TAX INFORMATION BULLETIN

Vol 13, No 6 **June 2001**

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ISSN 0114-7161

Inland Revenue
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PRODUCT RULING – BR PRD 01/07

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 BNZ Investment Management Ltd as trustee of the BNZ 25 NZ Equity Index Fund (the "Fund").

Taxation Laws

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

This Ruling applies in respect of section HH 3(5) and the definitions of "superannuation fund" and "qualifying trust" in section OB 1 of the Act.

The Arrangement to which this Ruling applies

The Arrangement is the operation by the Bank of New Zealand of a superannuation fund known as the BNZ 25 NZ Equity Index Fund. The operation of the Fund is governed by the Trust Deed dated 24th February 1997. The Trust Deed was amended on 23 March 2001 ("the Amended Trust Deed").

Major changes effected by the Amended Trust Deed are as follows:

- A definition of "Cash Pool" has been added which sets out the terms and purposes of the cash pool.
- The definition of "Quarter" has been amended. It is now defined as the three months ending on the 15th of April, July, October and January respectively.
- The investment policy of the Fund has been amended to include an investment policy for the cash pool.
- The "home exchange" of equities in the Index, has been amended so that the "home exchange" can be New Zealand or any of the "grey-list" countries.
- The minimum liquidity measure for inclusion in the Index has been increased from 0.5% to 0.75%.
- The discretion to elect to include a substitute security in the same company in the case of constituent securities, which are identical except for ownership restrictions, has been removed.
- The clause governing when securities listed on the New Zealand Stock Exchange ("NZSE") for the first time will be included in the Index has been amended to set out the criteria for inclusion in the Index.
- A clause has been added to address the situation where there is a merger, take-over offer or scheme of arrangement for 100% of the issued securities of any company's shares forming part of the Index.

The current arrangement is the original arrangement as amended. Details of the Arrangement as it will be on entering into the Amended Trust Deed are set out in the paragraphs below.

1. The Trustee of the Fund is BNZ Investment Management Ltd ("the Trustee"). The Fund acts as a "wholesale" superannuation fund into which other "retail" superannuation funds invest. The Fund also operates for the purpose of providing retirement benefits to the limited number of natural persons who invest directly in it. The minimum investment amount required in respect of natural persons is $200,000.

2. The Fund is registered under the Superannuation Schemes Act 1989, as are the "retail" superannuation funds which invest in it.

3. Members of the Fund will receive payments from the Fund on withdrawal of part or all of the relevant member's account (being the account maintained for the member under the Trust Deed). Withdrawal may occur as a result of a request made at any time after a member attains the age of 50 years, on death of a member upon a request being made by the member's legal personal representatives, or at any other time upon a withdrawal request being made by a member.

4. The fund is a passive investment vehicle, investing only in a portfolio of equity securities each of which is listed on the NZSE. The Fund will be managed so as to track the composition of a set of listed equity securities which together form the constituent part of an Index known as the BNZ 25 Equity Index ("the Index").

5. The Index comprises up to 25 of the largest New Zealand equity securities listed on the NZSE, based on average weekly market capitalisation. The Fund will not be subject to any active management as such. Rather, it will be managed to track the composition of a set of listed equity securities that together form the constituent parts of the Index. The weighting of each security in the Index will reflect its respective market capitalisation on the NZSE at the relevant date.

6. The "home" exchange of each stock can be any of the "grey list" countries as they are defined in New Zealand tax law. If the equity security is listed on the NZSE and meets the other criteria, it will be included in the Index. There is no discretion as to whether a grey-list country security listed on the NZSE is included in the Index. The equity securities will normally be shares but there may also be convertible notes.

7. The market capitalisation for securities that have their "home" exchange outside New Zealand will be calculated under the standard NZSE rules for weighting of non-New Zealand equities.

8. Where identical constituent securities exist in the market except for ownership restrictions (such as Air New Zealand A and B shares) ("identical securities"), the Index previously only included one of those constituent securities. The Index will now include all the identical securities.

9. Approximately 95% of the net asset value of the Fund will be invested in such investments as the Trustee considers necessary to track the Index. While the majority of available funds will be invested to track the Index, a "cash pool" of the net assets of the Fund will be maintained in order to minimise the number of sale and purchase transactions and to fund any daily net fund withdrawals and net fund inflows pending purchase of equity securities and to manage the liquidity of the Fund in respect of meeting anticipated liabilities, withdrawals and distributions. The pool is only invested in bank accounts, cash or futures contracts that give appropriate equity exposure.

10. Changes will only be made to the Index composition in the following circumstances:

    (a) When this ruling is issued, and the consequential changes are made to the Trust Deed, the Trustee will recalculate the index taking into account the dual-listed securities that enter the Index, the inclusion of all identical securities (as discussed above in paragraph 8) and the higher liquidity threshold. This will result in a number of existing index securities being replaced.

    (b) At the end of each quarter, securities will be ranked according to their average weekly market capitalisation for the previous 6-month period. If a security not previously included in the Index has risen at the quarter end above 21st position, that security will be included as a constituent security in the Index and the lowest ranked Index security held at the quarter end will be removed. If a security that is currently included in the Index at the quarter end has dropped below a ranking of 30th, that security will be removed as a constituent security from the Index and the highest ranked security at the quarter end not already included in the Index will be included. An amendment to the Trust Deed is proposed so that "quarter" is defined as the three months ending on the 15th of April, July, October and January respectively. Currently, the quarterly rebalancing occurs at the end of a month.

    (c) At the end of each quarter, securities are reviewed with regard to compliance with the necessary minimum liquidity requirements. In order to be included and to maintain inclusion in the Index, a constituent security must meet a minimum liquidity requirement. Liquidity is defined as the average daily trading volume of a security (over a 6-month period leading up to the end of the relevant quarter, after eliminating the highest and lowest

months), expressed as a percentage of the total issued and quoted securities of the same class. The minimum liquidity measure for inclusion in the Index is 0.75% per month. This requirement does not apply to a security listed on the NZSE for the first time until the end of the second complete quarter following listing. If there are less than 25 securities which meet the minimum liquidity requirements, then there may be less than 25 securities included in the Index.

(d) If an event such as a share issue or share buy-back occurs so as to increase or decrease the number of any constituent security on issue and that increase or decrease, measured by market capitalisation on a cumulative basis since the last adjustment, is less than 0.03% of the Index, then any adjustments to the Index will be made at the end of the quarter in which the number of listed securities are increased or decreased. In the event that an increase or decrease represents more than 0.03% of the Index, an adjustment to the Index will be made, subject to five business days' notice, on the 15th of the month in which the number of listed securities is increased or decreased.

(e) If a security is listed on the NZSE for the first time, it will be included in the Index in the month of listing if:

(i) it ranks, in terms of market capitalisation, above 21st position (compared with other Index securities ranked according to their average weekly market capitalisation for the previous 6-month period); and

(ii) at least 25% of the security is freely tradeable at the time of listing.

If the security is listed before the 15th day of the month, it will be included in the Index on the 15th day and otherwise will be included at the end of the month. The security previously ranked 25th within the Index at that time will be removed.

If a security listed on the NZSE for the first time does not meet the 25% free float test at the time of listing but meets that 25% test at the end of the quarter in which listing occurs or the following quarter, it will be included in the Index at the relevant quarter end (subject to ranking above 21st at that time). Again, the security previously ranked 25th will be removed at that time.

(f) If the Trustee recommends, and the Fund's auditors agree, the Index must be altered to reflect a material change to the rules governing the NZSE 40 Index structure made by the NZSE.

(g) If there is a merger, takeover offer or scheme of arrangement sanctioned by the High Court for 100% of the issued securities of a company:

(i) the company's securities will be removed from the Index when the offeror or aquiror becomes entitled to, and announces that it will, proceed with compulsory acquisition; and

(ii) if the offer has less than 100% acceptance, but nevertheless proceeds and, at that time or any time after the merger, takeover offer or scheme of arrangement proceeds, less than 25% of the company's securities are freely tradeable as a result of the merger or takeover offer, the company's securities will be removed from the Index.

11. The Trustee will use best endeavours to track the Index as closely as possible. In circumstances where the Trustee is using best endeavours to track the Index as closely as possible, deviation from the Index may occur where it is not possible to exactly replicate the Index for one or more of the following reasons:

(a) The time taken to buy equities;

(b) Difficulties in acquiring equities;

(c) Rounding errors; or

(d) Price fluctuations

but in any such case deviation from the Index will not exceed the following levels:

(a) in the case of securities the Index weighting of which is 10% or greater of the total Index, the deviation from the Index replication is no larger than 1% of the Index; or

(b) in the case of securities whose Index weighting is less than 10% of the Index, the deviation from the Index replication is no greater than 10% of the relevant security's weighting in the Index.

12. The Trustee has appointed an independent party (the Fund's auditors) to provide an annual confirmation that the operations of the Fund have conformed to these criteria.

13. The minimum subscription amount for a natural person investing in the Fund is $200,000. The Trustee is authorised to accept from an investor a subscription in kind, i.e. a subscription in the form of a basket of securities that achieves a result of the Fund tracking the then Index composition.

14. Disposition of securities by the Trustee on behalf of the Fund (other than those in the cash pool) will only occur in the following circumstances:

    (a) It is anticipated that the 25 largest listed New Zealand equity securities will alter significantly when the Trust Deed is amended as proposed and dual-listed securities are included, all identical securities are included and the liquidity threshold is raised.

    (b) If the Fund is ever wound up.

    (c) If, at any time, the Index composition changes and as a result the composition of the securities in the Fund no longer tracks the weightings in the Index.

    (d) If, on any day, there is a net withdrawal of funds from the Fund by investing superannuation funds or natural persons which cannot be met out of the cash pool.

    (e) If there is a claim on the Trustee in respect of the Fund that cannot be met other than as a result of liquidating some securities. This is not anticipated, but the Trustee needs some ultimate protection against extraordinary circumstances such as, say, a change in taxation law or an unanticipated liability or expense.

    In respect of the events under subparagraphs (a) to (e), sales of securities will only be made to the extent required in each case.

15. A fee will be payable to the Trustee of 0.3% per annum of the value of the net assets of the Fund.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) The Fund is registered under the Superannuation Schemes Act 1989.

b) "Retail" funds which invest in the Fund will be registered under the Superannuation Schemes Act 1989.

How the Taxation Laws apply to the Applicant and the Arrangement

Subject in all respects to any conditions stated above, the Taxation Laws apply to the Applicant and the Arrangement as follows:

- The Fund is a "superannuation fund" as defined in section OB 1.
- The Fund is a "qualifying trust" under paragraph (b) of the definition of "qualifying trust" in section OB 1 of the Act.
- By virtue of section HH 3(5), any amounts received by investors from the Fund shall not be included in the gross income of the investor.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 April 2001 to 31 March 2002.

This Ruling is signed by me on the 28th day of March 2001.

Martin Smith

General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD 01/08

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 Barkworth Olive Groves Pty Limited ("BOGL").

Taxation Laws

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

This Ruling applies in respect of sections EP 1, BD 2(1)(b)(i), BD 2(2)(e), EG 1, and the section OB 1 definition of "depreciable property".

This Ruling does not consider or rule on the potential application (if any) of sections EF 1 and BG 1, or Determination E 10.

This Ruling considers expense deductibility in relation to section BD 2(1)(b)(i) (incurred by the taxpayer in deriving the taxpayer's gross income). Accordingly it has not been necessary for the purposes of this Ruling to consider or rule on whether investors are carrying on a business for the purposes of the Act.

The Arrangement to which this Ruling applies

The Arrangement is the purchase of a minimum of 250 "D" class shares in BOGL, and the growing of olives on certain land situated in Australia in respect of which the shares provide the right to grow olives, and the appointment of Barkworth Olive Management Limited ("BOML") to manage the growing, processing and marketing of those olives. This Ruling only applies to investors who appoint BOML to manage their Farms.

All amounts quoted in this Ruling are exclusive of Australian GST (if any).

Further details of the Arrangement are set out in the paragraphs below.

1. The Arrangement is governed by the terms of the "Barkworth Olive Groves Project No. 4" ("Project No. 4") prospectus dated 3 March 2000 ("the prospectus"). Project No. 4 is in no way dependent on the Barkworth Group's three existing projects and may be operated independently of the other three.

Key aspects of the prospectus are as follows:

(i) Investors (also referred to as "members" or "growers") purchase a minimum parcel of 250 "D" class shares of $1 each in a land owning company (BOGL): additional shares may be applied for in parcels of 250.

(ii) Holders of "D" class shares have the following rights:

- A member shall have the absolute right to occupy one "Farm" (or section of olive grove) in respect of each 250 "D" Class shareholding held by that member, subject to the payment of all moneys due to BOGL. The Farm shall be an identified area of land as nearly as practicable in area to 0.08 hectares and suitable for the planting of 20 olive trees at spacings of approximately 5 metres by 8 metres. The member's Farm or Farms will be separately identified on a master plan maintained under the supervision of the directors of BOGL.
- A member shall have an absolute right to process up to 1.5 tonnes of olives per annum in respect of each 250 "D" Class shareholding, subject to the payment of Factory Access Fees. The time allotted for each member's processing operations will be advised at least two weeks prior to commencement of the harvest period. The member may exchange his or her allotted time with any other member or members with the approval of BOGL: such approval not to be unreasonably withheld. The time allotted per 250 "D" Class shareholding will be as near as practicable to one half-hour and will be with respect to a machine or machines capable of processing in excess of 3 tonnes per hour.
- A member shall have the right to own and operate a business, as defined by the Constitution of BOGL, for the commercial cultivation and harvesting of olives on the member's Farm and the sale of produce therefrom.

- A member shall also have the right to own and operate a business as defined in the Constitution of BOGL, for the commercial processing and marketing of processed olive products which include, but are not necessarily limited to, olive oil and pickled table olives.
- A member shall have the right to use the agricultural infrastructure which includes, but is not necessarily limited to, roads around the property, access to irrigation mains and storage areas. This will be subject to the reasonable regulations imposed by BOGL's directors.
- A member shall have the right to use the processing infrastructure which includes, but is not necessarily limited to, loading and unloading equipment, storage areas, grading and sampling equipment. This will be subject to the reasonable regulations imposed by BOGL's directors.
- A member shall have the right to appoint BOML to manage his or her interests in accordance with the Management Agreement. Alternatively, growers have the right to manage the business personally or to appoint an employee, contractor, or agent to manage the business on their behalf.
- A member shall have the right to assign, transfer, or otherwise deal with the abovementioned special rights to any person, persons, or corporation with the approval of the directors of BOGL: such approval not to be unreasonably withheld.

(iii) The rights attaching to "D" Class shares expire on 1 July 2020 and, in accordance with the Constitution of BOGL, become ordinary shares. At that time BOGL will assume responsibility for, and the benefits of, the olive trees and from then on the member's benefits will be derived from the member's interest in BOGL by virtue of shares held.

(iv) A member or his or her assignee is obliged to ensure the efficient running of the business. If an employee, contractor, or agent is engaged to fulfil this function, BOGL must be satisfied in regard to the competence of that person or corporation and give its written approval.

Relationship between BOGL and members

(v) The members' interests are separate from the operation of the business of BOGL.

(vi) BOGL will derive income from annual Farm Administration Fees received from members. The year one Administration Fee in respect of the 2000 - 2001 year will be $88 for each parcel of 250 "D" Class shares allotted to the member.

(vii) In year two the Administration Fee will be $75 payable in advance.

(viii) Thereafter, until and including the year 2020, the annual Administration Fee shall be 10% of the gross income generated from the sale of olives attributable to the member's Farm.

(ix) BOGL will also derive income from the payment by the member of Factory Access Fees for each 250 "D" Class shareholding as follows:

- Year 1 - $225
- Year 2 - $225
- Year 3 and thereafter – 15% of the gross income generated from the sale of processed olive products attributable to the member's processing allocation. 90% of all income derived by BOGL for Factory Access Fees will be paid to the Factory Owner and the remaining 10% will be retained by BOGL to cover administration costs. BOGL may also derive income from the commercial use of that residue of BOGL land not being used for olive growing and from any direct interest in olive processing which BOGL may acquire.

2. The members may appoint BOML as the manager of the Farms. The Management Agreement is entered into between BOML and BOGL (as the agent of the members).

3. The Manager's duties until 30 June 2001 (as provided in clause 4.1 of the Management Agreement) are as follows:

(i) BOML will carry out the duties required to supply olive trees, plant olive trees on the grower's Farm, bring the trees to an initial harvest, process olives (whether those olives are sourced from the Farm or elsewhere), and market olives and processed olive product.

Without limiting the generality of this clause BOML must:

- Supply at least 20 olive trees to the grower selected from high yield stock in healthy condition.
- Carry out irrigation works to benefit the grower's Farm.
- Carry out drainage work and work to help prevent soil erosion on the grower's Farm.
- Prepare the Farm so that it will be suitable for the planting and growing of at least 20 olive trees.
- Tend the olive trees.
- Tend the trees and Farm in a proper and skilful manner.
- Comply with BOGL's constitution in so far as it relates to the use of the Farm and grower's processing allocation (except for the payment of Administration Fees and Factory Licence Fees).
- At BOML's discretion, procure raw olives, olive products or both from sources other than the Farms for processing.
- Determine the products into which those olives will be processed and the proportions of the various products.
- Carry out the processing of some or all of those olives or olive products pursuant to and during the processing time allowed under the grower's processing allocation.
- Package, market and sell the processed olives attributable to the grower using reasonable endeavours to obtain the maximum price available.
- If BOML markets and sells the processed olives attributable to the grower's processing allocation, account to the grower for the proceeds of sale.
- Eradicate as far as reasonably possible any pests and competitive weeds which may affect the growth or yield of trees.
- Repair damage to roads, tracks, or fences on the Farms or on neighbouring land resulting from the actions of BOML or its contractors.
- Embark on such operations as may be required to prevent or combat land degradation on the Farm or land.

4. The ongoing duties of the Manager (as provided in clause 4.3 of the Management Agreement) are as follows:

(i) BOML must continue to maintain the Farm and source, process, and market olives and olive products following the completion of the duties outlined in clause 4.1.

(ii) BOML's duties must be carried out according to sound agricultural, environmental, and proper workplace practices as well as in accordance with industry practices applicable to growing olive trees and processing and marketing olives or olive products. Without limiting the generality of this clause, BOML must:

- Eradicate as far as reasonably possible any pests or competitive weeds which may affect growth or yield of the trees.
- Comply with BOGL's constitution in so far as it relates to the use of the grower's Farm and the grower's processing allocation (except for the payment of Administration Fees and, if applicable, Factory Licence Fees).
- Repair damage to roads, tracks, or fences on the grower's Farm or on neighbouring land resulting from the actions of BOML or its contractors.
- Embark on such operations as may be required to prevent or combat land degradation on the grower's Farm or land surrounding the grower's Farm.
- Subject to the grower's right to harvest its own trees under clause 6.2, harvest the trees on the grower's Farm at or around the time estimated by BOML to maximise the produce from all the Farms established at or around the same time as the grower's Farm.
- Procure raw olives or olive products whether from the Farm or from other sources other than the Farms for processing.
- Determine the products into which those olives or olive products will be processed and the proportions of the various products.

- During the processing time allowed under the grower's processing allocation, carry out the processing of some or all of the olives attributable to the grower's Farm following harvest and olives procured from sources other than the Farms, in a proper and workmanlike manner having regard to proper workplace practices as well as in accordance with acceptable industry practices applicable to processing olives.
- Subject to the grower's rights to take and market olives and processed olive products under clauses 6.3 and 6.4, package, market, and sell the olives attributable to the grower's Farm and the processed olives attributable to the grower's processing allocation using reasonable endeavours to obtain the maximum price available.
- If BOML markets and sells the olives attributable to the grower's Farm and the processed olives attributable to the grower's processing allocation, account to the grower for the proceeds of sale.

5. Subject to complying with the conditions set out in clause 6 of the Management Agreement, growers may elect to:

   (i) Carry out their own maintenance work;

   (ii) Have their trees harvested separately;

   (iii) Harvest their own trees; and

   (iv) Market their own olives.

6. The Management Agreement (at clause 7.1) makes the following provision for remuneration in the first year:

   (a) for Growers who subscribe to the Project on or before 30 April 2000:

   (i) In consideration of BOML carrying out its duties (as set out in clause 4.1 of the Management Agreement), BOML is entitled to be paid:

   - $90 for the supply of 20 olive trees to the grower (payable on application).
   - $1,025 for irrigation works. Irrigation works consist of the supply and installation (above ground) of trickle tapes and sprinkler heads (together the "irrigation equipment") on growers' land (payable on or before 30 April 2000). The irrigation equipment is bought by BOML as agent for the grower.
   - $2,558.00 for the performance of management duties under clauses 4.1 (c) – 4.1 (e) "preparation and planting fees" (payable on or before 30 April 2000).
   - $2,255 for the following management duties (payable by twelve equal monthly instalments in arrears on the first day of each calendar month commencing on 1 July 2000. However, the fee is reduced to $2,050 if paid in full on or before 1 July 2000):
   - $1,293.00 for procuring, processing, packaging and marketing olives attributable to the grower's farm or sourced externally.
   - $962.00 for the balance of the management duties listed in clause 4.1.

   (ii) BOML is also entitled to be paid $550 for the use of the Barkworth name in carrying on the grower's business (payable by twelve equal monthly instalments in arrears on the first day of each calendar month during the first twelve months of this Agreement. However, the fee is reduced to $500 if paid in full on or before 1 July 2000).

   (b) for Growers who subscribe to the Project after 30 April 2000:

   (iii) In consideration of BOML carrying out its duties (as set out in clause 4.1 of the Management Agreement), BOML is entitled to be paid:

   - $90 for the supply of 20 olive trees to the grower (payable on application).
   - $1,025 for irrigation works. Irrigation works consist of the supply and installation (above ground) of trickle tapes and sprinkler heads (together the "irrigation equipment") on growers' land (payable on the later of 1 July 2000 or two months after application). The irrigation equipment is bought by BOML as agent for the grower.
   - $5,069 for the performance of management duties from 1 July 2000 until 30 June 2001 (payable by twelve equal monthly instalments in arrears on the first day of each calendar month commencing on the date of application and ending on 1 June 2001. However, the fee is reduced to $4,608 if paid in full on or before 1 July 2000):

- $2,814 for the performance of management duties under clauses 4.1 (c) – 4.1 (e) "preparation and planting fees".
- $1,293.00 for procuring, processing, packaging and marketing olives attributable to the grower's farm or sourced externally.
- $962.00 for the balance of the management duties listed in clause 4.1.

(iv) BOML is also entitled to be paid $550 for the use of the Barkworth name in carrying on the grower's business (payable by twelve equal monthly instalments in arrears on the first day of each calendar month during the first twelve months of this Agreement. However, the fee is reduced to $500 if paid in full on or before 1 July 2000).

(v) In addition to the fees set out in clauses 7.1(a) – 7.1(e), if BOML procures and markets processed olive products on behalf of the grower, then BOML is entitled to be paid 85% of the amount by which the gross proceeds from the sale of the processed olive products exceed prospectus projections. From this fee BOML must pay all costs associated with procuring and marketing processed olive products.

7. The Management Agreement (at clause 7.2) makes the following provision for remuneration in the second year:

(i) In consideration of BOML carrying out its duties from 1 July 2001 to 30 June 2002, BOML is entitled to be paid:

- $1,293 for procuring, processing, packaging, and marketing olives attributable to the grower's farm or sourced externally; and
- $962 for the balance of the duties listed in clause 4.3.
- The grower must pay these fees by equal monthly instalments in arrears on the first day of each calendar month during year two. However, the fees will be $1,175 and $875 respectively if the grower pays these amounts in full on or before 1 July 2001.

(ii) BOML is also entitled to be paid $500 in year two for granting the grower a licence to use the "Barkworth" name in carrying on the grower's business. The fee is payable from the gross income generated from the sale proceeds generated under the Management Agreement. The fee for the licence to use the "Barkworth" name is capped at the amount of gross income generated from the sale proceeds generated under the Management Agreement.

(iii) In addition, if BOML procures and markets processed olive products on behalf of the grower, then BOML is entitled to be paid 85% of the amount by which the gross proceeds from the sale of the processed olive products exceed the prospectus projections. From this fee, BOML must pay all costs associated with procuring and marketing processed olive products.

8. The Management Agreement makes the following provision for remuneration in the third year:

(i) In consideration of BOML carrying out its duties for the third year of the Management Agreement, BOML is entitled to be paid 70% of the gross income generated from the sale of processed olives attributable to the grower's processing allocation.

(ii) Payment of the above fees includes a fee to use the "Barkworth" name in carrying on the business of the grower. The amount of that fee is the amount paid under year two increased by the same proportion as the increase in the Consumer Price Index over the one-year period from year two to year three. If there is insufficient income earned from the sale of processed olives to pay this amount, the fee is capped at the income earned.

(iii) In addition, if BOML procures and markets processed olive products on behalf of the grower, then BOML is entitled to be paid 85% of the gross proceeds from the sale of the processed olive products. From this fee BOML must pay all costs associated with procuring and marketing processed olive products.

9. The Management Agreement makes the following provision for remuneration in the fourth and following years:

(i) In consideration of BOML carrying out its duties under clause 4.3 for the fourth year and all subsequent years, BOML is entitled to be paid fees calculated according to the following table:

Year no.	% of gross income of olives	% of gross income of processed olives
4	90%	70%
5	90%	70%
6	60%	70%
7	50%	70%
8 to 20	40%	70%

(ii) In the above table, "Gross Income of Olives" means the gross income generated from the sale of olives attributable to the grower's Farm, and "Gross Income of Processed Olives" means the gross income generated from the sale of processed olives attributable to the grower's processing allocation.

(iii) The fees payable are calculated in respect of the olives attributable to the grower's Farm which are produced during the year corresponding with the percentage of gross income of olives.

(iv) If the grower has made an election to have his or her trees harvested separately or to harvest the trees themselves such that the gross income of olives is not readily calculable by BOML, the fees payable in consideration of BOML carrying out its management duties under clause 4.3 of the Management Agreement are as per the fees in the following table plus or minus an adjustment.

Year no.	Management fees $
4	369
5	538
6	565
7	659
8	692
9	850
10	1,042
11	1,094
12	1,149
13	1,206
14	1,266
15	1,330
16	1,396
17	1,466
18	1,539
19	1,616
20	1,697

(v) That adjustment will be that amount actually paid in respect of Farms owned by growers who have not made the election. The adjustment will be credited or charged to the grower upon it being calculated by BOML.

(vi) If the grower has made an election to market his or her own processed olive products, fees payable to BOML for duties carried out under clause 4 of the Management Agreement will be the sum of the percentage of gross income of olives plus additional fees in respect of sourcing, processing, and related activities as set out below subject to adjustment in respect of years 3 to 20.

Year No.	% of gross income of olives	Additional fees for sourcing/procuring
1	-	0
2	-	500
3	-	1388
4	90%	2107
5	90%	2592
6	60%	2723
7	50%	2859
8	40%	3002
9	40%	3150
10	40%	3308
11	40%	3473
12	40%	3647
13	40%	3830
14	40%	4021
15	40%	4224
16	40%	4436
17	40%	4659
18	40%	4893
19	40%	5139
20	40%	5396

10. The projected cashflows for growers from the operation of a minimum holding of 250 "D" Class shares in BOGL, if BOML is appointed manager, are as follows:

Investing on or before 30 April 2000

Year	Net project income
2000	(3,673)
2001	(2,863)
2002	(1,965)
2003	416
2004	632
2005	777
2006	1,099
2007	1,385
2008	1,765
2009	2,008
2010	2,294
2011	2,409
2012	2,530
2013	2,656
2014	2,789
2015	2,929
2016	3,075
2017	3,229
2018	3,391
2019	3,562
2020	3,740

Investing after 30 April 2000

Year	Net project income
2000	(90)
2001	(6,446)
2002	(1,965)
2003	416
2004	632
2005	777
2006	1,099
2007	1,385
2008	1,765
2009	2,008
2010	2,294
2011	2,409
2012	2,530
2013	2,656
2014	2,789
2015	2,929
2016	3,075
2017	3,229
2018	3,391
2019	3,562
2020	3,740

11. The Prospectus states that the total net investment (over a period of two years) in respect of each interest for a member electing to have BOML manage the interests, is $9,136 including the 250 x $1 shares in BOGL. After that time it is projected that all costs will be met from revenue the project will generate.

12. Growers will be exposed to the normal risks of any commercial enterprise; some of which will be covered by insurance taken out by BOML.

13. This Ruling does not consider or rule on the taxation implications of financing arrangements (if any) entered into by growers in order to invest in this Arrangement.

Assumptions made by the Commissioner

This Ruling is made subject to the following assumptions:

i) Growers are liable for any repairs to or enhancement of the irrigation equipment required during the life of the project.

ii) Growers will participate in the project for the full 20 years (until 2020) and have an intention to make a profit from investing in the Arrangement.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

Balance date

a) This Ruling applies only to New Zealand resident taxpayers.

b) The balance date of any grower for the purposes of Australian income tax, is 30 June.

c) Any foreign source income and foreign expenditure that arises in respect of any grower's investment in BOGL has been included in the grower's annual returns of income in Australia.

d) No foreign source income, nor foreign expenditure arising from the investment in BOGL, has been included in the grower's income tax return for the base year.

e) Any dividends received from BOGL are to be returned when derived and not in accordance with section EP 1.

f) The total net foreign source income (derived from all foreign activities) of the grower is less than $100,000.

g) The income derived and expenditure incurred by the grower from the sale of raw olives and processed olive products is not income derived or expenditure incurred under the "accrual rules".

h) The shares in BOGL do not give rise to any "attributed foreign income" as defined in section OB 1.

i) The shares in BOGL do not give rise to "foreign investment fund income" as defined in section CG 16.

j) BOGL is not a "controlled foreign company" as defined in section CG 4.

Factory access fees; procuring, processing and marketing fees; and brand name licensing fees

k) The "year one" factory access fee is payable in respect of the year ending 30 June 2001.

l) The factory access fee; the procuring, processing and marketing fee; and the brand name licensing fee are all set at an arm's length rate.

m) In the year ending 30 June 2001, BOML processed olives on behalf of growers using a part, or all of, their annual allocation of factory access time for the year ended 30 June 2001.

n) The "year one" procuring, processing and marketing fee is payable in respect of the year ended 30 June 2001.

o) In the year ending 30 June 2001, BOML procured and processed olives on behalf of growers.

p) The "year one" brand name licensing fee is payable in respect of the year ending 30 June 2001.

q) In the year ending 30 June 2001, growers used the brand name "Barkworth" for marketing and selling olives and olive products.

Irrigation equipment

r) Growers acquire legal and beneficial ownership of the irrigation equipment by virtue of the $1,025 payment.

s) Growers have not elected to treat the right to use the irrigation equipment as low value property under section EG 16.

t) Growers have not been allowed a deduction in respect of the irrigation equipment under any of sections BD 2(1)(b)(i) and (ii), DJ 6, DJ 11, DL 6, DM 1, DO 3, DO 6, DO 7, DZ 1, DZ 3, EO 5, EZ 5, and EZ 6, or by virtue of an amortisation or other similar deduction allowed under any section of the Act.

u) Growers are not entitled to receive compensation for any decline in the value of the right to use the irrigation equipment.

v) No other taxpayers have been allowed a deduction for the right to use the irrigation equipment.

w) Growers have not elected to treat the property as not depreciable under section EG 16A.

x) Growers have not elected to treat the right to use the irrigation equipment as a financial arrangement under section EH 25.

General

y) The financial projections contained in Prospectus No. 4 demonstrate genuine and commercially achievable rates of return.

z) If BOML contracts with itself, under clause 5.2 of the Management Agreement, then it will do so on an arm's length basis.

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:

- Growers may make an election under section EP 1 to use a foreign tax balance date.
- The cost of acquiring shares in BOGL is a capital expense and not deductible by virtue of section BD 2(2)(e).
- The cost of acquiring olive trees is a capital expense and not deductible by virtue of section BD 2(2)(e).
- The Preparation and Planting Fee is a capital expense and not deductible by virtue of section BD 2(2)(e).
- The annual Farm Administration Fee payable to BOGL is deductible under section BD 2(1)(b)(i).
- The payment of the annual Factory Access Fee is deductible under section BD 2(1)(b)(i).
- The annual Procuring, Processing, Packaging and Marketing Fee is deductible under section BD 2(1)(b)(i).
- The annual Brand Name Fee is deductible under section BD 2(1)(b)(i).
- The irrigation equipment is "depreciable property".
- The $1,025 payment for the irrigation equipment is depreciable under section EG 1.
- Section DB 1 does not preclude growers who are not registered or liable to be registered for Australian GST from claiming a deduction in New Zealand for the GST inclusive amount.

The period or income year for which this Ruling applies

This Ruling will apply for the period 1 July 2000 until 30 June 2003.

This Ruling is signed by me on the 16th day of March 2001.

Martin Smith

General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD 01/09

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 Deltarg Distribution Systems Ltd.

Taxation Laws

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

This Ruling applies in respect of:

- Sections BD 2(2)(c), DE 1, KC 2, NC 13; the definitions of "extra emolument", "income from employment", "salary or wages", "source deduction payment", and "withholding payment" in section OB 1; and the definition of "PAYE rules" in section OZ 1(1);
- Regulation 4 and clause 5(d) of Part A of the Schedule to the Income Tax (Withholding Payments) Regulations 1979 ("the Regulations"); and
- Section 6 of the Goods and Services Tax Act 1985.

The Arrangement to which this Ruling applies

The Arrangement is the engagement of persons ("Contractors") by Deltarg Distribution Systems Ltd ("Deltarg") pursuant to its standard form contract ("the Contract"), for the provision of certain delivery services. Further details of the Arrangement are set out in the paragraphs below.

1. Deltarg carries on the business of distributing newspapers, leaflets, brochures, catalogues, advertising material, samples and other similar items to households and other premises throughout New Zealand.
2. The delivery services involve the Contractors undertaking delivery of the particular items within a specified period, to each house, flat or other premises located within a designated area, by placing one of each item in each letterbox (or other specified location).
3. The Contract contains both general terms and conditions (the text of which is appended to this Ruling as Appendix I) and a schedule (a copy of which is appended to this Ruling as Appendix II) setting out the terms specific to the particular delivery for which the Contractors are engaged.

Conditions stipulated by the Commissioner

This Ruling is based on the following condition:

> The actual relationship between Deltarg and its Contractors is, and will continue to be during the period this ruling applies, entirely in accordance with the Contract, provided in the application and affixed to the ruling as appendices I and II, and that there are no other collateral contracts, agreements, terms or conditions, written or otherwise, relating to the engagement of any of the Contractors.

How the Taxation Laws apply to the Arrangement

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

- For the purposes of the "PAYE rules" defined in section OZ 1, any payment made to a Contractor by Deltarg pursuant to the Contract (other than a payment made to a company as referred to in regulation 4(2)(b) of the Regulations):
  - Will fall within the class of payment specified in clause 5(d) of Part A of the Schedule to the Regulations and be declared to be a "withholding payment" by regulation 4(1) of the Regulations and thus a "withholding payment" as defined in section OB 1; and
  - Will not be "salary or wages" or an "extra emolument" within the meaning of those terms as defined in section OB 1.
- For the purposes of section NC 13 and the rebate provided by section KC 2, where in relation to a Contractor:
  - The Contractor's total weekly earnings do not exceed $20; or
  - The Contractor's weekly earnings exceed $20, but the Contractor's total earnings for the income year will not exceed $1,040;

  Deltarg will not be required to make tax deductions from payments made to the Contractor pursuant to the Contract if that Contractor complies with the requirements of paragraph (a), (b) or (c) of section KC 2 and is not an absentee or allowed a rebate under section KC 3.

- For the purposes of sections BD 2(2)(c) and DE 1, any payment made to a Contractor by Deltarg pursuant to the Contract will not be "income from employment" as that term is defined in section OB 1.
- For the purposes of the Goods and Services Tax Act 1985, the provision of services by any Contractor to Deltarg under the Contract will not be excluded from the definition of "taxable activity" in section 6 of that Act by section 6(3)(b) of that Act.

The period or income year for which this Ruling applies

This Ruling will apply for the period 1 April 2001 to 31 March 2006.

This Ruling is signed by me on the 23rd day of March 2001.

John Mora

Assistant General Manager (Adjudication & Rulings)

Appendix I

BY THIS AGREEMENT made the date specified in paragraph four (4) of the schedule Deltarg Distribution Systems Ltd whose address is set out in paragraph two (2) of the schedule ("Deltarg") hereby engages the person, firm or company whose name and address is specified in paragraph three (3) of the schedule ("the Contractor") on the terms and conditions hereinafter set out, to distribute, within the period specified in paragraph four (4) of the schedule, the newspapers, leaflets, brochures, catalogues, samples or other items specified in paragraph five (5) of the schedule ("the item") to each house, flat and other premises located within the area designated in paragraph six (6) of the schedule by placing one (1) of such items in each letterbox ("the services") or other location as specified.

TERMS AND CONDITIONS

1. (a) Within thirty (30) days after duly performing and completing the services (as to which Deltarg may require a filled in map of the streets or sides of streets serviced, or such other evidence as Deltarg may reasonably require to satisfy itself that the Contractor has duly performed and completed the services in accordance with the terms of this Agreement), Deltarg shall pay to the Contractor the fee specified in paragraph seven (7) of the schedule.

   (b) From time to time, due to circumstances beyond the control of Deltarg, there may be late changes, cancellations or additions to distributions (the item or part thereof necessitating re-calculation of the fee specified in paragraph seven (7) of the schedule. The final payment of the fee will then be paid at the recalculated amount which may vary from the fee specified in paragraph seven (7) of the schedule.

2. The Contractor shall not place any item in any letterbox displaying "No Junk Mail", "No Advertising Material" or similar sign (community newspapers excepted unless specifically referred to by signage, for example "No Newspapers Please" or similar specific signs), shall not in any way litter or commit a breach of any relevant Act, by-law or regulation and shall also comply with such other special instructions (if any) as may be specified in paragraph five (5) of the schedule.
3. The Contractor may sub-contract the services, or otherwise engage or obtain assistance from others for the performance of the services but shall at all times remain personally responsible to Deltarg under the terms of this agreement and is the only person to whom Deltarg will pay the fee for the services.
4. The Contractor shall if necessary, having regard to the bulk, weight or volume of the items to be delivered, and may at the Contractor's discretion, provide and use (but in all respects at the Contractor's cost, expense and risk) a car, trailer, trolley or other carrying equipment in connection with the delivery of the items.
5. The Contractor is an independent Contractor and as such is free (in addition to the Contractor's freedom to engage sub-contractors and others to use carrying equipment, as recognised by clauses three (3) and four (4) of this agreement) to select the Contractor's own means and methods of performing the services and, subject to the requirements of paragraph four (4) of the schedule, the hours during which the Contractor will perform those services. The Contractor in connection with the performance of the services shall indemnify and keep Deltarg indemnified against all actions, proceedings, liabilities, claims, damages, costs and expenses arising out of or in any way relating to the Contractor's activities hereunder.

6. The Contractor shall not deliver any material with the item other than those specified in paragraph five (5) of the schedule and will not use maps, materials or other information supplied by Deltarg, for any purpose other than in connection with the distribution of the item.
7. This document constitutes the entire agreement between the Company and the Contractor.

Signature of Parties

Date / /

_____

Deltarg (by its duly authorised representative)

Date / /

_____

Contractor

(If the Contractor is a firm or a company the person signing warrants that he/she has authority to sign on behalf of the Contractor)

Appendix II

DELTARG DISTRIBUTION SYSTEMS LTD. **SCHEDULE 1** 2 **CONTRACT**

3

RUN NO.	MAP REF	DISTRIBUTOR CODE	CONTRACT No.

CONTACT YOUR AREA REPRESENTATIVE ON:

SPECIAL DELIVERY INSTRUCTIONS:	6 POSTZONE		CHANGE CODE

4

START DATE	FINISH DATE

5 JOB DESCRIPTION & INSTRUCTIONS

HOUSES	UNITS	COMMERCIAL	NO ADVERTISING MATERIAL	QUANTITY	COMMENTS

1

7 TOTAL AMOUNT DUE

OFFICE COPY PLEASE RETURN THIS COPY TO YOUR AREA REPRESENTATIVE WITHIN 7 DAYS

DELTARG DISTRIBUTION SYSTEMS LTD. **SCHEDULE 1** 2 **CONTRACT**

3

RUN NO.	MAP REF	DISTRIBUTOR CODE	CONTRACT No.

CONTACT YOUR AREA REPRESENTATIVE ON:

START DATE	FINISH DATE	6 POSTZONE	CHANGE CODE

1

4

7 TOTAL AMOUNT DUE

DISTRIBUTOR COPY PLEASE RETURN THIS COPY AS YOUR RECORD AND RETURN THE OFFICE COPY (BLUE COPY) TO YOUR AREA REPRESENTATIVE WITHIN 7 DAYS.

PRODUCT RULING – BR PRD 01/12

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 the New Zealand Guardian Trust Company Ltd as Trustee for the NZGT30 Fund ("the Fund").

Taxation Laws

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

- This Ruling applies in respect of sections BG 1, CF 2 (3), CF 2 (3A) and Subpart LE, CF 3 (1)(b), GB 1 (3), and HH 3 of the Income Tax Act 1994.

The Arrangement to which this Ruling Applies

The Arrangement is the establishment and continued operation of the Fund, pursuant to the Deed of Trust dated 5 September 1996 and Deed of Amendment dated 15 September 2000, which acts as a specialist investment fund to hold a portfolio of shares and other securities that match the composition and weighting of the NZSE 30 Capital Share Price Index ("Index").

Further details of the Arrangement are set out in the paragraphs below.

1. The trustee and manager of the Fund is The New Zealand Guardian Trust Company Limited. It is registered as a trustee company under the Trustee Companies Act 1967. The Fund is established under the Trustee Companies Act 1967 and meets the definition of "group investment fund" contained in section OB 1. The beneficial interest in the Fund is divided into units. Each unit confers an equal interest in the Fund, but does not confer any interest in any particular investment of the Fund.
2. Income derived by the Fund comprises of dividends, interest on convertible notes, gains on futures contracts and interest on deposited funds. This income is distributed to investors holding units in the Fund as at the income distribution date, which is semi-annually.
3. Each investor subscribes for the issue of units in the Fund. The issue price is determined by dividing the total market value of the net assets of the Fund by the number of units issued in the Fund ("current unit value").
4. It is possible for investors to transfer similar securities to the Fund in lieu of a cash payment.
5. The majority of the investors in the Fund are from "designated sources" as defined in section HE 2 (3) ("category A units"). However, some units may be acquired with funds from "designated sources" as defined in section HE 2 (3) ("category B units"). These category B units are subject to the same rules regarding income distribution and redemption of units as apply to category A unit holders.
6. Investors are able to redeem their units at any valuation time (weekly) by giving notice to the fund manager. Their units are redeemed in cash at a price equal to the current unit value.
7. It is possible for the fund manager, in the ordinary course of the fund manager's activities, to purchase the units from the unit holders as an alternative to redemption.
8. The purchase price of the units paid by the fund manager is determined according to the current unit value.
9. Other facts of the Arrangement and relevant information are as set out in the prospectus of the Fund dated 30 September 1996.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) The Fund is a "qualifying trust" as defined in section OB 1; and

b) All cancellations of units by the Fund are in whole but not in part; and

c) None of the units is a "non-participating redeemable share" as defined in section CF 3 (14); and

d) Any relevant cancellation is not, and does not form part of, a "pro rata cancellation" as defined in section CF 3 (14); and

e) The Fund is an "unlisted trust" as defined in section CF 3 (14); and

f) The units are issued on such terms that their redemption is subject to section CF 3 (1)(b)(iv)(B); and

g) No election is made by the Fund to treat the category A units issued as shares of a separate class; and

h) Any relevant cancellation is not an "on-market acquisition"; and

i) At the date of redemption there is no arrangement for the units redeemed to be replaced by the subsequent issue of new units where the arrangement is intended to effect a substitution for the payment of dividends; and

j) Any cancellations of units are only effected in order to allow unit holders to exit the Fund; and

k) The unit holders do not in any way retain any interest in the units which are sold to the fund manager.

How the Taxation Laws apply to the Arrangement

Subject in all respects to the conditions stated above, the Taxation Laws apply to the Arrangement as follows:

- In the case of a payment or transaction with an investor in the Fund that is a dividend under section CF 2 (3), section CF 2 (3A) will treat the Fund as if it were a company for the purposes of Subpart LE; and
- The entire amount paid to category A unit holders on the redemption of their units is excluded from the definition of dividend by section CF 3 (1)(b) to the extent it does not exceed the available subscribed capital per share cancelled; and
- In respect of category B income distributed to category B unit holders semi-annually this will be treated as "beneficiary income" for tax purposes and subject to section HH 3; and
- Any gain on the redemption of category B units by a category B unit holder is not liable for income tax to the extent that it does not include beneficiary income, under section HH 3 (5). The accrued income component representing beneficiary income on distribution will be taxable to the category B unit holder; and
- In the absence of other factors relating to the circumstances of any particular category A unit holder, any gain on the sale of the category A units to the fund manager does not of itself give rise to the application of section GB 1 (3) and section BG 1; and
- In the absence of other factors relating to the circumstances of any particular category B unit holder, any gain on the sale of the category B units to the fund manager does not of itself give rise to the application of section BG 1.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 April 2001 until 30 June 2001.

This Ruling is signed by me on the 29th day of March 2001.

Martin Smith

General Manager (Adjudication and Rulings)

PRODUCT RULING – BR PRD 01/13

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 the Public Trustee as trustee of the BNZ NZ Equity Index Trust ("the Trust").

Taxation Laws

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

This Ruling applies in respect of sections CF 3(1)(b) and CF 3(7) and the definition of "excess return amount" in section CF 3(14).

The Arrangement to which this Ruling applies

The Arrangement is the operation of the Trust which holds a portfolio of securities listed on the New Zealand Stock Exchange ("NZSE") and the repurchase by the Manager of, or arranging for the redemption of, units in the Trust for the Unit Holders.

Further details of the Arrangement are set out in the paragraphs below.

1. The Bank of New Zealand ("the Settlor") formed a unit trust, under the Unit Trusts Act 1960 known as BNZ NZ Equity Index Trust ("the Trust"). The operation of the Trust is governed by the Trust Deed dated 19 March 1997 as amended by Deeds of Modification dated 26 November 1998 and 23 March 2001. The Trust is managed by BNZ Investment Management Limited ("the Manager") and its trustee is the Public Trustee ("the Trustee"). Members of the public hold units in the Trust and units in the Trust are offered to new investors continuously.

2. The Trust is a passive investment vehicle, managed so as to track the composition of a set of listed equity securities which together form the constituent part of the Index ("the Index"), known as the BNZ 25 Equity Index. The index comprises up to 25 of the largest New Zealand equity securities listed on the NZSE. The Trust will not be subject to any active management as such. Rather, it will be managed to track the composition of a set of listed equity securities that together form the constituent parts of the Index.

3. The Index is an equivalent of the well-known NZSE 10 and NZSE 40 indices, except that it will comprise up to 25 of the largest listed New Zealand equity securities, measured by average weekly market capitalisation. As with the NZSE 10 and NZSE 40 indices, the weighting of each security in the Index will reflect its respective market capitalisation on the NZSE at the relevant date. The "home" exchange of each stock can be any of the "grey list" countries as they are defined in the New Zealand tax law.

4. If the equity security is listed on the NZSE and meets the other criteria, it will be included in the Index. The equity securities will normally be shares, but there may also be convertible notes.

5. The market capitalisation for securities that have their "home" exchange outside New Zealand will be calculated under the standard NZSE rules for weighting of non-New Zealand equities.

6. Where identical constituent securities exist in the market except for ownership restrictions (such as Air New Zealand A and B shares), the Index previously only included one of those constituent securities. The Index will now include all the identical securities.

7. Approximately 95% of the net asset value of the Trust Fund of the Trust will be invested in such investments as the Manager considers necessary to track the Index. While the majority of available funds will be invested to track the Index, a "cash pool" of the net assets of the Trust will be maintained in order to minimise the number of sale and purchase transactions and to fund any daily net fund withdrawals and net fund inflows pending purchase of equity securities and to manage the liquidity of the Trust in respect of meeting anticipated liabilities, withdrawals and distributions. The pool is only invested in bank accounts, cash, derivatives or futures contracts that give appropriate equity exposure.

8. The beneficial interest in the Trust is divided into units. Each unit (other than a fractional unit that will confer a proportional interest in the Trust) confers an equal interest in the Trust, but does not confer any interest in any particular part of the Trust or any investment of the Trust.

9. Changes are made to the Index composition in the following circumstances:

(a) When this ruling is issued, and the consequential changes are made to the Trust Deed, the Manager will recalculate the Index taking into account the dual-listed securities that enter the Index, the inclusion of all identical constituent securities (as discussed above in paragraph 6) and the higher liquidity threshold. This will result in a number of existing Index securities being replaced.

(b) At the end of each quarter, securities will be ranked according to their average weekly market capitalisation for the previous 6-month period. If a security not previously included in the Index has risen at the quarter end above 21st position, that security will be included as a constituent security in the Index and the lowest ranked Index security held at the quarter end will be removed. If a security that is currently included in the Index at the quarter end has dropped below a ranking of 30th, that security will be removed as a constituent security from the Index and the highest ranked security at the quarter end not already included in the Index will be included. An amendment to the Trust Deed is proposed so that "quarter" is defined as the three months ending on the 15th of April, July, October and January respectively. Currently, the quarterly rebalancing occurs at the end of a month. The change in date is purely administrative, that is, to avoid clashing with the end of the financial year of the Trust and to avoid the inconvenience resulting from the high level of market activity at that time.

(c) At the end of each quarter, securities are reviewed with regard to compliance with the necessary minimum liquidity requirements. In order to be included and to maintain inclusion in the Index, a constituent security must meet a minimum liquidity requirement. Liquidity is defined as the average daily trading volume of a security (over a 6-month period leading up to the end of the relevant quarter, after eliminating the highest and lowest months), expressed as a percentage of the total issued and quoted securities of the same class. The minimum liquidity measure for inclusion in the Index is 0.75% per month. This requirement does not apply to a security listed on the NZSE for the first time until the end of the second complete quarter following listing. If there are less than 25 securities which meet the minimum liquidity requirements, then there may be less than 25 securities included in the Index.

(d) If an event such as a share issue or share buy-back occurs so as to increase or decrease the number of any constituent security on issue and that increase or decrease, measured by market capitalisation on a cumulative basis since the last adjustment, is less that 0.03% of the Index, then any adjustments to the Index will be made at the end of the quarter in which the number of listed securities are increased or decreased. In the event that an increase or decrease represents more than 0.03% of the Index, an adjustment to the Index will be made, subject to five business days' notice, on the 15th day or the last day (whichever next follows the relevant increase or decrease) of the month in which the number of listed securities is increased or decreased. (However, it should be noted that if there is a rights issue to existing security holders including the Trustee, the Manager will endeavour to take up the rights issue in anticipation of the change to the Index which is expected to result from the issue.)

(e) If a security is listed on the NZSE for the first time, it will be included in the Index in the month of listing if:

(i) it ranks, in terms of market capitalisation, above 21st position (compared with other Index securities ranked according to their average weekly market capitalisation for the previous 6-month period); and

(ii) at least 25% of the security is freely tradeable at the time of listing.

If the security is listed before the 15th day of the month, it will be included in the Index on the 15th day and otherwise will be included at the end of the month. The security previously ranked 25th within the Index at that time will be removed.

If a security listed on the New Zealand Stock Exchange for the first time does not meet the 25% free float test at the time of listing but meets that 25% test at the end of the quarter in which listing occurs or the following quarter, it will be included in the Index at the relevant quarter end (subject to ranking above 21st at that time). Again, the security previously ranked 25th will be removed at that time.

(f) If the Manager recommends, and the independent party (the Trust's auditors) agrees, the Index must be altered to reflect a material change to the rules governing the NZSE 40 Index structure made by the NZSE.

(g) If there is a merger, takeover offer or scheme of arrangement sanctioned by the High Court for 100% of the issued securities of a company:

(i) the company's securities will be removed from the Index when the offeror or acquiror becomes entitled to, and announces that it will, proceed with compulsory acquisition; and

(ii) if the offer has less than 100% acceptance but nevertheless proceeds and, at that time or any time after the merger, takeover offer or scheme of arrangement proceeds, less than 25% of the company's securities are freely tradeable as a result of the merger, takeover offer or scheme of arrangement, the company's securities will be removed from the Index.

10. The criteria stipulated in paragraph 9 (with the exception of subparagraphs (e), (f), and (g)) are similar to the criteria adopted with regard to the NZSE 10 Index. The Manager has appointed an independent party (the Trust's auditors) to provide an annual confirmation that the operations of the Trust have conformed to these criteria.

11. The Manager will use best endeavours to track the Index as closely as possible. In circumstances where the Manager is using best endeavours to track the Index as closely as possible, deviation from the Index may occur where it is not possible to exactly replicate the Index for one or more of the following reasons:

(a) The time taken to buy equities;

(b) Difficulties in acquiring equities;

(c) Rounding errors; or

(d) Price fluctuation

but in any such case deviation from the Index will not exceed the following tolerance levels:

(a) in the case of securities the Index weighting of which is 10% or greater of the total Index, the deviation from the Index replication is no larger than 1% of the Index; or

(b) in the case of securities whose Index weighting is less than 10% of the Index, the deviation from the Index replication is no greater than 10% of the relevant security's weighting in the Index.

12. The minimum subscription amount for units in the Trust will be $5,000. Investors are able to subscribe for units in the Trust by making a cash payment. The Manager is authorised to accept from an investor a subscription in kind, i.e. a subscription in the form of a basket of securities that achieves a result of the Trust tracking the then Index composition.

13. Disposition of securities by the Trustee on behalf of the Trust (other than those in the cash pool) will only occur in the following circumstances:

(a) It is anticipated that the 25 largest listed New Zealand equity securities will alter significantly when the Trust Deed is amended as proposed. Following these amendments dual-listed securities and all identical constituent securities are included in the Index and the liquidity threshold is also raised. Such dispositions will only occur once: when the trust Deed is amended and the Index recalculated. There is no profit-making purpose in any such disposition, and it will not involve any discretionary exercise of investment management powers.

(b) If the Trust is ever wound up either by sale of securities for cash and distribution of the cash, or alternatively by distribution of securities *in specie* to investors holding units in the Trust.

(c) If, at any time, the Index composition changes and as a result the composition of the securities in the Trust no longer tracks the weightings in the Index. Any such disposition will not involve any discretionary exercise of investment management powers.

(d) If, on any day, there is a net withdrawal of funds from the Trust by investors holding units in the Trust. It is expected that dispositions of securities to fund withdrawals will be likely on at most a weekly basis. It will be possible for the Trustee to satisfy a withdrawal request by distributing a basket of securities *in specie*.

(e) If there is a claim on the Trustee in respect of the Trust that cannot be met other than as a result of liquidating some securities. This is not anticipated, but the Trustee needs some ultimate protection against extraordinary circumstances such as, say, a change in taxation law or an unanticipated liability or expense.

In respect of the events under subparagraphs (a) to (e), sales of securities will only be made to the extent required in each case.

14. A fee will be payable to the Trustee of 0.07% per annum of the net assets of the Trust, calculated and accruing on a daily basis. A management fee is to be payable to the Manager of 0.95% per annum of the net assets of the Trust, calculated and accruing on a daily basis. No other general management fee will be levied, but it is contemplated that front-end promotion fees (entry fees) will be payable.

15. Any income on the held securities received by the Trustee in respect of the Fund will be distributed, on an annual basis, to investors holding units in the Trust at that point in time. To the extent that the distribution can be fully imputed, an amount equal to taxable gross income will be allocated to Unit Holders and reinvested, normally annually, by the Manager into new units on behalf of the Unit Holders. The Unit Holders will, therefore, derive dividends for tax purposes. In addition, it is possible that the Trust may on occasions distribute cash amounts on account of taxable gross income.

16. The Trust will generally determine dates of allocation of entitlements and the distribution periods to which entitlements relate in terms of clauses 32 and 33 of the Trust Deed so that investors receive distributions just prior to the 31 March of each year.

17. Under clause 32 of the Deed, the Manager is required to allocate taxable gross income to Unit Holders, and reinvest those amounts into new units on behalf of the Unit Holders. To the extent that the distribution can be fully imputed, an amount equal to taxable gross income will be allocated to Unit Holders and reinvested, normally annually, by the Manager into new Units on behalf of the Unit Holders.

Any departure from this practice can only occur if Unit Holders elect to have their entitlements distributed in cash pursuant to clause 33.4 of the Trust Deed.

18. Unit Holders are able to redeem their units at any time by giving notice, in the form of a repurchase request, to the Manager. Their units will be redeemed at a price equal to the net assets of the Trust (adjusted to take into account the costs of selling the net assets of the Trust) at the time, divided by the number of units on issue.

19. It is possible for the Manager to purchase the units from the Unit Holders as an alternative to redemption. Where units are repurchased, the Manager will pay the Unit Holder a price equal to the net assets of the Trust (adjusted to take into account the costs of selling the net assets of the Trust) at the time, divided by the number of units on issue.

20. The issuing of units and their redemption will be effected directly by the Trustee. No units are otherwise quoted on the official list of any "recognised exchange", as defined in section OB 1. All units will be issued on terms that the reverse ordering rule applies.

21. Any cancellation of units will only be effected in order to allow Unit Holders to exit the Trust or decrease their holding in the Trust, unless an investor's unit holding falls below a minimum value specified in the Trust Deed, in which case the Manager can require the Unit Holder to redeem their units. Units will also be cancelled in the event that the Trust is liquidated.

22. Except in the event of liquidation of the Trust, any cancellation of units will be in response to the activities of a particular Unit Holder, and not all the Unit Holders of the Trust. All redemptions will be of whole units (including whole fractional units), not part units.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) Subject only to the second paragraph of this condition, the proportion of the Applicant's assets to be held as the cash pool will not exceed what is strictly necessary in order to fulfil the purposes of the cash pool (as described in paragraphs 7 and 8 of this Ruling), and will not in any event exceed 5% of the total assets of the Trust.

   This condition will not be regarded as being breached if, pending investment of contributions or disbursement of the redemption proceeds, the Trust is forced to hold cash in excess of 5% of the net asset value of the Trust. In any such case the excess will only be to the extent, and exist only for the time, that is strictly necessary in order to invest contributions or disburse redemption proceeds and the Trust will invest or disburse such cash, as soon as possible.

b) The cash pool must not be used in order to increase the performance of the Trust or to enhance the Trust Fund's value. To the extent that the operation of the cash pool seeks to obtain the maximum market rate of return on cash pool investments, any such maximisation will not of itself be taken to be a breach of this condition.

c) The reason for changing the end of the quarter from the end of the relevant month (being March, June, September, and December) to the 15th of the relevant month (being, April, July, October and January) is purely administrative. It is to avoid the need to undertake the re-balancing and matters associated with the end of the financial year of the Trust at the same time, and also to avoid a flurry of activities in the market at that time because of the large number of "passive" index-linked funds that are in existence in the market and rebalance then. The purpose of this change is not to increase the performance of the Trust or enhance the value of the share capital in the Trust.

(d) The Manager will not exercise its discretion under clauses 32 and 33 of the Deed to determine the dates of allocation of entitlements and the distribution periods to which entitlements relate to increase the performance of the Trust or to enhance the Trust Fund's value.

(e) The Manager will only depart from the requirement to reinvest taxable distributions for Unit Holders in further units upon a written request from Unit Holders to do so pursuant to clause 33.4 of the Deed.

(f) The Manager will use best endeavours to track the Index as closely as possible.

   In circumstances where the Manager is using best endeavours to track the Index as closely as possible, deviation from the Index may occur where it is not possible to exactly replicate the Index for one or more of the following reasons:

   (i) The time taken to buy equities;

   (ii) Difficulties in acquiring equities;

   (iii) Rounding errors; or

   (iv) Price fluctuations,

   but in any such case, deviation from the Index will not exceed the following levels:

   (i) in the case of securities the Index weighting of which is 10% or greater of the total Index, the deviation from the Index replication is no larger than 1% of the Index; or

   (ii) in the case of securities whose Index weighting is less than 10% of the Index, the deviation from the Index replication is no greater than 10% of the relevant security's weighting in the Index.

g) Decisions by the Manager not to participate in dividend reinvestment plans will only be made to avoid an acquisition of equity securities that would lead to the Trust not tracking the Index.

h) Dispositions resulting from changes to the Trust Deed, and the resultant inclusion of dual-listed securities and the inclusion of identical constituent securities will only occur once, and any disposition will not be to increase the performance of the Trust or to enhance the Trust Fund's value or involve any discretionary exercise of investment management powers.

How the Taxation Laws apply to the Applicant and the Arrangement

Except in relation to Unit Holders who are non-resident companies holding 20% or more of the units in the Trust, and subject in all respects to the conditions above, the Taxation Laws apply to the Arrangement as follows:

- Amounts paid from the Trust to Unit Holders on redemption of units do not constitute amounts paid in lieu of dividends for the purposes of section CF 3 (1)(b)(iii).
- Equity securities of the Trust constitute "capital assets" for the purposes of section CF 3 (7) and the definition of "excess return amount" in section CF 3 (14).
- For the purposes of the definition of the term "excess return amount" in section CF 3 (14), gains realised on dispositions of equity securities by the Trust are capital gain amounts available for distribution to Unit Holders at the time of winding up of the Trust in the present circumstances where prior distributions of amounts to Unit Holders on redemption of units will be treated as falling outside the definition of the term "dividend", as a result of the application of section CF 3 (1)(b) and the reverse ordering rule.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 April 2001 to 31 March 2002.

This Ruling is signed by me on the 29th day of March 2001.

Martin Smith

General Manager (Adjudication & Rulings)

EMPLOYMENT COURT AWARDS FOR LOST WAGES OR OTHER REMUNERATION – EMPLOYERS' LIABILITY TO MAKE TAX DEDUCTIONS

PUBLIC RULING BR Pub 01/06

Note (not part of ruling): This ruling replaces Public Rulings BR Pub 97/7 and 97/7A published in *TIB* Vol 9, No 6 (June 1997). This new ruling is essentially the same as the previous rulings. The main changes take into account the new employment legislation and tax law amendments, and update relevant case references. The ruling applies from 1 October 2000 to 30 September 2005.

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

Taxation Laws

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

This Ruling applies in respect of sections CH 3, EB 1, NC 2, NC 16 , OB 1 (definitions of "employee", "extra emolument", "monetary remuneration", and "shareholder-employee"), and OB 2 (definition of "source deduction payment").

The Arrangement to which this Ruling applies

The Arrangement is an order by the Employment Court or the Employment Relations Authority requiring an employer to make a payment for lost wages or other remuneration to an employee under the Employment Relations Act 2000.

The Court or Authority will make such an award when an employee has lost wages or other remuneration as a result of an action by the employer which has been the subject of a personal grievance by the employee against the employer (e.g. unjustifiable dismissal or other unjustifiable action by the employer). An award for lost wages or other remuneration will usually be made under sections 123(b) or 128 of the Employment Relations Act, but may be made under another provision.

This Ruling does not apply to an award of compensation for humiliation, loss of dignity, or injury to feelings made under section 123(c)(i) of the Employment Relations Act.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

A. Monetary remuneration

The payment of an award for lost wages or other remuneration under the Employment Relations Act 2000 is "monetary remuneration" of the employee as defined in section OB 1. As the payment is monetary remuneration, it is gross income of the employee under section CH 3.

B. Employer's liability to make tax deductions from the award

The payment of an award for lost wages or other remuneration under the Employment Relations Act 2000 is an extra emolument and is a "source deduction payment" under section OB 2 (1). The employer must make tax deductions from the payment under section NC 2 and account for those deductions to Inland Revenue in the normal way.

If an employer fails to make the required tax deductions from a payment, the employee is liable, under section NC 16, to pay an amount equal to those tax deductions to the Commissioner (and is also required to furnish to the Commissioner an employer monthly schedule showing details of the payment).

C. When the payment is derived by the employee

Under section EB 1 (1), an employee derives a payment of an award for lost wages or other remuneration under the Employment Relations Act 2000 when the employee receives the payment, or when the payment is credited to an account or otherwise dealt with on the employee's behalf.

A person who is a shareholder-employee for the purposes of section EB 1 (as defined in sections OB 1 and OB 2 (2)) derives a payment of an award for lost wages or other remuneration under the Employment Relations Act 2000, in the income year that the expenditure on that award is deductible to the employer. If the expenditure on the award is not deductible to the employer, the shareholder-employee derives the award in the year of receipt.

The period for which this Ruling applies

This Ruling will apply to payments received between 1 October 2000 and 30 September 2005.

This Ruling is signed by me on the 12th day of June 2001.

Martin Smith

General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULING BR PUB 01/06

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 01/06 ("the Ruling").

The subject matter covered in the Ruling was previously dealt with in Public Rulings BR Pub 97/7 and 97/7A published in *TIB* Vol 9, No 6 (June 1997). The Ruling applies for the period from 1 October 2000 to 30 September 2005.

The commentary refers to the Income Tax Act 1994, particularly section CH 3 and the concept of "gross income".

Background

The Employment Relations Act 2000 provides for a number of remedies when an employee has a personal grievance against a current or former employer. This includes compensation for wages lost by the employee as a result of actions by the employer which are the subject of a personal grievance. Such compensation will usually be awarded under sections 123(b) or 128 of the Act but may be made under another provision.

For example, in *Cleland v CIR* AP 44/00 High Court, Hamilton, 30 April 2001, Hammond J was concerned with the assessability of part of an award made by the Employment Court in 1992. The Employment Court awarded compensation for lost wages up to the date of hearing under the equivalent of section 128 of the Employment Relations Act. An award for lost wages from that date on was made under the equivalent of section 123(c)(ii) which provides for compensation for the loss of a benefit. The law in this area seems to be evolving and while awards for lost wages or other remuneration are now generally made under section 123(b), the Ruling will apply under whatever provision such an award is made.

This Ruling confirms the Commissioner's existing practice in respect of the assessability and deduction of tax from awards for lost wages or other remuneration made under the Employment Relations Act 2000.

Legislation

Relevant provisions of the Employment Relations Act 2000

Section 103 of the Employment Relations Act 2000 ("the ERA") defines "personal grievance" as:

> For the purposes of this Act, "personal grievance" means any grievance that an employee may have against the employee's employer or former employer because of a claim—
>
> (a) that the employee has been unjustifiably dismissed; or
>
> (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
>
> (c) that the employee has been discriminated against in the employee's employment; or
>
> (d) that the employee has been sexually harassed in the employee's employment; or
>
> (e) that the employee has been racially harassed in the employee's employment; or
>
> (f) that the employee has been subject to duress in the employee'semployment in relation to membership or non-membership of a union or employees organisation.

Section 103(3) provides:

> In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

Section 123(b) of the ERA states:

> Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:
>
> …
>
> (b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance ...

Section 128 of the ERA states:

> (1) This section applies where the Authority or Court determines, in respect of any employee, -
>
> (a) that the employee has a personal grievance; and
>
> (b) that the employee has lost remuneration as a result of the personal grievance.

> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
>
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

Section 124 of the ERA states:

> Where the Authority or the Court determines that an employee has a personal grievance, the Authority or Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
>
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
>
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

Application of the Legislation

Monetary remuneration

An award for lost wages or other remuneration is made to compensate the employee for wages or other remuneration he or she may have lost as a result of an action by the employer which has been the subject of a personal grievance by the employee against the employer. The wages or other remuneration that would have been received if it were not for the personal grievance are "monetary remuneration". Section OB 1 defines "monetary remuneration" as meaning:

> … any salary, wage, allowance, bonus, gratuity, extra salary, compensation for loss of office or employment, emolument (of whatever kind), or other benefit in money, in respect of or in relation to the employment or service of the taxpayer ...

The words "emolument (of whatever kind) or other benefit in money, in respect of or in relation to the employment or service of the taxpayer ..." cover an award for lost wages or other remuneration. The payment of the award for lost wages or other remuneration is made "in respect of or in relation to the employment or service of the taxpayer", even though the payment is made to resolve a personal grievance rather than for services actually performed.

A wide interpretation of the words "in respect of or in relation to the employment or service" was endorsed by the Court of Appeal in *Shell New Zealand Ltd v CIR* (1994) 16 NZTC 11,303, in response to Shell's argument that a payment was not made in respect of or in relation to employment because it was not made under a contract of employment. The Court stated that the words "in respect of or in relation to" are words of the widest import. The Court also found that the words "emolument (of whatever kind), or other benefit in money" were not to be read *ejusdem generis* with the preceding words, the *genus* being reward for services. Thus, for the purposes of the definition of "monetary remuneration", the words "emolument ... or other benefit in money" are not confined to rewards for services.

In *Shell* the Court found it important that the employees were only in a position to receive compensation payments (for changing the employees' place of employment) because of their employment relationship with the employer. So, although the employees received compensation for the costs of moving rather than payments for services, this was still monetary remuneration. Similarly, the lost wages or other remuneration awarded on the personal grievance claim arise directly out of and as a result of an employee's employment relationship with the employer. Again, although this is not a payment for services, it is within the definition of "monetary remuneration".

The earlier TRA decisions on the previous legislation also illustrate the wide meaning that may be attributed to the words "in respect of or in relation to the employment or service of the taxpayer". In *Case L92* (1989) 11 NZTC 1,530, Barber DJ considered the term "monetary remuneration" in relation to a payment of compensation for unjustified dismissal under the Industrial Relations Act 1973. The compensation was calculated on the basis of the personal hurt and procedural unfairness suffered by the objector. Barber DJ found that, even though the compensation was damages in nature, it was money received in respect of the objector's employment. He stated that the words "compensation for loss of office or employment", "emolument (of whatever kind), or other benefit in money" and "in respect of or in relation to the employment or service of the taxpayer" have a wide embrace and go beyond the narrower concept of "salary, wage, allowance, bonus gratuity, extra salary" which precede them. On the particular facts of this case he said that "monetary remuneration", interpreted widely, covered the payment in issue.

Barber DJ reached the same conclusion in relation to a similar compensation payment in *Case L78* (1989) 11 NZTC 1,451. This case examined the nature of an *ex gratia* payment made to an employee as a result of a personal grievance claim brought against the employer under section 117 of the Industrial Relations Act 1973 which covered reimbursement for lost wages. The *ex gratia* payment was made up of six weeks' holiday pay and pay for untaken sick leave. This holiday and sick leave was not owing to the taxpayer. The payment, which the taxpayer said he regarded as "extra wages", was held to fall within the definition of "monetary remuneration" in section 2 of that Act.

In *Case P19* (1992) 14 NZTC 4,127, Barber DJ examined whether a severance payment of $77,598 paid to an objector by his overseas employer was assessable income. The objector was a jockey who entered into a three-year oral contract to ride his employer's horses. The employer became dissatisfied with the objector's performance and unilaterally terminated the contract after about 4 months. After negotiation, the matter was settled on the basis that the employer made the severance payment. Barber DJ held that "the severance payment was made as compensation for the objector's loss of income due to the millionaire having terminated the contractual relationship". He inferred that "the payment was a top-up of the first year's minimum income" made to "assist the objector re-build his income earning process" and said that that type of payment "must be revenue in nature". He stated that:

> In terms of the definition of "monetary remuneration", the payment made to the objector must be "compensation for loss of office or employment, emolument (of whatever kind), or other benefit in money, in respect of or in relation to the employment or service of the taxpayer;"

Although not concerning a Court award, *Case P19* supports the proposition that payments made as compensation for loss of income fall within the definition of monetary remuneration.

In *Case S96* (1996) 17 NZTC 7,603 and *Case U38* (2000) 19 NZTC 9,361 the taxpayers in each case did not dispute that the portion of their compensation payment that was for lost wages was taxable, and this was accepted by the TRA. Doogue J in the High Court decision in *Sayer v CIR* (1999) 19 NZTC 15,249 also accepted the assessability of the part of a settlement agreement attributed to lost remuneration.

In *Case U39* (2000) 19 NZTC 9,369 an IRD officer was awarded compensation of $126,000 being $46,000 (loss of wages), $30,000 (humiliation), and $50,000 (loss of benefits) by the Employment Court in 1992. The Commissioner accepted that the humiliation payment was not assessable and assessed the balance of $96,000.

Barber DJ readily found that the compensation for lost wages was monetary remuneration, and so was the compensation for loss of benefits. He said (at paragraph 26, p 9,374):

> Awards made by the Employment Court pursuant to ss 227(c)(ii) above and 229 (for lost income) of the Labour Relations Act 1987 are generally deemed to be "monetary remuneration" and assessable income pursuant to s 65(2)(b) of the Income Tax Act 1976. Indeed, because awards under s 229 are a reimbursement of, or compensation for, "lost remuneration" for the worker, any such award (in this case $50,000 [sic] of the $96,000 in issue) must, obviously, be revenue in character and within the above s 2 (of the Act) definition of "monetary remuneration", and assessable.

(Section 128 of the Employment Relations Act 2000 is the equivalent of section 229 of the Labour Relations Act).

In his decision on appeal dated 30 April 2001, Hammond J upheld the TRA's decision: *Cleland v CIR* AP44/00 High Court, Hamilton. He found that the reimbursement of lost wages was "monetary remuneration", saying, at paragraph 41:

> I cannot see how the loss of wages due up to the date of hearing under s229 ($46,000) is not "monetary remuneration" under s2 of the Income Tax Act 1976.

He went on to find that the $50,000 awarded by the Employment Court under section 227(c)(ii) for loss of benefits, which included an element of future wages, was also assessable as "monetary remuneration".

As noted earlier in this commentary, the law in this area seems to have moved on from requiring a division of awards of lost wages between those up to the date of the hearing (under the reimbursement remedy), and those from that date on (under the loss of benefits remedy). Compensation for lost wages, including those that the employee would have been likely to receive over some future period but for the grievance, are generally awarded under section 123(b) of the Employment Relations Act. See for example, *Trotter v Telecom Corporation of NZ Ltd* [1993] 2 NZER 659.

These cases clearly indicate that an award for lost wages or other remuneration is assessable as monetary remuneration. All monetary remuneration is gross income of the employee.

When the employment relationship has ended

In some cases the employment relationship of the employer and employee will have ended by the time the employer pays the court award to the employee. The fact that the employment relationship may have ended by the time the employer pays the award does not change the fact that the award is made "in respect of or in relation to the employment or service" of the former employee. In *Freeman & Ors. v FC of T* (1982) 82 ATC 4,629 the Supreme Court of Victoria found that a payment is made "in relation to the employment" of a former employee when the entitlement to that payment arises out of the employment or from services performed by the employee before the termination of employment.

In *Freeman* the taxpayers were directors, shareholders, and employees of the appellant company which ceased to carry on business. The next day the business was sold to another company controlled by the taxpayers and carried on business as before. Six months later it was decided that the appellant company should pay to each of the taxpayers certain lump sum payments. The evidence suggested that the source of the greater part of the payments consisted of fees (or "salaries") received by the appellant company after it ceased carrying on business. The Court found that the payments received by the appellants were assessable income under section 26(e) of the Income Tax Assessment Act 1936–1978. Section 26(e)

provided that assessable income included the value to the taxpayer of all allowances, gratuities, compensations, benefits, bonuses and premiums given to him or her in relation directly or indirectly to their employment or services rendered by him or her. Kaye J found that payments out of the income of the appellant company to employees by way of allowances for past services, which had been rendered by them, were within section 26(e). The decision on this aspect of the case was unchanged when the appeal was heard by the Federal Court.

Awards for lost wages or other remuneration arise out of the employee's previous service with the employer. A court award that compensates for lost wages or other remuneration is made as a result of the employee's service with the employer, and so is made in relation to the employment of the employee.

Employer's liability to make tax deductions from the award for lost wages or other remuneration

The Ruling states that the payment of an award for lost wages or other remuneration is a source deduction payment. Under section NC 2 (1), an employer must make the appropriate tax deduction from every source deduction payment made to an employee.

Award is a source deduction payment

The definition in section OB 2 (1) of "source deduction payment" includes a payment by way of salary or wages, an extra emolument, or a withholding payment.

Section OB 1 defines "extra emolument" as:

> ... in relation to any person, means a payment in a lump sum (whether paid in one lump sum or in 2 or more instalments) made to that person in respect of or in relation to the employment of that person (whether for a period of time or not), being a payment which is not regularly included in salary or wages payable to that person for a pay period, but not being overtime pay ...

An award for lost wages or other remuneration is generally paid in a lump sum. As discussed above, the payment of an award for lost wages or other remuneration is made to a person in respect of or in relation to the employment of that person. As the payment of an award for lost wages or other remuneration is made in a lump sum, is in respect of or in relation to employment of a person, and is not a payment of salary or wages, it is an extra emolument. As the payment of the award is an extra emolument, it is included in the definition of "source deduction payment".

A former employee is an "employee"

Section NC 2 requires an employer to make tax deductions from source deduction payments to employees. Section OB 1 defines "employee" as a person who receives or is entitled to receive a source deduction payment.

As discussed above, the payment of an award for lost wages or other remuneration constitutes a source deduction payment. A payment can still be "monetary remuneration" and a source deduction payment when it is paid to a former employee. A former employee who is entitled to receive this source deduction payment is also an "employee" for the purposes of section NC 2 (even though he or she may no longer be in an employment relationship with the employer).

The appropriate tax deduction

Section NC 2 requires the employer to make the appropriate tax deduction from source deduction payments to employees. As the payment of an award for lost wages or other remuneration constitutes an "extra emolument", the employer must deduct tax at the extra emolument rate as provided for in section NC 2(5) and clause 8 of Schedule 19. (This currently provides a minimum rate of 21 cents in the dollar, or 33 cents or 39 cents in the dollar depending on the recipient's income level, or on whether the recipient makes an election for a particular rate under section NC 8(1A).)

The employer must also:

- deduct ACC earner premium and earners' account levy from the payment, and
- account for the deductions to Inland Revenue in the normal way and pay the remaining amount to the employee, and
- pay employer premium and residual claims levy in respect of the gross award for lost wages or other remuneration.

By deducting tax from the gross award and paying the net sum to the employee, the employer will satisfy the requirements under both the court award and the Income Tax Act. When an employer has deducted tax from a source deduction payment, section NC 19 (a) deems the employer to have paid the amount deducted to the employee. Thus, the employer is deemed to have paid the total amount of the award to the employee for the purposes of satisfying the obligation imposed by the Court or Authority.

When the Court or Authority awards a net sum

In some cases a Court or Authority may make an award for lost wages or other remuneration net of tax, i.e. the sum that the employee would have received as remuneration after the deduction of tax. Because it is a "source deduction payment", in such cases the employer would normally "gross up" the award to take account of the PAYE, the ACC earner premium, and the earners' account levy. The employer is then required to pay the tax on the gross of the net award to Inland Revenue and pay the net award to the employee. In this way the employer would fulfil his or her obligations to both the employee and the Commissioner.

If the employer breaches the Court's or the Authority's direction to pay the net sum to the employee, the onus will be on the employee to enforce the terms of the award by requiring the employer to pay the employee the full net amount of the award. The required tax deduction must be made from whatever amount is paid to the employee.

When an employer fails to make tax deductions

Under section 168 of the Tax Administration Act 1994, if the employer fails to make the correct tax deductions from the payment of the award, the unpaid tax deductions become a debt owed by the employer to the Commissioner. The debt is due and payable on the date that the tax deductions were due to be paid to the Commissioner.

Where an employer fails to make a deduction, the employee is liable, under section NC 16, to:

- furnish the Commissioner with an employer monthly schedule containing particulars of the source deduction payment (i.e. the award) by the 20th of the month following the payment of the award, and
- pay the Commissioner a sum equal to the tax deductions that the employer should have made on that source deduction payment (unless the employee is exempted from this requirement) by the 20th of the month following the payment of the award.

When the payment is derived by the shareholder-employee

Under section EB 1, a person is a shareholder-employee if he or she is a shareholder-employee in a close company and has met the criteria set out in section OB 2 (2).

Example 1

An employee is dismissed from her job. She issues proceedings against her former employer alleging unjustifiable dismissal. She seeks reinstatement and damages for wages lost as a result of the unjustifiable dismissal.

The Employment Relations Authority orders the employer to reinstate the employee and awards her $27,000, a sum equivalent to the employee's wages from the time of dismissal to the time of reinstatement, to compensate for the wages lost as a result of the unjustified dismissal.

The Authority makes the award for lost wages on 20 March 2001. The employer pays this award to the employee on 10 April 2001.

1. The award for lost wages is derived by the employee in the 2001–2002 income year, as this is the year of receipt.
2. The employer must deduct tax and ACC earner premium and earners' account levy from the court award, and pay the following amounts to the employee and Inland Revenue respectively (in the 2002 income year):

Award for lost wages		$27,000
Less tax at the extra emolument rate, in this case 21%	$5,670	
Less ACC earner premium. ($27,000 x 0.011)	$ 297	
Total payable to Inland Revenue		$ 5,967
Total payable to the employee		$21,033

Example 2

The facts are the same as in Example 1, except that the Authority awards damages of $27,000 and states that this sum is net of tax. In order to ensure that it pays the employee a net sum of $27,000, the employer "grosses up" the payment by the extra emolument tax rate plus ACC earner premium and levy. The employer should make the following calculations and payments:

Award for net lost wages	$27,000.00	
Divided by 0.779 (1 - 0.21 - 0.011) to give the gross wage		$34,659.82
Less tax at the extra emolument rate of 21%	$ 7,278.56	
Less ACC earner premium ($34,659.82 x 0.011)	$ 381.26	
Total payable to Inland Revenue		$ 7,659.82
Total payable to the employee		$27,000.00

In both examples:

- The employer must also pay the employer premium and residual claims levy on the gross award.
- Any other source deduction payments received by the employee from that employer in the 4 weeks prior to payment of the award must also be taken into account in calculating her annualised salary or wages and determining the appropriate tax deduction rate.
- If the employee is required to file an income tax return, she will include the amount of the award for lost wages in her return for the 2001–2002 income year and claim the tax paid as a credit.

CORRECTION TO A PREVIOUS ITEM

FOREIGN CURRENCY AMOUNTS – CONVERSION TO NEW ZEALAND CURRENCY

In *TIB* Vol 13, No 4 (April 2001), there was an item with exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand currency under the CFC and FIF rules for the 12 months ending March 2001.

The internet version of the *TIB* showed the correct conversion rates. However the paper copy contained an error in both the mid-month and end-of-month rates for 23 countries. In each case the numeral to the far right of the decimal point had been rounded down by a value of one as a result of a software conversion problem.

The corrected tables are republished in this month's *TIB*.

Table A: Mid-month and 12-month cumulative average exchange rate

Currency	Foreign Currency to NZ $		17-Apr-00	15-May-00	15-Jun-00	17-Jul-00	15-Aug-00	15-Sep-00	16-Oct-00	15-Nov-00	15-Dec-00	15-Jan-01	15-Feb-01	15-Mar-01
			12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate
United States	Dollar	USD	0.4988	0.4810	0.4740	0.4596	0.4514	0.4191	0.3979	0.3958	0.4232	0.4473	0.4295	0.4145
			0.5161	0.5099	0.5045	0.4994	0.4928	0.4836	0.4742	0.4642	0.4583	0.4522	0.4473	0.4410
United Kingdom	Pound	GBP	0.3142	0.3164	0.3160	0.3068	0.2999	0.2977	0.2740	0.2765	0.2879	0.3024	0.2946	0.2867
			0.3211	0.3189	0.3173	0.3151	0.3126	0.3100	0.3073	0.3037	0.3021	0.3008	0.2998	0.2977
Australia	Dollar	AUD	0.8315	0.8252	0.7902	0.7865	0.7755	0.7628	0.7532	0.7616	0.7808	0.8003	0.8094	0.8372
			0.8010	0.8000	0.7983	0.7978	0.7947	0.7908	0.7880	0.7848	0.7851	0.7867	0.7896	0.7929
Austria	Schilling	ATS	7.1358	7.1997	6.7941	6.7362	6.8543	6.6585	6.3933	6.3343	6.5447	6.4576	6.4288	6.2673
			6.9456	6.9487	6.9230	6.8991	6.8951	6.8652	6.8556	6.8113	6.7948	6.7444	6.7102	6.6504
Bahrain	Dollar	BHD	0.1878	0.1812	0.1785	0.1731	0.1700	0.1579	0.1499	0.1490	0.1596	0.1686	0.1618	0.1561
			0.1944	0.1920	0.1900	0.1881	0.1856	0.1822	0.1786	0.1748	0.1726	0.1703	0.1685	0.1661
Belgium	Franc	BEF	20.9083	21.0889	19.9042	19.7387	20.0832	19.5122	18.7261	18.5642	19.1793	18.9288	18.8308	18.3615
			20.3511	20.3605	20.2847	20.2143	20.2029	20.1151	20.0866	19.9554	19.9073	19.7602	19.6611	19.4855
Canada	Dollar	CAD	0.7330	0.7145	0.6958	0.6815	0.6698	0.6228	0.5992	0.6110	0.6410	0.6708	0.6557	0.6435
			0.7573	0.7492	0.7417	0.7342	0.7247	0.7117	0.6987	0.6867	0.6792	0.6722	0.6678	0.6615
China	Yuan	CNY	4.1323	3.9850	3.9265	3.8087	3.7407	3.4711	3.2973	3.2795	3.4924	3.6973	3.5580	3.4328
			4.2725	4.2168	4.1691	4.1229	4.0635	4.0046	3.8964	3.8450	3.7954	3.7439	3.7042	3.6518
Denmark	Krone	DKK	3.8795	3.9245	3.6836	3.6526	3.7148	3.6147	3.4428	3.4352	3.5465	3.5020	3.4861	3.3947
			3.7563	3.7610	3.7487	3.7369	3.7357	3.7211	3.7150	3.6915	3.6835	3.6565	3.6388	3.6064
European Community	Euro	EUR	0.5186	0.5232	0.4938	0.4897	0.4982	0.4842	0.4646	0.4605	0.4758	0.4696	0.4672	0.4555
			0.5050	0.5052	0.5034	0.5016	0.5013	0.4991	0.4984	0.4951	0.4939	0.4902	0.4878	0.4834
Fiji	Dollar	FJD	1.0346	1.0154	0.9813	0.9689	0.9604	0.9224	0.8959	0.8982	0.9411	0.9669	0.9530	0.9467
			1.0209	1.0160	1.0105	1.0053	0.9987	0.9899	0.9815	0.9717	0.9679	0.9636	0.9613	0.9571
Finland	Markka	FIM	3.0837	3.1114	2.9355	2.9121	2.9631	2.8778	2.7628	2.7376	2.8286	2.7914	2.7778	2.7083
			3.0021	3.0034	2.9922	2.9819	2.9803	2.9673	2.9631	2.9437	2.9366	2.9148	2.9001	2.8742
France	Franc	FRF	3.4024	3.4330	3.2398	3.2118	3.2691	3.1753	3.0486	3.0206	3.1435	3.0799	3.0649	2.9883
			3.3125	3.3140	3.3017	3.2902	3.2884	3.2741	3.2695	3.2480	3.2420	3.2179	3.2017	3.1731
French Polynesia	Franc	XPF	61.6659	62.2078	58.6921	58.2073	59.2244	57.6062	55.2938	55.0245	56.7336	55.9847	55.5881	54.2945
			60.0800	60.0857	59.8590	59.6531	59.6156	59.3693	59.2741	58.9011	58.7721	58.3540	58.0485	57.5436
Germany	Deutsche-mark	DEM	1.0146	1.0237	0.9660	0.9566	0.9747	0.9469	0.9090	0.9006	0.9308	0.9184	0.9140	0.8911
			0.9878	0.9882	0.9845	0.9810	0.9805	0.9762	0.9748	0.9684	0.9660	0.9589	0.9541	0.9455
Greece	Drachma	GRD	173.2629	176.5315	165.6927	164.4115	167.6549	163.9690	157.7802	156.6170	162.0416	159.9748	159.2361	155.2190
			165.4642	166.1562	166.1040	166.0297	166.3979	166.2410	166.4456	165.8618	165.9410	165.1983	164.6720	163.5326
Hong Kong	Dollar	HKD	3.8831	3.7456	3.6928	3.5820	3.5194	3.2675	3.1016	3.0858	3.2985	3.4876	3.3497	3.2326
			4.0088	3.9624	3.9222	3.8837	3.8337	3.7638	3.6918	3.6144	3.5695	3.5226	3.4859	3.4372
India	Rupee	INR	21.7117	21.0584	21.0904	20.4471	20.5275	19.0751	18.3476	18.4509	19.7073	20.7494	19.9304	19.2516
			22.3054	22.0891	21.9189	21.7474	21.5460	21.2244	20.9173	20.6003	20.4587	20.3046	20.1998	20.0289
Indonesia	Rupiah	IDR	3,798.8098	4,049.0805	4,031.2182	4,361.4026	3,696.7140	3,601.5836	3,542.4767	3,702.6934	3,942.9966	4,287.1462	4,127.3600	4,213.6150
			3,859.8618	3,832.2481	3,834.4678	3,907.0709	3,866.2914	3,820.6209	3,765.7579	3,772.2167	3,805.5506	3,850.4048	3,899.1986	3,946.2580
Ireland	Pound	IEP	0.4078	0.4117	0.3880	0.3856	0.3931	0.3798	0.3659	0.3633	0.3747	0.3699	0.3678	0.3587
			0.3976	0.3978	0.3962	0.3948	0.3946	0.3928	0.3922	0.3896	0.3887	0.3858	0.3839	0.3805
Italy	Lira	ITL	1,004.2100	1,013.2185	956.1238	948.0621	964.6396	937.1888	896.4332	891.5048	921.1594	909.0826	904.6305	882.0123
			977.5083	977.9424	974.3129	970.9339	970.3826	966.1754	964.5297	958.1985	955.8801	948.7947	944.0086	935.6888
Japan	Yen	JPY	52.0958	52.1164	50.5372	49.5395	49.4068	45.0608	42.8901	42.7666	47.5089	52.9082	50.0511	50.1709
			57.0914	55.7547	54.5587	53.4460	52.4376	51.5309	50.5394	49.5753	49.2800	49.1006	48.8596	48.7544
Korea	Won	KOR	554.4800	535.7800	528.4600	511.7750	504.1850	467.5950	449.6550	450.0550	507.1600	571.7500	537.5650	529.1300
			600.0495	587.7282	578.5009	568.9900	556.7655	548.2496	526.8127	520.4163	516.0771	514.9050	513.9238	512.2992
Kuwait	Dollar	KWD	0.1526	0.1478	0.1450	0.1400	0.1400	0.1300	0.1200	0.1200	0.1297	0.1366	0.1315	0.1272
			0.1574	0.1556	0.1539	0.1522	0.1504	0.1479	0.1450	0.1419	0.1402	0.1384	0.1369	0.1350

Currency	Foreign Currency to NZ $		17-Apr-00	15-May-00	15-Jun-00	17-Jul-00	15-Aug-00	15-Sep-00	16-Oct-00	15-Nov-00	15-Dec-00	15-Jan-01	15-Feb-01	15-Mar-01
			12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate	12-month rate
Malaysia	Ringgit	MYR	1.8964	1.8292	1.8026	1.7479	1.7167	1.5934	1.5134	1.5055	1.6033	1.6973	1.6335	1.5757
			1.9616	1.9379	1.9175	1.8980	1.8730	1.8382	1.8026	1.7648	1.7421	1.7185	1.7003	1.6762
Netherlands	Guilder	NLG	1.1428	1.1531	1.0876	1.0785	1.0976	1.0666	1.0246	1.0148	1.0487	1.0347	1.0297	1.0040
			1.1128	1.1132	1.1090	1.1051	1.1045	1.0997	1.0982	1.0909	1.0883	1.0803	1.0748	1.0652
Norway	Krone	NOK	4.2414	4.3090	4.0639	3.9924	4.0228	3.8865	3.7369	3.6954	3.8673	3.8551	3.8400	3.7248
			4.1256	4.1295	4.1160	4.1019	4.0922	4.0676	4.0512	4.0185	4.0100	3.9847	3.9704	3.9363
Pakistan	Rupee	PKR	25.6866	24.7941	24.5033	23.8843	23.8334	22.7435	23.1927	22.1540	24.2049	26.0128	24.9415	24.4234
			26.5674	26.2844	26.0091	25.7574	25.4790	25.1002	24.8365	24.4574	24.3556	24.2819	24.2646	24.1979
Papua New Guinea	Kina	PGK	1.3123	1.1953	1.1411	1.1268	1.1563	1.1158	1.1153	1.1762	1.2262	1.3931	1.2810	1.2923
			1.4280	1.4127	1.3709	1.3534	1.3307	1.2949	1.2731	1.2549	1.2463	1.2431	1.2239	1.2110
Philippines	Peso	PHP	20.3653	19.7950	19.8607	20.2714	20.0597	18.8824	18.9531	19.5703	21.0190	22.6397	20.5042	19.8780
			20.3705	20.2833	20.2477	20.2835	20.2318	20.0595	19.9357	19.8553	19.9404	20.0776	20.1541	20.1499
Portugal	Escudo	PTE	104.0295	104.9677	99.0495	98.1659	99.8882	97.0442	93.1642	92.3113	95.3771	94.1238	93.6637	91.3199
			99.2330	99.2833	98.9121	98.5512	98.4945	98.0599	97.9183	99.2771	99.0370	98.2991	97.8029	96.9254
Singapore	Dollar	SGD	0.8503	0.8292	0.8154	0.7997	0.7729	0.7282	0.6987	0.6890	0.7335	0.7747	0.7490	0.7312
			0.8714	0.8614	0.8527	0.8457	0.8361	0.8226	0.8094	0.7951	0.7872	0.7793	0.7731	0.7643
Solomon Islands	Dollar	SBD	2.5159	2.4318	2.4114	2.3314	2.2893	2.1246	2.0176	2.0079	2.1040	2.2497	2.1803	2.1000
			2.5402	2.5208	2.5057	2.4923	2.4693	2.4297	2.3892	2.3430	2.3129	2.2855	2.2616	2.2303
South Africa	Rand	ZAR	3.2818	3.3580	3.2825	3.1596	3.1161	2.9861	2.9773	3.0217	3.2630	3.4942	3.3787	3.2600
			3.1926	3.1854	3.1867	3.1838	3.1739	3.1555	3.1442	3.1326	3.1528	3.1808	3.2055	3.2149
Spain	Peseta	ESP	86.2829	87.0648	82.1516	81.4859	82.8929	80.5550	77.3306	76.6083	79.1554	78.1125	77.7293	75.7839
			83.9973	84.0356	83.7232	83.4348	83.3876	83.0279	82.9126	82.3733	82.1731	81.5644	81.1537	80.4294
Sri Lanka	Rupee	LKR	36.4501	35.4180	35.2027	36.0069	35.2037	32.6866	31.4226	31.6695	34.5577	37.3971	36.8516	34.8722
			36.9504	36.6541	36.4207	36.3180	36.1040	35.6848	35.2788	34.8615	34.8028	34.7682	34.8881	34.8115
Sweden	Krona	SEK	4.3056	4.3269	4.0375	4.0838	4.1505	4.0676	3.9542	3.9841	4.0756	4.1584	4.2322	4.1781
			4.3611	4.3339	4.2897	4.2572	4.2356	4.2088	4.1934	4.1663	4.1555	4.1349	4.1360	4.1295
Switzerland	Franc	CHF	0.8143	0.8137	0.7730	0.7587	0.7760	0.7414	0.7040	0.7011	0.7165	0.7238	0.7169	0.7007
			0.8084	0.8067	0.8025	0.7974	0.7951	0.7887	0.7846	0.7761	0.7704	0.7617	0.7548	0.7450
Taiwan	Dollar	TAI	15.2000	14.7550	14.5400	14.1800	14.0050	13.0100	12.5450	12.7450	13.9250	14.5600	13.8550	13.4500
			16.3791	16.0664	15.8000	15.5595	15.2886	15.0792	14.6209	14.4646	14.3275	14.1188	14.0296	13.8975
Thailand	Baht	THB	18.8119	18.4813	18.3792	18.2173	18.2543	17.4066	17.1987	17.1785	18.3053	19.2363	18.1279	17.9993
			19.4855	19.3084	19.1885	19.1064	18.9608	18.6935	18.4560	18.2434	18.1879	18.1755	18.1731	18.1330
Tonga	Pa'anga	TOP	0.8256	0.8112	0.7978	0.7805	0.7735	0.7561	0.7547	0.7674	0.8314	0.8820	0.8590	0.8446
			0.8281	0.8242	0.8203	0.8161	0.8102	0.8035	0.7980	0.7925	0.7944	0.7990	0.8039	0.8070
Vanuatu	Vatu	VUV	66.5242	65.4895	64.1885	62.3092	62.0005	58.5052	56.5073	56.8062	60.5216	62.7549	61.0206	60.3177
			66.4328	65.9824	65.6111	65.2036	64.7174	64.0130	63.3236	62.5607	62.3030	62.0077	61.7927	61.4121
Western Samoa	Tala	WST	1.5251	1.4881	1.4637	1.4494	1.4307	1.3599	1.3202	1.3213	1.3846	1.4350	1.3998	1.3738
			1.5629	1.5502	1.5387	1.5289	1.5160	1.4911	1.4728	1.4519	1.4427	1.4296	1.4230	1.4126

Table B: End of month exchange rates

Country	Currency	Code	28-Apr-00	31-May-00	30-Jun-00	31-Jul-00	31-Aug-00	29-Sep-00	31-Oct-00	30-Nov-00	29-Dec-00	31-Jan-01	28-Feb-01	30-Mar-01
United States	Dollar	USD	0.4875	0.4594	0.4682	0.4570	0.4298	0.4128	0.4034	0.4036	0.4394	0.4408	0.4325	0.4094
United Kingdom	Pound	GBP	0.3095	0.3070	0.3083	0.3040	0.2948	0.2821	0.2775	0.2837	0.2944	0.3013	0.2995	0.2868
Australia	Dollar	AUD	0.8279	0.7960	0.7768	0.7776	0.7478	0.7567	0.7681	0.7724	0.7940	0.8045	0.8229	0.8303
Austria	Schilling	ATS	7.3700	6.7896	6.7632	6.8035	6.6172	6.4528	6.5792	6.4639	6.5122	6.5360	6.4861	6.3800
Bahrain	Dollar	BHD	0.1836	0.1731	0.1762	0.1722	0.1616	0.1555	0.1518	0.1520	0.1657	0.1664	0.1629	0.1543
Belgium	Franc	BEF	21.5904	19.8981	19.8129	19.9386	19.3887	18.9092	19.2782	18.9424	19.0774	19.1488	19.0041	18.6942
Canada	Dollar	CAD	0.7195	0.6911	0.6944	0.6750	0.6343	0.6191	0.6168	0.6222	0.6594	0.6623	0.6603	0.6438
China	Yuan	CNY	4.0398	3.8059	3.8808	3.7870	3.5566	3.4271	3.3464	3.3511	3.6399	3.6464	3.5840	3.3886
Denmark	Krone	DKK	3.9910	3.6910	3.6654	3.6851	3.5864	3.5004	3.5604	3.5045	3.5315	3.5436	3.5211	3.4601
European Community	Euro	EUR	0.5357	0.4936	0.4916	0.4945	0.4810	0.4694	0.4781	0.4700	0.4733	0.4751	0.4715	0.4638
Fiji	Dollar	FJD	1.0176	0.9911	0.9694	0.9652	0.9259	0.9094	0.9145	0.9129	0.9541	0.9737	0.9659	0.9502
Finland	Markka	FIM	3.1849	2.9346	2.9239	2.9396	2.8592	2.7885	2.8431	2.7938	2.8136	2.8247	2.8033	2.7573
France	Franc	FRF	3.5143	3.2380	3.2253	3.2436	3.1554	3.0772	3.1369	3.0825	3.1044	3.1167	3.0931	3.0423
French Polynesia	Franc	XPF	63.6385	58.6574	58.4421	58.8062	57.2138	55.7159	56.9000	56.0322	56.4292	56.6833	56.2257	55.3195
Germany	Deutsche-mark	DEM	1.0478	0.9655	0.9617	0.9676	0.9410	0.9176	0.9354	0.9193	0.9263	0.9293	0.9224	0.9073
Greece	Drachma	GRD	179.2149	165.7496	165.3349	166.4416	162.3226	158.9394	162.4588	159.8851	161.2697	162.0310	160.6686	158.0450
Hong Kong	Dollar	HKD	3.7959	3.5783	3.6487	3.5624	3.3510	3.2177	3.1449	3.1506	3.4261	3.4371	3.3726	3.1925
India	Rupee	INR	21.2070	20.3875	20.8169	20.3882	19.5881	18.8872	18.7262	18.8615	20.4292	20.3765	20.0820	19.0073
Indonesia	Rupiah	IDR	3,873.2653	3,959.0439	4,094.0968	4,083.3851	3,579.7219	3,630.6429	3,795.4852	3,826.2099	4,206.1803	4,128.7272	4,269.2100	4,256.3350
Ireland	Pound	IEP	0.4215	0.3879	0.3869	0.3885	0.3781	0.3684	0.3763	0.3689	0.3733	0.3740	0.3712	0.3651
Italy	Lira	ITL	1,037.10	955.66	951.89	957.38	931.26	908.20	925.93	909.80	916.22	919.92	912.88	897.94
Japan	Yen	JPY	51.8239	48.9037	49.2092	50.0383	45.7348	44.3818	43.9238	44.8695	50.2609	51.0490	50.2642	50.5379
Korea	Won	KOR	541.5500	522.3100	522.4550	510.6700	476.1900	461.7650	459.6050	486.2000	550.4800	556.4850	540.5150	540.7200
Kuwait	Dollar	KWD	0.1498	0.1400	0.1450	0.1400	0.1300	0.1250	0.1250	0.1240	0.1341	0.1351	0.1325	0.1261
Malaysia	Ringgit	MYR	1.8539	1.7472	1.7813	1.7380	1.6323	1.5727	1.5360	1.5383	1.6707	1.6736	1.6451	1.5554
Netherlands	Guilder	NLG	1.1804	1.0872	1.0842	1.0889	1.0595	1.0343	1.0539	1.0356	1.0429	1.0471	1.0392	1.0221
Norway	Krone	NOK	4.3580	4.1089	4.0162	4.0531	3.8834	3.7520	3.7819	3.7746	3.9112	3.8928	3.8826	3.7154
Pakistan	Rupee	PKR	25.1059	23.6931	24.2192	24.0963	23.2517	23.6128	22.9541	22.9269	25.2086	25.5962	25.6310	24.6318
Papua New Guinea	Kina	PGK	1.2329	1.1019	1.1285	1.1968	1.1354	1.1169	1.1620	1.1449	1.2765	1.3122	1.3133	1.2601
Philippines	Peso	PHP	19.9439	19.4050	19.9014	20.2626	19.1717	18.7867	20.4026	19.9106	21.7593	21.5298	20.7545	20.0467
Portugal	Escudo	PTE	107.4400	98.9503	98.6113	99.1279	96.4342	94.0400	95.8719	94.2003	94.8736	95.2450	94.5249	92.9778
Singapore	Dollar	SGD	0.8300	0.7941	0.8101	0.7917	0.7385	0.7186	0.7074	0.7085	0.7595	0.7681	0.7527	0.7360
Solomon Islands	Dollar	SBD	2.4624	2.3171	2.3656	2.3182	2.1795	2.0932	2.0468	2.0502	2.2102	2.2175	2.1781	2.0803
South Africa	Rand	ZAR	3.3310	3.2107	3.1878	3.1765	2.9856	3.0086	3.0433	3.1370	3.3243	3.4293	3.3334	3.2929
Spain	Peseta	ESP	89.1166	82.1200	81.7901	82.2817	80.0281	78.0195	79.5579	78.1825	78.7312	79.0383	78.4441	77.1572
Sri Lanka	Rupee	LKR	35.6689	34.0461	35.9606	35.6513	33.3995	32.4843	31.9336	32.5514	35.9644	38.6431	37.0290	35.1117
Sweden	Krona	SEK	4.3621	4.1399	4.1367	4.1886	4.0529	4.0007	4.0582	4.0833	4.1892	4.2066	4.2715	4.2492
Switzerland	Franc	CHF	0.84	0.78	0.77	0.77	0.74	0.72	0.73	0.71	0.72	0.73	0.73	0.71
Taiwan	Dollar	TAI	14.8800	14.1650	14.3800	14.1950	13.3100	12.9050	13.0400	13.3500	14.5550	14.1250	13.9850	13.3850
Thailand	Baht	THB	18.4424	17.8926	18.1965	18.7289	17.4581	17.4087	17.5507	17.5893	18.8512	18.7174	18.3958	18.1377
Tonga	Pa'anga	TOP	0.8145	0.7906	0.7867	0.7768	0.7598	0.7664	0.7745	0.7945	0.8610	0.8823	0.8660	0.8463
Vanuatu	Vatu	VUV	65.3108	63.4266	62.6364	62.0747	59.4674	57.7020	57.8018	57.9273	62.2787	62.3309	62.3229	60.4022
Western Samoa	Tala	WST	1.5007	1.4298	1.4418	1.4426	1.3777	1.3491	1.3435	1.3453	1.4131	1.4300	1.4144	1.3730

NEW LEGISLATION

WOULD YOU LIKE TO BE CONSULTED ON THE VALUATION OF NURSERY PLANTS?

Tax Information Bulletin Vol 12, No 12 (December 2000) announced that the administrative interpretation issued in 1999 on how nursery plants should be valued for trading stock purposes would be extended to apply to the 2000–2001 income year. It was announced that Inland Revenue was working with industry representatives to develop a new draft interpretation for wider consultation.

That draft has been developed and we are very grateful to the Nursery & Garden Industry Association and its members for their work in that process. Once finalised, the interpretation statement will apply from the 2001–2002 income year and will succeed the one in place since the introduction of the new trading stock rules, which reflected the best available information for the valuations of nursery plants at cost or market at that time.

Your views

The draft valuation method aims to minimise compliance costs while ensuring that nursery stock is valued accurately under the trading stock rules. We welcome your views on it. You can send us a written submission, or if there is sufficient interest, we will organise a small number of meetings in various parts of the country in mid to late July. Please let us know if you are interested in attending such a meeting and your preferred location. Written submissions should be received by 31 July 2001. Submissions, further enquiries and preferences for meetings can be sent to Bhagee Ramanathan in the Policy Advice Division of Inland Revenue, PO Box 2198, Wellington, ph 04 4747 083, fax 04 4747 217, or to bhagee@ird.govt.nz

Those of you who have already contacted us expressing interest in being part of this round of consultation will have received a copy of the draft interpretation.

Draft guidelines for using discounted selling price to value nursery stock

It is proposed to allow nursery growers to use an industry-wide category approach in applying the Discounted Selling Price (DSP) method to value their nursery stock. DSP is a low compliance cost method of valuing trading stock available to taxpayers with small turnover and some retailers. Most nursery growers should be eligible to use DSP. Eligibility is set out in sections EE 8, EE 9 and EE 10 of the Income Tax Act 1994.

Nursery plants have been divided into seven categories. The DSP of mature plants in each category would be calculated by multiplying the selling price of the plant by the DSP value. The proposed DSP values have been determined by surveying taxpayers within the industry.

Type of stock	DSP value
Bedding plants	58%
House plants and roses	55%
Liners/plugs	52%
Shrubs and perennials	48%
Trees	42%

Example

A nursery has 500 mature rose plants on hand at balance date. The nursery sells their mature roses to a retailer for $15 each. The value of that stock for trading stock purposes is $4,125 (500 plants x $15 x 55%).

Immature plants

It is proposed to calculate the DSP of immature plants my multiplying the DSP of a mature plant by a ratio of the whole years of completed growth to the number of whole years the plant takes to reach maturity. Whole years have been used in the ratio to minimise compliance costs. The fact that most nursery plants are propagated and sold within a 12-month cycle, and balance dates tend to be at times when stock at hand is at its lowest, should prevent significant numbers of plants being valued at nil for trading stock purposes despite the use of whole years in the calculation.

Example

Another nursery has 500 13-month-old flax plants and 300 25-month-old flax plants on hand at balance date. The flax plants take three years to mature and sell for $10 each.

The value for the purposes of the trading stock rules of the 1-year-old plants would be $800 (500 plants x $10 x 48% x 1/3); and the 2-year plants would be $960 (300 plants x $10 x 48% x 2/3).

Over-mature plants

It is proposed to value plants past their prime, or whose value drops, by multiplying their revised market value by the DSP value. The revised market value is the actual price at which the grower expects to sell a plant in that condition. The principle underlying this proposal is that because the cost of scrapping plants is very low, the decision to retain over-mature stock must necessarily anticipate an economic return on the stock. Revising down the market value to the anticipated sale price of such stock is, however, appropriate.

On the other hand, plants that are scrapped are effectively no longer part of a grower's business and therefore they should not have any value as trading stock. The particular treatments proposed for different circumstances are illustrated in the following table.

Circumstance	Treatment
The market selling value drops for a particular stock item, or there is no demand for the item, and the stock is scrapped	Nil value
The market selling value drops for a particular stock item, or there is no demand but stock is not scrapped	DSP based on revised market value
Plant is damaged and left in a "bargain area"	DSP based on revised market value
Plant is irrecoverably damaged and is scrapped	Nil value
Plant is over-mature and is scrapped	Nil value
Plant is over-mature and is not scrapped	DSP based on revised market value

Example

A third nursery business has 400 mature but frost-damaged Kahikatea plants at the back of its nursery. Mature plants in prime condition are sold for $30 each. The frost-damaged items are being offered for sale at $20. The value of these plants for trading stock purposes is $3,360 (400 plants x $20 x 42%).

Questions

Will all growers eligible to use DSP have to use the industry standards?

Nursery growers who prefer to calculate their own discounted selling prices will still be eligible to do so. They will need to keep records that justify their valuations.

How should large growers value their stock?

The DSP method is not available to all taxpayers. These taxpayers will have to value their stock at cost (using a cost valuation method) or at market selling value.

How will plants in the ground be valued?

Plants in the ground are part of the land in which they grow and are thus not trading stock. On the other hand, once they are lifted and ready for sale they become trading stock and any such plants on hand at balance date will be subject to the trading stock rules so will need to be valued.

LEGISLATION AND DETERMINATIONS

This section of the *TIB* covers items such as recent tax legislation, accrual and depreciation determinations, livestock values and changes in FBT and GST interest rates.

NATIONAL AVERAGE MARKET VALUES OF SPECIFIED LIVESTOCK DETERMINATION 2001

This determination may be cited as "The National Average Market Values of Specified Livestock Determination, 2001".

This determination is made in terms of section EL 8(1) of the Income Tax Act 1994 and shall apply to specified livestock on hand at the end of the 2000–2001 income year.

For the purposes of section EL 8(1) of the Income Tax Act 1994 the national average market values of specified livestock, for the 2000–2001 income year, are as set out in the following table.

NATIONAL AVERAGE MARKET VALUES OF SPECIFIED LIVESTOCK

Type of Livestock	Classes of Livestock	Average Market Value per Head $
Sheep	Ewe hoggets	63.00
	Ram and wether hoggets	61.00
	Two-tooth ewes	72.00
	Mixed-age ewes (rising three-year and four-year old ewes)	64.00
	Rising five-year and older ewes	54.00
	Mixed-age wethers	46.00
	Breeding rams	134.00
Beef cattle	*Beef breeds and beef crosses*:	
	Rising one-year heifers	423.00
	Rising two-year heifers	667.00
	Mixed-age cows	817.00
	Rising one-year steers and bulls	541.00
	Rising two-year steers and bulls	800.00
	Rising three-year and older steers and bulls	992.00
	Breeding bulls	2,015.00
Dairy cattle	*Friesian and related breeds:*	
	Rising one-year heifers	619.00
	Rising two-year heifers	1,125.00
	Mixed-age cows	1,313.00
	Rising one-year steers and bulls	460.00
	Rising two-year steers and bulls	752.00
	Rising three-year and older steers and bulls	991.00
	Breeding bulls	1,302.00

Type of Livestock	Classes of Livestock	Average Market Value per Head $
	Jersey and other dairy cattle:	
	Rising one-year heifers	588.00
	Rising two-year heifers	1,086.00
	Mixed-age cows	1,248.00
	Rising one-year steers and bulls	274.00
	Rising two-year and older steers and bulls	525.00
	Breeding bulls	988.00
Deer	*Red deer:*	
	Rising one-year hinds	251.00
	Rising two-year hinds	405.00
	Mixed-age hinds	450.00
	Rising one-year stags	279.00
	Rising two-year and older stags (non-breeding)	481.00
	Breeding stags	1,414.00
	Wapiti, elk, and related crossbreeds:	
	Rising one-year hinds	292.00
	Rising two-year hinds	455.00
	Mixed-age hinds	511.00
	Rising one-year stags	324.00
	Rising two-year and older stags (non-breeding)	544.00
	Breeding stags	1,459.00
	Other breeds:	
	Rising one-year hinds	87.00
	Rising two-year hinds	140.00
	Mixed-age hinds	157.00
	Rising one-year stags	95.00
	Rising two-year and older stags (non-breeding)	175.00
	Breeding stags	332.00
Goats	*Angora and angora crosses (mohair producing):*	
	Rising one-year does	49.00
	Mixed-age does	74.00
	Rising one-year bucks (non-breeding)/wethers	29.00
	Bucks (non-breeding)/wethers over one year	33.00
	Breeding bucks	142.00
	Other fibre and meat producing goats (Cashmere or Cashgora producing):	
	Rising one-year does	48.00
	Mixed-age does	105.00
	Rising one-year bucks (non-breeding)/wethers	33.00
	Bucks (non-breeding)/wethers over one year	35.00
	Breeding bucks	191.00
	Milking (dairy) goats:	
	Rising one-year does	60.00
	Does over one year	163.00
	Breeding bucks	100.00
	Other dairy goats	25.00

Type of Livestock	Classes of Livestock	Average Market Value per Head $
Pigs	Breeding sows less than one year of age	206.00
	Breeding sows over one year of age	261.00
	Breeding boars	304.00
	Weaners less than 10 weeks of age (excluding sucklings)	52.00
	Growing pigs 10 to 17 weeks of age (porkers and baconers)	87.00
	Growing pigs over 17 weeks of age (baconers)	138.00

This determination is signed by me on the 15th day of May 2001.

Martin Smith
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.

SUMMARY JUDGMENT

Case: *Sea Hunter Fishing Limited v Commissioner of Inland Revenue*

Decision date: 8 May and 23 May 2001

Act: Goods and Services Tax Act 1985

Facts

The plaintiff is a company which carries on business as a fishing vessel owner. The plaintiff claimed an input tax credit under section 21(5) of the Goods and Services Tax Act 1985 in respect of the fishing vessel. The claim was made in a GST return received by the defendant on 19 January 1998. It was for the period ended 31 May 1997. The return sought a GST input tax credit of $2,495,850. The senior investigator handling the matter determined that more information needed to be sought from the plaintiff before a credit adjustment or refund could be considered. As a result an account halt was activated on 3 February 1998. The account halt was due to expire on 18 February 1998.

After the account halt expired, a refund cheque was issued to the plaintiff. The investigator became aware that the GST credit adjustment claim had been released notwithstanding an incomplete review of the matter. The investigator was unable to access the defendant's computer system due to the power cuts in the Auckland region at the time and a stop payment request was, therefore, issued through the banking system.

On 27 February the plaintiff banked the cheque. However, on 5 March 1998 the plaintiff's bank account was debited as a result of the stop payment request.

Decision

The Master held that in order to invoke the provisions of section 46, the Commissioner must notify the taxpayer of his intention to invoke the section, and the taxpayer must receive that notification, within 15 working days following the day the return is received by the Commissioner.

WHETHER CHARGE OVER UNCOLLECTED BOOK DEBTS WAS FIXED OR FLOATING CHARGE

Case: *Agnew v CIR*

Decision date: 5 June 2001

Act: Goods and Services Tax Act 1985 and Income Tax Act 1976

Keywords: *Fixed and floating charges*

Summary

The taxpayer's appeal from the Court of Appeal was unsuccessful.

Facts

A debenture was entered into by Brumark Investments Limited ("the company") which purported to create two distinct charges—a fixed charge on the book debts while they remained uncollected, and a floating charge on their proceeds. The proceeds of the debts were released from the fixed charge as soon as they were received by the company. The company went into receivership, and the only assets available for distribution to creditors were the proceeds of the book debts that were outstanding when the receivers were appointed (and which were subsequently collected).

If the charge over the uncollected book debts were a fixed charge, the proceeds would be payable to the company's bank (Westpac Banking Corporation) as the holder of the charge. If, however, it was a floating charge at the time it was created then, by the combined effect of the Seventh Schedule to the Companies Act 1993 and section 30 of the Receiverships Act 1993, the proceeds would be payable to the employees and the Commissioner of Inland Revenue as preferential creditors.

The High Court held the debenture to be a fixed charge, but this was reversed in the Court of Appeal. The taxpayer appealed to the Privy Council.

The debenture in question was closely modelled on the instrument that was the subject of the English Court of Appeal case *In re New Bullas Trading Ltd* [1994] 1 BCLC 449. As in the present case the debenture purported to create two distinct charges, a fixed charge on the book debts while they remained uncollected and a floating charge on their proceeds. It differed from the debenture in the present case only in that the proceeds of the debts were not released from the fixed charge until they were actually paid into the company's bank account, whereas in the present case they were released from the fixed charge as soon as they were received by the company. Their Lordships attached no significance to this distinction. Prior to the receivers' appointment, however, the company was free to collect the book debts and deal with the proceeds in the ordinary course of its business, though it was unable to assign or factor them.

Decision

The question was whether the company's right to collect the debts and deal with their proceeds free from the security meant that the charge on the uncollected debts (though described in the debenture as fixed) was, nevertheless, a floating charge.

Lord Millet, delivering the judgment of the Privy Council, began by tracing the history of the floating charge from its inception to present day, paying particular attention to charges over book debts. Their Lordships noted that as early as 1910 it was evident that the classification of a security as a floating charge was a matter of substance and not merely a matter of drafting. If the chargor is free to deal with the charged assets and so withdraw them from the ambit of the charge without the consent of the chargee, then the charge is a floating charge.

The decision of Nourse J in *New Bullas* was then considered in some detail. Having observed that the principal theme of that judgment was that the parties were free to make whatever agreement they liked (the question then being simply one of construction), their Lordships stated that they considered this approach to be fundamentally flawed, and that deciding whether a charge is a fixed or a floating charge is a two-stage process:

> "At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the Court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it."

To summarise, the question is whether the charged assets were intended to be under the control of the company, or of the charge holder.

Their Lordships held that the reasoning of Nourse J, in saying that the book debts ceased to be subject to the fixed charge because that was what the parties had agreed when they entered into the debenture, was "entirely destructive of the floating charge" and would "turn every floating charge into a fixed charge".

The Lordships also could not accept that the critical distinction between a floating charge and a fixed charge lay in the presence or absence of a power on the part of the company to dispose of the charged assets to third parties (it being sufficient to create a fixed charge that the company be prohibited from assigning, factoring, or charging the book debts). This, they held, was contrary to principle, authority, and commercial sense:

> "A restriction on disposition which nevertheless allows collection and free use of the proceeds is inconsistent with the fixed nature of the charge; it allows the debt and its proceeds to be withdrawn from the security by the act of the company in collecting it."

Finally, their Lordships turned to the question of whether a debt or other receivable can be separated from its proceeds. It was acknowledged that while a debt and its proceeds are two separate assets, the latter are merely the traceable proceeds of the former and represent its entire value. To attempt to separate the ownership of the debts from ownership of their proceeds, in this context, makes no commercial sense.

Although the instant debenture did not purport to separate the book debts and their proceeds, the Lordships held that :

> "the critical factor which is determinative of the nature of the charge in respect of the uncollected book debts is that the event which is said to convert the charge from a fixed to a floating charge (if there is only one) or to replace the one charge by the other (if there are two) is the act of the company".

Here, the debenture was so drafted that the company was at liberty to turn the uncollected book debts to account by its own act. The company was left in control of the process by which the charge over the uncollected book debts was extinguished and replaced by different assets, which were not subject to a fixed charge and were at the free disposal of the company. That, their Lordships held, was inconsistent with the nature of a fixed charge, and the charge was, therefore, floating.

WHETHER SUPPLY OF A GOING CONCERN TO A REGISTERED PERSON WAS ZERO-RATED

Case:	TRA No.032/00. Decision 005/2001
Decision date:	8 June 2001
Act:	Goods and Services Tax Act 1985
Keywords:	*Going concern, zero rating, time of supply*

Summary

The Taxation Review Authority found that the Disputant supplied a going concern to a non-registered person, but that the actual purchaser had led the supplier to believe the purchaser would be a registered company of his. The zero-rated conditions of the Act were thus meet.

Facts

A property was sold to a property developer while subject to an existing tenancy. The vendor would accept no less than $2.85 million net of GST and the purchaser would pay no more than $2.5 million. The parties finally signed an agreement for sale and purchase (ASAP) for $2.80 million stating the contract to be "GST-inclusive if any" and "subject to existing tenancy". The purchaser was said to be "Person A or nominee". Clearly, the vendor had zero-rating in mind. The purchaser on the other hand did certain things to reinforce that impression while at the same time setting out to obtain an input credit for the supply.

In order to do so, the purchaser set up a company, ABC, which would act as a holding company in order to pass it on to a development company and claim an input credit on the second supply. ABC was formed after the ASAP was signed and the deposit was paid by a cheque from ABC's account. The purchaser, still not having made a nomination, applied to Inland Revenue for a binding ruling on the proposed transaction. The ruling considered that the transaction was caught by section 76 of the GST Act. The purchaser applied for a second ruling on a varied transaction where person A, who was not registered for GST, took the property in his own name before transferring it to his development company and claiming an input credit. This transaction was approved by Adjudication & Rulings on the facts submitted and the settlement proceeded on that basis.

The Commissioner assessed the disputant for output tax on the sale to person A, the basis being that, although the supply may have been of a going concern, the purchaser was not a registered person. The disputant contended that the purchaser was in fact ABC (who took the property from person A on the same day).

Decision

Judge Willy found that the disputant knew, on the facts, that at all times the purchaser was acting on behalf of a registered person and that the sale was a supply of a going concern. His Honour found too that the purchaser deliberately misled the vendor as to his intention to take the property in his own name and the involvement of Inland Revenue in obtaining a favourable ruling (there was no criticism of the Commissioner in so doing as his Honour stated that the ruling was "… acting upon the information supplied to him …").

The Commissioner had submitted that the cut and thrust of commerce is often of this nature and the taxing statutes levy tax on what actually occurs, rather than what a party may have thought or wished. In this case, there was no unequivocal act of nomination, and in his next submission, no agency relationship in fact or law.

His Honour made reference to English cases regarding the construction of written contracts. Moving on from his earlier findings of fact, he held that the background determined the meaning of the ASAP, inasmuch as both parties understood it to mean the sale of a going concern.

The Commissioner also submitted that "… or nominee" requires a positive notification. The Judge noted authorities that clearly showed that such wording merely flagged a potential legal right to nominate: *Lambly v Silk Pemberton Limited* [1976] 2 NZLR 427. He distinguished *Lambly* on the basis that, in the present matter, " … the disputant knew and accepted that the purchase would be made by a limited liability company". And later " … this is one of those cases in which the vendor readily accepted that it would sell either to the nominor named in the contract or his nominee. It is not a case where the vendor seeks to hold the nominor liable."

Again, his Honour referred to his earlier factual findings that the disputant intended to contract with a company to be formed, that it was formed and was registered for GST, and that it did not matter that the company did not exist when the contract was entered into. These findings were read into the relevant sections of the GST Act:

- the nominee existed when the deposit was paid—the time of supply (section 9)
- section 60(2) then deems the supply to be made to the principal, not the agent
- it is not relevant who pays the consideration *Turakina Maori Girls College v CIR* (1995) 15 NZTC 10,032
- GST is payable in accordance with the legal consequences of the transaction actually entered into—not on what they might otherwise have done: *Nicholls v CIR* (1999) 19 NZTC 15,233 (CA)

He concludes that the transaction was the sale of a going concern.

Judge Willy also held that it was a pre-incorporation contract in terms of section 182 of the Companies Act 1993, and that ratification was the taking of the property on the same day as person A.

LIABILITY FOR GST – WHETHER APPELLANT CARRYING ON A TAXABLE ACTIVITY; JUDICIAL REVIEW – WHETHER ASSESSMENT MADE OUT OF TIME

Case: *William Palmer Nelson v CIR*

Decision date: 11 June 2001

Act: Goods and Services Tax Act 1985 and Judicature Amendment Act 1972

Keywords: *Taxable activity, judicial review*

Summary

The taxpayer was unsuccessful both in his appeal from the Taxation Review Authority and his application for judicial review.

Tax case

Facts

The appellant is a farmer. He owed a property ("the property") with his family trust ("the trust") as tenants in common (he owned three-fifths, the trust owned two-fifths). From 1 July 1974 the appellant and the trust farmed the property in partnership (a formal deed of partnership was entered into on 21 May 1977). The partnership continued until 30 June 1994 when it was dissolved by agreement. The property was then sold to a company ("the company") formed and owned by the appellant and the family trust. The company made a secondhand goods GST claim when it acquired the property. The Commissioner allowed that claim but determined that the appellant and the trust would each be assessed with GST in respect of the sale.

The Taxation Review Authority held that the appellant was liable for the GST assessed.

Decision

The Taxation Review Authority held that in providing the partnership with land the appellant was carrying on a taxable activity. The Authority applied the Court of Appeal decision of *CIR v Bayly* (1998) 18 NZTC 14,073 which held, in circumstances similar to the present case, that landowners who made land available to farming partnerships were carrying on a taxable activity. *Bayly* was also applied by Smellie J in *Newman v CIR* (2000) 19 NZTC 15,666, which had similar facts to the present case.

Counsel for the taxpayer attempted to distinguish *Bayly* and *Newman* on the basis that the property in this case had not been supplied to the partnership in the course or furtherance of a taxable activity. The appellant considered it significant that in *Bayly* and *Newman* the partnership deeds had expressly provided for the land to be made available for the exclusive use of the partnerships. There was no equivalent provision in the deed in this case and there was no need to imply a term to that effect. Consequently there was no supply, and no taxable activity.

Rodney Hansen J considered that the arrangements in this case led to the same conclusion reached in *Bayly* and *Newman* despite there not being an express provision in the partnership agreement. The deed of partnership clearly contemplated that the business of the partnership would be conducted on the property. This was confirmed in the evidence given by the appellant before the Authority.

His Honour concluded that "the circumstances in which and the terms on which the partnership farmed the land leave no room for doubt that the appellant was carrying on the taxable activity of providing the farming partnership with land". Further, his Honour stated:

> "In my view, there is no material distinction between the facts of this case and those in *Bayly* and *Newman*. The absence of an express agreement to make the land available makes no difference. As the Authority pointed out, it is the act of repetitively and habitually making the land available which constitutes the taxable activity. … The reality of what has gone on behind the documentation cannot be ignored."

Judicial review

Facts

The application for review was brought on the grounds that the Commissioner's assessment was made outside the four-year period permitted by the old section 31 of the Goods and Services Tax Act 1985 (the time bar is now in section 108A of the Tax Administration Act 1994).

The assessment related to the GST period ending 31 August 1994. The period would have been time barred on 31 August 1998 but the taxpayer signed a waiver extending the time bar for a further six months (to 28 February 1999). The assessment was made on 25 February 1999. Following the decision of *Vela Fishing Limited v CIR* (2000) 19 NZTC 15,885 the appellant's advisors took the view that the waiver of time bar was not valid and that therefore the Commissioner's assessment was out of time. The *Vela Fishing* decision held that some waivers (relating to certain income tax periods) were not valid.

Decision

Hansen J firstly considered the old sections 27 and 31 of the Goods and Services Tax Act 1985. These sections restricted the Commissioner's power to reassess for GST (up to 30 September 1996). However, from 1 October 1996 the sections relating to the time bar for assessment of GST were "reorganised".

The Goods and Services Tax Amendment Act 1996 replaced the reference to section 31 in section 27 with a reference to sections 108A and 108B of the Tax Administration Act 1994. Section 31 was repealed and replaced without being saved. Sections 108A and 108B (which allowed a waiver of the time bar) were inserted into the Tax Administration Act 1994 by the Tax Administration Amendment (No 2) Act 1996. The legislation provided that all these amendments would come into force on 1 October 1996.

Counsel for the appellant argued that the waiver provision of section 108B was not available because the relevant legislative provisions should be those in force at the time of the relevant GST period. Counsel also argued that the time bar conferred a right that was unaffected by the repeal of former sections 27 and 31 of the GST Act, that the Commissioner was attempting to give retrospective effect to sections 108A and 108B by relying on the waiver, and that the reasoning in the *Vela Fishing* decision applied in this case.

Hansen J rejected the appellant's arguments. His Honour concluded that the ability granted to taxpayers by sections 108A and 108B was not retrospective and that the *Vela Fishing* decision was distinguishable from the present situation. The amendments to the Goods and Services Tax Act 1985 and the Tax Administration Act 1994 "achieved a seamless transition on 1 October 1996". Section 31 was repealed and there was no savings provision. Sections 31 and 108A referred to the same four-year period. Section 108B did not offend against the principle of retrospectivity. His Honour stated that "[i]t is sufficient for present purposes to acknowledge that it is a voluntary process which, it must be presumed, would be utilised only if a taxpayer perceived it to be advantageous."

There were at least two critical points of distinction that made the *Vela Fishing* decision inapplicable to the present case. Firstly, section 25 of the Income Tax Act 1976 was saved by section YB 5(2) of the Income Tax Act 1994. Former sections 27 and 31 were not saved. Secondly, the "triggering event" for income tax was changed in section 108 of the Tax Administration Act 1994. As a result Penlington J in *Vela Fishing* was not prepared to construe a reference to section 108 to include a reference to section 25. There was not a similar change in the GST legislation.

CHALLENGE TO ASSESSMENT OUTSIDE RESPONSE PERIOD – REVIEW OF TEST

Case:	*Fuji Xerox New Zealand Ltd v CIR*
Decision date:	14 June 2001
Act:	Section 138D Tax Administration Act 1994
Keywords:	*Response period, leave to proceed with challenge*

Summary

The plaintiff was given leave to proceed with a challenge to the Commissioner's assessment.

Facts

The Commissioner undertook an audit of the tax affairs of the taxpayer. The tax audit began in the middle of 1998. The tax audit at first concerned Fuji Xerox's income tax affairs, but later was expanded to include GST matters as well.

KPMG is the taxpayer's nominated tax agent in respect of income tax matters and all correspondence in relation to the tax audit (both in respect of income tax and GST matters) has been conducted by KPMG on behalf of the taxpayer. However, KPMG is not the taxpayer's nominated tax agent in respect of GST matters, and so the address in the Department's computer system for GST assessments in relation to the taxpayer is the taxpayer's own address rather than that of KPMG.

There was considerable correspondence between Inland Revenue and KPMG in relation to the tax audit. A letter dated 28 May 1999 from Inland Revenue was sent to the taxpayer itself and copied to KPMG but the subsequent correspondence was between KPMG on behalf of the taxpayer and Inland Revenue.

The final letter, indicating that Notices of Assessment were to be issued, is addressed to KPMG (not to the taxpayer care of KPMG) and refers to recent discussions, attaches a Statement of Amendment and contains the statement "Notices will be issued in due course" without saying to whom the Notices will be issued. It then continues:

"As you are aware, to protect your client's objection rights, certain actions must be taken by you within two months of the Notice. Full details are contained on the back of the Notice."

It was noteworthy that this warning refers to action being taken by "you" (KPMG, not the taxpayer). In fact the formal assessments referred to in the letter of 5 December were issued on 6 December 2000 (with one exception which was issued on 18 December 2000). Because the taxpayer's address was the one in Inland Revenue's computer system, the Notices of Assessment were sent to the address of the taxpayer and not to KPMG. Fuji's chief accountant gave evidence that he was informed by members of his staff that Notices of Assessment had been received but that he had no reason to expect any correspondence from Inland Revenue concerning the investigation and so he did not discuss the nature of them with his accounts staff. However, payment of the assessments was made because the taxpayer's policy was to pay all amounts due to Inland Revenue on time to avoid interest and penalties.

Meanwhile, the person responsible for the taxpayer's affairs at KPMG also expected that the assessments would be sent to KPMG. He had previously worked at Inland Revenue and his evidence was that he was not sure when the assessments would arrive and that his experience was that they could sometimes arrive some time after the advice that an assessment was about to be issued. However, he became concerned when no assessments had arrived by early February and rang the responsible officer at Inland Revenue on 7 February 2001. He was told that the assessments should have been issued but no details were provided. He did however enquire with Fuji's chief accountant whether he was aware of any Notices of Assessment being received and he, without checking, said he was not aware that they had been received by the taxpayer and that he expected they would be sent to KPMG. It was only some time later it was discovered that the Notices of Assessment received by Fuji's accounts staff in December 2000 had been the Notices of Assessment to which the 5 December 2000 letter to KPMG referred.

By then the response period had expired and Fuji took these proceedings seeking leave under section 138D of the Tax Administration Act, to commence a challenge out of the response period.

Decision

His Honour, O'Reagan J, applied the test set out by Gendall J, on similar facts in *Milburn New Zealand Ltd v CIR* (1998) 18 NZTC 14,005. That test is:

It must always be a matter of judgment when assessing individual factual situations, unique in themselves, whether exceptional circumstances apply. But there must be:

> "(1) an event or circumstance which is unusual or out of the ordinary (but not so rare as to be categorised as extraordinary), which operates alone or together with other circumstances (unusual or not);
>
> (2) which must be beyond the control of the taxpayer;
>
> (3) so as must provide the taxpayer with a reasonable justification for not commencing the challenge within the required period;
>
> (4) an act or omission of an agent of the taxpayer is only an exceptional circumstance if it was caused by an event or circumstances beyond the agent's control and could not have been anticipated and the effect of which could not have been avoided by compliance with accepted standards of business organisation and professional conduct."

On the "unusual or out of the ordinary" argument his Honour held that " … the sending of the assessments to the taxpayer's address when all other correspondence had been conducted with KPMG was sufficient to make this situation one which was out of the ordinary".

His Honour held that the circumstances he had set out amounted to sufficient justification for Fuji not commencing the challenge within the required period "[n]otwithstanding that a lack of prudence on the taxpayer's behalf has been a contributing factor".

His Honour did not believe "… that the situation in the present case provides as strong a case for the taxpayer as the *Treasury Technology* case. On the other hand, there has been conduct by Inland Revenue in this case which I have found amounts to exceptional circumstances, which distinguishes the case from *Milburn*".

REGULAR FEATURES

DUE DATES REMINDER

July 2001

5 **Employer deductions and Employer monthly schedule**

Large employers ($100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

9 **Provisional tax instalments due for people and organisations with a March balance date**

20 **Employer deductions**

Large employers ($100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due

Employer deductions and Employer monthly schedule

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

FBT return and payment due

31 **GST return and payment due**

August 2001

6 **Employer deductions and Employer monthly schedule**

Large employers ($100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

20 **Employer deductions**

Large employers ($100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due

Employer deductions and Employer monthly schedule

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

31 **GST return and payment due**

These dates are taken from Inland Revenue's Smart business tax due date calendar 2001–2002