Note (not part of the Rulings):
These rulings deal with the ability of a registered person to claim a GST input tax credit on the purchase of fishing quota or a marine farming authorisation from an unregistered person. It was considered appropriate to issue four separate rulings given the different nature of the different marine farming authorisations and fishing quota. However, a single commentary applies to all four of the Rulings.

MARINE FARMING LICENCES AND SECONDHAND GOODS INPUT TAX CREDITS

PUBLIC RULING - BR Pub 03/09

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

Taxation Laws

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Ruling applies in respect of section 20(3) and the definitions of “goods” and “secondhand goods” in section 2, the definition of “associated persons” in section 2A of the Act, and the definition of “input tax” in section 3A of the Act.

Definitions

For the purposes of this ruling, **“marine farming licence”** means a marine farming licence granted under the Marine Farming Act 1971.

The Arrangement to which this Ruling applies

The Arrangement is the supply of a marine farming licence. The supply of the marine farming licence must satisfy the following conditions:

1. The supply by the vendor is a supply made by way of sale.

2. The supply is not a taxable supply.

3. The vendor used the marine farming licence to carry on the marine farming activity specified in the marine farming licence.

4. The supply is made to the purchaser, who is a registered person.

5. The marine farming licence is situated in New Zealand at the time of supply.

6. The marine farming licence is acquired for the principal purpose of making taxable supplies.

7. The purchaser maintains sufficient records as required by section 24(7) of the Act.

8. The vendor and the purchaser are not associated persons under the Act.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

1. If the marine farming licence satisfies the following two factors:
   - the marine farming licence defines the area subject to the licence by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan; and
   - the legal effect of the marine farming licence is that the seabed is not excluded from the area licensed,

   then

   - The marine farming licence is "goods" in accordance with the definition of that term in section 2 of the Act.
   - As the vendor has used the marine farming licence for its intrinsic purpose before the sale to the purchaser, the marine farming licence will constitute "secondhand goods" for the purposes of the Act.
   - The purchaser of the marine farming licence will be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period the amount of input tax being the tax fraction of the consideration payable for the supply of the marine farming licence, to the extent that payment has been made for that supply in that taxable period.

2. If the marine farming licence does not satisfy one or both of the following two factors:
   - the marine farming licence defines the area subject to the licence by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan; and
   - the legal effect of the marine farming licence is that the seabed is not excluded from the area licensed,

   then
   - The marine farming licence is not "goods" in accordance with the definition of that term in section 2 of the Act. As a result, the marine farming licence will not constitute "secondhand goods" for the purposes of the Act.

- The purchaser of the marine farming licence will not be entitled under section 20(3) to deduct from the amount of output tax payable in a taxable period any amount of input tax in respect of the supply of the marine farming licence.

The period for which this Ruling applies

This Ruling applies to a supply of a marine farming licence where the time of the supply occurs within 3 years from the date on which this Ruling is signed.

This Ruling is signed by me on the 12th day of November 2003.

Martin Smith
General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULINGS BR PUB 03/07 to BR PUB 03/10

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 03/07 to BR Pub 03/10 ("the Rulings").

Background

The question being considered is whether a GST input tax credit is available to registered persons who acquire fishing quota or marine farming authorisations from unregistered persons. While this commentary considers both fishing quota and marine farming authorisations, they need to be dealt with separately as there are different statutory requirements for each of them. Before looking at the relevant GST legislation, the nature of both fishing quota and the various types of marine farming authorisations needs to be considered in more detail.

Fishing quota

The fishing quota being considered is individual transferable quota as defined in section 2 of the Fisheries Act 1996. The Fisheries Act 1996 is almost fully in force.

Prior to this, the operative legislation was the Fisheries Act 1983. It seems that the majority of fishing quota was allocated under the 1983 Act. The provisions in the 1996 Act relating to the allocation of quota came into force on 1 October 1997, and the registration provisions under the 1996 Act came into effect on 1 October 2001.

The background to the allocation of fishing quota is that it was initially established and allocated in 1986 pursuant to the Fisheries (Quota Management Areas, Total Allowable Catches, And Catch Histories) Notice 1986, which was made under the Fisheries Act 1983. The fishing quota appears to have been allocated based on a person's commercial fishing history and no charge was made for the quota initially allocated. The quota does not provide a "free" right, however, as an annual levy needs to be paid. These levies are typically significant amounts.

While the majority of the fishing quota is held by large organisations, individual fishermen hold some small parcels of fishing quota. Some of these persons may not make supplies in excess of $40,000 in a 12-month period and thus are not required to register for GST under section 51 of the Goods and Services Tax Act 1985. One of these persons may sell their fishing quota to another person who is registered for GST. The question arises for the purchaser as to whether a GST input tax credit can be claimed.

The nature of fishing quota

There is no definitive statement in any of the fisheries legislation as to the nature of fishing quota. "Individual transferable quota" was not defined in the Fisheries Act 1983. While the term is defined in the Fisheries Act 1996, the definition appears to have been added as a means of ensuring that all of the quota allocated under the different Acts and sections of the Acts is regarded as fishing quota for the purposes of the Fisheries Act 1996.

This change in legislation appears to have affected the characteristics that could be ascribed to fishing quota. Under the Fisheries Act 1983, the fundamental rights acquired by the holder of fishing quota (as determined from the legislation) were that the holder of the fishing quota had the right to catch and take away for their own purposes:

- a specified quantity;
- of a particular fish species;
- from a particular area (the quota management area);
- in a specific period (in a year, although the quota is issued in perpetuity).

These rights were able to be dealt with in ordinary commercial dealings in that they could be bought and sold, used as security, and it was possible to register interests against the rights.

The nature of fishing quota granted under the Fisheries Act 1983 has been alluded to in a number of court decisions. The Court of Appeal considered the nature of fishing quota in the case of *New Zealand Fishing Industry Association (Inc) v Minister of*

Fisheries (unreported, CA 82/97, 22 July 1997, Wellington). The case involved the judicial review of a decision made by the Minister of Fisheries to reduce the total allowable commercial catch (TACC) for snapper in quota management area 1. The Court of Appeal made various comments regarding the nature of fishing quota. At page 16 of the Court's judgment, Justice Tipping stated:

> While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them. That legislation contains the capacity for quota to be reduced. If such reduction is otherwise lawfully made, the fact that quota are a "property right", to use the appellants' expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned.

The Court of Appeal confirmed that fishing quota is property, although it provides little in the way of further guidance on its precise nature except to state that its characteristics must be determined from the legislation. Further clarification was provided by Justice Baragwanath in *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23. In dealing with a contractual dispute, he stated that fishing quota is a statutory chose in action (at paragraph 5 of the judgment):

> The root of title is the issue under the quota management system (the QMS) of individual transferable quota (ITQ) which is a statutory chose in action comprising a fraction of the total of exclusive rights to fish commercially a particular species of fish within one of the ten quota management areas into which the exclusive economic zone is divided. Rights to ITQ are codified by the relevant legislation, especially the Fisheries Amendment Act 1986 and the Fisheries Act 1996.

This dicta, while useful, does not fully explain the rights and obligations that arise in relation to fishing quota, particularly in relation to change in the nature of the entitlement under the Fisheries Act 1996. The position under the Fisheries Act 1996 is different to the previous position under the Fisheries Act 1983. One of the major differences in relation to the rights derived by holding fishing quota is the introduction of the concept of an "annual catch entitlement". Instead of the fishing quota providing a right to catch a specified amount of fish, the fishing quota now "generates" an annual catch entitlement on the first day of the fishing year. Fish are now generally caught under the authority of a fishing permit and an annual catch entitlement (there is also a deemed value payment procedure set out in the legislation). For fishing quota holders, the annual catch entitlement is separately tradable, so that for a particular year a quota owner can sell their annual catch entitlement while retaining the fishing quota that will generate another annual catch entitlement the following year. These developments add a further dimension to the nature of fishing quota.

The lack of any in-depth analysis of the nature of fishing quota means that it is necessary to examine the characteristics and rights granted under the fisheries legislation. These can then be compared to recognised categories of property. If they are sufficiently similar, it may be appropriate to conclude that the fishing quota should be regarded as belonging to that particular category. Alternatively, it may be that the most appropriate conclusion is that fishing quota is not sufficiently similar to anything else and must be regarded as a separate category of property.

There have been a number of suggestions as to the nature of fishing quota. The terms "usufruct right" and "profit à prendre" have been suggested as perhaps describing the fishing quota. A further possibility is that the fishing quota might be regarded as the

sale of goods coupled with a licence to retrieve the goods. This commentary will consider these possible classifications in the following order:

- Is fishing quota a "usufruct right"?
- Is fishing quota the sale of goods coupled with a licence to remove the goods?
- Is fishing quota a "profit à prendre"?

Usufruct right

The term "usufruct right" is a civil law rather than common law term. As New Zealand's jurisprudence is based on the common law and doctrine of precedent, the term "usufruct right" is largely unknown to New Zealand law. The basis of this term in the civil law as opposed to common law is confirmed by the definition of the word "usufruct" in the *Concise Oxford Dictionary* (9th ed, Clarendon Press, Oxford, 1995) which provides:

> **usufruct** *n.* (in Roman and Scots law) the right of enjoying the use and advantages of another's property short of the destruction or waste of its substance.

A more expansive definition of the term "usufruct" is found in *Black's Law Dictionary* (6th ed, West Publishing Co, 1990):

> In the civil law, a real right of limited duration on the property of another. The features of the right vary with the nature of the things subject to it as consumables or nonconsumables. … The right of using and enjoying and receiving the profits of property that belongs to another, and a "usufructuary" is a person who has the usufruct or right of enjoying anything in which he has no property interest.
>
> …
>
> There are three types of "usufructs": natural profits produced by the subject of the usufruct, industrial profits produced by cultivation, and civil profits, which are rents, freights, and revenues from annuities and from other effects or rights.

The South African case of *Geldenhuys v CIR* (1947) 14 SATC 419 provided a very full judicial consideration of the nature of a usufruct right. The case concerned the assessability of an amount of income that arose from the sale of a flock of sheep. The taxpayer's husband died leaving the taxpayer with a "life interest" in her husband's estate, with their children as the ultimate beneficiaries. The flock of sheep was valued at £1,451 at the date of the husband's death. The flock declined in number after the husband's death due to drought, and a lesser number of sheep were sold for £4,941 some years later. The taxpayer used the proceeds from the sale to invest, purportedly for her own benefit. The Commissioner sought to include the difference in the taxpayer's assessable income.

The taxpayer argued that she was unable to be assessed on this amount as she was only a usufructuary in relation to the sheep. This meant that she only had a right to use the sheep, with no liability for waste due to circumstances beyond her control. She accepted that this also meant that the investment did not belong to her.

Justice Steyn (with whom Herbstein and Ogilvie Thompson AJJ agreed) delivered the leading judgment. In considering the nature of a usufruct right, Justice Steyn made the following observations at page 424:

> According to some authorities, … movables which are consumed or impaired (*consumuntur et minuuntur*) by use cannot be subject to a full and complete usufruct, but they can be made the subject of an incomplete usufruct, a quasi-usufruct. In this class of movables cattle and animals are, according to the authorities, included.

After referring to further texts and commentaries, Steyn J reached the following conclusions at page 428:

> The passages from *Domat* and *Huber* which I have set out above, however, make it clear in my judgment, that with regard to the cattle and other animals to which they refer these authorities hold that the *dominium* remains with the remainderman; the usufructuary, according to the passage from *Huber* cited above having no right to sell or kill them and being obliged to restore them. … The authorities appear to be agreed that the usufructuary is only entitled to the young or progeny over and above the full complement of the flock. The full number of the flock must be maintained, the young replacing the old as they die, but the flock as an entity must be returned ….

Application to fishing quota

It seems difficult to apply this concept to fish except perhaps in a fish farming situation. The nature of a usufruct right, even if it did apply in a New Zealand context, does not appear to be consistent with the characteristics of fishing quota identified above. A usufruct right is a right to use property without liability for waste. However, under the fishing quota, a person obtains the right to take the relevant fish from the sea and provide these for consumption. The quota owner is under no obligation in relation to all the other fish in the sea. Further, the quota holder does not have to give a school of fish back at the end of the period, although it will obviously be in the quota holder's best interests to manage the fisheries resources to ensure sustainability in accordance with the principles in the Fisheries Act 1996. It is also noted that a usufruct right is typically granted for a finite period, while the fishing quota is granted in perpetuity.

The effect of this is that the characteristics of a usufruct right are not sufficiently similar to the characteristics of fishing quota for there to be any serious possibility that the fishing quota could be a usufruct right.

Sale of goods with a licence

The concept of a sale of goods with a licence refers to a contract for the sale of goods, where a licence is granted to the purchaser to go onto (typically the vendor's) land to get the goods. For instance, an agreement for the right to take trees from a property could be the sale of goods coupled with a licence to enter onto the land and remove the trees. Alternatively, the agreement might constitute a profit à prendre, which will be discussed in more detail below.

The distinction between an agreement for the sale of goods with a licence and a profit à prendre appears to turn on whether the purchaser is obliged to take the trees, or simply may take the trees. This follows from the definition of "goods" in the Sale of Goods Act 1908. The definition provides that goods "includes emblements, growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale". Thus, unless the agreement between the parties requires that the trees shall be severed, the trees will not be goods under the Sale of Goods Act.

If the purchaser ***is obliged*** to take the trees, then the agreement is more likely a contract for the sale of goods coupled with a licence to retrieve the trees, but if the purchaser ***may*** take the trees, then it is more likely to be a profit à prendre.

This issue was addressed by Justice Young in the Supreme Court of New South Wales in *Ellison v Vukicevic* (1986) 7 NSWLR 104. The case concerned the nature of an agreement between a landowner and a quarrying company where in return for the payment of a royalty, the quarrying company was entitled to quarry for sand and sandstone on the landowner's property. In distinguishing between a profit à prendre and a contract for the sale of goods, Justice Young states at page 116:

> Taking all these factors together it seems to me that the document looks more like a profit à prendre than a licence, but I must also look at the distinction between profits and sale of goods.
>
> After a considerable search, it seems to me that the most accurate statement of the law in this connection is provided by *Hinde McMorland Sim* (op cit at 715), where the authors say:
>
>> "… profits à prendre and contracts for the sale of goods are seen as mutually exclusive, the former consist only of contracts relating to fructus naturales or other parts of the realty where the purchaser has merely a right or option to sever, while the latter consist of:
>>
>> (1) All sales of fructus industriales regardless of who is to sever them;
>>
>> (2) All sales of fructus naturales or other parts of the realty which are to be severed by the vendor before property passes to the purchaser; and
>>
>> (3) All sales of fructus naturales or other parts of the realty which the purchaser is under a contractual obligation to sever."
>
> Thus if the document puts on the purchaser an obligation to sever there is a contract for the sale of goods including a licence to go onto the land for the purpose of carrying out the contract, but if the purchaser merely has the option to sever then there is a profit à prendre.

In dealing with this issue, Justice Young referred to a statement in *Hinde McMorland & Sim on Land Law* (1978-79). That statement still represents the view of the authors as it is also included in the latest edition of the book *Land Law in New Zealand*, Hinde McMorland & Sim (1997, Butterworths, Wellington). On the basis of this, the key distinguishing feature between a profit à prendre and a sale of goods coupled with a licence to retrieve the goods is that a profit à prendre only gives rise to an ***option*** to sever and take the goods, while there will be an obligation to take the goods under a contract for sale.

This is consistent with the New Zealand Supreme Court decision in *Egmont Box Company Limited v Registrar General of Lands* [1920] NZLR 741.

Application to fishing quota

In determining whether fishing quota could be regarded as the sale of goods coupled with a licence to remove the fish, assistance can be derived from the Fisheries Act 1983. The fishing quota itself was originally allocated without cost to fishermen based on prior catch histories. In order to exercise the rights under the fishing quota and associated annual catch entitlement, an annual levy is payable. In determining whether fishing quota is the sale of goods coupled with a licence to remove the fish,

the key distinction is whether there is an obligation to take the fish, or whether there is merely an option to take the fish. This question appears to be answered by section 28ZC(3) of the Fisheries Act 1983, and the more recent version contained in regulation 4(3) of the Fisheries (Cost Recovery Levies) Order 2000. It provides that the levy is payable by quota holders irrespective of whether or not the fish, aquatic life, or seaweed to which the quota relates is taken.

Given that the levy is payable regardless of whether the fish are caught in relation to the quota, fishing quota should not be regarded as a sale of the fish as there is no obligation to take the fish. It is also noted that the levy charged is for administering the quota management system rather than necessarily being a "price" payable for the fish. Further, the fish are not "made available" either – the quota owner still has to catch the fish. Thus, situations might exist where the quota owner is unable to catch the amount of the particular species for which they have quota, despite having paid the full levy and desiring to catch the fish. The characteristics of fishing quota are more consistent with the quota holder having only a right to catch the fish. Therefore, the terms of the ownership of the fishing quota are inconsistent with it being an agreement for the sale of goods.

Profit à prendre

It is noted at the outset that the concept of profit à prendre has been referred to in relation to fishing quota in other contexts. The Law Commission in its Preliminary Paper No. 9 "The Treaty of Waitangi and Maori Fisheries" (1989, Wellington) referred to fishing quota as being in the nature of a profit à prendre. At paragraph 4.20 of the Preliminary Paper it states:

> In economic terms the ITQ scheme has created a new limited monopoly akin to those arising from other restrictive licensing schemes, such as liquor licences and taxi licences. In legal terms it has converted a public right to fish commercially (subject, of course, to regulation) into a series of private rights. It has created a new property right in the nature of a profit à prendre – broadly an ongoing right to take something tangible that is present on another person's land – and allocated that right to those who held, or had recently held, commercial fishing licences at the time of its commencement.

What is a profit à prendre?

The nature of a profit à prendre can be gained from the definition in *Halsbury's Laws of England* (4th ed, Butterworths, London, 1980) Vol 14, "Easements and Profits à Prendre" para 240, page 115:

> A profit à prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right.

Profits à prendre are often contrasted with easements or licences. All three items, profits à prendre, easements and licences, confer a right to enter onto land for a particular purpose. However, the distinguishing feature of a profit à prendre is that it confers an additional right to remove something from the land. While this concept has been used in relation to rights to take trees, turf and various minerals, it has also been applied to the taking of fish and other game from land.

One of the earlier cases on point is that of *Wickham v Hawker* [1835-42] All ER 1. The case was concerned with the nature of the right provided to an individual providing the "liberty of hawking, hunting, fishing, and fowling". The issue was whether this was a personal licence in which case it could only be exercised by the individual himself, or whether it was a right in the nature of a profit à prendre that could be exercised by servants. Parke B made the following observation at page 5:

> This being the rule of law on the subject, the point to be decided here is whether the liberty granted is a mere personal licence of pleasure, or a grant of a licence of profit – a profit à prendre. The liberty of fowling has been decided, in one case, to be a profit à prendre, and may be prescribed for as such (*Davies' Case* (1688) 3 Mod Rep 246). The liberty to hawk is one species of ancupium …, the taking of birds by hawks, and seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit: it is common of fishing.

The conclusion of the court was that this grant of the liberty of hawking, hunting, fishing, and fowling was a profit à prendre. This case was followed by the English Court of Appeal decision in *Fitzgerald v Firbank* [1895-9] All ER 445. This case concerned the nature of a grant of exclusive fishing rights in respect of a section of a river. The reason that the nature of the fishing rights was being considered was that the river had been polluted by the defendant discharging waste products from a gravel works into the river which had a significant detrimental effect on the fish in the river. The plaintiff brought an action for an injunction to stop further pollution and for damages for the pollution to date.

The Court of Appeal decided the case in favour of the plaintiff. The comments of the various members of the Court are useful in terms of identifying the nature of the fishing rights. Lindley LJ made the following comments at page 448:

> The right of fishing includes the right to take away fish unless the contrary is expressly stipulated. I have not the slightest doubt about that. Therefore, the plaintiffs have got a right of some sort as distinguished from a mere revocable licence.
>
> What is that? It is a good deal more than an easement; it is what is commonly called a profit à prendre. It is of such a nature that a person who enjoys that right has possessory rights that he can bring an action for trespass at common law for the infringement of those rights.…

Rigby LJ, in agreeing with Lindley LJ, went on to state at page 450:

> I hold that, on the incorporeal hereditament, there is a right of action against any person who disturbs them, either by trespass, or by nuisance, or in any other substantial manner.

This decision was followed by Farwell J in *Nicholls v Ely Beet Sugar Factory Ltd* [1931] All ER 154. That case concerned the ability of the plaintiff to bring an action of nuisance seeking an injunction to stop the defendant polluting a river in which the plaintiff held two fishing rights. The defendant sought to defend the action by arguing that the plaintiff's title was not sufficient title to maintain the action in nuisance. The Court held that the plaintiff's title, which was a profit à prendre, was sufficient to enable the plaintiff to bring an action in trespass or nuisance to protect that right.

The above cases demonstrate that a feature of a profit à prendre is the right to remove something from the land. The cases also show that the courts have applied this

concept to fishing rights. Therefore, on the basis that the fishing quota is a "fishing right", it is possible that the fishing quota is a profit à prendre.

An interest in land

So far, the cases have concluded that the grant of fishing rights is generally a profit à prendre as it includes the right not only to catch the fish but also to take them away. Another important feature of a profit à prendre is identified in the *Nicholls* case. This feature is that a profit à prendre is considered to be an interest in land. While not explicitly stated in the *Nicholls* case, the parties necessarily assume it, as the plaintiff was bringing an action of nuisance. A nuisance, according to the definition accepted by Goddard CJ in the English case of *Howard v Walker* [1947] 2 All ER 197 at page 199 is:

> Nuisance is the unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.

That a profit à prendre is an interest in land was addressed more directly in *Webber v Lee* (1882) 9 QBD 315. The case concerned the nature of a right that had been granted over certain land to shoot game and to take it away. The plaintiff was arguing that what had been granted was a mere licence, the defendant that the right was a profit à prendre.

The English Court of Appeal unanimously decided that the interest was a profit à prendre and an interest in land. While all three judges delivered separate judgments, they all made statements similar to that delivered by Jessel MR at page 318:

> The right to shoot game and to take it away when shot has been decided to be an interest in land and a profit à prendre.

One of the consequences of a profit à prendre being an interest in land is that a profit à prendre can only be created or granted by the owner of a sufficient estate or interest in the land. Hinde McMorland & Sim's *Land Law in New Zealand* (1997, Butterworths, Wellington) states at page 655:

> It is also necessary to ensure that the proposed grantor both has title to the product involved and has capacity as grantor if he or she owns an estate less than the fee simple.

Therefore, a profit à prendre is a right to take something off someone else's land. It has been held in a number of cases to describe certain fishing rights. Further, it is an interest in land. As it is an interest in land, the fishing rights if they were to constitute a profit à prendre would need to be granted by a person with a legal estate in the land concerned. However, the cases considered so far have only dealt with fishing rights granted over inland waterways, being lakes, rivers and streams. While some fishing quota is granted in respect of freshwater species, the majority of the fishing quota is granted in respect of species that live in the sea. It needs to be considered whether this makes any difference.

Can a profit à prendre exist in relation to the sea?

The principles identified in the cases considered regarding fishing rights and profits à prendre have been applied to inland waterways. The current situation also involves fishing quota granted over the open seas. There is an issue as to whether the same principles involving profits à prendre can be applied in this instance.

Some assistance on this issue can be found in the Privy Council decision in *Attorney General for the Province of British Columbia v Attorney General for the Dominion of Canada* [1914] AC 153. The case concerned the ability of the Government of British Columbia to grant various fishing rights. The Government of the Dominion had exclusive authority over the sea coast and inland fisheries, but the Government of British Columbia had exclusive authority over property and civil rights in the province. The case concerned an area known as the "railway belt", which included both non-tidal and tidal waters. The question was whether the granting of fishing rights over this area was in the domain of the Government of the Dominion or whether such rights were property rights properly in the domain of the Government of British Columbia.

The Privy Council acknowledged the distinction between tidal and non-tidal waters. Non-tidal waters are those such as lakes, rivers and other inland waterways, excluding those parts of rivers and other waterways that meet the sea and as such are tidal. Tidal waters include these areas where non-tidal waters meet tidal waters, at the mouths of streams and in estuaries, as well as the sea coast. The open seas appear to fall into a separate category.

The Privy Council held that in respect of non-tidal waters, the right to grant fishing rights is a property right and as such exists with the owner of the underlying land. It is a private property right. In the case of rivers this may well exist with private individuals, but in the case of lakes, the title to the underlying land is typically reserved to the Crown. On the facts of the case, this should have meant that the Government of British Columbia had exclusive authority to grant fishing rights. However, the Government of British Columbia had specifically granted ownership of the particular land in question back to the Government of the Dominion.

The railway belt also included tidal waters. The issue was whether the principles that applied to non-tidal waters could have equal application to tidal waters. The Privy Council concluded that the same principles did not apply. In respect of the tidal waters, there was an overriding public right of fishing in tidal waters, which was only subject to regulation by the Government of the Dominion. Viscount Haldane stated at pages 167 and 168:

> The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that title to a fishery arises from the right to the solum. A fishery may of course be severed from the solum, and then it becomes a profit à prendre in alieno solo and an incorporeal hereditament. The severance may be effected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription the fishing rights go with the property in the solum.
>
> The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognise it as giving to the owners of land on the foreshore or within an estuary or elsewhere where the tide flows and reflows a title to fish in the waters over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is prima facie in the public.

From these passages, it can be seen that the Privy Council accepted the general principle that fishing rights attach to the land under the water. These rights can be severed, at which point they become profits à prendre. The Privy Council noted that the authorities have treated this general principle as applying to both inland waterways as well as tidal waters. However, Viscount Haldane noted a further factor that could impact on the application of the principle to tidal waters. The factor is that there is an overriding public right to fish in tidal waters.

The Privy Council noted that the nature of the public right was "not easy to define". However, the public right was regarded as paramount, which led Viscount Haldane to conclude at page 173:

> So far as the waters are tidal the right of fishing in them is a public right subject only to regulation by the Dominion Parliament.

Therefore, while the general principle is accepted in respect of non-tidal or inland waterways, the Privy Council concluded that it does not apply in respect of tidal waters. The reason for this is that there is an overriding public right to fish in tidal waters. The Privy Council also reached the same conclusion in relation to the open seas. In specifically addressing fishing rights in waters below the mean low water mark and in the open seas, Viscount Haldane stated at page 173:

> Their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it.

The effect of this is that the Privy Council rejected the application of the profit à prendre concept in respect of fishing rights relating to tidal waters and the open seas. The basis for the rejection of the profit à prendre concept in relation to fishing rights in respect of tidal waters and the open seas is the existence of an overriding public right to fish in the sea. According to the Privy Council, this title is "paramount" and subject only to regulation by Parliament.

The existence of the overriding public right to fish in the sea was a sufficient basis for the Privy Council to decide the matter in the *British Columbia* case. However, it is noted that even if the public right had not existed, the Privy Council would not automatically have concluded that the fishing rights were profits à prendre. As a profit à prendre is an interest in land, the person granting the fishing rights needs to have a sufficient interest in the land before the fishing right can be a profit à prendre. Therefore, before the Privy Council could have concluded that the fishing rights were profits à prendre (in absence of the public right to fish), it would need to be established that the Crown owned the land under sea in respect of which the fishing rights were granted. The Privy Council regarded the issue as a difficult one, and one which they considered they did not need to answer. Viscount Haldane stated at page 174:

> But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low water mark to what is known as the three-mile limit because they are of the opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.

Therefore, the particular issue of whether the Crown owns the seabed appears to be a complex issue in English law. While the Privy Council did not reach a conclusion in respect of this matter, it seems clear that they considered it would have been relevant to a positive finding that the fishing rights were profits à prendre (although the Privy Council concluded that it was not a profit à prendre because of the overriding public right).

Application to fishing quota

In determining whether fishing quota might be in the nature of a profit à prendre, it is necessary to consider the factors established by the cases and then compare these with the fishing quota. The first characteristic of a profit à prendre is that it is a right to take something from land. The cases have held that this extends to taking fish from water that flows over land. Under the Fisheries Act 1983, fishing quota might have been argued to satisfy this requirement as being a right to take fish from water that flows over land. Under the Fisheries Act 1996, the position is less arguable. The introduction of the concept of an annual catch entitlement that is severable from the fishing quota perhaps indicates that the right to fish is one step removed from the fishing quota. However, given that the annual catch entitlement is generated by the fishing quota it is considered that fishing quota can still be regarded as ultimately giving rise to a right to take fish from water that flows over land.

The second point to note is that fishing quota is granted in relation to a number of different species. These include both freshwater species (found in internal waterways) as well as the deep sea species. It is considered that there is no express differentiation in the Fisheries Acts of the rights provided in relation to the different species. Accordingly, it is considered that any determination of the nature of the property rights obtained in relation to fishing quota has to apply equally to all quota across the various species.

Against this background, the Privy Council decision in the *British Columbia* case that an overriding public right to fish in the sea was inconsistent with the existence of a fishing right in the nature of a profit à prendre in relation to the seas poses a potential problem for the characterisation of fishing quota as a profit à prendre. The Privy Council considered that the public right was "paramount" and subject only to regulation by Parliament. The acknowledgement that this public right is subject to regulation by Parliament is important in the New Zealand context. It appears that Parliament in New Zealand has regulated the right to fish in the sea through the Fisheries Acts and associated legislation. While a public right to fish in the sea still appears to exist (with the right being limited as to the size and number of fish that can be caught), it seems clear that this is no longer an overriding public right to fish. The rights created under the quota management system now appear to be the paramount rights. The effect of this is that it is considered that primary concern of the Privy Council in the *British Columbia* case does not appear to be as relevant in a New Zealand context.

The final characteristic of a profit à prendre is that it is an interest in land. This means that the profit à prendre needs to have been created by a person with a legal interest in

the land. In this regard, problems may exist for fishing quota granted in respect of freshwater species. In relation to inland waterways, the owner of the adjacent land generally owns the land lying under the waterway where the waterway is contained on the land owned by the person, and to the midpoint where the waterway forms a border of the property. This principle is subject to certain exceptions where the Crown has asserted ownership of the underlying land – as may have occurred in the case of lakes and navigable rivers. Thus, the case for fishing quota being regarded as a profit à prendre encounters some difficulties in relation to fishing quota allocated in respect of freshwater species as it not clear whether the Crown would own all of the underlying land in question, from which it could grant an interest in land in the nature of a profit à prendre.

The situation is fraught with even more uncertainty in relation to the seabed and foreshore. There is some argument that section 7 of the Territorial Sea, Contiguous Zone, And Exclusive Economic Zone Act 1977 provides some assistance as to the ownership of the seabed. However, this only applies in respect of the "territorial sea" which extends 12 nautical miles from the coast of New Zealand. Fishing quota is granted in respect of quota management areas, which extend 200 nautical miles from the mean high water mark along the coast of New Zealand. Further, the effectiveness of this section against customary title was unanimously rejected by the Court of Appeal in *Ngati Apa and Others v Attorney-General and Others* [2003] NZCA 117 (19 June 2003). It is considered that the position is not improved by the "sovereign rights" conferred on New Zealand through Article 56 of the United Nations Convention on the Laws of the Sea. New Zealand did not become a signatory to the Convention until 19 July 1996, meaning that any fishing quota allocated between 1986 and 1996 could not have been granted by the Crown relying on the rights conferred under the Convention.

Accordingly, the issue of whether the Crown owns a sufficient interest in the land from which it could grant an interest in the nature of a profit à prendre is unclear. From this perspective, the approach of the Privy Council in the *British Columbia* case to leave the issue concerning the Crown ownership of the foreshore and seabed as unresolved has considerable merit.

There are further factors from which guidance can be obtained as to whether fishing quota can be regarded as a profit à prendre. When the Fisheries legislation is considered as a whole and in a wider statutory setting, it is considered that there are some other factors that support a conclusion that Parliament did not intend fishing quota to be a profit à prendre. An example is the Forestry Rights Registration Act 1983, where Parliament specifically refers to a forestry right being a profit à prendre. The absence of a similar provision in relation to fishing quota perhaps becomes more significant. A further example is the Personal Property Securities Act 1999 where fishing quota is specifically excluded from the ambit of that Act. While excluding fishing quota from an Act dealing with personal property might tend to support a conclusion that fishing quota is perhaps a profit à prendre, an interest in land, and not personal property, the method of exclusion suggests that Parliament did not exclude fishing quota on this basis. The exclusion provisions in section 23(e) of that Act contain general exclusions for interests in land, and a specific exclusion for fishing

quota. If fishing quota was regarded as a profit à prendre and an interest in land, there would have been no need for the specific exclusion.

The end result is that there are a number of difficulties with fishing quota being regarded as a profit à prendre. While there are a number of similarities between the characteristics of fishing quota and the characteristics of a profit à prendre, there are also a number of fundamental inconsistencies in the characteristics that indicate that fishing quota is not a profit à prendre. The effect of these conclusions on the nature of fishing quota leads to the further other possibility that fishing quota is a unique property right, with the rights and obligations in respect of the property determined from the statute creating the right (as alluded to earlier).

A unique property right

The decision in the *British Columbia* case was cited with approval by the Full High Court of Australia in the case of *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314. While the case concerned whether payments made by commercial fishermen for fishing licences were a "tax", the High Court made some useful observations regarding the nature of the Australian fishing licence system. The Court noted the similarities between the rights obtained under a commercial licence and the rights obtained under a profit à prendre. However, the Court ultimately concluded that the fishing rights were not profits à prendre, but instead were statutory rights created under the particular statutory regime. Mason CJ, Deane and Gaudron JJ stated at page 325:

> The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. This privilege can be compared to a profit à prendre. In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all context.

Conclusion on the nature of fishing quota

From the above analysis, it is concluded that fishing quota is not a usufruct right nor is it the sale of goods coupled with a licence. It is noted, however, that the rights granted under the fishing quota are similar to the rights that arise under a profit à prendre. The fishing quota generates an annual catch entitlement which provides the right to take a certain amount of a certain item (being the species of fish) from a certain area. These are the basic characteristics of a profit à prendre. While the rights seem similar, the courts have held that a profit à prendre cannot exist in respect of tidal waters and the open seas, and further that only the owner of an interest in land can create a profit à prendre. As the Crown ownership of the land under the water in respect of which fishing quota is granted is not clear and for the various other reasons considered above, it is concluded that fishing quota is not a profit à prendre.

The effect of this is that it is concluded that fishing quota cannot be categorised as a usufruct right, the sale of goods coupled with a licence, or a profit à prendre. Fishing quota has to be regarded as a unique property right, with its characteristics determined from the provisions of the fishing legislation as set out by Justice Tipping in the *New Zealand Fishing Industry Association* decision referred to above. This is consistent

with the Australian decision in *Harper*. It could also be seen to be consistent with the position set out by the Law Commission referred to above, where the rights are "akin" to a profit à prendre, but not entirely the same. It also reflects the statement made by Justice Baragwanath in *Antons Trawling Co Ltd*.

It is noted that the general characteristics of individual transferable quota were set out in section 27 of the Fisheries Act 1996, but that section 27 has since been repealed. It is considered that section 27 was repealed as being redundant, in that it merely summarised the characteristics that are found in other sections of the Fisheries Act 1996.

Marine farming authorisations

There are three different statutory bases on which a marine farming authorisation may have been granted. Prior to 1 October 1991, the relevant legislation was the Marine Farming Act 1971. Under this Act, the Ministry of Fisheries was able to grant marine farm leases and marine farming licences.

On 1 October 1991, the Resource Management Act 1991 came into effect. This Act set out a new procedure for obtaining a marine farming authorisation. The Resource Management Act also repealed the sections of the Marine Farming Act 1971, which enabled marine farm leases and licences to be granted. The new process under the Resource Management Act 1991 involves two stages.

The first stage involves obtaining a resource consent in the form of a coastal permit, or, if the proposed farming activity is already permitted by the relevant Regional Plan, a certificate of compliance. Once one of these documents has been obtained, an application can then be made to the Ministry of Fisheries for a marine farming permit. These are issued under section 67J of the Fisheries Act 1983.

The effect of these different statutory regimes is that there are three different types of statutory approval that might be involved in the sale of a marine farming authorisation. These are:

- A marine farming lease granted under the Marine Farming Act 1971;
- A marine farming licence granted under the Marine Farming Act 1971; or
- A marine farming permit granted under the Fisheries Act 1983 in conjunction with a resource consent in the form of a coastal permit or a certificate of compliance granted under the Resource Management Act 1991.

Marine farming leases

The characteristics of marine farming leases are set out in section 11 of the Marine Farming Act. On the basis of section 11(1)(a) of that Act, it appears that a lease granted under this section would constitute a leasehold estate and thus be an interest in land.

However, as the actual terms of any lease as set out in a marine farming lease agreement would govern the nature of the rights acquired under the lease, these terms of the marine farming lease agreement would need to be considered to ensure that they were consistent with the grant of a leasehold estate. For instance, the lease would need to define a particular area of the seabed. Additionally, the terms of the lease would need to be consistent with the lessee obtaining rights in respect of the seabed. While it is likely that most leases would specify a particular area, as it appears that there is no "standard form" lease agreement it is possible that some of the leases granted might exclude rights in respect of the seabed. Such leases may not constitute real property.

In order to ensure that the correct position is provided in the ruling, it only applies to marine farming leases that satisfy the following conditions:

- The marine farming lease defines the area subject to the lease by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan; and
- The legal effect of the marine farming lease is that the seabed is not excluded from the area leased.

Marine farming licences

Similar concerns arise in respect of marine farming licences as with marine farming leases. Section 11(3) refers to a property right that can be passed onto a person's estate and is able to be assigned. While the provision is consistent with a licence being in the nature of a contractual right in accordance with the general law concept of a licence, it is also possible that the terms of a licence granted under this provision might give rise to exclusive rights over a defined area of land and so constitute an interest in land – possibly a leasehold interest. Once again, this appears to be a matter that can only be determined by considering the specific terms of the particular marine farming licence in question.

In order to ensure that the correct position is provided in the ruling, it only applies to marine farming licences that satisfy the following conditions:

- The marine farming licence defines the area subject to the licence by means of a legal description giving an area in hectares (or equivalent) and its position on a survey plan; and
- The legal effect of the marine farming licence is that the seabed is not excluded from the area licensed.

Transition to the Resource Management Act

Section 11 of the Marine Farming Act was repealed as from 1 October 1991 by section 362 of the Resource Management Act 1991. However, a savings provision is contained in section 426 of the Resource Management Act. The effect of this provision is to preserve the pre-existing rights relating to both marine farming leases

and marine farming licences despite the repeal of section 11 of the Marine Farming Act by the Resource Management Act.

Therefore, both marine farming leases and marine farming licences granted under the Marine Farming Act continue in force under the Resource Management Act with no alteration of the rights and obligations under which they were granted.

New marine farming authorisations

New marine farming authorisations are granted under the Resource Management Act and the Fisheries Act 1983. The first step in the process is to apply for a resource consent from the Local or Regional Council. Section 87 of the Resource Management Act defines a resource consent granted in relation to a coastal marine area to be a "coastal permit". Both these terms are relevant as some provisions of the Resource Management Act relate to coastal permits and some relate to the more general resource consent.

If the Council has already approved the proposed marine farming activity in the area, the applicant will likely only require a Certificate of Compliance rather than a resource consent. Once a person has obtained either a coastal permit or a certificate of compliance, the person also requires a marine farming permit, which is issued under section 67J of the Fisheries Act 1983.

The treatment for GST purposes

The new marine farming authorisations need to be considered as to how they will be treated under the GST Act because they involve two separate items – a resource consent or certificate of compliance, and a marine farming permit. This matter needs to be considered as it needs to be determined whether there is a single supply of a "marine farming authorisation" or whether there are two separate supplies, one of the resource consent or certificate of compliance and another of the marine farming permit.

This general issue is a difficult one, and has not been fully dealt with by the courts. However, there have been a number of cases both in New Zealand and overseas which have provided some guidance. Some of the New Zealand cases to consider the issue of single versus multiple supplies are the High Court decision in *CIR v Smiths City Group Ltd* (1992) 14 NZTC 9,140; the High Court decision in *Coveney v CIR* (1994) 16 NZTC 11,328; and the Court of Appeal decision in *CIR v Coveney* (1995) 17 NZTC 12,193.

There have been a number of UK decisions on this issue as well, including *British Airways plc v Customs & Excise Commissioners* [1990] STC 643; *Customs and Excise Commissioners v United Biscuits (UK) Ltd* [1992] STC 325; *Virgin Atlantic Airways Limited v Customs & Excise Commissioners* [1995] STC 341; and *Customs & Excise Commissioners v British Telecommunications* [1998] STC 544.

From these cases a number of factors has emerged as being relevant to determining whether there is a single supply or multiple supplies. These factors can be summarised as follows:

- The degree to which the services alleged to constitute a single supply are inter-connected, the extent of the interdependence and intertwining, and whether each is an integral part or component of a composite whole.
- The mere separate itemisation of things in a contract does not make them separable if they are necessary components of the entire transaction.
- Whether the services are rendered under a single contract, or for a single undivided consideration, are matters to be considered, but they are not conclusive.
- If it would not be possible to purchase each of the various elements separately and still end up with a useful article or service, the supply is a compound supply that cannot be split up for tax purposes.

Application to the facts

In determining the degree of interdependence between the resource consent and the marine farming permit, section 67J(2) of the Fisheries Act 1983 provides some assistance. It states that a marine farming permit shall only be issued to a person who holds a coastal permit for the relevant area, or to a person who holds a certificate of compliance in respect of the relevant area.

Therefore, this section illustrates that there is a high level of interdependence between the resource consent and the marine farming permit. This relationship is also reflected in section 67M of the Fisheries Act 1983, the section relating to the transfer of the marine farming permit. This section implies that it is only possible to transfer a marine farming permit in conjunction with the resource consent or certificate of compliance to which it relates. It is understood that as a matter of practice, both the coastal permit and the marine farming permit would be transferred when a marine farm is transferred.

In terms of the case law discussed above, this relationship between the marine farming permit and the resource consent should be sufficient to conclude that they are sufficiently interconnected to be regarded as a single supply rather than as separate supplies. This is on the basis that one of the permits without the other is essentially useless.

Therefore, it appears that most transfers of marine farming activities will involve the supply of both the marine farming permit and the coastal permit or certificate of compliance. It is concluded that when these items are supplied together as part of the same supply, they should be treated as a single supply for GST purposes. The Ruling only applies to supplies of this nature.

Inland Revenue
Te Tari Taake

Legislation

Having established the nature of both fishing quota and the various types of marine farming authorisations, the next issue involves determining the relevant GST legislation. The section for obtaining an input tax credit is section 20. Section 20(2) outlines the documentary evidence that needs to be held in order to obtain an input tax credit, and section 20(3) provides the circumstances in which a claim will be available depending on the basis of GST registration.

20(1) In respect of each taxable period every registered person shall calculate the amount of tax payable by that registered person in accordance with the provisions of this section.

20(2) Notwithstanding any other provision in this Act, no deduction of input tax shall be made in respect of a supply, unless -

(a) A tax invoice or debit note or credit note, in relation to that supply, has been provided in accordance with sections 24 and 25 of this Act and is held by the registered person making that deduction at the time that any return in respect of that supply is furnished; or

(b) A tax invoice is not required to be issued pursuant to section 24(5) or section 24(6) of this Act, or a debit note or credit note is not required to be issued pursuant to section 25 of this Act; or

(c) Sufficient records are maintained as required pursuant to section 24(7) of this Act where the supply is a supply of secondhand goods to which that section relates:

Provided that where a tax invoice or debit note or credit note in relation to that supply has been provided in accordance with this Act, the Commissioner may determine that no deduction for input tax in relation to that supply shall be made unless that tax invoice or debit note or credit note is retained in accordance with the provisions of section 75 of this Act.

20(3) Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period -

(a) In the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19 of this Act, the amount of input tax -

(i) In relation to the supply of goods and services (not being a supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies), made to that registered person during that taxable period:

(ia) In relation to the supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:

(ii) Invoiced or paid, whichever is the earlier, pursuant to section 12 of this Act during that taxable period:

(iii) Calculated in accordance with section 25(2)(b) or section 25(5) or section 26 of this Act; and

(b) In the case of a registered person who is required to account for tax payable on a payments basis or a hybrid basis pursuant to section 19 of this Act, the amount of input tax -

(i) In relation to the supply of goods and services made to that registered person, being a supply of goods and services which is deemed to take place pursuant to section 9(1) or section 9(3)(a) or section 9(3)(aa) or section 9(6) of this Act, to the extent that a payment in respect of that supply has been made during the taxable period:

(ii) Paid pursuant to section 12 of this Act during that taxable period:

(iii) In relation to the supply of goods and services made during that taxable period to that registered person, not being a supply of goods and services to which subparagraph (i) of this paragraph applies:

(iv) Calculated in accordance with section 25(2)(b) or section 25(5) of this Act, to the extent that a payment has been made in respect of that amount, or section 26 of this Act; and

Under section 20(3), a registered person may deduct from the amount of output tax payable, an amount of "input tax" in accordance with paragraph (a) or (b). "Input tax" is defined in section 3A of the Act. It provides:

3A(1) Input tax, in relation to a registered person, means -

(a) tax charged under section 8(1) on the supply of goods and services made to that person, being goods and services acquired for the principal purpose of making taxable supplies:

(b) tax levied under section 12(1) of this Act on goods entered for home consumption under the Customs and Excise Act 1996 by that person, being goods applied or acquired for the principal purpose of making taxable supplies:

(c) an amount determined under subsection (3) after applying subsection (2).

3A(2) In the case of a supply by way of sale to a registered person of secondhand goods situated in New Zealand, the amount of input tax is determined under subsection (3) if -

(a) the supply is not a taxable supply; and

(b) the goods are not supplied by a supplier who -

(i) is not resident in New Zealand; and

(ii) has previously supplied the goods to a registered person who has entered them for home consumption under the Customs and Excise Act 1996; and

(c) the goods are acquired for the principal purpose of making taxable supplies.

3A(3) The amount of input tax is -

(a) if the supplier and the recipient are associated persons, the lesser of -

(i) the tax included in the original cost of the goods to the supplier; and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(b) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(7A), the lesser of -

(i) the tax fraction of the open market value of the deemed supply under section 5(3); and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(c) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(8), the lesser of -

(i) the tax fraction of the valuation under section 10(8) of the deemed supply under section 5(3); and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(d) if the supplier and the recipient are not associated persons and the supply is not the only matter to which the consideration relates, the lesser of -

(i) the tax fraction of the purchase price; and

(ii) the tax fraction of the open market value of the supply; or

(e) in all other cases, the tax fraction of the consideration in money for the supply.

3A(4) For the purpose of subsection (1)(b), applied does not include -

(a) the delivery or the arranging of the delivery of the goods to a person in New Zealand; or

(b) the making of the delivery of the goods to a person in New Zealand more easily achieved.

3A(5) For the purpose of subsection (3), tax fraction means the tax fraction that applies at the time of supply.

Section 3A(1)(c) of the definition of "input tax" is the relevant provision. It refers to the calculation of input tax through subsections (2) and (3) when the supply is one of "secondhand goods". "Secondhand goods" is defined in section 2:

"Secondhand goods" does not include -

(a) Secondhand goods consisting of any fine metal; or

(b) Secondhand goods which are, or to the extent to which they are, manufactured or made from gold, silver, platinum, or any other substance which, if it were of the required fineness, would be fine metal: or

(c) Livestock:

Section 2 also provides a definition of the term "goods":

"Goods" means all kinds of personal or real property; but does not include choses in action or money:

Application of the legislation

The starting place in order to determine whether a GST input tax credit is available to a registered person is section 20(3). The section provides different options depending on the method of registration adopted by the registered person. For a person registered on an invoice basis, the relevant paragraph is (a)(ia), and for a person using the payments or hybrid basis of registration the relevant paragraph is (b)(i). However, irrespective of the basis of registration, the Act provides very similar tests for claiming an input tax credit in respect of supplies of secondhand goods. The claim is limited to the amount of "input tax" in relation to a supply of goods or services to that registered person, "to the extent that a payment in respect of that supply has been made during the taxable period".

The relevant definition of "input tax" is contained in section 3A(1)(c) of the Act. In determining the input tax under paragraph (c) it is necessary to consider subsections (2) and (3). Leaving aside the associated persons provisions (which are not relevant to the current rulings), there are a number of requirements that need to be satisfied under the two provisions. These are that:

(i) there be a supply by way of sale;
(ii) the supply not be a taxable supply;
(iii) the supply be made to a registered person;
(iv) the supply be of secondhand goods;
(v) the secondhand goods be situated in New Zealand at the time of supply; and
(vi) the secondhand goods are acquired for the principal purpose of making taxable supplies.

Most of these requirements are specified in the rulings to ensure that they will be satisfied in every instance in which the ruling applies. However, requirement 4, that the supply be of secondhand goods, is something that needs to be considered in detail as it cannot be specified in the rulings. Therefore, it is necessary to determine whether or not the fishing quota and mussel licences can be secondhand goods.

"Secondhand goods"

The definition of "secondhand goods" does not attempt to define the term, but instead prescribes a list of things that are not included in the meaning of "secondhand goods".

Fishing quota and marine farming authorisations are not excluded under the definition. As the definition gives little indication as to what is included in the term, regard needs to be had to the ordinary meaning of “secondhand goods”.

The first observation that can be made is that “secondhand goods” is a composite term. It relates to items that are first of all “goods”, and then the subset of those goods that can be described as “secondhand”.

“Goods”

In considering the first question as to what is comprised in the term “goods”, assistance can be found in section 2. Goods “means all kinds of personal or real property; but does not include choses in action or money”. “Goods” is defined very widely in the initial part of the definition, and then subjected to two specific exclusions. It includes all kinds of real and personal property, but excludes choses in action and money. Therefore, it is necessary to establish whether fishing quota and marine farming authorisations are real or personal property and then secondly, whether they are money or choses in action.

“Property”

Before considering the “real” or “personal” aspects of property, the nature of “property” should first be established. The term “property” is not defined in the Act. *Halsbury's Laws of England* (4th ed, Butterworths, London, 1991) Volume 44, “Stamp Duty”, para 1,032, provides the following description of “property”:

> Property is that which belongs to a person exclusively of others, and can be the subject of bargain and sale. It includes goodwill, trademarks, licence to use a patent, book debts, options to purchase and other rights under a contract. A revocable licence is not property. An owner of unworked minerals who gives an undertaking to the service owner not to work them does not thereby convey property, and a grant of a purported exclusive right to carry on a certain business in an area when the grantor has no such right is not a conveyance of property.

A similar view is taken in Gray’s *Law of Personal Property* (5th ed, Butterworths, 1968) at page 1:

> The term “property” as used in the law of New Zealand and other common-law countries has a dual meaning. It may signify the title to or rights to ownership in goods or other property; and when s. 20 of the Sale of Goods Act 1908 provides by rule 1 that in a contract for the sale of ascertained goods in a deliverable state the “property” in the goods passes at the time the contract is made, “property” here means the title to or ownership of the goods in question. The word “property” may in addition signify the thing owned, that over which title is exercised; in this sense, of course, it includes tangible goods such as a book or a table, but the word covers also incorporeal forms of property such as estates in land (an estate being an aggregate of rights exercisable over or in respect of land) or the contractual rights embodied in a cheque or an insurance policy.

From this it can be seen that the term “property” is used to describe a wide range of things, both tangible and intangible. Its fundamental characteristics seem to be that it is capable of being owned, and that the rights of ownership are capable of being transferred (see, for instance the House of Lords decision in *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472). “Property” needs to be able to be defined and identified, and have a degree of permanence or stability. Further, it needs to able to be transferred.

"Real" and "personal" property

It is a well-established principle of English law that all "property" can be categorised as either real property or personal property. As Gray explains at page 1:

> "The distinction between real property (or realty) and personal property (personalty) is procedural in origin and is derived from the ancient forms of action in English law. In the twelfth century, the possession of freehold land was recoverable by certain actions which were called "real" actions; at this date the remedy for dispossession of all other kinds of property was, effectively, damages only, and actions for damages in these circumstances were called "personal" actions.

The existence of only two classes of property has its origin in these two types of action. The acknowledgement that property is either real or personal is contained in the first sentence of the following quote from Gray (at page 2):

> It is not sufficient, however, to say simply without qualification that land is realty and all other property is personalty. Real property includes, besides the freehold estates and interests in land, things which are said to "savour of the realty".

The effect of there only being two classes of property, one being real and the other personal, is that a finding that something is property necessarily means that it will be either real or personal property. There is no third category. Therefore, in terms of the definition of "goods", if the item is "property", then it will be either real or personal property.

A question arises as to whether it is necessary to determine whether the fishing quota is real or personal property. The section includes both types of property and as long as it is either one or the other there should be no need to make a final determination. While this is true, attempting to classify the property as either real or personal assists in determining whether or not the item is a chose in action. The reason for this is that the chose in action – chose in possession distinction appears to be limited to personal property.

The exclusion for "choses in action"

The term "chose in action" is used to describe various types of personal property. It is not a term that is applied to real property. This observation was made in the English case of *Torkington v Magee* [1900-3] All ER 991 where Channell J defined the term at page 994:

> Chose in action is a known legal expression used to describe all ***personal*** rights of property which can only be claimed or enforced by action, and not by taking physical possession (emphasis added).

Therefore, a finding that an item is real property means that the exclusion for choses in action will not be relevant. However, a finding that the item is personal property means that the exclusion for choses in action could be relevant. In determining the characteristics of a chose in action, the above quote from *Torkington v Magee* is referred to by a number of commentators as providing a useful working definition.

In a New Zealand context, the Court of Appeal considered the issue in the case of *Re Marshall (Deceased), CIR v Public Trustee* [1965] NZLR 851. The case considered a situation involving a right to demand interest on a loan, and whether this was a chose

in action for the purposes of the Death Duties Act 1921. In considering the issue of "chose in action", McCarthy J stated at page 860:

> The right was property, for property in its wider sense includes all things of value. It was personal property and "all personal things are either in possession or in action. The law knows no *tertium quid* between the two". This celebrated statement of Fry LJ in *Colonial Bank v Whinney* (1885) 30 Ch D 261 at p 285, is familiar to every lawyer. It received, I think the express, but certainly the implied approval of the House of Lords on appeal ((1886) 11 AC 426).

Justice McCarthy provides further guidance on the characteristics of choses in action at page 861:

> That is so because if the right to give the notice and the corresponding duty to accept it had been denied, there was no possible method of enforcement other than going to law and thereby **securing not the physical possession of the thing but the advantages of its ownership.** This, says Mr Cyprian Williams in his article in (1895) 11 LQR 223, is the true test, and I agree.
>
> …
>
> The characteristics that **one cannot take the right into physical possession** (even after judgment in one's favour) and that it **can only be vindicated by Court action**, are the qualifying features of a chose in action and have become the bases of most modern definitions (emphasis added).

The fundamental characteristic of a chose in action is the same in both authorities. Both authorities refer to the fact that in respect of a chose in action, one cannot take the right into physical possession. Being able to take the thing into possession is a characteristic of a chose in possession. Even if court action is taken to enforce the chose in action, the result may well be that the advantages of ownership are secured rather than actual physical possession of the thing.

"Secondhand"

There have been few cases on the meaning of the term "secondhand goods" in the GST context. *Case N16* (1991) 13 NZTC 3,142 was a decision of Barber DJ where he had to consider whether deer velvet purchased direct from producers by means of commission agents were secondhand goods when they were purchased by a distributor and exporter of deer velvet.

His Honour concluded that they were not secondhand goods. Judge Barber accepted that the two key concepts underlying whether something is secondhand are previous ownership and previous use. He stated at page 3,148:

> I agree with counsel that the concept of secondhand relates to pre-ownership or pre-use. I agree … that the emphasis is on pre-use. I consider that there is quite some commonsense flexibility in ascertaining whether a good is still new or has become secondhand. I do not regard second ownership as necessarily rendering an item secondhand. Many goods pass from manufacturer to wholesaler or retailer to customer or consumer (with other levels of distributors sometimes also involved), and yet are not regarded as secondhand at the consumer purchaser level, even though the item has been used as stock-in-trade at the various distribution levels. The good is not usually regarded as secondhand until it has been used for its intrinsic purpose.

The TRA felt that previous ownership of goods is not in itself necessarily sufficient to meet the test of secondhand in the Act. Usually a previous owner must have also used the goods for their intrinsic purpose.

Subsequently the Court of Appeal considered the meaning of secondhand in *LR McLean & Co Ltd v CIR* (1994) 16 NZTC 11,211. McKay J expressly referred to and agreed with Judge Barber's comments in *Case N16* as to the ordinary meaning of the term "secondhand". Justice Richardson (as he then was) stated at page 11,213:

> The short point of the appeal is whether wool purchased by registered persons from unregistered persons is secondhand goods for the purposes of the 1985 Act. If the expression secondhand goods is given its ordinary and natural meaning it is common ground that it is not within that description. In ordinary usage the expression refers to goods which have been used, although depending on the context it may apply to goods which are no longer new or even in some contexts goods which have simply been previously owned. Mr Harley for the appellants did not seek to draw any distinction based on "use" of the wool by the sellers. The argument for the appellants is that to accord with the scheme and purpose of the legislation the expression has to be given the meaning of any goods which have been purchased by a registered person.

The judgments of the Court of Appeal state that the term "secondhand" should be given its ordinary or normal meaning. While "secondhand" can mean either pre-owned or pre-used, the Court concluded that it is not sufficient that the goods were previously owned. If an item were "secondhand" simply through being previously owned, the term "secondhand" would be deprived of any practical meaning according to Justice Richardson. Therefore, the Court of Appeal concluded that the more relevant factor is whether the goods have been previously used.

The effect of this is that the courts have not extended the meaning of the term "secondhand goods" to goods that have been previously owned but not previously used for their intrinsic purpose.

Application to fishing quota

Is fishing quota "property"?

When these concepts are applied to fishing quota, it seems that fishing quota would constitute property. Fishing quota is definable and identifiable through being granted under a statutory regime. It is permanent or stable in nature as it is issued in perpetuity. Fishing quota is capable of being owned and there are specific legislative provisions in the Fisheries Act 1996 dealing with the ability of the fishing quota to be transferred. On this basis, it can be accepted that fishing quota is "property".

Is fishing quota real or personal property?

The next issue is whether fishing quota is real or personal property. The characteristics of fishing quota are determined from considering the legislation under which it is created. Under section 66 of the Fisheries Act 1996 (previously section 28O of the Fisheries Act 1983) the holders of individual transferable quota obtain a right to receive an annual catch entitlement for the species that is the subject of the quota. While the annual catch entitlement is defined by reference to a "quota

management area", there is nothing in either of the Fisheries Acts to suggest that it was intended that fishing quota gives rise to an interest in land. Therefore, based on this and the earlier conclusion that fishing quota is not a profit à prendre, it is considered that fishing quota is neither an interest in land nor real property.

As fishing quota is "property" and property is either "real" or "personal", the conclusion that fishing quota is not real property leads also to the conclusion that it must be personal property. As fishing quota is personal property, it will fall within the words "all kinds of real and personal property" in the definition of "goods" in the Act. Therefore, it is considered that this first part of the definition is satisfied. The next question is whether either of the two exclusions to the definition applies.

Is fishing quota a "chose in action"?

On the issue of whether fishing quota is a chose in action, it is established by the cases that the fundamental characteristic of a chose in action is that one cannot take the right into physical possession.

Fishing quota appears to possess this characteristic. The right to catch fish cannot be taken into possession. While an argument could be made that a person could simply catch the fish under the quota, this seems to confuse the fish (which could be taken into possession) with the right to catch those fish (which, it is considered, cannot be taken into possession).

The end result is that it is concluded that fishing quota is a chose in action. While fishing quota is capable of satisfying the first part of the definition of "goods", being a form of personal property, it is then excluded from the definition of "goods" by reason that it is a chose in action. The effect of this is that fishing quota cannot be regarded as being "goods" for the purposes of the GST Act.

Given that it is concluded that fishing quota is not "goods", there is no need to consider the further issue of whether the fishing quota could be regarded as being "secondhand". Therefore, as it is concluded that fishing quota is not "goods", it is also concluded that fishing quota cannot be "secondhand goods".

Application to marine farming authorisations

Are marine farming authorisations "goods"?

This question needs to be addressed in respect of the three types of marine farming authorisations:

- The old marine farming leases;
- The old marine farming licences; and
- The new combination resource consent and marine farming permit.

Marine farming leases

It is accepted that marine farming leases are property. The marine farming lease is definable, has a degree of permanence (being the term of the lease) and is capable of being transferred. This means that marine farming leases are property for the first part of the definition.

However, in terms of whether marine farming leases are real or personal property, it is not certain that all marine farming leases would give rise to a leasehold estate. To the extent that a marine farming lease is a leasehold estate, it will be real property. If the particular marine farming lease does not give rise to a leasehold estate, it will then constitute personal property.

An issue exists as to whether marine farming leases might be excluded from being goods on the basis that they are choses in action. As noted above in relation to fishing quota, because choses in action are a subset of personal property, this will only be relevant if it is determined that the particular marine farming lease is not a leasehold estate (and thus not real property). If the marine farming lease is real property, then it will be "goods" for the purposes of the GST Act.

For those marine farming leases that are not real property and are thus personal property, it needs to be determined whether they would be choses in action. The key distinguishing characteristic between choses in action and choses in possession, is the ability of the item to be "taken into possession". Marine farming leases are like fishing quota in this regard in that they do not have a physical aspect to their nature. They encompass a number of rights, but these rights cannot be taken into possession. The only way to enforce these rights is to sue to enforce them. The effect of this is the conclusion that those marine farming leases that are not real property would be choses in action. This means that if a marine farming lease does not give rise to a leasehold estate it will be a chose in action and excluded from the definition of "goods" for the purposes of the GST Act.

For those marine farming leases that constitute real property and are "goods", the further issue of whether they are "secondhand" so as to be "secondhand goods" needs to be considered. The marine farming leases being considered are interests in land, and it is settled on the basis of the Court of Appeal decision in *Coveney* that land can be secondhand goods. The only other issue to consider is the "use" issue from cases *LR McLean* and *Case N16*.

The intrinsic purpose of a marine farming lease is to farm the particular species specified in the lease. If a farming operation has been carried out pursuant to the lease, then the conclusion appears inescapable that the lease has been used for its intrinsic purpose. However, situations could arise in respect of marine farming leases where a person never actually exercises the rights under the lease and simply sells it without ever having attempted to farm the particular aquatic life in question. In such a case, an issue exists as to whether the lease has been used for its intrinsic purpose. On the basis of the case law, it appears that it has not been used for its intrinsic purpose.

As this is a question of fact to be determined on a case by case basis, the Ruling only applies to marine farming leases that have been used for their intrinsic purposes, namely used to farm the species of fish or marine vegetation specified in the lease.

Marine farming licences

Under section 11(3) of the Marine Farming Act, it seems clear that marine farming licences are property. The licences are defined in that Act, they have a degree of permanence (being the term of the licence) and are capable of being transferred. Therefore, it is concluded that marine farming licences are property.

The next issue is whether marine farming licences are real or personal property. The nature of a marine farming licence is not entirely clear from the Marine Farming Act. Section 11(3) of the Marine Farming Act provides that the right received under a marine farming licence is "the exclusive right during the currency of the licence to farm within the licensed area the species of fish or marine vegetation specified in the licence". It seems possible that the rights created under this provision could constitute an interest in land depending on the particular terms of any given licence. If the licence is defined by reference to a particular area of land and the licence provides the exclusive right to farm this area, it is possible that an interest in land (being a leasehold interest) would have been created despite the use of the term "licence".

On this basis, it is concluded that some marine farming licences may constitute an interest in land and will thus be real property. As it has been concluded that marine farming licences are "property", those licences that are not real property will be personal property.

The next matter to be considered is whether the exclusion for choses in action in the definition of "goods" applies. This issue will only be relevant to those licences that are personal property.

The key characteristic of a chose in action is that it cannot be taken into possession. It is a right that can only be enforced through court action. In respect of those marine farming licences that are personal property, it does not seem possible to take the bundle of rights that constitute the marine farming licences into possession. If the rights are not real property, the licence will not provide an exclusive right to "possess" the particular area. The marine farming licence will provide for the exclusive right of being able to farm in the particular area, but it does not appear to provide the right to exclude others from the area. Therefore, it seems that the only way to enforce the right would be to commence legal proceedings.

On this basis, it appears as if the marine farming licences that are personal property would more properly be regarded as choses in action rather than choses in possession. The result of this is that these marine farming licences are excluded from the definition of "goods" for GST purposes. However, the marine farming licences that are real property are not subject to the exclusion for choses in action, and thus will constitute "goods" for the purposes of the Act.

For those marine farming licences that are real property, the next question is whether these "goods" are "secondhand" so as to qualify for the secondhand goods input tax credit under the GST Act. The marine farming licences being considered are interests in land, and it is settled on the basis of the Court of Appeal decision in *Coveney* that land can be secondhand goods.

In terms of the "use" issue from cases *LR McLean* and *Case N16*, the same conclusion that applied to marine farming leases applies to marine farming licences. Whether the marine farming licence has been used for its intrinsic purpose is a question of fact to be determined on a case by case basis. For this reason, the Ruling only applies to marine farming licences that have been used for their intrinsic purposes, namely used to farm the species of fish or marine vegetation specified in the licence.

Resource consents and marine farming permits

The definition of "goods" requires that the item concerned be either real or personal property. It has been concluded that the GST Act will regard the supply of a resource consent or certificate of compliance in conjunction with a marine farming permit as a single supply. The nature of the property comprised in this supply needs to be considered.

The nature of a resource consent and certificate of compliance

Section 139(6) deems a certificate of compliance to be a resource consent with the result that the provisions of the Resource Management Act are to apply accordingly. Being a "resource consent" means that the rights attaching to the resource consent are governed by section 122 of the Resource Management Act. Section 122 states that "a resource consent is neither real nor personal property".

This statement is interesting. It is well established that all property is either real or personal property. On this basis, the only sensible interpretation which can be placed on this provision is that Parliament did not want all of the common law and other rights which would automatically attach to property of this nature to attach to resource consents. Parliament must have wanted to regulate the rights that attach to a resource consent. This is consistent with the rest of the section, which goes on to deal with the characteristics of resource consents for the purposes of other legislation. Unfortunately, there is no statement regarding the revenue Acts. The issue, therefore, is whether the statement in section 122 of the Resource Management Act applies to the GST Act.

Not real nor personal property

In determining whether or not the statement in the Resource Management Act 1991 impacts on the classification of a resource consent under the GST Act, there are a number of observations which can be made.

The first observation is that the statement in section 122 is not a standard definition. It is not contained in section 2 of the Resource Management Act along with all the

other definitions that are prefaced with the words "for the purposes of this Act". Therefore, Parliament may well have intended section 122 to have wider application than simply the Resource Management Act.

A second point can be derived from the wording of section 122 itself. After making the initial statement, the section goes on to address a number of specific Acts and circumstances where the resource consents are to be regarded as having the characteristics of personal property. The GST Act is not one of those situations.

This seems a clear indication from Parliament that the opening statement was intended to apply to the Acts that are dealt with in the section. To take the Personal Property Securities Act 1999 as an example, it seems from the plain wording of the section that Parliament intended that the opening words of the section would have meant that resource consents were not real or personal for the purposes of that Act. This was why Parliament inserted subsection (4) to make it clear that for the purposes of that Act, it was appropriate for a resource consent to be regarded as goods within the meaning of that Act. This does not make a resource consent goods or personal property for other purposes though.

On this basis, it seems that the statement in section 122 would apply for the purposes of the GST Act also. By not making a specific exception for the GST Act, it is only possible to assume that Parliament were content with the initial statement applying to the GST Act.

The third observation, which follows from the second, is the intention of the section that is apparent from the words used. By making the statement that a resource consent is neither real nor personal property, Parliament has created a legal fiction. A resource consent has the general characteristics of property, and the law only knows two categorisations of that property – real and personal. Therefore, in discerning the intention of Parliament in making this statement, the most logical intention is that Parliament did not want the natural common law rights to attach to a resource consent which would attach as a matter of course if the resource consent were either real or personal property.

The consequences of section 122 of the Resource Management Act then need to be applied to the definition of "goods" in the GST Act. "Goods" means "all kinds of personal or real property …". It has been established that resource consents and certificates of compliance are deemed not to be "personal or real property", and that the deeming provision operates for purposes outside the Resource Management Act and so affects the GST Act as well. This means that resource consents and certificates of compliance do not constitute "goods" for the purposes of the GST Act as they are not personal or real property.

Effect of the marine farming permit

There is one further matter to consider, and that is the effect that the marine farming permit might have on any ultimate conclusion regarding the combined property right, being the resource consent or certificate of compliance and a marine farming permit. It has already been concluded that for GST purposes, the supply of these items should

be treated as a single supply. It has also been noted that the issuing of a marine farming permit is dependent on having a resource consent or certificate of compliance. Based on these conclusions, it is possible to conclude that the marine farming permit would have no effect on the issue of whether the combined property right is goods.

However, if the marine farming permit were considered in its own right, it seems that the same conclusion would be reached. It appears that a marine farming permit would constitute property. Marine farming permits are capable of being owned, and the rights of ownership are capable of being transferred under section 67M of the Fisheries Act 1983. There is nothing in any of the relevant legislation to suggest that a marine farming permit is real property. While a marine farming permit provides a right to farm within the permit area, it does not typically provide any right to occupy the seabed. It is considered that without such a right, the marine farming permit is unlikely to be an interest in land and thus real property. That a marine farming permit does not provide any right to occupy the seabed seems reflected in section 67L(3), which provides that the marine farming permit does not authorise the permit holder to take any naturally occurring aquatic life in the area subject to the permit. Thus, it is considered that marine farming permits do not give rise to an interest in land and are accordingly concluded to be personal property.

As the marine farming permits are not "money" the only other exclusion to be considered is that for choses in action. From the earlier analysis, the key characteristic of a chose in action is that it cannot be taken into possession. In respect of marine farming permits, it does not seem possible to take the bundle of rights that comprise a marine farming permit into possession. It seems that the only way to enforce the right would be to commence legal proceedings. On this basis, it appears that marine farming permits would more properly be regarded as choses in action rather than choses in possession. The result of this is that marine farming permits are excluded from the definition of "goods" for GST purposes.

Therefore, it is concluded that the existence of a marine farming permit as part of a supply of a resource consent or certificate of compliance in conjunction with a marine farming permit will not affect the status of the supply for GST purposes. Regardless of whether the resource consent or certificate of compliance and the marine farming permit are considered together or separately, it is concluded that a supply of such items will not be a supply of "goods" as defined in the GST Act.

Summary for marine farming authorisations

Some marine farming leases and some marine farming licences may constitute "goods" for the purposes of the GST Act. These will be leases and licences that are defined with reference to a particular area of land, and that provide for exclusive rights in respect of that land. Such marine farming leases and licences are likely to be interests in land and thus real property. As real property, neither of the exclusions relating to "money" and "choses in action" will apply so that they will not be excluded from the definition of "goods".

The marine farming leases and licences that are not real property and so are personal property will not constitute "goods" for the purposes of the GST Act. The reason for this is that they are choses in action. Because the rights under these marine farming leases and licences cannot be taken into possession, the leases and licences that are personal property will constitute choses in action rather than choses in possession and so will be excluded from the definition of "goods".

In relation to resource consents and marine farming permits, it appears as if the declaration in section 122 of the Resource Management Act that resource consents are neither real nor personal property is intended to apply outside the Resource Management Act. As there is no legislative modification of the statement in respect of the GST Act, the resource consents and marine farming permits will not qualify as being "goods" because they do not satisfy the opening words of the definition of being real or personal property. Therefore, there is no need to consider the further issue of whether they are "secondhand".

One further matter

Before concluding in respect of marine farming authorisations, it needs to be noted that there is presently a Bill before Parliament that, if enacted in its present form, would affect the three different statutory permissions set out above.

The Bill is the Resource Management (Marine Farming and Heritage Provisions) Amendment Bill. This Bill has been reviewed by the Transport and Environment Committee (which reported back on 30 April 1999), and there are a number of useful comments in the Committee's report as to the existing situation and the proposed legislation. The Bill is currently awaiting its second reading.

Under the proposals, marine farming leases and licences will be incorporated into the Resource Management Act and deemed to be resource consents. According to the Committee there will be no diminution of rights for the holders of leases under the Marine Farming Act and the rights of marine farming licence holders may well increase. It certainly appears that the nature of the rights held by marine farmers under the Marine Farming Act will be affected. Instead of a marine farming lease or licence potentially being an interest in land as discussed above, marine farming leases and licences will be deemed to be resource consents.

If the Bill is enacted in this form, this will mean that, based on the previous analysis, the marine farming leases and licences will be neither real nor personal property under section 122(1) of the Resource Management Act. Such a conclusion will mean that all of the various types of "marine farming authorisations" will be treated in the same manner for GST purposes, namely that no secondhand goods input tax credit will be available.