Inland Revenue
Te Tari Taake

INTERPRETATION STATEMENT | PUTANGA WHAKAMĀORI

Income tax – business activity

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IS 25/25

This interpretation statement gives guidance on whether and when a taxpayer is carrying on a "business" for income tax purposes. This is relevant to whether a person has income from a business under s CB 1 and to other provisions in the Income Tax Act 2007 where carrying on a business is a requirement.

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

REPLACES | WHAKAKAPIA

- Expenditure in establishing a new business within "Setting up or moving a business – what costs may be allowed" *Public Information Bulletin* 64 (October 1971): 6
- Income Tax Act 1976: Confirming that an activity is not a business for income tax purposes, *Tax Information Bulletin* Vol 6, No 4 (October 1994): 16
- Difference between a taxable activity (GST) and a business activity (income tax), *Tax Information Bulletin* Vol 7, No 3 (September 1995): 8
- Income Tax Act 1994: Diminishing business activity request to treat as hobby, *Tax Information Bulletin* Vol 7, No 5 (November 1995): 19

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Summary | Whakarāpopoto

1. This statement is about **whether** a taxpayer is carrying on a business for the various purposes of the Act, and **when** a business commences and ceases. This statement is not about whether a business is a specific type of business (eg, a farming, insurance or mineral-mining business), the location of the business, or whether an amount is derived "from" a business.

2. It is important to understand if you are carrying on a business, and when that business is being carried on, because carrying on a business is a requirement of many provisions in the Income Tax Act 2007. In particular, an amount that a person derives from a business is included in a person's income for tax purposes and the person is allowed a deduction for expenditure incurred in carrying on that business. It is also important to understand that whether there is a business is not necessarily determinative of whether an amount is income or whether a deduction is available. Sometimes amounts will be income or deductible even if there is no business.

3. The term "business" is defined in the Act to include certain things, but the meaning of the term is largely taken from case law.

4. The leading New Zealand case on what constitutes a business is *Grieve*.[1] Deciding whether a taxpayer is in business involves a two-fold inquiry as to the nature of the activities carried on and the intention of the taxpayer in engaging in those activities.

5. As to the first enquiry, the following matters may properly be considered:

   - the nature of the activity;
   - the period over which the activity is engaged in;
   - the scale of operations and volume of transactions;
   - the commitment of time, money and effort;
   - the pattern of activity; and
   - financial results.

6. The second enquiry is the element of intention. A taxpayer's subjective intention to make a profit, once established is sufficient to satisfy the second enquiry under the *Grieve* business test. However, this subjective intention must be objectively assessed.

7. A business can be contrasted with other activities, including hobbies, pastimes, non-profit pursuits and even profit-making activities that, for example, lack sufficient scale. "Hobby" is not a defined term. However, it is sometimes used to describe an activity

[1] *Grieve v CIR* (1984) 6 NZTC 61,682 (CA).

that does not meet the definition of a business because the person carrying on the activity does not have an intention of making a profit or because they have an insufficient level of activity. As a result, case law that discusses the distinction between a business and a hobby involves a standard application of the business test.

8. Passive activities such as holding shares in a subsidiary, share portfolio investment, money lending and property leasing are capable of being a business depending on the particular facts and an application of the *Grieve* business test.

9. In some cases, it may be difficult to distinguish between a person making a payment to other persons who may be in business and a person carrying on business themselves by contracting with others to carry out certain tasks. In these cases, a person is more likely to be carrying on a business themselves if they are involved in oversight, organisation or control of the tasks they are paying other people to carry out.

10. A single transaction does not usually constitute a business, but this factor is not conclusive. Determining whether a single transaction gives rise to a business depends on the facts and an application of the business test.

11. Depending on the facts, a person may carry on multiple businesses or carry on a business while having a full-time job. However, where the person has a full-time occupation or is retired or unemployed, and they devote only a modest amount of time to the other activity, there is a presumption against a business.

12. A company may more readily be found to be in business than an individual. Similarly, it has been stated that any gainful use to which a company puts its assets to make a profit for its shareholders, on its face, amounts to carrying on a business. However, any presumption as to the existence of a business is rebuttable.

13. The correct characterisation of the nature and scope of a business is important to determining whether any income is derived from the business and whether a sufficient nexus exists between any expenditure and the business.

14. The question of when a business has ceased is important as it generally determines the last moment when expenditure can be deducted for tax purposes under s DA 1. A business ceases when the activities cease or are no longer at a sufficient scale to be considered a business, or when there is no longer an intention to make a profit. This usually occurs when a business is winding up but may also occur where a business downscales or ceases temporarily.

15. Although the concept of a taxable activity for GST purposes is similar to a business for income tax purposes, there are important differences. It follows that the fact the Commissioner may accept a taxable activity is being carried on does not mean a business exists.

16. Figure | Hoahoa 1 sets out factors that may be relevant when determining whether a business is being carried on under the business test.

Figure | Hoahoa 1 – Factors that may indicate a "business" is being carried on

*This table sets out factors that **may** be relevant when determining whether a business is being carried on under the business test. These are factors only. The factors might not be relevant or determinative on their own or in all cases. Some of these factors will not be relevant for some businesses.*

Business	Not a business
The activity has a real prospect of profit. *This is not a requirement in itself. It is the genuineness of the intention to profit that is relevant, not whether there is any reasonable prospect of a profit being made.* *Nevertheless, whether there is a real prospect of profit is a factor, among others, the courts will consider in the objective assessment of a taxpayer's stated intention of making a profit. See [31].*	The activity has no real prospect of profit. *Again, this is not a requirement in itself. Where there is no real prospect of profit, the courts and the Commissioner may be sceptical of a taxpayer's stated intention to profit.*
The activity is commonly carried on as a business.	The activity is typically carried on as a hobby, sport or pastime for recreation or amusement.
The number of transactions is significant.	The number of transactions is low.
The taxpayer's commitment of money, time and effort to the activity is significant.	The taxpayer's commitment of money, time and effort to the activity is low.
The activity is carried on for a sustained period.	The activity is carried on for a short period.
The activity is systematic, repetitive and regular.	The activity is ad hoc or haphazard.
The scale of operations involves significant assets, accepting that not all businesses need significant assets.	No significant assets are involved, accepting that not all businesses need significant assets.
The taxpayer keeps accounts and business records.	The taxpayer does not keep accounts and business records.

The taxpayer seeks professional advice.	The taxpayer does not seek professional advice.
The taxpayer develops a business plan and analyses and monitors transactions.	The taxpayer has no business plan and does not analyse and monitor transactions.
The activity is marketed and advertised, accepting that not all businesses need to market or advertise.	The activity is not marketed or advertised, accepting that not all businesses need to market or advertise

Introduction | Whakataki

17. This interpretation statement gives guidance on whether a taxpayer is carrying on a "business" for the purposes of the Act.

18. The term business is used throughout the Act in many contexts, including the following.

- Amounts from a business are income under s CB 1 and expenditure is broadly deductible if it is incurred in the course of carrying on a business under s DA 1(1)(b).
- The presence of a business is required for many of the land taxing provisions in ss CB 6A, CB 6 to CB 15, CB 15B, CB 15C, CB 15D, CB 15E, CB 16A, CB 16 to CB 23, and CB 23B.
- Income derived from a business may have a source in New Zealand if the business is wholly or partly carried out in New Zealand under s YD 4.
- The presence or otherwise of a business in New Zealand is relevant to the territorial scope of many regimes (eg, financial arrangements rules, thin capitalisation rules, loss commonality rules, and research and development tax credits).
- For charities, the requirements for the exemption of income differ depending on whether the income is business or non-business income.
- Many regimes apportion deductions based on business and non-business use (eg, employer-provided accommodation, motor vehicle expenditure, entertainment expenditure, and mixed-use assets).
- The presence of a business is relevant to the application of the trading stock rules in subpart EB, the depreciation rules in subpart EE, and the ability to claim bad debt deductions under s DB 31.

- Special provisions and regimes apply to particular types of businesses (eg, farming, forestry, aquaculture, bloodstock, aircraft operators, insurance, life insurance, shipping and mineral mining).
- The presence of a business can be relevant to the calculation of family scheme income for the purposes of Working for Families tax credits.

19. This statement is about **whether** a taxpayer is carrying on a business for the various purposes of the Act, and **when** a business commences and ceases. This includes the following matters:

- the meaning of "business" (see from [21]);
- the difference between a business and other activities (see from [48]);
- whether passive activities can be a business (see from [57]);
- a person's involvement in a business (see from [80]);
- whether a single transaction can give rise to a business (see from [86]);
- whether a person can carry on multiple businesses (see from [92]);
- the scope of a business (see from [102]);
- when a business commences (see from [117]);
- when a business has ceased or been suspended (see from [130]);
- the difference between a business and a taxable activity (see from [160]); and
- that the existence of a business will not necessarily be determinative of whether an amount is income or whether a deduction is available (see from [166]).

20. This statement is not about whether a business is a specific type of business (eg, a farming, insurance or mineral-mining business), the location of the business, or whether an amount is derived "from" a business.

Analysis | Tātari

Meaning of "business"

21. Guidance aimed at a more general audience (including some Inland Revenue website guidance) uses the term "business" in a general sense to refer to a taxpayer who is carrying on an activity that may be taxed. The general usage of the term business may not always align with the legal test described below.

22. "Business" is defined broadly in s YA 1 as including "any profession, trade, or undertaking carried on for profit".

YA 1 Definitions

In this Act, unless the context requires otherwise,—

...

business—

(a) includes any profession, trade, or undertaking carried on for profit:

(b) includes the activities of—

(i) a statutory producer board:

(ii) an airport operator:

(c) is further defined in section DD 11 (Some definitions) for the purposes of subpart DD (Entertainment expenditure)

23. The definition of business includes certain things but largely the term "business" has the meaning given to it by case law.

24. The leading New Zealand case on what constitutes a business is *Grieve*.[2] In the leading judgment, Richardson J confirmed that the statutory definition does not add anything to the common meaning of the word and does not catch anything that would not otherwise be caught.[3]

25. On the meaning of "business", Richardson J said:[4]

> ... Underlying each of the words in the definition in sec 2 and the term "business" itself when used in the context of a taxation statute is **the fundamental notion of the exercise of an activity in an organised and coherent way and one which is directed to an end result**. And the definition itself proceeds to identify its concern that the enterprise be one carried on "for pecuniary profit". [Emphasis added]

26. Richardson J went on to state that deciding whether a taxpayer is in business involves a two-fold inquiry as to the:[5]

- nature of the activities carried on; and
- intention of the taxpayer in engaging in those activities.

[2] *Grieve v CIR* (1984) 6 NZTC 61,682 (CA). See also Richardson J's summary of his findings in *Grieve* in *Calkin v CIR* (1984) 6 NZTC 61,781 (CA).

[3] At 61,687.

[4] At 61,688.

[5] At 61,691.

Nature of the activities carried on

27. As to the first enquiry – the nature of the activities carried on – Richardson J said the following matters may properly be considered:[6]

- the nature of the activity;
- the period over which the activity is engaged in;
- the scale of operations and volume of transactions;
- the commitment of time, money and effort;
- the pattern of activity; and
- financial results.

28. Richardson J added:[7]

> It may be helpful to consider whether the operations involved are the same kind and are carried on in the same way as those that are characteristic of ordinary trade in the line of business in which the venture was conducted. **However, in the end it is the character and circumstances of the particular venture which are crucial**. Businesses do not cease to be businesses because they are carried on idiosyncratically or inefficiently or unprofitably, or because the taxpayer derives personal satisfaction from the venture. [Emphasis added]

29. In *Stockwell*,[8] McKay J observed that the presence or absence of the above factors does not conclude the matter, but rather they are relevant considerations that involve questions of degree.

Taxpayer's intention

30. The second enquiry is the element of intention. It is the taxpayer's subjective intention to make a profit that is relevant, although this must be objectively assessed.

31. In *Grieve*, Richardson J said that a taxpayer's statements about their intentions are relevant in this respect, but actions often speak louder than words.[9]

32. Similarly, Richardson J observed that courts are justified in viewing circumspectly a claim that a taxpayer genuinely intended to carry on a business for profit when looked

[6] At 61,691.

[7] At 61,691.

[8] *CIR v Stockwell* (1992) 14 NZTC 9,190 (CA) at 9,196.

[9] At 61,691.

at realistically there seems no real prospect of profit.[10] However, he went on to state that an actual intention, once established, is sufficient and that it is the genuineness of the intention to profit that is relevant, not whether there is any reasonable prospect of a profit being made.

33. Richardson J also stated:[11]

> It may be proper, too, to approach with some scepticism asserted intentions which on any objective appraisal of external factors seem incapable of realisation. But, unless required by the statutory language, that testing process cannot be elevated into an independent ingredient to be established before the activity is recognised as a business.

34. In *Lawrence*, Fisher J put it this way:[12]

> It is plain that in asking whether the taxpayer's purpose in pursuing the undertaking was "for pecuniary profit" one must apply a subjective test. The test is not to determine whether on an objective appraisal the undertaking would ever have been financially viable, still less to rely upon the actual history of the undertaking with the benefit of hindsight and the knowledge that the undertaking did not in fact result in any pecuniary profit. The requirement is to place oneself in the position of the taxpayer at the time that the undertaking was pursued and to ask what his or her actual purpose was at that time.

35. In *Mainzeal Holdings Ltd*, the Court of Appeal stated:[13]

> A taxpayer claiming a deduction under s 104(b) does not have to show that, realistically, there was a reasonable prospect of profit. The existence of a genuine intention, however ill-founded, to carry on business for profit is enough. But a claimed intention may be viewed with some scepticism if, on an objective examination of the realities at the time it appears that, even in the longer term, a profitable outcome was impossible or highly unlikely. Lack of a reasonable prospect of profit may indicate that, no matter what legal entitlement to a profit may have existed, the taxpayer did not make the expenditure with that intention.

36. Having a real prospect of making a profit is not a separate requirement for having a business. However, it is a factor that the courts will consider in determining the genuineness of a taxpayer's stated intention of making a profit.

37. *Mainzeal* is an example of a case where the prospect of profit was considered, not as a separate requirement, but among other factors, in evaluating whether a taxpayer had an intention of profit. In *Mainzeal*, the taxpayer claimed deductions under (what is

[10] At 61,691.

[11] At 61,689.

[12] *Lawrence v CIR* (1994) 16 NZTC 11,263 (HC) at 11,266.

[13] *Mainzeal Holdings Ltd v CIR* (2001) 20 NZTC 17,409 (CA) at [25].

now) s DA 1(1)(b) for payments the taxpayer made under a joint venture agreement with its Australian subsidiary for the purpose of exiting from two failed property developments. The Commissioner argued the deductions were not allowed because the taxpayer did not have an intention of making a profit, so was not carrying on a business as required by the section. The Court of Appeal noted that the taxpayer bore the burden of proof but did not put before the Court evidence about how a profit would be properly calculated under the joint venture. The Court of Appeal also noted the High Court's finding about evidence given by witnesses for the taxpayer. The High Court had found the evidence, about the reasons for and the nature of the relevant payments, unclear and unconvincing. The Court of Appeal stated that a claimed intention of profit may be viewed with some scepticism if on an objective examination of the realities it appears that, even in the longer term, a profitable outcome was impossible or highly unlikely. The Court of Appeal discussed, over several paragraphs, the prospect of profit for the joint venture. The court concluded that there was plainly no prospect of profit for the joint venture and the taxpayer did not establish that it genuinely had a profit-making intention.

38. In some cases, the way that a taxpayer is set up may provide clear support for a stated intention of making a profit. For example, if a company is set up to carry on an income earning activity, has a detailed business plan and has equity investment from investors who expect a return on their investment, the company is likely to have an intention to make a profit.

39. Some activities are expected to make losses for several years before they make a profit. Persons carrying out these activities may have detailed business plans with projections of when they expect to make a profit. They may also have external funding support to cover their expenses in the first years of operation. The fact that persons carrying out these activities expect to make losses initially does not preclude them from having an intention to make a profit.

40. The fact that a person has not made a profit in past years does not mean that they do not intend to make a profit in the future. However, in some cases, past performance may be a relevant factor to consider (among other factors) in determining whether a person has an intention to make a profit. It may be relevant to ask what has changed since the earlier years where losses were made.

41. Some activities may have a high risk of failure. This does not preclude persons carrying on these activities from having an intention to make a profit. Again, it is the genuineness of the intention to profit (objectively assessed) that is relevant.

42. In some cases, if a person has another purpose for carrying on an activity, it may be harder to establish an intention of making a profit. This may be the case with some hobbies, pastimes, and non-profit pursuits (see [48]).

43. In summary:

- The taxpayer has the burden of proving, to the balance of probabilities, that they have an intention to make a profit.
- It is the taxpayer's subjective intention to make a profit that is relevant.
- It is the genuineness of the intention to profit that is relevant, not whether there is any reasonable prospect of a profit being made. An actual intention, once established, is sufficient.
- A taxpayer's statements about their intentions are relevant, but the taxpayer's intention must be objectively assessed.
- If there is no real prospect of profit, the courts (and the Commissioner) are justified in being sceptical of a taxpayer's claim that they intend to make a profit.
- A real prospect of making a profit is not an independent requirement, but it is a factor, among others, that a court will consider in evaluating whether a taxpayer has an intention of making a profit.

The test is one of intention, not motive

44. The test is one of intention, not motive.[14] For example, a charity can have an intention of making a profit, even if their motive is to fund their charitable activities.

Meaning of profit

45. In *Grieve*, Richardson J considered the meaning of "profit" for the purposes of the definition of business. He said:[15]

> It may readily be assumed … that Parliament intended that the profit of which the definition speaks is one that is to be ascertained on ordinary commercial principles affecting the type of undertaking in question.

46. Richardson J further elaborated that profit cannot sensibly be equated with profit for tax purposes and that whether special tax deductions and incentives should be taken into account in assessing profitability depends on the context:[16]

> … I am inclined to think that what is required is to assess the overall financial result that is intended in order to determine whether or not in one form or another a pecuniary profit

[14] *Grieve* at 61,688.

[15] At 61,691.

[16] At 61,692.

> is being sought. No doubt there will be other problems that arise for consideration in determining what items are to be taken into account and what are to be excluded from account in arriving at that pecuniary profit. They can best be considered in their own context rather than in a vacuum.

47. An intention to make a profit could in some cases be established, at least in part, from an intention to make a capital gain or from an intention to receive tax credits. In *Case 2/2012*, the TRA held that a taxpayer had an intention to make a profit from a rental property activity. This was because the taxpayer had an intention to make capital gains from the rental properties (in the long term) and an intention to receive working for families tax credits (for the periods in dispute, the taxpayer's rental losses reduced the taxpayer's family scheme income and increased the taxpayer's entitlement – this is no longer possible after a law change).[17]

The difference between a business and other activities

48. A business can be contrasted with other activities, including hobbies, pastimes, non-profit pursuits and even profit-making activities that, for example, lack sufficient scale. In *Grieve*, Richardson J said that the definition of "business" allows the Commissioner and taxpayers to consider whether an activity has been transformed into a business.[18]

49. In *Case K37*, Judge Barber said:[19]

> An undertaking carried on for profit in the present context is to be distinguished from a hobby, pastime, game, recreation, sport, or a "flutter", of a less consuming, organised and involved activity.

50. "Hobby" is not a defined term. However, in case law it is sometimes used to describe an activity that does not meet the definition of a business because the person carrying on the activity does not have an intention of making a profit or has an insufficient level of activity. As a result, case law that discusses the distinction between a business and a hobby involves a standard application of the business test.

51. The fact a person might be indulging in their interests and enjoying their activity does not prevent the activity from being a business. In *Edgecombe,*[20] the taxpayer argued that his activity, which involved racing and breeding horses, was merely a hobby.

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[17] *Case 2/2012* (2012) 25 NZTC 1,014. For a critique of *Case 2/2012* see Lindsay Ng, A taxing decision for rentals, Journal – New Zealand Institute of Chartered Accountants, 5 October 2012: 30.

[18] At 61,689.

[19] *Case K37* (1988) 10 NZTC 314 (TRA) at 320.

[20] *Edgecombe v CIR* (1991) 13 NZTC 8,140 (HC).

However, based on the facts, the High Court concluded that the taxpayer had been carrying on a business. The court held:[21]

> … there can be little doubt that the conduct and the activities undertaken by the appellant showed a scale and volume of transactions and necessarily involved a commitment of time and money which are very similar in character to the carrying on of an ordinary business. **That the appellant was indulging his interest and enjoying his activity is not to be doubted but I think that in the end it was not just as a hobby but with an intention to make a pecuniary profit.** [Emphasis added]

52. *Case F55*[22] concerned a husband and wife who carried on a garage business in partnership and also derived earnings from stockcar racing. The taxpayers argued the stockcar racing activity was a hobby. Judge Barber agreed it was a hobby. He said:[23]

> I find as a fact that Mr H was merely pursuing a hobby on the basis that he hoped that year by year he would average out winnings to about equate expenses. **I find that the activity was not with a view to profit but with a view to fun and prestige. There might have been a reasonable prospect of making a profit but not in a business or commercial or money making sense - only in a sporting sense.** Winnings depended not just on skill but on luck and for some reason or other Mr H seemed to have a large share of luck. [Emphasis added]

53. *Case F55* also illustrates that even if there is a significant amount of assets, money spent and time devoted to an activity, it will not be a business if the intention of making a profit is missing.

54. Many other cases have considered whether an activity carried on by a taxpayer is a business or hobby or is carried on for private purposes. The contexts include horse breeding, hunting, art, boat chartering, farming, gambling and vintage car restoration.

55. For further discussion of this topic in the context of content creators, see **IS 21/08: Content creators - tax issues.**[24]

56. The difference between a business and other activities is illustrated in Example | Tauira 1 and Example | Tauira 2.

Example | Tauira 1 - Raising cattle on a small rural property

Zaid recently purchased a 4-hectare rural property outside of Hamilton in which to live.

[21] At 8,146.

[22] *Case F55* (1983) 6 NZTC 59,840 (TRA).

[23] At 59,848.

[24] IS 21/08: Content creators - tax issues *Tax Information Bulletin* Vol 33, No 10 (November 2021).

He raises five beef cattle on the land to keep the grass down, fill the freezer and to sell to cover expenses.

Zaid regularly moves the cattle between paddocks and maintains water supply and fences when required. He is able to do this in his spare time and also has a full-time job in the city.

Zaid needs to buy feed for the cattle and pays for vet bills and other expenditure related to the cattle. Overall, if Zaid were to calculate all his expenditure related to raising the cattle, he would likely find that he is making a loss from this activity.

Zaid is considering selling the land, but the sale would be subject to the bright-line test if the land was "residential land". Zaid wants to know if his cattle raising would be considered a farming business (if it is, the land will be "farmland" and, therefore, not "residential land", and the bright-line test would not apply).

Zaid's cattle-raising activity does not constitute a business.

Applying the first stage of the two-fold inquiry in *Grieve*, the scale of operations is very low – he only has a 4 acre property and 5 cattle; the volume of transactions is very low – he will be selling only some of the 5 cattle he keeps; the commitment of time, money and effort are relatively low – he looks after the cattle in his spare time while also working in a full time job; and the financial results are very low – the money he receives would not even cover his expenses. Therefore, the nature of his activity does not support the existence of a business. It is not necessary to go on to consider the second stage involving intention to make a profit.

Therefore, the bright-line test may apply to the sale of the land.[25]

Example | Tauira 2 – Sportsperson[26]

Nani is a keen athlete who has represented New Zealand in her favoured event of hammer throwing for more than 5 years. She does this in addition to having full-time employment when she is not away competing.

[25] See QB 25/13: When is the sale of a lifestyle block excluded from the bright-line test?

[26] Comparisons might be drawn between Example | Tauira 2 and the Australian case of *FCT v Stone* 2005 ATC 4234 (HCA). In *Stone*, a javelin thrower, in a similar (but slightly different) situation to Nani in Example | Tauira 2, was found to be carrying on a business and, therefore, various receipts were included in her income.

Nani regularly competes in high-level competitions in New Zealand and overseas. Over the last few years, she has regularly placed in the top 20 world rankings and has received some prize money, although the amounts involved are not large. She receives a regular training grant from a high-performance sports academy and received a one-off payment for winning a bronze medal at a recent international competition.

Nani also earns money from a sponsorship deal and from her social media accounts.

However, the costs involved in competing in these events, including travel expenditure for her and her coach are considerable. When these costs are considered, despite the multiple income streams, Nani has never come close to making a profit from competing and she has relied on the income from her job to fund some of her costs.

To make a profit, her manager estimates she would need to consistently place top five in the hammer-throw world rankings and secure a more lucrative sponsorship deal. Placing in the top five is absolutely one of Nani's goals, but realistically she is aware that her chances of achieving this are low. Nani's recent training and results relative to her competitors do not suggest that she is likely to place higher in the rankings this year. Nevertheless, Nani states that she does have an intention of reaching her goals and, therefore, making a profit.

Nani wants to know whether the amounts she derives are taxable under s CB 1 and whether she can claim deductions for her expenses.

The nature of the activity, hammer-throw, is not indicative of a business. Although the ability for a person to sustain a career as a professional athlete has increased in recent years, it is very difficult to make a living from competing in the hammer-throw event. The fact that Nani still maintains a full-time job, and that she relies on her salary to fund some of the costs of competing, suggests that the competition activity is not a business. Further, although Nani is pursuing multiple income streams, overall, the

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Although Example | Tauira 2 is inspired by the facts in *Stone*, the facts in Example | Tauira 2 have be deliberately designed so as to raise doubt about whether Nani intended to make a profit. This design included making Nani less successful than the taxpayer in *Stone*.

Also, Australian income tax law is different from New Zealand law. The Australian legislation, the Income Tax Assessment Act 1997 (Australia), does not have an equivalent to s CB 1. Instead, an amount that is derived from a business in included in income under s 6-5 of the Income Tax Assessment Act 1997 (Australia), which includes income according to ordinary concepts.

Also, in New Zealand, an intention to make a profit is required to have a business. In Australia, an intention to make a profit is treated as a factor to be considered – see *Stone* at [55]. A comparison with *Stone* in particular is made more difficult because little was said in the case about whether the taxpayer had an intention to make a profit or the level of the taxpayer's expenditure.

financial return is not substantial and is somewhat erratic (in terms of prize money). On the other hand, the commitment of time, effort and money in her spare time is significant.

Although Nani states she has an intention of making a profit, this must be tested against the objective evidence. It is very difficult to make a living from competing in the hammer-throw event. Over the last five years Nani has never come close to making a profit and there is no suggestion from her recent training and results relative to her competitors that she will be more competitive this year. Realistically, there appears to be little prospect of making a profit. It appears that Nani competes for the personal satisfaction and enjoyment, not to make a profit.

Taking into account the *Grieve* factors, in particular the nature of the activity and the financial results, it will be difficult for Nani to show that she is in business and is able to claim deductions.

This means that even if Nani has an especially good year in which she does manage to make a profit, this will not be taxable (the answer could change if this is not a one-off occurrence). It also means that Nani cannot claim deductions or offset losses from her activity against her other income.

Whether passive activities can be a business

57. A question that arises is whether a passive activity can be a business. This question often arises in the context of holding companies, share portfolio investment, money lending and property leasing.

58. The question is particularly relevant to charities. A charity's business income can be exempt under s CW 42 only to the extent its charitable purposes are carried out in New Zealand.[27] In contrast, the exemption for non-business income under s CW 41 is not subject to a territorial restriction.

59. For further discussion of the business test in the context of charities, see **IS 24/08: Charities – business income exemption**.[28]

[27] Section CW 42(3) contains an extended definition of "business" for this purpose.

[28] IS 24/08: Charities – business income exemption *Tax Information Bulletin* Vol 36, No 10 (November 2024): 3 at [24]–[35].

Holding companies

60. Corporate groups are often organised under a holding company. The question is sometimes asked whether a holding company is in business. This may be of limited relevance if a consolidated group is used.

61. It will be relatively common for holding companies to carry on business.[29] However, whether a holding company is in business depends on the facts in each situation and applying the *Grieve* business test.

62. If a holding company does no more than benefit from holding shares in a subsidiary, then it may not satisfy the first stage of the *Grieve* business test. However, if, for example, a holding company provides corporate services to its subsidiaries in return for fees, it may satisfy the first stage of the test.

63. With respect to the second part of the *Grieve* business test, a holding company will usually have an intention to make a profit because it will usually intend to derive dividends or benefit from an increase in the value of the shares held in the subsidiaries. In considering whether a holding company has an intention of making a profit, profit is to be ascertained on ordinary commercial principles affecting the type of undertaking in question (as noted in *Grieve* and discussed from [45]). An intention to profit from receiving dividends from its subsidiaries or from an increase in the value of shares held in subsidiaries could satisfy the intention to profit requirement.

64. This is illustrated in Example | Tauira 3.

Example | Tauira 3 – Holding company

The Property Group Limited is the holding company of a group of companies that specialises in property development. Each development is undertaken in a separate special purpose subsidiary that the holding company wholly owns. The holding company receives dividends from subsidiary companies as property developments are completed.

All staff in the group are employed by the holding company, which is responsible for identifying property development opportunities, negotiating the acquisition of land for that purpose and obtaining finance, as well as providing operational and administrative support for the subsidiaries.

All expenditure of a revenue nature the holding company incurs is on-charged to its subsidiaries by way of intra-group management fees on a full cost recovery basis such

[29] *Rangatira Ltd v CIR* (1996) 17 NZTC 12,727 at 12,730. See also from [98].

that the holding company generally breaks even each year. In the current income year, the company's financial accounts show management fees totalling $110,000 and a small operating surplus of $1,100 (due to a timing issue with the on charging of some of the fees). The company wishes to claim a deduction under s DA 1 for its expenditure.

Applying the first stage of the *Grieve* test, the holding company has a sufficient level of activity to give rise to a business. The only question is whether the company has an intention of making a profit.

The level of intra-group management fees on-charged to its subsidiaries means the holding company will generally not make operating surpluses. The holding company will generally break even or have relatively small surpluses or losses. This is a factor that could point to the company not having an intention of making a profit, and so not being a business for the purposes of s DA 1(1)(b).

However, as noted in *Grieve*, "profit" is to be ascertained on ordinary commercial principles affecting the type of undertaking in question. Here, the holding company has an intention to make a profit in a relevant sense – from dividends that are paid to it on the completion of property development projects.

Therefore, the holding company is carrying on a business.

Share investment

65. The issue in the context of share investment is generally whether gains on share disposals are taxable under either s CB 1 (amounts derived from business) or s CB 5 (business of dealing in personal property), or whether losses on share disposals are deductible under s DA 1(1)(b). Even if there is no business of dealing in shares, amounts derived from share disposals may be income under other provisions of subpart CB, for example, under s CB 3. Income derived from share investment is discussed in **IS 24/10: Income tax – Share investments**.[30]

66. Whether share investment constitutes a business is illustrated in Example | Tauira 4.

[30] IS 24/10: Income tax – share investments *Tax Information Bulletin* Vol 37, No 1 (February 2025): 13.

Example | Tauira 4 – Online investment

Hone started using an online investment platform in November 2020. Over the next few months, he enjoyed making trades and started investing more time and money into buying shares.

Hone was employed for 30 hours a week and spent his free time making trades. Hone invested around $20,000 in the share market and used the profits from sales to supplement his living costs and re-invest in more shares.

Hone typically didn't hold shares for more than a few months, unless he thought they would peak in value later. He didn't plan to hold any shares long term and didn't consider dividends when purchasing shares.

Hone has an intention to profit from share sales, but his level of activity and amount of time and money spent on the share market do not indicate he is in a business of share dealing. His level of activity does not indicate he has an organised plan that amounts to a profit-making undertaking or scheme.

While Hone may not be in a business of share dealing, the amounts he receives from his share sales are still taxable (and losses are deductible) because the facts indicate that he acquired shares for the dominant purpose of disposal.

Money lending

67. In the context of money lending, the issue is typically whether a taxpayer has a "business of dealing in or holding financial arrangements" so that a bad debt deduction can be claimed under s DB 31.

68. In *Case Z21*,[31] the taxpayer, a trust, claimed a bad debt deduction on the basis it was in the business of holding financial arrangements under (what is now) s DB 31. The taxpayer had made three high-risk loans over two years. Judge Barber rejected the Commissioner's argument that the activity of money lending, of itself, gave rise to a presumption that there was not a business because it was passive. Instead, Judge Barber confirmed it was necessary to apply the *Grieve* factors. He said:[32]

> There is no dispute that the taxpayer trust intended to profit from its activity of holding the DW Ltd loan, the L loan and the first and second restructured N 2000 Ltd loans. Therefore, the only issue is whether, having regard to the factors in *Grieve* and other

[31] *Case Z21* (2010) 24 NZTC 14,286 (TRA).

[32] At 14,297.

> relevant case law, the disputants' activity was carried on in an organised and coherent manner and with sufficient continuity and extent to be the activity of carrying on a business of holding financial arrangements.

69. On the facts, Judge Barber concluded there was "just, and only just, a sufficient level of activity to support the trustees' intention of profit so as to constitute a business of money lending".[33] In coming to this conclusion, Judge Barber considered the factors set out in *Grieve* and made the following comments.

- The taxpayer's period of activity was for two years. Judge Barber described the period of activity as a very relevant factor but also noted that many businesses only operate for such short periods.
- In terms of the scale of operations, Judge Barber appears to have regarded the taxpayer's scale of operations as consistent with a small business.
- The volume of transactions was low.
- Judge Barber described the taxpayer's pattern of activity as the making of somewhat risky loans to seek a high return.
- Judge Barber appears to have accepted that the commitment of money was limited but nevertheless was consistent with a business that was making a start.
- Judge Barber agreed with the taxpayer's argument that the commitment of time and effort was substantial in respect of due diligence and recovery actions undertaken. Judge Barber found that much consideration went into each transaction and that much effort was put into the recovery of loans made.
- The financial results were poor.

70. In *Case M118*,[34] the taxpayer claimed a bad debt deduction for a loan she had made to her son under (what is now) s DA 1. One of the issues the Taxation Review Authority considered was whether the taxpayer was in the business of money lending. In addition to the loan to her son, the taxpayer had made three retail investments and lent money to a company owned by another son. Judge Barber said:[35]

> I find that a simple application of the criteria set out in *Grieve and Anor v C of IR* (1984) 6 NZTC 61,682; (1983) 6 TRNZ 461 shows that although the nature of the activity carried on by the mother could be consistent with that of a business, it is doubtful whether she ever

[33] At 14,300.

[34] *Case M118* (1990) 12 NZTC 2,755 (TRA).

[35] At 2,758.

intended to be in business[36] and when, as suggested by Richardson J at NZTC p 61,691; TRNZ p 471, consideration is given to the scale of operations, the volume of transactions, the commitment of time, money and effort, and the pattern of activity, I could not find a business to exist.

71. In summary, the question of whether a taxpayer has a business of dealing in or holding financial arrangements depends on a straightforward application of the *Grieve* factors. This is illustrated in Example | Tauira 5.

Example | Tauira 5 – Family trust investment

The Alexandra Trust is a family trust that holds various investments, including property, shares, bonds and term deposits. The trust has also made a loan of $200,000 to a beneficiary at a market rate of interest. The bonds and term deposits have a combined value of about $800,000 in six parcels that are typically held to maturity for a three to five–year term and rolled over. Due to the nature of the investments, the trust does not spend a substantial amount of time on due diligence or on the recovery of amounts invested.

A company in which the trust has $150,000 of bonds defaults on the bonds, and the trust seeks to claim a bad debt deduction under s DB 31. The issue is whether the trust is in the business of holding or dealing in financial arrangements for the purposes of that section.

The bonds, term deposits and loan to the beneficiary are financial arrangements. The holding of financial arrangements may constitute a business. The trust holds its investments for the purpose of making a profit by receiving interest payments. The trust has held its investments for an extended period. The scale is significant in absolute terms ($1 million), but very low when compared with the scale of financial institutions that carry on a business of holding or dealing in financial arrangements. The trustees' commitment of time and effort is low, as the investments are generally reviewed only annually and on maturity. The pattern of activity is regular but low. The financial results are in line with low- to medium-risk long-term investments.

It is considered that the trust is not carrying on a business of holding or dealing in financial arrangements. Although the trust has an intention of making a profit, applying the first stage of the *Grieve* test, the scale of operations, volume of

[36] With regard to Judge Barber's comment that "it is doubtful whether she ever intended to be in business" it should be remembered that the relevant question, established in *Grieve*, is whether the taxpayer intended to make a profit.

transactions and commitment of time and effort are insufficient to give rise to a business.

This is a different conclusion from that reached on the facts in *Case Z21*. The key difference between this example and *Case Z21* is that, in *Case Z21*, the TRA found the taxpayer's commitment of time and effort to be substantial in respect of due diligence and recovery actions undertaken in that case. The same is not true in this example.

Property leasing

72. Rent and other revenues that an owner of land derives from leasing land is specifically included in the person's income under s CC 1 (and deductions may be available for expenses incurred in deriving this income) without the need to establish the existence of a business. However, sometimes it will be relevant to consider whether a property leasing activity is a business.

73. Whether the activity of property leasing is a business depends on an application of the business test set out in *Grieve*. Where a taxpayer leases multiple properties or derives significant rental income, it is likely the activity will constitute a business. Where a taxpayer leases a single property, it is possible the activity may constitute a business, but this will depend on the facts.

74. The following discusses some cases where the courts have considered whether property leasing can be a business.

75. In *Dick*,[37] the Court of Appeal considered whether passive rental income derived by a charitable trust was exempt income under (what is now) s CW 42. The trust originally earned income from gaming machines, but to preserve an income stream it acquired several properties from which it derived rent. The leases were long-term net rent leases under which the tenants were responsible for maintenance. The taxpayer argued that the investment in the properties was passive, so not a business. Salmon J quoted the *Grieve* business test and concluded:[38]

> In our view there is no doubt that the property related transactions constitute a business. Substantial incomes were received from the properties. There is evidence of a profit making intention.

[37] *Dick v CIR* (2002) 20 NZTC 17,961 (CA).

[38] At 17,973.

76. Similar conclusions have also been reached by the courts in other contexts. In *Case G44*,[39] the taxpayer, an individual, owned two residential properties. He lived in one property, in which he rented the spare rooms, and rented the other property in its entirety. The taxpayer sought to offset losses from the rental activity against his other income on the basis he was in business.[40] Sheppard DJ applied the *Grieve* business test and concluded:[41]

> Considering first the nature of the activities carried on, letting of residential accommodation has a character which can be consistent with business. The objector had been engaged in those activities for several years, certainly since before 1978, and had continued them. The scale of operations had increased with the addition of the house at S (and subsequently increased further with the acquisition at P). The commitment of time and effort was not equivalent to full time employment, but the commitment of money was considerable for a single proprietor. It is in the financial results that the circumstances are not so consistent. Yet I bear in mind that businesses are not necessarily profitable in any year or even group of years, particularly as they are being built up. Looking at the first part of the inquiry overall, I conclude that the facts are consistent with the objector carrying on a business.
>
> Concerning the objector's intention, his own evidence was unequivocal and unshaken. He intended to make a profit from his activities, though not at the expense of the longer term capital growth and investment aspects of the undertaking. Although he had not produced successful results (except in 1980 in respect of the property at S) I find that he was carrying on the activities in respect of both properties with the intention, which was not entirely unrealistic, of making a pecuniary profit.

77. In contrast, in *Case L102*,[42] Judge Barber held that a taxpayer who let four rooms in his home to flatmates was not in business as there was not significant enough scale of operations or volume of transactions and observed that he thought it would be rare for an isolated renting transaction to constitute a business.

78. In *LD Nathan*,[43] the High Court considered whether the taxpayer, the property holding company for a retail group, was entitled to a deduction for expenditure incurred insulating a building under (now repealed) s 125 of the Income Tax Act 1976. This section allowed a deduction for capital expenditure on energy conservation incurred in the carrying on of a business. The Commissioner argued that deriving income from

[39] *Case G44* (1985) 7 NZTC 1,170 (TRA). See also *Case 2/2012* [2012] NZTRA 02, (2012) 25 NZTC 1,014 and *Case 8/2013* [2013] NZTRA 08, (2013) 26 NZTC 2,007.

[40] This would now be subject to the residential rental ring-fencing rules in subpart EL.

[41] At 1,173.

[42] *Case L102* (1989) 11 NZTC 1,575 (TRA).

[43] *LD Nathan Group Properties Ltd v CIR* (1980) 4 NZTC 61,602 (HC).

rents and interest was not a business. The High Court held that the taxpayer was carrying on a business, quoting several overseas cases that had concluded that negotiating leases and collecting rents from properties gave rise to a business.

79. Whether property leasing constitutes a business is illustrated in Example | Tauira 6.

Example | Tauira 6 – Charitable purposes overseas

TeachAid is a registered charity set up to promote education in low-income countries. The charity derives income from donations as well as rental income from a commercial property in New Zealand consisting of four retail units. The property was donated to the trust by a person who does not retain any interest in the property. The charity engages a property manager to manage all aspects of the property, including leasing the units, maintenance and insurance.

TeachAid wishes to know whether its rental income from the property is exempt from tax in New Zealand.

There are two potentially relevant exemption provisions that apply to a registered charity like TeachAid: ss CW 41 and CW 42. If the rental income is derived from a business, then the question of whether the income is exempt is determined under s CW 42. If the rental income is not business income, the question of whether the income is exempt is determined under s CW 41.

This is particularly relevant for TeachAid because, under s CW 42, an exemption is only allowed to the extent that the charitable purposes are carried out in New Zealand, and TeachAid's charitable purposes are carried out overseas.

It is also noted that under s CW 42(3) a trustee can be treated for the purposes of s CW 42 as carrying on a business if the trustee derives rental income from a property that was transferred to the trust, and the transferor retains an interest in the property. However, this does not apply on these facts. Therefore, the standard business test must be considered.

Applying the business test, the activity is property leasing, which is capable of being a business (*Dick*). The leases of the retail units are ongoing, and the charity receives significant income from the four units. Although the charity engages a property manager to deal with all aspects of the property, the manager is the agent of the charity, so any commitment of time and effort is effectively ascribed to the charity (see [85]). The property is valuable, so represents a significant commitment of money. Finally, the charity intends to profit from the property (albeit for charitable purposes).

Accordingly, it is considered the leasing activity is a business. This means TeachAid's entitlement to an exemption is determined under s CW 42. This means TeachAid's rental income will not be exempt because TeachAid's charitable purposes are carried out overseas.

Person's involvement in a business

80. A question that sometimes arises is whether a person is carrying on a business if they are not themselves involved in carrying on activities that are part of the alleged business.

81. In some cases, it may be difficult to distinguish between a person acquiring services from other persons who may be in business and a person carrying on business themselves by contracting with others to carry out certain tasks.

82. In these cases, a person is more likely to be carrying on a business themselves if they are involved in oversight, organisation or control of the tasks they are paying other people to carry out. If the person has sufficient involvement, the activities of other persons will generally be attributed to the person and considered alongside the person's own involvement when determining whether the person is carrying on business.

83. This is illustrated in the Australian case of *Ferguson v FTC*.[44] In that case, the taxpayer was a naval officer who intended to buy a grazing property and raise beef cattle when he retired. Several years before he was due to retire the taxpayer entered two agreements. One was with a cattle leasing company and the second was with management company that would care for cattle leased from the first company. The taxpayer had the right to progeny of the leased cattle and made decisions regarding what to do with bull calves. The taxpayer saw the leasing arrangement as a feasible way of building up a herd which he could eventually move to his own property where he could engage in full scale cattle production.

84. The court noted that there was evidence of considerable system and organisation in relation to the breeding scheme itself, although most of this was done by the manager. Nevertheless, the court noted the appellant paid for the manager's services. The court also stated that the taxpayer spent a fair amount of his spare time on maintaining familiarity with the progress of the cattle through reports received from the manager and through reading periodicals relating to primary production. The court also noted that the taxpayer began to keep records relating to the breeding programme and

[44] *Ferguson v FTC* 79 ATC 4,261 (FFC).

maintained a ledger of his receipts and payments. The court also noted a significant proportion of the appellant's income was applied by him under the two agreements. Overall, the court found that the taxpayer was conducting his activities on a commercial basis and was carrying on a business – despite being in the Navy and contracting with others to look after the cattle.[45]

85. Further, if a person has an agency relationship with another person, the person (as principal) will be treated as doing the things that the agent does. Therefore, an agent's activities can be considered in determining whether a person is carrying on a business. This is illustrated in Example | Tauira 6.

Whether a single transaction can give rise to a business

86. A question that occasionally arises is whether a single transaction can give rise to a business.

87. In *Public Trustee*,[46] Hutchison J said an isolated transaction does not normally constitute a business of dealing, but it is not conclusive:[47]

> … A person who carries on a business of dealing in land of course buys land for the purpose of selling it at a profit, but it does not follow that, because he buys land for the purpose of selling it at a profit, he carries on a business of dealing in land. The land sold by Marshall was acquired by him in one purchase only. That is a factor to be considered, for an isolated transaction does not normally constitute a business, but it is not conclusive …

88. In *Mitchell*,[48] the High Court considered whether a horse breeding activity was a business of dealing in personal property under (what is now) s CB 5. Greig J said:[49]

> I turn then to the three limbs of the subsection, and the first is whether this is a business. **It is a single transaction and clearly was the first transaction by the objectors. It is accepted, as it must be, that a single transaction can be within the terms of the subsection a business dealing in such property, and there are a number of authorities which are cited in support of that**. Moreover, the horse-breeding industry involves rather infrequent transactions and there may be very few in any given business.

[45] Comparisons might be drawn between this case and Example | Tauira 1, where Zaid keeps five cattle on a small rural property and the conclusion is he is not carrying on business. However, there are important differences between *Ferguson* and Example | Tauira 1. For instance, in *Ferguson*, the taxpayer's cattle were being managed together with other cattle in a larger scale grazing operation.

[46] *Public Trustee v CIR* [1961] NZLR 1,034 (HC).

[47] At 1,038.

[48] *Mitchell v CIR* (1987) 9 NZTC 6,033 (HC).

[49] At 6,037.

> The operation of one brood-mare producing a foal every year would still be a business as much as the substantial stud with several mares and sires producing numerous progeny for sale each year. **But it must be accepted that a single and first transaction is less likely to be treated as the part of a business**. [Emphasis added]

89. In *Case E99*,[50] the taxpayer salvaged abandoned agricultural equipment from a property, restored and sold it in four lots, mostly to a related party. The taxpayer argued that the isolated transactions or "one particular act never to be repeated" are normally excluded from the concept of business. Judge Barber accepted that an isolated transaction does not constitute a business but due to the systematic effort of the taxpayer over a six-month period was in "no doubt whatsoever" that there was an undertaking carried on for pecuniary profit.[51]

90. In *AAA Developments (Ormiston) Ltd*,[52] Gendall J confirmed that the taxpayer, which was incorporated for the purpose of developing a single block of land into a significant number of retail units, residential apartments and car parks, was in business.

91. In summary, in determining whether a single transaction gives rise to a business, each situation will depend on its own facts and an application of the *Grieve* factors. This is illustrated in Example | Tauira 7.

Example | Tauira 7 – One-off property development

Lakefront Limited is a special purpose company incorporated to undertake a small property development involving acquiring a block of bare land and building a single residential house on it for the purpose of sale. The combined cost of the land and house is $1.2m and the development takes two years to complete. The company wants to ensure its expenditure on the development is deductible under s DA 1.

In terms of the *Grieve* factors, the company has a clear intention to profit from the development. Property development is an activity that can give rise to a business. The commitment of time, money and effort is significant, as the development takes two years from start to finish and costs $1.2m. However, the scale of operations and volume of transactions is low, as the development consists of building a single residential house and will result in a single sale of that property. The company also has no pattern of activity as it is a special purpose vehicle.

[50] *Case E99* (1982) 5 NZTC 59,532 (TRA).

[51] At 59,539.

[52] *AAA Developments (Ormiston) Ltd v CIR* (2015) 27 NZTC ¶22-026 (HC) (see further at [115]).

In weighing up the *Grieve* factors, it is considered that the company is not carrying on a business. Although the commitment of time and money is significant, the scale of operations and volume of transactions is too low to give rise to a business.

Despite this conclusion, the company's expenditure will nevertheless be deductible under s DA 1(1)(a) as the company will be taxable on the proceeds of sale under s CB 6.

Whether a person can carry on multiple businesses

92. Another issue that arises is whether a person can carry on multiple businesses or carry on a business while having a full-time job. This usually arises where an individual already has an existing full-time job or business and begins to carry on a new activity. The issue is important as it may determine whether amounts arising from the new activity are taxable.

93. In *Stockwell*, the Court of Appeal considered whether the taxpayer, a structural engineer, was carrying on a business of buying and selling shares. Hardie Boys J confirmed that a taxpayer may have two or more businesses:[53]

> Whether a particular activity amounts to a business is a matter of fact and degree, but the continuity and extent of the activity must be important considerations, if not the dominant considerations. Plainly the activity need not be the taxpayer's sole or even principal activity. **A person may have two or more businesses. One may be major, the other or others minor, but all may still be businesses**. [Emphasis added]

94. However, in a separate judgement, Cooke P said that when a taxpayer (a natural person) has a full-time occupation, is retired or unemployed, and engages in a modest amount of activity, the presumption should be against a business:[54]

> … When a taxpayer has a full-time occupation and devotes some of his spare time to stock exchange speculation, one should be slow, I think, to find that he has gone as far as to embark on a business. Usually it would be an artificial use of language. The same applies to a retired or unemployed person who engages in a modest amount of buying and selling shares. In such cases the presumption should be against a business.

95. In *Case L19*,[55] Judge Barber accepted that the taxpayer, a medical doctor, was carrying on a small farming business. The taxpayer worked steadily on the farm each weekend,

[53] At 9,194.

[54] At 9,194.

[55] *Case L19* (1989) 11 NZTC 1,125 (TRA).

one afternoon during the week and for most of his holidays. Judge Barber regarded the time and effort commitment as quite substantial.

96. Similarly, in *Case L57*,[56] Judge Barber accepted that the taxpayer was in business both as a farmer and a professional artist.

97. In summary, depending on the facts, it is possible for a person to carry on more than one business. However, where the natural person has a full-time occupation, is retired or unemployed, and devotes a modest amount of time to the other activity, there will be a presumption against a business.

A company may more readily be found to be in business than an individual

98. A company may more readily be found to be in business than an individual. The Privy Council in *Rangatira*[57] stated at 12,730:

> … At one stage in their respective arguments, counsel for both parties took up extreme positions. Thus for the appellant, Mr Underhill QC advanced the contention that there could be no question of liability under s 65(2)(a) since the holding of investments did not constitute the carrying on of a business, and therefore the appellant fell outside the scope of the charge. This is a novel proposition, and one which their Lordships have no hesitation in rejecting. It may well be that in the case of individuals or trustees the holding of investments would very rarely amount to the carrying on of a business. It may well be, therefore, that, if the investments held by the appellant had instead been held by the various bodies of trustees who made up the majority of its shareholders, there would have been no scope for the operation of s 65(2)(a). But the interposition of the appellant made all the difference. The objects clause of the appellant is drawn in conventionally broad terms and authorises it to carry on a range of businesses which embraces almost the whole conceivable gamut of commercial activities. The authorities, to some of which reference must be made, contain a number of instances in which investment holding companies, no less than investment dealing companies, have been treated as carrying on a business for taxation purposes, and their Lordships feel no doubt about the correctness of such treatment.

99. Similarly, it has been stated that any gainful use to which a company puts its assets to make a profit for its shareholders, on its face, amounts to carrying on a business.[58] However, any presumption as to the existence of a business is rebuttable.

100. The same test outlined in *Grieve* will apply to a company as is applied to an individual or a trustee. Differences may naturally arise in the application of the test, as a company may not have competing non-business purposes like an individual would and

[56] *Case L57* (1989) 11 NZTC 1,326 (TRA).

[57] *Rangatira Ltd v CIR* (1996) 17 NZTC 12,727 (PC).

[58] *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1979] AC 676 (PC).

the establishment and maintenance of the company may provide some evidence of a profit-making intention.

101. An example of a company that may not be carrying on a business is a company that is established and maintained as a charity. Although such companies can carry on businesses to fund their charitable activities, the existence of a business would not be presumed.[59]

The scope of a business

102. The scope of a business (including the type of business and the various activities carried on in the business) can be important in determining whether income is taxable under s CB 1 and expenditure is deductible under s DA 1(1)(b).

Scope can affect the determination of income

103. For income purposes, an amount a person derives **from** a business is income of the person (s CB 1). In *AA Finance Ltd*, Richardson J said:[60]

> … A transaction may be part of the ordinary business of the taxpayer or, short of that, an ordinary incident of the business activity of the taxpayer although not its main activity. A gain made in the course of carrying on the business is thus stamped with an income character.

104. The taxpayer in *AA Finance* provided motor vehicle finance to its members. It was required to hold prescribed levels of government stock for capital adequacy purposes. The issue was whether proceeds from the realisation of the government stock were taxable. The taxpayer argued that the government stock represented an investment separate from and unconnected to its ordinary trading activities.

105. Richardson J described the business of the taxpayer as that of a finance company and said the acquisition and holding of government stock was a necessary incident of that business and, further, its private sector and public sector (ie, government stock) lending were not separate activities.

106. It follows that the scope of a business may be an important factor in determining whether an amount of income arises as part of the ordinary operations of that business or as an ordinary incident.

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[59] See also IS 24/08: Charities – business income exemption *Tax Information Bulletin* Vol 36, No 10 (November 2024): 3

[60] *AA Finance Ltd v CIR* (1994) 16 NZTC 11,383 (CA) at 11,391.

Scope can affect the determination of deductions

107. The scope of a business can also be important in determining whether expenditure is deductible under s DA 1(1)(b).

108. For deduction purposes, an amount of expenditure or loss must be incurred **in the course of carrying on** a business under s DA 1(1)(b). This is referred to as the nexus test. The scope of a business is particularly important in determining whether expenditure relating to the commencement of a new or separate business, or the cessation of a business, is deductible.

109. Note that even if the nexus test is satisfied, a deduction may not be available. This is because it is also necessary to consider whether a general limitation applies under s DA 2. For example, expenditure is not deductible if it is of a private or domestic nature (s DA 2(2)).

110. For a new business, a question about the deductibility of feasibility expenditure might arise. The position on feasibility expenditure was summarised by the Supreme Court in *Trustpower* as follows:[61]

> Section DA 1 denies deductibility to feasibility expenditure for a new, or an entirely separate, business venture which is not underway at the time the expenditure is incurred. If activities are undertaken to decide whether or not to enter a business (as against, as in this case, in the course of a taxpayer's existing business), the expenditure will lack the required nexus to a business and s DA 1 will not be satisfied.

111. In brief, preparatory expenditure relating to a new or entirely separate business venture that is not yet underway is not deductible.

112. If a person has an existing business and is investigating a new business opportunity, it is particularly important to understand the scope of the existing business to understand whether the new opportunity is an extension of the existing business or an entirely new business. Preparatory expenditure relating to an entirely new and separate business that is not yet underway is not deductible.

113. In *Case L74*,[62] the taxpayers, who carried on a business of property development, sought to deduct travel expenditure incurred travelling to the Cook Islands to investigate the purchase of land from which they could run a motel. The taxpayers argued that the expenditure related to an extension of their existing business, so was deductible. Judge Barber held that while property development was wide in scope, the

[61] *Trustpower Ltd v CIR* (2016) 27 NZTC 22,061 (SC) at 29,169.

[62] *Case L74* (1989) 11 NZTC 1,431 (TRA).

expenditure was linked to the creation of a new business as moteliers and was preparatory in nature.

114. In contrast, in *Case S39*,[63] the taxpayer was described as being in the business of media and entertainment production, which led the Taxation Review Authority to conclude that expenses incurred on the investigation and formulation of media projects were incurred as part of the taxpayer's ordinary business operations.

115. The scope of a business was relevant in a cessation context in *AAA Developments (Ormiston) Ltd*. In that case the taxpayer entered into a sale and purchase agreement to buy land for development purposes in 2006 subject to the vendor obtaining resource consent. By 2008 the vendor had not obtained consent, and the taxpayer decided not to continue with the development. This led to litigation between the parties as they tried to variously cancel and enforce the contract. The taxpayer sought to deduct expenditure incurred in relation to the litigation. The Commissioner argued that the taxpayer's business had ceased from 2008. The taxpayer argued (among other things) that because its purposes were not constrained by a constitution its business included making "any form of income or profit in relation to the land", such that the litigation constituted a continuation of its business. Gendall J rejected the taxpayer's argument on other grounds but observed that the argument was unsupported because the taxpayer's intention was only ever to develop the land.

116. For a detailed discussion of the scope of a business in the context of feasibility expenditure, see **IS 17/01** Income tax - deductibility of feasibility expenditure.[64]

When a business commences

117. The question of when a business commences is important because it will usually determine the first moment a deduction can be claimed under s DA 1(1)(b). A taxpayer may incur costs in setting up a business including legal fees, training and advertising costs. Setup costs incurred before the business commences will generally not be deductible.

118. One exception to this is interest incurred by a company. For most companies, interest is deductible under s DB 7, without having to satisfy the nexus test under s DA 1. This means that for these companies, pre-commencement interest expenditure will be deductible.

[63] *Case S39* (1995) 17 NZTC 7,264 (TRA).

[64] IS 17/01: Income tax – deductibility of feasibility expenditure (interpretation statement, Inland Revenue, 23 February 2017).

119. The issue of when a business has commenced has been considered in both New Zealand and overseas cases.

120. In the English case *Birmingham*,[65] Rowlatt J concluded that the taxpayer, a manufacturer of meat by-products, had not commenced business until the date it started to receive raw material and produce finished products. Until then, all its actions were merely preparatory to the commencement of business; it was in the process of "getting ready".

121. *Birmingham* was cited by Barker J in the New Zealand Court of Appeal decision *Duff*,[66] as being authority for the proposition that a business does not commence until the plant is ready and the owner is ready to commence dealings in the articles from which the owner is to derive profit; preparatory activities do not constitute the running of a business.

122. *Birmingham* was also confirmed by the Court of Appeal in *Calkin*, where Richardson J noted the difficulty in distinguishing between transactions that are preparatory to the commencement of business and those that occur once the business has begun. He concluded:[67]

> Clearly it is not sufficient that the taxpayer has made a commitment to engage in business: he must first establish a profitmaking structure and begin ordinary current business operations.

123. *Calkin* was applied in the High Court decision of *Stevens & Stevens*.[68] In *Stevens & Stevens*, Gallen J also noted that it is not always easy to establish when a business commences and said:[69]

> Preliminary investigations will clearly not be enough, nor will the expenditure of capital requirements in order to enable the business to be carried on, see *Birmingham and District Cattle By-Products Company Limited v Commrs of IR*. The business must involve trading.

124. Gallen J went on to consider the Canadian case *MP Drilling Ltd*[70] where it was held that a business had commenced when the permanent structure, the market and the

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[65] *Birmingham & District Cattle By-Products Co Ltd v Inland Revenue Commissioner* (1919) 12 TC 92 (KB).

[66] *Duff v CIR* (1982) 5 NZTC 61,131 (CA) at 61,144.

[67] At 61,786.

[68] *Stevens & Stevens v CIR* (1989) 11 NZTC 6,001 (HC).

[69] At 6,006.

[70] *Minister of National Revenue v MP Drilling Ltd* [1976] CTC 58 (FCA).

products all existed, and the efforts of the respondent were directed to bringing them together with a resultant profit to it.

125. Despite the requirement that the income-earning process must have begun, there are cases that indicate it is not necessary for a taxpayer to have derived any income from an activity for a business to have commenced. For example, in *Eggers*,[71] Richardson J concluded that a deduction may be allowed for expenditure incurred even though no income was derived in the year in which the expenditure was incurred. However, he emphasised that it was necessary for a business to have commenced.

126. The ultimate failure or abandonment of all or part of an activity does not necessarily indicate that a business was never commenced.[72]

127. In summary, key factors to consider in determining whether a business has commenced are whether:

- the profit-making structure has been established; and
- ordinary current business operations have begun.

128. The profit-making structure and the current business operations could look very different depending on the type of business involved. For example, for a manufacturing business, a profit-making structure may not be established until machinery has been set up and the ordinary current business operations may not begin until finished products are being produced. For a property development activity, the profit-making structure and current business operations might look quite different.[73]

129. For further discussion of business commencement in the context of:

- feasibility expenditure, see **IS 17/01:** Income tax - deductibility of feasibility expenditure*;*
- bloodstock breeding, see **QB 22/07:** Income Tax and Goods and Services Tax – Treatment of bloodstock breeding;[74] and

[71] *Eggers v CIR* (1988) 10 NZTC 5,153 (CA). See also *Stevens & Stevens v CIR*, *Case M68* (1990) 12 NZTC 2,384(TRA), *Slater v CIR* (1996) 17 NZTC 12,453 (HC) and *Case T25* (1997) 18 NZTC 8,160 (TRA).

[72] See, for example, *Goodman Fielder Wattie Ltd v FCT* 91 ATC 4,438 (FCA) and *Whitfords Beach Pty Ltd v Federal Commissioner of Taxation* 83 ATC 4,277 (FCAFC).

[73] See *Whitfords Beach Pty Ltd v FCT* 83 ATC 4277 (FCAFC) and *AAA Developments (Ormiston) Ltd v CIR* [2015] NZHC 2,318; (2015) 27 NZTC 22,026.

[74] QB 22/07: Income tax and goods and services tax – treatment of bloodstock breeding *Tax Information Bulletin* Vol 34, No 9 (October 2022): 22.

- content creators, see **IS 21/08** Content creators - tax issues at [85].[75]

See also Example | Tauira 8 and Example | Tauira 9.

Example | Tauira 8 – Starting a small service business

Graeme wishes to become self-employed, so he takes steps to set himself up as a bookkeeper. He retires from his previous employment and spends April and May converting an existing sleepout at his property into a home office. Once the conversion is complete, Graeme spends June acquiring the necessary office equipment and supplies and setting up his office. On 2 July, he starts seeking clients and is available to start providing bookkeeping services. Seeking clients involves posting advertisements on social media and entertaining. On 5 August, Graeme obtains his first client but must wait until 12 September before he receives sufficient information from his client to begin work. There is only enough work at this point to keep Graeme busy two days a week. On 15 October, Graeme raises his first invoice. In November, Graeme obtains two further clients, and by December he is working full time as a bookkeeper.

Graeme wishes to claim deductions under s DA 1 for expenses incurred in painting his home office, buying stationary and entertaining prospective clients and for office overheads (including a portion of rates, insurance and mortgage interest) and depreciation on his office equipment. The issue is when his business commenced.

The required profit-making structure for Graeme's business is in place by the end of June when he finishes setting up his home office. Graeme's ordinary business operations begin on 2 July because Graham was ready to start providing bookkeeping services at that time and in Graeme's situation seeking new clients will be part of his ordinary business operations. Even after December, by which time he is working full time, he may need to seek new clients if old clients are lost.

It follows that Graeme's business commenced on 2 July. The fact Graeme did not start keeping books straight away and had not yet raised an invoice does not affect this conclusion.

This commencement date means that any expenditure incurred or depreciation loss arising before 2 July is not deductible under s DA 1.

[75] IS 21/08: Content creators – tax issues *Tax Information Bulletin* Vol 33, No 10 (November 2021): 33 at [85].

Example | Tauira 9 - Product design business interrupted

Fadi is a well-regarded product designer with 15-years' experience who wants to start out in business on his own designing homeware. He researches the market for a range of homeware products he has in mind. Based on his research, he thinks he can design products to licence to manufacturers. He creates a business plan and approaches private investors for funding that he will need to cover expenditure while starting out – he expects to make a loss in the first two years of business. After securing the funding, he resigns from his current employment. He then sets up a company, searches for an appropriate office and workspace and advertises for employees. The company then employs two staff, sets up the office and workspace and begins work on the first product designs. The company's business plan will see the company working on a pipeline of product design projects which it will then licence to manufacturers. The company plans to be able to market initial designs to manufacturers and enter licencing contracts six months after setting up the office.

However, three months after setting up the office, Fadi is involved in an accident, and the business cannot continue. The company's accountant wants to know whether expenditure incurred by the company is deductible. The accountant is unsure whether the business had commenced, given no contracts had been entered or income derived.

The business commenced when the company set up the office and workspace and started product design. The product design was part of the current business operations of the company. Accordingly, expenditure, including staff and office costs incurred during the three months the business was carried on could potentially qualify for a deduction. However, consideration may need to be given to whether the expenditure is capital expenditure and how the depreciation rules apply in this situation to any depreciable property.

When has a business ceased

130. The question of when a business has ceased is important because it generally determines the last moment when expenditure can be deducted for tax purposes under s DA 1.

131. In *Case U29*, Judge Barber said it was settled law that post-cessation expenditure did not meet the criteria for deductibility:[76]

[76] *Case U29* (2000) 19 NZTC 9,273 (TRA) at [50].

It is also settled law that post-cessation expenditure does not meet the criteria of s 104, and the various authorities for that seem to rely on the words of Latham CJ of the High Court of Australia in *Amalgamated Zinc (de Bavay's) Ltd v FC of T* (1935) 54 CLR 295 at p 303:

> "So it has also been held that expenditure which has a direct relation to income of a past year can be deducted in a later assessment year where it is of such a character that, in a continuing business, it must be met from time to time as part of the process of gaining assessable income … But even this benevolent construction cannot assist the taxpayer in a case like this, **where there has been a complete cessation of the income-producing operations out of which the necessity to make the outgoing arose**." [Emphasis added]

132. A common type of post-cessation expenditure is interest expenditure. A deduction for interest charged on a loan is only available in an income year to the extent the loan amount has been used in the business during that income year. With the exception of some companies, interest expenditure paid on a loan after the business ceases is not deductible – even if the loan amount was used in the business before it ceased. This was the conclusion reached in *Case L89*[77] and *Case N7*.[78]

133. This is based on what is described as the "use test". Under the use test, interest is deductible if it is paid on capital (loan principal) used in the production of assessable income. Importantly, the question is how the loan is being used in the income year for which the interest deduction is being sought. A deduction is only available for an income year if the loan capital is still being used in the business in that income year. The use test can be traced back to cases such as *Pacific Rendezvous Ltd*,[79] *Eggers*[80] and *Brierley*.[81]

134. For some companies, interest expenditure is deductible under s DB 7 without having to establish a nexus or connection with the derivation of income. This means that interest expenditure can continue to be claimed by these companies post cessation.

135. The position in New Zealand on the deductibility of expenditure post-cessation differs from the position in other countries. In Australia, for example, the courts allow deductions after a business has ceased, provided that "the occasion" for the expenditure is to be found in a transaction entered into in the carrying on of the

[77] *Case L89* (1989) 11 NZTC 1,508 (TRA) at 1,512.

[78] *Case N7* (1991) 13 NZTC 3,048 (TRA) at 3,051.

[79] *Pacific Rendezvous Ltd v CIR* (1986) 8 NZTC 5,146 (CA).

[80] *Eggers v CIR* (1988) 10 NZTC 5,153 (CA).

[81] *CIR v Brierley* (1990) 12 NZTC 7,184 (CA).

business (ie, before cessation) for the purpose of producing assessable income.[82] Given that the Australian cases were heard by the full Federal Court of Australia, the Australian case law might be influential in any future New Zealand judicial consideration of the issue. However, at the moment, the New Zealand position is different from that in Australia.

136. A business ceases when the activities cease or are no longer at a sufficient scale to be considered a business, or when there is no longer an intention to make a profit. This usually occurs when a business is winding up, but the question may also arise where a business downscales or temporarily ceases. Each of these contexts is discussed below.

Winding up a business

137. When a business is in the process of winding up, there will come a point at which there is either no intention to make a profit, or the level of activity is too low to constitute a business.

138. In *Case F31*,[83] Judge Bathgate held that the taxpayers no longer had an intention to profit in the context of winding up a business. The taxpayers, a husband-and-wife partnership, acquired land intending to establish an orchard. They initially planted an onion crop on the land; it failed. Subsequently, and before acquiring any fruit trees or vines, the taxpayers decided to sell the land. Before the sale went through, the land was planted in maize. The taxpayers sought to deduct losses from the onion crop as well as expenses incurred planting the maize against their other income. Judge Bathgate said:[84]

> The objectors were carrying on the farming partnership venture for the purpose of obtaining an excess of income over expenditure. They were carrying on the venture for pecuniary gain. I am satisfied that was their purpose until at least 29 October 1979. …
>
> When the objectors decided to sell the land, or endeavour to sell the land, on 29 October 1979 I am not satisfied on a balance of probability that their intention to make a profit from the farming partnership continued. In this regard I again refer to "profit" in the sense of excess of income over expenditure, and not to a capital profit. In my view the

[82] See *FCT v Riverside Road Pty Ltd (in liq)* 90 ATC 4,567 (FFC), *Placer Pacific Management Limited Pty v CT* 95 ATC 4,459 (FFC), *FCT v Brown* 99 ATC 4,600 (FFC), and *FCT v Jones* 2002 ATC 4,135 (FFC). *Case 17/2014* (2014) 26 NZTC 2,027 (TRA) does not provide clear authority for following the approach taken in the Australian cases. In *Case 17/2014*, the TRA was not required to decide whether post-cessation expenditure was deductible because the TRA held that there was an insufficient nexus in any event.

[83] *Case F31* (1983) 6 NZTC 59,712 (TRA).

[84] At 59,719.

> objectors have proved no more than from that date they continued with the maize planting and growing as an aid to their sale of the land.

139. In summary, Judge Bathgate concluded that the taxpayers ceased to have an intention to profit from the date they decided to sell the land and that the maize was merely planted to aid the sale of the land.

140. See also *AAA Developments (Ormiston) Ltd* (discussed at [115]) in which the High Court held that the taxpayer ceased to have a profit-making intention from the date it decided to abandon a property development.

141. In *Case L89*,[85] Judge Barber found that a hotel business had ceased when the hotel lease and chattels were sold. The taxpayer acquired a hotel business funded in part by a loan from the vendor. The business was not as profitable as represented, and the taxpayer ceased making interest payments under the loan. The vendor appointed a receiver who operated the business on the taxpayer's behalf for a time before selling the business. For the following two years the taxpayer was involved in litigation against the vendor and collecting trade debts. The taxpayer sought to claim interest deductions over that period. Judge Barber said:[86]

> … I find that the trading activity of the objector ceased on 9 October 1983 when the hotel lease and chattels were sold to new licensees. Although the receivership was terminated on 17 December 1985, by the beginning of the 1985 income tax year there was no business activity taking place on behalf of the objector company. True, **the recovery of debts and tidying up of the affairs of a business can be of such a degree as to amount to a continuation of the previous trading business, but not usually**. That issue must always be one of fact and degree in any particular case. Here, there was very little such activity in 1985 and 1986. **I do not accept as a general proposition that, for income tax purposes, a business continues so long as it has debts which result from that business.** [Emphasis added]

142. In summary, Judge Barber concluded there was insufficient activity to constitute a business after the sale of the hotel business. However, he acknowledged that depending on the facts the recovering of debts and tidying up the affairs of a business may amount to a continuation of the business, but not usually.

143. In *Case U29*, which concerned the deductibility of a settlement payment arising from litigation following the sale of a business, Judge Barber revisited the above conclusion and said:[87]

[85] *Case L89* (1989) 11 NZTC 1,508 (TRA).

[86] At 1,511.

[87] At 9,280.

> … Since [*Case L89*], my approach to that situation has slightly mellowed in terms of my perception of current commercial practice. It now seems to me that the tidying-up of the affairs of a business could often mean the continuance of the business for income tax purposes for a reasonable period beyond cessation of trading, but one needs to examine the particular facts of the case to ascertain whether or not the business terminated when trading ceased.

144. In summary, Judge Barber confirmed that, depending on the facts, the tidying up of the affairs of a business for a reasonable period beyond the cessation of trading could mean the continuance of the business.

145. In conclusion, the question of when a business ceases in the context of winding up depends on the facts. The sale of a business or a decision to sell or abandon could indicate that there is no longer a profit-making intention. Alternatively, the scale of activity may become too low to sustain the continued existence of a business. Where trading has ceased, a business may nevertheless continue for a reasonable period so its affairs can be tidied up.

Downscaling a business

146. Some businesses choose to downscale their operations until trading conditions improve by reducing staff numbers or hours of operation. If there is still an intention to make a profit and sufficient operational activity (relevant to that type of business and current market conditions), then it is likely a business is still being carried on and any expenditure or loss incurred can be deducted.

147. In *Case F131*,[88] Judge Barber said it is not necessarily correct that if through adversity (or any other reason) the major part of an enterprise is sold off and the balance continued for a time, then the owners are no longer in business.

148. Despite this, a point will come where the downscaling is to such a degree that it indicates the business has ceased.

149. In *Case J78*,[89] an elderly couple decided to reduce the area of their farm from 50 acres to 4 acres to reduce costs and alleviate the physical burden of farming. They also decided to diversify their farming from annual crops to longer-term crops that required less effort. The longer-term crops were not readily available, so the couple continued to farm as usual, but only on the 4 acres. They farmed this way, knowing there would be little chance of a profit, and worked part-time jobs to supplement their income. The couple claimed deductions for business losses over the period. The Commissioner

[88] *Case F131* (1984) 6 NZTC 60,200 (TRA) at 60,204.

[89] *Case J78* (1987) 9 NZTC 1,459 (TRA).

disallowed the claim on the basis that they had not been carrying on a business. Judge Barber held that by farming on a reduced scale and with the knowledge that they would not make a profit, the taxpayers could not be regarded as carrying on a business.

Temporary cessation

150. When applying the business test, the courts have drawn a distinction between a temporary cessation of business (where the business activities have temporarily ceased or been suspended but will recommence) and cessation with the possibility of recommencement (where business activities have ceased, and it is not certain they will recommence). Deductions are usually allowed for temporary cessation but not for cessation with the possibility of recommencement.

151. This distinction was explained in *Case F73*.[90] The taxpayer company was a partner in a fishing venture. In 1979, the skipper resigned, and the boat stopped being used for fishing, although the partners continued to look for a new skipper. In 1980, the boat was removed from the water to reduce overheads and sale became a possibility. The boat was sold a year later. The taxpayer claimed a deduction for expenses incurred in the 1981 income year, arguing that at this stage, there was merely a temporary cessation of the fishing venture. They relied on attempts (that came to nothing) to set up share fishing or leasing arrangements with the boat.

152. Judge Barber held that by 1981 the business had ceased to operate, and the partners were biding their time over the best course of action to take. This was not a temporary cessation, but a cessation with the possibility of recommencement:[91]

> The source of income from fishing no longer existed well before 1 April 1980. I consider that there was not merely a temporary cessation of income earning operations in the partnership. There was a cessation with the possibility of recommencement if a suitable operating structure could be worked out with a third party. [Emphasis added]

153. In *AAA Developments (Ormiston) Ltd* (discussed at [115]), Gendall J rejected the taxpayer's argument that its business had only temporarily ceased. The Commissioner argued that the taxpayer's business had ceased from the time it decided not to continue with the property development. The taxpayer argued, among other things, that its business had only temporarily ceased because it had not abandoned all expectation of resuming the property development. Gendall J concluded:[92]

[90] *Case F73* (1983) 6 NZTC 59,931 (TRA).

[91] At 59,935.

[92] At 28,746.

> … This leads to the conclusion, in my view, that from 24 July 2008 AAA no longer had any profit making intention. The factors favouring this conclusion are:
>
> (i) the development was not proceeding (due to first, AAA's and Ormiston's attempts to extricate themselves from the purchase agreement, seen as an onerous contract, secondly, the subsequent litigation and, thirdly, the economic downturn);
>
> (ii) from that point forward, there was no prospect of deriving assessable income, with efforts being directed towards recuperating losses and winding up of the business.

154. In summary, Gendall J rejected the taxpayer's argument on the basis there was no longer any profit-making intention.

155. The above cases can be contrasted with the Queensland Supreme Court decision in *Queensland Meat Export Co Ltd v FCT*.[93] In that case, the taxpayer operated meat works in two locations. One of the works was closed for three years because of competition from a new abattoir in the area, but it was intended that it would reopen once conditions improved. However, after three years, the directors decided to advertise the closed works for sale as a going concern. The issue was whether expenditure incurred in relation to the closed works such as insurance, rates, security and depreciation was deductible during the three-year period. Douglas J held that the cessation of business was merely temporary until the decision to sell was made:[94]

> I consider that the establishment of the abattoir in Brisbane resulted in business competition which compelled the appellant to close its works at Brisbane. Such closure was at first temporary. **The works and plant were kept in good order and condition in the hope that they might be profitably used at some future date**. When the decision to offer them for sale was made on 5th July, 1934, such hope had vanished, but in the expectation of sale the money expended until the end of November was properly expended in keeping the works and plant in good order and condition. **I think it is one of the incidents of a business of this kind that competition or other adverse conditions may compel the owner to close down [a] portion of its plant for an indefinite period. It is an ordinary business precaution that during such period the works and plant should be retained so far as possible in good working order whether the ultimate result be that they should again be opened or that they should be sold or eventually dismantled**. It appears to me that it is an incident of all competitive manufacturing works and plants that some of them may succumb temporarily or finally to their more successful rivals. **The question whether the**

[93] *Queensland Meat Export Co Ltd v FCT* (1939) 5 ATD 176 (QSC).

[94] At 180.

> **cessation of operations is merely of a temporary nature or is one which has reached the final stage is difficult to answer**.
>
> In the present case I have come to the conclusion that up to the 5th July, 1934, the cessation was of a temporary nature. After that date, seeing that the plant had merely been offered for sale and not sold, I think the appellant may be considered as holding the plant for sale in the first instance and for possible use if some turn of the tide came.

156. In summary, the court in *Queensland Meat* accepted that it may be an ordinary incidence of business to shut down part of its operations for an indefinite period. However, drawing the line between a temporary cessation and cessation with the possibility of recommencement can be difficult.

157. Ultimately, whether a business has ceased is a question of fact in each case. However, it is easier to argue a business is being carried on where it is well established and has kept its business structure and assets in place. Properly maintaining assets and expending time and effort on a relaunch also support the argument that a business was continuing despite a hiatus.

158. For a more detailed discussion of the distinction between temporary cessation and cessation with the possibility of recommencement see **IS 21/04** Income tax and GST – deductions for businesses disrupted by the COVID-19 pandemic.[95]

159. The deductibility of expenditure on the winding down of a business is illustrated in Example | Tauira 10.

Example | Tauira 10 – Winding up a business

Capital Foods Limited owns and operates a popular central city café. However, due to the increase in people working from home and a decrease in nearby parking spaces, clientele has dropped off and the business is no longer viable. The owners make the difficult decision in May to close the café from the end of June.

The company engages its lawyers to advise on staff redundancies and negotiate a break of its lease.

The café's last day of trading is 30 June. No income arises after that date. The company does its final pay run the following week, paying accrued wages, holiday pay and redundancy entitlements.

[95] IS 21/04: Income tax and GST – deductions for businesses disrupted by the COVID-19 pandemic *Tax Information Bulletin* Vol 33, No 9 (October 2021): 8.

A break fee is paid to the landlord in August, and the company incurs expenditure removing its plant and equipment and cleaning the premises.

The company's equipment is advertised for sale on an online auction site in August. The coffee machine sells quickly at a loss, but the chairs, tables and crockery remain unsold in November. The company continues to incur storage costs and ultimately pays for the unsold items to be taken to the dump in December.

The company has an outstanding loan, which it is unable to repay immediately. The company will be repaying the loan (and incurring interest) for some time.

The company's owner wonders whether the company can deduct its staff costs, the lease break fee,[96] cleaning costs, the loss on sale of the coffee machine, storage costs, equipment disposal costs and interest.

The company ceased to have a profit-making intention from the date it ceased trading (ie, 30 June). However, a business can continue for a reasonable period beyond cessation of trading while its affairs are tidied up. It is considered that the amount of time the company takes to wind down its operations is reasonable in this context, so the expenditure outlined above is deductible.

Because Capital Foods Limited is a company, it is able to continue to claim deductions for interest after the business has ceased (s DB 7 allows a company to claim an interest deduction without being required to establish a nexus between the interest expense and the production of income). However, if Capital Foods Limited wasn't a company, the interest incurred after December would not be deductible.

The difference between a business and a GST taxable activity

160. There are important differences between a business for income tax purposes and a "taxable activity" for GST purposes.

161. Whether a person is carrying on a "taxable activity" is a key concept for determining whether a person is required to register for and charge GST. A taxable activity is broadly defined as an activity that is carried on continuously or regularly, whether or not for profit, that involves or is intended to involve supplies of goods or services for consideration.[97]

[96] Lease surrender payments are deductible under s DB 20C if they satisfy the general permission in s DA 1.

[97] Section 6 of the Goods and Services Tax Act 1985.

162. Although the concept of a taxable activity is similar to the income tax meaning of a business, there are some important differences. In particular, the definition of taxable activity has many prescribed requirements that must be satisfied. In addition, a taxable activity does not need to be carried on for profit, where a business does.

163. Another important difference is that activities connected with the commencement or ending of a taxable activity are treated as being carried out in the course of that activity.[98] There is no equivalent rule for income tax purposes.

164. It follows that the fact the Commissioner may accept a taxable activity is being carried on for GST purposes does not mean a business exists.

165. For an in-depth discussion of the meaning of taxable activity, see **IS 25/21: GST – taxable activity**.[99]

Whether there is a business is not determinative of tax

166. The question of whether there is a business will not necessarily be determinative of whether an amount is income or whether a deduction is available. A person may have an income-earning activity that does not fall within the definition of a business. Amounts derived may be included in a person's income under another taxing provision in the ITA, and deductions may be available for expenditure incurred in deriving that income. This is illustrated in Example | Tauira 4 and Example | Tauira 7.

[98] Section 6(2) of the Goods and Services Tax Act 1985.

[99] IS 25/21: GST – taxable activity *Tax Information Bulletin* Vol 37, No 9 (October 2025).

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About this document | Mō tēnei tuhinga

Interpretation statements are issued by the Tax Counsel Office. They set out the Commissioner's views and guidance on how New Zealand's tax laws apply. They may address specific situations we have been asked to provide guidance on, or they may be about how legislative provisions apply more generally. While they set out the Commissioner's considered views, interpretation statements are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further Status of Commissioner's advice (Commissioner's Statement, Inland Revenue, December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in an interpretation statement will not necessarily lead to the same tax result. Each case must be considered on its own facts.