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This TIB has no appendix

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BINDING RULINGS

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

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

For full details of how binding rulings work, see our information booklet *Adjudication & Rulings, a guide to Binding Rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

You can download these publications free of charge from our website at **www.ird.govt.nz**

Note: Product ruling BR Prd 01/30 was withdrawn on 24 January 2002 to allow for a replacement ruling to be issued taking account of the change of trustee from BNZ Investments Limited to TOWER Superannuation Limited.

The replacement ruling, BR Prd 02/01, is set out below.

PRODUCT RULING – BR PRD 02/01

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 Limited as Administration Manager of the BNZ International Equity Index Fund.

Taxation Laws

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

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

The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of the BNZ International Equity Index Fund ("the Fund") pursuant to the Trust Deed of the Fund, dated 21 May 1997, as replaced in an amended form by the Trust Deed, dated 1 July 2001 and as amended by the Deed of Amendment dated 21 December 2001 ("the Trust Deed").

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

1. The Fund invests in equity securities that correspond to the composition of the Morgan Stanley Capital International World Index ("MSCI"), modified such that the securities invested in will be of those countries specified in Part A of Schedule 3 to the Act ("grey-list countries") that each comprise 1% or more of the MSCI ("the BNZ Index"). The Fund has been designed to enable investors to obtain, through one security, the same financial results that can be obtained through the direct investment in the securities of those companies that make up the BNZ Index.

2. The Trustee of the Fund initially was BNZ Investment Management Limited but is now TOWER Trust Superannuation Limited, ("the Trustee").

3. The Administration Manager of the Fund is BNZ Investment Management Limited (the "Administration Manager"). The Investment Manager of the Fund is State Street Global Advisors, Australia, Limited ("the Investment Manager").

4. The Sponsor of the Fund is the Bank of New Zealand.

5. The Fund is a wholesale superannuation fund into which other wholesale and retail superannuation funds invest. The Fund was established for the purpose of being a wholesale investment vehicle for retail superannuation funds, other wholesale superannuation funds

and for the purpose of providing retirement benefits to the limited number of natural persons who invest directly in it. There is no minimum investment amount.

6. The Fund is registered under the Superannuation Schemes Act 1989.

7. The Trust Deed states that:

> "The investment policy of the Fund will be:
>
> (a) to invest the Fund (other than the Cash Pool) in accordance with Schedule 2 to this Deed only in such investments as the Trustee considers necessary to track the modified grey list components of the World Index; and
>
> (b) to invest the Cash Pool in restricted investments, being deposits with banks, and futures contracts."

8. The Fund buys and sells shares as required to ensure that it continues to correspond to the BNZ Index. Such buying and selling will not be motivated by any intention to derive profit or gain from such sales. In this regard, the Trust Deed states:

> "The Fund and the Trustee do not have an intention to profit from holding, acquiring or selling Index Company securities."

9. The Applicant has confirmed that all material aspects of the previous rulings (Prv 97/125, Prv 01/11, Prv 01/65, Prd 97/38 and Prd 01/30), relating to the Fund, have been complied with.

10. The only amendments to the Trust Deed are those contained in the Deeds dated 1 July 2001 and 21 December 2001. There has not been any material change to the management or operation of the Fund since its establishment.

Date of adjustments

11. The Fund is rebalanced in the following circumstances:
    - If a security is outside its BNZ Index weight by the lesser of:
      - 0.5% of the total Fund, whether positive or negative, or
      - three times the BNZ Index weight of the individual security, and
    - When the periodic (currently quarterly) adjustments are made to the MSCI, and
    - If there are any MSCI market-driven changes or corporate actions such as a merger, takeover, new listing or reduction or increase in capital affecting any index company in the BNZ Index.

12. Such rebalancing will occur as soon as possible after the above events have occurred and in any event within five business days.

Events that trigger acquisitions or realisations

13. There are certain reasons or events when investments held by the Fund will have to be bought or sold. The Trustee will only dispose of securities (other than cash pool investments) if:
    - the Fund is wound up
    - there is a change in the BNZ Index and composition of the securities of the Fund no longer tracks the BNZ Index (whether as a result of a change to the countries included or a change to the securities included)
    - there is a compulsory acquisition of one of the Fund's securities or a security is acquired on a compulsory acqusition that does not track the BNZ Index
    - there is a net withdrawal of funds from the Fund by members
    - there is a claim on the Trustee in respect of the Fund that cannot be otherwise satisfied, or
    - the fund is rebalanced in accordance with the first bullet point in paragraph 11 above.

Rights issues

14. In the event of any rights issue by an Index company, the Investment Manager will retain the entitlement and take up the securities (if the securities that are the subject of the entitlement will be immediately included in the BNZ Index).

15. Notwithstanding paragraph 14, if the securities that are the subject of the entitlement are over-represented, the Investment Manager will sell the entitlement and reinvest the proceeds in the Index companies to track the BNZ Index.

16. If the Investment Manager does not know whether the securities that are the subject of the entitlement will be included in the Index, the Investment Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index companies to track the BNZ Index.

Mergers, takeovers and share buy-backs

17. The BNZ Index may be adjusted from time-to-time because of mergers, takeovers, share buy-backs, distributions of capital, cash issues and substitutions of companies in the BNZ Index.

18. In the event of a merger or takeover of a BNZ Index company, the Investment Manager will adjust the Fund portfolio at a time as close as practicably possible (but in any event within five business days) to the time the BNZ Index is adjusted. The Fund will not accept an offer unless, as a consequence of not accepting the offer, the Fund would track the BNZ Index less accurately than if it had accepted the offer.

19. The Investment Manager will not participate in a share buy-back by a BNZ Index company.

Hedging

20. There is no specific provision in the Trust Deed that allows the Fund to hedge foreign exchange risks.

21. The Fund will not take any action to hedge or manage foreign exchange risks or exposures that arise from the investments of the Fund being held in non-New Zealand currencies.

Borrowing

22. Clause 10.1(c) of the Trust provides:

> …The Trustee may:
>
> borrow money for the purpose of the Fund upon terms and conditions agreed by the Sponsor and the Trustee and charge all or part of the assets of the Fund with repayment and payment of interest on the moneys so borrowed;

23. However, the Fund will not in fact borrow, although involuntary borrowing may occur if there is a settlement mismatch between the purchase and sale of securities.

Cash investments held by the Fund

24. Although it is not an objective of the Fund to hold cash, the Trustee and the Investment Manager may hold cash to facilitate the easier administration of the Fund. The cash held by the Trustee and the Investment Manager is on call. Wherever possible, futures contracts will be entered into by the Investment Manager to cover cash held by the Investment Manager. This is known as "equitised cash".

25. The Investment Manager or the Trustee will hold cash in the following circumstances:
    - following the sale of securities in the course of tracking the BNZ Index or in the course of a compulsory acquisition, pending the reinvestment of that cash
    - following a contribution to the Fund, pending the investment of that contribution
    - following the sale of securities to meet a request for withdrawal by a member
    - when a dividend is paid to the Fund in respect of an investment in a security
    - to accumulate the minimum amount of cash required to allow for minimum trade sizes and to obtain a reasonable representation of the number of securities on the BNZ Index ("the minimum investment level"). The Investment Manager has advised that this amount is presently approximately $NZ5 million, and will increase to $US3 million as at 31 May 2002 (to take account of changes to the MSCI described in the MSCI Announcement, dated 10 December 2000). The minimum investment level may also increase (or reduce) in the future to the extent that a different amount is required to purchase the equivalent representation of securities on the BNZ Index.

26. The Investment Manager may hold up to an amount equivalent to the minimum investment level in cash (including both free and equitised cash). This threshold may be exceeded in the following circumstances:
    - for up to 10 business days preceding an MSCI structural change or for up to three business days following a significant new investment
    - for up to three business days after an MSCI structural change
    - for up to 10 business days prior to a pending withdrawal in respect of which it has received a withdrawal request.

27. In addition to any funds held by the Investment Manager, the Trustee may hold up to NZ$2 million in cash. This threshold may be exceeded in the following circumstances:
    - for up to 10 business days if there are withdrawals pending in respect of which it has received a withdrawal request, or
    - for up to three business days if the excess results from a significant new investment.

28. At all times, there is a limit on the total cash (including cash held by the Trustee, and free and equitised cash held by the Investment Manager) of 5% of the total Fund (except if there is a significant withdrawal or investment).

29. The Investment Manager will use best endeavours to equitise all cash, subject to futures contract size constraints.

30. The following futures contracts are used:

Country	Contract
Australia	SPI200
Canada	S&P/TSE60
Japan	Nikkei 225
Germany	DAX
United Kingdom	FTSE100
United States	S&P500

31. In the event that alternative futures contracts in one or more markets enable improved tracking of the BNZ Index, or that one or more of the above contracts ceases to exist, the Investment Manager will use such an alternative contract or contracts.

Dividends

32. The Investment Manager will receive the dividend (and other income) distributions from the securities in which funds are invested and will hold these as part of the cash pool, subject to the terms of paragraph 25 above.

33. The Investment Manager will not elect to participate in any dividend reinvestment plan.

Foreign currencies

34. The Investment Manager may enter into spot foreign exchange contracts where these are necessary in order to purchase or sell the foreign currencies necessary to invest in BNZ Index securities. These contracts are not speculative and are settled within two business days.

Suspension of subscriptions and withdrawals

35. Clause 18.7 of the Trust Deed enables the Fund to suspend the payment of benefits relating to withdrawal requests. The Fund has not previously suspended withdrawals. The Fund also has the power under clause 3.2 of the Trust Deed to refuse any application for membership without giving reasons. The Fund has never exercised this power.

36. The Fund will only suspend withdrawals or subscriptions in the following exceptional circumstances:
    - if the volume of withdrawals is too large to be processed, or
    - if the volume of withdrawals exceeds the immediately available funds, or
    - trading on the relevant equity markets has been suspended.

37. Any suspension will only be for three business days, unless the exceptional circumstance giving rise to the need to suspend is beyond the control of the Trustee and Investment Manager, in which case the suspension will only be for such period as is strictly necessary for the Trustee and/or the Investment Manager to recover from that event.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) If the Fund is resettled, this Ruling shall not apply from the date of resettlement.

b) The Fund is an investment vehicle primarily for investment by superannuation funds which are themselves either: (i) widely-held investment vehicles for direct investment by natural persons or, (ii) vehicles for investment (directly or indirectly) by other superannuation funds that are widely-held vehicles for direct investment by natural persons.

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

d) All investors in the Fund who are not natural persons are registered under the Superannuation Schemes Act 1989.

e) The existing binding private ruling for the Fund (BR Prv 01/114) remains in force and continues to apply in all respects to the Arrangement.

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:

- The Fund is a "superannuation fund" as that term is defined in section OB 1.
- The Fund is a "qualifying trust" as that term is defined in section OB 1.
- Investors are not assessable to income tax on withdrawals from the Fund, by virtue of section HH 3(5).

The period or income year for which this Ruling applies

This Ruling will apply for the period 24 January 2002 to 30 June 2004.

This Ruling is signed by me on the 24th day of January 2002.

Martin Smith

General Manager (Adjudication & Rulings)

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.

LIVESTOCK VALUES – 2002 NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK

The Commissioner of Inland Revenue has released a determination, reproduced below, setting the national standard costs for specified livestock for the 2001/2002 income year.

These costs are used by livestock owners as part of the calculation of the value of livestock on hand at the end of the income year, where they have adopted the national standard cost (NSC) scheme to value any class of livestock.

Farmers using the scheme apply the one-year NSC to stock bred on the farm each year, and add the rising two-year NSC to the value of their opening young stock available to come through into the mature inventory group at year-end. Livestock purchases are also factored into the valuation of the immature and mature groupings at year-end, so as to arrive at a valuation reflecting the enterprise's own balance of farm-bred and externally purchased animals.

NSCs are developed from the national average costs of production for each type of livestock farming based on independent survey data. Only direct costs of breeding and rearing rising one- and two-year livestock are taken into account. These exclude all costs of owning (leasing) and operating the farm business, overheads, costs of operating non-livestock enterprises (such as cropping) and costs associated with producing and harvesting livestock dual products (wool, fibre, milk and velvet).

The NSCs calculated for the year ending 31 March 2002 have increased quite significantly for sheep, beef and dairy cattle. Total expenditure on these farm types increased substantially in the survey years on which the NSCs are based. These increases are mainly a result of improved farm incomes permitting additional expenditure, plus some cost inflation as a result of the depreciated New Zealand dollar, and on-farm responses to seasonal conditions such as drought resulting in higher feed costs. While much of this expenditure increase is aimed at producing more of the dual products (particularly milk), and is consequently excluded from the NSCs calculated, some of the increases in costs flow to the higher average cost of producing livestock.

One-off movements in expenditure items are effectively smoothed within the mature inventory grouping, by the averaging of that year's intake value with the carried forward values of the surviving livestock in that grouping. For the farm-bred component of the immature inventory group, the NSC values will appropriately reflect changes in the costs of producing those livestock in that particular year.

The NSC scheme is only one option under the current livestock valuation regime. The other options are market value, the herd scheme and the self-assessed cost (SAC) option. SAC is calculated on the same basis as the NSC but uses a farmer's own costs rather than the national average costs.

NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK DETERMINATION 2002

This determination may be cited as "The National Standard Costs for Specified Livestock Determination 2002".

This determination is made in terms of section EL 3A of the Income Tax Act 1994. It shall apply to any specified livestock on hand at the end of the 2001/2002 income year, where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EL 3A of the Income Tax Act 1994, the national standard costs for specified livestock for the 2001/2002 income year are set out in the following table.

Kind of livestock	Category of livestock	National standard cost $
Sheep	Rising 1 year	19.00
	Rising 2 year	12.20
Dairy cattle	Purchased bobby calves	164.00
	Rising 1 year	569.00
	Rising 2 year	98.40
Beef cattle	Rising 1 year	179.00
	Rising 2 year	103.00
	Rising 3 year male non-breeding cattle (all breeds)	103.00
Deer	Rising 1 year	59.50
	Rising 2 year	29.80
Goats (meat and fibre)	Rising 1 year	14.50
	Rising 2 year	9.80
Goats (dairy)	Rising 1 year	91.60
	Rising 2 year	15.20
Pigs	Weaners to 10 weeks of age	79.60
	Growing pigs 10 to 17 weeks of age	63.20

This determination is signed by me on the 23rd day of January 2002.

Martin Smith

General Manager (Adjudication & Rulings)

STANDARD PRACTICE STATEMENT

These statements describe how the Commissioner will, in practice, exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

TIMELINESS IN RESOLVING TAX DISPUTES – IR-SPS INV-170

Introduction

This Standard Practice Statement (SPS) establishes administrative practices and timelines that will assist in the timely progression of cases in dispute.

Application

This SPS shall apply from 1 March 2002 to all cases in dispute.

Summary

The disputes resolution process aims to promote the prompt and efficient resolution of tax disputes. Taxpayers have a right to have their dispute go through the whole disputes resolution process. When it becomes evident that a case is likely to proceed to dispute, a timeline should be negotiated between the taxpayer and the Inland Revenue officer involved to ensure timely and efficient progression of the case.

While both Inland Revenue staff and taxpayers should endeavour to meet the agreed timelines, if it becomes apparent the negotiated timeline cannot be achieved, this will be discussed with the taxpayer with a view to agreeing a new time line.

Negotiating timelines for the timely resolution of disputes is an administrative practice encouraged by the Commissioner of Inland Revenue. Failure to negotiate an agreed timeline or adhere to the agreed timeline will not prevent a case from progressing through the disputes resolution process.

Background

In 1996, the disputes resolution process was introduced to ensure the effective and efficient resolution of tax disputes. The process requires the issues and evidence to be considered by the Commissioner and the disputant before proceedings commence in a court.

Fundamental to the effective progression of a case in dispute is a commitment by the parties involved to work through the process in a constructive manner and to a reasonable timeline. This SPS sets out the steps the Commissioner will follow when a case enters the disputes resolution process. This includes both statutory requirements and administrative practices.

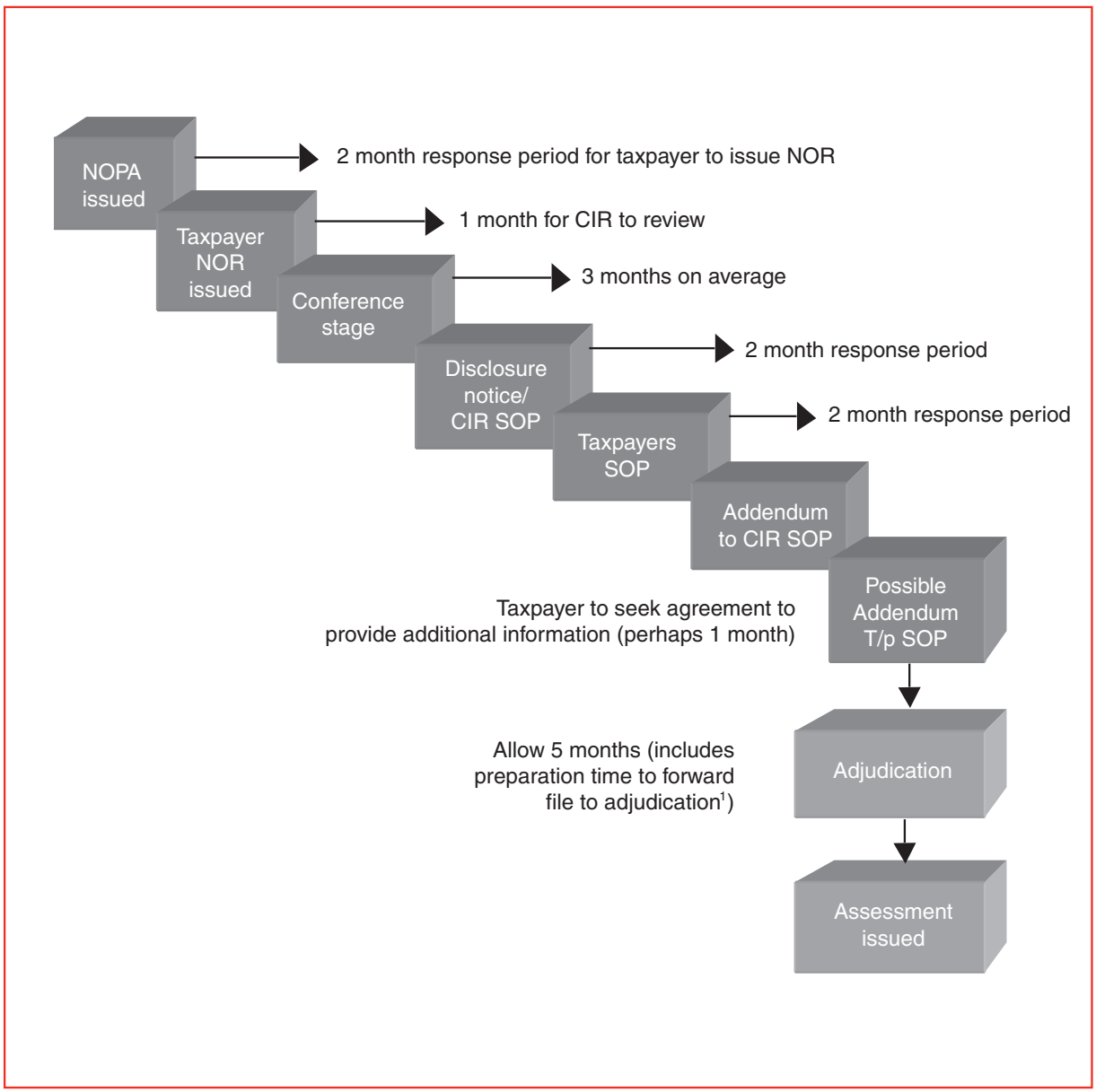
While the emphasis of the disputes resolution process is to obtain agreement, the SPS covers all the stages of the disputes resolution process that could be involved in any one dispute to establish the timelines and procedures that Inland Revenue staff will follow.

Discussion

Timelines for completing the disputes resolution process

Each case in dispute will have a different set of circumstances and features. Nevertheless, there is practical value in establishing timelines for completing the steps in the disputes resolution process. The suggested timeline outlined below should form the basis of discussing and agreeing timelines for a specific case in dispute.

As a yardstick, a simple case in dispute can take up to 16 months from the time a Notice of Proposed Adjustment (NOPA) is issued until the assessment is issued. The following diagram is indicative of the timeline for a simple dispute initiated by the Commissioner.



[1] One month preparation time is included allowing for the Adjudication

Factors that may influence the agreed timelines

While it is expected that the agreed timelines established between the taxpayer and the Inland Revenue officer will closely follow the timelines suggested above, there may be aspects of the particular disputed case that could have a bearing on the timely progression of that case. These aspects are commented on below.

- *Information on which to form opinions and make fact-based decisions*

Critical to the timely and satisfactory progression of a case in dispute is the Commissioner's need to have all the information and facts necessary on which to form opinions and make fact-based decisions. Any delay in providing information will inevitably impact on the timely progression of the case.

Where circumstances warrant, the Commissioner will take assertive action to seek information required. The actions will include use of the information requisition powers in the Tax Administration Act 1994 (TAA).

The prime objective remains to effectively resolve the dispute by way of agreement or move to formal proceedings in a timely manner.

- *The conference phase*

The conference phase is an administrative practice designed to identify and clarify facts or issues, and to attempt to resolve those facts or issues in dispute. The time suggested for the conference phase is an average of three months. The time will vary according to the facts of the specific case.

The conference is an important part of the overall disputes resolution process. The Commissioner's intention is to encourage open and full communication. Conferences provide Inland Revenue and taxpayers with an opportunity to precisely identify the facts and issues causing the dispute. Effective dialogue between Inland Revenue and the taxpayer increases the prospect of a productive outcome. For example, dialogue may identify common ground, inconsistencies, erroneous arguments or alternative agreements.

The parties to the dispute should carefully assess the significance of conducting a conference. In brief, taxpayers and Inland Revenue staff should perceive the conference phase as an effective option to progressing or resolving the dispute.

The clarity of each party's position in respect to the matters in dispute, the level of cooperation and the nature of the communications to date would be factors taken into account in determining whether or not to conduct a conference or determining how long the conference phase should be.

The decision to either conduct or waive a conference should be by mutual agreement. The timelines involved in completing the next step in the agreed process would be expected to be an important outcome from the overall discussions.

- *Time-bar waivers*

Timelines for investigations and resultant dispute proceedings will take account of the time bar reopening limitations set out in sections 107A, 108, and 108A of the TAA.

If the original timeline established for progressing a dispute has not been met, it is still important to ensure, as far as practicable, that the case follows the full course of the disputes resolution process, and in particular, to have the case adjudicated by the Adjudication Unit.

If a case is likely to be time-barred, the taxpayer will be contacted and asked to waive the time bar under section 108B of the TAA. Exercise of the time-bar waiver will allow further opportunities for the disputed case to be resolved before issue of the assessment notice, including by way of an independent review by the Adjudication Unit.

In the event that the request to waive the time bar is declined by the taxpayer, the Commissioner will consider the options available to progress the case towards finality.

Standard Practice

Upon receipt or issue of a NOPA, unless already negotiated, the Inland Revenue officer involved will contact the taxpayer to negotiate a timeline for progression and finalisation of the dispute.

Negotiation of the timeline will take into account the following statutory and administrative timeframes.

Where a NOPA is issued by the Commissioner

Issue of a NOPA

When the Commissioner issues a NOPA, the taxpayer or agent will be contacted within 10 working days of the date of issue of the NOPA to ensure that the NOPA has been received.

Within two weeks of the expiry of the response period for the NOPA, the taxpayer or agent will be contacted with a view to ascertaining if the NOPA is to be responded to.

Consideration of taxpayer's Notice of Response (NOR)

Within one month of receipt of the taxpayer's NOR, the Inland Revenue officer involved will advise the taxpayer or agent whether the NOR is accepted, rejected in full or in part, or requires further work to be done before a decision can be made.

Where the NOR is accepted in full, all "closure" actions on the case (such as issuing the notice of assessment) should be completed within one month of the issue of advice of acceptance of the NOR.

If further work is required to be carried out before a decision to accept or reject a NOR can be made, the Inland Revenue officer will regularly update the taxpayer or taxpayer's agent on the progress of further analysis or enquiry work being undertaken.

The conference phase

The time suggested for the conference phase is an average of three months commencing one month after receipt of the NOR. This time is intended to cover any analysis required as well as organising and conducting a conference. The time may well vary according to the specific facts of the case. If by the end of this phase, the dispute has not been resolved, or if by mutual agreement no conference is held, a Disclosure Notice will be issued together with the Commissioner's Statement of Position (SOP).

Taxpayer's response

The taxpayer must file their SOP within the statutory response period for the Disclosure Notice, that is two months. This time may be extended by application to the High Court.

Additional information by the Commissioner

Within two weeks of receipt of the taxpayer's SOP, the taxpayer will be advised whether or not the Commissioner proposes to provide additional information by way of Addendum to the SOP.

Additional information by taxpayer

Where the Commissioner has agreed to accept additional information from the taxpayer, the timeline above suggests one month for agreement to be reached and information provided.

File preparation and adjudication

Where agreement cannot be reached, the disputed case should proceed to adjudication. Before the case is forwarded to the Adjudication Unit, the Inland Revenue officer involved will send to the taxpayer a copy of the Adjudication cover sheet. The cover sheet includes a list of the evidence being sent to Adjudication with the file. The taxpayer should respond within 10 working days, advising whether they want any other material already disclosed and not listed on the cover sheet to be included in the file. The file will be sent to Adjudication within 12 working days of the taxpayer being sent the cover sheet.

Where the NOPA is issued by the taxpayer

The processes and steps involved in progressing the dispute towards settlement or formal proceedings when a taxpayer has issued a NOPA are generally the same as those outlined above. Establishing agreed timelines to assist in the timely progression of a case, where the taxpayer has initiated the dispute proceedings, is as important as where the Commissioner has initiated the disputes resolution process.

When discussing timelines for resolving taxpayer initiated disputes, three key differences from a Commissioner-initiated dispute will be taken into account:

- Within two weeks of the expiry of the response period for the NOPA, the taxpayer will be contacted and advised whether the Commissioner intends to respond to the NOPA by issuing a NOR. At this stage, the Inland Revenue officer involved will initiate timeline negotiations with the taxpayer.
- The Commissioner will initiate the conference stage within one month of receipt of the notice of rejection of the Commissioner's NOR.
- An additional two months must be added to the timeline to recognise the fact that the Commissioner's SOP does not accompany the Disclosure Notice, but is issued within two months of the date of issue of the taxpayer's SOP.

Inability to meet negotiated timelines

While both Inland Revenue staff and taxpayers should endeavour to meet the agreed timelines, if it becomes apparent the negotiated timeline cannot be achieved this will be discussed with the taxpayer with a view to agreeing to a new timeline.

Negotiating timelines for the timely resolution of disputes is an administrative practice encouraged by the Commissioner. Failure to negotiate an agreed timeline or adhere to the agreed timeline will not prevent a case from progressing through the disputes resolution process.

Margaret Cotton

National Manager, Technical Standards

LEGAL DECISIONS – CASE NOTES

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

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

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

WHETHER ASSESSMENT WAS INVALID

Case:	TRA Number 93/26 and 93/27 Decision Number 001/2002
Decision date:	15 January 2002
Act:	Income Tax Act 1976
Keywords:	*Assessment, Notice of Assessment*

Summary

The Taxation Review Authority ("TRA") found that the assessments were valid and correct. If need be Taxation Review Authority would exercise its own power to raise assessments to cure any procedural defects in Commissioner's assessments

Facts

This was a final hearing of a case which was first reported as *Case T49* (1998) 18 NZTC 8,335. In that decision the TRA held that what it perceived to be defects in the notice of assessment to the taxpayers rendered the assessment invalid. The Commissioner successfully appealed *Case T49* to the High Court, and the Court of Appeal upheld the Commissioner's argument: see *CIR v Hyslop* (2000) 19 NZTC 15,560 and Hyslop v CIR [2001] 2 NZLR 329; (2001) 20 NZTC 17,031. As a result the remaining issues were remitted back to be dealt with by the TRA.

The case was similar to *Case M7* (1990) 12 NZTC 2,046 [also reported as *Case 84* (1990) 14 TRNZ 21; TRA No 88/9; Dec No 89/107] (Judge Bathgate) except that M7 dealt with the 1982 to 1984 financial years (inclusive) of the objectors and *Case T49* deals with 1985 to 1989 inclusive. The essential tax issue was whether the husband and wife objectors successfully split some income among their children consequential to measures taken in about September 1982 to gift capital to their children.

The remaining issues involved the correctness of the assessments, whether the assessments had validity, whether the taxpayers could challenge their validity in any event and whether the Taxation Review Authority could cure any invalidity.

Decision

Barber DCJ adopted the Commissioner's submissions on all points.

He held that the taxpayers could not pursue a validity argument as they had not put validity in issue in their notice of objection and that there was no res judicata from the *T49* decision.

The investigator had satisfied the requirements for a valid assessment and had applied the law as he understood it to be to the facts as he understood them to be, and this amounted to independent and adequate enough judgment for the purposes of a valid assessment. It was made in good faith and was not arbitrary.

In any event, any procedural defects in the Commissioner's assessments (on the basis of the above, there were none) have been cured by hearings before the TRA and so it was appropriate for the TRA to in effect ratify the Commissioner's assessments by raising its own assessments under section 32(1)(b) Income Tax Act 1976 (now s138P(1)(b) Tax Administration Act 1994).

The assessments were held to be correct for the same reasons as set out in Case M7.

SALE OF LAND – BUSINESS OR PRIVATE USE?

Case:	TRA Number 038/00 Decision Number 005/2002
Decision date:	5 February 2002
Act:	Goods and Service Tax Act 1985
Keywords:	*Taxable activity, course or furtherance, sale of land, private use*

Summary

This decision is an interim decision. The disputant was successful in the output tax argument, but the assessments will not be amended until relevant input tax claims are clawed back. Parties are to confer or apply for directions.

Facts

The disputant company owned land at a beach resort in a popular holiday destination, which it held in its own name as an undivided lot since purchase in 1972. Over time smaller lots were divided off and sold, the original 52-odd hectares becoming 23-odd by 1986 when the disputant registered for GST.

The disputant thereafter provided GST returns that included claims for input credits for all expenditure relating to the whole land and two businesses run by non-registered subsidiaries of the disputant. The disputant provided part of the land free of charge to one of the subsidiaries, a residential educational business.

The disputant experienced financial difficulties in 1991 and was encouraged by its bankers to survey and subdivide the property to provide the bank a better security. The disputant was threatened with a mortgagee sale of the entire property if a sale or subdivision did not occur.

The mortgagee sale was averted by the sale of other property and the disputant refinanced the property (now in six subdivided titles), with a different bank.

In July 1996 the disputant sold two lots and part of a third to a local property developer for $900,000 "…inclusive of GST, if any." As the result of an audit, the Commissioner issued a Notice of Proposed Adjustment ("NOPA"), contending that the land was sold in the course or furtherance of the disputant's taxable activity. The disputant in response claimed that the land it had disposed of had no physical business use and only marginal private use. It acknowledged that a small part of the land had been used by a subsidiary contracting business for storage and made a small GST payment in respect of that portion in 2000.

Decision

His Honour Barber DCJ held that the land in question was employed not as part of a taxable activity, but as a private asset that was mixed with business assets by way of a "streamlined" accounting system, which combined all three legal entities (the disputant and its two subsidiaries). He so found on the evidence of Mrs G, the disputant's director and operator of the education centre.

In so doing, he placed less weight on the Commissioner's evidence, which rested mainly on the disputant's GST and general accounting treatment of the land and the businesses conducted thereon. In particular, the Commissioner submitted that the business could not have continued unless the subdivided land had been used as security for refinancing. His Honour rejected this argument, preferring to look at the physical use of the land first and finding that it was "… not brought into the disputant's taxable activity."

Having so found, Judge Barber went on to say that, as the disputant had claimed all inputs for GST purposes (including the costs of survey, subdivision and valuation),

"…it was understandable that [the Commissioner] considered that in 1986 all the disputant's land was introduced into the disputant's taxable activity.

However, the land now in issue was private residential/ recreational land and so not part of any taxable activity and such inputs should not have been allowed in respect of it.

… in terms of s21 of the Act, there may need to be an apportionment between the taxable and non-taxable supplies made where a portion of a total landholding is private and not part of a taxable activity.

… the disputant should not have been claiming every outgoing in respect of the land in issue as a GST input, nor claiming such as a deduction for income tax purposes."

His Honour formally held that the sale of the land in question was not in the course or furtherance of a taxable activity. However, he declined to revoke the GST assessments until there is a review of the GST inputs and income tax deductions claimed by the disputant in accordance with the evidence given.

PENAL TAX

Case:	TRA Number 97/041 Decision Number 003/2002
Decision date:	17 January 2002
Act:	Income Tax Act 1976
Keywords:	*Penal tax*

Summary

The Taxation Review Authority ("TRA") upheld the Commissioner's assessments and penal tax assessments. However, in light of some deductions conceded by the Commissioner since assessment, a new statement of overall position was required.

Facts

The objector was an accountant who filed false returns both on his own account and for clients. He claimed refunds for his clients and himself, and banked all the proceeds himself. He served 24 months' periodic detention as a result of criminal charges arising out of this behaviour. The Commissioner assessed him by reversing the refunds claimed, assessing income tax on (undeclared) interest derived from the refunds and charging penal tax on the overpayment. The Commissioner had originally also assessed the objector for income tax on the refunds received by him as a result of the false returns for his clients, but after the Court of Appeal decision in *"A Taxpayer" v CIR* (1997) 18 NZTC 13,350 it became clear that this was not taxable income. However, by that stage the case was filed in the TRA and the adjustment had to wait until resolution of the other matters.

Decision

Barber DCJ made some adverse credibility findings against the objector saying that any allegation of hatred by Inland Revenue staff against the taxpayer was preposterous. He held that the penal tax assessments were made by experienced Inland Revenue officers, who were acting properly, intelligently and in good faith. The allegations of improper purpose were somewhat beside the point, because the Authority has the power to assess de novo and any defects will be cured at that point.

His Honour found for the Commissioner on the interest adjustment. The account was the objector's and he derived the income. The objector was not being charged tax or penal tax on the amounts he had embezzled from clients, but he was being assessed with respect to interest that he gained from using those embezzled funds.

The TRA was satisfied that the objector had evaded tax by claiming donation rebates in the 1993 and 1994 years under a false name and false IRD number, when he had already claimed donation rebates under his own name up to the maximum and had refused to produce any receipts to substantiate the claims.

His Honour also held that the quantum of penal tax was justifiable, saying that "the objector had been blatantly dishonest, furtive and deliberate… unrepentant… the offending was extensive…breach of position of trust…no cooperation" and that the objector continued with his accountancy activities after he knew of the Inland Revenue investigation.

The objector has caused the general body of taxpayers (the State), and Inland Revenue inordinate expense in a series of unmeritorious appeals and hearings in various jurisdictions.

DECISION ON PUBLIC INTEREST IMMUNITY AND MAIL TO POST OFFICE BOXES

Case:	EC Hieber & Hieber Family Trust & Fleming Investments v CIR; London Continental Limited v CIR
Decision date:	31 January 2002
Act:	Tax Administration Act 1994
Keywords:	*Discovery, Public Interest Immunity, section 14 TAA, mail to post boxes*

Summary

This was one of the preliminary hearings to address various orders sought by parties (discovery, consolidation of the actions, legal privilege claims and submitting original documents to forensic examination). This judgment deals with Public Interest Immunity from discovery and the Master's conclusions on section 14 Tax Administration Act 1994.

Facts

The plaintiffs had challenged income tax assessments arising from evasion involving offshore funding.

The plaintiffs had sought discovery of the identity of the informant or informants that had alerted the Commissioner to the evasion. The Commissioner resisted this, relying upon the grounds of Public Interest Immunity from disclosing that information.

In turn, the Commissioner sought to limit the plaintiff's ability to bring evidence, as notices under

section 21 TAA 1994 (dealing with information requests relating to offshore payments) had been issued. These were send to the plaintiffs' accountants at their post office box number. The plaintiffs argued that this was not notice to the plaintiffs under section 14 TAA, which provides:

"14 Giving of notices

14(1) [Communication of notices] Any notice required by this Act or any other Act to be given by the Commissioner to any person may be—

(a) Given to the person personally; or

(b) Sent to the person by post addressed to the person at the person's usual or last known place of abode or business; or

(c) Given personally to any other person authorised to act on behalf of the person; or

(d) Sent to that other person by post addressed to that other person at that other person's usual or last known place of abode or business.

14(2) [Notices sent by post] Any notice sent by post to any person, or to any other person authorised to act on behalf of that person, shall be deemed to have been received by that person, or that other person, when in the normal course of post it would have been delivered."

This case is noted because of the comments of Master Kennedy-Grant in relation to Public Interest Immunity and section 14 Tax Administration Act 1994. All other issues are particularly fact specific and not of general interest.

Decision

Public Interest Immunity

The Master concluded the claim of Public Interest Immunity was properly made. The plaintiffs argued that if, as a result of the investigation prompted by the informant's disclosure, the informant's identity or likely identity was discerned, then the immunity was lost. The Master rejected this argument saying:

"Given the purpose of the immunity, namely to ensure the continued supply by third parties of information to relevant authorities in relation to actual or possible breach of the law by a person or persons, I am unable to accept the proposition that the subsequent involvement of an informer in the investigative process in a manner which results in his or her identification as the informer or probable informer, results in the loss of the immunity against disclosure of the fact that he or she was indeed an informer. What is protected by the immunity is the fact of informing, not the content of the information. Informers trigger the commencement, renewal or redirection of the investigative process by giving the information to the relevant authority in the first place. It is the fact that they were the persons who triggered the investigative process that is protected by the immunity. If the immunity were to be lost by reason of the mere involvement of an informant in the subsequent investigative process in a manner which identifies that person as an informer or probable informer, the effectiveness of the immunity as an encouragement to informers would be substantially weakened." [at par 26]

He also considered said that:

"If regard is had to the purpose of the immunity, namely the encouragement of the continued supply of information by third parties to relevant authorities regarding illegal or potentially illegal activities of persons, seems to me that the immunity must apply not only where the informer is identifiable as a particular individual but also where the informant is identifiable as one of a small, clearly defined, group. [at par 29]

It was submitted by the plaintiffs that Public Interest Immunity does not cover situations were the information inferred the identify of the informant or informants. Rather it only covered information that positively identified the informant or informants. The Master considered this "is to impose too high a standard of proof." And that to accept this would "weaken the effectiveness of the immunity as an encouragement to the provision of information by third parties such as the informer or informers in this case."

Section 14 TAA 1994

The Master noted that the provisions of section 14 TAA regarding the giving of notices were phrased that the giving of notices "by the Commissioner to any person *may* be…" (section 14(1) TAA 1994, emphasis added). He also noted the effects of *Abbattis Properties* (2001) 20 NZTC 17,013 at 17,17,015 and *Sea Hunter Fishing* (2001) 20 NZTC 17,206 at 17,215 to conclude:

"Given that the stated purpose of the [TAA] is, inter alia, 'to reorganise and consolidate the law relating to… the administration of income tax matters', that s 14 is important in the scheme of tax administration (because of the large number of documents to which it can apply), and that the consequences of some of those documents…are serious, I am satisfied that, notwithstanding the use in the section of the word 'may', as opposed to the word 'shall', s 14 ought to be held to be mandatory. Such an interpretation produces certainty without placing unreasonable requirements in the way of the Commissioner. I am not persuade to the contrary view by the [Commissioner] … Parliament has seldom been rigorously consistent in the manner in which it has expressed itself." [at par 50[d]]

Having so concluded, the Master then turned to consider if posting notices to the plaintiffs' accountant's post office box number was compliance with section 14 TAA. The Master concluded that it was not. He accepted that a post office box is geographically separated from a place of abode or place of business and this was in accordance with the "ordinary and natural meaning" of the words of the section.

Thus effective notice under section 14 had not been given, despite the Master accepting that the accountants were the plaintiffs' agents in dealing with the Commissioner.

REGULAR FEATURES

DUE DATES REMINDER

MARCH 2002

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

7 **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

28 **GST return and payment due**

APRIL 2002

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

8 **End-of-year income tax**

- 7 April 2002, 2001 end-of-year income tax due for clients of agents with a March balance date
- 7 February 2003, 2002 end-of-year income tax due for people and organisations with a March balance date and who do not have an agent

22 **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

30 **GST return and payment due**

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