Note (not part of the rulings):

BR Pub 09/04 and BR Pub 09/05 are essentially the same as public rulings BR Pub 03/07 and BR Pub 03/10 which were published with BR Pub 03/08 and BR Pub 03/09 in *Tax Information Bulletin* Vol. 15, No 12 (December 2003).

The four previous rulings expired on 12 November 2006. It was considered appropriate to issue four separate rulings with a shared commentary given the different nature of the different marine farming authorisations and fishing quota. BR Pub 03/08 and BR Pub 03/09 on marine farming leases and licences respectively will not be reissued, because marine farming leases and licences are now deemed to be coastal permits granted under the Resource Management Act 1991. Marine farming permits (previously covered by BR Pub 03/10) are no longer required under section 67J of the Fisheries Act 1983, which was repealed in 2004. Therefore, the reissued rulings do not consider marine farming permits.

BR Pub 03/07 and BR Pub 03/10 have been updated to take into account changes to the Fisheries Act 1983, the Fisheries Act 1996, and the Resource Management Act 1991, and the enactment of the Foreshore and Seabed Act 2004. No changes to these Acts, nor the enactment of the Foreshore and Seabed Act 2004, affect the conclusions reached in these Rulings.

The reissued rulings consider whether a secondhand goods input tax credit can be claimed on the purchase of fishing quota, coastal permits, or certificates of compliance.

The rulings conclude that secondhand goods input tax credits cannot be claimed on such purchases. A single commentary applies to BR Pub 09/04 and BR Pub 09/05. Both rulings apply until 30 June 2014.

FISHING QUOTA - SECONDHAND GOODS INPUT TAX CREDITS

PUBLIC RULING – BR Pub 09/04

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), the definitions of "goods" and "secondhand goods" in section 2, and the definition of "input tax" in section 3A.

Definitions

For the purposes of this ruling, "fishing quota" means –

(a) individual transferable quota that has been granted under the Fisheries Act 1983; or

(b) individual transferable quota that has been granted under the Fisheries Act 1996; or

(c) annual catch entitlements that have been generated by individual transferable quota under section 66 of the Fisheries Act 1996.

The Arrangement to which this Ruling applies

The Arrangement to which this Ruling applies is the supply of fishing quota. The supply of fishing quota 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 supply is made to the purchaser, who is a GST-registered person.
4. The fishing quota is situated in New Zealand at the time of supply.
5. The fishing quota is acquired for the principal purpose of making taxable supplies.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Fishing quota is not a good in accordance with the definition of "goods" in section 2. As a result, fishing quota will not constitute "secondhand goods" for the purposes of the Act.
- The purchaser of such fishing quota 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 fishing quota.

The period for which this Ruling applies

This Ruling applies to a supply of fishing quota where the time of the supply occurs or occurred at any time during the period 13 November 2006 to 30 June 2014.

This Ruling is signed by me on 26 June 2009.

Susan Price
Director, Public Rulings

COASTAL PERMITS AND CERTIFICATES OF COMPLIANCE - SECONDHAND GOODS INPUT TAX CREDITS

PUBLIC RULING - BR Pub 09/05

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), the definitions of "goods" and "secondhand goods" in section 2, and the definition of "input tax" in section 3A.

Definitions

For the purposes of this ruling—

- "coastal permit" means a resource consent in the form of a coastal permit granted under the Resource Management Act 1991; and
- "certificate of compliance" means a certificate of compliance granted under the Resource Management Act 1991.

The Arrangement to which this Ruling applies

The Arrangement to which this Ruling applies is the supply of a:

- coastal permit; or
- certificate of compliance.

The supply of a coastal permit or certificate of compliance 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 supply is made to the purchaser, who is a GST-registered person.
4. The coastal permit or certificate of compliance is situated in New Zealand at the time of supply.
5. The coastal permit or certificate of compliance is acquired for the principal purpose of making taxable supplies.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- A coastal permit or certificate of compliance is not a good in accordance with the definition of "goods" in section 2. As a result, the coastal permit or certificate of compliance will not constitute "secondhand goods" for the purposes of the Act.
- The purchaser of a coastal permit or certificate of compliance 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 coastal permit or certificate of compliance.

The period for which this Ruling applies

This Ruling applies to a supply of a coastal permit or a certificate of compliance where the time of the supply occurs or occurred at any time during the period 13 November 2006 to 30 June 2014.

This Ruling is signed by me on 26 June 2009.

Susan Price
Director, Public Rulings

COMMENTARY ON PUBLIC RULINGS BR PUB 09/04 and BR PUB 09/05

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 09/04 and BR Pub 09/05 ("the rulings").

Summary

Individual transferable quota and annual catch entitlements cannot be categorised as usufruct rights, sales of goods coupled with a licence, or profits à prendre. Individual transferable quota and annual catch entitlements have to be regarded as unique property rights, with their characteristics determined from the provisions of the fishing legislation. Individual transferable quota and annual catch entitlements are personal property, however, these rights are choses in action. Therefore individual transferable quota and annual catch entitlements are not "goods", and therefore not "secondhand goods", for the purposes of the Goods and Services Tax Act 1985.

Coastal permits and certificates of compliance are not personal or real property but are unique statutory rights created under the Resource Management Act 1991. Therefore, coastal permits and certificates of compliance are not "goods", and therefore not "secondhand goods", for the purposes of the Goods and Services Tax Act 1985.

Background

BR Pub 09/04 and BR Pub 09/05 consider whether a GST input tax credit is available to registered persons who acquire fishing quota or coastal permits and certificates of compliance from unregistered persons. While this commentary considers both fishing quota and coastal permits and certificates of compliance, fishing quota need to be dealt with separately from coastal permits and certificates of compliance because different statutory requirements exist for each. Before looking at the relevant GST legislation, the natures of fishing quota and coastal permits and certificates of compliance need to be considered.

Fishing quota

The fishing quota being considered are individual transferable quota and annual catch entitlements as defined in section 2 of the Fisheries Act 1996.

Individual transferable quota were established and allocated in 1986 under the Fisheries (Quota Management Areas, Total Allowable Catches, and Catch Histories) Notice 1986, which was issued under the Fisheries Act 1983. They appear to have been allocated based on a person's commercial fishing history. No charge was made for the quota initially allocated. Individual transferable quota does not provide a "free" right, however, because an annual levy must be paid. These levies are typically significant.

The annual catch entitlement was introduced under the Fisheries Act 1996, and section 66 of that Act provides that the annual catch entitlement is generated by the individual transferable quota at the beginning of each fishing year. Section 74 provides that the annual catch entitlement confers the immediate right to catch fish in a given year. Section 132 and 133 provide that the individual transferable quota and annual catch entitlement may be transferred.

Individual transferable quota and annual catch entitlements are not the same, but they are both unique statutory rights that may be bought, sold and, in the

case of individual transferable quota, may have interests registered against them. Even though annual catch entitlements are generated from individual transferable quota and are separate property rights, this commentary will use the term "fishing quota" to refer to both rights for the sake of convenience.

While most fishing quota are held by large organisations, individual fishers hold some small parcels of fishing quota. Some of these fishers may not make supplies in excess of $60,000 in a 12-month period ($40,000 prior to 1 April 2009), so are not required to register for GST under section 51 of the Goods and Services Tax Act 1985. One of these non-registered fishers may sell their fishing quota (individual transferable quota or annual catch entitlements) to a person who is registered for GST. The question arises as to whether the purchaser may claim a GST input tax credit.

Nature of fishing quota

There is no definitive statement in any of the fisheries legislation as to the nature of fishing quota. The expression "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 to ensure all quota allocated under the different Acts are regarded as fishing quota for the purposes of the Fisheries Act 1996.

The change between the Fisheries Act 1983 and Fisheries Act 1996 appears to have affected the characteristics that could be ascribed to fishing quota. Under the 1983 Act, the fundamental rights acquired by the holder of fishing quota (as determined from the legislation) were that the quota holder 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 a quota is issued in perpetuity).

These rights could be dealt with in ordinary commercial dealings; they could be bought and sold, used as security, and have interests registered against them.

The nature of individual transferable quota granted under the Fisheries Act 1983 has been considered in court decisions. Under the 1983 Act the individual transferable quota granted the right to fish rather than the right to receive annual catch entitlements. The Court of Appeal considered the nature of fishing quota in *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* 22 July 1997, CA 82/97). The case involved the judicial review of a decision made by the Minister of Fisheries to reduce the total allowable commercial catch for snapper in quota management area 1. The Court of Appeal made various comments regarding the nature of fishing quota. Tipping J stated (at page 16):

> 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 individual transferable quota are property under the Fisheries Act 1983, although the court provides little in the way of further guidance on the precise nature of individual transferable quota except to state that the characteristics of quota must be determined from the legislation.

Further clarification of individual transferable quota was provided by Baragwanath J in *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23. In dealing with a contractual dispute, Baragwanath J stated that individual transferable quota are statutory choses in action (at paragraph 5):

> The root of title is the issue under the quota management system ... 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 individual transferable quota, particularly in relation to the change in the nature of the entitlement under the Fisheries Act 1996. 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 individual transferable quota providing a right to catch a specified amount of fish, the individual transferable quota now "generates" an annual catch entitlement on the first day of the fishing year under section 67 of the 1996 Act. 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 holders of an individual transferable quota, the annual catch entitlement is separately tradeable, so that for a particular year a quota owner may sell their annual catch entitlement while retaining the individual transferable quota that will generate another annual catch entitlement the following year.

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

Several suggestions have been made as to the nature of fishing quota. The terms "usufruct right" and "profit à prendre" have been suggested to describe fishing quota. A further possibility is that a fishing quota might be regarded as the sale of goods coupled with a licence to retrieve the goods. This commentary considers 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"?

Is fishing quota a 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 English Dictionary* (11th edition, Oxford University Press, Oxford, 2006), which provides:

> **usufruct** *n.* (Roman law) the right to enjoy the use 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* (8th edition, West Group,2004):

> **usufruct** *n.* [fr. Latin *usufructis*] *Roman & civil law*. A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time. … In modern civil law, the owner of the usufruct is similar to a life tenant, and the owner of the thing burdened is the *naked owner*. …

The South African case *Geldenhuys v CIR* (1947) 14 SATC 419 provided a 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 she had a right only to use the sheep, with no liability for waste due to circumstances beyond her control. She accepted that this also meant the investment did not belong to her.

Steyn J (with whom Herbstein and Ogilvie Thompson AJJ agreed) delivered the leading judgment. In considering the nature of a usufruct right, Steyn J 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 the concept of a "usufruct right" 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, appears inconsistent with the characteristics of either individual transferable quota or annual catch entitlements.

A usufruct right is a right to use property without liability for waste. However, under the individual transferable quota or annual catch entitlements a person obtains the right directly or indirectly to take the relevant fish from the sea and provide these for consumption. In the case of the direct right, the owner of an annual catch entitlement is under no obligation in relation to all the other fish in the sea. Further, the owner of an individual transferable quota or an annual catch entitlement does not have to give a school of fish back at the end of the period, although it will obviously be in their 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, which is consistent with the annual catch entitlement, but the individual transferable quota is granted in perpetuity. However, in neither case is there an obligation to restore fish at the end of the year or to maintain the resource generally.

The characteristics of a usufruct right are not sufficiently similar to the characteristics of either individual transferable quota or annual catch entitlements for there to be any serious possibility that either of them could be a usufruct right.

Is fishing quota the sale of goods coupled with a licence to remove the goods?

The concept of a sale of goods with a licence to remove the goods refers to a contract for the sale of goods, where a licence is granted to the purchaser to go onto land (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 is discussed 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 the term "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 1908.

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 the agreement between the parties is more likely to be a profit à prendre.

This issue was addressed by Young J 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. 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, Young J 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* (...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, Young J referred to a statement in *Hinde McMorland and Sim Land Law* (Butterworths, Wellington, 1978–79). That statement still represents the view of the authors as it is included in the latest edition of *Hinde McMorland and Sim's Land Law in New Zealand* (Vol 2, LexisNexis NZ, Wellington 2003). 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 gives rise only to an ***option*** to sever and take the goods, while there is an obligation to take the goods under a contract for sale.

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

Application to fishing quota

In determining whether either individual transferable quota or annual catch entitlements 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 individual transferable quota were originally allocated without cost to fishers based on their prior catch histories. However, in order to exercise the rights under the individual transferable quota (and now the associated annual catch entitlement) the fishers must pay an annual levy.

In determining whether either individual transferable quota or annual catch entitlements is the sale of goods coupled with a licence to remove the fish, the key distinction is whether there is an obligation or merely an option to take the fish. This question appears to be answered in regulation 5(3) of the Fisheries (Cost Recovery Levies for Fisheries Services) Order 2008 (similar to now-repealed section 28ZC(3) of the Fisheries Act 1983). The regulation provides that the levy is payable by holders of individual transferable quota irrespective of whether they take 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, individual transferable quota should not be regarded as a sale of the fish because 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" – the owner of an annual catch entitlement must still catch the fish. Thus, situations might exist where the owner of an annual catch entitlement is unable to catch the amount of the particular species for which they have an entitlement. The characteristics of a fishing quota are more consistent with the owner of an individual transferable quota or annual catch entitlement having only a right, directly or indirectly, to catch the fish. Therefore, the terms of the ownership of the individual transferable quota or annual catch entitlement are inconsistent with it being an agreement for the sale of goods.

Is fishing quota a profit à prendre?

The concept of profit à prendre has been referred to in relation to fishing quota in other contexts. The New Zealand Law Commission in "The Treaty of Waitangi and Maori Fisheries" (Preliminary Paper No 9, Wellington, 1989) referred to fishing quota in the form of individual transferable quota as being in the nature of a profit à prendre. The Law Commission stated (at paragraph 4.20):

> In economic terms the [individual transferable quota] 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 "Easements and Profits à Prendre", *Halsbury's Laws of England* (vol 14, 5th ed, Butterworths, London, 2008) paragraph 254:

> 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. A profit à prendre is a servitude.

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 minerals, it has also been applied to the taking of fish and other game from land.

One of the earlier cases on point is *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 be exercised only by the individual or whether it was a right in the nature of a profit à prendre that could be exercised by servants of the indivdual. 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 decision 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 court considered the nature of the fishing rights because the defendant had polluted the river by discharging waste products from a gravel works into the river which had a significant detrimental effect on the fish in the river. The plaintiffs 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 plaintiffs. 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 plaintiff's ability 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 fishing quota is a "fishing right", it is possible that either the individual transferable quota or the annual catch entitlement 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 because 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 *Nicholls*. This feature is that a profit à prendre is considered an interest in land that, while not explicitly stated in *Nicholls*, is necessarily assumed by the parties, as the plaintiff was bringing an action of nuisance. A nuisance, according to the definition accepted by Goddard CJ in the English case *Howard v Walker* [1947] 2 All ER 197, 199:

> 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. This 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 argued 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 consequence of a profit à prendre being an interest in land is that a profit à prendre can be created or granted only by the owner of a sufficient estate or interest in the land. *Hinde McMorland & Sim's Land Law in New Zealand* (Vol 2, LexisNexis NZ, Wellington, 2003) states (at page 705):

> 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. A profit à prendre has been held in several 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 are granted in respect of freshwater species, most fishing quota are 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. The issue is 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. This 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 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 those 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, title to the underlying land may be held by 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 to fish in tidal waters, which was subject to regulation only 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 had treated this general principle as applying to inland waterways as well as tidal waters. However, Viscount Haldane noted a further factor that affected the application of the principle to tidal waters: the 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 *British Columbia*. 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 the absence of the public right to fish), it would need to be established that the Crown owned the land under the sea in respect of which the fishing rights were granted. The Privy Council regarded the issue as a difficult one, and one that it considered it 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 the court 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 individual transferable quota and annual catch entitlements.

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 individual transferable quota. However, given that the annual catch entitlement is generated by the individual transferable quota it is considered that individual transferable quota and the annual catch entitlement can still be regarded as ultimately giving rise to a right to take fish from water that flows over land.

The second point is that fishing quota are granted in relation to several different species. These include freshwater species (found in internal waterways) as well as 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 *British Columbia* 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 may 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 the primary concern of the Privy Council in *British Columbia* 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 a fishing quota being regarded as a profit à prendre encounters difficulties in relation to fishing quota allocated in respect of freshwater species, because it is 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 even more uncertain in relation to the seabed and foreshore. "Sovereign rights" are conferred on New Zealand in respect of its exclusive economic zone (comprising those areas of the sea, seabed, and subsoil that are beyond and adjacent to the territorial sea, and extending 200 nautical miles from the coast) through article 56 of the United Nations Convention on the Laws of the Sea. However, New Zealand did not ratify 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.

In any case, in *Ngati Apa v Attorney-General* [2003] NZCA 117 (19 June 2003), the Court of Appeal held that the vesting provision in section 7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 was not sufficient to extinguish the customary title where it was found to exist. The court found that the Act was primarily concerned with sovereignty, not property rights. The title vested in the Crown was "radical title" (title acquired with the acquisition of sovereignty), which was not inconsistent with native title.

The Foreshore and Seabed Act 2004 was subsequently enacted, and expressly vested the "public foreshore and seabed", as defined under that Act, in the Crown. Section 13(1) of the Foreshore and Seabed Act 2004 provides that full legal and beneficial ownership of the "public foreshore and seabed" is vested in the Crown. The "public foreshore and seabed" as defined in that Act, extends only as far as the outer limits of the territorial sea, which remains at 12 nautical miles from the coast of New Zealand. The effect of this legislative amendment is to 'reinstate' the Crown's full ownership of the seabed of the territorial sea. However, fishing quota are granted in respect of quota management areas, which extend 200 nautical miles from the mean high water mark along the coast of New Zealand. The Foreshore and Seabed Act 2004 does not deal with the areas that extend beyond the territorial sea. Accordingly, 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.

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 other factors support a conclusion that Parliament did not intend a 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 individual transferable quota and annual catch entitlements are specifically excluded from the ambit of that Act under section 23(e)(xii). While excluding fishing quota in general from an Act dealing with personal property might tend to support a conclusion that individual transferable quota and annual catch entitlements are perhaps rights that arise under a profit à prendre, an interest in land, and not personal property, the method of exclusion suggests that Parliament did not exclude them on this basis. The exclusion provisions in section 23(e) of the Personal Property Securities Act 1999 contain general exclusions for interests in land, and a specific exclusion for individual transferable quota and annual catch entitlements. If individual transferable quota and annual catch entitlements were regarded as rights that arise under a profit à prendre and an interest in land, the specific exclusion would not have been needed.

The result is that there are difficulties with individual transferable quota and annual catch entitlements being regarded as rights that arise under a profit à prendre. While there are similarities between their characteristics and the

characteristics of a profit à prendre, there are also fundamental inconsistencies in the characteristics that indicate that individual transferable quota and annual catch entitlements are not rights that arise under a profit à prendre. For example, regarding fishing quota (whether individual transferable quota or annual catch entitlements) as a profit à prendre leads to difficulties in relation to individual transferable quota and annual catch entitlements allocated in respect of freshwater species because the Crown would not 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 effect of these conclusions on the nature of individual transferable quota and annual catch entitlements leads to the possibility that individual transferable quota and annual catch entitlements are unique property rights, with the rights and obligations in respect of the property determined from the statute creating the right (as alluded to earlier).

Unique property right

The decision in *British Columbia* was cited with approval by the full High Court of Australia in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314. While this case concerned whether payments made by commercial fishers for fishing licences were a "tax", the court made 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 concluded that the fishing rights were not profits à prendre, but instead were statutory rights created under the particular statutory regime. Mason CJ and 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 individual transferable quota and annual catch entitlements are not usufruct rights nor are they the sale of goods coupled with a licence. It is noted, however, that the rights granted under the individual transferable quota and annual catch entitlements are similar to the rights that arise under a profit à prendre. The individual transferable quota generates an annual catch entitlement that provides a person with the right to take a certain amount of a certain item (being a 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 an individual transferable quota is granted is not completely determined and for the various other reasons considered above, it is concluded that individual transferable quota and annual catch entitlements are not profits à prendre.

The effect of this is that individual transferable quota and annual catch entitlements cannot be categorised as usufruct rights, sales of goods coupled with a licence, or profits à prendre. Individual transferable quota and annual catch entitlements have to be regarded as unique property rights, with their characteristics determined from the provisions of the fishing legislation as set out by Tipping J in *New Zealand Fishing Industry Association*. 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, but not the same as, a profit à prendre. It also reflects the statement made by Baragwanath J 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 has since been repealed. It is considered that section 27 was repealed as being redundant, in that it merely summarised the characteristics found in other sections of the Fisheries Act 1996.

Coastal permits and certificates of compliance

The definition of "goods" in the Goods and Services Tax Act 1985 requires that the item concerned be either real or personal property. The nature of coastal permits and certificates of compliance needs to be considered.

Nature of a resource consent and certificate of compliance

Section 87 of the Resource Management Act 1991 defines a "resource consent" to include a consent to do something in a coastal marine area that otherwise would contravene certain provisions of the Resource Management Act and calls this kind of consent a "coastal permit". Both these terms, "resource consent" and "coastal permit" are relevant because some provisions of the Resource Management Act relate to coastal permits and some relate to the more general resource consent.

Section 88 of the Resource Management Act 1991 provides that resource consents are to be obtained from the local or regional council by application. Section 139 of the Resource Management Act provides that where an activity may be lawfully carried out without a resource consent, a certificate of compliance must be applied for instead. 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 of the Resource Management Act 1991 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 that can be placed on this provision is that Parliament did not want all of the common law and other rights that 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 1991 applies to the Goods and Services Tax Act 1985.

Not real nor personal property

In determining whether section 122 of the Resource Management Act 1991 affects the classification of a resource consent as a "good" under the Goods and Services Tax Act 1985, several observations can be made.

The first observation is that the definition in section 122 of the Resource Management Act 1991 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 an application wider than simply the Resource Management Act.

A second observation can be derived from the wording of section 122 of the Resource Management Act 1991. After making the initial statement that a resource consent is not real or personal property, the section provides specific exceptions where resource consents are to be regarded as having the characteristics of personal property in several specific Acts and circumstances. One of these Acts is the Personal Property Securities Act 1999. The Goods and Services Tax Act 1985 is not included as one of the exceptions in section 122.

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 property 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, however, 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 of the Resource Management Act 1991, that resource consents are neither real nor personal property, would also apply for the purposes of the Goods and Services Tax Act 1985. By not making a specific exception for the Goods and Services Tax Act, it is only possible to assume that Parliament was content with the initial statement applying to the Goods and Services Tax Act.

The third observation, which follows from the second, is that the intention of the section 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 has only two categorisations of that property – real and personal. Therefore, in discerning the intention of Parliament in making this statement, the most logical conclusion is that Parliament did not want the natural common law rights to attach to a resource consent that would attach as a matter of course if the resource consent were real or personal property.

It has been established that resource consents, and therefore coastal permits and certificates of compliance, are deemed not to be “personal or real property” under section 122 of the Resource Management Act 1991. It has also been established that this deeming provision operates for purposes outside the Resource Management Act and so also affects the Goods and Services Tax Act 1985. Unlike the Personal Property Securities Act 1999, the Goods and Services Tax Act is not excluded from the operation of section 122. Therefore, coastal permits and certificates of compliance are not personal or real property but, as resource consents, are statutory rights created under the Resource Management Act.

Legislation

Having established the nature of fishing quota and coastal permits and certificates of compliance, the next issue involves determining the relevant GST legislation.

Section 20 of the Goods and Services Tax Act 1985 concerns the calculation of the amount of tax payable. Section 20(1) provides that every registered person

shall calculate the amount of GST payable by that person in accordance with the provisions of section 20. In relation to secondhand goods, section 20(2) requires sufficient records to be maintained of supplies of secondhand goods. Section 20 also deals with input tax deductions. In particular, section 20(3) provides that a person may deduct input tax paid 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 in calculating the amount of output tax payable by that person. Section 20(3) also takes account of taxpayers who operate on different accounting bases.

Under section 20(3) of the Goods and Services Tax 1985, a registered person may deduct from the amount of output tax payable, an amount of "input tax" in accordance with paragraph (a) or paragraph (b). "Input tax" is defined in section 3A. Section 3A(1)–(3) provides:

> **(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).
>
> **(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 a non-resident; 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 and—
>
> (i) The taxable supplies are not charged with tax at the rate of 0% under section 11A(1)(q) or (r); or
>
> (ii) The taxable supplies are charged with tax at the rate of 0% under section 11A(1)(q) or (r) and the goods have never, before the acquisition, been owned or used by the registered person or by a person associated with the registered person.
>
> **(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.

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". The term "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 defines the term "goods":

> **Goods** means all kinds of personal or real property; but does not include choses in action, money or a product that is transmitted by a non-resident to a resident by means of a wire, cable, radio, optical or other electromagnetic system or by means of a similar technical system:

Application of the legislation

The starting place to determine whether a GST input tax credit is available to a registered person is section 20(3) of the Goods and Services Tax Act 1985. Irrespective of the basis of registration, the Act provides 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 in section 3A(1)(c) of the Goods and Services Tax Act 1985. 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), six requirements need to be satisfied under the two subsections. These requirements 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 GST-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 they will be satisfied in every instance in which the ruling applies. However, the requirement that the supply be of secondhand goods needs to be considered in detail because it cannot be specified in the rulings. Therefore, it is necessary to determine whether individual transferable quota, annual catch entitlements, coastal permits and certificates of compliance can be secondhand goods.

"Secondhand goods"

The definition of "secondhand goods" does not define the term, but prescribes a list of things that are not included in the meaning of "secondhand goods". Fishing quota, coastal permits, and certificates of compliance 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 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 what is comprised in the term "goods", assistance can be found in section 2 of the Goods and Services Tax Act 1985. "Goods" is defined widely in the initial part of the definition, and then subjected to three specific exclusions. It includes all kinds of real and personal property, but excludes choses in action, money and electronic products (only the first of which is relevant here). Therefore, it is necessary to establish whether fishing quota, coastal permits, and certificates of compliance are real or personal property and then, whether they are 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. "Stamp Duty", *Halsbury's Laws of England* (vol 44, 5th ed, Butterworths, London, 2008, paragraph 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, trade marks, licences 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 surface 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 Garrow and Fenton's *Law of Personal Property* (6th ed, Butterworths, Welington, 1998, at page 2):

> The term "property" has at least two meanings within the law of Commonwealth countries including New Zealand. It may signify the title to all rights of ownership in goods or other property; for example, when s 20 of the Sale of Goods Act 1908 provides by r 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" means the title to or ownership of the goods in question. The second, more general use, signifies the thing owned, that over which title is exercised. For example, when it is said that a person's property includes cars, books, royalty rights, and other property it is normally the second sense of the word "property" that is intended. In the first sense a person has property in a particular item; in the second sense, it is said that a person owns certain items of property. The context generally indicates which form is used.

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 real property or personal property. As Garrow and Fenton in *Law of Personal Property* (6th ed, Butterworths, Wellington, 1998, page 1) explain:

> 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 and hereditaments was recoverable by certain actions called "real" actions; by "mixed" actions if both land and damages were claimed and "personal" actions if only damages were claimed. Remedies for interference with goods were seen to be in personam, giving rise to damages, rather than in rem.

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 quotation from Garrow and Fenton (at page 3):

> The distinction between land and personalty requires further qualification. Real property includes, besides estates and interests in land, things which are said to "savour of the realty".

The effect of there being only 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 to the necessity of determining whether fishing quota are real or personal property. The section includes both types of property and as long as property is one or the other a final determination should not be needed. While this is true, attempting to classify the property as either real or personal helps to determine whether the item is a chose in action. The reason for this is that the distinction between chose in action and chose in possession appears to be limited to personal property.

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 *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, several commentators refer to the above quotation from *Torkington v Magee* as providing a useful working definition.

In a New Zealand context, the Court of Appeal considered the issue in *Re Marshall (Deceased), CIR v Public Trustee* [1965] NZLR 851. This 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 a "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).

McCarthy J 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. In *Case N16* (1991) 13 NZTC 3,142 District Court Judge Barber had to consider whether deer velvet purchased direct from producers by means of commission agents was a secondhand good when it was purchased by a distributor and exporter of deer velvet.

Judge Barber concluded that the deer velvet was not a secondhand good. 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 Taxation Review Authority felt that previous ownership of goods is not in itself necessarily sufficient to meet the test of secondhand in the Goods and Services Tax Act 1985. 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 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 Richardson J. 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 both individual transferable quota and annual catch entitlements constitute property. They are definable and identifiable through being granted under a statutory regime. Both are capable of being owned and specific legislative provisions in the Fisheries Act 1996 deal with the ability of individual transferable quota and annual catch entitlements to be transferred. On this basis, it can be accepted that a fishing quota is "property".

Is fishing quota real or personal property?

The next issue is whether individual transferable quota and annual catch entitlements are real or personal property. Their characteristics are determined by considering the legislation under which they are 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", nothing in either of the Fisheries Acts suggests that it was intended that individual transferable quota or annual catch entitlements gives rise to an interest in land. Therefore, based on this and the earlier conclusion that neither individual transferable quota nor annual catch entitlements are profits à prendre, it is considered that they are neither an interest in land nor real property.

As individual transferable quota and annual catch entitlements are "property" and property is either "real" or "personal", the conclusion that individual transferable quota and annual catch entitlements are not real property leads also to the conclusion that they must be personal property. As individual transferable quota and annual catch entitlements are personal property, they will fall within the words "all kinds of real and personal property" in the definition of "goods" in the Goods and Services Tax Act 1985. 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 individual transferable quota and annual catch entitlements are choses 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.

Both individual transferable quota and annual catch entitlements appear to possess this characteristic. The right to catch fish directly or indirectly 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 result is that it is concluded that both individual transferable quota and annual catch entitlements are choses in action. While they are capable of satisfying the first part of the definition of "goods", being a form of personal property, they are then excluded from the definition of "goods" by reason that they are choses in action. The effect of this is that neither can be regarded as being "goods" for the purposes of the Goods and Services Tax Act 1985.

Given that it is concluded that individual transferable quota and annual catch entitlements are not "goods" in terms of the definition in the Goods and Services Tax Act 1985, there is no need to consider the further issue of whether they could be regarded as "secondhand". Because it is concluded that individual transferable quota and annual catch entitlements are not "goods", it is also concluded that they cannot be "secondhand goods".

Application to coastal permits and certificates of compliance

The consequences of section 122 of the Resource Management Act 1991 need to be applied to the definition of "goods" in the Goods and Services Tax Act 1985. The term "goods" means "all kinds of personal or real property". It has been established that, under section 122, coastal permits and certificates of compliance are deemed not to be "personal or real property". It has also been established that the deeming provision operates for purposes outside the Resource Management Act and so affects the Goods and Services Tax Act. As there is no legislative modification of the statement in respect of the Goods and Services Tax Act, coastal permits and certificates of compliance do not constitute "goods" for the purposes of the Goods and Services Tax Act as they are not personal or real property. Therefore, the further issue of whether they are "secondhand goods" does not need to be considered.