Inland Revenue
Te Tari Taake

DISPOSITION OF REAL PROPERTY FOR INADEQUATE CONSIDERATION WHERE FOLLOWING A GRANT OF A LEASE THE BALANCE IS TRANSFERRED TO ANOTHER PERSON – GIFT DUTY AND INCOME TAX IMPLICATIONS

Note (not part of Rulings):
The nine rulings BR Pub 02/02 – 02/10 replace both public ruling BR Pub 96/1 and public ruling BR Pub 96/2A. BR Pub 96/1 was published in TIB Vol 7, No 8 (February 1996), and applied up until 31 March 1999. BR Pub 96/2A was published in TIB Vol 8, No 10 (December 1996), and applied up until the end of the 1998-99 income year. Rulings BR Pub 02/02-02/10 cover the application of the Estate and Gift Duties Act 1968 and the Income Tax Act 1994 to nine different arrangements. Some of the conclusions in those earlier rulings have changed as a result of the House of Lords decision in *Ingram v IRC* [1999] 1 All ER 297. The rulings and commentary also supersede the view given in a "Question we've been asked" item in TIB Vol 9, No 8 (August 1997).

Nine separate binding rulings have been issued covering both the income tax and gift duty implications of similar but separate arrangements. This provides greater certainty to taxpayers over a range of possible arrangements. However, a single commentary applies to all nine rulings.

PUBLIC RULING BR Pub 02/03

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Laws

All legislative references are to either the Estate and Gift Duties Act 1968 (EGDA) or the Income Tax Act 1994 (ITA).

This Ruling applies in respect of section 70 of the EGDA and section CE 1 (1)(e) of the ITA.

The Arrangement to which this Ruling applies

The Arrangement is the disposition of real property for inadequate consideration, where a transferor grants a lease for a term to him or herself, and then subsequently transfers the balance of the property to another person.

For the purposes of this Ruling, a "person" includes a person or persons acting in their capacity as trustees of a trust.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The lease granted by the transferor is a retention and not a reservation for the purposes of section 70(2) of the EGDA.
- The retention of the lease does not give rise to gross income to the transferor or the transferee under section CE 1(1)(e) of the ITA.

The period for which this Ruling applies

This Ruling will apply for the period from 1 April 1999 to 31 March 2005.

This Ruling is signed by me on the 29th day of November 2002.

Martin Smith
General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULINGS BR PUB 02/02 TO 02/10

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in public rulings BR Pub 02/02-02/10 ("the Rulings").

The commentary deals first with the gift duty implications under the Estate and Gift Duties Act 1968 of each of the arrangements in the public rulings, and secondly with the income tax implications under the Income Tax Act 1994. These rulings are all variations on a theme, where a transferor wishes to transfer real property but wishes still to have some interest in the property. An example is a person who transfers a house to a family trust, keeping the right to occupy the property. These rulings cover different ways in which this can be achieved, and specify situations in which the transactions will give rise to a liability for gift duty and income tax and the situations in which they will not.

All legislative references are to the Estate and Gift Duties Act 1968 (EGDA), the Income Tax Act 1994 (ITA), or the Property Law Act 1952 (PLA).

PART ONE: GIFT DUTY

Background

The rulings are concerned with the situation where someone gives away some property that is subject to gift duty, and takes something back from the gift. Section 70(2) of the EGDA prevents the value of any benefit or advantage reserved from a gift, being deducted from the value of the dutiable gift. If the transferor reserves an

interest in the property, the transferor is assessed for gift duty on the value of all of the property transferred, including the interest reserved.

The aim of section 70(2) is to prevent the transferor arguing that the liability for gift duty is reduced. Without section 70(2), the transferor might argue that when an interest in property gifted has been reserved, the transferee has given value to the transferor for the gift in the form of an interest in the property gifted.

If the transferor *reserves* part of the property transferred, that part of the property *is* included in determining whether or not there is a dutiable gift, and whether or not section 70(2) applies. Property is reserved if, under the arrangement, some of the property gifted is to be given back. If the transferor *retains* part of some property and transfers the rest of the property, the part of the property retained is *not* included in determining whether or not there is a dutiable gift, and whether or not section 70(2) applies.

It is important, therefore, to distinguish between reservations and retentions, as apparently similar transactions are treated quite differently. The analysis in this commentary particularly focuses on the distinction between reservation and retention.

The new rulings and commentary apply from 1 April 1999 to 31 March 2005. The previous ruling on this matter, Public Ruling BR Pub 96/1, applied to dispositions of real property made between 1 April 1996 and 31 March 1999. It was published in *Tax Information Bulletin* Vol 7, No 8 (February 1996). An issue arising from the previous ruling, which was discussed in a "Question we've been asked" item in *Tax Information Bulletin* Vol 9, No 8 (August 1997), is dealt with in this commentary, and so is superseded by this commentary.

Because of recent developments in the law on reservations and retentions, particularly the House of Lords decision in *Ingram v IRC* [1999] 1 All ER 297, which came after the previous ruling, the Commissioner's view of the law has been refined to reflect that decision.

Another change from the previous ruling is that the Commissioner now considers that there needs to be a gift for section 70 to apply. The Commissioner no longer takes the view that section 70 can apply to create a gift.

These points are discussed in the commentary. In other respects the law relating to the gift duty aspects, and the Commissioner's view of that law, has not changed.

The arrangements

In order to provide for a comprehensive range of situations, the Commissioner has developed nine separate arrangements, BR Pub 02/02-02/10. These arrangements are dispositions of property for inadequate consideration where:

1. A transferor grants a life estate to him or herself, and then subsequently transfers the balance of the property to another person.

2. A transferor grants a lease to him or herself, and then subsequently transfers the balance of the property to another person.

3. A transferor transfers the property to another person, and under the arrangement that other person later grants a life estate back to the transferor out of the property transferred.

4. A transferor transfers the property to another person, and under the arrangement that other person later grants a lease back to the transferor out of the property transferred.

5. A transferor transfers the property to another person, and under the arrangement that other person later grants a licence to occupy back to the transferor out of the property transferred.

6. A transferor purports to grant him or herself a licence to occupy, and transfers the balance of the property to another person.

7. A transferor grants him or herself a life estate and simultaneously transfers the balance of the property to another person.

8. A transferor grants him or herself a lease, and simultaneously transfers the balance of the property to another person.

9. A transferor purports to grant him or herself a licence to occupy, and simultaneously transfers the balance of the property to another person.

It is important to recognise that with section 70(2) of the EGDA such seemingly minor differences in arrangements may significantly change the parties' respective rights and obligations, and the revenue law implications.

The words "grant" and "transfer" are often used interchangeably. For the purposes of this commentary, "grant" refers to the conveyance of the carved-out estate (such as the life interest or lease) and "transfer" refers to the conveyance of the balance of, or reversionary interest in, the property. Some of these arrangements may apply to taxpayers other than individuals. The arrangements specifically include trustees. Because of the nature of the arrangements, the focus is on individuals and trusts, although the same reasoning may apply in some instances to other entities.

Other references

Note that generally speaking, gift duty is payable only when the value of the total amount of gifts made in a year exceeds $27,000. The Commissioner has published two booklets, *Gift duty* IR 194 (April 2002), explaining the general features of gift duty, and *Gift duty – A guide for practitioners* IR 195 (May 1999) which covers some issues in more detail. These are available from Inland Revenue offices or through the website at www.ird.govt.nz. The Commissioner has also published items on various aspects of gift duty in the *Tax Information Bulletins*.

Summary of conclusions

The following bullet points summarise the different ways of transferring interests in property, the Commissioner's view of whether there is a reservation or retention, and therefore whether section 70(2) of the EGDA applies. In each of these situations, the property must be disposed of for inadequate consideration.

- Where a transferor grants an interest in property to him or herself, and later transfers the balance or reversionary interest in the property to another person, there is no reservation for the purposes of section 70(2) of the EGDA and the section does not apply. The most obvious example is a person who grants him or herself a life estate or a lease, and then subsequently disposes of the balance of his or her interest to another person. The life estate or lease is, in law, a distinct interest in the property separate from the balance of or reversionary interest in the property that is transferred and is not part of the gift. Gift duty is concerned with what is gifted. The focus is on the balance transferred, not the life estate or lease that the transferor kept throughout (BR Pub 02/02 and BR Pub 02/03).

- Where a transferor transfers property to another person, and the parties intend that all the property rights in the property be transferred and then later an interest be granted back, there is a reservation by the transferor of the interest granted back to him or her. If the transfer of the property is a dutiable gift, the transferor would not be able to deduct the value of the reserved interest from the value of the gift, because of the operation of section 70(2) of the EGDA (BR Pub 02/04-02/06).

- Where a transferor grants a property right to him or herself, and simultaneously transfers the balance or reversionary interest of the property to a transferee, it is considered that there is no reservation of a benefit for the purposes of section 70(2) of the EGDA.

  A simultaneous transfer will include the situation where it was the intention of the parties that only the net property interest was to be given away, but because of conveyancing rules, the transfer had to be effected by a transfer of all of the property, and then the net property interest being transferred back. In this situation, nothing has been reserved out of the subject matter of the gift. This point was stated in the 1999 House of Lords decision in *Ingram*, and the Commissioner has incorporated the point in the rulings and in this commentary. It is, however, consistent with the New Zealand case *Commissioner of Stamps v Finch* (1912) 32 NZLR 514 (CA) (BR Pub 02/07-02/10).

Legislation

Gift duty is imposed under the EGDA by part IV of that Act. The key definitions and provisions relating to gift duty follow.

Section 2(2) defines "gift" as:

"Gift" means any disposition of property, wherever and howsoever made, otherwise than by will, without fully adequate consideration in money or money's worth passing to the person making the disposition:

Provided that where the consideration in money or money's worth is inadequate, the disposition shall be deemed to be a gift to the extent of that inadequacy only.

"Disposition of property" is also defined in section 2(2):

"Disposition of property'' means any conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity; and, without limiting the generality of the foregoing provisions of this definition, includes—

...

Therefore, for a gift to exist, there must be a disposition of property without fully adequate consideration. A gift exists only to the extent of the inadequate consideration.

Section 61 of the EGDA imposes gift duty on dutiable gifts, at rates set out in section 62. Section 63 provides a definition of dutiable gift. A gift is a dutiable gift if the donor is domiciled in New Zealand or is a body corporate incorporated in New Zealand, or the property which is the subject of the gift is situated in New Zealand.

Under section 66 of the EGDA, a gift is valued at the date it is made. Section 67 allows the Commissioner to value property in such manner as he thinks fit, subject to restrictions in sections 68A-G, 69 and 70.

Section 70 of the EGDA states:

(1) For the purposes of this section-

"**Ascertainable**" means ascertainable as at the date of the disposition to the satisfaction of the Commissioner:

"**Benefit or advantage**" means any benefit or advantage whether charged upon or otherwise affecting the property comprised in the disposition or not, and whether—

(a) By way of any estate or interest in the same or any other property; or
(b) By way of mortgage or charge; or
(c) By way of any annuity or other payment, whether periodical or not; or
(d) By way of any contract for the benefit of the person making the disposition; or
(e) By way of any condition or power of revocation or other disposition; or
(f) In any other manner whatever;—

but does not include any annuity or other payment, whether periodical or not, if and so far as the annuity or payment—

(g) Is of a fixed or ascertainable amount in money payable over a fixed or ascertainable period, or for life, or at a fixed or ascertainable date or dates, or on demand; and
(h) Is secured to the person making the disposition—
(i) By a mortgage or charge over the property comprised in the disposition; or
(ii) By an agreement for the sale and purchase of land comprised in the disposition; or
(iii) By an agreement in writing to lease land comprised in the disposition; or
(iv) By deed,—

in each case executed by the person acquiring the beneficial interest under the disposition.

(2) Where any disposition of property is, in whole or in part, a dutiable gift, and is made in consideration of, or with the reservation of, any benefit or advantage to or in favour of the person making the disposition, no deduction or allowance shall be made in respect of that benefit or advantage in calculating the value of the dutiable gift.

(3) Notwithstanding anything in section 78 of this Act, the Commissioner may permit the cancellation or alteration of any instrument creating or evidencing a disposition of property to which this section applies, if application in writing is made by the parties to the instrument within 6 months after the date of the instrument, or within such extended time as the Commissioner thinks fit to allow in the special circumstances of the case. On evidence to his satisfaction being produced of any such cancellation or alteration, the disposition shall not constitute a dutiable gift except to the extent to which the transaction as altered constitutes a dutiable gift.

Therefore, after imposing gift duty the Act provides a valuation regime, including certain prohibitions for deductions when valuing property.

Section 76 allows relief for gift duty for the subsequent gift of a reserved benefit where section 70(2) has applied. The section states:

When the donor of a dutiable gift to which section 70 of this Act applies (in this section referred to as the original gift) subsequently makes a dutiable gift of the whole or any part of the benefit or advantage (as defined in that section) created or reserved on the making of the original gift, there shall be deducted from the gift duty otherwise payable in respect of that subsequent gift (so far as that gift duty extends) an amount calculated in accordance with the following formula:

$$\frac{a}{b} \times c$$

where—

a is the value of that benefit or advantage comprised in that subsequent gift, either at the date of the gift, or at the date of the original gift, whichever is the less; and
b is the value of the original gift; and
c is the amount of gift duty paid on the original gift.

Application of the legislation

The object of section 70(2)

Section 2(2) of the EGDA states that a gift is only a gift to the extent of the amount of the inadequacy of consideration. Section 70(2) requires that any amount “reserved” to the donor of a gift is not to be taken into account as being consideration. This means that in determining the inadequacy of consideration, any reservation is not included as consideration.

The intention behind section 70(2) was discussed by Chapman J of the Court of Appeal in *Finch*:

If a donor could give a farm or a house to his son, and take back some kind of estate or interest in or charge representing part of the value of some other kind of property of the son, such as a life estate or mortgage, it would be easy to annihilate the taxable value of the gift: therefore that device is barred.

This view is also taken in Adams and Richardson's *Law of Estate and Gift Duty* (5th ed., 1978, Wellington, Butterworths), in which the authors say (p 205):

> Section 70 is aimed at certain types of benefit or advantage which, if they were taken into account as a consideration in calculating the value of a gift, might be used to make a gift appear to be a grant for valuable consideration, thus avoiding or at least postponing the gift duty.

These statements indicate that the policy behind section 70(2) is to prevent donors from arguing that the amount of a gift should be reduced by the value of anything reserved from a disposition of property, with a consequent reduction in the amount of gift duty payable. Instead, a gift with a reservation is valued without taking into account the value of the reservation.

Section 70 only applies to gifts

Section 70 does not operate to create a gift. Section 70 only applies to a gift. If the consideration, including any benefit or advantage reserved is not inadequate, section 70 does not apply. If the total consideration is inadequate, section 70 applies, and the reserved amount is not deducted in determining the amount of the gift. So if property worth $100 with a reservation of $40 is transferred, and the transferee gives consideration of $100, there is no gift and section 70 does not apply. If, instead, property worth $100 with a reservation is transferred and the transferee gives consideration of $90, there is a gift and section 70 applies. The amount of the gift is $10. As section 70 applies, the value of the gift is not reduced to reflect the reservation.

This view was taken by the Court of Appeal in *Commissioner of Stamps v Finch*. At p 318, Stout CJ said:

> In interpreting this section 9 [of the Death Duties Amendment Act 1911, now section 70(2)] it has to be noted that the section begins by stating "when any gift". The transaction has to be a gift. If it was an out and out sale it could not be construed as a gift. In a previous statute, namely section 6 of the Stamp Acts Amendment Act, 1895, the provision was very different. That section began thus: "In order to prevent the avoidance or evasion of duties by family arrangements or otherwise, the definition of 'deed of gift' in section 7 of the Stamp Acts Amendment Act, 1891 is hereby extended to include every deed or instrument whereby any person directly or indirectly conveys, transfers or otherwise disposes of property to or for the benefit of any person connected with him by blood or marriage," etc.
>
> There is in this section 9, no definition of what a gift means. In such a case the Court must ascertain if the word "gift" is interpreted in the Act itself.
>
> …
>
> If for example it had declared that what was not a "gift" was to be deemed a gift, as was the case in section 6 of the Act of 1895, then the Court would have been bound to interpret section 9 as charging duty on a disposition of property that was not in effect a gift. But there is no such provision in section 9.

In this passage, Stout C.J. notes that section 9 (now section 70) only applies if there is a gift without its operation. He then contrasts the section with the previous "very different" wording of the provision which did not require that there is first a gift before the section applied.

This earlier form of the section was applied in *In re Deans* (1910) 29 NZLR 1089. In that case a widow transferred various lands to her four children. In consideration, they paid her some annuities. The actuarial value of the annuities was equivalent to the capital value of the land. The section was held to apply and the value of the annuities was ignored. Gift duty was charged on the capital value of the land. Chapman J said at p 1,098:

> It is argued that this is still limited to transactions which are gifts in some sense. The contrary is, however, plainly declared when the clause refers to transfers made "in consideration or with the reservation" of any benefit or any advantage to or in favour of the transferor or his nominee in that or any other property in the shape of an annuity or benefit of the like class.

Adams and Richardson say in *Law of Death and Gift Duties in New Zealand* at p 205:

> Before s 70(2) can apply there must first be a disposition of property which is "in whole or in part a dutiable gift". If the consideration for a disposition is fully adequate there is no dutiable gift and consequently the section does not apply. But if the consideration is inadequate, even to the smallest degree, there is a dutiable gift involved and s 70(2) can be applied.

How section 70(2) works

The purpose of section 70(2) is to prevent the value of a gift subject to gift duty being reduced if the transferee gives a part of the gifted property back to the person making the gift. For example, a person might gift her house but agree with the recipient that the recipient will later give the transferor the right to continue to live in the house until she dies. If not for section 70(2), the transferor might then claim that the amount of gift duty payable should be reduced. The transferor might argue that the value of the gift is not the value of the house, but the value of the house reduced by the value of the life interest the transferee has agreed to. In these circumstances, section 70(2) will apply so that the value of the life interest is not treated as consideration from the transferee to the transferor.

Therefore, in determining whether or not the transferee has given adequate consideration, and whether section 70(2) applies, the following three-step analysis is required:

- Identify the property that the transferor transfers to the transferee. Does the transferor transfer all the property to the transferee with the transferee granting some property back to the transferor (a reservation of the part given back), or does the transferor transfer only part of his or her property to the transferee, and retain part of the property (a retention of the part not given)?

- Identify the value of the property transferred to the transferee.

- Identify the consideration given by the transferee for that property (the value of any benefit reserved by the transferor is included as consideration in determining whether the consideration given by the transferee for the property transferred is inadequate).

If the transferee's consideration for the property is less than the value of the property, the definition of "gift" in section 2(2) is triggered, and assuming the general requirements in section 63 are met, there is a dutiable gift. The dutiable value of the gift is the difference between the value of the property gifted, less any consideration given. However, at this step, section 70 provides that the value of any interest reserved is not treated as consideration in determining the amount of the dutiable gift.

The first of the three steps in the bullet points is very important, because section 70(2) will apply when there is a reservation of a benefit or advantage from property, and not when there is a retention.

Difference between retaining an interest and reservation of a benefit or advantage

The focus of the arrangements in the public rulings is on the distinction between a reservation of property, and a retention of property. Case law has established that section 70(2) applies if there is a "reservation" of a benefit or advantage to the transferor, but not where there has been a retention of some property.

"Reservation" is not defined in the EGDA. The *Concise Oxford Dictionary* (10th ed. 1999) defines "reservation". The most appropriate definition is:

> **3** a right or interest retained in an estate being conveyed.

The definition implies that a reservation is something kept or retained while an estate is conveyed. The fact that the right or interest must be kept in the estate "being conveyed" may suggest that the reservation of the interest should occur at the same time as the conveyance.

While this dictionary definition may convey the ordinary usage of the word "reservation", the cases dealing with estate and gift duty legislation (including overseas equivalent legislation) have held (as discussed below) that "reservation" has a very narrow, technical meaning. Whether or not there is a reservation will depend on the particular transaction entered into.

In the Court of Appeal case *Lees v CIR* (1989) 11 NZTC 6,079, Richardson J stated the test for whether there is a reservation (in the context of section 12, a provision related to estate duty), at p 6,081:

> The test in that regard is whether the disponor disposed of the whole interest reserving an interest out of that which was disposed of, or whether the disponor disposed of a particular interest and merely retained the remaining interest in the property.

In *Finch,* the only New Zealand case on section 70(2) or its predecessors, Chapman J in the Court of Appeal drew the same distinction:

> ... I do not find that any of the language is apt to describe something which is not and never was reserved out of the gift or the value of the gift, but is an independent item of property retained by the donor.

These statements emphasise the importance of the distinction between a reserved interest and one that is merely retained. While it may be quite proper in ordinary usage to say that they are both reserved and retained, it is clear from the case law that, legally, the difference is an important one, particularly in terms of section 70(2).

In *Finch,* the Commissioner of Stamps assessed gift duty on the transfer of an undivided moiety (i.e. half share) of land to the transferor's two sons as tenants in common in equal shares. The transferor retained the remaining moiety. The value of the whole land was about £2,200, each moiety being worth just less than £1,100. The sons paid the father £100 in cash to ensure the value of the gift was less than £1,000, which at that time was the exemption level for gift duty. The Commissioner assessed gift duty on the whole value of the land, arguing that the moiety the transferor retained was a reservation of a benefit or advantage in the land. Alternatively, the Commissioner argued that if the gift was only the moiety transferred, the £100 was a reservation of a benefit or advantage. The transferor argued that the moiety retained was not a reservation of a benefit, nor was the £100 payment.

The five judges in the Court of Appeal all found for the transferor on both counts. All agreed that the transferor had not "reserved" a benefit or advantage in the land by retaining his moiety. The Court held that there is a reservation when a benefit or advantage is reserved from the interest actually given, not the entire estate from which the interest came.

A number of Australian and United Kingdom cases discuss whether there is a reservation of a benefit or advantage from the disposition of property. Two (originating from Australia) concern estate duty rather than gift duty, but they do discuss the meaning of "reservation".

In *Oakes v New South Wales Commissioner of Stamp Duties* [1953] 2 All ER 1563 (PC), the Privy Council considered a case where the transferor declared by deed of trust that he held farmland on trust for his children. He used the profits for the children's maintenance and education. He also claimed remuneration for his work as trustee, which he was entitled to do under the trust deed.

The Privy Council held that the remuneration to the transferor was a "benefit or advantage", even though it was provided for in the trust deed and that, therefore, there was a reservation of a benefit within the meaning of the section. Lord Reid stated at p1567:

> In their Lordships' judgment, it is now clear that it is not sufficient to bring a case within the scope of these sections, to take the situation as a whole and find that the settlor has continued to enjoy substantial advantages which have some relation to the settled property: it is necessary to consider the nature and source of each of these advantages and determine whether or not it is a benefit of such a kind as to come within the scope of the section.

Lord Reid also confirmed the distinction between "reservation" and "retention" at p 1571 where he said:

> The contrast is between reserving a beneficial interest and only giving such interests as remain, on one hand, and, on the other hand, reserving power to take benefit out of, or at the expense of, interests which are given…

Lord Reid is saying that when a transferor has retained a pre-existing interest, this is not the same as a reservation of a benefit. The Court's opinion was consistent with previous authority including *Earl Grey v Attorney-General* [1900] AC 124; [1900-3] All ER Rep 268 (HL).

Applying these same principles, a number of Australian and United Kingdom cases have found, on the facts, that there was not a reservation from the disposition of property. One of these is *Munro v Commissioner of Stamp Duties (NSW)* [1934] AC 61; [1933] All ER Rep 185 (PC). In that case the transferor entered into a partnership with his six children, and the partnership farmed the transferor's land. Four years later he gifted a portion of the land to each of the children. On the transferor's death the Commissioner attempted to assess death duty on the gifted land. The Privy Council held that the gifted property could not be brought back into the deceased's estate. In the speech of the Privy Council, Lord Tomlin said (p188 of the All ER Rep report):

> It is unnecessary to determine the precise nature of the right of the partnership at the time of the transfers. It was either a tenancy during the term of the partnership or a licence coupled with an interest. In either view what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right which belonged to the partnership, and ... the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not ... a benefit referable in any way to the gift.

This finding is consistent with *Commissioner of Stamp Duties (NSW) v Perpetual Trustee Co Ltd* [1943] AC 425; [1943] 1 All ER 525 (PC) and *Re Cochrane* [1906] 2 IR 200 (CA).

Simultaneous transfers

The case law discussed so far has distinguished between a reservation, where some property is gifted and then an interest in that property is gifted back; and a retention, where a transferor creates an interest out of some property which he or she owns, and gifts the balance or reversionary interest in that property. Recent case law has raised the issue of whether there is a reservation or a retention when an interest is created in property (for example, a life estate in the property) and the balance or reversionary interest is transferred at the same time, or in terms of the legal theory in relation to conveyancing transaction, shortly afterwards. These cases, which will be discussed below, are the House of Lords decision in *Ingram*, and the United Kingdom High Court and Court of Appeal decisions in *Nichols*.

New Zealand courts have held that what is in effect a simultaneous transaction, is not a reservation. In *Finch*, as discussed above, a father transferred an undivided half share in land. The Court of Appeal did not explicitly conclude that the transfers were simultaneous. However, the facts do not disclose any action on the part of the father to grant his half to himself before transferring the other half to his sons. He did not retain something he always had. He had owned the fee simple in the land, and after the transfer, he owned a different estate in the land which was a half share as a tenant in common. The father's moiety appears to have been created at the same time as the

other moiety was transferred to the sons. Therefore, the transfers can be viewed as simultaneous transfers.

The Court concluded that there was no reservation of a benefit or advantage, because no interest was granted back to the donor. The father had not reserved an interest out of property that was given, but had retained an independent item of property which was not given to his sons.

The only New Zealand case where the transfers have explicitly been held to be simultaneous is *Lees*. In that case, the transferor created a life interest and transferred the reversionary interest in the property by documents executed on the same day. The Court held that there was a reservation of a benefit to the transferor.

However, the case was concerned with a different provision from section 70(2). Section 12(1)(b) (now repealed) of the EGDA concerned estate duty, and allowed the reservation of a benefit to *accompany* the disposition of property. It has been noted in some cases that the meaning of this phrase is unclear (*Overton's Trustees v CIR* [1968] NZLR 872), and may be inconsistent with the meaning of the word "reservation" in the context of gift duty. In that statutory context, the Court held that a simultaneous transfer is a reservation. The case is relevant to section 70, however, not for that finding, but because it was held that transfers may sometimes be simultaneous.

The* Ingram *case – when is a transfer simultaneous?

The English courts have more recently considered the issue of simultaneous transfers, in the trilogy of cases involving Lady Ingram. The High Court decision ([1995] 4 All ER 334) was appealed to the Court of Appeal ([1997] 4 All ER 395), which resulted in a further appeal to the House of Lords. The judgments in the case focused on the meaning of "reservation" in section 102 of the Finance Act 1986 (UK). That provision states that a gift that comes within it will be a "gift with reservation" and may be subject to inheritance tax. The test is whether or not the property gifted continues to be enjoyed by the donor in any way.

In the original (High Court) decision, it was concluded that the transfers were simultaneous and, therefore, there was no reservation of a benefit to the transferor. However, a majority of the Court of Appeal held that there was a grant back and a reservation. The House of Lords held that the transfers were simultaneous, and that there was no reservation.

The facts

In the *Ingram* case the transaction was structured as follows:

> 29 March – Lady Ingram transfers property absolutely to her solicitor.
> 29 March – solicitor declares he holds the property on trust for Lady Ingram and is acting on her direction.
> 30 March – solicitor grants Lady Ingram two 20-year rent free leases.

31 March – solicitor transfers property (subject to the leases) to the two sons and grandson of Lady Ingram (the trustees).
31 March – the trustees declared themselves to be the trustees of a settlement of the property for the benefit of certain beneficiaries. Lady Ingram is not a beneficiary.

The House of Lords observed that the series of transactions was structured, in part, to make the benefit to Lady Ingram a retention rather than a reservation so that inheritance tax would not be payable. However, in practice, this was more difficult in the United Kingdom than it would be in New Zealand. The United Kingdom has no equivalent provision to section 49 of the NZ Property Law Act 1952, allowing a lease to be granted to oneself. As Lady Ingram was unable to grant a lease to herself, it was necessary for her to transfer the property to someone else – her solicitor – so he could grant the lease to her.

The reasoning of the House of Lords

The House of Lords held that there was no reservation. The Law Lords held that section 102 of the Finance Act 1986 (UK) only applied where the benefit was derived from the interest given away. They held that, in this case, the trustees and beneficiaries had never had anything more than the freehold of the property subject to the lease. This property (the freehold less the leasehold interests) was not enjoyed by Lady Ingram in any way. She enjoyed only the leasehold interests. There was no reservation because the interest retained by Lady Ingram had been defined with the necessary precision, whether the leases were technically valid or not. Her intention was evidenced by the documents that gave effect to the transaction.

The Court of Appeal had held that the leases were not valid, and so the whole property must have transferred to the transferees and then a reservation was made back to Lady Ingram. The Court of Appeal also said that even if the leases were valid, that it is not conceptually possible for a lease to come into existence until the lessor has acquired the freehold interest. Therefore, the gift must have comprised the freehold interest and the lessor must have then given a lease back.

The House of Lords concluded that the leases granted by the solicitor to Lady Ingram were valid. However, the Law Lords also stated that they did not need to decide the validity of the leases in order to decide the case. They stated that, even if the leases were not valid, it was clear that the intention of the parties was for Lady Ingram to keep the leasehold rights and only give the other rights in the property away. This intention was evidenced by the documents. Lord Hoffman recognised that under conveyancing law, the whole property must pass before a lease can be granted. However, his Lordship considered that conveyancing form could not apply to make the transfer a reservation when it would otherwise not be. Lord Hoffman stated that (p 303):

> It is true that as a matter of conveyancing, no lease can come into existence until the freehold has been vested in the intended lessor. But s. 102 is concerned not with conveyancing but with beneficial interests. It uses words like 'enjoyment' and 'benefit'. In *A-G v Worrall* 1 [1895] QB 99 at p. 104, a case on a predecessor of s. 102, Lord Esher MR began his judgment with the words:

> 'It has been held that in cases of this kind the Court has to determine what the real nature of the transaction was, apart from legal phraseology and the forms of conveyancing.'

If one looks at the real nature of the transaction, there seems to me no doubt that Ferris J [in the High Court] was right in saying that the trustees and beneficiaries never at any time acquired the land free of Lady Ingram's leasehold interest. The need for a conveyance to be followed by a lease back is a mere matter of conveyancing form. As I have said, she could have reserved a life interest by a unilateral disposition. Why should it make a difference that the reservation of a term of years happens to require the participation of another party if the substance of the matter is that the property will pass only subject to the lease?

Lord Hoffman considered it important to look at the real nature of the transaction and not just the conveyancing form. The rights and obligations of each party should be examined to determine whether or not the transactions are within the section.

The Law Lords decided that it was the intention of the parties that only the net property interests be given away. They considered that the way the section was written focused on benefits. They held that Lady Ingram did not receive any benefits from the net property interest, but only from the leases, which were not part of the subject matter of the gift. At no time did the donees hold the property free from Lady Ingram's leasehold interest. Therefore, she was not within the provision as she had not reserved a benefit out of the property the subject of the gift.

The Law Lords identified three aspects of the transaction which persuaded them that this was a situation where the transferor only ever intended that the net property interest be transferred, and not the whole property with a subsequent grant back. First, the House of Lords noted that Lady Ingram had defined very precisely the rights she intended to give away. She had never intended to grant the lease to the trustees, only the freehold shorn of the leasehold interests.

Secondly, the creation and existence of the leases was not dependent on the concurrence of the trustees and beneficiaries. It was never intended that the trustees would receive the whole property and then grant a lease back. This finding was supported by the fact that Lady Ingram had gone to such lengths to grant the lease before transferring the balance of the property.

Thirdly, because of the first two reasons, the House of Lords looked at the equitable rights and obligations of the parties, assuming that the leases were not valid. The Law Lords stated that equity would give Lady Ingram a right to the leases. Where the intention of the parties is clear that it was intended that the transfers be simultaneous, or it was intended that some rights never be given away, then this would give rise to equitable rights and obligations as between the parties. Therefore, in equity, the trustees were regarded as never having received the leasehold interests. From the moment they received the property they were subject to an equitable obligation to grant the leases. The only part of the property they ever received was the freehold less the leasehold interests. Therefore, the subject matter of the gift was the property shorn of the leasehold interests.

These equitable rights would arise from the time of transfer. They would have the effect of making the transfers simultaneous, notwithstanding that in legal theory or under conveyancing rules, the whole property would need to be transferred prior to

there being a grant back. This means that the transfers may sometimes be simultaneous where there is (at least under legal theory) a grant back of a right.

The effect of Ingram

Following *Ingram* (HL), in a situation where the parties to the transactions never intend that the leasehold interests should be part of the subject matter of the gift, and they structure the arrangement with the necessary precision so that equitable rights arise simultaneously, the law will give effect to the parties' intention. The transaction should not be viewed as involving an instant of time for property to be transferred and then an interest granted back, in order that conveyance formality be met. The House of Lords in *Ingram* stated that the need for an instant of time was only necessary for conveyancing theory, whereas the particular provision under consideration was more concerned with the rights, benefits and obligations that resulted from the transactions, and with determining enjoyments and benefits of the property interests. The Commissioner's view is that section 70(2) should be interpreted the same way. Discounting the notion of an instant of time between the transfer and the grant back has the result that some transfers, previously considered to be a post transfer grant back, would now be considered to be simultaneous transfers.

It could be argued that the reasoning of the House of Lords judgments in *Ingram* is more sensible than the law as it was before the decision, because the law now will not require such fine distinctions to be made. Before *Ingram* (HL), if a transferor attempted to retain an interest at the same time property was transferred, there was a potential gift duty liability, whereas if the transferor's interest in the land was created a moment before the transfer, there was no potential liability. The House of Lords held that all of these types of transactions (where the transferor wishes to give away property rights while retaining some right of occupation), in circumstances where the transferor defines precisely the rights he or she wishes to give away, have the same end result and that, therefore, there should be no reservation.

The Nichols *case*

In coming to its conclusion, the House of Lords endorsed the approach of Walton J in the High Court decision of *Nichols v IRC* ([1973] STC 278). That case concerned a father who wished to gift the family home and surrounding land to his son. However, the parents wished to continue living on the property. Therefore, they arranged for the property to be transferred to the son, and for the son to execute a lease in their favour.

Walton J in the High Court held that in principle, where property passes which has an immediate equitable obligation on the transferee to grant a lease back, the transaction can amount to a retention of the leasehold interest. Walton J considered that there is no legal impediment to regarding simultaneous transactions as only giving the transferee the property shorn of the leasehold interest. The House of Lords agreed with this approach, and not the Court of Appeal decision in *Nichols* which had reversed Walton J's judgment. The House of Lords in *Ingram* considered it was conceptually possible for a lease to come into existence before the lessor acquires the leasehold interest.

A simultaneous transfer is not always a retention

However, a simultaneous transfer and grant back will not always be outside the scope of section 70(2). Lord Hoffman in the House of Lords indicated that if the leasehold interest held by Lady Ingram had contained benefits that she did not have before the property was transferred, then it may not be possible for the transfer to be a retention of the leasehold.

Lord Hoffman took this point from the Court of Appeal judgment in *Nichols*. Although the House of Lords disapproved of the Court of Appeal judgment in *Nichols*, the disagreement was on the central issue of whether a simultaneous transfer and a lease back could be a retention.

In *Nichols*, a father had given his son his land, and as part of that transaction, the son was required to give a lease back. Under the lease, the son gave a covenant to undertake any repairs. The Court of Appeal held that existence of the covenants made the transaction a reservation, and it could not be a retention. The right to have the buildings repaired under the covenant did not exist before the transfer, and therefore could not be something not given (p 285).

A retention must be a retention of property that the transferor had prior to the transfer of the balance of the property. If, for example, the transferor has a leasehold interest as a result of a transfer of property, and the leasehold interest gives the transferor rights that he or she did not already have, then that leasehold interest could not have been something retained. It can only be something given by someone else. Therefore, if the transferor has a property interest as a result of a transfer that he or she could not have had before the transfer, then the transaction will be a transfer with a grant back, and will be a reservation.

Other points to come from the House of Lords judgment in Ingram

The House of Lords judgment held that it is possible in England to create a property interest prior to transferring the balance of the property, by the use of a nominee. Prior to this decision, it had been the view that it was not possible to retain an interest to oneself in England because of the common law rule that one can not grant a property interest to oneself (*Rye v Rye* [1962] 1 All ER 146). That rule has been overridden (at least partly) in New Zealand by section 49 of the Property Law Act 1952. The judgments of both Lord Hutton and Lord Hoffman concluded that, at least in English law, it was possible for a nominee to grant a lease to his or her principal. The implication is that a transferor can now retain a property interest prior to transfer, through the use of a nominee.

Following the House of Lords decision, it seems that the British Parliament decided that legislation was the only way to ensure clarity. As a result of the case, amendments have been made to add new sections into the Finance Act 1986 (UK), setting out specifically and in great detail when a gift will be a "gift with reservation" and when it will not. In the Budget Press Release of 9 March 1999 it was declared that:

> Loopholes which result in the avoidance of inheritance tax are to be closed … the changes which confirm the Government's determination to stamp out tax avoidance, relate to what is often referred to as making a 'gift with reservation'. This is when, for example, someone gives away his/her house but continues to live in the property. The change restores the tax position as it was understood to be prior to the House of Lords' ruling in the case of *Ingram v IRC*.

The Commentary to the Bill also stated that it was a specific anti-avoidance measure designed to counter *Ingram*-type schemes, and that no attempt was being made to rewrite the basic wording of the gift with reservation rules.

***Meaning of "reservation" in section 70(2) after* Ingram**

The law established by the cases

The cases discussed above establish that:

- Property is retained when the transferor retains an interest in property and disposes of the balance or reversionary interest in the property (*Lees*).

- Property is reserved when the transferor disposes of the whole interest and reserves an interest out of that which was disposed of (*Lees*).

- The case of *Finch* distinguishes between a reservation and a retention of a benefit or advantage. There is a reservation when a benefit or advantage is reserved from the interest actually given. There is merely a retention of the benefit or interest if the benefit or interest is held before the transfer of the balance of the property, or if the grant and transfer occur at the same time. See also *Munro*, *Oakes*, and *Ingram*.

- The House of Lords decision in *Ingram* recognises that the transfers may sometimes be simultaneous. The House of Lords concluded that when the transfers are simultaneous, in circumstances where it was never the intention of the parties that the whole property be disposed of, there will be no reservation. This is because the transferor will have received no benefit arising from the subject matter of the gift.

- The House of Lords judgment in *Ingram* stated that the courts should look at the intention of the parties to the transaction. The House of Lords held that section 102 of the United Kingdom Finance Act, a comparable provision to New Zealand's section 70(2), is concerned with the transfer of benefits and advantages, not the transfers of property which must take place for legal reasons. Sometimes equitable rights will come into effect which will make transfers simultaneous, notwithstanding the requirements of the rules of conveyancing that there be a certain sequencing of transactions. The parties' intentions will be evidenced by the documents of the transaction.

- Simultaneous transfers will include the situation where the transferring of the legal rights does not happen precisely at the same time, where the transfers are part of the one transaction, provided that it was never the intention of the parties

that the whole property is transferred, and provided also that equitable rights arise simultaneously (*Nichols* (HC) and *Ingram* (HL)).

- If an apparently simultaneous transfer results in the donor having an interest in property that includes rights that he or she did not have before the transfer, the transfer will be a reservation, and not a retention of property the transferor already had (*Nichols* (CA) and *Ingram* (HL)).

Which types of real property do the rulings apply to?

The rulings apply to real property. Real property includes dwelling houses, farms and commercial buildings. After the previous ruling was issued, the Commissioner was asked whether the arrangements only apply to dwelling houses. In a "Question we've been asked" item, published in *Tax Information Bulletin* Vol 9, No 8 (August 1997), the Commissioner gave the view that real property includes all forms of real property. The Commissioner's view on this issue has not changed.

Application of section 70(2) to the specific arrangements

Pre-transfer grant of a life interest, a lease or a licence to occupy

A pre-transfer grant occurs where the transferor creates an interest in the property and grants that interest to him or herself before transferring the rest of the property interest to a third party (for example, a family trust). If the separation of the interest occurs before the transfer to the other person, the subsequent transfer is treated as the transfer of one interest while retaining another.

If an arrangement is a pre-transfer grant, it does not involve a reservation of interest by the transferor. Section 70(2) does not apply, and accordingly any duty payable will be based on the value of the balance or reversionary interest in the property transferred less the amount of any consideration paid.

This analysis applies to BR Pub 02/02 and BR Pub 02/03.

Life interests granted to oneself

The Property Law Act 1952 (PLA) gives the transferor authority to grant a life estate to him or herself. Under section 49 of the PLA, the transferor may transfer an estate or interest in land to him or herself individually or jointly with others. Section 66A of the PLA provides that covenants in a transfer by the transferor to him or herself (under section 49 of the PLA) are enforceable.

Example 1

A creates a life estate in a property, and then transfers the balance of the property to the trustees of his family trust. A's property is worth $175,000. The value of the life estate is $60,000. The price for the reversionary interest is $100,000. This is outstanding as an unsecured debt owed by the trust to A.

Section 70(2) does not apply. There is a gift because the consideration paid by the trust ($100,000 for property worth $115,000) for the interest in reversion is inadequate. The Commissioner will assess A for gift duty on the $15,000 gifted under section 61, the section which imposes gift duty, assuming other gift duty thresholds and requirements are met. However, section 70(2) does not apply to include the $60,000 life interest in the dutiable amount, because that interest was retained by the transferor and not gifted to the transferor.

Leasehold interests granted to oneself

A transferor can grant a lease to him or herself in New Zealand. At common law a person could not grant a lease to him or herself, *In re Nichol* [1931] NZLR 718, 727, *Rye v Rye* [1962] AC 496; 1 All ER 146. However, because a lease is an estate or interest in land, this rule has been abrogated in New Zealand by sections 49 and 66A of the PLA (*Harding v CIR* [1977] 1 NZLR 337; 2 NZTC 61, 145).

At common law, when the same person owned the freehold and the leasehold interest in a property, a merger of the interests occurred and the lesser interest (the lease) ceased to exist. In equity, merger depended on the intention of the parties. Section 30 of the PLA adopts the equitable rule, so there will only be merger where the parties intend it to occur. Usually, when a person creates a lease and grants it to him or herself, the intention is for the estates to remain separate.

Example 2

B creates a lease for fifty years in her own favour over her property, and then transfers the balance of the property to her only child, C. B's property is worth $250,000. The value of the lease is $100,000. The value of the balance of the property is $150,000. The price to be paid for the balance is $90,000. This price is outstanding, as an unsecured debt owed by C to B.

There is a gift under section 61, the section which imposes gift duty, assuming other gift duty thresholds and requirements are met. The gift is the amount of $60,000, being the inadequacy of consideration for the property transferred worth $150,000, less the $90,000 paid. Accordingly, there is potentially gift duty payable on the $60,000.

Section 70(2) has no application because there is no reservation from the disposition of property to C. Therefore, the Commissioner will not include the $100,000 value of the lease in the dutiable value of the gift.

Licences to occupy purported to be granted to oneself

However, the provisions of the PLA do not extend to a licence to occupy. A licence, unlike a lease, is not an estate or interest in land. A licence is a personal permission to enter land and use it for a particular purpose. As Gresson P said in *Baikie v Fullerton-Smith* [1961] NZLR 901, 906 in a land law context, a licence is basically an authority that prevents the individual to whom it is granted from being regarded as a trespasser

on someone else's property. Therefore, a licence must be granted from a licensor to a licensee. In the absence of comparable provisions to sections 49 and 66A of the PLA applying to licences, a landowner cannot license him or herself to be a licensee.

The arrangement in BR Pub 02/07 is the situation where a transferor purports to grant him or herself a licence to occupy before transferring the remaining property interest. The purported grant of the licence will be invalid for conveyancing purposes, and all the rights in the property will be transferred to the transferee. One of two results will occur.

Firstly, the transferee could keep ownership of all the rights to the property. If all property rights are kept, there will be no grant back to the transferor (at any time) and no reservation. However, gift duty will be payable to the extent of the inadequacy of the consideration.

Secondly, the transferee could transfer the licence back to the transferor once the third party has been granted the rights in the property. This is acceptable in land law. Under land law, the grant back would take place after the transfer. This is the situation covered in BR Pub 02/07.

Following *Ingram* (HL), the Commissioner considers that this second situation should not be analysed as a post-transfer grant. *Ingram* established that the focus of section 102 of the Finance Act 1986 (UK) is on the transfer of benefits as a result of the transaction. In the Commissioner's view, section 70(2) should be interpreted the same way. So although a transfer is invalid under legal conveyancing theory, it still may create equitable rights and obligations as between the parties. In this situation, if the intention of the parties was that the licence be taken out of the property before the transfer, then following the equitable maxim "equity, regarding as done what ought to be done", effect will be given to such an agreement for the transfer of land, and equitable rights and obligations will accrue to each party with effect from the moment of transfer. In this situation, the transferee never acquires the property free from the obligation to transfer back the licence the transferor intended to retain. The result will be that from the moment of the transfer, the transferor will have an equitable right to the licence and the transferee will have an equitable obligation to grant it. This has the effect of making the transfers simultaneous.

If the transaction is simultaneous, it will not be a reservation subject to section 70(2). (The other arrangements which are simultaneous transfers are discussed below.) The documents to the transaction will be evidence of the intention of the parties (as in *Ingram* (HL)). They should be used to ascertain what the parties intended was to be the subject matter of the gift.

The first situation mentioned above, where the transferee does not grant a licence back, is not similar in nature to the other arrangements ruled on. Therefore, the Commissioner has not ruled on that arrangement.

Summary of the consequences of pre-transfer grants

Where a pre-transfer grant of a life estate or a lease occurs, there is no reservation of a benefit under section 70(2) (BR Pub 02/02 and BR Pub 02/03). Therefore, the amount of the life estate or lease is not included in the amount of the gift.

A licence to occupy cannot be structured as a pre-transfer grant. The result will either result in no licence, or a simultaneous transfer. Neither of these will be a reservation. Simultaneous transfers are discussed more under a following heading.

Post-transfer grant back of a life estate, a lease, or a licence to occupy

A post-transfer grant back occurs where the transferor transfers property to a transferee subject to the transferee granting an interest (any of a life interest, a lease or a licence to occupy) back to the transferor.

If an arrangement is a gift involving a post-transfer grant, it will be a reservation of an interest by the transferor. Section 70(2) will apply, and accordingly the duty payable will be calculated on the value of the whole of the property transferred, without deducting the value of the reservation, less the amount of any consideration paid.

This analysis applies to BR Pub 02/04-02/06.

Example 3

A transfers property worth $200,000 to B, as she is going overseas for three years and no longer wants to have property in New Zealand. B pays A $100,000 for the property. However, A and B agree that B will grant A a lease for the property when she returns, in three years time. The lease has a value of $50,000. A and B have documents drawn up to this effect. In this case, it is clearly the intention of the parties that the whole property interest is transferred, and at a later time a lease be granted back. The gift is the difference between the value of the property ($200,000) and the consideration paid ($100,000). The value of the lease is a reservation, and so is not deducted from the value of the gift.

Example 4

D has decided to transfer ownership of her family home to a family trust. She wishes to ensure that she has a right to occupy the property for the rest of her life. She intends to transfer the full property interest to the trustees of the trust, and at a later stage, for the trustees to grant her a licence to occupy. In accordance with this arrangement, the trustees later grant D a licence to occupy. The documents are consistent with the parties' intentions.

The property has a market value of $200,000. The licence to occupy is valued in accordance with the provisions of the EGDA at $50,000. The transfer price of the property is $100,000, which D leaves owing as a debt, repayable on demand.

The property is disposed of without fully adequate consideration ($150,000 compared with the market value of $200,000), so the Commissioner will assess D for gift duty under section 61 assuming other gift duty thresholds and requirements are met. The

licence is a reservation, because under the arrangement, it is transferred back out of the property gifted. Section 70(2) applies, so the value of the licence is not deducted from the value of the gift. The amount on which gift duty is calculated is $100,000 (being the licence reserved and the extent of the inadequate consideration).

Simultaneous transfers of a life estate, a lease, or a licence to occupy

Life estates and leases

A simultaneous transfer of property occurs where the transferor transfers property to a transferee and simultaneously the transferee grants back an interest in that property (whether a life estate or a lease).

As discussed earlier, the House of Lords in *Ingram* considered that the focus of section 102 of the Finance Act 1986, the comparable section to New Zealand's section 70(2), was on the benefits actually reserved, and not the legal form of the transactions. Where it is clearly the intention of the parties that the net property interest only be transferred, but conveyancing rules would say that the whole property must be transferred before the other interest can be transferred back, the transferor has equitable rights in the interest transferred back from the moment the first transfer is made. It is not necessary to regard there being an instant of time between the transfers, even though it may be required in conveyancing theory. Therefore, the transfers will be simultaneous, and there will be no reservation.

If an arrangement is a simultaneous transfer and grant, no reservation of interest by the transferor is involved. Section 70(2) does not apply, and accordingly any duty payable will be based on the value of the balance or reversionary interest in the estate transferred less the amount of any consideration paid.

This analysis applies to BR Pub 02/08 and BR Pub 02/09.

Licences to occupy and other transactions intended to be pre-transfer grants

As mentioned above under pre-transfer grants, it is not possible for land owners to grant themselves a licence to occupy their land. Therefore, if a person purports to grant him or herself a licence to occupy and then transfers the balance of the land to someone else, that transaction will not, in terms of conveyancing law, be a pre-transfer grant. However, following the House of Lords decision in *Ingram*, where it is the intention of the parties that only the net property interest is to be given away, conveyancing rules should not mean that the transaction is carried out in some other way. Where rights cannot be validly self-granted, but it was clearly the intention of the parties that those rights should not be part of the transfer, equity will give effect to those rights as though they were valid from the time of transfer. If the original transfer is invalid for some other reason, this reasoning may also apply.

The effect of this is that grants of rights that cannot be validly self-granted will often now be simultaneous transfers rather than post-transfer grants back. Therefore, in the case of the arrangement in BR Pub 02/07, it is not possible to grant a licence to

oneself. However, the parties' intention to transfer only the net property is evidenced by the documents in which the transferor attempts to grant the licence to him or herself. If that was the parties' intention, equity will demand that the transferee grant the licence back. These equitable rights will arise from the moment of transfer. Therefore, in the Commissioner's view, the arrangement in BR Pub 02/07 will now be treated as a simultaneous transfer rather than a post-transfer grant back, if it is the parties' intention, evidenced by the documents and the circumstances of the transfer, that only the net property interest transfers. Consequently, it will be a retention of the licence and not a reservation.

The arrangement in BR Pub 02/10 is similar to the arrangement in BR Pub 02/07. The arrangement in BR Pub 02/10 is the situation where the parties intend that the transferor will grant a licence to him or herself simultaneously as the balance of the property is granted to someone else. Even though the parties attempt to make the transaction simultaneous, it still amounts to an attempt to grant oneself a licence, and legally the transaction will consist of property passing and a licence being granted back. The documents relevant to the attempt to grant a licence to him or herself will be evidence that only the net property interest was intended to pass. In the Commissioner's view, *Ingram* applies, and this arrangement will be treated as a simultaneous transfer of the licence and the net property, and it will be a retention and not a reservation.

On the other hand, if it is clear from the documents that the whole property interest was intended to be the subject-matter of the gift followed by a grant back, and there is no intention for an interest to be retained, then equity will not intervene to create rights and obligations as between the parties, and there will be a post-transfer grant back. In this situation, there is a reservation of a benefit to the donor.

Transactions that may appear to be post-transfer grants may be simultaneous transfers

It may in some situations be difficult to distinguish between a simultaneous transfer and a post-transfer grant. Both may involve the same legal steps of property transferring and a lesser interest transferring back.

The essential difference between the two is that in a simultaneous transfer, the parties only ever intend the net property interest to pass. In a post-transfer grant, the parties intend the whole property to pass, and the lesser interest subsequently to pass back. The documents relevant to the transaction will be important in establishing the legal nature of the transaction and the parties' intention.

Requirements of a simultaneous transfer needed to satisfy the Commissioner

The Commissioner will be satisfied that a simultaneous transfer amounts to a retention (i.e. pre-transfer grant) and not a reservation (i.e. a post-transfer grant), if there is sufficient evidence that the parties never intended that the whole property in question pass to the transferee. This evidence would usually include the following elements, taken from *Ingram* (HL).

- The transferor defines very precisely the rights he or she intends to give away.

- The documents relevant to the transaction support the claim that the parties intend that only part of the property, as defined, is to be given away.

- There is never a time, in equity, when the transferee holds the whole property free of the interest that the transferor seeks to retain.

- The retention is not dependent on the concurrence of the transferee[s], including beneficiaries where the property is transferred to a trust.

- The transferor does not receive an interest in the property that includes something more than he or she previously had, e.g. covenants by the transferor/lessor to repair the property.

Summary of simultaneous grants

Where there is a simultaneous grant and transfer (BR Pub 02/07-02/10) there is no reservation.

Example 5

H wishes to provide for her children by making sure that they will own her house when she dies. She draws up a document, which gifts the house to the children while at the same time creating a life estate for herself. It was always intended, as evidenced by the documents, that the life estate be created and kept by H. She does not gain any extra rights that she did not have before the gift.

The house is worth $250,000 and the amount of the life estate is estimated to be $45,000.

The amount of the life interest will not be a reservation within the meaning of s 70(2), meaning that H will only be liable for gift duty under section 63 on the amount that is given away, being $205,000.

Other sections of the EGDA affecting reservations

Sliding value clauses

Commonly, documents evidencing the disposition of property provide that the consideration shall be a fixed amount or such higher amount as the Commissioner accepts will not give rise to a gift for gift duty purposes. If:

- the consideration is bona fide; and

- the obligation to pay it is fulfilled; and

- the consideration is a genuine attempt to approximate the market value of the property;

the Commissioner accepts that where section 70(2) might otherwise apply, and the parties use the sliding value clause to increase the consideration so there is no gift, gift duty will not be payable.

Amendment of documents

Under section 70(3), the Commissioner may permit the cancellation or amendment of any instrument creating or evidencing a disposition of property to which section 70 applies. Application in writing must be within six months of the date of the instrument, or within such extended time as the Commissioner thinks fit to allow in the special circumstances of the case. Documents that are amended or redrawn will be reconsidered to see whether section 70(2) applies to them.

Valuation of retained interests

Section 66 of the EGDA requires every dutiable gift to be valued as at the date of the making of the gift. Section 67 gives the Commissioner a general discretion as to how property is valued, subject to sections 68A to 68G, 69 and 70, which include methods for valuing particular property.

Particularly relevant to this commentary are sections 68A and section 68F. Section 68A prescribes how land is valued. Section 68F provides that the tables of life expectancies in the Second Schedule to the Act are used to value life interests, except in one instance. The Commissioner has some discretion in determining the life expectation of a person suffering from a terminal illness. In practice, in determining the life expectancy of a person suffering from a terminal illness, the Commissioner will generally use Table D. Table D gives the present value of an annuity or other interest for a period other than life, or expectant on an event other than death. The Commissioner will generally apply it for the period which the Commissioner accepts as the actual or expected life expectancy of the person.

When there is more than one transferor, and all are entitled to a life estate or a lease for life, the value of the right should take account of the longest remaining life expectancy of the transferors. The value of the right relates to the time the transferees are out of possession of the property. If all transferors have a right of occupation until their respective deaths, the discount of the property's value to the transferees relates to the longest expected occupation of any of the transferors.

Subsequent gift of reserved benefit

Where gift duty has been paid on a gift valued under section 70, any gift duty on a subsequent gift of the benefit or advantage reserved, or any part of it, may be reduced, under section 76. A deduction from the gift duty on the subsequent gift is calculated as follows:

$$\frac{a}{b} \times c$$

Where:

a is the value of the benefit or advantage comprised in the subsequent gift, either at the date of the gift, or at the date of the original gift, whichever is less; and

b is the value of the original gift; and

c is the amount of gift duty paid on the original gift.

Example 6

	$	$
Assume A transfers property worth $42,000 to B and reserves a life interest in it.	42,000.00	

A is a male aged 48 years at date of transfer. The present value of income on capital of $1 for life for a male aged 48, from Table A is 0.71201. The present value of the life interest is therefore 0.71201 x $42,000 = $29,904.42

	$
The value of the reservation is therefore	29,904.42
And the value of the balance of the gift is	12,095.58

	$
A has to pay gift duty on both under Sec 70	
- value of the balance of the gift	12,095.58
- value of the reservation	29,904.42
Total value of Gift	42,000.00

	$
Duty on $42,000	
on $36,000 at set rate	450.00
on $6,000 at 10%	600.00
	1,050.00

Assume 10 years later A surrenders the life interest. The property previously worth $42,000 is now worth $48,000. A is now aged 58 years at the date of surrender. The present value of income on capital of $1 for the life of a male age 58 from Table A is 0.57617. The present value of the life interest is therefore 0.57617 x $48,000 = $27,656.16

	$
A makes another gift of $30,000 at the same time.	
The aggregate gift is therefore:	30,000.00
	57,656.16

	$
Duty on $57,656 is calculated as follows:	
on $54,000 at the set rate	2,250.00
on $3,656 at 20%	731.20
Gross gift duty	2,981.20

Section 76 applies to give relief for the gift duty already paid. The gross gift duty is reduced by the relief given under section 76 where:

(a) is original gift of reservation $29,904.40
subsequent gift value of reservation $27,656.16
whichever is less

(b) value of the original gift $42,000

(c) gift duty on the original gift $1,050

$$\frac{27,656.16}{42,000.00} \times 1,050.00 = \$691.40$$

Maximum relief under
section 76 = $691.40

Apportionment of the gift duty between the two gifts

	$
Gift $30000 = $\frac{30,000}{\$57,656}$ x 2,981.20 =	1,551.20
Gift $27656 = $\frac{27,656}{57,656}$ x 2,981.20 = $1,430.00	
Less relief under section 76 1,430.00 691.40	738.60

$738.60
Gift duty collectable on subsequent gift 2,289.80

PART TWO: INCOME TAX

Background

Section CE 1(1)(e) of the ITA includes within a person's gross income all rents, fines, premiums, or other revenues derived by a land owner from:

- any lease, licence, or easement affecting the land; or
- the grant of a right to take profits of the land.

This section considers the application of section CE 1(1)(e) to the arrangements.

The new rulings and commentary apply from 1 April 1999. The previous ruling and commentary on the income tax aspects of this matter, Public Ruling BR Pub 96/2A, applied to dispositions of real property made up until the end of the 1998-1999 year. It was published in *Tax Information Bulletin* Vol 8, No 10 (December 1996).

The Commissioner's view of the income tax aspects of the arrangements has not changed from the expired rulings. However, more analysis is provided to support aspects of the Commissioner's view.

Summary of conclusions

Pre-grant transfer

If a transferor grants an interest in property to him or herself, and later grants the balance or reversionary interest in the property to another person, the interest kept by the transferor does not constitute gross income of the transferee or the transferor under section CE 1(1)(e).

Post-grant transfer

If a transferor transfers property to another person, reserving an interest in the property which the transferee later grants back to the transferor, the transferee may derive gross income under section CE 1(1)(e).

The transferee will derive gross income if the transferee grants a lease or a licence back to the transferor, and an amount is derived by the transferee which is attributable to the lease or licence.

Simultaneous transfer

If a transferor grants him or herself a property interest, and simultaneously transfers the balance or reversionary interest to another person, the interest granted to the transferor does not constitute gross income to the transferee or the transferor under section CE 1(1)(e).

Legislation

Under section CE 1(1)(e) of the Income Tax Act 1994, a person's gross income includes:

All rents, fines, premiums, or other revenues (including payment for or in respect of the goodwill of any business, or the benefit of any statutory licence or privilege) derived by the owner of land from any lease, licence, or easement affecting the land, or from the grant of any right of taking the profits of the land**.**

Section OB 1 contains definitions for the purposes of the Act. Section OB 1 begins:

In this Act, unless the context otherwise requires,—

"Lease", "leasehold estate" and "estate" are defined in section OB 1:

"**Lease**" —

(a) Except as provided in paragraphs (b), (d), (e), and (f) means a disposition that creates a leasehold estate:

…

"**Leasehold estate**" includes any estate however created, other than a freehold estate:

…

"Estate", or **"interest"**, in relation to land, means any estate or interest in land, whether legal or equitable, and whether vested or contingent, in possession, reversion, or remainder; and includes any right to the possession of land or to the receipt of the rents or profits from the land, or to the proceeds of the sale or other disposition of the land, whether immediate or through a trustee, or otherwise; but does not include a mortgage:

Application of the legislation

Section CE 1(1)(e) deems a person's gross income to include all rents, fines, premiums, or other revenues derived by a land owner from any lease or licence affecting the land. Amounts derived from certain transfers of land, where an interest in land is transferred back to the transferor, may be included in gross income.

Pre-transfer grant of an interest in land

Where a lease or a licence is created before land is transferred, an income tax liability will not arise under section CE 1(1)(e).

Pre-transfer grants – implications for the transferee

If a transferor obtains an interest in land transferred before the balance or reversionary interest in the land is transferred, the transferee does not derive gross income as a result of the transaction. He or she never owns the interest that the transferor keeps,

so does not derive income from that land. Therefore, he or she cannot derive a rent, fine, premium, or other revenue from that lease or licence as a result of the transfer.

Pre-transfer grants – implications for the transferor

The transferor also does not derive income from the transaction. The transferor does not derive a rent, fine, premium, or other revenue from a lease, licence, easement, or profits from his or her land. Instead, the owner has simply kept an interest in the land.

This analysis applies to BR Pub 02/02 and BR Pub 02/03.

Example 7

Taxpayer A creates a lease in a property, and then transfers the reversionary interest to the trustees of his family trust. A's house is worth $175,000. The value of the lease is $60,000. The price to be paid for the reversionary interest is $175,000 less the $60,000. This price of $115,000 is outstanding as an unsecured debt owed by the trust to A.

The Commissioner will not assess A or the trustees for income tax under section CE 1(1)(e) on the $60,000 value of the lease. Section CE 1(1)(e) does not apply because neither A nor the trustees derive any rent, fines or premiums from the lease.

Licences to occupy

A transferor can grant him or herself a life interest or lease over land, before disposing of the balance or reversionary interest in the property to another person. However, it is not legally possible for a transferor to grant a licence to occupy to him or herself. A licence is not an estate or interest in land. A licence is a personal permission to enter land and to use it for a particular purpose. A licence must be granted from a licensor to a licensee.

Consistent with the conclusions relating to gift duty, the Commissioner will treat a purported grant to oneself of a licence as a simultaneous transfer. This point is discussed further below.

Post-transfer grant back of an interest in land

Where land is transferred subject to a lease or a licence later being transferred back, an income tax liability may arise under section CE 1(1)(e).

Post-transfer grants – implications for the transferee

If the transferor transfers land, and reserves an interest in the land by receiving a grant of an interest from the transferee, section CE 1(1)(e) may apply to any gross amount derived by the transferee in relation to that transaction.

There are three parts to section CE 1(1)(e) that are relevant to the arrangements:

- There must be a rent, fine, premium, or other revenue.

- The income must be derived by a land owner.

- The income must be derived from a lease or a licence.

Requirement 1 – amounts that are "rents, fines, premiums, or other revenues"

Section CE 1(1)(e) will apply if, by granting an interest back to the transferor, the transferee derives an amount that is within the words "rents, fines, premiums, or other revenues". The arrangements potentially subject to section CE 1(1)(e) (the arrangements in BR Pub 02/5 and BR Pub 02/06) are concerned with situations where property is gifted for inadequate consideration, subject to an interest being granted back to the transferor by the transferee. If the transferee derives an amount that is attributable to the interest granted by the transferee back to the transferor, the transferee may derive gross income if the other two requirements of section CE 1(1)(e) are met (which are discussed below).

An amount is derived even if there is no direct payment

Income is derived by the transferee, even though there may be no payment made to the transferee. Under section EB 1(1) of the ITA, a person derives income, even where it has not been received, when an amount has been, for example, credited in account or otherwise dealt with in the person's interest or behalf. A netting off of obligations is an example of this, and so the transferee "derives" the income. So the amount in the following situations may be income to the transferee:

- the transferor reduces the price (if any) payable by the transferee for the initial transfer of property; or
- the transferor reduces a debt owed by the transferee to the transferor; or
- the transferor otherwise pays the transferee; and

the amount of the reduction in price, reduction in the debt or the payment is attributable to the lease or licence granted back to the transferor.

Whether the amounts derived under the lease or licence arrangements are rents, fines, premiums, or other revenues

The amounts derived under the arrangements in BR Pub 02/05 and BR Pub 02/06 will be subject to section CE 1(1)(e) if they are within the words "rents, fines, premiums, or other revenues". The words of the section are now examined to see when amounts derived under the arrangements are within these words. The lease arrangement in BR Pub 02/05 is discussed first.

"Rent" has been characterised as the contractual sum payable for the use of the leased premises: *United Scientific Holdings Ltd v Burnley BC* [1978] AC 904. A similar definition was used in *Samuel v Salmon* [1945] 2 All ER 520. Rent does not only relate to leases. For instance, the term "rent" or "rent-charge" may be used when a purchaser of land pays periodic sums rather than a lump sum for the land. A "fine" is

technically a sum of money payable by the tenant on the renewal of a lease (Hinde, McMorland & Sim, para. 5.086), but is sometimes loosely used to refer to a premium (*B G Utting & Co Ltd v Hughes* [1939] 2 All ER 126). A "premium" is a lump sum paid for the acquisition of a lease by a lessee: *Regent Oil Co Ltd v Strick* [1965] 3 All ER 174 at p 197. In *King v Earl Cadogan* [1915] 3 KB 485, at p 492, Warrington J said that

> … a premium is a payment representing the capital value of the difference between the actual rent and the best that otherwise might be obtained… It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease.

The amount derived under the lease arrangement, that is potentially subject to section CE 1(1)(e), arises when one person transfers property to another, and the transferee grants a lease back, and there is either:

- a reduction by the transferor of the price of the property first transferred;
- a reduction of a debt owed by the transferee to the transferor; or
- any other payment by the transferor to the transferee;

where the amount is attributable to the lease granted back to the transferor. This payment arises where the transferor transfers property to another person and the other person later grants a lease back to the transferor.

Under this arrangement, it is not specified whether the consideration is a premium, i.e. a payment for the acquisition of the lease, or rent, i.e. a payment made for the use of the property, or a fine, i.e. a payment for the renewal of a lease.

A premium is a payment for the granting of a lease. In the arrangement, it is specifically stated that the amount is attributable to the lease granted back. In the Commissioner's view, the payment under the arrangement is best characterised as consideration for the granting of the lease and is therefore a premium.

The amount may also be rent, especially if it is quantified on the basis of the current value of rental payments appropriate to the value of the use of the land under the lease. It is least likely to be a fine, because the arrangement involves the granting of a new lease, and not the renewal of a lease. However, if "fine" also means premium, it may be a fine.

In the Commissioner's opinion, the amount derived under the arrangement is either a premium or rent, or a payment for both. Premiums and rents cover between them any payment for the granting of a lease and any payment made during the lease for the use of the property. The amount must be either one of these two types of amounts. Therefore, an analysis of the words of the section supports the conclusion that a one-off payment for a lease is a premium and/or rent.

Section CE 1(1)(e) also applies to amounts of goodwill. The Commissioner considers that the amounts derived under the arrangements are clearly not payments of goodwill. Goodwill is the benefit and advantage of the good name, reputation and

connection of a business: *Inland Revenue Commissioners v Muller & Co's Margerine Ltd* [1901] AC 217. There is no business element in the arrangements.

Other revenues

If the amount derived is not a rent, fine, or a premium, the Commissioner's view is that the amount derived under the arrangement comes within "other revenues" in section CE 1(1)(e). The issue in interpreting these words is whether "other revenues" means amounts that are revenue in nature. The amounts derived under the arrangements are lump sums received in relation to the transfer of ownership of interests in land. If "revenues" in the context of section CE 1(1)(e) means revenue in nature, then it could be argued that the amounts derived under the arrangement are capital in nature and not subject to the section.

The ordinary meaning of "revenues" and dictionary definitions suggest that "revenues" means revenue in nature (see the *Concise Oxford Dictionary*, 10th ed., 1999).

The issue, which is discussed next and under the following headings, is not the meaning of "revenues" in isolation, but its meaning in the context of section CE 1(1)(e).

Miller v IRC

The meaning of "revenues" as used in section 88(1)(d) of the Land and Income Tax Act 1954 (which was the same as section CE 1(1)(e)) was considered in *Miller v IRC* 10 AITR 122 (SC). The Court was concerned with a payment received by a land owner for two purposes. It was paid for the right to remove coal from the land owner's land. It was also accepted by the owner as payment in full satisfaction of compensation for damage to the land, which would otherwise be payable under a previous agreement. Henry J made the following comment:

> The word "revenue" in its ordinary import in relation to the owner of land connotes the incomings which arise therefrom: *London, Midland and Scottish Rail Co v Anglo-Scottish Railways Assessment Authority, London and North-Eastern Rail Co v Anglo-Scottish Railways Assessment Authority* (1933) 150 LT 361 (HL) per Lord Tomlin at p 367.

His Honour held that the monthly payments payable to the objector came within the words "other revenues" because they were paid for the use of land. This finding suggests that the purpose of the section is to capture payments made for the use of land.

In finding that the payment was not compensation, and so the section could apply, it could be argued that the case also supports the view that section 88(d) (and section CE 1(1)(e)) only applies to payments that are revenue in nature. The Commissioner's view is that the case does not go that far. The key finding was that the payments were made for the use of land, and so were within the section. Although Henry J said that a payment for compensation would not be within the section, he did not go so far as to rule out the possibility that capital payments may be within section CE 1(1)(e).

In considering the meaning of "revenue" in *Miller*, Henry J referred to the House of Lords decision in *London, Midland and Scottish Rail Co*. The House of Lords said that the word "revenue" in relation to a business means those incomings of the business which are the products of or are incidental to the normal working of the business. It is arguable that *London, Midland & Scottish Railway Co* is authority for the proposition that "revenues" means amounts received in the course of a business. However, in the Commissioner's view, *London, Midland and Scottish Rail Co* is not direct authority for the meaning of "revenues" in the context of section 88(1)(d), i.e. CE 1(1)(e), as the statutory contexts are quite different. In *London Midland*, Lord Tomlin was defining "revenue" in relation to a business. Section CE 1(1)(e) is concerned with amounts derived for the use of land. Even the form of the word is different – "revenues" in section CE 1(1)(e) and "revenue" in the Railways Act.

In summary, although there are arguably indications in *Miller* and *London, Midland and Scottish Rail Co* that "revenue" in section CE 1(1)(e) may mean revenue in nature, in the Commissioner's opinion *Miller* establishes only that payments for the use of land are within the section. Henry J in *Miller* did not hold that capital payments could never come within the section.

<u>The context of the section</u>

The context of the word "revenues" within section CE 1(1)(e) supports the conclusion that the intention is to capture a wide range of payments related to the use of land, and that the section is not limited to payments that are revenue in nature. "Revenues" is preceded by the words "rents, fines, premiums". In the Commissioner's opinion, the common theme of the specific words listed is that they are payments made in relation to land. This approach is supported also by considering the other words in the section:

> (e) All rents, fines, premiums, or other revenues (including payment for or in respect of the goodwill of any business, or the benefit of any statutory licence or privilege) derived by the owner of land from any lease, licence, or easement affecting the land, or from the grant of any right of taking the profits of the land.

The section clearly deals with payments for rights relating to land. Types of interests in land or rights relating to land are listed, and further, these interests or rights are only included if they affect the land. In discussing goodwill in *Romanos Motel Limited v CIR* [1973] 1 NZLR 435, the Court of Appeal said that the aim of the section is to include in income receipts from land (p 438).

The opening words of the section "rents, fines, premiums" are not linked because they are revenue in nature. Clearly premiums are generally capital in nature. Goodwill, which forms part of this group of words by coming within parentheses after "other revenues", is also usually capital in nature. Given that, it can be concluded that Parliament intended to include at least some capital payments in the section.

The Australian High Court in *Clarke v FC of T* (1932) 6 ALJ 241 interpreted the comparable Australian section as having the broad intention to capture all payments derived from a lease.

Case T8

Case T8 (1997) 18 NZTC 8,044 arguably supports the view that "revenues" in section CE 1(1)(e) means revenue in nature. Barber DJ held on the facts that a payment paid by a lessee was not an option payment but a payment to obtain a lease. Given this finding, in his opinion it was a premium or other revenue derived by the owner of land from a lease affecting the land, and within section 65(2)(g) of the Income Tax Act 1976 (now section CE 1(1)(e)). His Honour made the following comment about section 65(2)(e):

Also, if the $22,000 was genuinely part of a sale of realty transaction, then s 65(2)(e) would not apply because it assesses revenue from land and not capital derived or relating to land.

Barber DJ could be interpreted as taking the view that the section is aimed at amounts that are revenue in nature. The Commissioner considers in making this comment, his Honour was not asserting that section 65(2)(e) (section CE 1(1)(e)) only assesses revenue and not capital. Clearly some capital items are assessed under section CE 1(1)(e) – premiums are generally capital in nature, as the Privy Council said in *Commissioner of Inland Revenue v Wattie* (1998) 18 NZTC 13,991, at p 13,999, and goodwill is generally capital in nature.

The Commissioner considers that this comment is best interpreted as meaning that the section does not apply to income from the sale of land. If the amount received by the taxpayer had been for an option to purchase the motel, then it would have been for the sale of an interest in land, and such a fee would probably not be within section CE 1(1)(e). Therefore, in the Commissioner's view, Barber DJ's comment is not authority that no capital payments are caught within section CE 1(1)(e).

Commentators' views

The Report of the Taxation Review Committee 1967 (usually known as the "Ross Report") said that the section treats goodwill as being equivalent to additional rent calculated over the term of the lease but payable at the commencement of the lease. Similarly the Valabh Committee in its December 1989 report *Consultative Document on the Taxation of Income from Capital* said:

Section 65(2)(g) [now section CE 1(1)(e)] is an attempt to avoid allowing taxpayers to transform lease payments (which would generally be taxable payments received on revenue account) into a non-taxable receipt received on capital account. For that reason, section 65(2)(g) includes in assessable income premiums as well as goodwill received by a lessor.

…

These provisions demonstrate how it has been found necessary to move the traditional capital/revenue boundary to hinder the ability of taxpayers to transform otherwise assessable income into income on capital account which would not be subject to tax.

These commentators consider that the policy intention is to include in section CE 1(1)(e) payments that are revenue in nature but disguised as capital. Note that that intention does not mean that the section is restricted to capturing disguised rent. The

Court of Appeal in *Romanos* rejected the submission by counsel that only disguised rents for the lease of land, as opposed to a payment for what is really a lease of the goodwill of a business, are taxable under the section. As the Valabh Committee says, a decision has been made to include capital payments in section CE 1(1)(e). Thus the Ross and Valabh Committees considered that genuine premiums and goodwill payments, as well as attempts to disguise rent as premiums or goodwill, are within section CE 1(1)(e).

<u>Conclusion as to the issue of whether only receipts that are revenue in nature are income under section CE 1(1)(e)</u>

The Commissioner's opinion is that section CE 1(1)(e) is intended to capture amounts that are paid in relation to use of land, and that payments that have capital attributes may be included in section CE 1(1)(e). The words of the section and the decision in *Miller*, in particular, support this view. *Romanos* and *Clarke* also support the view that the intention of the section is to include in income payments for the use of land. The arguments that would support the contrary view are that *Miller* is not conclusive authority that "revenues" means incomings and not income in nature. The authority relied on by Henry J – *London Midland and Scottish Rail Co.* - appeared to find that "revenue" means revenue in nature.

In the Commissioner's view, the contrary arguments are less persuasive than the arguments supporting the view that "revenues" means incomings from land and includes receipts of a one-off nature. Therefore, the Commissioner's view is that the amounts derived under the lease arrangement are not excluded from the words "other revenues" on the basis that payments that are capital in nature are not included in those words.

<u>Reliance on the case of Capel v CIR</u>

In the commentary to BR Pub 96/2A, the following was stated:

> A payment for buying a licence to occupy, or a lease, would also normally be considered a capital sum. However, *Romanos* and *Capel* are authority for the proposition that such a payment is included within the term "premiums, or other revenues".

The main issue in *Capel* was whether any of a number of goodwill payments received by a taxpayer setting up burger bar businesses, was for goodwill attached to a site, or for personal goodwill. *Romanos Motel* had established that only goodwill attached to a site is included within section CE 1(1)(e) (then section 88 1(d) of the Land and Income Tax Act 1954).

The Commissioner now relies primarily on the arguments already discussed, which support the conclusion that capital payments that are not specifically included within section CE 1(1)(e), are in fact intended to be included in the section. *Capel* does gives some support for this view, in that the Court held that a payment that is capital in nature was within section CE 1(1)(e). Similarly the Court of Appeal in *Romanos* held that a capital payment for goodwill was subject to section CE 1(1)(e).

Comments on technical submissions received

Submissions received included two arguments that section CE 1(1)(e) applies to amounts that are revenue in nature. The first of these is that section CE 1 uses both the words "income" and "revenues" leading to the inference that to distinguish these two words, "revenues" must be taken to mean revenue in nature. The Commissioner prefers the view that the word "income" at the beginning of the section is part of the defined term "gross income", and so inferences cannot be drawn from the use of the word in section CE 1(1)(e). The term gross income is used in the Act as a machinery provision to ensure that the provisions of the Act combine to identify a taxpayer's taxable income. When the section was first enacted, the term "assessable income" was used for the same purpose. Therefore, the term "gross income" should be viewed as a defined term used for a specific purpose, and the substantive meaning of the word "income" is not relevant in determining the meaning intended for "revenues".

The second argument is that the Income Tax Act treats premiums and fines as revenue items. Previously, premiums and fines could be deducted under section EZ 6. The Commissioner does not consider that an examination of section EZ 6 assists in the interpretation of section CE 1(1)(e).

Conclusion as to whether amounts derived under the arrangement involving a lease are subject to section CE 1(1)(e)

In summary, the conclusions are that the amounts derived in relation to a lease (the fourth arrangement) are subject to section CE 1(1)(e), because

- The amount is rent or a premium; or

- The amount is included within "other revenues" because it is an incoming from land, and

- The statutory intention is to capture a wide range of amounts derived from a lease, and

- The words "other revenues" do not mean other things that are revenue in nature; instead, they mean incomings from land.

Is the licence arrangement subject to section CE 1(1)(e)?

The discussion so far has related to the application of section CE 1(1)(e) to the arrangement involving a lease. The other arrangement to which section CE 1(1)(e) applies involves a licence – the arrangement in BR Pub 02/06. The words listed in section CE 1(1)(e) – "rents, fines, premiums" apply most commonly to leases and not licences. That raises the issue of whether the amount derived under the licence arrangement is subject to the section.

The first point to note is that section CE 1(1)(e) applies to certain receipts derived by the owner of land from "any lease, licence, or easement affecting the land". Clearly, the section applies to licences.

The arrangement involving a licence is described in the ruling as follows:

The Arrangement is the disposition of real property for inadequate consideration, where a transferor transfers property to another person and under the arrangement the other person later grants a licence back to the transferor out of the property transferred:

- where:
  - the transferor reduces the price of the property first transferred; or
  - the transferor reduces a debt owed by the transferee to the transferor; or
  - the transferor otherwise pays the transferee; and
- the amount of the reduction in price, reduction in the debt or the payment is attributable to the licence granted back to the transferor.

In summary, an amount is paid under the arrangement as consideration for the licence granted back to the transferor.

Are the payments derived under the arrangement included in the words "other revenues" in section CE 1(1)(e)?

The Commissioner considers that an amount derived in respect of a licence is included in the words "other revenues" in section CE 1(1)(e). For the reasons discussed above in relation to the lease agreement, the Commissioner does not consider that the words "other revenues" means "revenue in nature". Instead, the Commissioner considers that these words are intended to mean amounts derived in relation to the use of land.

Requirement 2 – the income must be derived by a land owner

The discussion has been about the first requirement of section CE 1(1)(e), that is, whether there are "rent, fines, premiums, or other revenues" under the arrangements.

The second requirement is that income must be derived by an owner or land. In the arrangements in BR Pub 02/05 and BR Pub 02/06, a transferee granting either a lease or a licence back to the transferor is the owner of the land out of which that interest is granted.

Requirement 3 – income derived from a lease or a licence

If the transferee grants the transferor a lease or a licence, and the transferee derives an amount that is attributable to the lease or licence, then the requirement that the income is derived from any lease or licence is satisfied. Accordingly, the transferee is subject

to income tax on an amount equal to the value of the amount attributable to the grant of the lease or licence.

This analysis applies to BR Pub 02/05 and BR Pub 02/06.

Example 8

Taxpayer B has decided to transfer her family home to a family trust. She wishes to ensure that she has a right to occupy the house for the rest of her life. She transfers the house to the trustees of the trust. A condition of the transfer is that the trustees subsequently grant B a licence to occupy. The trustees comply with this condition.

The house has a market value of $200,000. A valuer and actuary value the licence to occupy at $50,000. The house is transferred for $175,000, reduced by $50,000 to $125,000 to take into account the value of the licence to occupy. The $125,000 is left owing by the trustees as a debt repayable on demand.

The trust has derived gross income under section CE 1(1)(e) of $50,000, being the value of the licence to occupy.

Life estate

If the transferee grants the transferor a life estate, the transferee is not subject to section CE 1(1)(e). The reason is that section CE 1(1)(e) only applies to leases, licences, easements affecting land, and the grant of a right to take profits from land.

This analysis applies to BR Pub 02/04.

Lease for life

Generally, an arrangement referred to as a ‘lease for life’ is not a lease, but a life estate. An essential characteristic of a lease is that is has a certain term: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 3 All ER 504. A lease that is based on the duration of a person’s life does not have a duration that is certain. It is a freehold estate in the nature of a life estate – see *Amalgamated Brick & Pipe Co Ltd v O'Shea* (1966) 1 NZCPR 580.

In some instances, what is referred to as a lease for life may have a certain duration, and therefore will be a lease. For example, a lease expressed to be for say 200 years or for the life of A, is a valid lease. Although it is not known when A will die, and that A will die before 200 years have passed and the lease will terminate at A’s death, the lease has in law a certain duration.

A tenancy with the power of each party to determine the tenancy at the end of any period by giving the appropriate notice, called a periodic tenancy, is a lease because any particular term can be made certain, even though it is impossible at the outset of the tenancy to say for what period the terms will last: *Amalgamated Brick*.

Example 9

C and D decide to transfer their home to a family trust. They wish to ensure that they have a right to occupy the house for the rest of their lives. They transfer the house to the trustees of the trust. A condition of the transfer is that the trustees later grant C and D life estates in the property. The trustees comply with this condition.

The house has a market value of $250,000. The life estates are worth $75,000. The price of the house is $250,000, which C and D leave owing as a debt, repayable on demand. The debt is reduced by $75,000 upon the grant of the life estates.

The trust will not have derived gross income under section CE 1(1)(e), because the grant of a life estate is not income derived from a lease, licence, easement, or the right to take profits from land.

Post-transfer grants – income tax implications for the transferor

There are no income tax implications for the *transferor* under section CE 1(1)(1). Section CE 1(1)(e) applies to rents, fines, premiums, or other revenues derived from land. When a transferor transfers land, the person no longer owns the land, so cannot receive any rents, fines or so on from it. Any amount paid by the transferee for the transfer, in the arrangements covered by the rulings, will be consideration for a sale of land.

Simultaneous transfer of a lease or a licence

Where the grant and the transfer of a lease or a licence occur simultaneously, no income tax liability under section CE 1(1)(e) will arise as a result of the transaction.

Purported grant of a licence to oneself

The Commissioner's view is that if a person purports to grant him or herself a licence, whether before or at the same time as the property is transferred to the transferee, that action should be interpreted as an intention to retain rights over the property before the transfer of the balance of the property. Following the House of Lords decision in *Ingram*, discussed above in relation to gift duty, the Commissioner considers that this situation should be treated as a simultaneous transfer.

Simultaneous transfers–- implications for the transferee

The transferee is the owner of the property interest transferred from the transferor. Where the transfers are simultaneous, the transferee does not grant anything out of the interest he or she receives, as he or she receives the property interest at the same time as it becomes subject to the obligation to grant an interest in the land back to the transferor. Accordingly, the transferee does not receive any rents, fines, premiums, or other revenues as a result of receiving the property interest.

As this commentary has explained, a simultaneous transfer includes the situation where the requirements of conveyancing mean that the whole property must be transferred before the other interest can be transferred back. Such a situation will be

treated as simultaneous, when the intention of the parties, as evidenced by the documents and surrounding circumstances, is for the transferor to retain an interest in the property transferred, and for the transferee never to obtain the property free of the transferor's interest.

Simultaneous transfers – implications for the transferor

The transferor does not have an income tax liability, because the transferor does not derive any rents, fines, premiums, or other revenues from a lease or a licence in respect of the property kept or the property transferred.

This analysis applies to BR Pub 02/07-02/10.

Spreading income

When a taxpayer derives income under section CE 1(1)(e), section EB 2(1) of the ITA allows the person to apportion that income between the income year in which it is derived and up to five subsequent income years.