

# TAX INFORMATION BULLETIN

Volume Eleven, No 11

December 1999

## Contents

|  |    |   |    |
|--|----|---|----|
| Invitation to comment on drafts  | 3  | Questions we've been asked  |    |
| Binding Rulings  |    | Returning residents' visas - when a person seeking such a visa is resident for tax purposes       | 13 |
| Local authority rates apportionments on property transactions - Goods and Services Tax treatment | 4  | Section OE 1(1) Income Tax Act 1994 - Determination of residence of a person other than a company |    |
| Public Ruling - BR Pub 99/8  |    |   |    |
| Product Ruling - BR Prd 99/27  | 8  | Regular Features  |    |
| Legal decisions – case notes   |    | Due dates reminder  | 15 |
| Whether objector liable to pay tax on salary initially credited or only on rectified amount      | 10 | Booklets available from Inland Revenue  | 16 |
| TRA Numbers 97/119 & 97/120. Decision Number 025/99  |    | Your chance to comment on draft taxation items before they are finalised                          | 19 |
| Whether amounts assessed as deemed dividends repaid to the company                               | 11 |   |    |
| TRA Number 97/147 & 97/148. Decision Number 026/99   |    |   |    |
| Application for a stay of proceedings pending the outcome of a test case                         | 12 |   |    |
| Bage Investments Ltd v CIR   |    |   |    |

November 2006

Errors to page numbering of the printed issue are corrected and extra pages in the original PDF version are now removed.

Note added on page 20

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Inland Revenue  
*Te Tari Taake*

## GET YOUR TIB SOONER BY INTERNET

This Tax Information Bulletin is also available on the Internet, in two different formats:

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- Individual TIB articles will print satisfactorily, but this is not the better format if you want to print out a whole TIB.
- All TIBs from January 1997 onwards (Volume Nine, No.1) are available in this format.

Online TIB articles appear on our website as soon as they're finalised – even before the whole TIB for the month is finalised at mid-month. This means you can read the first of any month's TIB articles on our website in the last two weeks of the previous month.

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### **Where to find us**

Our website is at <http://www.ird.govt.nz>

It also includes other Inland Revenue information which you may find useful, including any draft binding rulings and interpretation statements that are available, and many of our information booklets.

If you find that you prefer the TIB from our website and no longer need a paper copy, please let us know so we can take you off our mailing list. You can e-mail us from our website.

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## THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

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Inland Revenue produces a number of statements/rulings aimed at explaining how taxation law affects taxpayers and their agents.

Because we are keen to produce items that accurately and fairly reflect taxation legislation, and are useful in practical situations, your input into the process – as perhaps a “user” of that legislation – is highly valued.

The following draft items are available for review/comment this month, having a deadline of 29 February 2000. Please see page 25 for details on how to obtain a copy:

| Ref.   | Draft type               | Description   |
|--------|--------------------------|---|
| IS2228 | Interpretation statement | <b>Transferable term fishing quota – acquisition and conversion.</b> The item considers whether the cost of acquiring a transferable term fishing quota (TTQ) is deductible and if it is depreciable property as defined in the Income Tax Act 1976. It further considers issues arising when a TTQ is converted to an individual term quota. |
| PU0066 | Public ruling            | <b>Bad debts – writing off debts as bad for GST and income tax purposes.</b> The draft ruling is essentially the same as public ruling 96/3A, but has an application period from 1 April 1999 to 31 March 2004. It looks at when a debt is considered bad, and what is required to write off a debt as bad.                                   |
| PU3019 | Public ruling            | <b>“Cost price of the motor vehicle” – meaning of the term for fringe benefit tax purposes.</b> The draft ruling considers what should be included under the term “cost price of the motor vehicle”, where an employer who owns a vehicle makes provision of the vehicle to an employee for that employee’s private use and enjoyment.        |

## BINDING RULINGS

This section of the TIB contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our information booklet "Binding Rulings" (IR 115G) or the article on page 1 of TIB Volume Six, No.12 (May 1995) or Volume Seven, No.2 (August 1995). You can order these publications free of charge from any Inland Revenue office.

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## LOCAL AUTHORITY RATES APPORTIONMENTS ON PROPERTY TRANSACTIONS - GOODS AND SERVICES TAX TREATMENT

### PUBLIC RULING - BR Pub 99/8

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

#### Taxation Law

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

This Ruling applies in respect of section 2(1) - definition of "Input tax", and section 10(2).

#### The Arrangement to which this Ruling applies

The Arrangement is the sale and purchase of real estate, between a vendor and a purchaser, where the parties to the transaction make an apportionment between them of local authority rates. The rates apportionment is part of the determination of the consideration for the supply of the property.

#### How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- A GST registered vendor must charge GST, if the supply of land is subject to GST, on the consideration including the portion of rates payable by the purchaser.
- A GST registered purchaser, who is entitled to an input tax deduction in respect of the supply of the land, can also claim an input tax deduction on the portion of rates payable to the vendor.

#### The period or income year for which this Ruling applies

This Ruling will apply for the period 18 November 1999 to 31 March 2003.

This Ruling is signed by me on the 18th day of November 1999.

Martin Smith

General Manager (Adjudication & Rulings)

## COMMENTARY ON PUBLIC RULING BR PUB 99/8

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusion reached in Public Ruling BR Pub 99/8, (“the Ruling”).

### Background

Section 5(7) of the GST Act requires local authorities to charge GST on rates.

Local authorities generally charge occupiers of land rates in advance under the Rating Powers Act 1988. On sales and purchases of land, sellers can pass on to buyers rates that relate to the period of the buyer’s occupation of the land. Apportionment is normally provided for in sale and purchase contracts.

Some confusion exists as to whether the GST inclusive or GST exclusive amount of rates should be apportioned, and whether sellers should seek to recover a GST inclusive amount of rates from buyers.

Question 19 in PIB 148 (May 1986) analysed a rates apportionment as involving two transactions for GST purposes:

The supply of local authority services for rates was one supply, personal to the seller. The seller was the only party entitled to claim input tax deductions for GST imposed.

There was a supply of the land from seller to buyer. A GST registered seller, supplying in the course or furtherance of a taxable activity, must charge GST on the value of supply of the land (including the seller’s outgoings such as apportioned rates) and issue a tax invoice to the buyer. A registered buyer, acquiring the land for the principal purpose of making taxable supplies, can claim an input tax deduction for GST charged on the outgoings.

This Ruling follows, and expands on, the approach in question 19.

### Legislation

The Goods and Services Tax Act 1985 and the Rating Powers Act 1988 make it clear that local body rates (including the GST element) are consideration for supplies personal to the seller, as the person on the relevant local authority roll at the time.

#### **GST Act**

Section 5(7)(a) states:

For the purposes of this Act -

Every local authority is deemed to supply goods and services to **any person** where any amount of rates is payable **by that person** to that local authority. (Emphasis added).

Section 5(15) states:

Where a dwelling is included in a supply, the supply of that dwelling is deemed to be a separate supply from the supply of any other real property included in the supply.

“Consideration” is widely defined in section 2(1) to include:

... in relation to the supply of goods ... to any person, ... any payment made ..., whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods ..., whether by that person or by any other person ...

For example, the Court of Appeal in *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032 held consideration to include money paid in respect of a supply, even if paid by a person other than the recipient of the supply.

“Dwelling” is defined in section 2(1) as:

“Dwelling” means any building, premises, structure, or other place, or any part thereof, used predominantly as a place of residence or abode of any individual, together with any appurtenances belong thereto and enjoyed with it; but does not include a commercial dwelling.

#### **Rating Powers Act**

Section 121 of that Act states:

The occupier of any rateable property shall be primarily liable for all rates becoming due and payable while his or her name appears in the rate records as the occupier of the property

The “occupier” under section 2 is, generally, the owner or long-term lessee of the relevant land.

Section 122 states:

The local authority shall levy each rate by delivering to the occupier a rates assessment ...

Every rate shall be deemed to have been levied upon delivery of such an assessment.

(4) Delivery of the rates assessment shall be effected before the date on which the rate is due and payable.

Section 106 requires the owner (or occupier) and the buyer of the land to notify the relevant local authority of the change in land ownership. However, section 106(7) states:

... the giving of notice under this section shall not release the owner or occupier giving it from liability for any rates due at the time the notice is given.

### Application of the Legislation

The Commissioner considers that apportionments of rates are a part of the consideration for the seller’s supply of land.

A sale of land is a supply of goods for GST purposes. As a matter of contract, the seller and buyer can agree to any price for the land (including apportionments). The Commissioner considers that the payment of rates apportionments from the recipient (buyer) to the land supplier (seller) is consideration for that single supply. Rates apportionments are paid in respect of, in response to, or for the inducement of the supply of land.

Accordingly, the GST treatment of apportionments is the same as the other consideration for the land. The buyer should be able to claim an input tax deduction if he or she is entitled to an input tax deduction for the other consideration.

### **Section 5(15) of the GST Act**

If the property being transferred is to be used by the purchaser in a taxable activity and the property also includes a dwelling (e.g. a farm or horticultural property), section 5(15) deems the dwelling (as defined: predominantly a place of residence) to be a separate supply from the supply of the real estate. This means that the rates apportionment, since it forms part of the consideration for the land, will be apportioned along with the other consideration for the land, between the dwelling and the land excluding the dwelling.

However, where all the property being transferred will form part of, or is used in, the purchaser's taxable activity, no such rates apportionment is required, e.g. a property developer who acquires land and buildings for the purposes of a development activity.

## **Examples**

The GST position is illustrated in the land sale examples that follow. Assume in each situation that the local authority charges the seller rates in advance. The apportioned amount of rates is \$11.25 (inclusive of \$1.25 of GST). This is payable by the buyer to the seller under the agreement for sale and purchase of the land.

### **Example 1 - sale by an unregistered seller to an unregistered buyer**

This is the situation for most residential property transactions. The seller is unregistered and is not entitled to an input deduction of \$1.25 for the rates.

In the absence of provision in the Property Law Act 1952 or elsewhere, the amount of the apportionment is a matter for negotiation between the seller and buyer (as to whether the seller recovers the GST component of \$1.25. Although the seller could pass on the GST exclusive amount of \$10, usually the seller would wish to recover the full \$11.25).

As the buyer is unregistered, the GST Act does not allow an input tax deduction for any GST element of the rates apportionment.

### **Example 2 - sale by a registered seller to an unregistered buyer**

For example, a GST registered property developer sells a residential property to an ordinary house buyer.

The seller may be able to claim an input tax deduction for the GST component of rates if he or she can satisfy the requirements of section 20(3).

Even if those requirements cannot be satisfied, the supply of the land is likely to be in the course or furtherance of the supplier's taxable activity, and will be a taxable supply on which the seller must charge and return GST output tax. The apportionment will be part of the consideration for that supply. This part of the consideration will presumably be \$11.25, including \$1.25 of output tax, which the seller must return to Inland Revenue.

The GST Act will not allow an unregistered buyer to claim an input tax deduction for the GST element of the apportionment.

### **Example 3 - sale by an unregistered seller to a registered buyer (secondhand goods)**

For example, a GST registered property developer buys a residential property to renovate and resell.

Again the amount of the apportionment is a matter for agreement between the parties. It is likely that the seller would wish to recover the GST on the rates from the buyer, and in these circumstances would charge \$11.25.

The seller is unable to issue a GST tax invoice to the buyer because the seller is unregistered. The buyer could only claim an input tax deduction of \$1.25 under section 20(3) if he or she was entitled to a secondhand goods deduction on the overall property purchase.

### **Example 4 - sale by a registered seller to a registered buyer (at the standard rate)**

This is the situation for commercial property transactions that are not sales of going concerns under section 11(1)(c). The seller is able to claim an input tax deduction for the GST on rates paid if it has a tax invoice and the local authority goods and services are acquired for the principal purpose of making taxable supplies.

The seller would return GST output tax on the value of the supply of land (including the apportionments), and would issue a tax invoice to the buyer inclusive of the apportionments. This allows the buyer to claim an input tax deduction for the GST element of the purchase price, provided the property is acquired for the principal purpose of making taxable supplies.

**Example 5 - sale by a registered seller to a registered buyer (zero-rated)**

This situation arises when the supply was of land that was a taxable activity, or part of a taxable activity, as a going concern within section 11(1)(c). The seller could claim an input tax deduction for the GST on rates paid if he or she could satisfy the normal tests.

In this situation the apportionments on sale should be GST exclusive (\$10) rather than inclusive (\$11.25), that is consistent with zero-rating the supply of the going concern.

**Examples of GST tax invoices**

Following are two examples of GST tax invoices and a settlement statement prepared by the New Zealand Law Society in consultation with Inland Revenue. They are consistent with the Commissioner’s policy in this Ruling.

**Example 1- registered seller: rates paid in advance**

Address of vendor and GST number

|     |  |   |
|-----|--|---|
| To: | Sale of x parcel of land   | x |
| To: | Unused rates apportionment (calculated on a GST exclusive basis) | y |
|     | GST 12.5% on x plus y  |   |
|     | TOTAL  | — |

**Example 2 - registered seller: rates paid in arrears**

Address of vendor and GST number

|     |  |   |
|-----|--|---|
| To: | Sale of x parcel of land   | x |
| To: | Amount of rates in arrears (calculated on a GST exclusive basis) | y |
|     | GST 12.5% on x plus y  |   |
|     | TOTAL  | — |

**Example 3 - unregistered seller: rates paid in advance**

Note: In this situation a GST tax invoice is not required. The seller’s settlement statement could be:

Address of vendor

|     |  |   |
|-----|--|---|
| To: | Sale of x parcel of land   | x |
| To: | Unused rates apportionment (calculated on a GST inclusive basis) | y |
|     | TOTAL  | — |

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## PRODUCT RULING - BR PRD 99/27

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This is a product ruling made under section 91F of the Tax Administration Act 1994.

### Name of the Person who applied for the Ruling

This Ruling has been applied for by Fernz Corporation Limited.

### Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections EH 4, EH 17, EH 46 (and Part EH generally) and the definition of "maturity" in section OB 1 of the Act.

### The Arrangement to which this Ruling applies

The Arrangement is the transfer by way of an order of the High Court under sections 236 and 237 of the Companies Act 1993 from Fernz Corporation Limited ("Fernz") to Fernz Corporation (NZ) Limited ("Fernz NZ") of the liabilities at present owed by Fernz to holders of Capital Notes ("Noteholders") issued by Fernz under the terms of a trust deed dated 29 October 1996 ("Original Trust Deed"). Further details of the Arrangement are set out in the paragraphs below.

1. Fernz has issued subordinated debt by way of Capital Notes with a face value of \$170 million bearing a coupon interest rate of 9.8%, issued in 1996 and maturing in April 2002. The Capital Notes are the subject of a trust deed between Fernz and New Zealand Permanent Trustees Limited.
2. In anticipation of a proposed migration of corporate residence of Fernz from New Zealand to Australia it is intended that Fernz will transfer to Fernz NZ (a member of the Fernz corporate group that will remain incorporated in New Zealand) the obligation to pay Noteholders the interest and the redemption amounts due (unless renewed) on 15 April 2002.
3. Fernz will pay Fernz NZ an amount equal to the then present value of the Capital Notes liabilities transferred to Fernz NZ.
4. The transfer of the Capital Notes liabilities referred to in paragraph 2 above will be accomplished by:

- (a) Fernz convening a meeting of Noteholders in accordance with an order for directions given by the High Court under which the Noteholders will be requested to approve by an extraordinary resolution (requiring at least a 75% majority of the principal amount represented by Noteholders in attendance in person or by proxy) the application by Fernz and Fernz NZ to the High Court for orders:

- Approving the Arrangement transferring the liabilities under the Capital Notes from Fernz to Fernz NZ (other than the obligation of Fernz to issue its shares on the conversion of the Capital Notes);
- Varying the Original Trust Deed by replacing the existing terms thereof with those contained in the form of deed to be annexed to the court order; and

- (b) the High Court making the orders accordingly.

5. The amended Trust Deed referred to will record that the debtor under the Capital Notes is Fernz NZ. A guarantee will be entered into under a separate deed under which Fernz will guarantee the liabilities of Fernz NZ under the ongoing financial arrangements. Under the guarantee, Noteholders will have recourse against Fernz in case Fernz NZ defaults.
6. Fernz will remain primarily liable to issue shares in itself to Noteholders that elect to convert Capital Notes into shares (if Fernz NZ does not elect to redeem them for cash). Fernz NZ is required to pay Fernz the redemption price on behalf of the applicable Noteholders for the Capital Notes which are converted.
7. The reasons for Fernz considering a migration to Australia are:
  - Migrating to Australia will provide access to a larger capital market, and it will increase the profile of Fernz in that market. This should reduce the cost of raising equity to finance future growth.
  - There is an existing head office structure already in place in Australia for another group company, Nufarm Limited (Australia) which could be developed to encompass the corporate functions that are currently performed in New Zealand. Combining these offices would be expected to generate savings in total group overheads.



- The Fernz group's core business management in industrial chemicals and agricultural chemicals, which segments account for a significant proportion of the total group turnover, is located in Australia. Future growth opportunities are expected in large part in these business segments.
- Fernz's ability to network with major international research and development companies is becoming increasingly important in the development and growth of the Fernz corporate group, and this may be more easily expedited from a base other than New Zealand.
- Fernz now earns more revenue in Australia, and it pays more Australian tax than New Zealand tax. Given the large amount of shares owned by Australian residents, the ability to frank dividends with Australian franking credits will increase returns to shareholders overall.

## Assumptions made by the Commissioner

This Ruling is made subject to the following assumptions:

- a) That the terms of the Capital Notes will be unchanged, other than the party required to make the payments (and other incidental changes provided in the amended Trust Deed), and the cashflows to be paid to the Noteholders will be exactly the same as they were before the transfer of the Capital Notes liabilities by way of court order.
- b) That the final amended trust deed and the "Notice of Originating Application For an Order for Approval of an Arrangement Pursuant to section 236 of the Companies Act 1993" do not materially differ from the draft trust deed and the draft of the Notice both provided to the Commissioner on 5 November 1999.
- c) That the amendments made to the Trust Deed to insert Australian statutory terms in substitution for New Zealand terms do not materially affect the operation of the Trust Deed other than allowing for the appropriate jurisdiction to prevail.
- d) That the Trustee appointed under the Trust Deed has never been, and never will be, the legal owner of the Capital Notes.

## Condition stipulated by the Commissioner

This Ruling is made subject to the following condition:

- The High Court order will stipulate, and the effect for all purposes will be:

- (a) that all rights, obligations, liabilities or engagements of Fernz in respect of the Capital Notes, under the Original Trust Deed (save and except the obligations to issue ordinary shares on conversion of the Capital Notes under clause 5.8 of Schedule 2 of the Original Trust Deed) will be transferred and vested in Fernz NZ, as fully and effectually in every respect as if Fernz NZ had been the party to the Original Trust Deed instead of Fernz, and as if every reference to Fernz or to "the Company" in the Original Trust Deed were a reference to Fernz NZ, save and except the references to "the Company" in the definition of "Ordinary Shares" and in clause 5.8 of Schedule 2 of the Original Trust Deed and other references in the Original Trust Deed to conversion of the Capital Notes by the Company, which shall remain references to Fernz; and
- (b) that the terms upon which the Capital Notes have been issued will be varied by amending the Original Trust Deed and replacing the terms of the Original Trust Deed with the terms of the schedule to the court order (a draft of which was forwarded to the Commissioner on 5 November 1999), so that all rights, benefits, liabilities or obligations in respect of the Capital Notes shall be governed and determined by the terms of the amended Trust Deed in substitution in all respects for the terms of the Original Trust Deed.

## How the Taxation Laws apply to the Arrangement

Subject in all respects to any assumption or condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Under Part EH of the Act, upon the transfer of the Capital Notes under the court ordered transfer, no base price adjustment is required to be made by Noteholders.

## The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 September 1999 to 31 August 2000.

This Ruling is signed by me on the 16th day of November 1999.

John Mora

Assistant General Manager (Adjudication & Rulings)

## LEGAL DECISIONS - CASE NOTES

This section of the TIB 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'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.

## WHETHER OBJECTOR LIABLE TO PAY TAX ON SALARY INITIALLY CREDITED OR ONLY ON RECTIFIED AMOUNT

|                       |  |
|-----------------------|--|
| <b>Case:</b>          | TRA Numbers 97/119 & 97/120.<br>Decision Number 025/99 |
| <b>Decision date:</b> | 22 November 1999                                       |
| <b>Act:</b>           | Income Tax Act 1976 & 1994                             |
| <b>Keywords:</b>      | <i>Retrospective amendments to current account</i>     |

### Summary

The Taxation Review Authority found in favour of the objector on the facts of the case.

### Facts

The objector was the sole shareholder and director of the objector company ("the company") during the 1994-1995 years.

The company credited salary to the objector's current account for the 1994 and 1995 years. The company filed returns to this effect. However, the objector had failed to take into account the tax liabilities of the company during preparation of annual accounts. This caused profits to be overstated, decreasing the amount actually available for distributing as salaries.

The objector retrospectively amended the company accounts and resolutions adjusting downwards the amounts which had been credited to the objector for the 1994 and 1995 years. The Commissioner contended that the objector was liable for income tax on the salary actually credited to the objector's current account for the 1994 and 1995 years.

### Decision

Judge Willy found for the objector on the fact that the objector's accountant was under the mistaken belief that the company had made a profit.

His Honour found that the money was not there to pay the salaries recorded and the company was entitled to have the accounts rectified in the way that the company's accountant did when he realised his mistake, by cancelling the debit against the company and the credit to the shareholder.

His Honour was satisfied that the company had no intention of paying out the salaries assumed to be payable by the accountant and was entitled to rectify the error. He was also satisfied that the objector did not receive the benefit of the salary initially credited to him in 1994 and 1995 and that the objector is obliged to pay tax only on that rectified amount.

#### Judge Willy's Minute Dated 17 November 1999:

Judge Willy found that he did not have the jurisdiction while sitting in the TRA to award relief under the Contractual Mistakes Act 1977.

His Honour decided to determine all matters as far as his jurisdiction would allow and in doing so to indicate to parties whether or not, if he were sitting as a District Court Judge, he would grant relief under the Act.

The objector could make an application to the District Court for relief. The application would be brought before Willy J and if the parties agree, follow the outcome of any indication given by Willy J in the TRA hearing of this case.

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## WHETHER AMOUNTS ASSESSED AS DEEMED DIVIDENDS REPAID TO THE COMPANY

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**Case:** TRA Number 97/147 & 97/148.  
Decision Number 026/99

**Decision date:** 15 November 1999

**Act:** Income Tax Act 1976

**Keywords:** *Deemed dividends*

---

His Honour preferred the evidence of the husband objector to that of the Commissioner. He found the husband objector to be a credible, careful and accurate witness. His Honour also placed importance on the objectors' apparent and thorough knowledge of the purpose and construction of company records.

Judge Willy was satisfied that the objectors did recognise that the deductions, which the companies sought to make in the relevant years, were incorrect and did in fact rectify the position in 1993 by way of journal entry.

### Summary

The Taxation Review Authority found in favour of the objectors on the facts of the case.

### Facts

This case involved a husband and wife who were the major shareholders and directors of two companies. The cases against the husband and wife were consolidated and the husband objector appeared on behalf of the wife objector

The husband and wife objectors claimed deductions for various private expenses against the companies assessable income for the years ended 31 March 1988 and 31 March 1989. The Commissioner disallowed the deductions. The Commissioner assessed the amounts disallowed as deemed dividends in the hands of the objectors.

During the trial the husband objector recognised that the amounts ought never to have been claimed. He then produced evidence that showed that the amounts assessed had been repaid to the companies by way of journal entries. This evidence had never been sighted by counsel or the investigator, however it was shown to have been sent to and received by Inland Revenue.

The issue then became whether the amounts assessed as deemed dividends had been repaid to the companies.

### Decision

Judge Willy found for the objectors on the facts of the case.

His Honour turned to the evidence and said:

“I have dealt with the letter of the 16<sup>th</sup> of November which the objector forwarded to the Commissioner full details of the shareholders' loan accounts and profit and loss accounts for both of the companies in issue. He also refers in that letter to journal entries having been carried out in May 1993, affecting the 1993 tax year accounts. It is therefore clear that the Commissioner has had all the information which is today before the Court. It is only a question of whether or not I am satisfied that it is sufficient, coupled with the objector's uncontradicted evidence given on oath that he has made the repayments as he asserts.”

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# APPLICATION FOR A STAY OF PROCEEDINGS PENDING THE OUTCOME OF A TEST CASE

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**Case:** Bage Investments Ltd v CIR  
**Decision date:** 25 November 1999  
**Act:** Income Tax Act 1976 and Tax Administration Act 1994

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## Facts

This was an application by the Commissioner of Inland Revenue (“Commissioner”) to have the Bage Investments Limited (“Bage”) case stayed pending the outcome of a designated test case, being BNZ Investments Limited (“BNZ”).

This was the first time the new test case procedure has been tested in the Courts.

The Commissioner designated BNZ as a test case and at that time, notified Bage that its case would be stayed pending the outcome of the designated test case.

Bage responded to the Commissioner’s notification stating that it required its case to be determined separately from the BNZ case.

The Commissioner applied to the High Court for an order allowing Bage’s case to be stayed pending the outcome of the test case.

## Decision

It was agreed at the beginning of the hearing that there was no need for the Court to decide under which provision the test case procedure is most appropriately applied as they are identical and for the purposes of this proceeding it was unnecessary.

Firstly, Justice Chambers commented on the point raised by Bage that the Commissioner was unable to utilise the test case procedure once a case has been stated and filed. This was argued on the basis that the wording of section 33A(6) required the Commissioner to apply ‘by originating application’. His Honour stated that he agreed with Master Thomson (in his decision dated 25 May 1999 in the High Court at Wellington) that the Commissioner may make the application under section 33A(6) regardless of whether a case has been stated and filed.

His Honour also noted that Rule 477 of the High Court Rules provides for stays of civil proceedings in certain circumstances. He stated in his decision that Rule 477 has a different purpose from the application of section 33A and was not applicable to these proceedings.

Justice Chambers set out a list of principals he has developed, however he does not intend them to be either definitive or exhaustive. These principals are set out in brief below:

### Principle 1

A taxpayer should not lightly have access to the courts denied, even for a time.

### Principle 2

The closer the similarity in facts between the test case and the subject case, the more likely the stay will be granted.

### Principle 3

The more cases riding on the test case, the more likely the stay will be granted.

### Principle 4

The more tax involved, the less likely the stay will be granted.

### Principle 5

The longer the period between the events leading to the tax dispute and the likely resolution of that dispute if the case is parked, the less likely the stay will be granted.

### Principle 6

The more devastating the consequences of the unwanted stay to the taxpayer, the less likely the stay will be granted.

In applying these principals to the Bage case, Justice Chambers concluded that he was satisfied that the Commissioner’s application for an order granting a stay of the proceedings should be dismissed.

## QUESTIONS WE'VE BEEN ASKED

This section of the TIB sets out the answers to some day-to-day questions that people have asked. We have 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.

## RETURNING RESIDENTS' VISAS - WHEN A PERSON SEEKING SUCH A VISA IS RESIDENT FOR TAX PURPOSES

### Section OE 1(1) Income Tax Act 1994 - Determination of residence of a person other than a company

We have been asked whether a person who is applying for a returning resident's visa ("RRV") is tax resident. The person spends most of his time in another country running a business. He comes to New Zealand for holidays, totalling 50 days a year. His wife and young, dependent children live here, and the children go to school. The husband and wife are not estranged, and he regularly sends money to New Zealand to support his family. The family bought a house in New Zealand, a car, and other possessions, and have bank accounts in New Zealand. The person's intention is to continue to live in the other country, although he may at some future time come to live in New Zealand. It is also possible that the whole family may return to the other country once the children finish their schooling.

Non-New Zealanders who meet the Government's immigration eligibility criteria may be granted residence in New Zealand. Residents who wish to travel out of New Zealand need to hold a valid RRV in order to re-enter New Zealand as residents. All residents are issued with an initial RRV, valid for two years, upon approval of their residence application. At the end of the two-year period, they may be eligible for an RRV valid for an indefinite period provided they have (among other things):

- been in New Zealand for a total of 184 days or more in each of the two 12-month periods preceding their application; or
- been in New Zealand for a total of 41 days or more in each of the two 12-month periods preceding the application, and are assessed as having tax residence status for 24 months in the two years before their application.

Applicants who do not meet the requirements for an indefinite RRV may be eligible for an RRV valid for 12 months or 14 days, depending on the circumstances.

Note that immigration requirements are not relevant in determining tax residence.

If a person is tax resident in New Zealand, the person will be liable for tax in New Zealand on world-wide income. Liability for tax in New Zealand can be relieved if New Zealand has a double tax agreement with a country in which the person is also tax resident. The tests to determine whether a person is resident for tax purposes are found in section OE 1:

**(1) [Permanent place of abode]** Notwithstanding any other provision of this section, a person, other than a company, is resident in New Zealand within the meaning of this Act if that person has a permanent place of abode in New Zealand, whether or not that person has a permanent place of abode outside New Zealand.

**(2) [Deemed resident]** Where a person other than a company is personally present in New Zealand for a period or periods exceeding in aggregate 183 days in any period of 12 months, that person shall be deemed to be resident in New Zealand from the first day within that period of 12 months on which that person was personally present in New Zealand.

The person in this example is not present in New Zealand for more than 183 days in 12 months, and so will not be resident under section OE 1(2). Notwithstanding this, he will be resident if he has a permanent place of abode in New Zealand under section OE 1(1).

The legislation is clear that the permanent place of abode test is a broad one. A person may have a permanent place of abode here, even though he or she is not present in New Zealand for much of a year, and regardless of whether or not he or she has a permanent place of abode in another country.

The test of whether someone has a permanent place of abode is a matter of weighing all the facts of a person's circumstances. The nature and quality of the person's ties with New Zealand are important. Cases that have discussed the permanent place of abode test include *FC of T v Applegate* 79 ATR 899, *Case Q55* (1993) 15 NZTC 5,313, and *Case H97* (1986) 8 NZTC 664.

In this situation, the person has some important connections with another country. He spends most of his time in that country, earns his living there, has somewhere to live there, and must have other associations there. He may have a permanent place of abode there. He may never intend to live in New Zealand in the future, in the sense of spending most of his time here.

However, having a permanent place of abode somewhere else does not mean that a person does not have a permanent place of abode in New Zealand. Also, the courts have held that "permanent" in this context, does not mean "everlasting" (see *FC of T v Applegate* at p.p. 906 and 909).

The person also has some important connections with New Zealand. His family lives here, he has a home permanently available to him, and he has personal property here. The fact that the person's immediate family lives in a home in New Zealand is important. It is not simply an empty house or an investment house let to tenants, but is the person's family home. The presence of the family in the home gives the person an enduring connection with it. It has the nature of a home because it is the centre of the person's domestic life, and the children are young and dependent. There is the element of permanence to his association with New Zealand. The financial support he gives the family represents an economic tie with New Zealand. The nature and quality of these ties with New Zealand distinguish him from, for example, an investor or a casual visitor. In these circumstances, the person has a permanent place of abode, and is tax resident, in New Zealand.

## Other situations

Determination of the permanent place of abode test is a matter of fact. In a similar situation, but with differences in some important respects to the facts in this item, a person will not have a permanent place of abode in New Zealand. For example, a business person who does not have a dwelling in New Zealand, but who comes to New Zealand for 50 days a year on business may not have a permanent place of abode here. More would need to be known before a conclusion could be made on whether the person had a permanent place of abode in New Zealand.

The conclusion in this item might also be different if the wife and children were absent from New Zealand for significant periods during the year, or if the person and his spouse were separated. In the recent decision in *TRA Case 17* (1999) 19 NZTC 9,174 the Court found that an estranged husband working overseas did not have a permanent place of abode in New Zealand.

The residence of a person's spouse does not determine a person's residence, and in other situations, the presence of members of a person's family in New Zealand may not create a permanent place of abode.

## Notes

1. In the situation in this item, the person has not been a tax resident of New Zealand before, and is trying to establish that he is tax resident. In another situation, perhaps the more common one, a person may have been tax resident in New Zealand, and may argue that he or she is no longer tax resident. The permanent place of abode test applies equally to people seeking residence as to people seeking to establish that they are non-resident.
2. The procedures for issuing RRVs are changing. From June 2000, tax residence will no longer be a relevant factor. For more information on immigration requirements, contact the New Zealand Immigration Service.

More information on this topic can be found in the Commissioner's statements on residence in *Public Information Bulletin* 180 (June 1989) and *Tax Information Bulletin* Volume Seven, No.1 (July 1995).

## REGULAR FEATURES

### DUE DATES REMINDER

#### January 2000

- 17 Employer monthly schedule: **large employers** (\$100,000 or more PAYE and SSCWT deductions per annum)
- IR 348 *Employer monthly schedule* due
- Employer deductions: **large employers** (\$100,000 or more PAYE and SSCWT deductions per annum)
- IR 345 or IR 346 *Employer deductions* form and payment due
- GST return and payment due for period ending 30 November 1999
- 20 Employer deductions: **large employers** (\$100,000 or more PAYE and SSCWT deductions per annum)
- IR 345 or IR 346 *Employer deductions* form and payment due
- Employer deductions and Employer monthly schedule: **small employers** (less than \$100,000 PAYE and SSCWT deductions per annum)
- IR 345 or IR 346 *Employer deductions* form and payment due
  - IR 348 *Employer monthly schedule* due
- FBT return and payment due
- RWT for those who deduct \$500 or more each month due for the month of December 1999
- 31 GST return and payment due for period ending 31 December 1999

#### February 2000

- 7 IR 66N or IR 66W PAYE and schedules: **large employers** (\$100,000 or more PAYE and SSCWT deductions per annum)
- schedules and payment due
- Employer deductions: **large employers** (\$100,000 or more PAYE and SSCWT deductions per annum)
- IR 345 or IR 346 *Employer deductions* form and payment due
- Employer monthly schedule: **large employers** (\$100,000 or more PAYE and SSCWT deductions per annum)
- IR 348 *Employer monthly schedule* due
- 21 Employer deductions: **large employers** (\$100,000 or more PAYE and SSCWT deductions per annum)
- IR 345 or IR 346 *Employer deductions* form and payment due
- Employer deductions and Employer monthly schedule: **small employers** (less than \$100,000 PAYE and SSCWT deductions per annum)
- IR 345 or IR 346 *Employer deductions* form and payment due
  - IR 348 *Employer monthly schedule* due
- 29 GST return and payment due

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## BOOKLETS AVAILABLE FROM INLAND REVENUE

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The list shows all of Inland Revenue's information booklets as at the date of this Tax Information Bulletin. There is also a brief explanation of what each booklet is about.

Some booklets could fall into more than one category, so you may wish to skim through the entire list and pick out the booklets that you need. To order any of these booklets, call the forms and stationery number listed under "Inland Revenue" in the blue pages at the front of your phone book. This is an automated service, and you'll need to have your IRD number handy when you call.

We publish this list in the TIB every March, June, September and December. Updates are available at other times from our website at <http://www.ird.govt.nz>. You can also download many of these booklets from our website.

### General information

**Binding rulings (IR 115G) - Mar 1998:** Explains binding rulings, which commit Inland Revenue to a particular interpretation of the tax law once given.

**Disputing a notice of proposed adjustment (IR 210K) - Oct 1996:** If we send you a notice to tell you we're going to adjust your tax liability, you can dispute the notice. This booklet explains the process you need to follow.

**Disputing an assessment (IR 210J) - Oct 1996:** Explains the process to follow if you want to dispute our assessment of your tax liability, or some other determination.

**Gift duty (IR 654) - Jun 1998:** Explains the duty payable on gifts.

**How to tell if you need a special tax code (IR 23G) - Jun 1999:** Information about getting a special "flat rate" of tax deducted from your income, if the usual tax codes don't suit your particular circumstances.

**If you disagree with us (IR 210Z) - Sep 1996:** This leaflet summarises the steps involved in disputing an assessment.

**Income from a Maori Authority (IR 286A) - Feb 1996:** For people who receive income from a Maori authority. Explains which tax return the individual owners or beneficiaries fill in and how to show the income.

**Inland Revenue audits (IR 297) - Mar 1998:** For business people and investors. It explains what is involved if you are audited by Inland Revenue; who is likely to be audited; your rights during and after the audit, and what happens once an audit is completed.

**Maori Community Officer Service (IR 286) - Apr 1996:** An introduction to Inland Revenue's Maori Community Officers and the services they provide.

**New secondary tax codes and extra emolument rates (IR 184R) - May 1998:** Explains the rates and codes available since 1 July 1998.

**New Zealand tax residence (IR 292) - Jun 1997:** An explanation of who is a New Zealand resident

for tax purposes.

**Overseas private pensions (IR 257) - Apr 1999:** Explains the tax obligations for people who have interests in a private superannuation scheme or life insurance annuity policy that is outside New Zealand.

**Overseas social security pensions (IR 258) - Jun 1997:** Explains how to account for income tax in New Zealand if you receive a social security pension from overseas.

**Payments and gifts in the Maori community (IR 278) - April 1998:** A guide to payments in the Maori community-income tax, PAYE and GST consequences.

**Provisional tax (IR 289) - Jul 1999:** People whose residual income tax is \$2,500 or more must generally pay provisional tax for the following year. This booklet explains what provisional tax is, and how and when it must be paid.

**Putting your tax affairs right (IR 282) - Jun 1997:** Explains the advantages of telling Inland Revenue if your tax affairs are not in order, before we find out in some other way. This book also sets out what will happen if someone knowingly evades tax, and gets caught.

**Rental income (IR 264) - Aug 1999:** An explanation of taxable income and deductible expenses for people who own rental property. This booklet is for people who own one or two rental properties, rather than larger property investors.

**Self-employed or an employee? (IR 186) - Jun 1997:** Sets out Inland Revenue's tests for determining whether a person is a self-employed contractor or an employee. This determines what expenses the person can claim, and whether s/he must pay ACC premiums.

**Stamp duty (IR 665) - Jun 1998:** Explains what duty is payable on transfers of real estate and some other transactions. Written for individual people rather than solicitors and legal firms.

**Student loans - going overseas (SL 13) - Aug 1998:** A brief guide to the student loan obligations of a borrower who goes overseas. This information is also



included in the SL 5 booklet.

**Student loans - how to get one and how to pay one back (SL 5) - 1999:** This booklet is published jointly everything they need to know about getting a loan and paying it back.

**Student loans - interest and calculations (SL 12) - Aug 1998:** A brief guide how the interest on a student loan is calculated. This information is also included in the SL 5 booklet.

**Student Loans - making repayments to Inland Revenue (SL 14) - Aug 1998:** A brief guide to repaying your student loan. This information is also included in the SL 5 booklet.

**Tax facts for income-tested beneficiaries (IR 40C) - Aug 1997:** Vital information for anyone who receives an income-tested benefit and also has some other income.

**Taxes and duties (IR 295) - May 1995:** A brief introduction to the various taxes and duties payable in New Zealand.

**Taxpayer obligations, interest and penalties (IR 240) - Apr 1999:** A guide to the laws dealing with interest, offences and penalties.

**Trusts and estates - income tax rules (IR 288) - May 1995:** An explanation of how estates and different types of trusts are taxed in New Zealand.

**Visitor's tax guide (IR 294) - Nov 1995:** A summary of New Zealand's tax laws and an explanation of how they apply to various types of visitors to this country.

**We'll help you foot the bill for your growing family (IR 211) - Jun 1999:** Explains the different kinds of assistance available to families and how to apply.

## ***Business and employers***

**ACC residual claims (ACC 450 and ACC 451) - Mar 1999:** These booklets explain the residual claims levy and provides the levy rates for employers and self-employed (respectively).

**Dairy farming (IR 252) - Jul 1998:** A guide to GST and PAYE obligations of dairy farmers.

**Depreciation (IR 260) - Apr 1999:** Explains how to calculate tax deductions for depreciation on assets used to earn assessable income.

**Direct selling (IR 261) - Aug 1996:** Tax information for people who distribute for direct selling organisations.

**Electronic payments to Inland Revenue (IR 583) - Jun 1999:** Explains how employers and other people who make frequent payments to Inland Revenue can have these payments automatically deducted from their bank accounts.

**Employer's guide (IR 335) - Mar 1999:** Explains the tax obligations of anyone who is employing staff, and explains how to meet these obligations. Anyone who

receive a copy of this booklet.

**Entertainment expenses (IR 268) - Jun 1999:** When businesses spend money on entertaining clients, they can generally only claim part of this expenditure as a tax deduction. This booklet fully explains the entertainment deduction rules.

**First-time employer's guide (IR 333) - Apr 1999:** Explains the tax obligations of being an employer. Written for people who are thinking of taking on staff for the first time.

**Fringe benefit tax guide (IR 409) - Jul 1999:** Explains fringe benefit tax obligations of anyone who is employing staff, or companies which have shareholder-employees. Anyone who registers as an employer with Inland Revenue will receive a copy of this booklet.

**GST - do you need to register? (IR 365) - May 1999:** A basic introduction to goods and services tax, which will also tell you if you have to register for GST.

**GST guide (IR 375) - May 1999:** An in-depth guide which covers almost every aspect of GST. Everyone who registers for GST gets a copy of this booklet.

**IR 56 taxpayer handbook (IR 356) - Mar 1999:** A booklet for part-time private domestic workers, embassy staff, nannies, overseas company reps and Deep Freeze base workers who make their own PAYE payments.

**ir-File - electronic filing (IR 343) - Mar 1999:** General information about electronic PAYE filing for employers, how to register and step-by-step instructions on how to download and instal ir-File software.

**Making payments (IR 87C) - Nov 1996:** How to fill in the various payment forms to make sure payments are processed quickly and accurately.

### **PAYE deduction tables - 2000**

- Weekly and fortnightly (IR 340)
- Four-weekly and monthly (IR 341)

Tables that tell employers the correct amount of PAYE to deduct from their employees' wages from 1 April 1999.

**Retiring allowances and redundancy payments (IR 277) - Aug 1997:** An explanation of the tax treatment of these types of payments.

**Smart business (IR 320) - Apr 1999:** An introductory guide to tax obligations and record keeping for businesses and non-profit organisations.

**Taxes and the taxi industry (IR 272) - Jun 1999:** An explanation of how income tax and GST apply to taxi owners, drivers, and owner-operators.

## ***Resident withholding tax and NRWT***

**Approved issuer levy (IR 291A) - May 1995:** For taxpayers who pay interest to overseas lenders. Explains how you can pay interest to overseas lenders without

having to deduct NRWT.

**Non-resident withholding tax payer's guide**

**(IR 291) - Mar 1995:** A guide for people or institutions who pay interest, dividends or royalties to people who are not resident in New Zealand.

**Resident withholding tax on dividends**

**(IR 284) - Feb 1998:** A guide for companies, telling them how to deduct RWT from the dividends that they pay to their shareholders.

**Resident withholding tax on interest**

**(IR 283) - Jul 1996:** A guide to RWT for people and institutions which pay interest.

**Resident withholding tax on investments**

**(IR 279) - Jun 1996:** An explanation of RWT for people who receive interest or dividends.

**Non-profit bodies**

**Charitable organisations (IR 255) - May 1993:** Explains what tax exemptions are available to approved charities and donee organisations, and the criteria which an organisation must meet to get an exemption.

**Clubs and societies (IR 254) - Feb 1998:** Explains the tax obligations which a club, society or other non-profit group must meet.

**Education centres (IR 253) - Jun 1994:** Explains the tax obligations of schools and other education centres. Covers everything from kindergartens and kohanga reo to universities and polytechnics.

**Gaming machine duty (IR 680A) - Jun 1997:**

An explanation of the duty which must be paid by groups which operate gaming machines.

**Grants and subsidies (IR 249) - Jun 1994:** An guide to the tax obligations of groups which receive a subsidy, either to help pay staff wages, or for some other purpose.

**Company and international issues**

**Company amalgamations (IR 4AP) - Feb 1995:**

Brief guidelines for companies considering amalgamation. Contains an IR 4AM amalgamation declaration form.

**Consolidation (IR 4E) - Mar 1993:** An explanation of the consolidation rules, which allow a group of companies to be treated as a single entity for tax purposes.

**Controlled foreign companies (IR 275) - Nov 1994:**

Information for NZ residents with interests in overseas companies (for larger investors, rather than those with minimal overseas investments).

**Foreign dividend withholding payments**

**(IR 274A) - Mar 1995:** Information for NZ companies that receive dividends from overseas companies. This booklet also deals with the attributed repatriation and underlying foreign tax credit rules.

**Foreign investment funds (IR 275B) - Oct 1994:**

Information for taxpayers who have overseas

investments, but who don't have a controlling interest in the overseas entity.

**Imputation (IR 274) - Dec 1997:** A guide to dividend imputation for New Zealand companies.

**Qualifying companies (IR 435) May 1999:** An explanation of the qualifying company rules, under which a small company with few shareholders can have special tax treatment of dividends, losses and capital gains.

**Child support booklets**

**A guide for parents who pay child support**

**(IR 170) - May 1999:** Information for parents who live apart from their children.

**Child support - a guide for custodians**

**(IR 171) - Feb 1999:** Information for parents who take care of children and are eligible to receive child support.

**Child support - a guide for prisoners**

**(CS 288) - Mar 1998:** Information for prison inmates who have to pay child support.

**Child support administrative reviews - a general**

**guide (IR 175) - Aug 1999:** Explains the administrative review process and the grounds for applying.

**Child support administrative reviews - how to apply**

**(CS 69A) - Feb 1998:** How to apply for a review of the amount of child support you receive or pay, if you have special circumstances.

**Child support administrative reviews - how to**

**respond (CS 69B) - Apr 1998:** Information about the administrative review process, and how to respond if you are named in a review application.

**Child support and redundancy (CS 277) - Jun 1999:**

An explanation of how becoming redundant can affect a paying parent's child support liability.

**Child support and the Family Court**

**(CS 51) - May 1999:** Explains what steps people need to take if they want to go to the Family Court about their child support.

**Child support - estimating your income**

**(IR 151) - Apr 1999:** Explains how to estimate your income so your child support liability reflects your current circumstances.

**Child support - how the formula works**

**(IR 150) - Jun 1999:** Explains the components of the formula and gives up-to-date rates.

**Child support is working for children**

**(CS 80) - Mar 1998:** Brief summary of how child support works, plus some statistics on number of child support customers and amount collected/paid.

**Child support - shared care (IR 156) - Jan 1999:**

Explains what shared care is, and how it affects the child support assessment.

**Problems with our child support service?**

**(IR 153) - Jul 1999:** Explains how our Customer Service Advisors can help if our usual services haven't resolved your child support problems.

## YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft public binding rulings, interpretation statements, standard practice statements, and other items that we now have available for your review. You can get a copy and give us your comments in these ways:

**By post:** Tick the drafts you want below, fill in your name and address, and return this page to the address below. We'll send you the drafts by return post. Please send any comments *in writing, to the address below*. We don't have facilities to deal with your comments by phone or at our other offices.

**By Internet:** Visit <http://www.ird.govt.nz/rulings/> Under the "Adjudication & Rulings" heading, click on "Draft items", then under the "Consultation Process" heading, click on the drafts that interest you. You can return your comments via the Internet.

Name \_\_\_\_\_

Address \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### *Public rulings*

### *Comment Deadline*

- |                          |  |                  |
|--------------------------|--|------------------|
| <input type="checkbox"/> | <b>PU0066:</b> Bad debts – writing off debts as bad for GST and income tax purposes                    | 29 February 2000 |
| <input type="checkbox"/> | <b>PU3019:</b> "Cost price of the motor vehicle" – meaning of the term for fringe benefit tax purposes | 29 February 2000 |

### *Interpretation statements*

### *Comment Deadline*

- |                          |   |                  |
|--------------------------|---|------------------|
| <input type="checkbox"/> | <b>IS2228:</b> Transferable term fishing quota – acquisition and conversion | 29 February 2000 |
|--------------------------|---|------------------|

*We must receive your comments by the deadline shown if we are to take them into account in the finalised item*

*No envelope needed - simply fold, tape shut, stamp and post.*

The Manager (Field Liaison)  
Adjudication & Rulings  
National Office  
Inland Revenue Department  
P O Box 2198  
WELLINGTON

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The content page of this PDF has been altered to correct the error in the page numbering of the printed issue.

Numerous blank pages that occurred by error in the original PDF version have also been removed.

Blank pages at the end of the printed issue as well as a "Mailing list update form" and the back cover (making a total 24 pages) are omitted in this revised PDF.

November 22 2006