Payment of unclaimed money and Inland Revenue's role

Introduction

We are publishing this article to coincide with the release to the media of the names of people identified as being owed money under the Unclaimed Money Act 1971. That release is being made to try and find the owners of the money. A copy of the list released to the media is also available at every Inland Revenue office.

The Unclaimed Money Act 1971 ("the Act") has these purposes:

- to ensure that people or organisations who hold funds on behalf of someone else take adequate steps to find the owners of unclaimed deposits and other amounts owing:
- to enable businesses and the personal representatives of deceased people to clear their accounts of unclaimed money:
- to require unclaimed money be paid to the Crown as the custodian for the owner of the funds, with the benefit from the use of the money accruing to the community in the interim:
- to establish a mechanism for the owner to recover the unclaimed money at a future date.

The Act applies from 1 June 1971 and sets out the procedures to follow for unclaimed money. It defines unclaimed money and holders of unclaimed money. Generally, money held in an account where there is no activity for 6 consecutive years (or 25 consecutive years, for some deposits) becomes unclaimed money. There are special provisions for amounts of $100 or less.

The Act applies to all companies, banks, building societies, insurance offices, money-lenders, auctioneers, real estate agents, accountants, sharebrokers, and motor vehicle dealers that hold defined classes of unclaimed money. There are special provisions where the holder has ceased to carry on business or has died. The Commissioner of Inland Revenue ("the Commissioner") may also enter into special arrangements to exempt holders from some of the administrative requirements of the Act.

The Act does not apply where provisions relating to unclaimed money exist under other legislation, e.g. for solicitors. However, any person or organisation who is not required to comply with the Act may elect to become a holder, and take advantage of the Act's facilities to clear unclaimed money.

The Act sets out the obligations of holders and the Commissioner for unclaimed money held on behalf of the owner. Inland Revenue administers the Act on behalf of Treasury.

Unclaimed money

What is unclaimed money?

Unclaimed money falls into three broad groups - deposits of money, life assurance proceeds, and certain types of trade debts. Money only becomes unclaimed money after it has been held for a certain length of time and it is situated in New Zealand. Money unclaimed in another country is generally subject to that country's law.

The following money is treated as unclaimed money for the purposes of the Act:

- **Fixed term deposits** - money (including interest) deposited by the customer to earn interest for a fixed term. The money becomes unclaimed money if the holder has held the money for 6 years after the end of the fixed term.
- **Deposits for indefinite periods** - money (including interest) deposited by the customer to bear interest for an indefinite period, e.g. an ordinary savings account. The money becomes unclaimed money if the customer has not used the account for 25 years by making a deposit, withdrawing money, or giving written instructions.
- **Automatically renewable fixed term deposits** - money (including interest) deposited by the customer to bear interest for a fixed period where the money is automatically reinvested at the end of the term. For example, the customer may give a written standing instruction that the holder should reinvest the deposit on the expiry of each deposit term. This money becomes unclaimed money if the customer has not used the account for 25 years by making a deposit, withdrawing money, or giving written instructions.
- **Non-interest bearing current accounts** - money deposited by the customer in a current account which does not bear interest. The money becomes unclaimed money if the customer has not used the account for 6 years by making a deposit, withdrawing money, or giving written instructions. If the account is held by a savings bank, the money becomes unclaimed if the customer has not used the account for 25 years.

  Savings banks include the Post Office Bank Ltd, trustee savings banks, private savings banks, and building societies.
- **Life assurance proceeds** - money payable on the maturity of a policy of life assurance. This money becomes unclaimed if held by the holder for longer than six years after the earlier of the date that the policy matures (otherwise than by death) or the date

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that it matures due to death. The holder only needs to have reason to suppose that the policy has matured due to death. The holder does not need to ensure that the death is legally proved, even if this is a condition of the life assurance policy itself.

For example, if a policy holder disappears while swimming, the 6 year period starts to run from the date of the probable drowning, although the death may not be legally presumed until later.

- **Trade debts and other money** - any other money which has been owing by a person who is defined as a "holder" (explained below). Examples of money which falls into this group include trade debts, wages, and unpresented cheques. This money becomes unclaimed money if it has been owing for 6 years after the due date for payment.

What is not unclaimed money?

Three types of money can never become unclaimed money (except where the holder or person owing the money ceases business - see discussion below). These are:

- Dividends - This exclusion does not apply to dividends payable by mutual associations if the dividends are effectively interest on members' contributions or deposits.
- Mutual association rebates - This exclusion applies to rebates on store trading payable by mutual associations to their members. Interest on members' contributions or deposits can become unclaimed money.
- Benefits payable from a pension or superannuation fund.

Other legislation

The Unclaimed Money Act does not override any special provisions for the treatment of unclaimed money which are contained in any other act. Acts which include such special provisions include:

- The Law Practitioners Act 1982
- The Companies Act 1955 and the Companies Act 1993 (liquidations)
- The Innkeepers Act 1962
- The Public Trust Office Act 1957

Holders

Who is a holder?

Holders of unclaimed money fall into one of the following three groups:

- **General mandatory holders** - these are companies, banks, building societies, and insurance offices. General holders are liable to account for all classes of unclaimed money.
- **Restricted mandatory holders** - there are certain holders (who are not companies) who are only obliged to account for particular kinds of unclaimed money. These holders, and the unclaimed money they must account for, are:

  Moneylenders - money they have borrowed in the course of the money lending business

  Auctioneers - the balance of any proceeds of goods sold at auction

  Real estate agents - money held in the real estate agent's trust account

  Sharebrokers - money held on behalf of clients

  Members of the New Zealand Society of Accountants - money held on behalf of clients

  Motor Vehicle Dealers - proceeds a dealer receives when acting as agent.
- **Voluntary Holders** - any person, firm, body, or institution not included above may *elect* to be a holder and comply with the provisions of the Act. In addition, any of the restricted holders mentioned above may elect to be a holder of additional money except:
  - money which they hold as a mandatory holder; and
  - funds which do not qualify as unclaimed money (e.g. dividends, mutual association rebates, or pension and superannuation fund benefits).

Any person (or personal representative) may elect to be a holder where the business has ceased or death has occurred.

Before the Commissioner can accept the unclaimed money held by a person who has elected to be a holder, the person must give the Commissioner a copy of the entry in the holder's unclaimed money register. In the case of business cessation or death, the holder must give the Commissioner brief details of the money and its owner.

Requirements for holders

- On 1 June each year, holders must enter in an alphabetical register details of unclaimed money arising in the preceding year. The register must be available for inspection by the public.
- By 30 June each year, the holder must send a letter to each owner (at the last known address), providing details of the unclaimed money.
- By 30 September each year, the holder must advise the Commissioner of the entries made in the register.
- If the money is not claimed by the owner, the holder must pay it to the Commissioner according to the requirements set out below.
- The holder must make an election for amounts not exceeding $100 for any one owner according to the requirements set out below.

Payment of unclaimed money

The money is payable to the Crown through the Commissioner when:

- The money is deemed to be unclaimed money; and
- It has been held unclaimed for the required number of years (6 years or 25 years as applicable); and
- It is held by a holder.

The holder of unclaimed money in any year ending on 31 May, where either the money has not been paid to or claimed by the owner by 30 September, must pay the money to the Commissioner by 31 October. Where the holder pays unclaimed money to the Commissioner in accordance with the Act, the holder has no further liability to anyone who claims the money.

Amounts of $100 or less

There are special provisions to overcome the expense of handling small amounts of unclaimed money that do not exceed $100 for any one owner. A holder can choose within twelve months after the end of the 6 year or 25 year period not to search out owners and not to pay the unclaimed money to the Crown. The money ceases to be unclaimed money. The holder can apply the amount for personal benefit or for the benefit of any other person or for any purpose or object. The owner can still claim the money from the holder in the future.

Where the holder has ceased business or died

Where a business ceases or a death occurs, money that has been held unclaimed for six months after cessation or death may be paid to the Crown to hold as custodian. This applies to money which:

- would become unclaimed money when the time limits expired; or
- would have become unclaimed money if it had not been one of these items:
  - dividends
  - a rebate from a mutual association to members in relation to trading transactions
  - benefits payable from any pension or superannuation fund.

This is an option that will assist in the early clearing of books, and is available to anyone who ceases business or in the event of death.

Inland Revenue's role

The Commissioner administers the Act on behalf of Treasury. All unclaimed money received is paid into the Consolidated Account. The Act provides that all Inland Revenue officers must maintain secrecy about all information obtained in administering the Act. Inland Revenue only communicates such information for the purpose of administering the Act. There is one exception to this strict secrecy requirement; the Commissioner may make available for publication the names of owners and amounts of unclaimed money paid to the Commissioner.

Examination of register

The Commissioner may authorise officers to examine at any time any register kept by a holder and any accounts of the holder that relate to unclaimed money. The officer may require the holder to correct any errors in the register.

Special arrangements

The Commissioner may enter into a special arrangement in writing to exempt any holder or class of holder from these obligations:

- keeping an unclaimed money register
- notifying owners (although this particular exemption would be rare)
- supplying register entry copies to the Commissioner
- paying unclaimed money to the Commissioner by 31 October where no person has established a valid claim by 30 September.

Repayment of money

If a claimant establishes a valid claim for unclaimed money paid to the Crown, the Commissioner will repay the money out of the Consolidated Account. A claimant must satisfy the Commissioner that he or she is the owner of the money. There are no specific rules as to what is satisfactory evidence of ownership. In some cases it may be necessary to consult the former holder. For example, Inland Revenue might consult a former holder such as an insurance company or bank, for comparison of signatures or other evidence.

Where the Commissioner pays money to a claimant and another person later claims to be the owner the Commissioner is not responsible for repayment. The second claimant may have a claim against the first claimant.

Offences

It is an offence for a holder to wilfully or negligently fail to comply with the Act. Where the holder is a company, both the company and the executive officer who authorised or permitted the failure are open to prosecution.

The Court can impose a fine of up to $500 upon conviction for each offence.

Enquiries

If you want to enquire about unclaimed money, write to:

District Commissioner
Inland Revenue Department
P O Box 812
MASTERTON

Maori Land Act 1993 - tax implications

Introduction

The Maori Land Act 1993 (Te Ture Whenua Maori Act 1993) came into force on 1 July 1993. The Act's main purpose is to assist in retaining Maori land (comprising Maori customary land and Maori freehold land) in Maori ownership. The Act generally governs the ownership of Maori land (especially restrictions on its transfer) and its management. It consolidates and reforms Maori land law and replaces the Maori Affairs Act 1953 and various amendment Acts.

The major topics covered by the Maori Land Act 1993 are:

- The constitution and role of the Maori Land Court.
- The classification of all land in New Zealand for the purposes of the Act. The main categories are Maori land, general land, and Crown land.
- Restrictions on the transfer of ownership (alienation) of Maori land.
- Provision for the establishment of different types of trusts.
- Continued provision for Maori incorporations.
- Administration of the estates of individual Maori.

This article deals with the tax implications of the Maori Land Act 1993. It provides an explanation of the Act's provisions only where this is necessary to discuss the Act's tax implications. Te Puni Kokiri (Ministry of Maori Development) has published extensive background material on the Act which gives a detailed description of what the Act does generally.

Trusts

Five types of land holding trusts are established under the Act. These trusts are generally designed to limit the further fragmentation of Maori land titles by limiting rights of succession (i.e., inheritance) in certain cases. Note that while these trusts hold the legal title in the land, the individual Maori beneficiaries of the trust retain beneficial ownership of the land.

The five types of trusts are:

- *Putea Trusts* - These may be established to deal with interests in Maori land or general land owned by Maori, or shares in a Maori incorporation. They are designed to deal with small land holdings which have become difficult to administer as separate interests. Future succession is prevented, and the assets and income are to be used for Maori community purposes.
- *Whanau Trusts* - These trusts are available to consolidate the land (both Maori land and general land owned by Maori) or Maori incorporation shareholdings of Maori families. The assets and income of these trusts are to be used for the benefit of the descendants of the tipuna (ancestor) named in the court order constituting the trust. As with putea trusts, it is not possible to succeed to any interests held by whanau trusts.
- *Ahu Whenua Trusts* - These trusts are designed to promote and facilitate the use and administration of land in the interests of the Maori beneficial owners. Unlike putea or whanau trusts, the establishment of an ahu whenua trust does not affect succession to the beneficial owners' interests. Trusts created under section 438 of the former Maori Affairs Act 1953 will continue under the Maori Land Act 1993 as ahu whenua trusts. The trust assets are held for the beneficial owners of the land in proportion to their interests in the land.
- *Whenua Topu Trusts* - These trusts can be established to hold all or a substantial part of the land owned by members of an iwi or hapu. Assets and income of these trusts are held for Maori community purposes for the general benefit of the members of the iwi or hapu. Succession rights under these trusts are restricted.
- *Kai Tiaki Trusts* - These trusts may be established for minors or for adults who cannot manage their business affairs because of disability. They can be established to hold any interests in Maori land or general land owned by Maori, any shares in a Maori incorporation, or any personal property. Rights of succession to any property held by these trusts are preserved.

An application to the Maori Land Court is necessary to establish any trust under the Act. Trustees' powers and obligations are contained in the trust order made by the Court establishing a particular trust. All trusts are subject to regular review by the Maori Land Court.

Tax effect of charitable status approval

Under section 245 of the Act the trustees of any trust established under the Act may apply to the Court for an order that they hold any part of the trust's income on trust for such charitable purposes as are specified in the Court order. The Court may only make such an order if it is satisfied that:

- the beneficiaries of the trust have had sufficient notice of the proposal and sufficient opportunity to discuss and consider it; and
- there is a sufficient degree of support for the proposal among the beneficiaries of the trust.

Only those trusts approved under section 245 ("section 245 trusts") which are, in fact, charitable at general law will be entitled to the various taxation benefits accorded to charities.

Section 245 of the Act is an enabling provision only. Without this provision the Maori Land Court would not be authorised to allow trustees to hold any part of the trust income on trust for charitable purposes. Section 245 does not deem any income derived by an approved trust to be held for charitable purposes for the purposes of the Inland Revenue Acts, regardless of whether the trust's purposes are in fact charitable at general law.

Inland Revenue will apply its usual criteria, (see Technical Rulings Chapter 53, or our "Charitable Organisations" booklet - IR 255) when determining whether a section 245 trust will receive charitable status for Inland Revenue Act purposes. Briefly, a trust must meet all of these requirements to gain charitable status for Inland Revenue Act purposes:

- It must have a charitable purpose at general law.
- It must not be carried on for the private pecuniary profit of any individual;
- If it is wound up, it must have provision in its rules for its assets to be given to another charity with terms at least as strict as the donor charity.
- It must have no power to amend its rules to detract from the above charitable requirements.

The definition of "charitable purpose" in section 2 of the Income Tax Act 1976 equates with the general law definition of charitable purpose because it utilises the four main classes of charitable purpose identified by Lord McNaughton in *Pemsel's Case* [1891] AC 531. These four classes or heads of charitable purpose are the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community. Inland Revenue must therefore use the general law criteria as to what constitutes a charitable trust when we determine whether a particular trust is charitable for Inland Revenue Act purposes.

The law relating to charities contains a number of requirements (mainly developed by the courts) which ensure that trusts which are of an inherently private nature do not qualify as charitable trusts. Every charitable trust (except trusts for the relief of poverty) must satisfy the public benefit rule, i.e., it must be directed to the benefit of the public or a sufficient section of the public, and not for the private benefit of particular individuals.

It is unlikely that section 245 trusts established by whanau trusts would be accepted by Inland Revenue as having a charitable status unless they had a relief of poverty purpose. This is because these trusts are inherently of a private nature so they would not satisfy the public benefit rule. On the other hand, section 245 trusts established by whenua topu (iwi) trusts could satisfy the public benefit rule if Inland Revenue considered them to be directed to the benefit of a sufficient section of the public. For example, a section 245 trust with an education purpose (an accepted charitable purpose) set up for the benefit of members of a major tribe such as the Ngati Porou would satisfy the public benefit test as it would be directed to the benefit of a sufficient section of the public.

Charitable trusts enjoy certain advantages under the Income Tax Act. Section 61(25) exempts from tax income (except business income) derived by a charitable trust which is not carried on for the private benefit of any individual. Section 61(27) exempts from tax income derived by a charitable trust from any business carried on by or on behalf of or for the benefit of it. There are a number of other taxation advantages enjoyed by charitable trusts under other Inland Revenue Acts.

Charitable status of Maori community purposes

The assets and income of putea and whenua topu (iwi) trusts must be held in trust for Maori community purposes. The issue arises whether Maori community purposes qualify as charitable purposes at general law (and therefore for Inland Revenue Act purposes).

Maori community purposes are defined in section 218 of the Act. While some of these listed purposes would be charitable at general law (e.g., those relating to the promotion of health and education) others would not be (e.g., the provision of loans for industries and especially subsection (2)(d): "Such other or additional purposes as the trustees with the approval of the Court from time to time determine").

It is a requirement of charitable trust law that the purposes of a trust need to be wholly charitable for the trust to have a charitable status, so putea and whenua topu trusts would not be accorded a charitable status for tax purposes.

However, if putea or whenua trusts themselves establish section 245 trusts whose designated purposes were only those specific Maori community purposes in section 218 (which are in fact charitable at general law) then Inland Revenue would accept these section 245 trusts as having a charitable status if they also satisfy the public benefit rule.

Maori incorporations

Maori incorporations are established by order of the Maori Land Court. The effect of the order of incorporation is to vest only the legal title in Maori land in the incorporation. The beneficial ownership of the land remains with the shareholders in the Maori incorporation. The incorporation holds the legal title to the land on trust for the shareholders. Previously, Maori incorporations held both the legal and beneficial interest in the land that they owned. Under the new Act owners in a Maori incorporation will hold a direct interest in the land. The owners' link to the land will therefore be maintained.

Maori incorporations have wider powers under the new Act (more like those of standard companies) to operate commercially in the best interests of their shareholders. The law no longer restricts incorporations to certain activities.

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Maori incorporations established under previous legislation now operate under the provisions of the new Act.

Tax effect of charitable trust declaration

Under section 258 of the Act a Maori incorporation may, by special resolution, declare that it shall possess any part of its property, or the income derived from any part of its property, on trust for charitable purposes.

Again only those trusts established under section 258 (which are, in fact, charitable at general law - and therefore for the purposes of the Inland Revenue Acts) will be entitled to the taxation benefits accorded to charities. Section 258 (as is section 245 in relation to Maori trusts) is merely an enabling provision. In the absence of this provision a Maori incorporation would not be authorised to declare that it held any of its income on trust for charitable purposes. The fact that a Maori incorporation has declared a charitable trust under section 258 does not deem the trust to have a charitable purpose for the purposes of the Inland Revenue Acts.

Inland Revenue will apply its usual criteria when determining whether a trust established under section 258 should have a charitable status for tax purposes. The statements above relating to charitable trusts approved under section 245 apply equally to charitable trusts declared by Maori incorporations under section 258.

Taxation of Maori trusts and incorporations

All Maori trusts and incorporations established or operating under the Maori Land Act would come within the Maori authority definition in section 234 of the Income Tax Act 1976. They would therefore be taxed according to the terms of sections 234 to 240 (Maori authority taxation provisions) of the Income Tax Act.

Estate duty payable on succession to Maori land

Although estate duty has been abolished on the estates of people dying on or after 17 December 1992, section 105 of the Act remains relevant for estate duty payable on the estates of Maori who died before 17 December 1992. This provision enables the Registrar of the Maori Land Court, on the application by the administrator of an estate, to certify for the purposes of the Estate and Gift Duties Act 1968 the value of any undivided interest in Maori freehold land if the value of the interest does not in the Registrar's opinion exceed $15,000. The dutiable estate of a deceased person does not include any interest in land set apart under section 338 of the Act as a Maori reservation.

Conveyance duty payable on vesting orders

The Maori Land Court may make vesting orders to transfer any Maori freehold land to any person to whom the land is entitled to be transferred under the Act.

Section 168 provides for the payment of conveyance duty on the making of a vesting order in accordance with the Stamp and Cheque Duties Act 1971.

On making a vesting order, the Maori Land Court must determine the value of the land. If the value of the land is determined to be $6,000 or less the vesting order will be exempt from conveyance duty.

If the value of the land comprised in the vesting order exceeds $6,000, conveyance duty is payable. This duty must be paid into Court, and a vesting order cannot be issued until the duty is paid.

Conveyance duty is not payable on vesting orders which merely vest the land in the persons beneficially entitled to it (or in someone acting in a representative capacity for the beneficial owners).

Late GST return filers could be prosecuted

More than 22,000 people who have failed to send in their GST returns received final reminders from Inland Revenue recently. These people have failed to put in over 54,000 GST returns, and they will get no further warnings before Inland Revenue begins prosecution action.

We sent reminder letters to people in June, and have also been in contact with them since then. As a result, the number of outstanding GST returns has gone down from 74,000 to 54,000.

Inland Revenue will now concentrate on the hard core who have continued to ignore their responsibilities. People who have received letters recently should respond immediately to avoid prosecution action.

In a recent court case a taxpayer with GST returns outstanding was fined more than $40,000.

Questions We've Been Asked

This section of the Tax Information Bulletin sets out the answers to some day-to-day questions that we've answered. We've published these as they may be of general interest to readers.

These items are based on letters we've received. A general similarity to items in this package will not necessarily lead to the same tax result. Each case will depend on its own facts.

Income Tax Act 1976

Student Loan borrowers must file tax returns

Section 9 - Annual Return by Taxpayers: A Student Loan borrower asked if she had to file a tax return for the tax year in which she is departing from New Zealand.

Section 16 of the Student Loans Act 1992 states that section 9 of the Income Tax Act 1976 applies to student loan borrowers. Section 9 requires every taxpayer to file a tax return.

A tax return is not required where the taxpayer is a pay period taxpayer under section 357(2) Income Tax Act 1976. However, a student who has an IRD loan balance at any time during the year is excluded from being a pay period taxpayer and therefore must file a tax return.

If the borrower is a non-resident for the full year, ***for Student Loan purposes*** a tax return is not required as the repayment obligation will be based on the amount of the loan balance, rather than the borrower's assessable income, if any.

Extra emolument - PAYE deducted at 28 cents per dollar

Section 50D Low Income Rebate: A restaurant employee was paid a bonus which was to be taxed at the extra emolument rate of 28 cents in the dollar (excluding earner premium). The employer stated that when the employee filed a tax return, there would be a refund of 4 cents in the dollar because the employee's assessable income would be taxed at 24 cents in the dollar at the end of the year.

This is incorrect. When PAYE is deducted, an allowance for the expected low income rebate is calculated based on the income. When an extra emolument is paid, the income is increased while the allowance for the rebate by way of reduced PAYE will not have changed. Taxing the extra emolument at 28 cents in the dollar compensates for the 4 cent rebate reduction and the 24 cent end of year tax rate where the employee's income is $9,500 or greater. The low income rebate reduces as assessable income gets closer to $30,875.

Example

An employee has wages of $20,391 with PAYE of $4,472.52.

The employee receives a bonus of $2,000 with PAYE @ 28% = $560

Tax to pay before the bonus would be as follows:

Tax on 20,391 @ 24%	$4,893.84
Less low income rebate	$419.36
Less PAYE	$4,472.52
Tax to pay	$**1.96**

Tax to pay after the bonus is paid will be as follows:

Tax on 22,391.00 @ 24%	$5,373.84
Less low income rebate	$339.36
Less PAYE (4,472.52 + 560.00)	$5,032.52
Tax to pay	$**1.96**

Request for donee status

Section 56A(2) Qualifying Gifts: An organisation has asked if it meets the criteria to be an approved donee organisation. Money donated to the organisation is applied to the preservation of natural forests around the world.

Section 56A(2)(a) of the Act requires that the donations made to the organisation be applied wholly or principally within New Zealand, and that no individual should benefit from the organisation. As funds are applied overseas, approval can not be given. Should the organisation wish to set up a separate fund for exclusive use within New Zealand, approval could be reconsidered.

Section 56A(2) also lists organisations whose funds are not applied wholly or principally within New Zealand. Any donations to these organisations will still qualify for the donations rebate. The list includes such organisations as the Red Cross and The Save the Children Fund. Organisations can be specifically added to section 56A(2)(a) by way of a legislative amendment.

Donations rebate - donations must be in money

Section 56A(2) - Qualifying Gifts: An unpaid volunteer works for a local charity in his spare time. He asked if he could claim the donations rebate on the estimated value of his time spent there.

The value of time spent at the organisation will not qualify for the donations rebate. Section 56A(2) provides that qualifying gifts can only be made in “money” which excludes time and effort or donated goods.

Confirmation of charitable status

Section 61(25) Charity: A trust was formed by a church group with approved charitable status. They now wished to confirm that the trust would also be charitable for the purposes of section 61(25) of the Act.

Provided the newly-formed trust conforms to the rules of the parent body and is under its ultimate control, the trust will enjoy the same tax exemptions as the parent. In this instance, a letter of assurance stating that the trust is subject to the parent’s rules will satisfy Inland Revenue that the trust is also charitable.

Disabled people’s tax free earnings

Section 61(53) - Disabled Persons: A taxpayer involved in establishing workshops for disabled people has asked whether the income earned by the participants in the workshop will be taxable.

Section 61(53) of the Act provides that where a disabled person earns $50 or less on average per week and the employment undertaken is for the therapeutic benefit to the person at a “sheltered workshop”, the income is exempt from income tax.

To qualify for the exemption, the workshop must be a sheltered workshop within the meaning of the Disabled Persons Employment Promotion Act 1960. Generally, this will be where the object is the care, treatment, and rehabilitation of disabled persons.

The Commissioner of Inland Revenue may approve a “sheltered workshop” if it meets similar criteria.

Ministry of Defence personnel stationed in an operational area

Section 64 - Exemption From Tax of Pay of Serviceman in Operational Areas: An army officer has asked if the pay received while on a peacekeeping mission was exempt from income tax. The request for personnel was made by the United Nations to the New Zealand Government.

An exemption from income tax under section 64 on salary and wages applies to the pay of service personnel when the area in which they are posted is declared to be an operational area. The declaration is made jointly by the Prime Minister, the Minister of Defence and the Minister of Finance. As to date, no such declaration has been made, and therefore the salary paid by the Ministry of Defence is not exempted from tax.

Subsidised mortgage where employee on transfer

Section 65 - Items included in Assessable Income: An employer was considering the tax implications of a mortgage subsidy paid to an employee.

Where the employer pays a subsidy to the employee or pays a subsidy to the lending institution on behalf of the employee, the payment will be treated as monetary remuneration under section 65(2)(b) of the Act. Tax deductions must be made from all amounts that constitute monetary remuneration. The amounts paid by the employer are also tax deductible.

Where the employer is liable for loan repayments with the lending institution, or where the employer loans money at a reduced interest rate to the employee, fringe benefit tax applies.

Value of board and lodging when extra pay received

Section 72 - Value of Board, Lodging and House Allowances: An employee assessed for the value of board and lodging supplied by his employer asked if the value assessed on an annual basis should be proportionately increased when there is an additional pay in the year.

The employer and Inland Revenue had mutually agreed that the value of accommodation supplied to each employee be assessed at $4,000 per annum.

The employer had therefore included $153.84 ($4,000/26 pays) in each fortnightly pay of the employees for two years. In the 1993 tax year, 27 pays were made so that $4,153.68 ($153.84 x 27 pays) would be included in the gross taxable income amount on the IR 12.

Where Inland Revenue has agreed to the value of a taxable allowance on a per annum basis, the amount of the taxable allowance (in this example $4,000) is unaltered, regardless of the number of pays. Therefore the employer should not have included the housing allowance in the 27th pay of the year.

CFC and FIF regimes: effect of grey list

Section 245P - Controlled Foreign Companies in Certain Countries: A New Zealand company was expanding into Asia. The company wanted to know if the countries in which it wanted to operate could be included on the “grey list’ of countries - a list of countries whose resident companies are exempt (with certain exceptions) from the attribution requirements of the controlled foreign company (CFC) and foreign investment fund (FIF) regimes.

New Zealand residents are not required to attribute to themselves under the CFC or FIF regimes the income of companies resident in grey list countries in which they have interests. The grey list countries, listed in the Fifteenth Schedule to the Income Tax Act, are currently: Australia, Canada, Germany, Japan, the United Kingdom and the United States.

There are two exceptions to the general grey list exemption. First, companies which enjoy the benefit of certain tax concessions in grey list countries, set out in the sixteenth schedule, are still subject to the attribution requirements of the CFC regime. Secondly, the interests of New Zealand residents in superannuation schemes constituted in grey list countries or in life insurance policies entered into in grey list counties remain subject to the FIF regime.

The Government announced in its 1992 Budget that it would keep the grey list under active review. It also announced the following criteria for grey list inclusion, all of which a country must satisfy before it is included:

- It must have strong anti-avoidance rules, such as its own CFC or FIF regimes.
- It must impose on resident companies an average effective tax rate on their income that is not less than 85% of the average effective tax rate that is imposed by New Zealand tax law on New Zealand companies in any income year.
- It must have a tax treaty with New Zealand.
- It must have a tax base similar to that of New Zealand.
- Its income and expense recognition rules should be no more favourable than those of New Zealand.
- It should have few or no tax incentives, other than those that may be specified in the Sixteenth Schedule.

Double Taxation Agreement - Vietnam

Section 293(2) - Credit for Tax Paid Overseas: A New Zealand resident company has been operating a business in Vietnam through a subsidiary. As there is no double taxation agreement with Vietnam the company was concerned about being subject to double taxation and asked whether a double taxation agreement with Vietnam was envisaged.

There are no current proposals for a double taxation agreement to be negotiated between New Zealand and Vietnam. However, most double taxation is eliminated by the operation of the unilateral tax credit provision in section 293(2) of the Income Tax Act. This provision allows a New Zealand resident a tax credit for foreign tax paid which is substantially of the same nature as New Zealand income tax or non-resident withholding tax. Accordingly, the New Zealand company can claim a credit for withholding taxes paid in Vietnam on dividends, interest and royalties.

The amount of the credit for foreign tax paid is limited to the lesser of the foreign tax paid or the New Zealand tax payable on the relevant item of foreign income. The amount of New Zealand tax payable is determined by the following formula:

$$\frac{\text{Foreign income item}}{\text{Total income}} \times \text{total New Zealand tax payable}$$

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The New Zealand company may also be eligible for a credit for company taxes paid by the subsidiary in Vietnam to the extent that:

(a) it is attributed with the income of the subsidiary under the controlled foreign company regime; or

(b) it receives a dividend from the subsidiary and claims a credit under the underlying foreign tax credit regime.

Pension liable for National Superannuitant Surcharge

Section 336D - Determination of Other Income: A taxpayer asked if half of the pension he received was liable for National Superannuitant Surcharge.

The pension was paid directly to him from a previous employer. The assumption that half would be liable to surcharge was incorrect, because the pension was not paid from a scheme with the approval of the Government Actuary. Therefore, the full amount of the pension would be liable for surcharge and the pension would be liable for income tax.

Only pensions paid from a registered superannuation scheme are paid tax-free to the recipient (the superannuation scheme pays the tax) and only half is liable to the surcharge.

National Superannuitant's surcharge payment method

Section 336G - Election by National Superannuitant in respect of Payment of Surcharge: A superannuitant received income from National Superannuation and interest or dividends, and expected to be liable for surcharge. She asked which method she had to use to pay surcharge - either a special tax code or by provisional tax payments.

The payment method to use is determined by the source from which the income is expected to be derived. In this case where the other income is from interest and dividends only, the superannuitant must elect that payment be made by either provisional tax payments or by requesting a surcharge deduction from the National Superannuation. Inland Revenue will calculate the surcharge deduction rate.

If a superannuitant will derive other income from salary and wages only, he or she must pay the surcharge either by having it deducted from National Superannuation, or by using a SAJ, MAJ or MIN tax deduction code for the salary or wages.

If a superannuitant's other income is made up of both salary and wages and other income (such as interest, rents, business profits etc), he or she can elect either to have the surcharge deducted from National Superannuation, or elect both methods - provisional tax payments and a SAJ, MAJ or MIN deduction codes on the salary or wages.

The exception to the rule (section 336LA) is for National Superannuitants who are also Student Loan borrowers. They cannot use the SAJ, MAJ, or MIN codes; instead they must have a special tax code so that both surcharge and loan repayment deductions will be made from salary and wage income.

Goods and Services Tax Act 1985

GST on gift vouchers

Section 10(16) Token, Stamp etc and 10(17) Redemption of Token, Stamp, etc: The taxpayer who wished to sell gift vouchers asked about any GST implications.

Where the voucher has a face value that is equal to or greater than the amount paid, GST will be charged when the voucher is redeemed and not at the time of purchase.

Where the voucher has a face value that is less than the amount paid, GST will be charged at the time of sale on the difference between the amount paid and the voucher's face value. When the voucher is redeemed GST will be payable on the face value.

Where there is no face value stated on the voucher, (e.g., a milk token) GST will be payable at the time of purchase of the voucher and not when it is redeemed.

GST treatment on licence granted to non-resident

Section 11(2) - Zero-rated services: A non-resident manufacturer was granted a licence to use a manufacturing technique developed in New Zealand. The non-resident has asked if GST would be payable on payment for the licence.

Section 11(2)(fa)(i) permits zero-rating on services for various intellectual property, including the granting of licences. This is subject to the condition that the services are to be supplied to a person who is not resident in New Zealand and is outside New Zealand when the services are performed.

In this case, the New Zealand company will charge GST at the rate of zero percent.

Application for buyer-created tax invoice

Section 24(2) - Invoice Created by Recipient: A company purchases supplies from regular suppliers. It has advised that it is in a better position to issue invoices, rather than have the seller issue them.

Where such a case arises, the purchaser can request approval from Inland Revenue to be allowed to issue buyer-created tax invoices.

Inland Revenue's conditions of approval are:

- Both parties must agree that the supplier will not issue a tax invoice for the supply.
- Both parties must keep a copy of the tax invoice.
- The words "buyer-created tax invoice - IRD approved" must be included in the invoice.

Buyer created invoices must also comply with all the requirements of section 24(3). This means they must contain all these items:

- the words "tax invoice" in a prominent place
- the name and registration number of the supplier of the goods, i.e., not the person who generates the tax invoice

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- the name and address of the recipient, i.e., the purchaser
- the date on which the tax invoice is issued
- a description of the goods and services supplied
- the quantity or volume of the goods and services supplied
- either
  - the value of the goods and services and the amount of tax charged, or
  - the tax inclusive price and a statement that it includes the tax.

Note that Inland Revenue will not automatically approve an application and approval may be withheld if the registered person has a poor compliance record. Approval once given may be revoked if the conditions of consent have not been complied with.

Child Support Act 1991

Request for Child Support declined - not NZ resident

Section 5 - Children who qualify for Child Support: A custodial parent has asked why Child Support is not payable for her children. The custodian and her child live and have always lived in Australia, while the non-custodian is a New Zealand resident.

Only children who are New Zealand citizens or ordinarily resident in New Zealand will qualify for Child Support. In this case, as the children are not New Zealand residents the non-custodial parent is not required to make contributions under the Act.

Estimating Child Support income

Section 44 - Reconciliation of estimated and actual taxable income after end of year Child Support year: A liable parent estimated his income for the 1994 year. He asked what will happen if the estimate is incorrect.

When he files his 1994 tax return, the assessment previously based on his estimated income will be recalculated using the actual income from the 1994 return.

If an additional Child Support payment is required, it will be due within 30 days from the date of the assessment. An underestimation penalty and daily interest will also be charged if the estimated Child Support liability is less than 80% of the actual liability.

Exemption for prisoners

Section 73 - Application for exemption by prisoner or hospital patient: A prison inmate advised that he cannot pay his Child Support liability and asked that his liability for Child Support be held over until he comes out of prison. He expects to resume family life when he is released.

If the prisoner is still married or living in the nature of marriage, (the fact that he is in prison may not alter the marriage status) an application for Child Support will not be accepted. This is because the custodian will not be an eligible custodian under section 8(2)(b) of the Act, as she will still be living in the nature of marriage.

Where the prisoner is not married or living in the nature of marriage, then an exemption may apply for the period of imprisonment, provided that the prisoner has no assessable income, or assessable income from investments of $520 or less for the full tax year.

The exemption must be requested in writing, and ceases on the earlier of the day on which any assessable income except income from investments, or investment income exceeding $520 is earned. When the exemption ceases as a result of one of these income tests, the prisoner is liable for the full Child Support year, under section 75(2) of the Act.

Child Support payment required when assessment under objection

Section 95 - Obligation to Pay Child Support Where Objection Made: A liable parent has asked why payment is being pursued when there is a valid objection to the Child Support assessment.

Child Support liability can only be suspended because of an impending appeal where the grounds are that the liable parent is not a parent of the child. In this case any liability is suspended until the date that the Family Court makes its determination of the appeal. Where an objection has not been finally determined, the objector may apply to the Family Court for an order under section 117 of the Act for suspension of liability. If the objector loses the objection, the liability becomes payable on the original due date unless the Family Court considers that time to pay should be allowed for special reasons.

Departure order from formula assessment

Sections 104 and 105 - Application for departure from formula assessment in special circumstances: A non-custodial parent who is liable for Child Support payments of $150 per week asked under what circumstances it would be permissible to apply to the Family Court for a departure order from the formula assessment.

Either parent can make an application. The Family Court must take into account the following circumstances before deciding to adjust any part of a formula assessment:

- Whether either parent's capacity to provide financial support is significantly reduced because of special circumstances such as:
  - a duty to maintain any other child or person, or
  - the special needs of any other child or person, or
  - commitments in supporting himself or herself or any other child or person.
- Whether the costs of maintaining the child are significantly affected in special circumstances because:
  - the cost of access to the child is greater than 5% of the Child Support income, or
  - the child has special needs, or
  - the child is being cared for, educated, or trained in a manner expected by either parent.

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- That the formula assessment would be unfair because of special circumstances such as:
  - the income, earning capacity, property and financial resources of parents or child, or
  - any previous payments or property settlements, or
  - the continued occupancy by the custodian of the family home.

Student Loan Scheme Act 1992

Base interest write-off

Section 41 - Periods in Which Interest Write-Off and Interest Reduction Apply: A borrower's income was less than the repayment threshold - $12,670 for 1993. Consequently, his repayment obligation in his 1993 tax return was calculated at zero. The borrower wanted to know why he was not entitled to a base interest write-off.

An interest write-off is allowable when the base interest charged is greater than the repayment obligation. However, a write-off is not allowable in the income year in which a loan has been transferred to Inland Revenue for collection.

In this case, the loan related to the 1992 academic year and was transferred to Inland Revenue to administer on 28 February 1993. Therefore a write off is not allowable in the 1993 income year.

Note: The interest rate for 1994 is 7.2 % This is made up of 6.2 % base interest (the cost of borrowing to Government) and 1.0 % Consumer Price Index adjustment. It is the base interest component only that may qualify for write off.

Repayment deductions

Section 49(1)(b) - Dates on Which Payments Deemed to be Credited: A borrower was concerned that amounts deducted by the employer are not credited to the borrower's account on a timely basis. The Student Loan account attracts interest on a daily basis.

Example: Deductions from salary or wages paid in January 1994 are required to be paid by 20 February 1994, along with the PAYE deductions.

Under section 49(1)(b) of the Act, all repayment deductions credited to a Student Loan account are effectively credited on the 15th day of the month for which the deduction was made. In the above case, a deduction would be treated as received on 15 January 1994. This means that although the client's account is charged daily interest up until the date the credit is paid to the account (say 20 February), when the amount is credited a new interest calculation will take into account the payment based on it being available on 15 January, not the date of actual payment.

Student Loan repayment deferral

Section 54 - Commissioner may refrain from collecting Repayment Obligation: The borrower was finding it difficult to repay his Student Loan and wanted to know if the repayment threshold ($12,670 for 1993 tax return) could be increased in order to reduce his repayment liability.

When the borrower earns more than the repayment threshold, the loan is paid back at 10% of the excess. The threshold is set annually at a level to ensure that a loan will be repaid within an acceptable time frame, and that a borrower has sufficient income to meet basic living expenses. Where the borrower is experiencing serious financial hardship relief can be given, not by changing the threshold but under section 54 of the Act. This section allows the Commissioner of Inland Revenue to ***defer*** the borrower's repayment obligations. Note that where repayment obligations have been deferred interest continues to accrue on the outstanding balance.

Requests for deferral are considered by Debt Management staff at Inland Revenue offices.

Estate and Gift Duties Act 1968

Gift duty not affected by repeal of estate duty

A donor asked if the repeal of estate duty had any implications on gift duty.

Estate duty was lifted from the estates of people who died on or after 17 December 1992. This will not affect gift duty. Details of any aggregated gifts made in excess of $12,000 within any twelve month period must be supplied to Inland Revenue on form IR 635. Duty is payable when the value exceeds $27,000 within any twelve month period.

FBT - prescribed interest rate reduced

The prescribed rate of interest used to calculate the fringe benefit value of low interest employment-related loans has been lowered to 7.8% for the quarter starting on 1 October 1993. This new rate will apply to all subsequent quarters unless it is later amended.

The rate reduction reflects the market interest rates during the quarter. The prescribed rate was previously 8.5% for the quarter starting 1 July 1993.

Receiving the TIB - have you replied?

With last month's Tax Information Bulletin we sent out a reply portion for people who want to keep on receiving the TIB. If you haven't already sent this back, please do so if you still want to receive the Tax Information Bulletin. The address is:

TIB Mailing List
P O Box 2546
WELLINGTON

It's faster for us to process your response if you send back the original bar-coded reply page, but if you've misplaced that page then please write to us anyway so we know to keep you on our mailing list.

Legal Decisions - Case Notes

This section of the Tax Information Bulletin sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Privy Council.

We have given each case a rating as a reader guide to its potential importance.

• • • • • Important decision

• • • • Interesting issues considered

• • • Application of existing law

• • Routine

• Limited interest

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

Contents

Restraint of trade payments - capital or income?

Rating: • • •

Case: CIR v Henwood HC Wellington AP 117/92

Act: Income Tax Act 1976

Keywords: *restraint of trade, capital, income*

Summary: Payments were made to an actor under a television commercial contract. The actor agreed not to endorse or promote any other type of competitive product. Upon appeal to the High Court, Judge McGechan held that the payments were assessable income and not capital.

Facts: The taxpayer, a well-known actor, entered into a contract with an advertising agency to appear in two television commercials for a client of the agency. Under the contract, the taxpayer agreed not to participate in New Zealand in any other promotion for products similar or in competition with those advertised in the commercials. The contract stated that the payments made by the advertising agency were consideration for this agreement but did not specifically quantify the amount of consideration.

After completion of the commercials, the taxpayer received $25,000 in the first income year the commercials were screened and $17,500 in the second year. The Taxation Review Authority held that both payments, less $5,000 acting fee, were clearly capital in nature.

Decision: In the High Court, Judge McGechan looked at what the payments were intended to achieve from a business and practical point of view. His Honour concluded that the payments were for acting services and not for a restrictive covenant. Two features of the case pointed to this conclusion. First, the payment to the taxpayer related to his special acting persona. Second, there was no realistic danger that a competitor would employ the taxpayer due to the unique format of the commercials.

Therefore, the High Court held that the payments were assessable income. The court distinguished the early authorities on the assessability of restrictive covenant payments. In the earlier cases, the agreements typically specifically quantified the consideration referrable to the restraint of trade.

Comments: The taxpayer had not lodged an appeal when this item went to print in early December.

Payments to employees who relocate

Rating: • • •

Case: Shell New Zealand Limited v CIR HC Wellington AP 153/92

Act: Income Tax Act 1976 - section 338(1)

Keywords: *Lump sum payments, transfer of employees, housing assistance, source deduction payments, salary and wages, extra emoluments*

Summary: Certain lump sum payments made by the company to employees were held to be made in relation to the employment of the employees. As a result, the company was required to make tax deductions on these payments.

Facts: The company had a housing policy to assist certain employees who were transferring from one location to another at the employer’s request. The disadvantage to the employee of selling his or her house and buying another house at the new location was compensated for by the employer. The policy was to ensure that the employee was not left out of pocket as a result of the transfer. The company argued that these payments were made to reimburse the employees for expenditure incurred directly as a result of their employment. Therefore, these payments were not subject to tax deductions.

Decision: It was held that these payments constituted extra emolument payments on the basis that these payments were made in respect of, or in relation to, the employment of the employees. As a result, these payments were liable to have tax deducted from them under section 338(1) of the Income Tax Act 1976.

Comments: The taxpayer had not lodged an appeal when this item went to print in early December.

Upcoming TIB Articles

In the next few months we'll be releasing policy statements on these topics in the Tax Information Bulletin:

- Repairs and maintenance policy resulting from the new depreciation regime
- When Inland Revenue can grant relief from payment of tax in cases of financial hardship
- Various qualifying company statements

We'll publish these statements as soon as we've finished consulting with external commentators.

Due Dates Reminder

January 1994

5 PAYE deductions and deduction schedules for last 16 days of December 1993 due - "large" employers only.

7 First instalment of 1994 provisional tax due for taxpayers with September balance dates.

Second instalment of 1994 provisional tax due for taxpayers with May balance dates.

Third instalment of 1994 provisional tax due for taxpayers with January balance dates.

1993 end-of-year tax due for taxpayers with February balance dates.

Annual income tax return due for non-IR 5 taxpayers with balance dates from 1-30 September 1993. (Remember to attach SL 9 form for Student Loan borrowers.)

First instalment of 1994 Student Loan interim repayment due for taxpayers with September balance dates.

Second instalment of 1994 Student Loan interim repayment due for taxpayers with May balance dates.

Third instalment of 1994 Student Loan interim repayment due for taxpayers with January balance dates.

17 GST return and payment for period ended 30 November 1993 due.

20 PAYE deductions and deduction schedules for first 15 days of January 1994 due - "large" employers.

PAYE deductions and deduction schedules for December 1993 due - "small" employers.

FBT return and payment for quarter ended 31 December 1993 due.

Gaming machine duty return and payment for month ended 31 December 1993 due.

RWT on interest deducted during December 1993 due for monthly payers.

RWT on dividends deducted during December 1993 due.

Non-resident withholding tax (or approved issuer levy) deducted during December 1993 due.

31 GST return and payment for period ended 31 December 1993 due.

February 1994

5 PAYE deductions and deduction schedules for last 16 days of January 1994 due - "large" employers only.

7 First instalment of 1994 provisional tax due for taxpayers with October balance dates.

Second instalment of 1994 provisional tax due for taxpayers with June balance dates.

Third instalment of 1994 provisional tax due for taxpayers with February balance dates.

1993 end-of-year tax due for taxpayers with balance dates from March-September inclusive.

Annual income tax return due for non-IR 5 taxpayers with balance dates from 1-31 October 1993. (Remember to attach SL 9 form for Student Loan borrowers.)

First instalment of 1994 Student Loan interim repayment due for taxpayers with October balance dates.

Second instalment of 1994 Student Loan interim repayment due for taxpayers with June balance dates.

Third instalment of 1994 Student Loan interim repayment due for taxpayers with February balance dates.

1993 residual Student Loan repayment due.

Earner and employer premium payments due for self-employed people.

20 PAYE deductions and deduction schedules for first 15 days of February 1994 due - "large" employers.

PAYE deductions and deduction schedules for January 1994 due - "small" employers.

Gaming machine duty return and payment for month ended 31 January 1994 due.

RWT on interest deducted during January 1994 due for monthly payers.

RWT on dividends deducted during January 1994 due.

Non-resident withholding tax (or approved issuer levy) deducted during January 1994 due.

31 GST return and payment for period ended 31 January 1994 due.

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This TIB has no appendix