

INCOME TAX: DEDUCTIBILITY OF COMPANY ADMINISTRATION COSTS

All legislative references are to the Income Tax Act 2007, unless otherwise stated.
Reproduced in the Appendix are the relevant legislative provisions.

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INTRODUCTION

1. This Interpretation Statement considers the deductibility of certain expenditure relating to the administration of a company (“company administration costs”) being:

- accounting fees associated with company administration costs
- audit fees
- costs relating to the payment of dividends
- legal fees associated with company administration costs

- listing fees incurred by a company to obtain and maintain registration on a recognised exchange
- share registry costs
- costs relating to meetings of shareholders
- statutory return preparation and filing costs.

Before discussing these company administration costs, this statement briefly considers the principles of deductibility that underlie the analysis of the particular administration costs.

2. This statement applies from the 2014/15 and subsequent income years, contemporaneously with the commencement of amendments made by s 50 of the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014. These amendments inserted three provisions into the Act as follows:
 - Section DB 63 provides that a company is allowed a deduction for expenditure incurred in authorising, allocating, or processing the payment of a dividend or in resolving a dispute concerning these matters.
 - Section DB 63B provides that a listed company is allowed a deduction for expenditure incurred as periodic fees of a recognised exchange for maintaining the registration of the company on the exchange.
 - Section DB 63C provides that a company is allowed a deduction for expenditure incurred in holding an annual meeting of shareholders but is denied a deduction for expenditure incurred in holding a special or extraordinary meeting of shareholders.
3. This statement does not consider specific deductibility provisions that may apply to some types of company expenditure. These include expenditure related to:
 - the determination of tax that may be deductible under s DB 3 (fees for return preparation, objections and litigation expenses), and
 - the preparation and registration of a lease that may be deductible under s DB 18.
4. In addition, the transfer pricing rules set out in ss GC 6 to GC 14 may also apply to substitute an arm's length consideration for the expenses referred to in this statement.
5. In many instances, each type of company administration cost will relate to a variety of different outgoings. It is likely these outgoings will include composite payments for which issues of dissection or apportionment may arise. Therefore, the principles of apportionment discussed from para 36 may need to be considered in determining the tax treatment of any particular payment.

SUMMARY

Accounting fees associated with company administration costs

6. The deductibility of accounting fees depends on whether the underlying transaction or issue requiring the fees to be incurred is of a capital or revenue nature. For example, accounting fees relating to the acquisition of a capital asset would generally be an item of a capital nature and non-deductible. In contrast, accounting fees associated with dealing with creditors or other operational matters would be of a revenue nature and therefore deductible.

Audit fees

7. Audit fees are incurred to provide shareholders and others with reliable financial information. Reliable financial information enables the shareholders to exercise their power to control the company and other stakeholders to make decisions regarding their relationship with the company.
8. The Commissioner considers audit fees are deductible because there is a sufficient relationship between annual audit fees and a company's business and the fees are not capital expenditure.

Dividends

9. Expenditure incurred in authorising, allocating, or processing the payment of a dividend (including expenditure incurred in resolving a dispute in relation to these matters) is deductible for the 2014/15 and subsequent income years. Section DB 63 provides a deduction for this expenditure. To qualify for a deduction under s DB 63, the expenditure in question does not need to satisfy the general permission contained in s DA 1. The deduction is also not prohibited by the capital limitation.

Legal fees associated with company administration costs

10. Like accounting fees mentioned above, the deductibility of expenditure on legal fees depends on whether the underlying transaction or issue requiring the fees to be incurred is of a capital or revenue nature. For example, legal fees relating to the acquisition of a capital asset or drafting changes to a company's constitution would generally be items of a capital nature and non-deductible. In contrast, legal fees associated with dealing with creditors or other operational matters would be of a revenue nature and therefore deductible.
11. However, s DB 62 overrides the capital limitation to provide a deduction for legal fees that meet the general permission but would otherwise be non-deductible as capital expenditure. Section DB 62 applies where the taxpayer's total legal expenses for an income year are equal to or less than \$10,000.

Listing fees

12. A company listing with a licensed operator of a financial products market will incur expenditure on the initial listing of the company's securities plus further fees for any subsequent listing of additional securities (referred to in this statement as "additional listing fees"). It will also incur periodic fees to maintain the company's listing. Initial and additional listing fees are treated differently to periodic fees for income tax deductibility purposes.
13. Listing facilitates capital raising because it enhances the marketability of a company's securities by providing liquidity to investors. The capital raised from the funds provided by shareholders subscribing to shares is a contribution to the capital structure of the company. Generally, expenditure incurred in borrowing money to raise capital is capital expenditure.
14. Accordingly, the Commissioner considers that initial listing fees and any additional listing fees are not deductible because they are capital expenditure, being expenditure that facilitates the raising of capital. However, if initial listing fees or any additional listing fees are incurred in relation to debt securities, then s DB 5 or the financial arrangements rules in subpart EW of the Act may apply depending on the facts of the case (see Interpretation Statement, IS 13/03: "Income Tax - deductibility of expenditure incurred in borrowing money - Section DB 5", *Tax Information Bulletin* Vol 26, No 1 (February 2014): 3).

15. In contrast, periodic listing fees incurred to maintain the listing of a company are considered deductible under s DB 63B. Section DB 63B supplements the general permission in s DA 1 and specifically provides for the deductibility of periodic fees incurred to maintain registration of a listed company on a recognised exchange, regardless of whether the company is carrying on a business or income-earning activity. Section DB 63B also overrides the capital limitation.

Share registry expenses

16. Expenditure incurred on the maintenance of the share register is deductible where a company carries on a business. The maintenance of the share register is necessary to identify the persons who are the shareholders who have the power to make decisions relating to the company's business, such as at annual shareholder meetings. The Commissioner considers there is a sufficient relationship between the expenditure and the company's business. The expenditure is generally not capital expenditure. The expenditure is recurrent and does not result in the creation of a structural asset or enduring benefit (with the possible exception of costs incurred in relation to mergers, acquisitions or company migration).

Shareholder meetings

Direct expenditure incurred in holding a meeting

17. Direct expenditure incurred in holding a meeting would include expenditure incurred on:
- Venue hire and any other costs related to preparation of the venue.
 - Equipment hire (eg, audiovisual equipment).
 - Refreshments provided to those attending the meeting.
 - Printing, publishing, postage and advertising of notices of the meeting.
 - Preparation of resolutions.
 - Travel costs for directors and other persons required to attend the meeting.
 - Any other costs directly related to physically holding or conducting the meeting.
18. Such expenditure incurred in holding a meeting of shareholders is:
- Deductible where the expenditure is incurred in holding an annual meeting, regardless of whether the company is carrying on a business or income-earning activity and whether the expenditure is capital in nature: s DB 63C(1).
 - Not deductible where the expenditure is incurred in holding a special or extraordinary meeting: s DB 63C(2).

Indirect expenditure incurred in relation to meetings of shareholders

19. Indirect expenditure in relation to a meeting would be any other expenditure that is incurred for, or in preparation for, a meeting of shareholders that is not a direct cost of physically holding or conducting the meeting.
20. The tax treatment of indirect expenditure incurred for a meeting of shareholders depends on the purpose of the meeting for which the expenditure was incurred.
21. Indirect expenditure incurred for the following purposes will be deductible or non-deductible as shown:

- *Ordinary business purposes of an annual meeting* – Deductible where the company is carrying on a business.
- *Alteration of the company's constitution* – Generally not deductible but may be in some situations (such as in *Commissioners of Inland Revenue v Carron Company* (1968) 45 TC 18 (HL)).
- *Alteration of shareholders' rights* – Generally not deductible because the general permission is not met and the capital limitation applies. May be deductible where inseparable from, or ancillary or incidental to, business objectives that meet the general permission.
- *Arrangements with creditors* – Deductible where the company is carrying on a business.
- *Liquidation* – Not deductible because the general permission is not met and the capital limitation applies.
- *Major transactions under the Companies Act 1993* – Depends upon the facts. Not deductible where incurred after the company has committed to a major transaction because the capital limitation will apply.
- *Ratifying directors' actions or breaches in their duty to the company* – For the ratification of directors' actions under s 177 of the Companies Act 1993, deductibility depends on the actions ratified. Expenditure incurred for the purpose of a shareholders' meeting to ratify breaches of the directors' duty to the company is generally deductible where the company is carrying on a business.
- *Takeovers (target company)* – Not deductible where incurred to preserve position of existing shareholders or to obtain a benefit of a capital nature.

Statutory return fees

22. A primary reason for incurring expenditure on statutory returns, such as return filing fees, is to ensure that the company remains on the register of companies. This allows the company to continue to operate as a company and meet obligations to third parties in any commercial contracts.
23. In addition, failure to register the annual return or notices of change of the company's address for service or registered office may result in documents or notices not being sent to the company correctly. Unless it receives a notice a company may not be able to respond to actions that may be taken against the company and that may have an impact on the company's business.
24. In the Commissioner's view, the commercial necessity for the expenditure provides grounds for finding that expenditure on return filing fees has a sufficient relationship with the company's business. The costs are deductible. The expenditure is not capital expenditure. The expenditure is recurrent and does not result in the creation of a structural asset.

Summary table of deductibility of company administration costs

Company administration cost	Deductibility	Para Ref.
Accounting fees	Depends on the purpose of the services. Follows treatment of the underlying cost.	45–50
Audit fees	Deductible for companies carrying on a business.	51–61
Dividends	Deductible. No need to meet general permission and capital limitation overridden: s DB 63.	62-64
Legal fees	Depends on the purpose of the services. Follows treatment of the underlying cost unless s DB 62 applies.	65–67
Listing fees	<i>Initial listing fees and any additional listing fees:</i> Not deductible: capital limitation applies unless fees relate to debt markets and s DB 5 or financial arrangements rules apply.	68–81
	<i>Periodic listing fees:</i> Deductible. No need to meet general permission and capital limitation overridden: s DB 63B.	82–84
Share registry costs	Deductible where company is carrying on a business (capital limitation may apply if for mergers, acquisitions or migrations).	85–98
Shareholder meetings	<i>Direct costs incurred in holding meetings:</i> <ul style="list-style-type: none"> • <i>Annual Meetings:</i> Deductible. No need to meet general permission and capital limitation overridden: s DB 63C(1). • <i>Special/extraordinary meetings:</i> Not deductible. Section DB 63C(2). 	99-153
	<i>Indirect costs incurred for meetings of shareholders for:</i> <ul style="list-style-type: none"> • <i>Ordinary business of annual meeting:</i> Deductible where company is carrying on a business. • <i>Alteration of constitution:</i> Generally not deductible but may be deductible when the alterations facilitate business operations. • <i>Alteration of shareholders' rights:</i> Generally not deductible - general permission not met and capital limitation applies. May be deductible where inseparable from, or ancillary or incidental to, business objectives that meet the general permission. • <i>Arrangements with creditors:</i> Deductible where the company carries on a business. • <i>Liquidation:</i> Not deductible, capital limitation applies. • <i>Major transactions under the Companies Act 1993:</i> Depends on the facts. Not deductible if incurred after commitment to major transaction when the capital limitation applies. • <i>Ratifying directors' actions or breaches of their duty to the company:</i> <ul style="list-style-type: none"> ○ <i>Ratification under s 177 Companies Act 1993:</i> depends on action being ratified. ○ <i>Ratification of breach of directors' duty:</i> generally deductible where the company is carrying on a business. • <i>Takeovers (target company):</i> Not deductible where incurred to preserve position of existing shareholders or to obtain a benefit of a capital nature. 	
Statutory return fees	Deductible where company is carrying on a business.	154–162

ANALYSIS

Introduction

25. When considering the deductibility of company administration costs, it is helpful to have a general understanding of the principles of deductibility under the Act, including the general permission, the capital and private limitations and apportionment. Accordingly, this statement first discusses these principles before considering (from para 43) the deductibility of each company administration cost.

Principles of deductibility

General permission

26. The following discussion summarises the main aspects of the principles of deductibility only. For a more detailed discussion of the general permission and the capital limitation, see the Commissioner's Interpretation Statement, IS 10/06: "Deductibility of business relocation costs" published in *Tax Information Bulletin* Vol 22, No 8 (September 2010): 20.

27. To determine whether company administration costs are deductible the general permission in s DA 1 must first be considered. Section DA 1 states:

Nexus with income

- (1) A person is allowed a deduction for an amount of expenditure or loss, including an amount of depreciation loss, to the extent to which the expenditure or loss is—
- (a) incurred by them in deriving—
 - (i) their assessable income; or
 - (ii) their excluded income; or
 - (iii) a combination of their assessable income and excluded income; or
 - (b) incurred by them in the course of carrying on a business for the purpose of deriving—
 - (i) their assessable income; or
 - (ii) their excluded income; or
 - (iii) a combination of their assessable income and excluded income.

General permission

- (2) Subsection (1) is called the **general permission**.

Avoidance arrangements

- (3) Section GB 33 (Arrangements involving depreciation loss) may apply to override the general permission in relation to an amount of depreciation loss.

28. The following principles of deductibility can be drawn from case law:

- For expenditure to be deductible there must be a sufficient relationship between the expenditure and the taxpayer's income-earning process. It is a question of fact and degree in each case: *CIR v Banks* [1978] 2 NZLR 472 (CA); *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA).
- Determining whether the necessary relationship exists requires considering the true character of the expenditure and its relevance to the taxpayer's income-earning process. This includes considering the scope of the taxpayer's income-earning process and the factual situation at the time the expenditure was incurred: *Banks*; *Buckley & Young*.
- For expenditure to be deductible a particular item of expenditure need not be linked with a particular item of income. Also, income need not have been

produced in the year of expenditure: *Commissioner of Taxation (NSW) v Ash* (1938) 5 ATD 76 (HCA) at 78; *Eggers v CIR* (1988) 10 NZTC 5,153 (CA).

- Paragraph (b) of s DA 1(1) applies only to taxpayers who are carrying on a business. In contrast to s DA 1(1)(a), under s DA 1(1)(b) expenditure need not be directly related to the derivation of income but is deductible when incurred in carrying on a business for the purpose of deriving income. This permits a broader approach:
 - To be expenditure incurred in carrying on a business, the expenditure must be incurred as part of the taxpayer's business operations to obtain assessable income: *FCT v Wells* 71 ATC 4,188 (HCA); *John Fairfax and Sons Pty Ltd v FCT* (1959) 101 CLR 30 (HCA).
 - Whether expenditure has a sufficient relationship to the taxpayer's business operations is usually determined from objective matters. However, subjective matters may be relevant where the expenditure was incurred by choice and the relationship between the expenditure and the business operations is more indirect and remote: *Banks* at 477; *Magna Alloys & Research Pty Ltd v FCT* 80 ATC 4,542 (FCAFC) at 4,548, 4,558–4,559; *Fletcher v FCT* 91 ATC 4,950 (HCA) at 4,957; *Putnin v FCT* 91 ATC 4,097 (FCAFC); *Schokker v FCT* 99 ATC 4,504 (FCAFC).
 - Longer-term objectives can be considered. A deduction is permitted for expenditure incurred to protect or advance a business or to avoid or reduce expenditures: *Europa Oil (NZ) Ltd (No 2) v CIR* (1974) 1 NZTC 61,169 (CA) at 61,196–61,197; *Cox v CIR* (1992) 14 NZTC 9,164 (HC) at 9,168.

Capital limitation

29. If company administration costs meet the general permission, then whether any of the general limitations of s DA 2 apply to deny a deduction must also be considered. The general limitations of s DA 2 override the general permission (s DA 2(7)). Of particular relevance to company administration costs are the private and capital limitations. The capital limitation in s DA 2(1), which will be considered first, states:

A person is denied a deduction for an amount of expenditure or loss to the extent to which it is of a capital nature. This rule is called the **capital limitation**.

30. To decide whether the capital limitation applies, the various tests the courts have formulated for determining whether expenditure is capital or revenue in nature must be considered. The approach of Lord Pearce in *BP Australia Ltd v FCT* [1965] 3 All ER 209 (PC) has been described as being the governing approach for distinguishing between capital and revenue receipts or expenditure. This approach has recently been endorsed again in New Zealand by the High Court in *TrustPower Ltd v CIR* [2013] NZHC 2,970, (2013) 26 NZTC ¶121–047.
31. In *BP Australia*, Lord Pearce considered that the solution was not to be found by any rigid test. He considered it is derived from the whole set of circumstances, some of which may point in one direction, some in the other. One circumstance, pointing in one direction, may dominate other vaguer circumstances pointing in the contrary direction. What is required is a common-sense appreciation of all the guiding features. Where the categories of capital and revenue are distinct and easily ascertainable in obvious cases that lie far from the boundary line it may not be necessary to apply all the tests: *CIR v L D Nathan & Co* [1972] NZLR 209 (CA).
32. The courts have identified seven tests to assist in determining whether expenditure is capital or revenue in nature. They are summarised as follows:

- The **need or occasion** that calls for the expenditure. This important test focuses on the principal reason or need for incurring the expenditure. It can form the basis for applying other tests: *Birkdale Service Station Ltd v CIR* (2000) 19 NZTC 15,981 (CA); *Carron*.
 - Whether the expenditure is **recurrent** in nature. This involves considering whether the expenditure is recurrent (suggesting a revenue outlay) or a once and for all payment (suggesting a capital outlay): *Vallambrosa Rubber Co Ltd v Farmer (Surveyor of Taxes)* (1910) 5 TC 529 (CtSess) at 536; *W Nevill and Co Ltd v FCT* (1937) 4 ATD 187, (1937) 56 CLR 290 (HCA); *BP Australia*; *Sun Newspapers Ltd v FCT* (1938) 5 ATD 87, (1938) 61 CLR 337 (HCA).
 - Whether the expenditure is sourced from **fixed or circulating capital**. Fixed capital is what an owner turns to profit by keeping it in their possession. Circulating capital is that which comes back as part of the trading operations. A fixed capital source suggests a capital outlay: *BP Australia*; *John Smith & Son v Moore (Inspector of Taxes)* [1921] 2 AC 13 (HL); *Milburn NZ Ltd v CIR* (2001) 20 NZTC 17,017 (HC); *CIR v Fullers Bay of Islands Ltd* (2004) 21 NZTC 18,834 (HC).
 - Whether the expenditure creates an **identifiable asset**. Where an asset of a capital nature has been acquired or where money is spent on improving the asset, making it more advantageous or getting rid of a disadvantageous asset, the expenditure will be on capital account: *Tucker v Granada Motorway Services Ltd* [1979] 2 All ER 801 (HL); *CIR v McKenzies* (1988) 10 NZTC 5,223 (CA).
 - Whether the expenditure is a once and for all payment producing assets or advantages that are of an **enduring benefit**. Expenditure will be regarded as capital where it brings into existence an asset or advantage for the enduring benefit of the business: *British Insulated and Helsby Cables Ltd v Atherton* [1925] All ER Rep 623 (HL) at 629; *Anglo-Persian Oil Co Ltd v Dale* (1931) 16 TC 253 (KB) at 262; *McKenzies*.
 - How the expenditure is treated under **ordinary principles of commercial accounting**: *FCT v James Flood Pty Ltd* (1953) 88 CLR 492 (HCA); *Broken Hill Theatres Pty Ltd v FCT* (1952) 85 CLR 423 (HCA).
 - Whether the expenditure is on the **business structure** or **business process**. This test focuses on the distinction between expenditure on the business structure set up to earn profit (capital), and regular expenditure on the process by which regular returns are obtained (revenue): *Buckley & Young* at 61,274; *Sun Newspapers*; *Hallstroms Pty Ltd v FCT* (1946) 72 CLR 634 (HCA); *Anglo-Persian Oil*; *Fullers Bay of Islands Ltd*.
33. Many of the above tests will overlap and some factors will carry more weight than others in given circumstances. Therefore, while these tests are a useful guide, a final judgement of whether the expenditure is capital or revenue in nature must be made by analysing the facts as a whole and weighing up which factors carry the most weight in light of these facts. Generally, no case will be decided under one test.

Private limitation

34. The Taxation Review Authority has considered several times whether a company can incur expenditure subject to the private limitation where the expenditure is for the private benefit of a shareholder or employee. See, for instance: *Case L31* (1989) 11 NZTC 1,188; *Case L89* (1989) 11 NZTC 1,508; *Case M82* (1990) 12 NZTC 2,484.

35. However, none of these decisions considered company administration costs. The Commissioner considers it unlikely that company administration costs will be incurred for the private benefit of a shareholder or employee. Therefore, the private limitation is not relevant to the issue of whether company administration costs are deductible under the Act.

Apportionment

36. Section DA 1 allows a deduction for expenditure “to the extent to which” it is incurred in deriving income and so expressly contemplates apportionment: *Banks* (at 476-477).
37. In *Banks*, Richardson J drew a distinction between dissecting and apportioning expenditure. This distinction was drawn from the Australian High Court decision of *Ronpibon Tin NL v FCT* (1949) 78 CLR 47 at 59. Where expenditure has distinct and severable deductible and non-deductible components it can be divided or dissected. This occurs where the distinct and severable components can be related to differing tax treatments, such as assessable and non-assessable income or to revenue and capital or private expenditure. Dissection would be possible for a composite amount that relates to, say, an itemised invoice, or to several things or services with discrete parts.
38. In contrast, where a single outlay serves two or more objects indifferently, dissection is impractical. Here, apportionment on a fair and reasonable basis (such as time, area or some other quantifiable basis), applies. The court noted in *Ronpibon Tin* that entire sums, such as directors’ fees, are not normally able to be dissected so are subject to apportionment.
39. Richardson J also drew a distinction between two circumstances where dissection or apportionment would either apply or not apply: *Buckley & Young* at 489 (citing *Anglo-Persian Oil* at 139-140). One was where a payment secures two advantages, one of which is merely ancillary to the other and does not affect the true character of the payment. Deductible expenditure with some ancillary non-deductible object remains entirely deductible based on its true character (and vice versa). In these circumstances, dissection or apportionment does not apply. The second circumstance was where a payment serves more than one distinct and separately identifiable advantage or outcome, in which case it should be subject to dissection or apportionment.
40. This distinction can be seen in *Christchurch Press Company Ltd v CIR* (1993) 15 NZTC 10,206 (HC). In *Christchurch Press*, Gallen J considered that although there may be more than one reason for making a payment, the principal reason for a payment determined the nature of the expenditure. Therefore, the court considered that wages of employees who were engaged in installing a capital asset did not cease to be capital expenditure, even though there may have been a secondary revenue-related reason for the expenditure of improving the production of the newspaper. So, where a payment secures dual outcomes a need for apportionment may arise. However, if one outcome is ancillary or incidental to the principal outcome, the principal outcome will determine the nature of the expenditure.
41. In *Buckley & Young*, Richardson J commented that the appropriate basis for apportionment of expenditure will depend on the circumstances. At 61,282 Richardson J acknowledged that there may be cases where it is difficult or impossible to determine the amount that is attributable to each advantage (particularly where each advantage is intangible and there is no obvious basis for apportionment). However, he considered that such a situation is likely to be rare and the mere fact that apportionment might be difficult would not of itself be reason for failing to formulate an answer.

42. In summary, the following can be drawn from case law regarding apportionment:
- Apportionment issues arise because expenditure is deductible under s DA 1 “to the extent to which” it is incurred in deriving income: *Banks*.
 - Apportionment encompasses situations where undivided items of expenditure can either be dissected or not: *Banks; Ronpibon Tin*.
 - Dissection can apply where the expenditure relates to distinct and severable parts divisible between those parts that give rise to deductible expenditure and those parts that do not.
 - Where the expenditure serves both deductible and non-deductible objects at the same time, dissection may not be possible and a fair and reasonable assessment must be made of the extent of the relationship between the expenditure and deductible objects.
 - Apportionment is not required where the expenditure has some incidental non-deductible object and the true character of the expenditure remains deductible: *Buckley & Young; Christchurch Press*.
 - The most appropriate way of apportioning expenditure depends on the circumstances of the case but practical difficulties alone in determining how apportionment should apply does not mean apportionment should not be made: *Buckley & Young*.

Deductibility of company administration costs

43. While company administration costs are discussed below as distinct costs, in some instances each cost will encompass a range of different outgoings falling under the one head. It is likely these outgoings will include composite payments for which issues of dissection or apportionment may arise.
44. Therefore, in the context of the deductibility of company administration costs, the “importance of identifying the true character of the outgoing for which the deduction is sought” (*Buckley & Young*) should be borne in mind. In addition, the principles of apportionment discussed above may need to be considered in determining the tax treatment of any particular payment.

Accounting fees associated with company administration costs

45. Accounting fees do not of themselves create a category of deductible expenditure. The correct tax treatment of accounting fees depends on whether the underlying transaction or issue requiring the fees to be incurred is of a capital or revenue nature.
46. In *Case Y17 (2008) 23 NZTC 13,171* there was an underlying assumption that accountancy fees incurred for the preparation of annual financial accounts and tax returns by a company operating a business were deductible. At issue was the timing of the deduction and the Taxation Review Authority found that the fees were deductible in the year the accountancy services were performed.
47. This assumption also underlies s EA 3. Section EA 3 provides rules affecting the timing of deductible expenditure. Determination E12 *Persons excused from complying with section EA 3 of the Income Tax Act 2007* provides exemptions from compliance with s EA 3. The Determination includes an exemption for “mandatory accounting costs” incurred for the purpose of meeting statutorily imposed information requirements. Such costs are exempted on the presumption they would otherwise be deductible and potentially subject to s EA 3.

48. Other examples of deductible accounting fees are those associated with dealing with creditors or other operational matters relating to a business.
49. In contrast, accounting fees relating to the acquisition of a capital asset will generally be an item of a capital nature and non-deductible. In *Case K50* (1988) 10 NZTC 411 accounting costs incurred by the taxpayer to investigate whether to purchase a veterinary practice were found to be capital costs and as such were not deductible. The Authority considered the accounting costs related to the taxpayer's business structure and were not incurred as a revenue item in gaining or producing assessable income.
50. Another example is the Australian decision in *Case E29 73* ATC 241, which concerned a company that was incorporated after preliminary studies into establishing a large industrial enterprise were favourable. However, an overseas promoter ultimately withdrew from the project and the enterprise was not established. The company had incurred substantial expenses, including legal and accounting expenses, over several years. The Board held that all the expenses incurred were losses or outgoings of a capital nature for the purpose of establishing a "profit-yielding subject" and so were not deductible.

Audit fees

51. The Companies Act 1993 requires some companies to appoint an auditor. An annual audit of a company's accounts is generally sought because the ownership of the company is separate from the management of the company. An audit is necessary to ensure that the financial accounts prepared by the directors accurately reflect the company's financial position. This protects the company from the consequences of errors in the accounts and provides shareholders with reliable financial information. Reliable financial information enables the shareholders to monitor the performance of the directors. Others who rely on the accuracy of audited financial statements include the providers of goods or services to a company (such as general trade creditors and financiers). Also, as a matter of practice, a company will generally be required to supply financial statements to its financiers on a regular basis.
52. Not every company that is carrying on a business for the purpose of gaining income will be required to appoint an auditor. However, in practice, audit fees will generally be incurred only by companies that are carrying on a business and are required to report trading results either to their shareholders or financiers. As the function of the audit is to disclose the company's business to its shareholders or financiers, there are strong grounds for finding that such expenditure has the necessary relationship with the business carried on by the company. Where a company has the option not to appoint an auditor but elects to do so, the appointment will generally be dictated by business ends, such as a requirement to report the business operations to shareholders or third parties with an interest in the company.
53. Treating audit fees as a deductible expense is consistent with the UK decision of *Caparo Industries plc v Dickman* [1990] 1 All ER 568 (HL) in which Lord Oliver said at 583:

It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order, first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing (by, for instance, declaring dividends out of capital) and, second, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided.
54. The discussion in *Caparo* suggests there is a relationship between the auditing of a company's accounts and the company's business because it would not be

possible for a company to make appropriate decisions as to the use of its funds if its accounts were not accurate. The Canadian Exchequer Court in *British Columbia Power Ltd v MNR* 66 DTC 5,310 also considered that audit fees were deductible. Support for treating audit fees as deductible can also be found in *Worsley Brewery Co Ltd v Commissioners of Inland Revenue* (1932) 17 TC 349 (CA) and *Rushden Heel Co Ltd v Keene (Inspector of Taxes)* (1948) 30 TC 298 (KB).

55. In addition, Canadian cases have taken a broader interpretation of expenses incurred for the purpose of gaining income from a business. These cases establish that a company's expenses in communicating with its shareholders can be considered a necessary part of carrying on business through a company and that those communications can be part of the process of earning business income. These cases include *British Columbia Power Corporation v MNR* 67 DTC 5,258 (SCC) and *Boulangerie St-Augustin Inc v The Queen* 95 DTC 164 (TaxCC). The Commissioner considers that one aspect of communicating with shareholders will be ensuring the accuracy of the information via the audit process.
56. In the Supreme Court of Canada case of *British Columbia Power*, the court had to consider the deductibility of legal expenses incurred in a court action to defend a company's title to shares in a subsidiary that were to be expropriated by the government. In addition, certain expenses were incurred for communicating with shareholders to inform them of the expropriation and ensuing developments. The court found that expenditure incurred in relation to communicating with shareholders was a deductible expense. The court considered that, as shareholders hold the ultimate control of a company and the power of shareholders to determine a company's policy could not be properly exercised unless they are informed periodically of its affairs, the reasonable furnishing of such information is properly part of the company's business.
57. Referring to *British Columbia Power* (SCC), the Tax Court in *Boulangerie* also considered that a company must communicate regularly with its shareholders as part of the process of earning business income. The court considered that the expenses in communicating with shareholders and share transfer costs were inherent in the management of every business corporation and were part of the general administration expenses that every company must incur to earn business income. Such expenditure was a legitimate expense made in the ordinary course of the company's business.
58. The court did not accept that the expenditure was incurred to preserve the existing shareholders' positions as owners of the company. Neither was it incurred to obtain any enduring benefit, such as additional funds or the expansion of the company's business. Any enduring benefit, in the form of the advancement of the company's long-term interests, was a secondary consequence of the expenditure. As a result, the expenditure incurred was not capital expenditure. The decision was upheld by the Federal Court of Appeal (*The Queen v Boulangerie St-Augustin Inc* 97 DTC 5,012 (FCA)).
59. On the basis of the above approach by the courts, audit fees are deductible where a company carries on a business. The provision of accurate information to shareholders on the company's financial position is essential to enable the shareholders to exercise their power to control the company and for other stakeholders to make decisions regarding their relationship with the company. The auditing of the company's accounts is undertaken to ensure that financial information can be relied on.
60. Therefore, the Commissioner considers that audit fees are revenue expenditure because the fees are:

- an on-going annual cost;
 - generally incurred where there is a need to report trading results to shareholders and financiers;
 - incurred to accurately inform shareholders of those trading results to allow the shareholders to exercise their power of control over the company; and
 - incurred to help protect the company from the consequences of undetected errors and wrongdoing.
61. The Commissioner also considers that audit fees are not capital expenditure. The need or occasion for such expenditure is to report trading results. The expenditure does not create an identifiable asset or an enduring benefit for the company. It is a recurrent annual expense, most likely funded out of circulating capital, and is treated as a revenue expense under ordinary accounting principles. Therefore, overall, the expenditure has the character of a revenue expense.

Dividends

62. Expenditure incurred in paying dividends is deductible for the 2014/15 and subsequent income years. This is provided by s DB 63, which allows a company a deduction for expenditure incurred in authorising, allocating, or processing the payment of a dividend. Section DB 63 also provides a deduction for expenditure incurred in resolving a dispute concerning authorising, allocating, or processing the payment of a dividend.
63. Section DB 63 supplements the general permission contained in s DA 1, meaning the general permission does not need to be satisfied to achieve a deduction. Also, the limitation on deducting capital expenditure does not apply. Section DB 63 states:

DB 63 Expenses in paying dividends

Deduction

- (1) A company is allowed a deduction for expenditure incurred in—
- (a) authorising, allocating, or processing, the payment of a dividend;
 - (b) resolving a dispute concerning a matter referred to in paragraph (a).

Link with subpart DA

- (2) This section supplements the general permission and overrides the capital limitation. The other general limitations still apply.

64. In the Commissioner's opinion, s DB 63 provides a deduction for all expenses usually encountered by a company in paying dividends.

Legal fees associated with company administration costs

65. Legal fees do not of themselves create a category of deductible expenditure. Similar to accounting costs, discussed from para 45, the correct tax treatment of legal fees associated with company administration costs will depend on the purpose for which such services have been employed. As stated by Dixon J in *Hallstroms* at 647:

The claim is to deduct legal expenses, and legal expenses, we may assume, take the quality of an outgoing of a capital nature or of an outgoing on account of revenue from the cause or the purpose of incurring the expenditure. We are, therefore, remitted to a consideration of the object in view when the legal proceedings were undertaken, or of the situation which impelled the taxpayer to undertake them.

66. Accordingly, if the underlying cause or purpose for incurring the legal fees is deductible in nature, the fees will also be deductible. If the cause or purpose is capital in nature, the fees will not be deductible.

67. However, s DB 62 may allow a deduction for some legal expenses despite the underlying cause or purpose being capital in nature. Section DB 62 provides that a deduction is allowed for legal expenses that are deductible under the general permission but are of a capital nature and total, for an income year, \$10,000 or less. Section DB 62 specifically overrides the capital limitation, but the general permission and other general limitations still apply. Legal expenses are defined for s DB 62 as fees for legal services (as defined in the Lawyers and Conveyancers Act 2006) provided by a person who holds a practising certificate issued by the New Zealand Law Society or an Australian equivalent. Where the total legal expenses for an income year exceed the \$10,000 limit, then the legal expenses must be treated in the normal way as described above.

Listing fees

68. A company may enter into a listing agreement with the operator of a financial products market licensed under the Financial Markets Conduct Act 2013: s 327. Usually, an initial listing fee is payable for admission to the market and listing of financial products. Additional listing fees are payable for any subsequent listing of additional financial products. Companies that have listed also pay a periodic fee to remain listed. Whether listing fees are deductible depends on whether the fees incurred are periodic listing fees or whether they are initial or additional listing fees. These two types of fees are considered separately below.

Initial and additional listing fees

69. To determine whether initial and additional listing fees are deductible, the true character of the advantage sought or obtained by a company from listing must be identified (*Buckley & Young*). Listing a company's shares or debt securities facilitates capital raising because it enhances the marketability of a company's securities by providing liquidity to investors. Another advantage of listing is that it raises the profile of the company and its brands. It can also aid a company's ability to attract and retain senior employees through the use of share options and the use of its shares as currency for mergers and acquisitions.

70. Viney, in McGrath's *Financial Institutions, Instruments and Markets* (5th ed, McGraw-Hill, Sydney, 2007), states at para 5.3:

Listing on a stock exchange provides access to a large equity capital market that is not available to an unlisted business entity. Access to this market enables a listed corporation to extend the funding base on which it can expand and grow its business activities into the future. Also ... shares issued by listed companies are very liquid; that is, they can easily be sold through a stock exchange, and therefore are an attractive investment option for investors. Another advantage of listing for a corporation is that it raises its profile in the financial markets and in the markets for its products and services.

71. A publication by NZX Ltd, *From Good to Great, Book One: The story of listing with NZX* (New Zealand Exchange Ltd, October 2006), at 17, explains that listing provides access to additional capital after the initial capital raising through secondary capital raising options (including new issues to existing shareholders, placement or subsequent public offerings). It also suggests how listing on the market could raise a company's profile and brand leverage at 35:

The day of listing can be a great PR opportunity for your firm should you choose to publicise it. This is because interest in your company will be at its highest – and naturally, media attention will follow. Having the media interested in your company will grow your reputation and image and sharpen your competitive advantage. The benefit is that it will be easier for you to naturally attract new customers and suppliers as well as improving your company's creditworthiness in the eyes of banks and suppliers, who can rely on the release of publicly available information for analysis.

Ongoing, the fact that the public now hold an interest and ownership stake in your company presents you with a unique marketing opportunity. With disclosure obligations, you will be required to make regular public announcements and the media will take a more active interest

in your business. Generally, the more information in the public domain, the more the media will follow your brand.

72. As mentioned, listing on the market raises the profile of a company and its brands. In other words, listing helps build a company's goodwill. Goodwill has been defined as "the attractive force which brings in custom": *Commissioners of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217 (HL).
73. Goodwill is generally regarded as an asset of a capital nature, so that expenditure relating to the acquisition of goodwill is capital expenditure: *CIR v L D Nathan & Co Ltd; Buckley & Young*. Goodwill can be built up by expenditure to generate brand, product and business name recognition that helps to generate revenue. Though goodwill is a capital asset of a business, it is frequently earned and maintained by the daily activities of those engaged in the business. The valuable, if intangible, asset of goodwill frequently grows out of activities for which the cost is a charge on revenue account. Expenditure that results in the creation of goodwill would not cease to be expenditure of a revenue nature merely because such expenditure enables goodwill to be earned or maintained. However, listing fees are paid principally to facilitate the acquisition of additional capital (that is, an advantage of a capital nature).
74. Funds provided by shareholders subscribing to shares are a contribution to the capital structure of the company: *FCT v The Midland Railway Co of Western Australia* (1952) 85 CLR 306 (HCA). Also, expenditure incurred in borrowing money to raise capital is generally capital expenditure: *Texas Land & Mortgage Co v Holtham (Surveyor of Taxes)* (1894) 3 TC 255 (QB); *New Zealand Dairy-Farm Mortgage Co Ltd v Commissioner of Taxes* [1941] NZLR 83 (CA); *Case E1 73 ATC 1*; *Montreal Coke and Manufacturing Co v MNR* [1944] 1 All ER 743 (PC); *Ure v FCT* 80 ATC 4,264 (NSWSC); *CIR v Inglis* (1992) 14 NZTC 9,180 (CA).
75. The initial and additional listing fees are paid for the same purpose, the listing of the company's securities. The advantage sought or obtained from the initial and additional listing fees is the facilitation of the raising of capital, whether equity or debt. Equity funding is fixed capital. Generally, debt funding is also fixed capital. Therefore, initial and additional listing fees (whether relating to listing equity or debt securities) will generally be capital expenditure on the basis that it is paid to facilitate the obtaining of fixed capital.
76. There are circumstances where expenditure incurred in borrowing money is revenue expenditure. This will be so where a taxpayer is in the business of borrowing and lending money and the borrowed money is borrowed for on-lending in the ordinary course of the taxpayer's business: *Scottish North American Trust v Farmer (Surveyor of Taxes)* [1912] AC 118 (HL); *Canada Permanent Mortgage Corporation v MNR* 71 DTC 5,409 (FCTD); *AVCO Financial Services Ltd v FCT* 82 ATC 4,246 (HCA); *Coles Myer Finance Ltd v FCT* 93 ATC 4,214 (HCA).
77. Accordingly, the Commissioner considers that the initial and additional listing fees are a cost of raising capital. The advantage obtained from listing is the facilitation of both the initial capital raising and the raising of additional capital by the issue of further securities. Therefore, in the Commissioner's view, initial and additional listing fees are not deductible on account of being capital expenditure.
78. However, the implications of s DB 5 and the financial arrangements rules need to be considered in the context of initial and additional listing fees for debt securities. Those matters are set out briefly below. For a comprehensive discussion of s DB 5, including the implications of the financial arrangements rules in this context, see Interpretation Statement, IS 13/03: "Income Tax – deductibility of expenditure incurred in borrowing money – Section DB 5".

Section DB 5 and financial arrangements rules

79. Paragraph 12 of IS 13/03 states:

Section DB 5 allows a person a deduction for expenditure incurred "in borrowing money that is used as capital in deriving their income". For expenditure to be deductible under s DB 5, the:

- expenditure must be incurred by the taxpayer;
- expenditure must be incurred in borrowing money; and
- the taxpayer must use the borrowed money as capital in the derivation of their income.

80. A deduction is allowable under s DB 5 for expenditure incurred as a transaction cost in borrowing money where that expenditure would otherwise be capital expenditure. To be expenditure incurred in borrowing money, the expenditure must be incurred under a contractual obligation entered into in connection with the establishment of a loan: *Ure; Brown v CIR* (1995) 17 NZTC 12,385 (HC); *MNR v Yonge-Eglinton Building Ltd* 74 DTC 6,180 (FCA).

81. Initial and additional listing fees for debt securities may form part of the consideration arising under a financial arrangement subject to the financial arrangements rules of subpart EW. If applicable, the financial arrangements rules will take precedence over s DB 5 in determining the deductibility of the fees: s EW 2. Whether initial or additional listing fees for debt securities are deductible under s DB 5 or fall under the financial arrangements rules will depend on the particular circumstances.

Periodic listing fees

82. Unlike initial or additional listing fees, periodic listing fees are not directly related to the raising of particular funds. The true character of the advantage sought or obtained by a company from incurring periodic listing fees is to maintain the advantages that the initial or additional listing fees have secured.

83. Where a listed company incurs periodic listing fees in the course of carrying on a business for the purpose of deriving income, the Commissioner considers that, unlike the initial or additional listing fees, the periodic listing fees are deductible under the general permission in s DA 1 and are not capital expenditure.

84. This conclusion has been confirmed and expanded upon for the 2014/15 and subsequent income years. The deductibility of periodic listing fees is now dealt with by a specific provision in the Act: s DB 63B. Section DB 63B supplements the general permission in s DA 1, overrides the capital limitation and provides a deduction for expenditure incurred on periodic fees of a recognised exchange. Accordingly, all companies, whether or not they are carrying on a business or income-earning activity, are able to deduct periodic listing fees under s DB 63B. Generally, licensed markets under the Financial Markets Conduct Act 2013 will be a "recognised exchange" as defined in s YA 1 of the Income Tax Act 2007. Section DB 63B states:

DB 63B Periodic company registration fees

Deduction

- (1) A listed company is allowed a deduction for expenditure incurred as periodic fees of a recognised exchange for maintaining the registration of the company on the exchange.

Link with subpart DA

- (2) This section supplements the general permission and overrides the capital limitation. The other general limitations still apply.

Share registry expenses

85. The Companies Act 1993 places companies under a duty to maintain a share register. Failure to comply leaves both the directors and the company open to prosecution. The share register must contain the names and addresses of all shareholders over the last 10 years. If shares have been issued, repurchased, redeemed or transferred, the register must contain the dates of each transaction and the name of the shareholder to, or from, whom shares were transferred. A company must also make the share register available for inspection by members of the public. A share register is intended to show persons dealing with the company, such as creditors, to whom and what they have to trust: *Oakes v Turquand & Harding* (1867) LR 2 HL 325 at 367.
86. The entry of a shareholder's name on the register is prima facie evidence of legal title to shares. In the absence of a register or if the register is defective, a shareholder's title to shares may be established by other evidence: *Haddow Nominees Ltd v Rarawa Farms Ltd (in liq)* [1981] 2 NZLR 16, (1981) 1 NZCLC 98,171 (CA). For a person to receive distributions, exercise rights and be entitled to receive notice of and attend meetings, their name must appear in the share register of the company.
87. Under the Companies Act 1993, the shareholders hold the power to make certain decisions relating to the company's business, such as the appointment or removal of directors at annual shareholder meetings. The persons who hold the power to make such decisions are the persons whose names are registered in the share register on the relevant date. The share register must be maintained to enable the company to establish who holds the power to make decisions on matters relating to the company's business. Accordingly, a share register:
- provides prima facie evidence of legal title to shares
 - records and discloses who the shareholders of the company are.
88. Under the general permission in s DA 1, expenditure incurred in maintaining a share registry may not immediately be regarded as having a direct connection with the derivation of a company's income or to the carrying on of a business. Given that all companies are required to maintain a register whether or not they are carrying on a business, it is arguable that share registry expenses are not wholly dictated by business ends. These issues do not appear to have been considered by the courts of New Zealand, Australia or the United Kingdom.
89. In the Canadian case of *Distillers Corporation Seagrams Ltd v MNR* 58 DTC 1,168, the Exchequer Court considered issues of apportionment concerning various items of expenditure incurred by a holding company, including what might be regarded as "share registry expenses". These were amounts paid for the services of transfer agents and registrars of the company's shares and dividend disbursing agents. The court considered these amounts were not deductible because they were incurred in connection with dealings with the company's own shareholders or in connection with the administration of the capital structure of the company.
90. However, as discussed above in paras 55 to 58 in the context of audit fees, more recent Canadian cases (*British Columbia Power (SCC)* and *Boulangerie (FCA)*) have taken a broader interpretation of expenses incurred for the purpose of gaining income from a business. These cases establish that the expenses of communicating with shareholders can be considered deductible. In the earlier discussion of audit fees, the Commissioner considered that an aspect of communicating with shareholders relevant to that expense was ensuring the accuracy of the information communicated. Similarly, the Commissioner considers that another aspect of communicating with shareholders relevant to share registry expenses is the need to establish the identity and contact

information of the company's shareholders. The share register identifies who the shareholders are and facilitates the company's ability to communicate with them.

91. The Supreme Court in *British Columbia Power* does not refer to *Distillers*. In *Boulangerie* (TaxCC), the court considered that *Distillers* had been implicitly reversed by the Supreme Court in *British Columbia Power*. Under the New Zealand test of deductibility, a sufficient relationship between the expenditure and the taxpayer's business or income-earning process must be established. In the Commissioner's view, the conclusions in *British Columbia Power* (SCC) and *Boulangerie* (TaxCC) and (FCA) are consistent with the New Zealand test of deductibility.
92. Other case law also establishes that expenditure relating to a company's capital structure and transactions with shareholders may be deductible in some circumstances: *Carron; Truckbase Corporation v The Queen* (2006) DTC 2,930 (TaxCC); *St George Bank Ltd v FCT* [2009] FCAFC 62, 2009 ATC ¶20-103. In each case, the true character of the advantage sought or obtained from the expenditure must be determined. An ancillary or incidental advantage does not alter the character of a payment: *Buckley & Young*.
93. *Carron* and the other cases suggest:
 - The fact that expenditure relates to dealings with a company's shareholders does not necessarily mean that the expenditure is not deductible (as in some circumstances the interests of the shareholders may be inseparable from those of the company).
 - The cost of meeting obligations relating to a company's capital structure is not necessarily capital expenditure. Whether such expenditure is capital expenditure depends on whether the company obtains an advantage from the expenditure that is capital in nature.
94. As indicated, the New Zealand courts have not considered the issue of whether share registry costs have the necessary relationship to a company's business operations. If called upon to do so, they are likely to take an approach that reflects the commercial realities of the relationship between a company and the business it carries on. Such an approach would be consistent with the findings of Richardson J in *Banks* at 477, where he indicated the reluctance of judges to establish hard and fast rules for the interpretation of the primary deductibility provisions:

The language of s 111 [now s DA 1(1)(b)] is deceptively simple. The width and generality of the statutory language has posed problems for the courts and tribunals faced with applying the provisions in a practical way. There has been an understandable unwillingness in the cases to establish hard and fast rules to cover all situations in an area of the law which, so far as possible, should reflect commercial realities.
95. In New Zealand, a company structure is a preferred structure for operating a business. There are many reasons for this, such as limitation of liability, the ability to raise capital, controlling ownership and succession planning. The commercial view is that, once an entity is chosen for a business, expenditure on maintaining that entity is an administrative cost that should be regarded as necessarily incurred in carrying on its business. As a matter of good management practice, and as a practical requirement of running a business through a company structure, a company is bound to comply with the provisions of the Companies Act 1993 and its own constitution.
96. In the Commissioner's opinion, sufficient support exists for the view that, once a company is chosen as the entity through which a business activity is to be carried on, generally the administrative costs of maintaining the company will meet the general permission. The reason for this view is that such expenditure will be

dictated by commercial necessity for the period during which the company is carrying on a business.

97. However, even if such expenditure meets the general permission, a deduction will be disallowed if it is expenditure of a capital nature. The following observations can be made regarding the tests or indicia formulated by the courts:
- The need or occasion for the expenditure is to comply with statutory requirements and there is no wider object in view. Failure to comply with those requirements is an offence under the Companies Act 1993.
 - The identifiable asset test does not apply to share registry expenses. No asset is acquired or brought into existence. There is no improvement to an asset nor can such expenses be said to produce any enduring benefit. They can be viewed as maintenance type expenses, having been accepted as being of a revenue nature: *Tucker v Granada Motorway Services Ltd*.
 - The expenses associated with maintaining a share registry are expenses that are recurrent and may be contrasted with the "once and for all" type of expenditure that might be regarded as being associated with bringing into existence an enduring benefit. Expenses will be incurred on an on-going or annual basis to the extent that the expenditure may be concerned with annual reports, meetings or proxies associated with such meetings. Expenses will also be incurred on maintaining the register with each change of shareholding.
 - The expenses incurred in relation to share registry matters relate to the income-earning structure rather than the process of earning income. However, share registry expenses do not relate to the creation, acquisition or enlargement of the permanent structure of a company and are related to maintaining its operational structure.
 - The most likely treatment of share registry costs under the ordinary principles of commercial accounting would be to treat them as revenue expenses, given that the expenditure does not give rise to an asset.
98. Having regard to the various capital/revenue tests, only the test relating to whether the expenditure is on the income-earning structure or income-earning process might lead to a view that the expenditure is of a capital nature. Otherwise, the tests support a finding that generally share registry expenses are on revenue account. However, some share registry expenses could possibly relate to matters that will create an enduring benefit to the company in particular situations (such as in relation to mergers, acquisitions or migrations). In such situations, the facts in each case must be considered.

Shareholder meetings

Introduction

99. The powers reserved to shareholders by the Companies Act 1993 may be exercised at a meeting of shareholders or by a resolution in lieu of a meeting. Shareholders must be given a reasonable opportunity at meetings to question, discuss or comment on the management of the company and they can pass a non-binding resolution relating to the management of the company. Under the Companies Act 1993, a company must have an annual meeting of shareholders but other meetings, called special meetings, are possible.
100. An annual meeting of shareholders must be called not later than 6 months after balance date and not later than 15 months after the previous annual meeting. Generally, the ordinary business of an annual meeting is to:

- consider the financial accounts and auditors' report;
 - confirm the appointment and removal of directors and determine their remuneration; and
 - confirm the appointment of auditors and determine their remuneration.
101. A special meeting of shareholders may be called at any time, either by the board, by someone authorised by the constitution or by shareholders holding not less than 5% of the voting rights. The board of a company is likely to call a special meeting when there is a major transaction requiring shareholder approval or if there are constitutional matters that need to be considered. Often, the purpose of a special meeting is to consider:
- alterations to the company's constitution (including alterations to shareholders' rights);
 - arrangements with creditors;
 - liquidating the company;
 - major transactions, as required by s 129 of the Companies Act 1993;
 - ratifying the actions of directors; or
 - matters relating to a takeover offer.
102. Occasionally, meetings of shareholders may also arise as a result of a court order. A court has the power to make a wide range of procedural orders, including ordering meetings of shareholders or any class of them be held to consider, and approve if appropriate, arrangements under Parts 14 (Compromises with creditors) and 15 (Approval of arrangements, amalgamations, and compromises by court) of the Companies Act 1993.
103. The tax treatment of expenditure incurred for shareholder meetings is subject to s DB 63C, which provides:
- DB 63C Meetings of shareholders**
- Deduction*
- (1) A company is allowed a deduction for expenditure incurred in holding an annual meeting of the shareholders of the company to consider the affairs of the company.
- No deduction*
- (2) A company is denied a deduction for expenditure incurred in holding a special or extraordinary meeting of the shareholders of the company.
- Link with subpart DA*
- (3) Subsection (1) supplements the general permission and overrides the capital limitation. Subsection (2) overrides the general permission. The other general limitations still apply.
104. Section DB 63C applies to expenditure incurred in "holding" a meeting. The Commissioner considers that expenditure incurred in holding a meeting comprises only the costs directly incurred in physically holding or conducting the meeting. This is based on the meaning of "holding" or "hold", which, according to the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011), is:
- 9 arrange and take part in (a meeting or conversation).
105. This means that expenditure likely to be incurred by companies for a shareholders' meeting can be divided into two categories:
- Expenditure incurred in holding a meeting.

- Other expenditure incurred in relation to a meeting.

This division is necessary because different tax treatments can apply to the two categories of costs.

106. Direct expenditure incurred in holding a meeting would include costs of:

- Venue hire and any other costs related to preparation of the venue (eg, hire of audiovisual equipment).
- Refreshments provided to those attending the meeting.
- Printing, publishing, postage and advertising of notices of the meeting.
- Preparation of resolutions.
- Travel for directors and other persons required to attend the meeting.
- Any other costs directly related to physically holding or conducting the meeting.

107. Indirect expenditure for a meeting would be any other expenditure incurred for matters to be considered or tabled at a meeting of shareholders that is not a direct cost of physically holding or conducting the meeting. This would include expenditure such as consultants' fees or internal costs incurred in the preparation of reports to the board specifically on matters concerning the meeting. Other indirect costs could include costs relating to determining the contents of meeting agendas, reports and shareholder resolutions or polling shareholders on likely voting decisions.

Direct expenditure incurred in holding a meeting

108. The tax treatment of expenditure incurred in holding a meeting is provided for by s DB 63C for the 2014/15 and subsequent income years. Accordingly, expenditure incurred in holding a meeting of shareholders is:

- deductible where the expenditure is incurred in holding an annual meeting
- not deductible where the expenditure is incurred in holding a special or extraordinary meeting.

109. To qualify for a deduction under s DB 63C(1) for annual meeting costs, the expenditure in question does not need to satisfy the general permission in s DA 1. Deductibility of the expenditure is also not prohibited by the capital limitation.

Indirect expenditure incurred for a meeting

110. The tax treatment of indirect expenditure incurred for a meeting of shareholders depends on identifying the true character of the advantage sought or obtained from the expenditure: *Banks; Buckley & Young*. This requires examining the purpose of the meeting for which the expenditure was incurred.

Indirect meeting costs relating to the ordinary business purposes of an annual meeting

111. The Commissioner considers that where the indirect expenditure was incurred for the ordinary business of an annual meeting it will be deductible where the company is carrying on a business. As mentioned at para 100, the ordinary business of an annual meeting would generally include:

- Considering the financial accounts and auditors report.

- Confirming the appointment and removal of directors and determining their remuneration.
 - Confirming the appointment of auditors and determining their remuneration.
112. The Commissioner considers that the ordinary business of an annual meeting has a sufficient connection with a company's business so that the indirect meeting costs would be deductible. For instance, reporting to shareholders on the financial performance of the company should be regarded as a proper part of carrying on the company's business: *British Columbia Power* (SCC); *Boulangerie* (TaxCC) and (FCA). The management of the business is in the hands of the directors and this requires shareholders to discuss and approve their remuneration. This requirement often originates from the carrying on of a business by the company. Generally, the power of shareholders to determine the company's policy is exercised by appointing directors who agree with the shareholders. *British Columbia Power* (SCC) also supports the view that expenditure incurred to enable shareholders to exercise their power to determine the company's policy is deductible. Also, audit fees are considered to be deductible (see discussion from para 51). It follows that expenditure incurred to appoint auditors should also be deductible, including indirect costs incurred for a meeting of shareholders to confirm their appointment and remuneration.

Indirect meeting costs relating to other meeting purposes

113. Here, the other meeting purposes considered are the:
- alteration of the company's constitution;
 - alteration of shareholders' rights;
 - making of arrangements with creditors;
 - liquidation of the company;
 - approval of major transactions under the Companies Act 1993;
 - ratification of directors' actions or breaches of their duty to the company; and
 - consideration of takeover offers by a target company.

Alteration of constitution

114. Where expenditure is incurred to make alterations to the constitution of a company, whether there is the required nexus with the carrying on of the business or income-earning activity by the company must first be established. Consistent with the approach approved in *Banks*, to determine whether such expenditure is deductible, it is necessary to:
- consider the circumstances in which the expenditure was incurred;
 - identify the true nature of the advantage sought or obtained from the expenditure – this requires consideration of the commercial objective of the expenditure; and
 - consider whether there is a sufficient relationship between the expenditure and the company's business or income-earning activity.
115. In many cases, expenditure on altering a company's constitution will not have an impact on the earning of income and will relate to the distribution of income, so the necessary nexus will not be established. Also, expenditure incurred for the alteration of a company's constitution is more likely to be capital expenditure. Such matters are related to the business entity rather than to the carrying on of a

business. An alteration to the constitution is a matter affecting the entity or the capital structure of the company and is expenditure that is “once and for all” rather than recurrent expenditure. Such expenditure may create some enduring benefit for the company.

116. However, *Carron* shows that this may not always be the case. *Carron* involved a company that incurred legal expenses to obtain a supplementary charter, as its original charter affected the profitability of the company’s business because:

- the company’s borrowing powers were limited so that it was unable to raise sufficient finance for expansion; and
- there were restrictions on the transfer of shares that made it difficult to obtain a suitable person for the position of managing director.

The company’s profitability had increased following obtaining the supplementary charter.

117. In the House of Lords, the Revenue argued that the supplementary charter included provisions that were irrelevant to the company’s business operations. The House of Lords rejected that argument. Their Lordships considered that the purpose of amending the company’s constitution was to facilitate the company’s trading operations and that any constitutional amendments going beyond that purpose could be disregarded.

118. The Revenue also argued that the expenditure was capital expenditure because it secured an enduring benefit in the form of a better administrative structure and that the company’s constitution itself was a capital asset. That argument was also rejected. Lord Reid (with whom Lord Morris agreed) considered that the advantage obtained from the expenditure was of a revenue nature, in that it enabled the company’s business to be carried on more efficiently and to be financed more easily. Lord Guest considered that the advantage obtained was of a revenue character as the removal of restrictions in the original charter enabled the company’s day-to-day business to be carried on more efficiently. The advantages gained from the expenditure were in the nature of repair and modernisation of the trading machinery.

119. *Truckbase Corporation v The Queen* is another case where the necessary nexus was established. In *Truckbase*, the taxpayer had incurred legal and accounting fees for the redrafting of unanimous shareholder agreements that were the means by which the shareholders could limit the powers of the directors. The agreements had the same function as a constitution. The revision of these agreements took operational powers away from the shareholders and gave it to the managers. McArthur J accepted that the revision of the agreements made the company more profitable as it gave employees the motivation to become an integral part of the business. His Honour considered that the costs were incurred for the purpose of a business reorganisation that facilitated effective management, good governance and protection for the company against any disruption due to the disability of key shareholder-employees. Therefore, the court held that the fees were incurred to earn income. McArthur J also considered that the fees were comparable to expenditure on “repairs” to the initial shareholder agreements and were not capital expenditure.

120. The above cases confirm that expenditure is not necessarily non-deductible because it relates to a company’s administration or structure.

Alteration of shareholders’ rights

121. A company is a separate entity from the shareholders. They do not own the company’s property or its business, other than through the ownership of a share.

The shares confer on the shareholders an interest in the company to the extent of the rights and obligations defined in the company's constitution or in the Companies Act 1993. A company must not take any action that affects the rights attached to shares unless that action has been approved by a special resolution of each interest group.

122. Expenditure incurred to alter shareholders' rights will most likely be regarded as non-deductible because it fails to have the necessary nexus to the company's business or it is capital expenditure. This is because such matters will usually be related to either the right to distributions of profit or the right to control the company (affecting voting rights). These matters are related to the business entity, rather than to the carrying on of a business.
123. In *St George Bank*, Perram J considered that the number of shares on issue and the arrangements about the distribution of profits were not related to the company's income-earning activities. However, Perram J noted (at [97] – [98]) that in some circumstances (not present in the case), the position and rights of the shareholders may be enmeshed with the company's business. That is, expenditure could be deductible in some circumstances even though the expenditure relates to the position and rights of shareholders. In *St George Bank* it was held that expenditure incurred in obtaining an advantage relating to a company's business may be deductible although the expenditure also results in the alteration of the rights of shareholders.
124. It is difficult to be definitive about the circumstances in which a company may obtain an advantage of a revenue nature from expenditure incurred in altering shareholders' rights. One possibility might be where the rights of shareholders are altered in conjunction with an alteration to the company's constitution to obtain a revenue advantage. *Carron* is authority that expenditure incurred in altering a constitution to obtain a revenue advantage is deductible.
125. Therefore, the Commissioner considers that generally expenditure incurred in altering the rights of shareholders will not satisfy the general permission. However, in some circumstances, the interests of the shareholders may coincide with the interests of the company. The alteration of the rights of shareholders may be an ancillary or incidental effect of expenditure incurred for the company's business. In such circumstances, the fact that the expenditure also results in the alteration of the rights of shareholders does not necessarily mean that the expenditure is not deductible. In each case, the true nature of the advantage sought or obtained from the expenditure must be identified.

Arrangements with creditors

126. A company that is in financial difficulties may wish to take advantage of provisions in Parts 13, 14 and 15 of the Companies Act 1993 that allow it to implement compromises, arrangements, amalgamations and reconstructions.
127. Andrew Beck in *Guidebook to NZ Companies and Securities Law* (8th ed, 2010, CCH, Auckland) at [1134] states that common outcomes from compromises with creditors are an extended time to repay debts, acceptance of less than the full amount of the debt owing, and priority for some creditors over others. A compromise that is approved by creditors at a creditors' compromise meeting is binding on the company and on all creditors, or all creditors of the particular class of creditors, to whom notice of the proposal is given.
128. Part of this process may include a shareholders' meeting to consider directors' proposals relating to creditors. It is primarily these costs that are being considered here, not the costs in relation to compromise meetings of creditors.

129. *FCT v Snowden & Willson Pty Ltd* (1958) 99 CLR 431 suggests that expenditure incurred in enforcing debts owed to a taxpayer and in resisting claims by debtors of the taxpayer for a reduction of their liability is deductible. The High Court of Australia held that the expenditure was deductible because the matters at issue could have had an effect on the company's business.
130. The Commissioner considers that similar considerations would arise for debts owed by a taxpayer to creditors. Dealing with creditors may be regarded as an ordinary incident of a business and expenditure incurred in dealing with creditors will generally have the necessary connection with the carrying on of the business of the company.
131. Therefore, expenditure to consider a directors' proposal involving dealings with creditors is likely to be deductible, as such an arrangement with creditors is made to get approval from creditors to allow the company to keep on trading. An analogy can be drawn with *Carron* in that such an arrangement is made to remove impediments to efficient trading. Dealing with creditors is an ordinary incident of a company's business and is recurrent throughout the life of a company.
132. The Commissioner considers that the indirect meeting costs incurred in these circumstances are not capital expenditure. Expenditure on an arrangement with creditors is unlikely to be made "once and for all" and does not bring into existence an identifiable asset. The source of funds is likely to be circulating capital and on ordinary accounting principles the expenditure will be treated as being on revenue account. Although it could be argued that the expenditure relates to maintaining the business entity or capital structure, the expenditure is more closely related to the operations of the business.

Liquidation

133. The shareholders of a company may appoint a liquidator by a special resolution of shareholders. The principal duty of a liquidator is to take possession of, protect, realise, and distribute the company's assets. If there are surplus assets remaining, the liquidator is required to distribute the assets or the proceeds of realisation in accordance with the company's constitution or in accordance with the Companies Act 1993.
134. Andrew Beck, in *Guidebook to NZ Companies and Securities Law*, states at [1501] that normally the winding up of a company (which terminates the existence of the company) is preceded by liquidation.
135. In the Commissioner's view, indirect meeting costs incurred for shareholders to consider the liquidation of a company are not deductible. This is because:
- Expenditure incurred in closing down a business is not deductible as it is incurred in disposing of a business and ceasing to derive income, rather than in deriving income.
 - If the company's business has already ceased, the costs will not be incurred in the course of deriving income: *Amalgamated Zinc (de Bavay's) Ltd v FCT* (1935) 54 CLR 295 (HCA).
 - Costs of appointing a liquidator are capital expenditure, being expenditure incurred to distribute the company's assets (that is, to dismantle the business structure).

Major transactions under the Companies Act 1993

136. A major transaction is one that, under s 129 of the Companies Act 1993:

- involves the acquisition of assets or disposition of assets of the company where the value of those assets is equal to more than half the value of the company's assets; or
 - has the effect of the company either acquiring rights or interests, or incurring obligations or liabilities, the value of which is more than half the value of the company's assets prior to the transaction.
137. The management of a company is generally reserved to the directors but s 129 provides a limitation on the directors, in that a company must not enter into a major transaction unless it is contingent on, or has the approval of, shareholders by way of a special resolution. However, if the approval of the shareholders is not obtained, a major transaction would still be valid unless the other party to the transaction knew or ought to have known that the consent of shareholders had not been obtained: s 18(1)(a) Companies Act 1993.
138. The legislative history of s 129 suggests Parliament's purpose for the section was to provide a protection for shareholders. The report of the Law Commission, *Company Law Reform and Restatement* (NZLC R9, June 1989), included the first draft of what became the Companies Act 1993. The report commented on s 99, the "major transaction" provision that was enacted as s 129. The Law Commission stated:
- 499 The provision is based on the view that some dealings have such far-reaching effects that they should be referred to shareholders. **Shareholders should not find that massive transactions have transformed the company they invested in without warning.** Clearly, unless the constitution of a company restricts its activities, all shareholders will have to accept a large measure of change. Normally that may be achieved over some time, permitting the shareholder who does not like the direction the company is taking to leave or to exercise his rights to call management to account. **What we are concerned about is abrupt and substantial change which transforms the nature of the enterprise.** We think that recent experience in New Zealand has demonstrated that such transformation is a problem that should be faced up to and that it has often operated to the detriment of the company and the shareholders. [Emphasis added]
139. There is also some support in case law for the view that s 129 protects shareholders. In *Xylem Fund I, LP and Xylem Investments GP Inc v Fletcher Challenge Forests Ltd* (2002) 9 NZCLC 262,955, the High Court refused an application by minority shareholders for an order restraining the company from allowing another shareholder to vote on a s 129 resolution seeking approval for the company to acquire certain assets (Resolution 1). The minority shareholders sought the order because the other shareholder was to be involved in various transactions that would provide funding for the acquisition. The court refers to s 129 as providing protection for shareholders, at 262,963:
- The necessity for a special resolution under s 129 is the appropriate protection for shareholders in relation to Resolution 1.
140. Significantly, a shareholder who votes against a successful s 129 resolution has a further protection provided by s 110 of the Companies Act 1993. Section 110 entitles them to require the company to purchase their shares. This suggests the scheme of the Companies Act is primarily for s 129 to provide protection for shareholders, rather than reserving a significant management power to shareholders.
141. In practice, prudent directors would generally only commit to proceed with a major transaction once it was fully investigated and they would only incur the expense of holding a meeting of shareholders when they were fairly confident of gaining shareholder approval. Section 129 provides for a company to enter into a major transaction contingent on shareholder approval. If the transaction proceeds without approval, the Companies Act provides that the transaction could still be valid. Accordingly, shareholder approval under s 129 will often be a contingency

to a decision that precedes it, providing shareholders some protection of their interests in the company.

142. In the Commissioner's Interpretation Statement IS 08/02: "Deductibility of feasibility expenditure", *Tax Information Bulletin* Vol 20, No 8 (July 2008): 12, feasibility expenditure is defined as expenditure incurred to determine the practicability of a new proposal. However, IS 08/02 draws a distinction between expenditure incurred in the course of carrying on a business to enable a taxpayer to make an informed decision on the acquisition of a capital asset (or other enduring advantage) and expenditure incurred once the decision is made to proceed with the acquisition. Expenditure incurred once a decision is made to proceed with the acquisition is more likely to be capital expenditure.
143. In IS 08/02, the Commissioner concludes that commitment to proceed with a capital project can still be made despite recognising that whether the development or acquisition ultimately goes ahead may be contingent on particular factors. For example, the taxpayers in *Milburn* had committed to developing the quarry sites, but the obtaining of appropriate resource consents was a known contingency. Other contingencies that may be recognised are the need for technical refinement to occur and the obtaining of the final construction cost. Such matters would not necessarily mean a commitment or decision to proceed with the acquisition or development of a capital asset had not been made, if the facts or circumstances otherwise showed that the taxpayer was actively proceeding. Also, IS 08/02 concludes that "commitment does not require a legal or other form of binding decision that is final and irrevocable"(at para 186).
144. In the Commissioner's view, it is most likely that approval under s 129 occurs after a company commits to a capital transaction and is part of the costs of acquiring or disposing of an asset under the "major transaction". Whether this is the case will always be a question of fact. Indirect meeting costs to consider major transactions incurred after the company has committed to the transaction are non-deductible because of the capital limitation.

Ratifying directors' actions or breaches of their duty to the company

145. Section 177 of the Companies Act 1993 gives shareholders the power to ratify the purported exercise by the directors of a power vested in the shareholders. The section contemplates a situation where the directors did not have the power to act, so that the action taken by the directors is invalid. If ratified, the purported exercise of that power is deemed to be a valid exercise of the power. In other words, if the purported exercise by the directors of a power vested in the shareholders is ratified, the exercise of the power is treated as the exercise of the power by the shareholders. On that basis, expenditure incurred in considering whether to ratify the exercise by the directors of a power that is vested in the shareholders should have the same treatment as expenditure incurred in exercising the power directly.
146. In addition, s 177(4) of the Companies Act 1993 preserves the existing rules of law relating to the ratification or approval by shareholders of any act or omission of the directors. Under the common law the directors have a fiduciary duty to the company analogous to that of trustees: *Re Smith & Fawcett Ltd* [1942] 1 All ER 542 (CA). The duties of directors under the common law are set out in the Companies Act 1993. These duties are:
- to act in good faith and in the best interests of the company when exercising their powers or performing duties;
 - to exercise a power for a proper purpose;

- not to act, or agree to the company acting, in contravention of the Companies Act 1993 or the company's constitution;
 - not to agree to the business of the company being carried on in a manner likely to create a serious loss or risk to the company's creditors;
 - not to incur an obligation unless the directors believe on reasonable grounds at the time that the company will be able to perform the obligation when required;
 - to exercise care, diligence and skill that reasonable directors would exercise in the same circumstances taking into account the nature of the company, the nature of the decision and the position of the directors, and the nature of the responsibilities undertaken by them.
147. A transaction that is entered into in breach of a duty of the directors is voidable by the company. Ratification by the shareholders has the effect of affirming the transaction: *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589 (PC); *Bamford v Bamford* [1969] 1 All ER 969 (CA). Ratification does not release the directors from personal liability and ratification in this context means no more than an election by the company not to exercise its right to rescind a transaction.
148. Where the directors have acted in breach of their duty to the company in exercising their power to manage the company and its business, the company has a choice whether to rescind or ratify the directors' actions. That decision can only be made by the shareholders. Therefore, in the Commissioner's view, expenditure incurred for shareholders meeting to consider the ratification of such a breach of duty by the directors is incurred in exercising a management power in carrying on the company's business. Such expenditure has a sufficient relationship with the carrying on of the company's business. Whether the expenditure is deductible does not depend on the action that is ratified (that is, on whether it relates to a transaction of a capital nature).

Takeovers (target company)

149. The costs considered are those of a target company in receipt of a takeover offer incurred to allow shareholders to meet to consider the takeover offer. Under the Takeovers Code, the target company is entitled to recover from the offeror any costs incurred on an offer or a takeover notice. However, the target company could be faced with expenditure that it has not been able to recover. The costs incurred by the entity making a takeover bid are not considered here.
150. *FCT v The Swan Brewery Co Ltd* 91 ATC 4,637 (FCAFC) shows that the existence of a statutory obligation to incur expenditure (such as under the Takeovers Code) does not necessarily mean that expenditure incurred in complying with the obligation is deductible. In *Swan Brewery*, the company had a statutory obligation to provide an independent report on the takeover offer to shareholders and to provide advice on the takeover offer to shareholders. However, the court held that there was no relationship between the carrying on of the company's business and expenditure incurred in providing information to shareholders. *Swan Brewery* also supports the view that the fact that the carrying on of a business results in takeover activity is not sufficient. The court considered that expenditure incurred in providing information regarding a takeover offer to shareholders related to the interests of the shareholders in the company. See also *St George Bank*, in which Perram J commented that the costs incurred by companies in complying with regulatory obligations may in some cases be capital expenditure.
151. The Australian Tax Office (ATO) considers that costs incurred by the target company of a takeover bid (including legal and accounting fees, stockbrokers' fees, consultancy fees, printing, advertising and mailing costs and the costs of

independent reports) are not incurred in gaining or producing income: Taxation Ruling, IT 2656: "Income tax: Deductibility of takeover defence costs" (October 1991, addendum September 1998). The ATO also considers that takeover defence costs are capital expenditure, being costs incurred to protect or preserve the capital structure or the ownership of the company.

152. However, in *Boulangerie* (TaxCC), Archambault TCCJ did not accept that the expenditure in question was incurred to preserve the existing shareholders' positions as owners of the company. The expenditure was considered to be incurred to secure an advantage of a revenue nature for the company. In that case, in making their recommendation to shareholders, the directors considered the effect of one of the proposed takeovers on the company's relationship with its employees and customers and the continuity of the company's business. Also, the directors recommended that the shareholders did not accept the highest offer. The offer the board recommended replaced all of the existing shareholders, rather than improving the positions of existing shareholders. However, Archambault TCCJ noted that if the company had wanted to maintain the status quo, the expenditure would have been capital expenditure.
153. In the Commissioner's view, whether expenditure incurred to allow shareholders to consider a takeover offer is deductible depends on the facts in each case:
- Expenditure incurred merely to provide information to shareholders as to the adequacy of the takeover offer or to preserve the position of existing shareholders is not deductible. There is an insufficient relationship between expenditure incurred for the benefit of shareholders, or to satisfy a duty to shareholders, and the company's business: *Swan Brewery*.
 - Expenditure incurred in providing information to shareholders on a takeover offer to obtain a benefit of a capital nature (such as the prevention of the winding up of the company's business, new equity funds, the expansion of the company's business) is capital expenditure: *Boulangerie* (TaxCC) and (FCA).
 - Expenditure incurred in providing information to shareholders regarding a takeover offer with a view to preventing a takeover offer that would detrimentally affect the company's ability to continue its business in the same form is deductible: *Boulangerie* (TaxCC) and (FCA); *Swan Brewery*.

Statutory return fees

154. A company is required to file certain information with the Companies Office as part of the disclosure requirements in the Companies Act 1993. This includes:
- Notice of change of registered office.
 - Notice of change of address for service.
 - Annual return.
155. Service of documents relating to legal proceedings and delivery of other documents to the company is effective if the documents are delivered or posted to the address for service or registered office notified in the Companies Register. Failure to file the annual return or notices of change of the company's address for service or registered office may result in documents served or delivered at an incorrect address being treated as effective although the company may not have received the documents. A company cannot take steps in response to actions taken against the company, and that may have an impact on the company's business, unless it receives notice of the proposed action.

156. Complying with these requirements is an administrative matter to ensure that there is accountability for persons carrying on business through a company. Such expenditure is required to be met by all companies, regardless of whether the company is carrying on business. To that extent, it may be argued that such expenses are not dictated by the business ends.
157. However, a primary reason for incurring the expenditure is to ensure that the company remains on the register so that it can continue to operate as a company. A company may agree to meet these obligations in commercial contracts entered into between the company and third parties. While a contract between the company and a third party cannot determine the tax treatment of expenditure incurred pursuant to the agreement, it indicates how the business community views such obligations.
158. As mentioned, *Distillers* concerned apportioning various items of expenditure incurred by a holding company because the company's income included exempt income. The company had incurred general expenses, including "minor filing fees". The court considered some of the expenses were deductible in full and that apportionment was required for others, including the filing expenses because they could not be traced exclusively to any particular type of income. The case supports the view that statutory filing fees would generally be deductible. The court did not explain the basis for the conclusion but stated (at 1,172) in relation to all the expenses (including the filing fees) that:
- All of such expenses may very well have been incurred for the purpose of gaining or producing income from the appellant's business, and the evidence, so far as it goes, tends to support the fact so assumed.
159. In the *Distillers* litigation, the Tax Appeal Board (*No. 226 v MNR 55 DTC 18*) had considered that the expenditure considered in the case was in the nature of maintenance expenditure, being expenditure that is required to satisfy obligations that a company has under the Canadian equivalent to the New Zealand Companies Act 1993 "to do certain things each year in order to remain a subsisting corporation" (at 19).
160. The reality is that a company cannot continue its business if it fails to meet its filing obligations as it could be struck off the register for non-compliance. Similarly, if it fails to comply with obligations imposed by a third-party lender, it could be in default of its obligations under its financing agreements. Clearly, where a company is not carrying on a business, it would not be possible to establish a relationship between the statutory filing fees and any business. In the Commissioner's view, where a company is carrying on a business, it is likely that a court would hold that expenditure incurred by a company in complying with statutory obligations relating to the administration of the company is deductible, being expenditure that is analogous to maintenance expenditure.
161. Accordingly, in the Commissioner's view, the commercial necessity for the expenditure provides strong grounds for finding that expenditure on such filing fees should be regarded as having the required relationship to the business operations of a company.
162. However, the expenditure must still be tested against the capital limitation. The Commissioner considers statutory filing expenses are not capital expenditure as:
- The filing fees are by their nature recurrent, create no asset and have no benefit that endures in the way that fixed capital endures.
 - Such expenses are likely to be met out of the circulating capital of the company as such expenses are part of the recurrent business cycle of a company.

- Although statutory filing expenses are related to the corporate structure, they are expenses relating to maintaining the company as a statutorily compliant company rather than enlarging or altering the business structure.

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Subject references

General permission, capital limitation, private limitation

Company administration costs – annual and special meeting costs; audit fees; dividend related costs; listing fees; share registry costs; statutory filing costs; associated legal and accounting fees

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APPENDIX – LEGISLATION

1. Section DA 1: General permission:

Nexus with income

- (1) A person is allowed a deduction for an amount of expenditure or loss, including an amount of depreciation loss, to the extent to which the expenditure or loss is—
 - (a) incurred by them in deriving—
 - (i) their assessable income; or
 - (ii) their excluded income; or
 - (iii) a combination of their assessable income and excluded income; or
 - (b) incurred by them in the course of carrying on a business for the purpose of deriving—
 - (i) their assessable income; or
 - (ii) their excluded income; or
 - (iii) a combination of their assessable income and excluded income.

General permission

- (2) Subsection (1) is called the **general permission**.

Avoidance arrangements

- (3) Section GB 33 (Arrangements involving depreciation loss) may apply to override the general permission in relation to an amount of depreciation loss.

2. Section DA 2: General limitations:

Capital limitation

- (1) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is of a capital nature. This rule is called the **capital limitation**.

Private limitation

- (2) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is of a private or domestic nature. This rule is called the **private limitation**.

Relationship of general limitations to general permission

- (7) Each of the general limitations in this section overrides the general permission.

3. Section DB 5 provides for a deduction for the costs of borrowing money in some circumstances:

DB 5 Transaction costs: borrowing money for use as capital

Deduction

- (1) A person is allowed a deduction for expenditure incurred in borrowing money that is used as capital in deriving their income.

...

Link with subpart DA

- (2) This section overrides the capital limitation. The general permission must still be satisfied and the other general limitations still apply.

4. Section DB 62 provides for a deduction for legal expenses in some circumstances:

DB 62 Deduction for legal expenses

When this section applies

- (1) This section applies to a person when their total legal expenses for an income year is equal to or less than \$10,000.

Deduction

- (2) The person is allowed a deduction for the legal expenses.

Definition

- (3) For the purposes of this section, **legal expenses** means fees for **legal services** (as defined in the Lawyers and Conveyancers Act 2006) provided by a person who holds a practising certificate issued by the New Zealand Law Society or an Australian equivalent.

Link with subpart DA

- (4) This section overrides the capital limitation. The general permission must still be satisfied and the other general limitations still apply.

5. Section DB 63 provides a deduction for the costs of authorising, allocating and paying a dividend:

DB 63 Expenses in paying dividends

Deduction

- (1) A company is allowed a deduction for expenditure incurred in—
- (a) authorising, allocating, or processing the payment of a dividend;
 - (b) resolving a dispute concerning a matter referred to in paragraph (a).

Link with subpart DA

- (2) This section supplements the general permission and overrides the capital limitation. The other general limitations still apply.

6. Section DB 63B provides a deduction for periodic listing fees with recognised exchanges:

DB 63B Periodic company registration fees

Deduction

- (1) A listed company is allowed a deduction for expenditure incurred as periodic fees of a recognised exchange for maintaining the registration of the company on the exchange.

Link with subpart DA

- (2) This section supplements the general permission and overrides the capital limitation. The other general limitations still apply.

7. Section DB 63C provides rules for the deductibility of costs of holding meetings of shareholders:

DB 63C Meetings of shareholders

Deduction

- (1) A company is allowed a deduction for expenditure incurred in holding an annual meeting of the shareholders of the company to consider the affairs of the company.

No deduction

- (2) A company is denied a deduction for expenditure incurred in holding a special or extraordinary meeting of the shareholders of the company.

Link with subpart DA

- (3) Subsection (1) supplements the general permission and overrides the capital limitation. Subsection (2) overrides the general permission. The other general limitations still apply.

8. A "recognised exchange" is defined for the purposes of the Act in s YA 1:

recognised exchange, at any time,—

- (a) means a recognised exchange market in New Zealand or anywhere else in the world that at the time has the features described in paragraphs (c) to (e); and
- (b) includes a recognised exchange market that at the time is approved for the purposes of this definition by the Commissioner, having had regard to the features described in paragraphs (c) to (e); and
- (c) for the purposes of paragraphs (a) and (b), the first feature is that the exchange market brings together buyers and sellers of shares or options over shares; and

- (d) for the purposes of paragraphs (a) and (b), the second feature is that the exchange market involves the listing of prices, whether by electronic media or other means, at which persons are willing to buy or sell shares or options; and
- (e) for the purposes of paragraphs (a) and (b), the third feature is that the exchange market provides a medium for the determination of arm's length prices likely to prove fair and reasonable, having regard to—
 - (i) the number of participants in the market or having access to the market; and
 - (ii) the frequency of trading in the market; and
 - (iii) the nature of trading in the market, including how prices are determined and transactions are effected; and
 - (iv) the potential or demonstrated capacity of a person or persons significantly to influence the market; and
 - (v) any significant barriers to entry to the market; and
 - (vi) any discrimination on the basis of quantity bought and sold unless based on the risks involved, the transaction costs, or economies of scale