TAX INFORMATION BULLETIN

INLAND REVENUE

TE TARI TAAKE

THIS IS AN INLAND REVENUE DEPARTMENT SERVICE TO PEOPLE WITH AN INTEREST IN THE TECHNICAL ASPECTS OF TAXATION IN NEW ZEALAND.

No. 8

FEBRUARY 1990

RESIDENT WITHHOLDING TAX - DISCLOSURE REQUIREMENTS (Interest PAYE)

From 1 April 1990 the disclosure requirements of sections 327J and 327ZB will take effect.

Section 327J requires disclosure of interest payments where no resident withholding tax deduction required.

Where a deduction of interest PAYE is not made because either:-

- the payment is not made in the course of a taxable activity; or
- the payer's interest is below the $5000 threshold; AND

the interest paid is claimed as a deduction by the payer when calculating assessable income, and is paid to a person who does not hold a certificate of exemption the payer is required to provide details of the payment to the Commissioner.

Affected persons are likely to be persons who have borrowed from private lenders, such as relatives, for purposes such as share investment or purchase of one rental property. They will be claiming a deduction of interest against their taxable income, but will not be recorded as registered payers.

Also affected will be persons who have paid less than $5000 in the previous period and so did not become registered payers, and who are paying to non-exempts e.g. payment to a family trust.

Section 327ZB requires disclosure of transactions in financial arrangements .

Where any person who holds a Certificate of Exemption:

- acquires from or disposes to any other person, a financial arrangement; or
- makes a redemption payment from which no deduction of interest PAYE is made;

certain information is required to be provided to the Commissioner.

This provision will almost always apply to registered payers.

IRD NUMBER REPORTING REQUIRED.

In both of the above situations one of the details required to be provided in relation to each person to whom a payment is made, or with whom a financial arrangement is traded, is that person's IRD number for all transactions after 1 April 1990.

TAXPAYER TO PROVIDE IRD NUMBER ON REQUEST

Any taxpayer who receives a request from a relevant payer to provide an IRD number is required to do so within 10 working days.

IRD NUMBERS TO BE RECORDED

All persons who will have reporting requirements arising through these provisions should be taking the appropriate steps to obtain and record IRD numbers of persons about whom they will be required to report.

Steps should also be taken to ensure that procedures are in place to record IRD numbers of new clients.

NOTIFICATION TO EMPLOYERS: FBT PRESCRIBED RATE OF INTEREST FOR QUARTER COMMENCING 1 JANUARY 1990

The prescribed rate of interest used to calculate the fringe benefit value of low interest employment related loans has been lowered to 14.8 percent for the quarter commencing 1 January 1990. An order in Council to this effect has been issued.

A brief press statement was released by the Minister of Revenue, David Caygill, on 13 December 1989 confirming the rate.

GST AND THE DROUGHT REHABILITATION LOAN SCHEME

SUMMARY

This item explains the GST implications of the Drought Rehabilitation Loan Scheme which is available to farmers in the designated drought areas of the South Island.

BACKGROUND

As part of the South Island Drought Post-Drought Adjustment Programme the Government has, through the Ministry of Agricultural and Fisheries, introduced a Drought Rehabilitation Loan Scheme. The purpose of this scheme is to allow farmers to restore their properties and stock in accordance with a realistic rehabilitation programme.

This scheme is available to any farmer in the drought affected areas, who paid more than 15 percent of gross farm income in interest and rents (based on the 1987/88 financial accounts). A farmer may be precluded from the scheme if a financier (i.e., a bank or lending institution) considers the farm not to be a viable proposition.

Under the scheme, an eligible farmer is entitled to borrow funds from a financier for specific items of expenditure such as re-pasturing, fertilizer etc. In respect of such advances (or drawdowns as they are referred to in the relevant documentation), the Government will pay a portion of the interest on the drawdown direct to the financier for the initial two years of the loan. In addition, the Government underwrites and guarantees 80 percent of the principal for a period of 4 years.

GST IMPLICATIONS

The payment of interest and the underwriting of the loan is consideration for a supply made by the farmer in the course or furtherance of a taxable activity. Accordingly, if the farmer is registered for GST there is an obligation to account for GST on this supply.

The value of the supply is the amount of interest paid by the Government to the financier plus the value of underwriting the loan. As the value of the underwriting is not expressed in monetary terms, it is valued at open market value. The open market value of this supply will be calculated as follows:

> The balance owing as at the anniversary of the commencement date of the loan (i.e., date of the first drawdown) multiplied by the difference between the risk free interest rate (such as the rate of Treasury Bills) and the normal interest rate that would be charged by the financier to that farming activity, reduced by any specific fees and charges payable by the borrower in respect of the underwriting, such as the guarantee fee payable to the Government. The risk free interest rate and the normal interest rate will be specified by MAF for each year for calculating the value of the underwriting.

The value of the supply will be calculated quarterly, to coincide with the interest payments by the Government. The value of the underwriting will be calculated annually and included as part of the consideration for the supply in the quarter which covers the anniversary date.

APPLICATION

The value of this supply (i.e., the interest paid and the underwriting) will be grossed-up by MAF to become a GST inclusive amount. The GST component of this supply will be paid direct by MAF to the Inland Revenue Department and credited to the respective farmer's GST account. In addition, MAF will issue an advice letter to each farmer at the end of each quarter, advising the farmer of:

(a) The GST inclusive amount of the supply which is to be accounted for as taxable supplies made in the taxable period covering the end date of that quarter; and

(b) the amount of GST that has been paid to the farmer's account which should be taken into account in calculating the tax payable or refunded for the respective taxable period.

The first payments of interest by the Government in terms of this scheme were made in respect of the quarter ending 30 September 1989.

Reference: LA GST S.5.Vol.1

DISCOUNTING OF DEFERRED PAYMENT LICENCES BY LAND CORPORATION LTD.

The question has arisen as to the tax consequences of Land Corporation Ltd. discounting deferred payment licences entered into after 8.30pm 31 July 1986.

The deferred payment licences in question were all entered into after 31 July 1986 and were one of the options available to a number of farmers under a renewable lease entered into with Land Corporation Ltd. The deferred payment licence is essentially an "agreement for the sale and purchase of property", as defined in section 64B(1) of the Act and is therefore subject to the accruals provisions of the Act. A deduction for the interest component of the deferred property settlement will be allowed to farmers, calculated on a yield to maturity basis.

On the discounting of the deferred payment licence, and refinancing of the amounts outstanding, a base price adjustment is calculated in accordance with section 64F(2). The amount forgiven, i.e. the amount of the discount, will be reflected in the base price adjustment and therefore in the borrower's assessable income for that income year.

TAXATION REFORM BILL No.6

The Taxation Reform Bill (No.6) 1989 was passed through all its stages in Parliament on the 14th of December 1989. Immediately following passage it was split into six separate Acts being:

- The Income Tax Amendment Act (No.4) 1989.
- The Goods and Services Tax Amendment Act (No.2) 1989.
- The Inland Revenue Department Amendment Act 1989.
- The Estate and Gift Duties Amendment Act (No.2) 1989.

- The Stamp and Cheque Duties Amendment Act 1989.

- Land Tax Amendment Act (No.2) 1989.

These six Acts received the Governor General's assent on the 19th of December 1989.

The issues covered are:

1. New Start Grants.

2. Livestock taxation.

2A. Excess Retention Tax

2B. Resident Withholding Tax

3. Twice monthly PAYE is now only payable by employers whose total PAYE deductions are more than $50,000 per annum.

4. A number of changes to the Imputation, Dividend Withholding Payment and Branch Equivalent Tax Account regimes

5. Transitional arrangements for Provisional Tax in the 1990 income year.

6. The Land Tax Amendment Act makes a number of amendments, among them are amendments to the assessment of Land Tax, the due dates and the exemptions.

7. Minor amendments to the Estate and Gift Duties Act 1968.

8. Minor amendments to the Stamp and Cheque Duties Act 1971.

9. Minor amendments to the Inland Revenue Department Act 1974.

10. Several GST amendments.

Details of the changes outlined above can be found in Appendix A to this bulletin.

GOODS AND SERVICES TAX AMENDMENT ACT (NO. 2) 1989

This Act amends the Goods and Services Tax Act 1985 and contains 18 sections in total. The scope of these amendments range from minor consequential drafting changes to technically complex amendments redefining the boundary between taxable and exempt supplies. A number of these amendments result from the Legislative Audit currently being completed by the Department.

Complete details on all the amendments contained in this Act are contained in Appendix B of this Bulletin.

CERTIFICATES OF EXEMPTION FOR SOLICITORS' TRUST ACCOUNTS

This item relates to the insert in "Law Talk" issued to all solicitors on 1 November 1989 addressing the above topic.

Under the heading "Instructions for Solicitors Requiring Refunds", solicitors were advised that the new Certificate of Exemption would be showing an issue date of 1 October 1989, as this was the Department's original intention. This is now incorrect.

The legislation assented to on 19 December 1989 in the Income Tax Amendment Act (No 4) 1989 contains a provision whereby any certificate of exemption issued in terms of that Act, is deemed to have been held from 1 October 1989, where the application for that certificate is made prior to 31 January 1990.

In view of this, Certificates of Exemption that are issued with regard to Solicitors' Trust Accounts will not be showing an issue date of 1 October 1989.

APPLICATION OF SECTION 99

The Commissioner released a policy statement on the application of section 99 on 1 February 1990. Following is a copy of the release issued By the Commissioner with the policy statement.

SECTION 99 OF THE INCOME TAX ACT 1976 - STATEMENT OF INLAND REVENUE'S POLICY

This policy statement on section 99 represents a significant step forward for taxpayers, their tax advisers and for Inland Revenue.

The statement is the first comprehensive attempt for many years to indicate to taxpayers and their tax advisers how Inland Revenue sees section 99 and how it intends to apply the section.

Section 99 is often referred to as the "general anti-avoidance" section. It is designed to protect the tax revenue of the Government from tax avoidance devices but being enacted in a general form its application can give rise to uncertainty. Hence this policy statement which is designed to reduce that uncertainty.

There are three further points to note.

First, the statement takes into account the views expressed to me by the New Zealand Law Society and the New Zealand Society of Accountants but it does not purport to represent any agreement between those two bodies and Inland Revenue. Indeed there may be significant differences between tax experts inside and outside Inland Revenue on the subject but I have decided to issue the statement now to enable taxpayers and their advisers to gain the benefit of the reduced uncertainty which this policy does provide.

Secondly, I do not regard the statement as one which is not capable of further refinement and development.

Thirdly and finally it is in the end the Courts which decide whether section 99 has been correctly applied to a particular taxpayer and I would expect further refinement to the statement to result from that process.

Appendix C to this TIB provides the text of the policy statement and examples of its application.

DUE DATES REMINDER

February 20th	January PAYE Tax Deductions due.
March 1st	GST Return and payment for period ended 30 January 1990 due.
March 7th	First instalment of 1990 Provisional Tax due for taxpayers with November balance dates.
	Second instalment of 1990 Provisional Tax due for taxpayers with July balance dates.
	Third instalment of 1990 Provisional Tax due for taxpayers with March balance dates.
March 14th	Interest PAYE deducted during February due (if accumulated over $500)
	February Non-Resident Withholding Tax deductions payment due.
March 20th	February PAYE Tax Deductions due.

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APPENDIX C TO TIB NO. 8, FEBRUARY 1990

EXPLANATION TO THE APPLICATION OF SECTION 99 OF THE INCOME TAX ACT 1976

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POLICY STATEMENT ON SECTION 99

INTRODUCTION

The Commissioner has reviewed the policy in relation to the application of section 99 of the Income Tax Act 1976 (the Act). The purpose of this statement is to set out the new policy. The statement presents the Commissioner's view on section 99 - the need for the section, its function in terms of the Act, the impact and relevance of the recent legislative reforms and previous case law, the process of application, and some examples showing the effect of the new policy. It is not intended to be a detailed textual analysis of the provision. Rather it will provide guidance to both Departmental officers and taxpayers on the application of the section.

The focus of the Commissioner's new policy will be to evaluate arrangements in terms of whether they frustrate the underlying scheme and purpose of the relevant provisions of the Act.

This new policy will apply from the date of release of this statement to all cases, including those cases which are presently under review.

Section 99

Section 99 is the general anti-avoidance provision in the Act which renders void against the Commissioner any arrangement entered into for the purpose of avoiding tax.

Section 99 is designed to protect the Government's revenue from tax avoidance devices. To effectively achieve its objective the section is enacted in a general form, without reference to specific tax avoidance devices. This preserves flexibility to cope with new devices, but a consequence of this generality is a degree of uncertainty. This uncertainty is the cause of much of the criticism levelled at the section. This uncertainty can be remedied, to some extent, by outlining the Commissioner's opinion on section 99. The main points of this opinion are as follows -

- the Commissioner's view as to the function of the section;
- the effect on the recent reforms to the income tax system;
- the relevance of case law;
- the process undertaken when considering invoking section 99; and
- some specific examples demonstrating the effect of the new policy.

Function of Section

Section 99 is designed to protect the integrity of the tax system from tax avoidance devices implemented to frustrate it. It is not an independent charging section except insofar as section 99(3) provides for the reconstruction of an arrangement to counteract any tax advantage obtained, and section 99(5) provides for the reconstruction of dividend stripping arrangements. It does not itself create a liability for income tax. Its function is to protect the liability for income tax established under other provisions of the Act. Section 99 supports the more specific provisions of the Act to prevent their frustration by those who would avoid their impact.

Impact of the Legislative Reforms

The recent legislative reforms have significantly altered the income tax system. The lowering of the tax rate, broadening of the tax base, introduction of new regimes in the areas of international tax, trusts, accruals and dividend imputation have made significant structural changes to the system. The reforms have reduced the availability of schemes which some taxpayers used to avoid their liability to income tax. Many of these schemes utilise legislative gaps in the Act and, in terms of the Commissioner's previous practise on section 99, the provision was applicable. In light of the reforms the Commissioner has reconsidered the application of section 99. As discussed above the section does not itself create a liability to income tax but is intended to protect the liability for income tax established under the other provisions of the Act. Accordingly it is considered more appropriate that legislative gaps be filled by Parliamentary action to amend the law rather than by invoking section 99. The role of section 99 is to support the other provisions of the Act where the underlying scheme and purpose of the Act and the specific provision under review has been frustrated.

The recent legislative reforms offer significant guidance in discerning the scheme and purpose of the Act and section 99 will actively be used to buttress the intent of the Act where that intent has been frustrated.

Relevance of Case Law

There are a number of interpretive guidelines, on section 99, of general application which have been judicially developed.

Some relate to particular factual situations. Cases involving alienation of income, transfer of income earning assets on a short term basis, payments to relatives and family trusts claimed as a deduction give clear guidelines on the application of section 99 in these situations.

In addition certain broad interpretive principles have also evolved. The Newton predication test, for example, is regarded as fundamental to the process of section 99 application. In *Newton v FC of T* [1958] AC 450 the test was set out by Lord Denning.

> "In order to bring the arrangement within the section you must be able to predicate by looking at the overt acts by which it was implemented - that it was implemented in that particular way so as to avoid tax."

There was also the series of cases in the 1960's involving constructional arguments primarily designed to ascertain the scope and the application of the predecessor to section 99. For example whether the section applies only to sham transactions or has fiscal effect - effect, that is, as against the Commissioner or just between the parties to the arrangement.

CIR v Challenge Corporation [1986] 2 NZLR 556 is another example of the judicial development of section 99. In *Challenge* the taxpayer acquired a company (Perth) having no assets or debts but with a large deductible loss. After the acquisition, in compliance with s 191 of the Tax Act Perth gave notice of the transfer of its loss to the taxpayer's other subsidiaries, thereby reducing the group's assessable income. The Privy Council made it clear that s 99 is of general application and may apply notwithstanding that specific anti-avoidance provisions exist within a particular section.

All of these cases have added to the knowledge of what the section was intended to do and how it achieves this purpose. They will continue to assist both the Commissioner and taxpayers in ascertaining the boundaries of the provision.

Process of Application

While application of the section is not dependent on any discretionary decision by the Commissioner, the Commissioner recognises that it will be of considerable assistance to taxpayers if they know the process undertaken in considering the invocation of the section.

The Commissioner's approach requires a careful and thorough analysis of -

(a) the underlying scheme and purpose of the Act as a whole and of the specific provision under review;

(b) the arrangement to ascertain its purpose or effect;

(c) whether a fair and reasonable inference can be drawn that tax avoidance is one purpose of the arrangement (other than merely incidental);

(d) whether following this analysis it can be inferred that the arrangement frustrates the underlying scheme and purpose of the legislation.

These four steps are cumulative - that is, it is necessary to undertake each step before the decision is made as to whether section 99 is applicable.

The following is an explanation, in general terms, of the constituent elements of this process.

Scheme and purpose

A succinct and practical guide to the "scheme and purpose" approach was given by Mr. Justice Richardson in his paper "Appellate Court Responsibilities and Tax Avoidance" delivered at Monash University in 1984. The approach was described as follows:

> "The twin pillars on which our approach to statute rests are the scheme of the legislation and purpose of the legislation. Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole Act including the long title, analysing its structure and examining the relationship between the various provisions, and recognising any discernible themes and patterns and underlying policy considerations. It presupposes that in that way the study of the statute or of a group of sections may assist in the interpretation of a particular provision in its statutory context. It may provide a detailed guide to the intentions of the framers of the legislation and in so doing may cast light on the meaning of the provision in question."

His Honour considered that the scheme and purpose approach may not furnish an answer to all the interpretation problems which may arise. However he was satisfied that the emphasis on trying to discern the scheme and purpose of the legislation is likely in many cases to lead to the resolution of interpretation problems in the tax field that best reflects the intention of Parliament as expressed in the statute. The Commissioner concurs with this view.

In trying to discern the scheme and purpose of the legislation primary regard must be had to the words of the legislation. It is Parliamentary intent, as expressed in the statute, which is crucial. The increased complexity of tax legislation has resulted in some instances of ambiguity leading to confusion as to the meaning of particular provisions which makes the ascertainment of the true Parliamentary intent difficult. The Government's consultative documents, the various consultative committee reports, Parliamentary discussion and debate, and Departmental interpretive guidelines may provide assistance in interpreting the legislation under review.

The Purpose or Effect of the Arrangement

The test to be applied in ascertaining the purpose or effect of an arrangement is objective. In short the word "purpose" means, not motive, but the effect which it is sought to achieve - the end in view. The word "effect" means the end accomplished or achieved. The whole set of words denotes concerted action to an end - the end of avoiding tax. This is the well-known passage from Lord Denning in the *Newton* case. The section is not concerned with the motives of taxpayers. It is not concerned with the desire to avoid tax. Rather the section is only concerned with the means employed to avoid tax. In the *Newton* case Lord Denning said -

> "In applying the section you must, by the very words of it, look at the arrangement itself and see which is its effect - what it does - irrespective of the motives of the persons who made it. Williams J put it well when he said -
>
>> 'The purpose of a contract agreement or arrangement must be what it is intended to effect and that intention must be ascertained from its terms. Those terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect.'

Inference

Having established the purpose of the arrangement as implemented by the taxpayer, it is necessary to effect a fair and balanced evaluation of that arrangement. The evaluation will be with a view to concluding whether one can predicate whether the arrangement was implemented in its particular way so as to achieve an income tax advantage.

That advantage may arise in one or more of a variety of ways. These include the reduction, avoidance, or postponement of income tax. They also include an alteration in the incidence of income tax, or relieving persons from income tax.

If there is an income tax advantage, it is necessary to identify whether or not that advantage is merely an incidental purpose or effect of the arrangement. In *CIR v Challenge Corporation*, Mr. Justice Woodhouse acknowledged that the meaning of this qualification is all important and stated:

> "... The issue as to whether or not a tax saving purpose or effect is "merely incidental" to another purpose is something to be decided not subjectively in terms of motive but objectively by reference to the arrangement itself."
>
> "... The phrase "merely incidental purpose or effect" in the context of section 99 points to something which is necessarily linked and without contrivance to some other purpose or effect so that it can be regarded as a natural concomitant. Many taxpayers when considering a course of action are likely to appreciate and welcome an opportunity provided by the Act for achieving some tax benefit as an aspect of it. But this should not bring the transaction or transactions almost automatically within the avoidance provisions of s 99. By itself conscious recognition and acceptance that a commercial transaction will be accompanied by a degree of tax relief is not the issue."
>
> "... In the end the breadth of the qualifying phrase and so the ambit of the section itself will be discovered as a matter of fact and degree on a case by case basis."
>
> "... When construing s 99 and the qualifying implications of the reference to "incidental purpose" the questions that need to be framed in terms of the degree of economic reality associated with a given transaction in contrast to artificiality or contrivance or what may be described as to the extent to which it appears to involve exploitation of the statute while in direct pursuit of tax benefits. To put the matter in another way, there is all the difference in the world between the prudent attention on one hand that can always be given sensibly and quite properly to the tax implications likely to arise from a course of action when deciding whether or not to pursue it and its pursuit on the other hand simply to achieve a manufactured tax advantage."

In some circumstances, an evaluation having regard to the view expressed by Mr. Justice Woodhouse may conclude that the securing of a tax advantage is a non-incidental purpose or effect of the arrangement. In this case, it is necessary to consider whether that non-incidental tax advantage is one that constitutes tax avoidance as contemplated by section 99.

Frustration

This requires the synthesis of the other facets of the process. Section 99 is used to support the rest of the Act. Its function is to protect the liability for income tax established under other provisions of the Act. Accordingly the section will apply to void those arrangements where an evaluation of the arrangement results in the inference that a non-incidental purpose or effect is tax avoidance and the resulting tax advantage frustrates the intent of the Act.
The Commissioner considers that this new four-step approach to the application of section 99 gives the provision its proper status within the Act, enabling it to do its work in a balanced but effective way.

Pretence

Many tax avoidance arrangements involve an element of pretence. Section 99 will be applied to counter this. The Commissioner expects that the provision will be mainly applied to those taxpayers who follow a course of action to achieve a manufactured tax advantage which is essentially void of any economic reality. However, economic reality is not of itself the sole determinate of whether section 99 applies. The degree of economic reality associated with a given transaction will be contrasted to any artificiality, contrivance, or exploitation of the Act while in direct pursuit of tax benefits. This analysis will focus on determining whether the underlying scheme or purpose has been frustrated.

Invoking Section 99

The section may be applied in conjunction with other provisions of the Act but only where the merits of application have been properly considered. The process requires the careful and thorough analysis described above. This analysis will be undertaken independently from the consideration of the transaction in terms of the more specific provisions of the Act. Section 99 will not be used without this analysis having been undertaken. In other words Departmental Officers are not empowered to invoke section 99, or indicate that it is intended to invoke the section, without having completed the analysis.

Section 99 will be invoked by the Department against arrangements intended to frustrate the underlying scheme and purpose of the relevant provisions of the Act.

Rulings

The Department recognises as an important aspect of tax administration that the tax consequences of entering into any particular transaction be known with the greatest degree of certainty possible.

To achieve this objective the Department will do its best within its current resource constraints to provide timely, accurate and adequate advice on the possible application of section 99 to specific situations subject to the following conditions:

(a) the full facts and documentation (including proposed documentation) of the transaction and associated transactions must be disclosed;

(b) the names of the parties, including the parties to the associated transactions, must be disclosed;

(c) the taxpayer's full arguments as to -
(i) why section 99 does not apply; and
(ii) the purpose and effect of the transaction;

(d) any subsequent amendments to the proposals must be brought to the Department's attention and presented with an analysis of whether the amendments affect the ruling given;

(e) the ruling is not legally binding on the Commissioner but the Commissioner will normally follow his ruling unless the taxpayer has failed to comply with one or more of these conditions;

(f) the Commissioner may use the factual situation submitted to amend or supplement his general guidelines on the application of the section but this would be done in such a way as to preserve the confidentiality of the taxpayer concerned.

Requests for rulings on the application of section 99 should be made in the first instance to:

Director (Taxpayer Services)
Head Office
P O Box 2198
Wellington.

Examples of Application of Section 99

The Annex to this statement sets out some examples of the application of this new policy.

ANNEX TO POLICY STATEMENT

APPLICATION OF POLICY

The examples set out below illustrate how the Department will in practice apply the new policy described above. It is important to note that the following examples are indicative only of when section 99 is considered by the Department to apply in the specific circumstances as described in each example. The examples should not be viewed as delineating the line between when section 99 will or will not be applied by the Department.

It is assumed that the arrangements described below comply with the literal terms of the provisions of the Act concerned and that the transactions are legally valid.

CONTENTS

1. PERMANENT TRANSFER OF INCOME PRODUCING ASSETS

YZ is an individual who derives income from salary and interest from a portfolio of interest bearing securities. YZ had some years ago established a discretionary trust for the benefit of YZ's family and had from time to time made settlements to the trust. YZ's income is at a level which attracts the highest marginal rate of tax. The income derived by the trustee during an income year is normally paid or applied to or for the benefit of the beneficiaries of the trust. The beneficiaries currently earn income at a level below the highest marginal rate of tax.

YZ recognises the opportunity to reduce YZ's liability to income tax on income that would otherwise be assessable to YZ and to reduce YZ's exposure to estate duty. In pursuit of this goal YZ transfers absolutely the portfolio of interest bearing securities to the family trust. YZ grants to the trust an interest free loan repayable on demand to effect the sale of the portfolio and forgives a portion of the debt over several years. The effect of this arrangement is that YZ is no longer subject to income tax on the interest income and YZ's estate has been considerably reduced. Assuming that the trustee pays or applies the income to or for the benefit of the beneficiaries during or within six months of end of the income year the overall effect is a reduction in the income tax paid.

INTERPRETATION

(a) **Scheme and Purpose**

A trust is an equitable obligation, binding on persons referred to as trustees to deal with the trust property over which they have control for the benefit of the beneficiaries of the trust.

A comprehensive scheme for the taxation of trustees and beneficiaries of trusts is contained in sections 226 to 233 of the Act. These provisions were substantially redrafted as a result of the Income Tax Amendment Act (No.5) 1988. The new regime generally takes effect from the income year commencing 1 April 1988. The former regime drew a distinction between "specified" and "non specified" trusts. In broad terms, a non specified trust included trusts created by will or on intestacy and inter vivos trusts created before 19 July 1968.

Specified trusts were inter vivos trusts created on or after that date. The distinction was brought about by an amendment to the Land and Income Tax Act 1954. The policy behind the distinction was an effort to frustrate income splitting through the use of trusts by creating a harsher tax regime which would apply to specified trusts. For example, trustees of a non specified trust were taxed at the normal individual rates after taking into account the $100 exemption. Whereas, trustees of a specified trust were taxed at a minimum rate of 35c in the dollar.

The specified trust regime was designed to deter but not prohibit the use of trusts for income splitting purposes. As part of the introduction of the new trust regime, the distinction between specified and non specified trusts was removed.

The continued inclusion in the Act of a specific regime for the taxation of trusts and the existence of the former trust regime, although drawing a distinction between specified and non specified trusts, clearly indicates that the Act contemplated and still contemplates the likelihood of permanent transfers of income producing assets to a trust for the benefit of its beneficiaries.

The inference that permanent transfers of income producing assets are consistent with the scheme of the Act is further reinforced by the presence of section 96 in the Act. Section 96 of the Act provides in general terms that where an assignment of income or income from settled property is for a period of less than seven years, and the assignor or settlor remains the owner or beneficial owner respectively of the income producing asset, or the property/corpus reverts to or otherwise remains under the control of the assignor/settlor, then the income, notwithstanding the assignment or settlement, is deemed for income tax purposes still to be derived by the assignor or settlor.

By implication the Act contemplates as acceptable tax planning the permanent transfer of income producing assets without reservation, reversion or the right to control the disposition of the asset.

The possibility of tax savings arising from the permanent transfer of income producing assets is contemplated by the Act, in that it provides for the taxation of beneficiary income at the beneficiary's ordinary income tax rate.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement it has several purposes: to reduce YZ's potential estate duty liability, the setting aside of income earning assets for the benefit of YZ's family, and the minimisation of income tax.

(c) **Inference**

The taxpayer in this case has chosen to transfer the portfolio of investments to a trust, subject to the provisions of the Act as they apply to trusts. Such a transfer would have been influenced by domestic and economical factors which may have included a wish to secure income tax savings. A reduction in taxation has occurred.

Although the tax saving may be significant, it is a natural consequence of the disposition of the assets to the trust. The inference to be drawn is that the tax saving is an incidental purpose or effect of the arrangement.

(d) **Frustration**

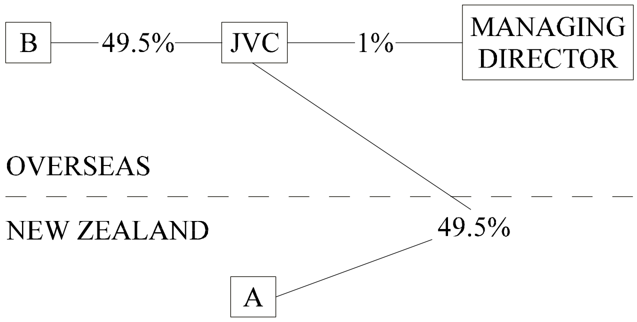
The Department does not consider that the scheme and purpose of the Act has been frustrated in the above circumstances. If a taxpayer permanently disposes of income producing property to another taxpaying entity so as to reduce the taxpayer's burden of taxation the Act contemplates that the new owner will be liable for the tax on that income. The incidence of the tax and the burden of tax falls precisely as the Act intends, namely, upon the new owner.

The Department would accept the above arrangement as acceptable tax and estate planning and would not apply section 99 to the arrangement.

2. INTERNATIONAL TAX REGIME

FACTS

A is a New Zealand resident and B is a non-resident. A and B are involved in a joint venture operation. A joint venture company is incorporated in Panama with the following share structure. The pint venturers each hold 49.5% and a non-resident Managing Director holds the remaining 1%. The Managing Director's shares carry limited voting rights. Additionally, the shares provide for limited entitlement to participate in the distribution of profits or the value of net assets on a winding up (or other distribution). The share structure adopted is not a requirement of the law of Panama, New Zealand, or the country in which B is resident. The Managing Director is neither a 'nominee' or 'associated person' of resident A, as those terms are defined in sections 245A and 245B of the Act.



(a) **Scheme and Purpose**

One of the primary objectives of the International tax regime is to prevent the deferral/avoidance by New Zealand residents of New Zealand income tax on foreign sourced income earned through non-resident companies.

The Controlled Foreign Company (CFC) regime was enacted as part of a trilogy of measures to ensure that foreign income derived by New Zealand residents is subject to New Zealand tax as it is earned. The CFC regime only applies where five or fewer New Zealand residents have a 50% or greater control interest in a foreign company.

The control tests contained in section 245C are the cornerstone of the CFC regime. Recognising the importance of this section, the legislature have included a specific anti-avoidance provision in section 245C(9). In general terms the provision provides that where two residents enter into an arrangement whereby any control interests in a foreign company are held by any other person or persons, where the arrangement has the purpose or a purpose of defeating the effect of section 245C, then the control interests are deemed to be held by those persons equally.

(b) **The Purpose of the Arrangement**

An objective evaluation of the arrangement is required to establish whether resident A effectively holds a 50% control interest in the joint venture. For example, the Managing Director may hold 0.5% of his shareholding on behalf of resident A in a manner intended to frustrate the control test requirements of section 245C.

(c) **Inference**

It cannot be automatically inferred that the structure like that outlined was designed to avoid the effect of the CFC regime. There may be a number of non tax related reasons for adopting the arrangement, such as, accommodating the commercial or tax needs of the non-resident joint venturer.

However, having considered all the relevant factors it may be that the only proper inference which can be drawn from the arrangement and surrounding circumstances is that it was implemented in this particular way so as to avoid tax.

Once it has been identified that the arrangement provides for tax benefits, an evaluation must be made as to whether they are a more than merely incidental consideration in the implementation of the arrangement.

(d) **Frustration**

The control interest requirements of section 245C are designed to ensure that the CFC regime applies to those New Zealand residents who control a foreign company. If the reality is that resident A owns a 50% interest in the joint venture operation, the Department will apply section 99 to the arrangement, on the basis that the 1% holding by the Managing Director is an attempt to circumvent the provisions of section 245C. This is notwithstanding that the specific anti-avoidance provision in section 245C(9) has no application because the arrangement is not entered into between two or more New Zealand residents.

The Department considers that section 99 can still apply notwithstanding that a specific anti-avoidance provision has been avoided. This is clear from the Privy Council decision in *Challenge*. The facts of the *Challenge* case were that Challenge acquired the shares in a tax loss company for the sole purpose of grouping those losses against Challenge's assessable income.

One of Challenge's arguments was that as section 191 of the Act contained its own specific anti-avoidance provision and that as Challenge had not temporarily acquired the shares in Perth and were not therefore within the ambit of the activities proscribed by section 191(1)(c)(i), then section 99 could not apply.

Section 191(1)(c)(i) provided, in general terms, that in determining whether the requisite proportions had been met at the end of the year for the purposes of the tax grouping provisions, the Commissioner could disregard any temporary alteration in shareholding or constitution of a company.

The taxpayer's submissions on this point were firmly rejected by the majority of the Privy Council in the *Challenge* case. To reiterate, the Department considers that the existence of a specific anti-avoidance provision within a section e.g.,. the export incentive provisions, will not bar the application of section 99. Similarly, section 99 operates side by side with sections such as section 96, which have an anti-avoidance function.

In this example the mere fact that resident A has settled for less than a 50% interest in the joint venture company does not in itself create a presumption that the intention of the legislation has been frustrated. A detailed analysis must be undertaken as to the true capacity in which the shares owned by the Managing Director are held, in order to determine if they are held on behalf of resident A.

Section 99 will not have application, where that section has been expressly excluded from operation e.g., section 336Y of the Act excludes section 99 from application in the context of fringe benefit tax.

3A. PREPAYMENT OF INTEREST (PRIOR TO ACCRUALS REGIME)

FACTS

For the purposes of this example, the transaction occurs prior to the introduction of sections 64B to 64M of the Act (the "accruals regime"). PI Ltd need to borrow $100,000 to finance their assessable income earning activity. The capital is to be fully employed in the production of PI Ltd's assessable income earning process. Bank Ltd offer two alternative funding proposals.

Proposal one, a five year loan of $100,000 at 10% simple interest per annum (the current market interest rate for loans of this term). For years one to four, interest of $10,000 is payable annually in arrears. At the end of five years PI Ltd is required to pay $110,000 to Bank Ltd, being interest of $10,000 and principal of $100,000.

Proposal two, a five year loan of $100,000 with interest required to be prepaid. The loan agreement also provides that there is no right of refund of the prepaid interest in the event of the loan being repaid early. The prepaid interest is calculated as the present value of the future stream of interest payments of $10,000, that is, the interest payable in arrears in proposal one. Applying a 10% discount rate, the prepayment amounts to $37,907. At the end of five years, PI Ltd is required to repay the principal of $100,000 to Bank Ltd.

PI Ltd selects proposal two because it can obtain a tax deduction in terms of section 106(1)(h)(i) at the time of payment of the interest in year one. PI Ltd funds the interest payment out of existing cash resources.

INTERPRETATION

(a) **Scheme and Purpose**

The statutory scheme in relation to the tax deductibility of interest has not been conclusively resolved. However, it is the Department's policy that in order to qualify for a deduction in terms of section 106(1)(h)(i) the following criteria must be met:

(i) The taxpayer's purpose in borrowing the capital is relevant at the threshold stage of considering whether the statutory nexus has in fact been met: *Pacific Rendezvous Ltd v CIR* (1986) 8 NZTC 5146, 5154,

(ii) The terms of section 104 must be satisfied as well as section 106.

(iii) Interest is a prohibited deduction unless it comes within the exceptions contained in section 106(1)(h)(i), (ia), (ii).

(iv) The paragraphs of section 106(1) provide cumulative proscriptions i.e. is the interest deduction prohibited by the other provisions of section 106(1) e.g. section 106(1)(j).

Aspects of the Department's policy were recently confirmed by Barber J in Taxation Review Authority Case No. 83/33. His Honour held that a taxpayer must cumulatively satisfy sections 104 and 106(1)(h) to qualify for an interest deduction. Specifically, in terms of this example, the Department considers that provided the tests as prescribed in section 106(1)(h)(i) are satisfied then the interest will be deductible for tax purposes. In other words, where the terms of section 106(1)(h)(i) have been met then that will be sufficient to satisfy section 104. In the circumstances section 104 is not considered to impose a more stringent test than section 106(1)(h)(i).

This issue is largely academic in regard to interest tax deductions post 1 April 1985 because of the close similarity between sections 104 and 106(1)(h).

Prior to 1 April 1985 section 106(1)(h) provided for a deduction for interest where:

(i) It was payable on capital employed in the production of assessable income; or

(ii) It was payable by one group company in respect of money borrowed to acquire shares in another group company.

With effect from 1 April 1985 the section was significantly redrafted. The Income Tax Amendment Act 1987, inserted a proviso to section 106(1)(h) to the effect that accrual expenditure is deemed to be "interest payable". The Income Tax Amendment Act (No.2) 1987, replaced the former section 106(1)(h)(i) as it existed prior to 1 April 1985 and introduced new subparagraphs (i) and (ia) in similar form to section 104.

Commencing from 1 April 1985, section 106(1)(h) provides for the deductibility of interest in the following terms, where:

"(i) It is payable in gaining or producing the assessable income for any income year: or

(ia) It is necessarily payable in carrying on a business for the purpose of gaining or producing the assessable income for any income year; or

(ii) It is payable by one company included in a group of companies in respect of money borrowed to acquire shares in another company included in that group of companies: Provided that for the purposes of this paragraph expenditure deemed to be incurred pursuant to sections 64B to 64M of this Act shall be deemed to be interest payable."

Prepaid interest loans entered into between 1 April 1985 and 31 July 1986 (the earliest implementation date for the accruals regime) are dealt with in terms of the new section 106(l)(h)(i), (ia), and (ii). However, the proviso is inoperative as prepaid interest schemes entered into before 31 July 1986 will not be subject to the accruals regime.

In this example the capital is fully employed in the assessable income earning process so that sections 106(1)(j) or 106(1)(a) have no application.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement its principle purpose is to provide PI Ltd with funds and to do so in a tax effective manner.

(c) **Inference**

The inference to be drawn from the facts of this case is that PI Ltd primarily required further working capital The tax-avoidance purpose is considered to be merely incidental.

(d) **Frustration**

The Department considers that the scheme and purpose of section 104 and section 106(1)(h)(i) has not been frustrated in the circumstances described above. More specifically, the Act did not prior to the introduction of the accruals regime prohibit the deductibility for tax purposes of interest paid in advance.

Additionally, the transaction is not artificial, the borrower has incurred real interest expenditure calculated by discounting to present value interest payable in arrears at the market interest rate. The prepaid interest is deductible in these circumstances.

The Department considers that section 99 would not apply to this arrangement because the scheme and purpose of section 104 and section 106(1)(h)(i) has not been frustrated and the taxpayer has been involved in genuine commitments and expenditure.

3B. PREPAYMENT OF INTEREST (PRIOR TO ACCRUALS REGIME)

FACTS

The transaction occurs prior to the introduction of sections 64B to 64M of the Act (the "accruals regime"). PI Ltd is a company which has substantial assessable income for the income year ending 31 March 1985. Bank Ltd is a financial institution whose activities include borrowing and lending money.

PI Ltd enters into the following tax saving arrangement. On 29 March 1985 Bank Ltd advances $750,000 for 3 years to PI Ltd. The terms of the loan require an upfront payment of interest of $287,675 (17.5% annual compounding) payable one day after the drawdown of the loan Although it is not a term of the loan agreement that Bank Ltd or PI Ltd can make early repayment of principal, it is expected and anticipated that the loan will be repaid at a discounted value of $462,325 shortly after drawdown. A fee of $30,000 is payable by PI Ltd for this loan facility.

PI Ltd deposits the $750,000 received on drawdown on call at 18% per annum.

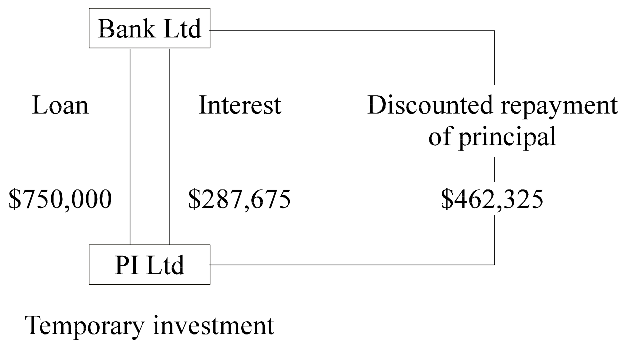
On 30 March 1985 PI Ltd recalls the sum of $287,675 and uses this to make the upfront payment of interest of $287,675 to Bank Ltd. PI Ltd claims an interest deduction in terms of section 106(1)(h)(i) of $287,675 for the income year ending 31 March 1985.

On 31 March 1985 PI Ltd recalls the $462,325 remaining on call and uses this to fund the discounted repayment of principal of $462,325. The "gain" to PI Ltd of $287,675 (i.e., the gain arising from the discharge by PI Ltd of its debt of $750,000 by a payment of $462,325) is treated as capital and consequently non assessable.

Interest is credited daily on the outstanding balance and the investment earns PI Ltd $598 of assessable income for the year ending 31 March 1985.

Bank Ltd return the interest of $287,675 as assessable income for the year ending 31 March 1985. The net tax effect to Bank Ltd of this arrangement is nil (ignoring the facility fee), the loss on loan of $287,675 (arising from the acceptance of a payment of $462,325 from PI Ltd in discharge of the debt of $750,000 owed to Bank Ltd) being set off against the assessable interest income.

The arrangement can be illustrated as follows:



INTERPRETATION

(a) **Scheme and Purpose**

The statutory scheme in relation to the tax deductibility of interest is set out in example 3A above.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement its sole purpose is the avoidance of income tax. It is considered that the income earning purpose is inconsequential to the tax avoidance purpose.

(c) **Inference**

The only inference that can be drawn from this arrangement and surrounding circumstances is that it was implemented in this particular way to avoid tax. The arrangement is economically neutral to all parties except for the interest deduction and loan facility fee.

(d) **Frustration**

The Department considers that the interest is not deductible in terms of sections 104 and 106 as the deduction does not satisfy the statutory test for deductibility in so far as the nexus to assessable income has not been established. On the contrary the only purpose of this arrangement is the avoidance of tax.

This arrangement is clearly intended to frustrate the scheme and purpose of the Act as it relates to the tax deductibility of interest and the Department would apply section 99 to this arrangement.

The following dictum from Lord Templeman in the Challenge (PC) case is binding authority that such arrangements constitute tax avoidance:

> "In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering the reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax."

4. SECTION 160A: AMOUNTS PAID ON SHARES IN PETROLEUM MINING COMPANIES

FACTS

P is a petroleum mining company in terms of section 214B of the Act. In order to continue its petroleum mining operations m New Zealand, it decides to raise further capital by way of an issue of ordinary shares to the public.

E, a New Zealand resident individual considers that the shares will rise in the short term after the public issue. On the basis of this expectation, E borrows to subscribe to the shares and concurrently enters into a sale agreement with non-resident purchaser L. The sale agreement provides that the sale to L is to occur two weeks after acquisition of the shares by E, at the then prevailing market rate.

Pursuant to this plan, E subscribes to the shares in P on 25 July 1986 and claims a one third deduction against E's assessable income pursuant to section 160A of the Act.

INTERPRETATION

(a) **Scheme and Purpose**

The Income Tax Amendment Act 1979 introduced into the Act a new taxation regime for petroleum mining companies. The regime provided for taxation incentives to petroleum mining companies e.g., section 214B(5) provides for the deduction of exploration expenditure (this term being defined to include what would otherwise be considered to be capital expenditure); and to investors in petroleum mining companies e.g., section 160A. This section allows a New Zealand resident shareholder to claim a deduction of one-third of the amount paid as subscriptions or calls on petroleum mining shares, subject to the following limitations:

(a) The money is used by the company in the exploring or searching for petroleum in New Zealand.

(b) The shares are ordinary shares in the company.

(c) The deduction being disallowed if the petroleum mining company does not use the money for the prescribed purposes within a reasonable time.

The section 160A deduction only applies to payments made on or before 30 September 1986 pursuant to calls made on or before 31 July 1986.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement, it is entered into for the purpose of deriving a taxable profit. An incidental consequence of the arrangement is the availability to E of the section 160A deduction.

(c) **Inference**

The inference to be drawn from the arrangement is that the tax consequences are merely incidental to E's profit making objective.

(d) **Frustration**

The Department considers that the plan falls within the underlying policy considerations for the provision; being to encourage capital contributions to companies whose business is the mining of petroleum in New Zealand. Additionally, the plan is neither artificial nor unreal.

The Department considers that section 99 would not apply to this arrangement because the scheme and purpose of section 160A has not been frustrated, more specifically, the section does not specify any period of time that a resident shareholder must hold the petroleum mining company shares in order to qualify for the deduction. The taxpayer has also been involved in genuine commitments and expenditure.

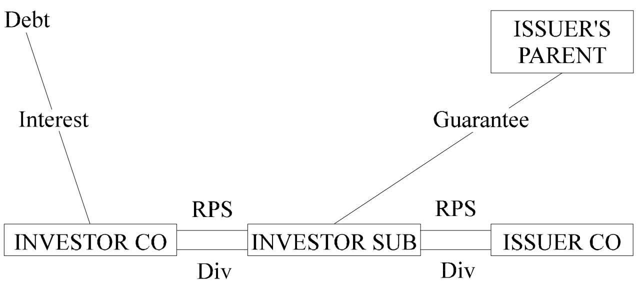
5. REDEEMABLE PREFERENCE SHARE FINANCING

FACTS

Issuer Co is a company which is currently in a tax loss situation which is expected to subsist in the foreseeable future. Issuer Co needs to raise further finance to fund its assessable income earning activities. Issuer Co realising that it is currently unable to utilise an interest tax deduction calculates that the cost of its borrowings can be reduced by raising equity finance in the form of redeemable preference shares as opposed to debt financing. A suitable subscriber to the redeemable preference shares is identified. Investor Co is attracted to the redeemable preference share financing as it can achieve a better after tax return on the redeemable preference shares in comparison to a similar debt investment.

The following arrangement is entered into. Investor Co borrows externally and uses the fresh capital to subscribe to redeemable preference shares issued by Investor Sub, a wholly owned subsidiary. The interest is claimed by Investor Co in terms of section 106 (1)(h)(ii). Investor Sub, in turn uses the capital to subscribe to redeemable preference shares issued by Issuer Co. Dividends are subsequently paid by Issuer Co and Investor Sub. The dividends are exempt income to Investor Co and Investor Sub in terms of section 63 of the Act.

Additionally, Investor Co requires security in respect of the redemption of the redeemable preference shares. Accordingly, another company in Issuer Co's group e.g. Issuer's parent company, guarantees Issuer Co's obligations to redeem the redeemable preference shares. Investor Sub allows Investor Co to pledge this guarantee as security for the debt raised from its own lender.



INTERPRETATION

(a) **Scheme and Purpose**

The Act marks a line between the taxation treatment of debt and equity investments. Sections 64B to 64M (the "accruals regime") provides for a comprehensive regime for the taxation of financial arrangements (a term which expressly includes a "debt instrument"). The accruals regime was not intended to affect the taxation treatment of equity instruments. This intent is reflected in the legislation, where in general terms shares are an "excepted financial arrangement", as that term is defined in section 64B(1) of the Act.

Equity investments have in general terms always been treated differently to debt investments for tax purposes e.g., interest is deductible but dividends are not. This difference has recently been further accentuated by the introduction of a full imputation system.

Additionally, the Act had previously contained provisions which deemed certain debt instruments to be taxed as equity e.g., section 192 dealing with floating rate debentures and certain equity instruments to be treated as debt e.g., section 194 dealing with deductions for dividends on specified preference shares. As far as possible these deeming provisions have been refined or removed. Section 192 was further clarified to ensure that floating rate debentures that were to be treated as equity were those where there was a direct relationship between the company's profits and the debenture payment. Secondly, section 192(3) expanded the exemption from treatment as equity where the interest on the debenture is calculated in terms of indices independent of the company's performance.

The deduction for dividends on section 194 specified preference shares has been removed for post accruals regime issues.

The intent of these amendments has been to ensure the delineation between debt and equity instruments for tax purposes is maintained as far as possible, without undermining the integrity of the tax system e.g., the tax treatment of debentures issued in substitution for shares was retained (section 195) and accordingly to tax financial instruments according to their true legal form.

By drawing and recently reinforcing the distinction between debt and equity instruments for tax purposes, the scheme of the Act is clear in its intent to provide to taxpayers a choice of raising or investing in capital by way of debt or equity instrument.

The interest deduction is claimed in terms of section 106(1)(h)(ii) which provides for a tax deduction for interest on money borrowed to acquire shares in another group company.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement its purpose is to raise finance and to do so in the most tax efficient manner.

(c) **Inference**

The inference to be reached on evaluating the arrangement is that the tax considerations are merely incidental to the purpose of fund raising.

(d) **Frustration**

The scheme of the Act contemplates that taxpayers may raise finance through either the debt or equity market. The scheme of the Act has not been frustrated when a taxpayer simply selects an option that the Act clearly contemplates that the taxpayer might choose.

Section 106(1)(h)(ii) provides a special deduction outside the general scheme of the Act, which has its own nexus, not between expenditure and assessable income, but between expenditure and the acquisition of shares in a group company. Investor Co has incurred genuine expenditure and both Investor Co and Investor Sub are members of the same group of companies. The terms of section 106(1)(h)(ii) are therefore satisfied.

The Department considers that section 99 would not apply to this arrangement because the scheme and purpose of the relevant provisions of the Act have not been frustrated and Investor Co is involved in genuine commitments and expenditure.

6. VALUATION OF TRADING STOCK

FACTS

J Company is in the business of importing and selling computers. For the income year ending 31 March 1988, the corporate tax rate was 48 cents per dollar reducing to 28 cents per dollar for the income year ending 31 March 1989.

J Company ordinarily adopts the cost price alternative for valuing its closing stock for tax purposes. J company realises that it can achieve a tax saving by reducing its assessable income for the income year ending 31 March 1988 via the use of the trading stock valuation options contained in section 85(4).

In pursuit of this goal, J Company elects in terms of section 85(4) to value its closing stock of computers at replacement price. J Company evaluates the other options but this valuation represents the lower of the three permissible alternatives of cost price, market selling value and replacement price. J Company accepts the risk of an increase in assessable income for the year ended 31 March 1989 (primarily because of the reduced value of the trading stock adopted in the previous year) because of the reduction of the corporate rate to 28 cents per dollar.

INTERPRETATION

(a) **Scheme and Purpose**

Section 85 of the Act provides for a comprehensive regime for bringing to account trading stock for tax purposes. In particular, section 85(4) provides a taxpayer with three different options for valuing trading stock at year end i.e., cost price, market selling value, or replacement price. In addition section 85(4A) provides for a different regime for livestock, not used in a dealing operation. Section 85(6) requires a taxpayer to include in assessable income the value of the trading stock at the end of the income year. Section 85 provides for certain valuation options which are unique to the Income Tax Act i.e., they do not reflect any external business norm. Specifically, the tax options can be usefully contrasted to options available for accounting purposes. Statement of Standard Accounting Practice No. 4 (SSAP 4) “Accounting for Inventories”, provides that inventories should be valued at the lower of cost and net realisable value, whereas the tax options are cost price, market selling value, and replacement price. The only similarity that the tax options have with accounting standards is the option to value trading stock at cost price. Secondly, it is important to note SSAP 4 requires the adoption of the lower of the two values specified, whereas, section 85(4) provides for a choice of options irrespective of their comparative value.

Section 85, by providing for options for valuing stock which are not commercially available i.e., at market selling value or replacement price and the provision of an unqualified choice as to which option to adopt, creates a unique tax norm.

(b) **The Purpose of the Arrangement**

On am objective evaluation of the arrangement, its purpose is to reduce J Company’s liability to tax.

(c) **Inference**

The prima facie inference to be drawn from the arrangement is that it was implemented in this particular way to avoid tax. The expression “tax avoidance” is defined in section 99(1) and includes “reducing or postponing any liability to tax”.

(d) **Frustration**

Section 85 creates trading stock valuation options which are unique to the Act, against which there is no external commercial yardstick that they can be judged. The Department does not consider it as tax avoidance for taxpayers to adopt an option created by the Tax Act and which exist only for the purposes of the Act.

Section 85 is clearly intended to provide taxpayers with an unfettered choice as to how to value their trading stock at year end for tax purposes. The ability to achieve the type of tax saving described above is clearly contemplated by section 85.

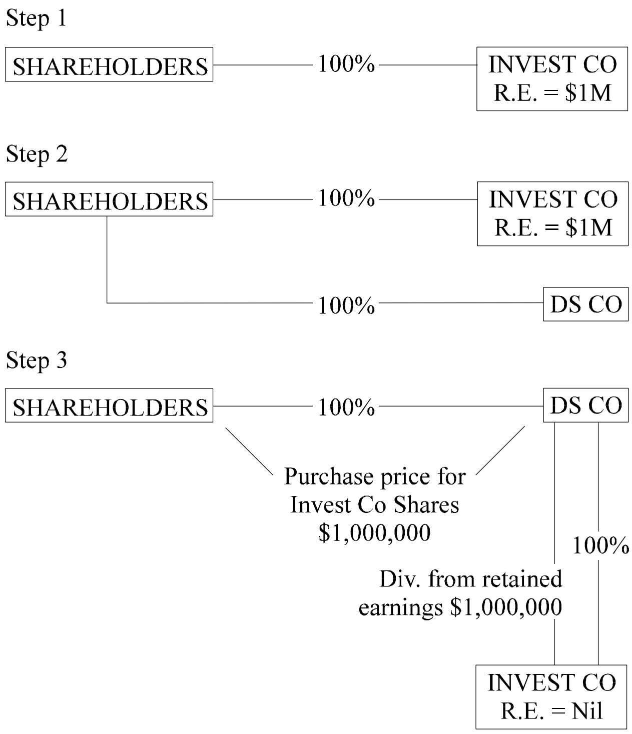
The Department considers that section 99 would not apply to this transaction because the scheme and purpose of section 85 has not been frustrated.

7. DIVIDEND STRIPPING

FACTS

Invest Co is an investment company with a substantial portfolio of interest bearing investments and retained earnings. The shareholders of Invest Co wish to have the retained earnings distributed to them in a tax free form. In accordance with a plan, the shareholders of Invest Co arrange for the incorporation of DS Co and subscribe to all of the share capital. The shareholders in DS Co cause DC Co to acquire all their shares in Invest Co for a consideration equal to the Invest Co retained earnings of $1,000,000. DS Co funds the purchase of the shares by causing Invest Co to pay a dividend out of and equivalent to Invest Co’s retained earnings.

The effect is that the original shareholders of Invest Co have had distributed to them the retained earnings of Invest Co in a tax free form whilst still retaining effective control of Invest Co.



INTERPRETATION

(a) **Scheme and Purpose**

Section 99(5) is a specific provision included in the Act which deals with dividend stripping arrangements. In general terms the section provides that where the Commissioner considers that any consideration received by a taxpayer as a result of the sale of shares, is in substitution for a dividend that would otherwise have been received, the Commissioner may deem such consideration to be a dividend.

A precondition for the application of section 99(5) is that the arrangement satisfy the criteria of section 99(2). As a result the normal sale of shares (not having a tax avoidance purpose) will not be caught by the section.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement, it has been entered into solely to convert assessable dividend income into a non assessable receipt. The purpose of the arrangement is tax avoidance.

(c) **Inference**

The inference to be drawn from the arrangement is that it is entered into solely to avoid tax.

(d) **Frustration**

The Department considers that section 99(5) of the Act applies to this arrangement and would treat the consideration received by the shareholders of Invest Co for the sale of their shares in Invest Co to DS Co as an assessable dividend. Section 99(5) is clear in its intent to defeat arrangements intended to recharacterise assessable dividends into non taxable receipts.

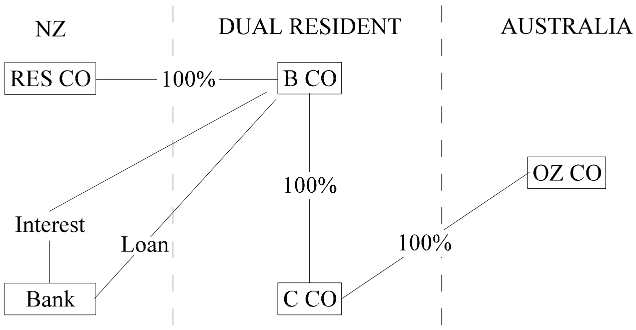
8. DUAL RESIDENT COMPANY LOSSES

FACTS

Res Co is a company resident in New Zealand. It has a subsidiary company, B Co, which in turn has a subsidiary company, C Co. Both B Co and C Co have been intentionally established so that they are resident of both Australia and New Zealand for income tax purposes. C Co has a wholly owned subsidiary in Australia, Oz Co. In order to finance investments by the group, dual resident company B Co, borrows to subscribe to shares issued by dual resident company, C Co. The interest deduction results in a tax loss in the dual resident company for New Zealand income tax purposes which is able to be grouped against assessable income derived by Res Co. Due to the dual resident status of B Co, the loss is also able to be grouped against the assessable income of Australian company, Oz Co. This results in the dual resident's tax loss being able to be utilised twice, once in each tax jurisdiction.

C Co advances funds to Oz Co and other associated group companies.

Section 191 was amended in 1987 by the insertion of section 191(7E) and in 1988 by the insertion of section 191(7F). In general terms, the effect of these provisions are to quarantine dual resident company and non dual resident company losses from New Zealand group company assessable income. The following interpretation applies to losses incurred by dual resident companies prior to the introduction of section 191(7E) and 191(7F).



INTERPRETATION

(a) **Scheme and Purpose**

The Act as it was structured prior to the introduction of section 191 (7E) and 191 (7F) did not contemplate or address the problem of dual resident company losses.

As no comprehensive scheme existed for the treatment of dual resident company losses, the analysis of the arrangement must proceed on the basis of analysing the scheme and purpose of the relevant taxing provisions affecting the different steps making up the arrangement.

The arrangement described above generally relies on an interest tax deduction in terms of section 106(1)(h)(ii) for its effectiveness This section provides for a deduction outside the general scheme of the Act, which has its own nexus, not between expenditure and assessable income, but between expenditure and the acquisition of shares in a group company.

Section 191 of the Act provides for a comprehensive scheme for the offset of losses within groups of companies. The method by which losses may be offset depends on whether the group is characterised as a "group of companies" or "specified group". In general terms, a company is a part of a group of companies where there is a 66 2/3% commonality of shareholding. Companies are a part of a specified group where the shareholders hold all the paid up capital in all the companies in the same proportions. A group of companies may transfer losses by subvention payment, whereas a specified group may choose between a subvention payment or notice of election. There are a multiplicity of tests which must be satisfied before a taxpayer can avail himself of the grouping provisions.

Section 191 creates a unique concept in a tax group, against which there is no external commercial yardstick. In other words, a tax group of companies is created by the Income Tax Act and exists only for the purposes of the Income Tax Act.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement it has several purposes: the financing of group company investments, the obtaining of a deduction in New Zealand and Australia for the incurring of a single expense, and to enable the dual resident company losses to be grouped against Res Co's income. The latter purpose would prima facie amount to "tax avoidance" as that expression is defined in section 99, being to relieve "any person from liability to pay income tax".

(c) **Inference**

The inference to be drawn from this arrangement and surrounding circumstances is that the tax deductibility of the interest by B Co and the subsequent grouping of B Co's losses against Res Co's assessable income is merely incidental to the purpose of funding the group's investment activity.

(d) **Frustration**

The Department has identified several multinational companies which have utilised the dual resident structure described above. The Department does not consider that the scheme of the Act as it was prior to the introduction of sections 191(7E) and 191(7F) has been frustrated in these circumstances.

The Department does not consider that section 99 applies to the above arrangement for the following reasons:

(a) The terms of section 106(1)(h)(ii) have clearly been satisfied by this arrangement.

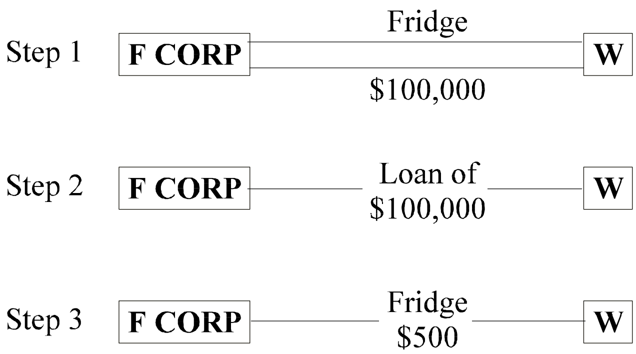
(b) The scheme of section 191 has not been frustrated by this arrangement. Through section 191 the Act creates a tax group which exists only for the purpose of the grouping of tax losses. The Department does not consider that an arrangement can constitute tax avoidance where a taxpayer has simply satisfied the statutory form which the Act has purposely created. Although Res Co has been relieved to some extent of its liability to tax; that is one of the purposes of every offset of loss by one company against the profits of another; indeed it may be concluded that it is the only reason for the presence of section 191.

(c) The Department considers that the mere ability to utilise losses in two separate tax jurisdictions is not of itself sufficient to trigger the operation of section 99. *Europa Oil (NZ) Ltd v CIR* [1976] 1 NZLR 546, 556, remains good law on this point; section 99 is not concerned with the fiscal consequences of the disputed arrangement in another tax jurisdiction. Section 99 is only concerned with the avoidance of New Zealand income tax.

9. CONTRIVED DEDUCTIONS

FACTS

F Corp is a company operating a business with substantial assessable income. The two major shareholders are a husband and wife, H and W respectively. F Corp enters into the following tax saving arrangement. F Corp acquire a household fridge from W for $100,000. The fridge is only worth $400. The purchase price is immediately lent back by W to F Corp on an interest free repayable on demand basis. The fridge is used by F Corp to store refreshments for entertaining clients. Two weeks after the purchase, F Corp sell the fridge to H for $500. F Corp claim the loss on disposal of $99,500 against its assessable income.



INTERPRETATION

(a) **Scheme and Purpose**

The Income Tax Act provides a code in relation to deductibility. Section 101 provides that no deductions are available otherwise than in terms of the Act. Section 104, the general deductibility provision of the Act provides for a deduction for any expenditure or loss incurred, or necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Expenditure otherwise deductible in terms of section 104 may be restricted by the provisions of section 106 e.g., section 106(1)(a) prohibits deductions for capital expenditure. Section 108 provides the test for deductibility for depreciation.

(b) **The Purpose of the Arrangement**

On an objective evaluation of the arrangement it has been implemented in this way for the sole purpose of avoiding income tax.

(c) **Inference**

The only inference which can be drawn from the arrangement and surrounding circumstances is that it was implemented in this particular way to avoid tax.

(d) **Frustration**

The basis for deductibility of losses of this nature is unclear, the alternatives are section 104 or section 108.

Where the claim is made in terms of section 104 the Department considers that the loss is not deductible as the arrangement has been entered into for the sole purpose of avoiding tax and thus lacks the nexus to assessable income. It is also considered by the Department that losses incurred in the above circumstances clearly fall outside the scheme of section 104.

Where the claim is in terms of section 108 the Commissioner would similarly disallow the deduction on the basis that it lacks the nexus to assessable income.

The Department would also challenge the deduction on the basis that it amounts to capital expenditure in terms of section 106(1)(a).

Additionally, the Department would also invoke section 99 as the sole purpose of the arrangement is the avoidance of tax. The arrangement is artificial and is intended to frustrate the scheme and purpose of section Act.

As from 1 October 1988 the excess over the market value of the fridge i.e., $99,600 is deemed to be a dividend to W in terms of section 4(1)(d) of the Act.

If an arrangement as described above were entered into by a taxpayer, the Department would give serious consideration to treating the arrangement as tax evasion.