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This TIB has no appendix

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THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

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

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

The following draft items are available for review or comment this month, having a deadline of 31 July 2002.

Ref.	Draft type	Description
DDG00002	General depreciation determination	Prints, paintings, and drawings

Please see page 8 for the text of this item.

IS0059	Interpretation statement	Sale of long-term residential rental properties—GST implications
IS3229	Interpretation statement	Deductibility of sponsorship expenditure
BR0002	Guidelines for binding rulings applications	Guidelines for applicants for binding rulings, and their agents or advisers

Please see page 17 for details on how to obtain copies.

NEW LEGISLATION

DEEMED RATE OF RETURN FOR FOREIGN INVESTMENT FUND RULES

The annual deemed rate of return for the purposes for the foreign investment fund (FIF) rules has been set at 10.46% for the 2001–2002 income year.

The FIF rules tax the income earned by foreign entities on behalf of a New Zealand resident when the controlled foreign company rules do not apply.
The deemed rate of return is set annually and is one of the four methods for calculating FIF income or loss.

The rate of 10.46% will apply to all types of investments, including interests in superannuation schemes and life insurance policies.

The rate was set by Order in Council on 20 May 2002.

Income Tax (Deemed Rate of Return, 2001– 02) Income Year regulations 2002.

FRINGE BENEFIT TAX: PRESCRIBED RATE OF INTEREST ON LOW-INTEREST EMPLOYMENT-RELATED LOANS

The prescribed rate of interest used to calculate fringe benefit tax for low-interest, employment-related loans has increased from 6.7% to 7.5% for the quarter beginning 1 July 2002.

The new rate was approved by means of an Order in Council signed on 20 May 2002.

The rate is reviewed regularly to ensure it is in line with the Reserve Bank's survey of first mortgage interest rates. It was last changed with effect from the quarter beginning 1 January 2002.

Income Tax (Fringe Benefit Tax, Interest on Loans) Amendment Regulations (No 2) 2002.

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 2002

This determination may be cited as "The National Average Market Values of Specified Livestock Determination, 2002".

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 2001 – 2002 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 2001 – 2002 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	71.00
	Ram and wether hoggets	65.00
	Two-tooth ewes	99.00
	Mixed-age ewes (rising three-year and four-year old ewes)	86.00
	Rising five-year and older ewes	70.00
	Mixed-age wethers	54.00
	Breeding rams	150.00
Beef cattle	*Beef breeds and beef crosses:*	
	Rising one-year heifers	472.00
	Rising two-year heifers	734.00
	Mixed-age cows	916.00
	Rising one-year steers and bulls	601.00
	Rising two-year steers and bulls	852.00
	Rising three-year and older steers and bulls	1,036.00
	Breeding bulls	1,941.00
Dairy cattle	*Friesian and related breeds:*	
	Rising one-year heifer	546.00
	Rising two-year heifers	1,077.00
	Mixed-age cows	1,225.00
	Rising one-year steers and bulls	462.00
	Rising two-year steers and bulls	752.00
	Rising three-year and older steers and bulls	928.00
	Breeding bulls	1,288.00
	Jersey and other dairy cattle:	
	Rising one-year heifers	513.00
	Rising two-year heifers	1,027.00
	Mixed-age cows	1,174.00
	Rising one-year steers and bulls	310.00
	Rising two-year and older steers and bulls	533.00
	Breeding bulls	937.00

Type of Livestock	*Classes of Livestock*	*Average Market Value per Head*
		$
Deer	*Red deer:*	
	Rising one-year hinds	219.00
	Rising two-year hinds	380.00
	Mixed-age hinds	433.00
	Rising one-year stags	241.00
	Rising two-year and older stags (non-breeding)	422.00
	Breeding stags	1,438.00
	Wapiti, elk, and related crossbreeds:	
	Rising one-year hinds	241.00
	Rising two-year hinds	402.00
	Mixed-age hinds	455.00
	Rising one-year stags	269.00
	Rising two-year and older stags (non-breeding)	447.00
	Breeding stags	1,570.00
	Other breeds:	
	Rising one-year hinds	77.00
	Rising two-year hinds	127.00
	Mixed-age hinds	153.00
	Rising one-year stags	86.00
	Rising two-year and older stags (non-breeding)	155.00
	Breeding stags	362.00
Goats	*Angora and angora crosses (mohair producing):*	
	Rising one-year does	77.00
	Mixed-age does	80.00
	Rising one-year bucks (non-breeding)/wethers	33.00
	Bucks (non-breeding)/wethers over one year	36.00
	Breeding bucks	266.00
	Other fibre and meat producing goats (Cashmere or Cashgora producing):	
	Rising one-year does	55.00
	Mixed-age does	90.00
	Rising one-year bucks (non-breeding)/wethers	41.00
	Bucks (non-breeding)/wethers over one year	50.00
	Breeding bucks	212.00
	Milking (dairy) goats:	
	Rising one-year does	60.00
	Does over one year	129.00
	Breeding bucks	112.00
	Other dairy goats	25.00
Pigs	Breeding sows less than one year of age	275.00
	Breeding sows over one year of age	310.00
	Breeding boars	359.00
	Weaners less than 10 weeks of age (excluding sucklings)	57.00
	Growing pigs 10 to 17 weeks of age (porkers and baconers)	107.00
	Growing pigs over 17 weeks of age (baconers)	177.00

This determination is signed by me on the 20th day of May 2002.

Martin Smith
General Manager (Adjudication & Rulings)

PRINTS (INCLUDING LIMITED EDITION PRINTS), PAINTINGS, AND DRAWINGS DRAFT GENERAL DEPRECIATION DETERMINATION

Please quote reference: DDG00002

The Commissioner proposes to issue a General Depreciation Determination that will insert two new asset classes ("Prints (including limited edition prints)" and "Paintings and drawings") into the "Office equipment and furniture" asset category of General Depreciation Determination DEP1.

There is currently an asset class "Prints" in the industry category "Hotels, Motels, Restaurants, Cafes, Taverns and Takeaway Bars". The new asset class "Prints (including limited edition prints)" specifies a rate for such assets in the office environment.
The proposed depreciation rates are 18% DV and 12.5% SL, based on an estimated useful life of 10 years. These rates are the same as those currently provided for the general asset class "Prints" in the industry category "Hotels, Motels, Restaurants, Cafes, Taverns and Takeaway Bars".

The general asset class "Paintings and drawings" is a new introduction. The depreciation rates proposed are 9.5% DV and 6.5% SL, based on an estimated useful life of 20 years. The estimated useful life of 20 years was established on the basis of advice that the majority of property falling in this general asset class would be oil paintings. However it is acknowledged that this general asset class will encompass works (including painted or drawn reproductions) in a variety of media and on a variety of substrates.

The proposed general depreciation rates will apply only where the property in question is "depreciable property" for the purposes of the Income Tax Act 1994. In particular, it must be property that might reasonably be expected in normal circumstances to decline in value while used or available for use in deriving gross income or in carrying on a business for the purpose of deriving gross income. Artwork that is not reasonably expected to decline in value is not depreciable property.

EXPOSURE DRAFT—GENERAL DEPRECIATION DETERMINATION DEP[X]

This determination may be cited as "Determination DEP[x]: Tax Depreciation Rates General Determination Number [x]".

1. Application

This determination applies to taxpayers who own the asset classes listed in the table below.

This determination applies to "depreciable property" other than "excluded depreciable property" for the 2002/2003 and subsequent income years.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

- Inserting into the "Office equipment and furniture" asset category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Office equipment and furniture	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Prints (including limited edition prints)	10	18	12.5
Paintings and drawings	20	9.5	6.5

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

If you wish to make a submission on the proposed changes, please write to:

Manager Field Liaison & Communication
Adjudication & Rulings
Inland Revenue Department
National Office
PO Box 2198
WELLINGTON

We need to receive your submission by 31 July 2002 if we are to take it into account in finalising the determination.

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.

GST ON SERVICES PROVIDED TO INTERNATIONAL STUDENTS

Case: Auckland Institute of Studies v Commissioner

Decision date: 6 May 2002

Act: Goods and Services Tax Act 1985

Keywords: *GST payable on tuition fees. Apportionment, Timebar. sections 5(14), 8(1), 9, 10(18) 11(2)(d) and (e) GTSA 1985, section 108A TAA 1994*

Summary

The services provided by the taxpayer to its international students comprised a single supply of tuition services. No portion of the service could be apportioned as zero-rated. However, by using a "seriously arguable" test the Commissioner had applied the wrong legal test to his determination and that led him to hold an opinion which he might not otherwise have reached, so the decision needed to be reconsidered.

Facts

Auckland Institute of Studies ("AIS") is a private educational institute which is primarily engaged in providing tuition to overseas students. In 1993 it incorporated a wholly owned subsidiary, AIS International Limited ("International") to conduct the overseas activities of AIS.

The new structure sought to isolate services performed outside New Zealand. Such services were zero-rated for GST purposes. Previously AIS had been required to account for GST on the full amount of its tuition fees. There was an introduction of an "overseas assistance fee" charged by International to the students. The introduction of this fee was intended to cover services performed overseas which would be GST-exempt.

The "overseas assistance fee" was not separately charged to the student. Instead, a global fee was charged for "tuition, assistance with various pre-arrival matters and related services".

The Commissioner accepted that some of the services supplied by International to overseas students may be zero rated for GST purposes. The Commissioner acknowledged that certain pre-arrival services, ie, interpreting and translating services, assistance with formalities relating to immigration procedures and with travel to, and accommodation in, New Zealand, are arguably sufficiently separate from the provision of tuition in New Zealand to attract a zero-rating to that part of the fee charged to students for those services.

The Commissioner had difficulties in quantifying this part of the fee for overseas assistance but was prepared to agree to 10% of the overall fee to cover this service. The Commissioner was not prepared to accept that any other services provided by International, either by itself or through its agents, were part of that separate supply.

AIS did not accept the 10% concession and argued an all or nothing approach in the High Court.

Decision

First issue:

Hansen J reviewed the English and New Zealand authorities in this area and considered that the following were the key principles to be taken from them:

a. In determining whether a supply may be apportioned for GST purposes, it is necessary to examine the true and substantial nature of the consideration given to determine whether there is a sufficient distinction between the allegedly different parts to make it reasonable to sever them and apportion them accordingly.

b. The enquiry is to determine whether one element of the transaction (or consideration given) is a necessary or integral part of another or whether it is merely ancillary to or incidental to that other element.

c. A service will be ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of enjoying the principal service supplied.

Hansen J stated that he needed to examine the supply from the point of view of the consumer and not to focus on the arrangements between AIS and International as that focus fails to consider the true and substantial nature of the consideration given to the consumer.

The importance of examining the services provided under the contract between the supplier and the recipient emerges clearly from the decision of the CA in Wilson & Horton v Commissioner (1995) 17 NZTC 12,325.

The English VAT cases accord with this approach and His Honour found them not only applicable but also persuasive.

The entire focus is on what the customer sought and was given. Therefore, a distinction must be drawn between what is supplied to a consumer and the goods or services acquired for the purpose of providing that supply.

The marketing and promotional services provided by International are goods and services provided to enable it (or AIS) to better perform the services supplied to students. Students did not contract for the provision of those services. It may be argued that the students benefited from them but, as Richardson J pointed out in Wilson & Horton, that is not the test.

In regards to the services provided by International's agents, His Honour stated that the duties identified as provided overseas by the agents include services which, by their very nature, are not provided to the students. They include arranging advertising, organising promotional activities and organising and hosting visits by AIS staff. They are services provided to International for the purpose of promoting and marketing tuition services. They could not possibly be part of a separate supply to students.

The remaining services performed by the agents include many which, in His Honour's opinion, are ancillary or incidental to the provision of tuition services. All are for the purpose of facilitating the students undertaking a course of study which is, of course, the core business of AIS to provide.

His Honour went on to state that, notwithstanding the Commisioner's concession that pre-arrival services constitute a separate supply, he is of the view that all of the services provided by International/AIS to students overseas are an integral part of the supply of tuition services. His Honour would regard those services as not constituting an aim in itself but as a means of better enjoying the principal service.

The evidence of individual students is that they regard the payments they make to AIS as tuition fees. They are unaware that they are being supplied with, and paying for, the services of the agent. Evidence is also that any services provided by an agent which go beyond assistance with enrolment and arrangements for travel to, and accommodation in, New Zealand are separately paid for by the students.

His Honour held that the evidence of the students serves only to confirm what emerges from an analysis of the services themselves, ie the dominant element of the transaction between AIS and a student is the provision of a course of education that is the true and substantial nature of the consideration given for the payment.

His Honour also found that the expert evidence given by an economist called by AIS was consistent with this analysis. In this case what the student wanted was tuition in New Zealand. The pre-arrival services were necessary but incidental. The relevant perspective is that of the consumer.

His Honour therefore concluded that the services provided by AIS/International to students comprises a single supply of tuition services.

Value of Supply

Given the Commissioner's concession His Honour felt it necessary to offer some comment in regards to attributing a value to the supply of the conceded "zero-rated supplies".

His Honour stated that where possible he could see no reason why values should not initially be assessed on the basis of the actual cost of providing the separate supply plus a reasonable allowance for profit. However, ultimately the appropriate value for a separate supply would have to be tested against the market.

For the purposes of this case, Counsel for the Commissioner's submission was accepted that the value of a separate supply could not exceed the sum which a hypothetical consumer was prepared to pay.

As His Honour was not provided with any information which would enable him to depart from the Commissioner's assessment that pre-arrival services should be valued at 10% of the first year's tuition fees, the principle in Buckly and Young Limited v Commissioner was applied and the 10% value was accepted.

Second issue – time of supply

At which point in time does liability arise to account for GST on tuition fees?

Pursuant to section 236A of the Education Act 1989, a teaching institute must hold fees in trust until a student has attended a course for more than seven days, except for a non-refundable sum which is the lesser of $500 or 10%.

AIS has been accounting for GST on the non-refundable portion on receipt but has not accounted for GST on the balance until it becomes entitled to payment in terms of the statute.

The Commissioner argued that section 9(1) deems a supply to take place when the student pays. Even though the AIS is entitled to receive only the lesser of $500 or 10% of the fees at the time of receipt, payment triggers liability for the full amount.

His Honour went through an analysis of Commissioner v Dormer (1997) 18 NZTC 13,446, L67 (1989) 11 NZTC 1,391 and N24 (1991) 13 NZTC 3,199 and stated that he agreed with them all.

His Honour held that when a student pays tuition fees AIS has an immediate right to receive the lesser of 10% or $500 therefore it is in the same position as the vendors in Case L67 and Case N24. It has received a payment in respect of a supply of services therefore section 9(1) applies. The supply of those services is deemed to take place on receipt of the payment. Their full value is therefore liable for GST at that time.

There was also a preliminary ground of opposition where the Commissioner claimed that AIS were barred from challenging the time of supply adjustment because AIS had not specifically rejected the adjustment in its Notice of Response – section 89(H)(1) of the Tax Administration Act 1994. His Honour held that he could not accept the Commissioner's claim in this regard. He held that it was true that the response from AIS does not expressly reject the Commissioner's position but the limited terms of the concession leaves room for no other implication.

Third issue – reopening the GST period

The narrow issue was whether the Commissioner had applied the right test in seeking to reopen the time bar pursuant to section 108A(3) of the TAA to enable GST to be reassessed for the periods ending 28 February 1994 to 31 October 1996 on the basis that the plaintiff by omitting to include zero-rated supplies in its returns for those periods knowingly failed to make full and true disclosure of all material facts necessary to determine the amount of GST payable in those periods.

His Honour went through the few authorities in this area and stated he had taken the following principles from those authorities:

1. The critical issue is whether the Commissioner was honestly of the opinion that the plaintiff knowingly failed to make full and true disclosure of all material facts.

2. The onus of proving that the opinion was not honestly held is on the plaintiff.

3. In order to successfully challenge the decision of the Commissioner to assess or reassess outside the four-year period the plaintiff must show:

   (i) The Commissioner did not honestly hold the opinion.

   (ii) The Commissioner misdirected himself as to the legal basis on which the opinion was to be formed.

   (iii) The opinion was one which was not reasonably open to the Commissioner on the information available to him.

His Honour held that by using a "seriously arguable" test the Commissioner had applied the wrong legal test to his determination and that led him to hold an opinion which he might not otherwise have reached. As a result the decision cannot stand.

This finding made it unnecessary for His Honour to consider in detail whether the opinion was one which it was reasonably open to the Commissioner to hold. His Honour did however, state that he did consider that there was a sufficient factual basis for the Commissioner to form an honest opinion that the plaintiff had knowingly failed to make disclosure.

His Honour couldn't however, be satisfied that the Commissioner would have formed that opinion if "he had not introduced the irrelevant and potentially misleading concept of seriously arguable". Therefore the appropriate course was for His Honour to set aside that decision and remit the question back to the Commissioner for reconsideration.

GST REFUND PAYABLE TO STRUCK-OFF COMPANY

Case: TA 96/58

Decision date: 15 May 2002

Act: Goods and Services Tax Act 1985

Keywords: *GST refund, Companies Act, Company struck off*

Summary

The Authority directed that the small GST refund which the Commissioner had conceded as owing to the objector company be paid, notwithstanding that the objector had not been restored to the register of companies.

Facts

This case related to a GST refund of $573.46.

The objector company was struck off the Companies Register on 13 February 1991. However, the objector continued to file GST returns. By letter of 25 March 1994 the Commissioner wrote to the objector saying that all figures on the GST returns filed after the date of the objector being struck off would be reassessed to zero, as there was no legal entity capable of conducting a taxable activity. It was also noted that there was no entity capable of objecting to the reassessment.

Justice Potter conditionally restored the objector to the Companies Register on 2 March 1998. However, as the conditions were never met the objector remained struck off.

On 21 January 2000, Judge Barber allowed the objection relating to the $573.46 by consent (the Commissioner having conceded the case).
However, the Commissioner refused to refund the sum until the objector was restored to the Register.

The objector argued that as the Commissioner had conceded the case and consented to an order allowing the objection, the Commissioner should give effect to that order by reassessing the objector to show a refund of $573.46 in respect of the GST period ended 31 August 1992.

The Commissioner argued that he was not required to (and indeed could not) pay the refund until the objector was restored to the Register.
The Commissioner argued that the matter could be resolved immediately by ex-directors paying outstanding filing fees to the Companies office.

In submissions, the Commissioner argued:

> " The Commissioner has agreed in principle to allow the company its refund of $573.46 and has accordingly consented to an order allowing the objection.
>
> The Commissioner stands ready and willing to issue an assessment on restoration of the company to the Register…"

The Commissioner submitted that the orders made by the Authority on 21 January 2000 were made in relation to a taxpayer that had no legal existence.
The Commissioner submitted that the Authority recall the judgment of 21 January 2000 and vary it as the Commissioner could not, as a matter of law, comply with the order until the objector was restored.
The Commissioner did concede, however, that he had dealt with struck off taxpayers on previous occasions.

The objector submitted that the Commissioner's arguments were simply manoeuvring to avoid paying the small refund that he had agreed to in January 2000.

Decision

Judge Barber took a pragmatic approach. His Honour concluded that the Commissioner's attitude had been unhelpful in this case. His Honour stated:

> "The short point is that on 21 January [2000], I allowed the objector's objection by consent. I expected that to lead to a reassessment, but certainly, in any event, to a refund cheque of $573.46 being promptly paid to the objector or to [a director]. It is disturbing that this had not happened…"

Judge Barber agreed that the Commissioner was probably correct in his submission that he could not issue a reassessment to a company which remains struck off but ordered a refund to be issued in terms of sections 6 and 6A of the Tax Administration Act 1994. His Honour noted:

> " I do not know why the Commissioner consented to my order of 21 January 2000 allowing the objection if he (i.e. someone among his staff) did not intend to make the said refund of $573.46. Frankly, this Authority has got better things to do with its time than waste it on such a petty dispute."

Judge Barber ordered the Commissioner to dispatch a cheque for $573.46 to dispose of the matter.

Judge Barber criticised the Commissioner for his actions in this case. His Honour noted that the case had put the State to the expense of many thousands of dollars, many times greater than the tax in dispute.
His Honour also noted that it was not pointed out to him that there was any issue of precedent in the case.

GST PAYABLE TO MORTGAGEE AHEAD OF COMMISSIONER

Case: Edgewater Motel LTD & Ors v Commissioner

Decision date: 28 May 2002

Act: Goods and Services Tax Act 1985

Keywords: *Debt and GST priority, Mortgagee sale. sections 17 and 27(1) and (6) GSTA 1985, section 104 Land Transfer Act 1952.*

Summary

On sale by the first mortgagee of land of a mortgagor registered under the GSTA 1985, the second mortgagee was entitled to payment of its debt and expenses ahead of the GST owing to the Commissioner.

Facts:

The plaintiffs ("Edgewater") were collectively second mortgagees of a property known as Westwood Meadows ("Westwood"). The first mortgagee ("Belman") sold the property in satisfaction of debts owed by Westwood. Following the sale, Belman paid out of the proceeds the GST of $117,000 to the Commissioner along with form GST 121; "Return for Goods Sold in Satisfaction of Debt". The form was endorsed in handwriting in two places: "Payment made under protest". Having paid the GST, Belman retained the balance of the proceeds which was $12,000 short of the priority to which it was entitled. No part of the proceeds was left to pay Edgewater. At no material time was Westwood in liquidation or receivership.

Edgewater wrote to the Commissioner claiming an immediate refund of the $117,000 paid by Belman. The Commissioner replied that he considered the GST properly payable by Belman and that no issue of priority arose as there was a clear liability on the part of a mortgagee selling in satisfaction of a debt (sections 5, 17 GST Act). Edgewater issued a Notice of Proposed Adjustment ("NOPA") which the Commissioner denied they had a right to do. He replied with a comprehensive rebuttal of the argument and rejected Edgewater's entitlement to invoke the disputes provisions of the Tax Administration Act 1994 ("TAA"). He added that, if he was wrong in holding such a view, that the contents of his letter was to be treated as a Notice of Response ("NOR").

Considerable detailed correspondence ensued wherein Edgewater pressed the Commissioner for a decision as to the priority he considered applied to the GST paid by Belman. The Commissioner refused to be drawn further into the argument having already provided a comprehensive reply and also disputed Edgewater's standing under the GST Act in what was a matter between himself and Belman.

Another NOPA followed reiterating Edgewater's arguments. The Commissioner simply referred them to his previous responses and stated that the appropriate means of challenging the matter was by way of judicial review. Edgewater then claimed that this was not a proper response to their purported NOPA and claimed a deemed acceptance by the Commissioner of their adjustment. The Commissioner bluntly rejected this logic, referred to previous correspondence and repeated his opinion that any claim Edgewater may have should be pursued outside the disputes resolution process.

Thereupon Edgewater commenced proceedings seeking summary judgment for the sum paid to the Commissioner by Belman. The Commissioner opposed the application and sought orders striking out Edgewater's claim.

Decision:

The priority issue

The plaintiffs argued that section 104 of the Land Transfer Act 1952 ("LTA") overrides the plain words of section 17 GST Act. The former states:

> **104 Application of purchase money**
>
> (1) The purchase money to arise from the sale by the mortgagee of any mortgaged land, estate, or interest shall be applied-
>
> (a) Firstly, in payment of the expenses occasioned by the sale:
>
> (b) Secondly, in payment of the money then due or owing to the mortgagee:
>
> (c) Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in the order of their priority:
>
> (d) Fourthly, the surplus (if any) shall be paid to the mortgagor.

Whereas the GST Act, having deemed by section 5(2), any such seller to be supplying goods in the course or furtherance of the mortgagor's taxable activity, states at section 17(1)(b) that the seller must "pay to the Commissioner the amount of tax charged on that supply".

Baragwanath J noted that in order to reach such a conclusion as urged by the plaintiff one must construe the plain words of section 17 in a strained manner. His Honour canvassed case law and commentaries which sanctioned such an approach and noted in his decision that:

> " while the text is central, it is necessary to discern the purpose of the statute in order to include not only "the indications provided in the enactment" but others that lie beyond it.
> …
> " The relevant context necessarily includes the expression of Parliament's will in other legislation – here section 104"

His Honour noted that the GST Act itself subordinates the collection of GST to secured charges in the event of liquidation (section 42(2)) and the plaintiff argued that it was absurd to claim that a mortgagee sale should be treated differently notwithstanding the GST Act's silence on the matter. The Commissioner submitted that such silence was prescriptive and no restrictive reading was required as GST ought to be considered a consequence of doing business while a taxable activity continues, as in the present case.

His Honour was disinclined to adopt such reasoning and preferred to leave the conventional interpretation of section 104 undisturbed. In so doing he held:

- section 5(2) and section 17(1) of the GST Act are to be read in the same way as section 42(2)(b) and (ba) of the GST Act, and section 104 PLA, which accord priority to mortgagees.
- The mortgagee is liable to the Commissioner for GST to the extent of any surplus on sale, thereafter the Commissioner must seek the balance from the mortgagor.
- The Commissioner has the option under section 27(1) GST Act to pursue either the person deemed to supply or any person required to furnish any return.
- section 17 is essentially a machinery provision "giving effect to the general policy of section 104 and the GST Act".
- such a construction however, must be taken to amend section 104 in part by imposing an obligation on the mortgagor to account for GST after discharging all mortgages.
- the above conclusion requires a strained interpretation of the GST Act which should be redrafted with "language that deals clearly and simply with the various contingencies".
- The fact that the payment was made by Belman "under protest" made it difficult to advance a defence to a restitutionary claim.

The Commissioner's application to strike out the claim was dismissed. His Honour held that the sum in dispute was paid in error and the plaintiffs are entitled to summary judgment with interest and costs.

The Part IV A, TAA Issue

His Honour simply disposed of this matter by agreeing with the Commissioner's submissions that the relevant taxpayer in this matter was Westwood and that the appropriate avenue for Edgewater to follow was judicial review rather than challenge.

The Commissioner has filed an appeal of this decision.

REGULAR FEATURES

DUE DATES REMINDER

JUNE 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

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

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

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

FBT return and payment due

31 GST return and payment due

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

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

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		Comment deadline
☐	*Draft interpretation statement* IS0059: Sale of long-term residential rental properties—GST implications	31 July 2002
☐	*Draft interpretation statement* IS3229: Deductibility of sponsorship expenditure	31 July 2002
☐	*Guidelines for binding rulings applications* BR0002: Guidelines for applicants for binding rulings, and their agents/advisers	31 July 2002

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