by a person while travelling in the course of business or for their employment duty. However, the limitation rule continues to apply if, among other things, the food or drink is consumed at a meal or function involving an existing or potential business contact as a guest (s DD 4(1)(b)) as is the case here. This same principle applies for Rob in Example 3.

Example 5 – Meal expenses of a shareholder-employee

Meg and John are the only shareholders of Brooke's Books Limited, a provider of bookkeeping services. Meg is employed by the company and often travels to conferences and seminars to promote the business. Pursuant to her employment agreement with the company, she is entitled to reimbursement for her meal expenses while away from home on company business and is also entitled to a daily allowance for light refreshments and liquid refreshments. On Meg's most recent business trip to a conference, John also attends to get a better idea of what occurs at these type of events and the company pays for all his meal expenses as well. John is not an employee of the company and is not related to Meg.

How should Brooke's Books Limited treat the payments it makes to Meg and John for their meals?

As Meg is genuinely undertaking her employment duties for Brooke's Books Limited, the treatment of her expenditure would be the same as the treatment of Darlene in Variation 3 of Example 2. That is, the allowance for light and liquid refreshments can be treated as exempt income of Meg under section CW 17CB(2), and the reimbursements for meals will be exempt income under section CW 17CB(3). The amounts paid will be deductible to Brooke's Books Limited and the private limitation will not apply.

In John's case none of the exempt allowance provisions can apply as John is not an employee of the company. Instead, the payment of John's meal expenses by the company is likely to give rise to a non-cash or 'deemed' dividend (see interpretation statement IS 21/05: Non-cash dividends, paragraph 20 and example 5, for more discussion of this issue).

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