

# TAX INFORMATION BULLETIN

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## GET YOUR TIB SOONER ON THE INTERNET

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This *Tax Information Bulletin* is also available on the internet in PDF. Our website is at **[www.ird.govt.nz](http://www.ird.govt.nz)**

It has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

If you prefer to get the *TIB* from our website and no longer need a paper copy, please let us know so we can take you off our mailing list. You can do this by completing the form at the back of this *TIB*, or by emailing us at **[IRDTIB@datamail.co.nz](mailto:IRDTIB@datamail.co.nz)** with your name and details.

## THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

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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/comment this month, having a deadline of 30 September 2004.

<b>Ref.</b>	<b>Draft type</b>	<b>Description</b>
QB0028	Question we've been asked	Residential investment property or properties in Australia owned by New Zealand resident—NRWT treatment of interest paid to Australian financial institution
XPB0015	Public ruling	Bad debts—writing off debts as bad for GST and income tax purposes

Please see page 50 for details on how to obtain a copy.

## BINDING RULINGS

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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 from our website at [www.ird.govt.nz](http://www.ird.govt.nz)

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### PRODUCT RULING – BR PRD 04/07

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

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

This ruling has been applied for by Tortis-International Fund.

#### 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(1)(c).

#### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of a unit trust known as Tortis-International Fund (“Tortis-INTL” or the “Fund” or the “Trust”) pursuant to a Deed of Trust dated 16 December 1996 and amended on 18 February 1997, 31 July 2000, 16 August 2001 and 12 July 2002 (the “Trust Deed”), and the Prospectus for the Fund dated 11 September 2003 (the “Prospectus”).

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

1. The Fund invests in the securities of those companies that make up the TOWER Global Index (the “Global Index” or the “Index”). The Global Index is a customised version of the Morgan Stanley Capital International World Index (the “MSCI World Index”). The Fund has been designed to provide investors with comprehensive coverage of global equities.
2. Tortis-INTL is a unit trust in terms of the Unit Trusts Act 1960 and meets the definition of a “unit trust” contained in section OB 1.

3. Tortis-INTL is a New Zealand tax resident. The trustee of Tortis-INTL is the Public Trustee (the “Trustee”). The manager of Tortis-INTL is TOWER Managed Funds Investments Limited (previously known under the name “TOWER Trust Services Limited”) (the “Manager”). The investment manager of the Fund is State Street Global Advisors, Australia Limited (the “Investment Manager” or “State Street”).
4. The investment policy of the Fund is set out in clause 82.1 of the Trust Deed. It states:
  82. The investment policy of the Trust shall be:
    - 82.1 to only invest the Fund (other than the Cash Pool and Unmarketable Accumulations) in Index Shares in a manner that replicates the Adjusted MSCI and to only enter into transactions that are necessary to give effect to that policy;
    - 82.2 to invest the Cash Pool in deposits with banks registered under the Reserve Bank Act 1989 or other debt obligations or in the TOWER FirstRate Account upon terms that will allow the Manager to pay the anticipated Liabilities of the Fund and to manage the redemption of Units and the liquidity of the Trust;
    - 82.3 to invest Unmarketable Accumulations in Derivatives until the total value of investment in Derivatives reaches a Marketable Amount whereupon the Derivatives will be realised and the proceeds invested in accordance with clause 82.1 or 82.2; and
    - 82.4 to not take any action to hedge or manage foreign exchange risks or exposures that arise from the Investments being held in non New Zealand currencies.
5. The investment objectives of the Fund are as follows:
  - To track the adjusted MSCI Index, called the TOWER Global Index, to provide broad international coverage of approximately 1,000 companies;
  - The Global Index includes only “grey listed” countries to New Zealand, so that double taxation issues do not occur. These include companies resident in the United States, United Kingdom, Germany, Canada, Japan, and Australia. These

companies provide coverage of 80% of all international companies contained within the total MSCI Index;

- The Investment Manager cannot diversify investments of the Fund, or take prudent steps in respect of the mix of the Fund's investments.
6. The Trust Deed states that:
- It is not the Fund or the Trustee's intention to profit from holding, acquiring or selling constituent company securities.
7. Tortis-INTL is an open fund and new investors are able to subscribe for units from time to time. The beneficial interest in Tortis-INTL is divided into units. Each unit confers an equal interest in Tortis-INTL (other than a fractional unit which will confer a proportionate interest) but does not confer any interest in any particular part of the fund or any particular investment of the fund.
8. Tortis-INTL has confirmed that all aspects of the previous rulings (BR Prv 96/135, BR Prv 96/136, and BR Prv 01/15), relating to the Fund, have been complied with. There has been no change to the Trust Deed of the Fund (except for the changes noted above), nor any change to the management or operation of the Fund since its establishment.

### The MSCI World Index

9. The TOWER Global Index is a customised version of the MSCI World Index.
10. The tracking of the Global Index is undertaken by the Investment Manager.
11. The document *MSCI Methodology Book: MSCI Standard Index Series Methodology* dated and effective from 29 April 2003 ("the Methodology Book") states the objective of MSCI, with respect to its Equity Index Series, as being the construction of global benchmark indices which serve as a gauge for measuring performance of a market and investment strategy, effective research tools for purposes such as strategic asset allocation, and as the basis for investment vehicles designed to replicate the performance of a market or to implement and manage an investment policy. MSCI consistently applies its equity index construction and maintenance methodology across regions and developed and emerging markets, making it possible to aggregate individual country and industry indices to create meaningful regional and composite benchmark indices.
12. The MSCI Standard Index Series adjusts the market capitalisation of index constituents for free float and targets for index inclusion 85% of free float-adjusted market capitalisation in each industry group, in each country. Currently, MSCI calculates the Standard Index Series for 50 countries globally in the developed and the emerging markets.

13. As of December 2003, the MSCI World Index comprises the 23 developed market country indices.
14. The Methodology Book describes MSCI's index construction objective (see paragraph 11 above), guiding principles, and the methodology for the Standard Index Series.

### Guiding principles

15. MSCI adheres to the following principles in the design and implementation of its index construction and maintenance methodology:
- broad and fair representation of the total underlying market
  - investability and replicability
  - consistent application of the methodology across all markets
  - continuity and relatively low turnover while reflecting the evolution of the markets in a timely fashion
  - disciplined approach: principles, rules and guidelines to ensure all decisions MSCI makes are consistent with a benchmark index
  - transparency
  - independence and objectivity.

### Index construction process

16. The index construction process involves:
- defining the equity universe—about 99% of the world's total equity market capitalisation is included
  - adjusting the total market capitalisation of securities in the universe for free float available to foreign investors
  - classifying the universe of securities under the Global Industry Classification Standard
  - selecting securities for inclusion according to MSCI's index construction rules and guidelines.

### Index constituent eligibility rules and guidelines

17. MSCI targets an 85% free float-adjusted market representation level within each industry group, within each country. The security selection process within each industry group is based on the careful analysis of:
- Each company's business activities and the diversification that its securities would bring to the index.
  - The size (based on free float-adjusted market capitalisation) and liquidity of securities. All other things being equal, MSCI targets for inclusion the most sizeable and liquid

securities in an industry group. In addition, securities that do not meet the minimum size guidelines and/or securities with inadequate liquidity are not considered for inclusion.

- The estimated free float for the company and its individual share classes. Only securities of companies with an estimated overall and/or security free float greater than 15% are, in general, considered for inclusion. The only exception is where not including a security of a large company would compromise the index's ability to fully and fairly represent the characteristics of the underlying market.

18. Differences in the structure of industries, and other considerations, may lead to over- or under-representation in certain industries. In these cases, the indices are constructed with a view to minimising the divergence between the industry group representation achieved in the index and the 85% representation guideline.

#### **Maintaining the MSCI Standard Index Series**

19. The MSCI Standard Index Series is maintained with the objective of reflecting, on a timely basis, the evolution of the underlying equity markets. Emphasis is also placed on continuity, replicability and on minimising turnover in the indices. Overall, index maintenance can be described by three broad categories of implementation of changes:

- Annual full country index reviews that systematically reassess the various dimensions of the equity universe for all countries and are conducted on a fixed annual timetable.
- Quarterly index reviews, aimed at promptly reflecting other significant market events.
- Ongoing event-related changes, such as mergers and acquisitions, which are generally implemented in the indices rapidly as they occur.

Potential changes in the status of countries (stand-alone, emerging, developed) follow their own separate timetables. These changes are normally implemented in one or more phases at the regular annual full country index review and quarterly index review dates.

In this Ruling, index maintenance is referred to as Structural Change (quarterly and annual review changes) and Market Driven Change (ongoing event-related changes).

#### **The Adjusted MSCI World Index: the TOWER Global Index**

20. The Global Index is a customised version of the MSCI World Index. The Global Index replicates the

MSCI World Index, with one qualification: it only contains grey list countries, which comprise at least 2% of the MSCI World Index. The Global Index does not alter the MSCI World Index in any other way.

21. If any of the countries included in the Global Index leave the grey list then securities held in companies resident in that country will be immediately divested. If any company in which Tortis-INTL holds securities ceases to be resident in a grey list country, then securities held in that company will be immediately divested.

#### **Trust Deed and Prospectus**

##### **Two classes of units**

22. The Fund offers two classes of units: Class A and Class B. Class A units are standard retail units. Class B units are issued on exactly the same terms as Class A units, however holders of Class B units, due to the size of their investment, are able to negotiate reduced management and trustee fees.

##### **Date of Adjustments**

23. The Fund is rebalanced in the following circumstances:
- if any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund, and
  - due to the Structural Changes in the MSCI, currently quarterly, and
  - if there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.
24. Such rebalancing will occur as soon as possible after the above events have occurred and in any event within two business days.

##### **Rights Issues**

25. The Global Index may be adjusted from time to time because of rights issues.
26. In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.

**Mergers, Takeovers and Share Buy-backs**

- 27. The Global Index may be adjusted from time to time because of mergers, takeovers or share buy-backs.
- 28. With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted. The Fund will not accept an offer unless, as a consequence of not accepting the offer, the Fund would track the Index less accurately than if it had accepted the offer.
- 29. The Manager will not elect to participate in a share buy-back scheme of a Index Company.

**Cash investments held by the Fund**

- 30. Although it is not an objective of the Fund to hold cash, the Manager and the Investment Manager (on behalf of the Fund) may hold cash to facilitate the easier administration of the Fund. The cash held by the Manager and the Investment Manager is on “call”. Wherever possible, the Manager will enter into futures contracts to cover the cash held by the Fund. This is known as “equitised cash”.
- 31. The Investment Manager (on behalf of the Fund) will hold cash in the following circumstances:
  - following the sale of securities in the course of tracking the Index, 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 Manager on behalf of a unit holder
  - 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 Index, which is presently \$US3 million (“the minimum investment level”).
- 32. 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 working days preceding a MSCI structural change;
  - for up to 3 working days after a MSCI structural change; or
  - for up to 10 working days prior to a pending withdrawal in respect of which it has received a withdrawal request.

- 33. In addition to any funds held by the Investment Manager, the Manager may hold cash. The amount of cash held by the Manager will not be greater than what strictly arises out of the circumstances described below, and in any event will not exceed 2% of the total assets of the Fund. Those circumstances are:
  - following a contribution to the Fund, pending the investment of that contribution
  - following the sale of securities to meet a request to redeem units in cash, and
  - to fund the expenses, fees and taxation for the Fund.
- 34. The 2% threshold of cash held by the Manager may be exceeded in the following circumstances:
  - for up to one business day if there is rapid inflow to the Fund, or the Fund has notice of a substantial pending withdrawal
  - for up to one calendar month if the Manager receives a formal notice of a forthcoming obligation of subsequent performance (ie, payment due on partly paid shares) affecting the constituent securities in the Index, or
  - for up to one calendar month if the Manager is aware of a forthcoming distribution to unit holders at the scheduled date of distribution.
- 35. However, in any event, if the 2% threshold of cash held by the Manager is exceeded, the Fund will take immediate action to remedy the situation within the shortest practicable time.
- 36. At all times, there is a limit on the total cash (including cash held by the Manager and free and equitised cash held by the Investment Manager) which is the greater of 5% of the total value of the Fund and the sum of 2% of the total value of the Fund and the minimum investment level (except if there is a significant withdrawal or investment).
- 37. The Investment Manager will use best endeavours to equitise all cash, subject to futures contract size constraints.
- 38. The following futures contracts are currently used:

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

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

#### Hedging

40. The Fund does not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.

#### Foreign currencies

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

#### Borrowing

42. The Fund may only borrow in the following circumstances:
- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days.
  - Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary.
  - To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary, or
  - for advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.

#### Events that trigger acquisitions or realisations

43. The Fund will only sell or otherwise dispose of securities in the following circumstances:
- If the Fund is voluntarily or involuntarily wound up.
  - If there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when

the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking.

- Funding redemptions to the extent that these cannot be met out of cash held by the Fund.
- Transferring securities to a unit holder if the unit holder redeems units for securities.
- If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

#### Issue and redemption of units

44. Investors wishing to subscribe for units may do so for cash or, alternatively, above a certain prescribed level, investors may subscribe for units by transferring to Tortis-INTL an appropriately weighted basket of securities, and will receive units in Tortis-INTL in exchange.
45. When a unit holder wishes to dispose of an investment in the Fund, the unit holder is able to elect that the units be either redeemed by the Trustee, or repurchased by the Manager.

Notwithstanding any provision in the Prospectus or the Deed of Trust, it is the invariable practice of the Fund that where such an election is made by the unit holder, the units will be either redeemed by the Trustee, or repurchased by the Manager, in strict accordance with that election.

In the absence of an election by the unit holder, the units will in all instances be repurchased by the Manager.

Where units are repurchased by the Manager, the price paid to the unit holder by the Manager will be the same amount as would be received by the unit holder if the unit holder had elected the direct redemption method. In all instances where units are repurchased by the Manager, whether pursuant to an election by a unit holder or not, the Manager will redeem those units with the Trustee for the same price as paid to the unit holder.

46. A unit holder may redeem units subject to the conditions in Article C of the Trust Deed. Article C gives the Manager a discretion to refuse to redeem units where the amount to be redeemed is less than the minimum number acceptable by the Manager at that time. Currently the Manager has set a minimum withdrawal at \$500.
47. Unit prices may be published in newspapers. Tortis-INTL has an internet site which will be used principally to publish prices at which the Manager will repurchase or redeem units, and as a means for transferring units only by purchase from the Manager, and redemption or repurchase by the Manager.



### Same day unit redemption policy

48. When units are repurchased, the Manager is required to pay the aggregate value of the units to the investor within 21 business days of the relevant time (as described in the Trust Deed). However, when possible the Fund operates a same day unit redemption policy. The Fund will endeavour to redeem the units requested by any unit holder and redeem and pay for those units on the same day as the unit holder's request is made.
49. If the Fund has insufficient cash in the cash pool, the Fund will always in the first instance attempt to borrow (on suitable commercial terms) sufficient funds in order to meet the redemption request. In situations where the Fund is not able to borrow such sufficient funds, the Fund may suspend the withdrawal of units in the Fund. The only exception to the Fund always attempting to borrow in the first instance where a redemption request is made and there is insufficient cash in the cash pool, is where a redemption request is made by a unit holder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unit holders. In such a case the Fund will always suspend the withdrawal of units.

### Suspension of issuing and redeeming units

50. A suspension from issuing or redeeming units (including any deferral notice with regard to Class B units) may be necessary in exceptional circumstances, being the following situations:
- (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed
  - (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed
  - (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests, or
  - (4) where there is insufficient cash in the cash pool and a redemption request is made by a unit holder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unit holders, or
  - (5) in the case of any deferral notice in respect of Class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund's obligations to Class A unit holders.

Where suspension occurs because of termination of the Fund, the suspension will be for a maximum of three months of the giving of the notice to terminate by the Manager.

In other circumstances, if a suspension from issuing or redeeming units occurs, the period of suspension will not exceed three business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund's obligations to Class A unit holders.

The Fund has suspended the issuing and redeeming of units only once, for three days after the World Trade Center was destroyed, as the US market was closed and so valuations were not available.

## Conditions stipulated by the Commissioner

This Ruling is subject to the following conditions.

- (a) The predetermined rules used by the Investment Manager to ascertain the Global Index constituents, and the predetermined rules used by MSCI to calculate the MSCI World Index, will not be made with or influenced by any intention of seeking higher rates of return or capital growth.
- (b) No material changes will be made to the way in which the Global Index tracks the MSCI World Index.
- (c) No material changes will be made to the way in which MSCI constructs and maintains the MSCI World Index.
- (d) The proportion of Tortis-INTL's assets to be held as cash (including all "free" cash and "equitised" cash) will not exceed what is strictly necessary in order to fulfil the purposes stated in paragraph 30 of this ruling, and will not in any event exceed the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level.

This condition will not be regarded as being breached if, pending investment of contributions or disbursement of withdrawal proceeds, the Fund is forced to hold cash in excess of the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level. The Fund will immediately invest or disburse such cash, except where immediate investment to track the Index is not possible due to the

unavailability of appropriate equities, in which case the excess cash may be held for only so long as is strictly necessary and in any event no longer than two business days.

- (e) When the cash held by the Investment Manager reaches the minimum investment level (presently \$US3 million), it will be immediately applied to track the Index.
- (f) The Investment Manager will rebalance the Fund in the following circumstances:
  - i. if any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund, and
  - ii. due to Structural Changes in the MSCI, currently quarterly, and
  - iii. if there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.

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

- (g) When rebalancing the Fund the Investment Manager will use their best endeavours to track the Index as exactly as possible. Any rebalancing of the Fund that does not achieve an exact match of the Index will only occur where it is not possible to obtain or sell the securities necessary to exactly replicate the Index. In any case the tracking deviation will not exceed 1% of the value of the Fund.
- (h) In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.
- (i) With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted (but in any event within two business days). The Fund will not accept an offer unless as a consequence of not accepting the offer the Fund would track the Index less accurately than if it had accepted the offer.

- (j) The Fund Manager will not elect to participate in a share buy-back scheme of any Index Company.
- (k) When the Fund is given the option of re-investing its dividends into any Index Company, the Fund invariably accepts the cash dividend.
- (l) The Fund can only borrow in the following circumstances:
  - i. to temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days
  - ii. where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary
  - iii. to temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary, or
  - iv. for advances (not to exceed total borrowings of \$5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.
- (m) The Fund will not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.
- (n) The Fund will only sell or otherwise dispose of securities in the following circumstances:
  - i. if the Fund is voluntarily or involuntarily wound up
  - ii. if there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking
  - iii. funding redemptions to the extent that these cannot be met out of cash held by the Fund
  - iv. transferring securities to a unit holder if the unit holder redeems units for securities
  - v. if there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

- (o) The Fund will not be wound up with a view to enhancing the performance of the Fund or to minimise losses of the Fund in any way. This condition will not be breached if:
- i. the Manager decides to wind up the Fund for reasons unrelated to the performance of the investments of the Fund, or
  - ii. if the unit holders independently resolve to wind up the Fund.
- (p) This Ruling shall cease to apply if at any time:
- i. there is a unit holder, or two or more unit holders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund, and
  - ii. if that unit holder, or one or more of such unit holders, ordinarily hold securities on revenue account or the disposal of securities by that unit holder, or one or more of such unit holders, would ordinarily give rise to gross income for income tax purposes.
- For the purposes of this condition unit holders are associated with each other if they are “associated persons” within the meaning of section OD 7 or OD 8(3).
- (q) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.
- (r) Apart from the Trust Deed and the Prospectus of the Fund that have been supplied to Inland Revenue as part of the application for this Ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unit holder (or any person associated with or acting on behalf of any unit holder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.
- This condition shall not be regarded as breached by virtue only of:
- i. the fact that a unit holder has the ability to invest, or withdraw at any time, and/or
  - ii. the entry into of any agreement, arrangement or understanding contemplated by the Trust Deed for the purpose of enabling investment or withdrawal, and/or
  - iii. the appointment by the Trustee of the Manager, and/or
  - iv. any agreement, arrangement or understanding entered into by the Trustee in a capacity other than as trustee of the Fund, or the Manager in a capacity other than as manager of the Fund,
- in the ordinary course of the Trustee or the Manager conducting an independent investment advisory or investment portfolio management business.
- (s) The Fund will not exercise any voting rights associated with the holding of Index Company securities.
- (t) If the Fund is resettled this Ruling shall not apply from the date of resettlement.
- The Fund will not be resettled in order to enhance the performance of the Fund or to minimise losses of the Fund in any way.
- (u) The Fund will not be involved in any securities lending.
- (v) The Fund will not utilise the power to suspend the issuing or redeeming of units (including any deferral notice with regard to Class B units) except in exceptional circumstances, being the following situations:
- i. if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed
  - ii. if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed
  - iii. where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests
  - iv. where there is insufficient cash in the cash pool and a redemption request is made by a unit holder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unit holders, or
  - v. in the case of any deferral notice in respect of Class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund’s obligations to Class A unit holders.
- Where suspension occurs because of termination of the Fund, the suspension will be for a maximum of three months of the giving of the notice to terminate by the Manager.
- In other circumstances, if a suspension from issuing or redeeming units occurs, the period of suspension will not exceed three business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or

the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund's obligations to Class A unit holders.

- (w) The Manager will not redeem units as a means of correcting tracking errors.
- (x) The Trustee will not exercise its power under clause 87.7 of the Trust Deed to promote or carry on any scheme or undertaking in any country upon such terms and conditions as the Trustee deems fit.
- (y) The Fund will not invest in derivatives, with the exception of futures contracts entered into for the purposes of tracking the Index and spot foreign exchange contracts (which have a settlement period of no longer than two business days) to acquire or dispose of the necessary foreign currency so as to purchase or dispose of Index securities.
- (z) The Manager has the power to purchase units from unit holders when unit holders wish to redeem their units. The Manager will always use this power when the unit holder specifically requests that the Manager purchase the units and in any instance where the unit holder does not specifically request that the Trustee redeem the units. The Manager will not purchase units from any unit holder, where to do so would be inconsistent with the unit holder's election to redeem their units with the Trustee. The Manager will not use this power to enhance the profit of the Fund.
- (aa) The Global Index will only include countries that are listed in Schedule 3, Part A.
- (bb) The foreign companies included in the Global Index are resident and liable for tax in a country listed in Schedule 3, Part A.
- (cc) For the purposes of section CG 15(2)(b)(iii), in the case of an interest, in relation to a foreign entity, of a kind specified in section CG 15(1)(a), the foreign entity is not a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.
- (dd) The Fund will not acquire or hold any income interest or any control interest in any company that is a "controlled foreign company" under section CG 4.
- (ee) There is no arrangement between the Trustee and any unit holders to effect the redemption of units in substitution for dividends.
- (ff) Any cancellation of units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).

- (gg) The Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- (hh) The Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- (ii) All distributions received by the Fund will be paid out to investors net of any expenses incurred by the Fund.
- (jj) In relation to amounts paid as consideration for a cancellation upon liquidation, the recipient will not be a person that is related to Tortis-INTL within the meaning of section CF 3(12).

## How the Taxation Laws apply to the Arrangement

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

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unit holders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled. The Commissioner is satisfied that, in terms of section CF 3 (1)(b)(iii), the distribution is not in lieu of the payment of dividends. The procedure of publicising buy-back and redemption prices on the internet does not constitute a "recognised exchange" in terms of the definition of that phrase in section OB 1.
- If the Fund is liquidated, section CF 3 (1)(c) will apply. The amount distributed to unit holders will not be a dividend to the extent that it does not exceed the aggregate of the "available subscribed capital per share cancelled" and the "excess return amount", as those terms apply to the Fund. The excess return amount will include gains on any securities sold by the Fund.

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

This Ruling will apply for the period from 1 July 2004 until 30 June 2007.

This Ruling is signed by me on the 11<sup>th</sup> day of June 2004.

**Martin Smith**  
General Manager (Adjudication & Rulings)

## PRODUCT RULING – BR PRD 04/08

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 ASB World Shares Trust.

### Taxation Laws

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

This Ruling applies in respect of sections CF 2(1)(i), CF 3(1)(b) and GB 1(3).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of the ASB World Shares Trust (the “ASB World Trust” or the “Trust” or the “Fund”) pursuant to a master deed dated 17 October 1997 (the “Master Deed”), an establishment deed also dated 17 October 1997 (the “Establishment Deed”), a “Variation of Master Deed dated 17 October 1997” (executed on 27 April 1999), a Deed of Amendment to ASB World Shares Trust Establishment Deed (dated 18 June 2001) and the ASB Unit Trusts Prospectus (dated 5 August 2003).

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

1. The ASB World Trust is a unit trust pursuant to the Unit Trusts Act 1960 and is a “unit trust” for the purposes of the definition of that term in section OB 1.
2. The trustee of the ASB World Trust is Trustees Executors Limited (the “Trustee”). It is registered as a trustee company under the Trustee Companies Act 1967. The manager of the Trust is ASB Group Investments Limited (formerly ASB Investment Services Limited) (the “Manager”), part of the ASB group of Companies. The beneficial interests in the Trust are divided into units. Each unit confers an equal interest in the Trust, but units do not confer any interest in any particular investment of the Trust.
3. The Applicant has confirmed that the Fund has complied with the previous ruling (BR PRD 01/18) except insofar as the issuing and redemption of units was suspended for five days as a result of the September 11 terrorist attack. There has been no material change to the management or operation of the Fund.

### Investment

4. The ASB World Trust acts as a special purpose vehicle, which holds units in the AMP Investments’ World Index Fund (the “AMP WiNZ Fund”). Ownership of units in the AMP WiNZ Fund enable the ASB World Trust to obtain the same financial results through one investment as would be achieved by direct investment in the securities which make up the MSCI World Index (the “Index”) tracked by the AMP WiNZ Fund.
5. ASB selected the AMP WiNZ Fund for its underlying investment for the following reasons:
  - the corporate strength and stability of AMP Limited (“AMP”), and the strong likelihood that AMP would be able to support an index-tracking fund well into the foreseeable future
  - AMP’s technical expertise, particularly the investment management skill and capability of AMP Capital Investors (New Zealand) Limited in being able to construct and efficiently manage an index-tracking fund
  - the high standard of service provided by AMP, eg regular statements and reporting on the AMP WiNZ Fund; good working relationship, and
  - AMP’s competitive investment management fees resulting in a lower cost to ASB World Trust Fund investors in having their funds invested in the AMP WiNZ Fund through the ASB World Trust.
6. Clauses 3.1 and 3.2 of the ASB World Trust’s Establishment Deed state the “investment objectives” of the ASB World Trust and identify the “authorised investments” as follows:
  - 3 Investment Policy
    - 3.1 Objectives: The objectives of the Trust are to:
      - (a) invest in the AMP Investments’ World Index Fund subject to the need for the Trust to hold some cash for liquidity and administrative purposes; and
      - (b) provide after tax foreign currency hedges in respect of 50% of the foreign currency securities indirectly invested in through the Trust’s investment in the AMP Investment’s World Index Fund.The funds of the Trust that are available for investment shall be invested in the AMP Investments’ World Index Fund or in foreign currency contracts as soon as practicable after receipt by the Trustee. The Trust and the Trustee do not have an intention to profit from holding, acquiring or selling AMP Investments’ World Fund units.
    - 3.2 Authorised Investments: For the purposes of this Trust “Authorised Investments” means:
      - (a) the AMP Investments’ World Index Fund;

(b) cash balances with banks, brokers, agents, funds, including, without limitation, the ASB Money Market Trust, or custodians held for the liquidity and administrative purposes of the Trust referred to at Clause 3.1; and

(c) foreign exchange contracts for the foreign currencies of the securities making up the AMP World Index entered into to provide the hedges referred to in clause 3.1

7. Pursuant to the Establishment Deed, the ASB World Trust is only authorised to invest contributions from Members in: (a) the AMP WiNZ Fund, (b) a fixed 50% after tax foreign currency hedge and (c) cash investments. The Fund may hold cash investments to facilitate the easier administration of the Fund. The cash investments are held by the Fund in bank deposits. The Fund will hold cash in the following instances:
- following a contribution to the Fund, pending the investment of that contribution
  - following the sale of AMP WiNZ Fund units to meet a request to redeem units in cash
  - to make income distributions to unit holders
  - to meet obligations under the fixed 50% after tax foreign currency hedge, and
  - to meet administration expenses of the Fund.
8. It is the intention of the ASB World Trust that investment in AMP WiNZ Fund units (taking into account the appropriate level of hedge, or distribution of excess cash, whichever is relevant) will be completed on a weekly basis. The level of funds is monitored on a weekly basis and invested if in excess of the cash pool. Funds passed to the Manager are invested in the underlying pool within 24 hours.
9. The currencies to be hedged are the US dollar, Japanese yen, Euro, British pound, Australian dollar and Canadian dollar. The weighting of these currencies in the hedge will be determined exactly, based on the Trust's underlying exposure, on each rollover date, based on the latest country weightings (included in the Index) which are made available by AMP Capital Investors (New Zealand) Limited.
10. The ASB World Trust is required to place an order for a 74.6% hedge (or an equivalent residual figure should the applicable income tax rate change from 33%) and accept the closest to this figure that is obtainable within the set limits. Further, realignment of the hedge level will occur monthly at the rollover of forward contracts to a new forward date. All hedge contracts will mature on or about the fifteenth business day of the month following entry. The level of the hedge is to be maintained at between 71.6% and 77.6% of the non-New Zealand dollar amount invested offshore. This variance is

required to take account of redemptions and subscriptions arising during a month. It is also required to take account of the fact that foreign currency hedges can generally only be obtained in round amounts. Where the hedge moves outside the +/- 3% (pre-tax) band the hedge will be adjusted back to 74.6%, on the day that this occurs, based on the country weightings made available by AMP Capital Investors (New Zealand) Limited on the last roll-over date.

11. Under clause 11.3(h) of schedule 1 to the Master Deed the unit holders can sanction any variation of the "authorised investments" of the Trust by extraordinary resolution. However, the Fund intends to maintain its current investment strategy.

#### **AMP WiNZ Fund**

12. The AMP WiNZ Fund is a "group investment fund" within the meaning of section OB 1. The AMP WiNZ Fund is required to buy and sell shares as required to ensure that it continues to track the Index. The AMP WiNZ Fund has two current binding rulings (BR PRV 01/31, regarding BD 1(1), CD 3, CD 4, and CD 5 and BR PRV 01/32, regarding OZ 1 and CG 1) which state that such buying and selling is not motivated by any intention to derive a profit or gain from such sales. The AMP WiNZ Fund is listed on the New Zealand Stock Market ("NZSX").
13. The AMP WiNZ Fund will make taxable distributions to the Trust from any income received by the AMP WiNZ Fund semi-annually within 20 days from the end of June and December.
14. The Trust will generally distribute such part, as is determined by the Manager, of its net income six-monthly to unit holders and that net income will be calculated taking into account all costs, charges and expenses due.
15. The Establishment Deed also provides for special distributions to occur at other times determined by the Manager. However, in the period between receipt of income from the AMP WiNZ Fund and any distribution, the ASB World Trust is required to invest amounts not held for administrative or liquidity purposes in units in the AMP WiNZ Fund and maintain the fixed 50% after tax foreign currency hedge.

#### **Suspensions**

16. A suspension from issuing or redeeming units will only occur in exceptional circumstances, being the following situations:
- (1) if a material adverse change in the financial markets occurs, namely, a breakdown in liquidity caused by an act of God or a system failure or a terrorist attack

- (2) if there is a fundamental breakdown in the functioning of financial markets, namely, the failure of pricemaking software, or
- (3) if it is required so as to avoid a breach of any applicable law.

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

The issuing and redeeming of units was suspended for 5 days as a result of the September 11 terrorist attack.

#### **Redemption of ASB World Fund units**

17. The Manager has the power to purchase units from unit holders, when unit holders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unit holders' requests. To date, the Manager has not utilised this power.

#### **Redemption of AMP WiNZ Fund units**

18. When the ASB World Trust is required to redeem units in the AMP WiNZ Fund, the ASB World Trust can sell its units to a third party, or it can redeem its units to the AMP WiNZ Fund. Upon redemption, the ASB World Trust will receive a parcel of securities equal to the value of the units at that time. The AMP WiNZ Fund manager may sell those securities on behalf of (as agent for) the ASB World Trust, and then give the ASB World Trust cash for those units. The ASB World Trust also has the option (as opposed to redeeming its units to the AMP WiNZ Fund) to sell its units through the AMP WiNZ Fund manager.
19. Redemption requests for AMP WiNZ Fund units must be for a minimum of 1 million WiNZ units. When the ASB World Trust makes a redemption request to the AMP WiNZ Fund, the AMP WiNZ Fund manager makes a choice as to how to effect that redemption request. The AMP WiNZ Fund manager may effect redemption by either: (1) cancellation of the units or (2) purchasing those units on its own behalf. In either situation, when the AMP WiNZ Fund manager effects a redemption request, the unit holder (ie, the ASB World Trust) will receive the same redemption amount for its AMP WiNZ Fund units.
20. Requests to dispose of parcels of less than 1 million AMP WiNZ Fund units will be facilitated by the AMP WiNZ Fund manager in parcels of

100,000 AMP WiNZ Fund units. The ASB World Trust will only dispose of its AMP WiNZ Fund units by making a redemption request to the AMP WiNZ Fund manager. The ASB World Trust will not dispose of AMP WiNZ Fund units in any other manner.

## **Conditions stipulated by the Commissioner**

This Ruling is made subject to the following conditions:

- a) There is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager and any unit holder (or any person associated with any unit holder) which directly or indirectly has a purpose or effect of the redemption or disposition of any of a unit holder's units occurring in substitution for or instead of one or more distributions from the Fund.
- b) The Trust will be a widely-held trust, as that term is defined in section CF 3(14).
- c) Any cancellation of ASB World Trust units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).
- d) The ASB World Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
- e) The ASB World Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- f) The income of the Fund, net of any expenses incurred by the Fund, will be paid out to unit holders either as cash or additional units in the Fund. However, the Manager may use its discretion, and decide not to make such a payment if the amount to be paid is so minimal that the administrative costs of making the payment would exceed the amount to be distributed. The payment of income to unit holders on this basis is consistent with the Fund's normal dividend policy and Trust Deed. Not necessarily paying out the full value of the WiNZ Fund units received as income reflects the Trustee's normal prudence in only distributing the "profits" of the Fund and does not occur for tax purposes.
- g) The Manager has the power to purchase units from unit holders, when unit holders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unit holders' requests.
- h) Where unit holders elect to receive distributions as additional Fund units instead of cash, these constitute a "taxable bonus issue" as that term is defined in section OB 1.

- i) The AMP WiNZ Fund was chosen to provide a cost-effective means for simulating an investment that matches the composition and weighting of the Index. The AMP WiNZ Fund was not selected in order to maximise returns.
- j) The Fund has not taken into account historical returns in deciding to maintain its current investment strategy.
- k) The investment objectives and authorised investments of the Trust will not be amended.
- l) The cash pool is held in cash deposits which are held on call in bank deposits. The holding of such cash will arise only from the following circumstances:
- pending investment in AMP WiNZ Fund units
  - to meet a withdrawal from the Trust
  - to make income distributions to unit holders
  - pursuant to the fixed 50% after tax foreign currency hedge, and
  - to meet administration expenses of the Fund.

The proportion of the Fund's assets to be held as cash will not be greater than what strictly arises out of the above described circumstances, and in any event will not exceed the greater of \$200,000 or 4% of the total assets of the Fund.

- m) Condition (l) shall not be breached if the limit referred to in condition (l) is exceeded when this occurs due to the following reasons:
- Where a large cash subscription has been paid into the cash pool, or
  - Receipt of dividends from the AMP WiNZ Fund, or
  - From proceeds or settlement of maturing currency hedge contracts, and

the Fund takes immediate action to remedy this within the shortest practicable time, and in any event, no longer than five business days.

- n) The Fund may borrow temporarily in order to meet the following obligations where it is unable to meet such demands out of its current cash reserves:
- (1) to redeem units
  - (2) to meet hedging contract obligations.

Any such borrowing will only be to the extent that is strictly necessary and in the case of borrowing to redeem units will not exceed 2% of the value of the Fund and in the case of borrowing to meet hedging obligations will not exceed 10% of the value of the Fund. All such borrowing will be repaid within five business days.

- o) The Fund will only sell or otherwise dispose of AMP WiNZ Fund units in the following circumstances:
- to meet administration expenses of the Fund that cannot be met out of the cash pool, or
  - where the Manager must purchase or redeem AMP WiNZ Fund units in order to meet the needs of the Fund's unit holders, or
  - in order to wind up the Trust, or
  - to meet hedging contract obligations that cannot be met out of the cash pool.
- p) When the Fund is given the option of re-investing its dividends for additional units in the AMP WiNZ Fund, the Fund will always accept the reinvestment option. In any such case, the value of the units received is equivalent to the value of the cash dividend (net of tax, fees and expenses).
- q) This ruling shall cease to apply if at any time:
- (i) there is a unit holder, or two or more unit holders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund, and
  - (ii) if that unit holder, or one or more of such unit holders, ordinarily hold securities on revenue account or the disposal of securities by that unit holder, or one or more of such unit holders, would ordinarily give rise to gross income for income tax purposes.

For the purposes of this condition unit holders are associated with each other if they are "associated persons" within the meaning of section OD 7 or OD 8(3).

- r) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.
- s) Apart from the Trust Deed and/or Prospectus and/or any Rules of the Fund that have been supplied to Inland Revenue as part of the application for this ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unit holder (or any person associated with or acting on behalf of any unit holder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.

For the avoidance of doubt, (i) the fact that a unit holder has the ability to invest, or withdraw at any time and/or (ii) the entry into of agreements, arrangements or understandings contemplated by the



Trust Deed for the purpose of enabling investment or withdrawal, will not alone constitute an agreement, arrangement or understanding to which the preceding sentence applies.

- t) The Fund will not exercise any voting rights associated with the holding of AMP WiNZ Fund units.
- u) If the Fund is resettled this Ruling shall not apply from the date of resettlement. The Fund will not be resettled in order to enhance the performance of the Fund or to minimize the losses of the Fund in any way.
- v) A suspension from issuing or redeeming units will only occur in exceptional circumstances, being:
  - (1) if a material adverse change in the financial markets occurs namely, a breakdown in liquidity caused by an act of God, or a system failure or a terrorist attack, or
  - (2) if there is a fundamental breakdown in the functioning of financial markets namely, the failure of pricemaking software, or
  - (3) if it is required so as to avoid a breach of any applicable law.

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

- w) The distribution period of the Fund will only be altered for administrative reasons and shall not be altered to enhance the performance of the Fund in any way.
- x) The Manager has the power to purchase units from unit holders, when unit holders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unit holders' requests.
- y) There is no agreement, arrangement or understanding between the AMP WiNZ Fund or its trustee or its manager and the ASB World Trust (or any person associated with the ASB World Trust) which directly or indirectly has a purpose or effect of the redemption or disposition of any of the ASB World Trust's units occurring in substitution for or instead of one or more distributions from the AMP WiNZ Fund.
- z) The Trust will only dispose of its AMP WiNZ Fund units by making a redemption request to the AMP WiNZ Fund Manager or by selling to a third party.

The Fund will only sell to a third party in the exceptional circumstance where the request to the AMP WiNZ Fund Manager cannot be actioned within seven business days.

- aa) Any powers exercised by the Trustee under the Master Deed and Establishment Deed are for the purposes of either buying units in the AMP WiNZ Fund, matched by a 50% after-tax hedge, to reflect the level of funds invested in the Trust, or selling units in the AMP WiNZ Fund to fund redemption of units in the Trust, or in order to meet its payment obligations under the hedging arrangement or to meet administration expenses of the Fund.
- bb) The existing binding rulings for the AMP WiNZ Fund (BR PRV 01/31 and BR PRV 01/32) or any such replacement ruling or rulings in respect of the same taxation laws remain current and in force.
- cc) The Fund will not be wound up with a view to enhancing the performance of the Fund or to minimise losses of the Fund in any way. This condition will not be breached if:
  - (i) the Manager decides to wind up the Fund for reasons unrelated to the performance of the investments of the Fund, or
  - (ii) if the unit holders independently resolve to wind up the Fund.

## 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.

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unit holders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3 (1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled.
- Section GB 1(3) does not apply to the arrangement.

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

This Ruling will apply for the period 1 July 2004 until 30 June 2007.

This Ruling is signed by me on the 22<sup>nd</sup> day of June 2004.

**Martin Smith**  
General Manager (Adjudication & Rulings)

## PRODUCT RULING – BR PRD 04/09

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 ASB New Zealand Shares Trust.

### Taxation Laws

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

This Ruling applies in respect of sections CF 2(1)(i), CF 3(1)(b) and GB 1(3).

### The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of the ASB NZ Shares Trust (the “ASB NZ Trust” or the “Trust” or the “Fund”) pursuant to the Master Deed (which is dated 17 October 1997) (the “Master Deed”), the Establishment Deed (which is also dated 17 October 1997) (the “Establishment Deed”), a “Variation of Master Unit Trust Deed dated 17 October 1997” (dated 27 April 1999), a Deed of Amendment to ASB NZ Shares Trust Establishment Deed (dated 18 June 2001) and the ASB Unit Trusts Prospectus (dated 5 August 2003).

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

1. The ASB NZ Trust is a unit trust pursuant to the Unit Trusts Act 1960 and is a “unit trust” for the purposes of the definition of that term in section OB 1.
2. The trustee of the ASB NZ Trust is Trustees Executors Limited (the “Trustee”). It is registered as a trustee company under the Trustee Companies Act 1967. The manager of the Trust is ASB Group Investments Limited (formerly ASB Investment Services Limited) (the “Manager”), part of the ASB Group of Companies. The beneficial interests in the Trust are divided into units. Each unit confers an equal interest in the Trust, but units do not confer any interest in any particular investment of the Trust.
3. The Applicant has confirmed that the Fund has complied with the previous ruling (BR PRD 01/19). There has been no material change to the management or operation of the Fund.

### Investment

4. The ASB NZ Trust acts as a special purpose vehicle, which holds units in the AMP Investments’ Tracker Fund (the “AMP Tracker Fund”). Ownership of units in the AMP Tracker Fund enable the ASB NZ Trust to obtain the same financial results through one investment as would be achieved by direct investment in the securities which make up the Russell Ord Minnett Tradeable Index (“the Index”) tracked by the Tracker Fund. The AMP Tracker Fund intends to switch in 2004 to tracking the NZSX 50 Index as soon as it obtains a replacement ruling that refers to the new Index. There will be no realisation of any investment by the ASB NZ Trust or change in the way that it will operate as a result of this change.
5. ASB selected the AMP Tracker Fund as its underlying investment for the following reasons:
  - the corporate strength and stability of AMP Limited (“AMP”), and the strong likelihood that AMP would be able to support an index-tracking fund well into the foreseeable future
  - AMP’s technical expertise, particularly the investment management skill and capability of AMP Capital Investors (New Zealand) Limited in being able to construct and efficiently manage an index-tracking fund
  - the high standard of service provided by AMP, eg regular statements and reporting on the AMP Tracker Fund, good working relationship, and
  - AMP’s competitive investment management fees resulting in a lower cost to ASB NZ Trust Fund investors in having their funds invested in the AMP Tracker Fund through the ASB NZ Trust.
6. Clauses 3.1 and 3.2 of the ASB NZ Trust’s Establishment Deed state the “investment objectives” of the ASB NZ Trust and identify the “authorised investments” as follows:
  - 3 Investment Policy
    - 3.1 Objectives: The objective of the Trust is to invest in the AMP Investments Tracker Fund, subject to the need for the Trust to hold some cash for liquidity and administrative purposes. The funds of the Trust that are available for investment shall be invested in the AMP Investment Tracker Fund as soon as practicable after receipt by the Trustee. The Trust and the Trustee do not have an intention to profit from holding, acquiring or selling AMP Investments’ Tracker Fund units. The Trust and the Trustee do not have an intention to profit from holding, acquiring or selling AMP Investments’ Tracker Fund units.
    - 3.2 Authorised Investments: For the purposes of this Trust “Authorised Investments” means:

- (a) the AMP Investments' Tracker Fund;
  - (b) cash balances with banks, brokers, agents, funds, including, without limitation, the ASB Money Market Trust, or custodians held for the liquidity and administrative purposes of the Trust referred to at Clause 3.1;
7. Pursuant to the Establishment Deed, the ASB NZ Trust is only authorised to invest contributions from members in: (a) the AMP Tracker Fund and (b) cash investments. The Fund may hold cash investments to facilitate the easier administration of the Fund. The cash investments are held as cash by the Fund in bank deposits. The Fund will hold cash in the following instances:
  - following a contribution to the Fund, pending the investment of that contribution
  - following the sale of AMP Tracker Fund units to meet a request to redeem Trust units in cash
  - to make income distributions to unit holders, and
  - to meet administration expenses of the Fund.
8. It is the intention of the ASB NZ Trust that investment in AMP Tracker Fund units, taking into account the appropriate distribution of excess cash, will be completed on a weekly basis. The level of funds is monitored on a weekly basis and invested if in excess of the cash pool. Funds passed to the Manager are invested in the underlying pool within 24 hours.
9. Under clause 11.3(h) of schedule 1 to the Master Deed the unit holders can sanction any variation of the "authorised investments" of the Trust by extraordinary resolution. However, the Fund intends to maintain its current investment strategy.
10. The ASB NZ Trust will generally distribute to its unit holders part of the distributions it receives from the AMP Tracker Fund six-monthly. To determine the amount of the distribution, the Manager of the ASB NZ Trust will determine the Trust's "net income" by taking into account, not only the distributions received by the AMP Tracker Fund, but also all costs, charges and expenses due by or to the ASB NZ Trust.
11. The AMP Tracker Fund is a "group investment fund" within the meaning of section OB 1. The AMP Tracker Fund is required to buy and sell shares as required to ensure that it continues to track the Index. The AMP Tracker Fund has a current binding ruling (BR PRV 01/84) which states that such buying and selling is not motivated by any intention to derive a profit or gain from such sales.
12. The AMP Tracker Fund units will be issued subject to the reverse ordering rule (subparagraph CF 3(1)(b)(iv)(B)) and may only be redeemed in whole, and not in part. Units in the AMP Tracker Fund are not quoted on any exchange.
13. The Establishment Deed also provides for special distributions to occur at other times determined by the Manager. However, in the period between receipt of income from the AMP Tracker Fund and any distribution the ASB NZ Trust is required to invest amounts not held for administrative or liquidity purposes in units in the AMP Tracker Fund.
14. The AMP Tracker Fund units will be issued subject to the reverse ordering rule (subparagraph CF 3(1)(b)(iv)(B)) and may only be redeemed in whole, and not in part. Units in the AMP Tracker Fund are not quoted on any exchange.

#### Suspensions

15. The Fund has not previously suspended redemptions. A suspension from issuing or redeeming units will only occur in exceptional circumstances, being:
  - (1) if a material adverse change in the financial markets occurs, namely, a breakdown in liquidity caused by an act of God or a system failure or a terrorist attack, or
  - (2) if there is a fundamental breakdown in the functioning of financial markets, namely, the failure of pricemaking software, or
  - (3) if it is required so as to avoid a breach of any applicable law.

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

#### Redemption of ASB NZ Trust units

16. The Manager has the power to purchase units from unit holders, when unit holders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unit holders' requests. To date, the Manager has not utilised this power.

### Redemption of AMP Tracker Fund units

17. When the ASB NZ Trust is required to redeem units in the AMP Tracker Fund, the parcel of securities held by the AMP Tracker Fund attributable to the ASB NZ Trust's investment can be returned to the ASB NZ Trust. Alternatively, the redemption parcel of securities can be delivered to the AMP Tracker Fund Manager as agent for the unit holder (ie the ASB NZ Trust). In this alternative situation, the AMP Tracker Fund Manager will sell the basket of securities comprising the redemption parcel as agent for the ASB NZ Trust, and the AMP Tracker Fund Manager will pay the proceeds to the ASB NZ Trust (or in certain circumstances, the AMP Tracker Fund Manager will hold the securities and transfer to the ASB NZ Trust the equivalent dollar value of the redeemed securities).
  18. The ASB NZ Trust always requests the AMP Tracker Fund Manager to redeem the basket of securities for cash, instead of receiving the basket of securities. Therefore, the ASB NZ Trust, upon redemption of units in the AMP Tracker Fund, will receive a transfer of securities followed by an immediate sale of those securities by the AMP Tracker Fund Manager as agent for the ASB NZ Trust.
  19. Although the AMP Tracker Fund's prospectus refers to a threshold of 100,000 units being the minimum redemption amount (in order to redeem the units in the AMP Tracker Fund), ASB Bank have agreed with the AMP Tracker Fund Manager that the treatment of redemptions for parcels of 100,000 units or greater will also apply to parcels of 50,000 or greater in respect of redemptions for the ASB NZ Trust.
- d) The ASB NZ Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.
  - e) The ASB NZ Trust units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
  - f) The income of the Fund, net of any expenses incurred by the Fund, will be paid out to unit holders either as cash or additional units in the Fund. However, the Manager may use their discretion, and decide not to make such a payment if the amount to be paid is so minimal that the administrative costs of making the payment would exceed the amount to be distributed. The payment of income to unit holders on this basis is consistent with the Fund's normal dividend policy and Trust Deed. Not necessarily paying out the full value of the Tracker Fund units received as income reflects the Trustee's normal prudence in only distributing the "profits" of the Fund and does not occur for tax purposes.
  - g) The Manager has the power to purchase units from unit holders, when unit holders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unit holders' requests.
  - h) Where unit holders elect to receive distributions as additional Fund units instead of cash, these constitute a "taxable bonus issue" as that term is defined in section OB 1.
  - i) The AMP Tracker Fund was chosen to provide a cost-effective means for simulating an investment that matches the composition and weighting of the Index. The AMP Tracker Fund was not selected in order to maximise returns.
  - j) The Fund has not taken into account historical returns in deciding to maintain its current investment strategy.
  - k) The investment objectives and authorised investments of the Trust will not be amended.
  - l) The cash pool is held in cash deposits which are held on call in bank deposits. The holding of such cash will arise only from the following circumstances:
    - to meet the administration expenses of the Fund
    - pending investment in AMP Tracker Fund units
    - to meet a withdrawal from the Trust, or
    - to make income distributions to unit holders.

### Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

- a) There is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager and any unit holder (or any person associated with any unit holder) which directly or indirectly has a purpose or effect of the redemption or disposition of any of a unit holder's units occurring in substitution for or instead of one or more distributions from the Fund.
- b) The Trust will be a widely-held trust, as that term is defined in section CF 3(14).
- c) Any cancellation of ASB NZ Trust units will not be part of a pro-rata cancellation as that term is defined in section CF 3(14).

The proportion of the Fund's assets to be held as cash will not be greater than what strictly arises out of the above described circumstances, and in any event will not exceed the greater of \$200,000 or 4% of the total assets of the Fund.

m) Condition (l) shall not be breached if the limit referred to in condition (l) is exceeded when this occurs due to the following reasons:

- where a large cash subscription has been paid into the cash pool, or
- receipt of dividends from the AMP Tracker Fund,

and, the Fund takes immediate action to remedy this within the shortest practicable time, and in any event, no longer than five business days.

n) In the event that the Fund has insufficient cash available to meet redemptions, the Fund may temporarily borrow in order to redeem units. Any borrowing that occurs will be: (i) only to the extent that is strictly necessary and will not in any event exceed 2% of the value of the Fund; and (ii) repaid as soon as possible and in any event within five business days.

o) The Fund will only sell or otherwise dispose of AMP Tracker Fund units in the following circumstances:

- to meet the administration expenses of the Fund
- the Manager must purchase or redeem AMP Tracker Fund units in order to meet the needs of the Fund's unit holders, or
- in order to wind up the Trust.

p) When the Fund is given the option of re-investing its dividends for additional units in the AMP Tracker Fund, the Fund will always accept the reinvestment option. In any such case, the value of the units received is equivalent to the value of the cash dividend (net of tax, fees and expenses) and the distribution of cash or units constitutes a "dividend" as that term is defined in section CF 2.

q) This ruling shall cease to apply if at any time:

- (i) there is a unit holder, or two or more unit holders that are associated with each other, or are acting in concert in relation to their investments in the Fund, who hold/s more than 75% of the issued units of the Fund, and
- (ii) if that unit holder, or one or more of such unit holders, ordinarily hold securities on revenue account or the disposal of securities by that unit holder, or one or more of such unit holders, would ordinarily give rise to gross income for income tax purposes.

For the purposes of this condition unit holders are

associated with each other if they are "associated persons" within the meaning of section OD 7 or OD 8(3).

r) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section CF 3(14)), and the Fund units are offered to the public.

s) Apart from the Trust Deed and/or Prospectus and/or any Rules of the Fund that have been supplied to Inland Revenue as part of the application for this ruling, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unit holder (or any person associated with or acting on behalf of any unit holder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.

For the avoidance of doubt, (i) the fact that a unit holder has the ability to invest, or withdraw at any time and/or (ii) the entry into of agreements, arrangements or understandings contemplated by the Trust Deed for the purpose of enabling investment or withdrawal, will not alone constitute an agreement, arrangement or understanding to which the preceding sentence applies.

t) The Fund will not exercise any voting rights associated with the holding of AMP Tracker Fund units.

u) If the Fund is resettled this Ruling shall not apply from the date of resettlement. The Fund will not be resettled in order to enhance the performance of the Fund or to minimise the losses of the Fund in any way.

v) A suspension from issuing or redeeming units will only occur in exceptional circumstances, being:

- (1) if a material adverse change in the financial markets occurs, namely, a breakdown in liquidity caused by an act of God, or a system failure or a terrorist attack
- (2) if there is a fundamental breakdown in the functioning of financial markets namely, the failure of pricemaking software, or
- (3) if it is required so as to avoid a breach of any applicable law.

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

w) The distribution period of the Fund will only be

altered for administrative reasons and shall not be altered to enhance the performance of the Fund in any way.

- x) The Manager has the power to purchase units from unit holders, when unit holders wish to redeem or sell their units. The Manager may use this power only when the Fund does not have enough funds in the cash pool to redeem the units requested and the Fund is unable to borrow to meet the unit holders' requests.
- y) The AMP Tracker Fund is an "unlisted trust" in terms of the definition of that term in section CF 3(14).
- z) Cancellation of AMP Tracker Fund units will not be made as part of a pro-rata cancellation of units.
- aa) AMP Tracker Fund units will not be quoted on the official list of a recognised exchange.
- bb) The AMP Tracker Fund units are issued on such terms that their redemption is subject to the reverse ordering rule as stated in section CF 3(1)(b)(iv)(B).
- cc) There is no agreement, arrangement or understanding between the AMP Tracker Fund or its trustee or its manager and the ASB NZ Trust (or any person associated with the ASB NZ Trust) which directly or indirectly has a purpose or effect of the redemption or disposition of any of the ASB NZ Trust's units occurring in substitution for or instead of one or more distributions from the AMP Tracker Fund.
- dd) The Trust will either: (1) redeem its AMP Tracker Fund units to the AMP Tracker Fund or (2) sell its units to the AMP Tracker Fund Manager. The Trust will not dispose of its units in any other manner.
- ee) All distributions received by the AMP Tracker Fund will be paid out (either as cash or AMP Tracker Fund units) to investors in the AMP Tracker Fund net of any expenses incurred by the AMP Tracker Fund.
- ff) Any powers exercised by the Trustee under the Master Deed and Establishment Deed are for the purposes of either buying units in the AMP Tracker Fund, to reflect the level of funds invested in the Trust or, selling or redeeming units in the AMP Tracker Fund to fund redemptions of units in the Trust.
- gg) The existing binding ruling for the AMP Tracker Fund (BR PRV 01/84) or any such replacement ruling or rulings in respect of the same taxation laws remain current and in force.
- hh) The Fund will not be wound up with a view to enhancing the performance of the Fund or to minimise losses of the Fund in any way. This condition will not be breached if:

- (i) the Manager decides to wind up the Fund for reasons unrelated to the performance of the investments of the Fund, or
- (ii) if the unit holders independently resolve to wind up the Fund.

## 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:

- Income distributed by the Trustee will be treated as a dividend pursuant to section CF 2(1)(i).
- Any amount received by unit holders on redemption of units in the Fund will be excluded from the definition of dividend in section CF 2, by section CF 3(1)(b) to the extent that that amount does not exceed the available subscribed capital per share cancelled.
- Section GB 1(3) does not apply to the arrangement.

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

This Ruling will apply for the period 1 July 2004 until 30 June 2007.

This Ruling is signed by me on the 22<sup>nd</sup> day of June 2004.

**Martin Smith**

General Manager (Adjudication & Rulings)

## PRODUCT RULING – BR PRD 04/12

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 Royal New Zealand College of General Practitioners (“the College”).

### Taxation Law

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

This Ruling applies in respect of section CB 9(d) of the Act.

### The Arrangement to which this Ruling applies

The Arrangement is the provision of the Payments (which are made monthly) by the College to the Registrars, for the Registrars’ participation in the Course, on terms and conditions that are materially the same as those contained in the following three documents (received by the Rulings Unit on 23 September 2003):

- Terms and Conditions for Registrars and Seminar Attenders 2004: the terms and conditions to be agreed between the College and all Registrars enrolled in the General Practice Educational Programme (“GPEP”).
- Letter of Appointment of Registrar 2004: the letter supplied to the Registrar, by the College, as an agreement of the respective obligations of each party.
- Stage 1: GPEP Handbook 2004: the detailed handbook of terms, conditions, obligations and syllabus of the Course.

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

1. The College was formed in 1974, and obtained a Royal Charter in 1979. The mission of the College is to improve the health of all New Zealanders through the provision of high-quality general practice care.
2. The main purpose of the College is to provide post-graduate general practice education to qualified doctors.
3. The objects and powers of the College (as set out in clause 5.1 of the 28 September 2002 document entitled “The Royal New Zealand College of General Practitioners: Rules”) are:

- (a) to promote in all ways the highest standards in general practice in New Zealand
- (b) to sustain and improve the professional competence of members of the medical profession who are engaged in general practice in New Zealand
- (c) to encourage, strengthen, and engage in vocational training for general practice
- (d) to conduct, direct, encourage, support or provide for continuing education of general practitioners
- (e) to encourage and assist in the provision of a high standard of teaching and training for all undergraduate medical students in the field of general practice in New Zealand
- (f) to promote activities that encourage the care of members and their families
- (g) to encourage and provide for the training of future teachers of general practice
- (h) to inform the public in New Zealand about general practice and primary health care issues
- (i) to conduct, direct, encourage, support or provide for research in matters relating to general practice
- (j) to publish and encourage publication of journals, reports and treatises on matters relating to general practice and allied subjects
- (k) to grant diplomas and other certification of proficiency in general practice or any related subject, whether upon examination, thesis, outstanding work or upon other grounds which may be considered sufficient
- (l) to establish a register of members of the College and to publish and revise the same from time to time
- (m) to acquire, establish, provide and maintain such land and buildings as are deemed necessary and to deal with or dispose of the same with a view to promoting the objects of the College
- (n) to acquire and receive property of any kind whether by way of gift, devise, bequest or otherwise howsoever to be applied solely towards the objects of the College provided that no portion thereof shall be paid or transferred directly or indirectly by way of profit to members of the College, but this shall not prevent a member being reimbursed for professional services

- (o) to apply annual dues received from members to defray the expenses of the College, and for such other objects as may be deemed proper by the Council, and
  - (p) to undertake all such other lawful acts and things as are incidental or conducive to the attainment of the foregoing objects.
4. The College runs the GPEP created from the objectives of the College and based on the College's commitment to maintaining and supporting standards of excellence among general practitioners. It is viewed as a significant part of a comprehensive cycle of vocational and professional education provided by the College and results in a Fellow of the Royal New Zealand College of General Practitioners ("FRNZCGP") qualification.
  5. The Course is a 40-week practice-based training course established by the College as one part of its GPEP. The 40 weeks are divided into two attachments of 20 weeks. The Course is placed at "year nine" of a doctor's standard educational path to gaining the FRNZCGP qualification. The GPEP is regarded as encompassing years seven to eleven of this "path".
  6. It is stated by the College (at page 10 of the Stage 1: GPEP 2004 Handbook) that the general aims of the Course are to:
    - improve the health of New Zealanders through the provision of a GPEP which achieves a level of competence sufficient to maintain independent general practice
    - promote high standards of general practice in New Zealand by ensuring those entering general practice are vocationally trained
    - ensure Registrars understand the principles of general practice
    - develop and foster a group of general practice teachers and teaching practices, and
    - foster an understanding of general practice within the medical profession and primary care purchasers.
  7. The Course involves various aspects of training that a Registrar is to complete. Essentially, a Registrar is assigned to a "teaching practice". Each teaching practice is a general practice medical centre for which the College has contracted with a general practitioner to be the Registrar's teacher. The general practitioner teacher ("the Teacher") holds vocational registration and is paid by the College under a separate contract.
  8. The standard week for a Registrar under the Course is broken up as follows:
    - eight half days per week attendance at the teaching practice to which they are assigned, consisting of:
      - patient contact. The conditions in respect of this are that a Registrar is to participate in between 5 and 13 patient consultations per half-day. In the early weeks of the attachment, to relieve possible pressure on a Registrar, each consultation is to be for a generous period of 20-30 minutes
      - the Registrar having at least three hours of direct contact time with the teacher per week, to include discussion, observation, review and feedback. It is essential that there be a minimum of a one hour and 30 minutes uninterrupted block between the Teacher and the Registrar per week.
    - two half-days attending seminars and workshops that are provided and organised by the College. Registrars are required to "satisfactorily" attend and participate in these seminars and workshops, and are responsible for organising/presenting part of the programme within these seminars and workshops.
  9. A Registrar does not receive any payment from the Teacher, but receives the Payments from the College allocated from the funding the College receives from the Clinical Training Agency ("CTA"). The total dollar value of the Payments is as follows (Registrars being paid monthly amounts during the period of the Course the aggregate of which equals that total amount):
 

	For the 40-week course	Annualised (before tax)
1.	\$35,035	\$44,600
2.	\$36,400	\$46,700
  10. Whether the Payments are set at the first or second level is dependent on the level of prior medical experience of a Registrar. However, these amounts are set at a level to provide for the maintenance of the Registrars' standard of living while undertaking the Course. The Payments are at a level lower than that which a doctor with similar experience in appropriate employment would earn during the period of the Course.
  11. A doctor who wishes to attend the Course as a Registrar applies to the College at the appropriate time. From the total number of applicants, the College undertakes a selection process to accept only the number of Registrars for which it has funding.



12. The criteria by which Registrars are selected are based on merit, the College taking the perspective of selecting Registrars who will benefit the community in the long term. These criteria include:
  - the intention to enter general practice
  - experience in various areas of medicine
  - a demonstrated commitment to general practice addressing priority health areas
  - a demonstrated commitment to general practice addressing rural health issues
  - a demonstrated commitment to general practice addressing Māori health issues, and
  - a demonstrated commitment to teaching medical students and colleagues.
13. The College initiates an agreement with each individual doctor that is to be agreed before the doctor becomes a Registrar in the Course.
14. The obligations of Registrars are contained in the Terms and Conditions for Registrars and Seminar Attenders 2004, which include (among others) that the Registrar:
  - satisfactorily attends, and participates in, 80% of the seminars and workshops
  - completes the “attachment” to teaching practices, and the assessments thereon
  - be involved in patient contact, by having five to 13 consultations with patients per half-day, and
  - undertakes review sessions with the attachment Teacher each day.
15. In exchange for undertaking the above, the Registrars receive from the College the Payments.
16. The College Council is responsible for setting the educational philosophy and mission statement for its GPEP.
17. With regard to the Course content, the College has developed a curriculum for general practice training in consultation with College Members and Fellows and with the CTA to ensure that government health priority areas are reflected in the educational programmes.
18. The College determines, in consultation with its Registrars, the methods of delivery for its programme for Stage I. The content of seminars and workshops is based on the syllabus for the Course and the specific learning needs of Registrars. The College determines the structure of the programme also. Materials for the programme are provided by the College and are purchased from the funding provided by the CTA. Seminars and workshops are held on premises hired by the College for that purpose.
19. Each Registrar’s activities while undertaking the Course reflect the agreement reached between the Registrar and their Teacher as to how the Course syllabus will, in their view, be best achieved for that Registrar. Each Registrar’s activities are therefore designed to enable them to implement their agreed learning programme. A Registrar’s performance of these activities may assist the operation of their Teacher’s practice, but the activities are not designed to achieve this.
20. The Course is designed to teach Registrars to translate prior learning to a community-based, primary health team context, as well as to teach them new skills in relation to (amongst other things) the clinical and business management needs of general practice.
21. The College is responsible for setting the Primex examination (sat at the end of the Course) and, in doing so, sets the standards for entry into Stage II and ultimately for vocational registration. The College also determines the structure and timing of the teaching programme. Furthermore, the College determines the outputs of Registrars in terms of assignments, research projects, presentations and other learning activities.
22. The College selects Teachers to the programme who meet a number of specific criteria. These include holding general registration with the Medical Council, being a Fellow of the College, and being assessed by the Regional Director as being competent and able to provide excellent education to a trainee. The Teachers are employed by the College to provide teaching within the calendar year of the programme. All Teachers must undertake ongoing professional development activities whilst they remain a Teacher.
23. Regional directors (employed by the College) are responsible for maintaining contact with the Teachers during the programme and resolving any difficulties that may arise. They do so primarily through meetings and practice visits with Teachers. The regional directors are kept informed by Teachers on the progress of Registrars.
24. The College devotes the majority of its resources (staff, funding and other assets) to the administration and running of the GPEP and the continuing education of doctors in general practice. Over 50% of the College’s total income and expenditure for the year ended March 2004 was directly attributable to the GPEP alone.

## **Condition stipulated by the Commissioner**

This Ruling is made subject to the following condition:

- a) The Payments made to the Registrars under the Arrangement are not grants made under regulations made under section 193 of the Education Act 1964, section 303 of the Education Act 1989, or any enactment in substitution for those sections.

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

Subject in all respects to the condition stated above, the Taxation Law applies to the Arrangement as follows:

- The Payments made to the Registrars under the Arrangement are exempt income under section CB 9(d).

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

This Ruling will apply for the period 1 January 2004 until 31 December 2009.

This Ruling is signed by me on the 29<sup>th</sup> day of July 2004.

**Martin Smith**  
Chief Tax Counsel

## NEW LEGISLATION

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### NEW DOUBLE TAX AGREEMENTS WITH SOUTH AFRICA AND THE UNITED ARAB EMIRATES, NEW PROTOCOL TO UK AGREEMENT

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Recently negotiated double tax agreements (DTAs) with South Africa and the United Arab Emirates (UAE) entered into force on 23 July 2004 and 29 July 2004 respectively, increasing New Zealand's network of such agreements to 29. A Protocol amending our existing DTA with the United Kingdom (UK) also entered into force on 23 July 2004. The new DTAs with South Africa and the UAE represent our first with Africa and the Middle East, and are expected to strengthen New Zealand's economic relations with those regions. The Protocol brings the 1983 UK DTA up-to-date and addresses a UK concern over the potential for the DTA to be used to avoid UK capital gains tax.

DTAs are bilateral international treaties generally entered into by countries to facilitate increased cross-border trade and investment. They are designed to address the problem of double taxation that typically arises when income crosses an international border. Such double taxation arises because the income is usually taxed both in the country from which it is derived (on the basis of source) and the country in which the recipient of the income is a resident (on the basis of residence). Double taxation acts as a disincentive for residents of one country to enter into business transactions with residents of the other country.

The new DTA with South Africa follows the same general principles as New Zealand's other DTAs. Business profits of an enterprise are taxable only in the country of which the enterprise is resident, unless the enterprise has a permanent establishment in the other country through which the business profits are derived. Investment income is subject to reduced rates of withholding tax at the border. Income from personal services can be exempt in the source country if certain criteria (such as the duration of personal presence in that country) are met. There are a number of detailed rules covering specific activities and forms of income.

The new DTA with the UAE is unusual in that, while the DTA contains similar rules to those outlined in the paragraph above, the problem of double taxation does not generally apply in relation to the UAE because of the lack of a developed income tax system in that country. The DTA was entered into for various reasons, including the opening of an air service to New Zealand by the UAE airline Emirates, the potential for significant foreign direct investment into New Zealand, and other potential benefits such as attracting fee-paying students to come to New Zealand to study at New Zealand educational institutions.

The Protocol to the UK DTA updates the exchange of information article to permit more effective exchange of information. It also brings the article dealing with the taxation of dividends up to date after the UK changed the way it taxes dividends a few years ago. It inserts an article dealing with "other income" into the DTA and makes a number of other changes. Of interest mainly to the UK is an amendment to the article dealing with the alienation of property to address UK concerns over avoidance schemes designed to utilise the DTA to avoid UK capital gains tax.

The provisions of the new DTAs with South Africa and the UAE will apply in New Zealand to all income years beginning on or after 1 April 2005. Provisions dealing with withholding taxes, however, take effect from 1 September 2004. The provisions of the UK Protocol apply from various dates from 4 November 2003, when the agreement was signed.

Note that DTAs are now subject to the Parliamentary Treaty Examination process, under which the DTAs and an accompanying national interest analysis (NIA) are subject to scrutiny by select committee and the House. The new DTAs and Protocol are the first to enter into force that have been subject to this process.

The NIA for each agreement can be viewed on the Parliamentary website at <http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/feitetaxation.pdf>

The agreements themselves can be accessed on the New Zealand Inland Revenue website at: <http://www.taxpolicy.ird.govt.nz/international/DTA/index.html>

*Double Taxation Relief (Republic of South Africa) Order 2004 SN 2004/176, Double Taxation Relief (United Arab Emirates) Order 2004 SN 2004/177, Double Taxation Relief (United Kingdom) Amendment Order 2004 SN 2004/181*

### GST REFORMS TO APPLY FROM 1 JANUARY 2005

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Changes to zero rate business-to-business supplies of financial services and apply the new GST reverse charge to certain imports of services will come into force on 1 January 2005. The commencement date was left open when the changes were enacted last year, to allow affected parties time to make necessary systems changes. The application date was set by Order in Council on 2 August 2004.

*Taxation (GST, Trans-Tasman Imputation and Miscellaneous Provisions) Act Commencement Order 2004 SN 2004/226*

## NEW DEEMED RATE OF RETURN FOR FOREIGN INVESTMENT FUND INTERESTS

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The deemed rate of return used for taxing foreign investment fund interests had decreased from 9.90% to 9.45% for the 2003-04 income year. The deemed rate of return, which is set annually, applies to all types of investments, including interests in superannuation schemes and life insurance policies. The new rate was set by Order in Council on 2 August 2004.

*Income Tax (Deemed Rate of Return, 2003-04 Income Year) Regulations 2004 SN 2004/225*

## TAX IMPLICATIONS OF THE MEAT BOARD RESTRUCTURING – MEAT BOARD ACT 2004

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### Introduction

The Meat Board Act 2004 (“the Act”) provides for the structural reform of the meat industry by changing the legal form of the New Zealand Meat Board (“the Board”), disbursing its assets and liabilities, and resolving a number of transitional and consequential issues. It was enacted on 1 July 2004.

The Act provides for the separation of the Board’s export quota management and industry-good functions. The Board, established as a statutory body under the Meat Board Act 1997, continued in existence following restructuring day. The Board retained responsibility for quota management and for the management of reserve funds held on behalf of livestock farmers.

A new company was created to operate under the Commodity Levies Act 1990. This company, named Meat and Wool New Zealand Limited, undertakes industry-good activities for the meat and wool industries. Meat and Wool New Zealand Limited was formed by combining the meat industry-good activities previously undertaken by the Board, with Sheepco, the wool industry-good entity emerging from the disestablishment of the Wool Board. Industry-good activities are partially funded by the imposition of commodity levies.

Shares issued by Meat and Wool New Zealand Limited are held by a shareholding trust for the benefit of livestock farmers. The Act provides for the allocation of available subscribed capital to shares issued by Meat and Wool New Zealand Limited. Available subscribed capital attached to shares can be used to shelter the distribution of reserves to livestock farmers from tax in certain circumstances. Available subscribed capital was allocated to Meat and Wool New Zealand rather than the Board, for this purpose. The amount of available subscribed capital was calculated as a proportion of the reserve funds held by the Board.

The Act contains a number of provisions to address the tax issues associated with the restructuring. These provisions, which are discussed in “Key features”, allowed the restructuring to occur without any adverse tax implications.

### Background

The New Zealand Meat Board was a statutory body established under the Meat Board Act, and was treated as a statutory producer board for tax purposes. Under the Act, the Board’s assets ultimately belonged to livestock farmers.

The Board had two primary functions: managing quota functions as a delegated function from the government, and supporting a range of industry-good activities, including research and development, information provision, market access and promotion.

The Board’s quota management function was primarily funded by fees charged to meat processors and exporters. Industry-good activities were funded by a statutory levy imposed under the Act, and interest earned on reserve funds held by the Board.

### Key features

Tax-related provisions in the Act ensured that the restructuring occurred without any adverse tax implications.

### Reconstitution of the Board

As part of the restructuring the former Board was converted into two separate entities: the Board and a new company, Meat and Wool New Zealand Limited.

Section 6 of the Act provides that the Board, which continued in existence following the restructuring, is the same legal entity as the former Board. Therefore the conversion of the former to the existing Board did not give rise to tax implications, and the assets and liabilities of the former Board became those of the existing Board.

Section 84 of the Act allows for the transfer of assets and liabilities from the former Board to Meat and Wool New Zealand Limited, for three months following the date of commencement of the Act. Section 85(1) ensures that the transfer of assets and liabilities is:

- not a dutiable gift
- not a sale, disposal, distribution or transfer for income tax purposes, and
- not a supply of good or services for GST purposes.

Section 85(2) provides that Meat and Wool New Zealand Limited is the same “person” as the former Board for income tax and GST purposes. Any assets or liabilities transferred from the former Board are treated as having been acquired by Meat and Wool New Zealand Limited, on the date that they were first acquired by the former Board.

## Issue of shares by Meat and Wool New Zealand Limited

Section 85(4) of the Act provides that the issue of shares by Meat and Wool New Zealand Limited to the shareholding trust is:

- not a dutiable gift
- not a dividend for income tax purposes, and
- not otherwise gross income of the trust for income tax purposes.

This provision prevents the issuing of shares to the new shareholding trust for the benefit of livestock farmers, from becoming a taxable event.

## Continuity of shareholder interest and net tax losses

Section 85(3) of the Act ensures that shareholder continuity is not breached as part of the restructuring process. In relation to the issue of shares by Meat and Wool New Zealand Limited to the shareholding trust, the trust is treated as having held those shares, and any voting or market value interest attributable to those shares, at all times before the restructuring day.

Section 85(5) provides that Meat and Wool New Zealand Limited was a member of the same wholly owned group of companies that includes the former Board and any of its subsidiary companies, at all times, before the restructuring day. This provision ensures that Meat and Wool New Zealand Limited can access any tax losses previously incurred by the former Board or its subsidiary companies.

## Ability of the Board and Meat and Wool New Zealand Limited to consolidate

Section 87 of the Act allows Meat and Wool New Zealand Limited, the existing Board and any subsidiary companies included in the same wholly owned group of companies as the Board, to form a consolidated group for tax purposes.

As the Board remains a statutory body that does not issue shares following the restructuring day, it would otherwise be unable to form a consolidated group. Consolidation allows assets to be relocated within the group without tax implications, and allows for the carry-forward and grouping of tax losses.

The consolidated group will cease to exist if Meat and Wool New Zealand Limited ceases to exist, the company is no longer owned for the benefit of livestock farmers, the majority of its directors are no longer elected by livestock farmers in proportion to their share of the livestock farming industry, or the company is unable to collect levies under the Commodity Levies Act for the immediately preceding year.

The Board, any subsidiary company of the Board and Meat and Wool New Zealand Limited may elect to leave the consolidated group at any time.

## Available subscribed capital

Section 86(1) of the Act provides for Meat and Wool New Zealand Limited to have available subscribed capital of \$98,108,000. This available subscribed capital has been allocated between the classes of shares issued by Meat and Wool New Zealand Limited to the shareholding trust, on the restructuring day and in such proportions as it nominated.

If the Board and Meat and Wool New Zealand Limited both cease to be part of the same consolidated group, section 86(2) provides that any available subscribed capital that has not been distributed before the date of deconsolidation, will be cancelled.

## GST

Section 88 of the Act provides that a payment of a grant of money by the Board to Meat and Wool New Zealand Limited will be ignored for GST purposes.

## Application date

Sections 6, 84, 85, 86, 87 and 88 apply from the date on which the Act received the Royal Assent, 1 July 2004.

## LEGAL DECISIONS – CASE NOTES

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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.

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### JURISDICTION OF THE TAXATION REVIEW AUTHORITY

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<b>Case:</b>	TRA 022/2004
<b>Decision date:</b>	22 July 2004
<b>Act:</b>	Tax Administration Act 1994 ("TAA")
<b>Keywords:</b>	Challenge, out of time, exceptional circumstances, section 138D, filing posting, strike out

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#### Summary

The disputant posted two notices of claim to the TRA which were not received. The disputant applied to challenge out of time pursuant to section 138D. The TRA considered the Regulations allowed filing either by physical delivery or posting via a registered postal agency. It was an exceptional circumstance if a document was lost in the post. On this basis the Commissioner's strike out application was dismissed.

#### Facts

The disputant was notified by the Commissioner ("the CIR") on 30 November 1999 that he intended to investigate the disputant's tax returns and various trusts he was associated with.

#### 1997 income tax year

A Notice of Proposed Adjustment ("NOPA") was issued to the disputant for the 1997 income tax year on 12 December 2002 which proposed to disallow losses claimed from the Acton Joint Venture and Future Card schemes. It also proposed to assess the disputant for taxable distributions from non-qualifying trusts.

A further NOPA was issued proposing adjustments pursuant to section BG1 and GB1 of the Income Tax Act 1994 ("the ITA").

The disputant issued Notices of Response ("NOR") rejecting the CIR's adjustments.

A manual assessment was issued on 30 September 2003. The disputant was advised that a computer-generated notice of assessment would also be issued, which occurred on 1 October 2003.

#### 1994 income tax year

A NOPA was issued to the disputant for the 1994 income tax year on 22 November 2002 which proposed to include as part of the disputant's income, salary from a company. The disputant issued a NOR rejecting the CIR's adjustments.

The dispute continued through to the Adjudication Unit who issued a report dated 28 October 2003 confirming the CIR's adjustments. A manual assessment was issued on the same date and a computer-generated notice of assessment was issued on 15 November 2003.

The disputant claimed he issued challenge proceedings by filing two notices of claim ("the notices") relating to the 1997 and 1994 income tax years. The CIR's Litigation Management Unit received these notices on 19 December 2003.

The disputant claimed he had filed the notices with the Taxation Review Authority ("the Authority") by posting them on 28 November 2003. The disputant was made aware in late December 2003 that the Authority had not received the notices. However, despite requests, he did not provide the Authority with the notices until 30 March 2004.

The disputant also made an application to file out of time on this date. The CIR opposed this application and filed a Notice of Application to Strike Out the disputant's notices.

#### Decision

##### "Filing"

The CIR contended that filing by post is only complete when the documents are received by the Authority. The CIR drew assistance from the High Court Rules ("HCR"),

the District Court Rules (“DCR”) and postal provisions pursuant to the TAA as illustration of Parliament’s intention that filing required receipt.

The disputant contended the plain words of Regulation 9 allowed for filing by posting. He submitted that reference to the HCR, the DCR and the TAA was misconceived and that the Authority was a forum designed to provide a fair, efficient and cheap mechanism for independent adjudication of tax disputes which allowed filing by way of post.

Regulation 9 states that when a person elects to bring a challenge, it is necessary to “file 3 copies of a Notice of Claim with the Registrar...” To “file” and/or “filing” is not defined. Judge Willy considered Regulation 9 allowed for two possible methods of filing, either by personal delivery or posting to the Wellington Registry, or that filing occurs when the documents reach the Registrar.

Judge Willy considered it was not necessary or desirable to use the DCR or HCR in deciding the meaning of Regulation 9. Firstly, he considered the rule to be plain on its wording. Secondly, the different approach to relief for non-compliance with time limits was inconsistent and could not be applied to determine whether a document had been “filed” pursuant to Regulation 9. At most, they suggested to “post” meant the same as to “send”.

To the extent the DCR provided any guidance, he considered they tended to confirm the disputants submissions that documents only needed to be committed to a postal agency registered pursuant to the Postal Services Act 1998.

### Payment of fee

The CIR raised the issue of the disputant failing to send the filing fee with the notices. Judge Willy considered if Parliament had intended the fee to accompany the notices it would have expressly said so.

### Convenience and absurdity

The CIR considered that if “filing” were complete on posting it would produce an absurd result and the Authority would have no way of knowing what proceedings it had before it. Judge Willy considered that matters concerning the Authority’s control of its processes were exclusively within the province of the Authority and it was not for the CIR to advance such an argument.

Judge Willy considered there was nothing absurd in construing “filing” to be complete upon posting. He considered accepting the CIR’s submission could result in significant injustice given the rigidity of time requirements in revenue cases. To allow “filing” only by personally delivering the documents would render unusable one of the methods allowed for.

### Section 138D

Judge Willy considered it was exceptional if an item was lost in posting. It was beyond the disputant’s control and provided him with a reasonable excuse for not getting the notices to the Registrar on time.

Judge Willy disagreed with the CIR that the Authority has discretion to refuse the application to file out of time even if the disputant was within the provisions of section 138D. He could see no basis why, if the disputant was within the strict criteria of statute, he should be barred from bringing a claim. Even if such discretion existed, Judge Willy considered the CIR’s arguments did not persuade him to use such discretion.

### Strike out

Judge Willy considered the CIR’s application to strike out could not be upheld on the basis that he had found the notices were “filed” on time. Although Judge Willy accepted that the notices were deficient (they did not comply with Regulation 7, 8 or form 1 of the schedule), he considered, due to the large sums of money involved the disputant should be allowed to “put his house in order”. Judge Willy ordered the disputant file and serve amended notices of claim within 14 working days of the judgment.

## COUNCIL-CONTROLLED TRADING ORGANISATION

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<b>Case:</b>	The Wellington Regional Stadium Trust v AG and CIR
<b>Decision date:</b>	12 July 2004
<b>Act:</b>	Local Government Act 2002, Income Tax Act 1994
<b>Keywords:</b>	Council-controlled trading organisation

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### Summary

The High Court found the Wellington Regional Stadium Trust was not a council-controlled trading organisation as it did not have a purpose of making a profit.

### Facts

The need for a new sports stadium in the Wellington region was identified and the Wellington Regional Council (“WRC”) arranged a meeting in August 1993. Following that, various preliminary studies were undertaken, investigating several possible sites. In September 1994 the WRST steering group was established at the initiative of the Wellington City Council (“WCC”) to lead the project for its preferred site,

the Wellington railyards. In November 1995, the Wellington Regional Stadium Development Trust (“the Development Trust”) was established by WCC as the settlor. The members of the steering group became the original trustees of the Development Trust. The Development Trust obtained a commitment for funding from WCC, of a limited amount, to enable the proposal to progress. In August 1995 the WRC confirmed that it would advance up to \$25 million, subject to the passage of special legislation to allow WRC to provide the funding and carry out its associated responsibilities, and to the risks of the project being appropriately managed. Special legislation was promoted and a local Act, the Wellington Regional Council (Stadium Empowering) Act 1996 (“the Empowering Act”) was passed on 2 September 1996.

The Empowering Act:

- enabled WRC to lend up to \$25 million to the WRST, on such terms and conditions as WRC thinks fit, and
- required WRC, before making any loan, to establish, with WCC, the WRST.

The WRST was established pursuant to a trust deed in November 1997, and was incorporated under the Charitable Trusts Act 1957 in December 1997.

The objects of the WRST are:

- (a) To be responsible for the planning, development, construction, ownership, operation and maintenance of the Stadium as a high-quality multi-purpose sporting and cultural venue.
- (b) To provide at the Stadium high quality facilities for use by the rugby, cricket and other sports codes, musical, cultural and other users including sponsors, events and fixtures organisers and promoters, so as to attract to the Stadium high quality and popular events for the benefit of the public of the Region.
- (c) To administer the Stadium, and the Trust Assets on a prudent commercial basis so that it is a successful, financially autonomous community asset.
- (d) Generally to do all acts, matters and things that the Trustees consider necessary or conducive to further or attain the objects of the Trust set out above for the benefit of the public of the Region including the acquisition of any land or interest in land or other assets as an ancillary ground or grounds or additional assets for the Stadium or for other purposes ancillary to the Stadium and to maintain and operate that venue or those assets to a high standard, and
- (e) Subject to the fulfilment of the objects and responsibilities set out in sub-clauses 3.1(a) to (d) inclusive, to govern and manage the Stadium and Trust Assets so as to repay all debt of the Trust (including to the Settlers) as soon as is reasonably practicable.”

Funding of \$40 million, out of a \$131 million total funding required to build the stadium, was provided by WCC (\$15 million) and WRC (\$25 million) by way of subordinated, non-recourse loans. The WRST took over the assets, liabilities and obligations of the Development Trust in March 1998. A construction contract was finalised in March 1998 and the Stadium was built and completed in December 1999.

The WRST argued that if it was a “Council-Controlled Trading Organisation” (“CCTO”) as defined in the Local Government Act 2002 (“the 2002 Act”), the following consequences would arise:

- section 63 of the 2002 Act will apply to loans which have been made by the WRC and the WCC to the WRST, and
- the WRST’s status as a charitable trust eligible for the income tax exemptions contained in s CB4(1) of the Income Tax Act 1994 will be lost.

## Decision

The WRST argued it was not a CCTO as:

- the Empowering Act represents a statutory code for the WRST’s establishment, governance, accountability and administration, and that the relevant provisions of the local government legislation do not apply
- alternatively, that, if the local government legislation does apply, then the WRST is not within the definition of a CCTO for the purposes of the 2002 Act.

In terms of whether the WRST was a CCTO it was common ground:

- that the WRST was an “organisation” as defined in the 2002 Act
- that the requisite degree of council control exists so that if the 2002 Act applies the WRST falls within the definition of “council-controlled organisation”;

The sole question therefore was whether the WRST “operates a trading undertaking for the purpose of making a profit”, so as to fall within the definition of CCTO as defined in the 2002 Act.

The WRST invited the Court for the purposes of the hearing to assume the “trading undertaking” prerequisite is fulfilled with reference to the WRST’s stadium operations.

In considering the meaning of “purpose” his Honour was referred to the decisions of *Plimmer v CIR* [1958] NZLR 147, *CIR v Walker* [1963] NZLR 339, *CIR v National Distributors Ltd* [1989] 3 NZLR 661 by WRST, and to *CIR v Hunter* [1970] NZLR 116 and *Holden v CIR* [1974] 2 NZLR 52 (PC) by the CIR. His Honour did not



consider that the *Hunter* and *Holden* cases were in conflict to the ones referred to by WRST. His Honour regarded the cases as consistent with the propositions that:

- (a) “purpose” and “intention” are distinct, and
- (b) the purpose must (in the absence of some indication to the contrary) be the dominant purpose.

His Honour referred to the change in wording between the 1974 Local Government Act and the 2002 Act. The 1974 Act refers to operating a trading undertaking “with the intention or purpose of making a profit”. The 2002 Act refers to operating a trading undertaking “for the purpose of making a profit”. There are two significant features of that change in wording:

- (a) the omission of the word “intention” in the 2002 Act, and
- (b) the change in the preposition, from “with” in the 1974 Act to “for” in the 2002 Act.

His Honour saw the omission of the word “intention” as deliberate and the change in definition in the 2002 Act had the effect of narrowing the test.

As to the meaning of “profit” His Honour was referred to the decision by Richardson J in *Grieve v CIR* [1984] 1 NZLR 101, that is a surplus over cost. His Honour noted that the word is defined in the relevant definition in the Shorter Oxford English Dictionary, as “the excess of returns over outlay. His Honour considered that the word has that ordinary meaning in the 2002 Act.

In considering the phrase as a whole, His Honour, after referring to a Select Committee report and the introduction at the third reading of the legislation, found that the distinction made by the Select Committee and the Minister between charitable organisations that make a profit only to re-invest it in the organisation and profit-making trading organisations is a distinction which is reflected in the words of the definition. He did not consider that a trading undertaking whose profit objective is limited to making a sufficient profit to meet the financial commitments of the organisation, so that those profits will necessarily be retained, and which does not have the aim of generating a surplus which will be available to its stakeholders, can be said to have the purpose of making a profit.

His Honour held that the reference in the 2002 Act is to **the** purpose and not to **a** purpose. Where there is more than one purpose, he considered that it is the dominant purpose which is relevant.

His Honour found that the evidence established:

- (a) the motives of the promoters of the WRST were to provide a stadium for the use and benefit of the Wellington region

- (b) the Councils sought to establish the WRST in such a way that it would not require further injections of money from them, but the Councils did not expect to obtain a return on the money that they did contribute
- (c) the building of the stadium could not be achieved without borrowing money on commercial terms
- (d) the terms of the borrowing require principal repayments, which can only be met if there is a profit from which to pay them.

His Honour considered it cannot properly be said that the purpose of the promoters of the stadium was to obtain profits. Nor could it be said that the purpose of the WRST as distinct from its promoters is to obtain profits. In the operation of the stadium, the WRST must necessarily make earnings that are within the meaning of the term profit if it is to be able to meet its principal repayment obligations. The profits are a means to an end, namely to enable the stadium to operate as a going concern, not an end in themselves. His Honour considered the WRST was an organisation which made a profit only to reinvest it in the organisation.

His Honour held the dominant purpose of the WRST was in pursuit of the objects in paragraphs (a) and (b) of the Trust Deed and paragraph (c) was more in the nature of an object designed to assist in the achievement of objects (a) and (b) than a principal object in its own right.

His Honour concluded with the comment that section 4 of the Empowering Act clearly overrode the general provision of section 63 of the 2002 Act though it was a matter he did not now have to decide.

## COMMISSIONER'S SECURITY FOR COSTS CONFIRMED – TAXPAYERS MUST GIVE SECURITY JUST LIKE OTHER LITIGANTS

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<b>Case:</b>	<i>Reefdale Investments Limited v CIR, Vanya Holdings Limited v CIR</i>
<b>Decision date:</b>	15 July 2004
<b>Act:</b>	N/A
<b>Keywords:</b>	Security for costs – impecunious taxpayers and secretly funded taxpayers liable to pay

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### Facts

This was an application for review of a decision of Master Thomson in February 2002 in which he required the plaintiffs to give \$150,000 security for costs.

The two plaintiffs were investors in a forestry investment which the CIR contends is a tax avoidance scheme. The scheme generated substantial tax losses used to shelter income of high net worth individuals. All the other investors in the scheme have conceded. The CIR applied for security for costs on the basis that Reefdale Investments Limited was insolvent and Vanya Holdings Limited would also be unable to pay the CIR's costs in the event he was successful. The plaintiffs admitted that they had no means to pay and did not dispute that Reefdale was insolvent, although an undisclosed source of funds has enabled the instruction of counsel and engagement of experts on the plaintiffs' behalf in these proceedings.

## Decision

The High Court rejected the plaintiffs' submissions, as follows:

### The constitutional validity of Rule 60 of the High Court Rules

The High Court Rules have statutory force and the Court must apply the Rules on that basis. The Court cannot examine the processes which Parliament has seen fit to adopt in enacting legislation.

### The principles to be applied to applications for security for costs in tax cases

The Judge did not consider that the fact that costs are not awarded in the TRA is significant, as there are a number of different consequences which flow from a case being commenced in the High Court rather than in the TRA, and the initial choice of commencing proceedings is with the taxpayer. He held that these proceedings were rightly commenced in the High Court and that the practices and procedures of the High Court apply.

The onus for objection to the assessment is clearly placed on the taxpayer. That involves the taxpayer and the Commissioner having the role of plaintiff and defendant respectively. The procedural consequences of that allocation of roles should follow the normal course.

The Court of Appeal's proposition in *Auckland Gas Co Ltd v CIR*, that the costs jurisdiction and rules applied to tax cases as to civil cases generally, should extend to security for costs. The Court of Appeal's reasoning that there are no special rules as to costs in tax cases should be applied broadly, and no sufficient case had been made to justify different rules to applications for security for costs in tax litigation.

### The principles to be applied in exercising the Court's discretion to order security for costs

The Master's decision was a fully reasoned one after a defended hearing, and in such cases the Court will be less

ready to intervene. The Judge noted that the Master considered the possibility of others contributing to the costs, which was a relevant consideration in an application such as this. It would not be right to allow the shareholders to shelter behind the impecuniosity of the companies to avoid a liability for costs in the litigation. The plaintiffs apparently have access to funds, so the claim that the shareholders are not prepared to contribute to meet an order for security for costs has a somewhat hollow ring.

The application for review was dismissed and the Master's order to provide \$150,000 security for costs was upheld. The quantum of the order was held to be realistic.

The Judge also awarded costs to the Commissioner on a category 2B basis.

## STRUCK-OFF COMPANY UNABLE TO APPEAR

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<b>Case:</b>	KJ Cummings Ltd (struck-off) v CIR
<b>Decision date:</b>	28 June 2004
<b>Act:</b>	Companies Act 1993 High Court Rules R700K
<b>Keywords:</b>	Liquidation, struck-off company

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## Summary

A company which has been struck off the Companies Register cannot appear or be represented in proceedings unless it is restored to the Register.

## Facts

This is a debt recovery action.

The taxpayer had been assessed under section 99 ITA 1976 (now section BG1 ITA 1994) as a consequence of its involvement with the Russell template (see *Miller v CIR* [2001] 3 NZLR 316). The taxpayer was assessed on what is referred to as "Track A" (assessing the profit company).

Both the TRA (*Case M104* (1990) 12 NZTC 2,660) and the High Court (*KJ Cummings v CIR* (1998) 18 NZTC 13,537) upheld the Commissioner's assessment. After the deemed abandoned of a further appeal the Commissioner sought to recover the outstanding tax and commenced liquidation proceedings. The taxpayer sought to restrain the advertising of the proceedings and to stay the proceedings on the basis that the debt was disputed (relying upon R700K High Court Rules).

The Commissioner opposed this arguing that the debt was not able to be disputed in the proceedings. He was successful before the High Court and the taxpayer appealed.

The taxpayer had also been struck off the Companies Register (under section 327 Companies Act 1994 a creditor may seek liquidation of a struck off company to enable access to assets).

## **Decision**

In an oral decision the CA (by Anderson J) dismissed the taxpayer's appeal.

The taxpayer could not get past the fundamental problem that it had been struck off the Companies' register and therefore had no existence. The Court could not itself reinstate the company in these proceedings but even if it could the appeal would fail on its merits.

The usual basis for a stay was that the debt was disputed or that to proceed would be unfair and oppressive to the company's business. Here, the company had been struck off so there was no basis to conclude that it would be unfair or oppressive to continue the proceedings. The only issue that could be considered was not if the tax was payable (it was) but if it had in fact been paid or otherwise discharged. This could be considered in the substantive proceedings.

## STANDARD PRACTICE STATEMENTS

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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.

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### SECTION 17 NOTICES IR-SPS GNL-440

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#### Introduction

1. This Standard Practice Statement outlines the procedures Inland Revenue will follow when issuing notices, including third party requests, under section 17 of the Tax Administration Act 1994. Section 17, which relates to requisitions for information, is one of Inland Revenue's information-gathering powers. Other powers (such as section 16) which relate to the gathering of information can be, and are, used by the Commissioner in conjunction with section 17 but they are not discussed in this Standard Practice Statement.

#### Application

2. This Standard Practice Statement applies from 15 August 2004 and replaces INV-321 *Section 17 Notices* published in *Tax Information Bulletin* Vol 11, No 9 (October 1999).

#### Background

3. Before Inland Revenue can verify or make an assessment of a person's taxation liability, information is needed. The Tax Administration Act 1994 gives the necessary powers to collect information including section 17 which empowers the Commissioner of Inland Revenue to require any person to furnish in writing any information and produce books and documents for inspection where it is considered necessary or relevant for the Commissioner to exercise his statutory functions.
4. Section 17 has been amended by section 85 of the *Taxation (Māori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003* and again by section 105 of the *Taxation (GST, Trans-Tasman Imputation and Miscellaneous Provisions) Act 2003*. The relevant changes are:
  - A new subsection (1B) provides that information or a book or document that is in the knowledge, possession or control of a non-resident who is controlled, directly or indirectly, by a New Zealand resident, is to be treated as being in the knowledge, possession or control of the New Zealand resident. Accordingly, that New Zealand resident may

be required to furnish information held by the non-resident that it controls.

- Subsection (1C) sets out rules for determining when a person is controlled by a New Zealand resident and provides that foreign secrecy laws are to be ignored.
- Subsection (1D) provides that Inland Revenue may require that the information requested is to be delivered to a particular office of the Department. Where this is required it will be stipulated, with the street or postal address, in the section 17 notice. Because this amendment may cause extra compliance costs to taxpayers by way of delivery charges, Inland Revenue may instead agree to the information being delivered to the office nearest the taxpayer or nearest to where the information is held. See paragraph 11 of this SPS.

These changes took effect on 26 March 2003. Further background to and explanation of these changes can be found in *Tax Information Bulletin* Vol 15, No 5 (May 2003) at pages 53-56.

5. Inland Revenue will usually request information, books or documents without expressly relying on section 17. This practice fosters a spirit of reasonableness and mutual cooperation.
6. However, where information is not provided voluntarily or in a timely manner Inland Revenue will use the statutory authority in section 17 to demand the information. In this case Inland Revenue issues a section 17 notice. If not complied with, a section 17 notice will result in Inland Revenue invoking the statutory remedies. However, Inland Revenue reserves the right in some cases to commence the information gathering process with a section 17 notice, eg in cases where it knows of prior instances of non-cooperation from the taxpayer and/or their advisors.

#### Legislation

Tax Administration Act 1994

##### 3 Interpretation

- (1) In this Act, unless the context otherwise requires,- ...  
“**Book and document**”, and “**book or document**”, include all books, accounts, rolls, records, registers, papers, and other documents and all photographic

plates, microfilms, photostatic negatives, prints, tapes, discs, computer reels, perforated rolls, or any other type of record whatever: . . . .

**17 Information to be furnished on request of Commissioner**

(1) Every person (including any officer employed in or in connection with any Department of the Government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish in writing any information and produce for inspection any books and documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.

(1B) For the purpose of subsection (1), information or a book or document is treated as being in the knowledge, possession or control of a New Zealand resident if—

- (a) the New Zealand resident controls, directly or indirectly, a non-resident; and
- (b) the information or book or document is in the knowledge, possession or control of the non-resident.]

(1C) For the purpose of subsection (1B) and sections 143(2) and 143A(2)—

- (a) in determining whether a non-resident is controlled by a New Zealand resident—
  - (i) anything in the knowledge, possession or control of<sup>1</sup> a person who is resident in New Zealand, or is a controlled foreign company, and is associated with the New Zealand resident is treated as being in the knowledge, possession or control of the New Zealand resident; and
  - (ii) a person is treated as being associated with the New Zealand resident if the person and the New Zealand resident are associated under section OD 7, interpreted as if “relative” had the meaning set out in paragraph (b) of the definition in section OB 1, or OD 8(3) of the Income Tax Act 1994; and
- (b) a law of a foreign country that relates to the secrecy of information must be ignored.

(1D) If information in writing is required, or books and documents must be produced, the Commissioner may require that the information be furnished, or the books and documents be produced, to a particular office of the Department.

- (2) Without limiting subsection (1), the information in writing which may be required under this section shall include lists of shareholders of companies, with the amount of capital contributed by and dividends paid to each shareholder, copies of balance sheets and of profit and loss accounts and other accounts, and statements of assets and liabilities.
- (3) The Commissioner may, if the Commissioner considers it reasonable to do so, remove and retain any books or documents produced for inspection under this section for so long as is necessary for a full and complete inspection of those books and documents.
- (4) Any person producing any books or documents which are retained by the Commissioner under subsection (3) shall, at all reasonable times and subject to such reasonable conditions as may be determined by the Commissioner, be entitled to inspect the retained books or documents and to obtain copies of them at the person’s own expense.
- (5) The Commissioner may require that any written information or particulars furnished under this section shall be verified by statutory declaration or otherwise.
- (6) The Commissioner may, without fee or reward, make extracts from or copies of any books or documents produced for inspection in accordance with this section.

**Standard Practice**

**Section 17 Notice**

- 7. Section 17 gives the Commissioner of Inland Revenue the power to require persons to produce for inspection books and documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of the Inland Revenue Acts. Included within the expression “book and document” are all books, accounts, rolls, records, registers, papers, and all photographic plates, microfilms, photostatic negatives, prints, tapes, discs, computer reels and perforated rolls. It is considered that “discs” would include any kind of recordable disc, ie compact and floppy discs, and DVDs, etc.
- 8. Where information is to be demanded under section 17 a notice will be issued (refer to Notice “A” in the attached Appendix). Prior to issuing a section 17 notice Inland Revenue will consider the following points.

- 1. *The reason for requiring the information*  
Inland Revenue will only request information considered necessary or relevant and that is reasonably required in the circumstances of the case.
- 2. *The impact of the demand on the suppliers of information*  
Inland Revenue will be reasonable in relation to the quantity of information sought and the

<sup>1</sup> The *Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill* which was introduced on 29 March 2004 proposes (clause 71) to amend s17(1C)(a)(i) by replacing “in the knowledge, possession or control of” with the words “held by” in both places where they occur. This would simply reverse the amendment effected by the *Taxation (GST, Trans-Tasman Imputation and Miscellaneous Provisions) Act 2003*.

timeframe for providing that information. Inland Revenue will reconsider parts of the demand where there is genuine difficulty in obtaining and/or providing that information.

3. *Previous requests for information or attempts to resolve disputes*

Generally, a section 17 notice will only be issued following a failure to provide information previously requested, or where specific issues have been identified and an attempt to resolve those issues has failed. There will be occasions where a section 17 notice may be issued without a prior request, eg where there have been prior instances of non-cooperation from the taxpayer and/or their advisors, or where the Commissioner otherwise considers that delay, or a less formal approach, may unreasonably increase the risk of non-compliance. (Depending on the circumstances, a refusal or failure to comply with an informal request for information would be non-cooperation and a refusal or failure to comply with a more formal request for information, ie one mentioning section 17, would be non-compliance as well.) Where the taxpayer's advisor has in the past been uncooperative (including in respect of matters unrelated to the taxpayer) this may be a factor to be taken into account in considering whether a section 17 notice may be issued without a prior request.

An example of a case where a notice might be issued without a prior request is where an audit has been in progress for some time without a request under section 17 having been made. It would then be appropriate, because the matter may proceed to adjudication, that a notice be issued to ensure that all relevant information has been gathered.

4. *Whether the information is available publicly*  
Inland Revenue will generally not use section 17 where information is available publicly and will meet the usual charges, for example where the information is held by the Land Transfer Office, the Companies Office and Quotable Value New Zealand. Public availability of information does not, however, prevent Inland Revenue from requiring information to be provided under section 17.

5. *The effect upon the disputes resolution process*

The disputes resolution process relies on full and prompt disclosure by both the Commissioner and the disputant. Where previous requests have not been met with full

and prompt disclosure Inland Revenue will use section 17 notices to obtain information. The use of section 17 prior to the commencement of the disputes resolution process may mean that the number of matters entering that process will be reduced.

Under proposed legislation the disputes process may be truncated where a taxpayer has failed to comply with an information request. However there may be instances where, with a statute bar approaching, it is considered necessary that the disputes resolution proceedings (including adjudication) be completed and a final decision whether to issue an assessment or not be made within time. Section 17 may also be used in such cases to ensure that all relevant information is gathered.

6. *Inland Revenue's intention to ensure compliance with the notice*

Generally, Inland Revenue will use section 17 only where it is prepared to invoke the statutory remedies in the event of non-compliance.

7. *The use of section 16 powers*

In some cases Inland Revenue will not request information but will access the books and documents under section 16 which gives the Commissioner the power to enter all places for the purpose of inspecting any books and documents.

9. Nothing in section 17 precludes Inland Revenue from seeking information from multiple sources and from sources other than the affected taxpayer.

10. Separate section 17 notices may be issued for different information and books or documents. If the Commissioner requires the information to be delivered to Inland Revenue, the notice will state that the information be furnished, or the books and documents be produced, to a particular office of the Department.

**Requests for significant amounts of documentation**

11. If a significant amount of documentation is requested, the person providing the information will be permitted to send the documents to the nearest Inland Revenue office, which will arrange for them to be forwarded to the office conducting the investigation. Where the delivery costs would be reduced by \$20 or more by sending to the nearest Inland Revenue office then it is considered that the amount of documentation is significant. In this circumstance we would generally accept the request to send the information to the nearest office.<sup>2</sup>

<sup>2</sup> This paragraph is included in accordance with Inland Revenue's statement in *Tax Information Bulletin* Vol 15, No 5 (May 2003) at page 56 that there would be administrative guidelines on this point.

12. The decision whether or not to issue a section 17 notice will generally be the responsibility of a team leader and approval to issue the notice should be given by an officer at or above that level.

#### **Legal professional privilege**

13. A taxpayer is entitled, and should have sufficient time, to seek legal advice in respect of whether particular books or documents are subject to legal professional privilege. Section 20 of the Tax Administration Act 1994 covers the topic of *solicitor-client* privilege, ie privilege of confidential communications between legal practitioners and their clients. Briefly, it provides that information is privileged from disclosure if it is a confidential communication between a legal practitioner and another legal practitioner (acting in their professional capacities) or a legal practitioner in the practitioner's professional capacity and the practitioner's client and it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance. However financial information and investment records kept in connection with solicitors' trust accounts are not privileged. The other kind of privilege, *litigation privilege* which relates to pending or contemplated litigation, is not covered by section 20.

#### **Advice and other work papers prepared by accountants**

14. The Commissioner has also adopted certain administrative rules concerning the use of section 17 to gain access to advice and other work papers of accountants for their clients.

#### **Correction of information**

15. Where a taxpayer has complied with an information requisition then, in accordance with section 6 of the Privacy Act 1993 (Information Privacy Principle No. 3), the taxpayer will be allowed to seek access to and correction of that information where Inland Revenue has incorrectly recorded the information.

#### **Changes to Section 17 Notice**

16. In following the above process every attempt will be made to maintain contact with the taxpayer so as to provide an opportunity for concerns to be raised. Inland Revenue expects holders of information to contact Inland Revenue where there is genuine difficulty in complying with the demand.
17. Any change to the date for compliance must be agreed before the expiration of the original date. Beyond this, the offence for non-compliance has already occurred and an extension of time will not be given.
18. Where modification of the notice is agreed it will be recorded in writing (refer to specimen Notice "B" in the attached Appendix).

#### **Requests to persons other than the taxpayer**

19. Some holders of information, such as banks, are willing to provide information but require Inland Revenue to state its legal authority before they will release the information. Generally, where information is required from persons other than the taxpayer and cooperation is likely, Inland Revenue will initially seek the information by a letter (refer to specimen Letter "C1" and the slightly more formal Notice "C2" in the Appendix). The letter may follow a discussion. Letter "C1" is provided by way of example and may be varied according to the circumstances, and it may or may not contain a reference to section 17.
20. The letter is not a formal section 17 demand. However, generally where the letter is not complied with, a section 17 notice based on specimen Notice "A" will be issued so the third party recipient is informed of the consequences of their non-compliance before further action is initiated.

#### **Controlled non-residents**

21. Under section 17(1), Inland Revenue may require a New Zealand resident to provide information in circumstances where the resident's non-resident employees or agents hold the information for the resident. Section 17(1B) now gives Inland Revenue the further power to require a New Zealand resident to provide information held by a non-resident entity controlled, directly or indirectly, by that New Zealand resident.<sup>3</sup> For example, a husband and wife have 51% of the shares in a foreign company. Inland Revenue can issue a section 17 notice to them requiring that they furnish information held by the foreign company. Subsection (1C) sets out further rules for determining whether a non-resident is controlled, in particular it provides that foreign secrecy laws are to be ignored.
22. If obtaining the information would be a costly or difficult exercise then generally it would not be required where the tax at stake is immaterial, or when Inland Revenue has access to this information through other sources.

#### **Medical information**

23. In rare instances Inland Revenue may seek access to an individual's medical records. For example, it may be necessary to inquire into the genuineness of a medical certificate. Such requests need careful consideration.

#### **Non-compliance with Section 17 Notice**

24. It is an offence not to comply with a section 17 notice. Sections 143 and 143A of the Tax Administration Act 1994 state that an offence has

<sup>3</sup> See *Tax Information Bulletin* Vol 15, No 5 (May 2003) at pages 55 and 56 for a brief discussion of this amendment.

occurred where a person does not provide, or knowingly does not provide, information to the Commissioner when required to do so by a tax law. Furthermore section 143B provides that it is an offence for a person knowingly not to provide information to the Commissioner or any other person when required to do so under section 17, where that person or any other person do so intending to evade the assessment or payment of tax.

However, sections 143 and 143A of the Act state that no person may be convicted of an offence for not providing information, or knowingly not providing information (other than tax returns and tax forms) to the Commissioner if that person proves they did not, as and when required to provide the information, have that information in their knowledge, possession or control. Control here is used in its wider sense and includes material held by others on one's behalf.

25. Where non-compliance occurs, Inland Revenue will not reissue a section 17 notice in a different format. An offence is committed if a section 17 notice is not complied with. However, those receiving section 17 notices have the ability to request a new due date for compliance with the notice before expiration of the original due date as mentioned above (paragraph 17).
26. Where non-compliance occurs, a follow-up notice will generally be issued before further action is taken. The follow up notice will state that the section 17 notice has not been complied with, court orders are being sought and/or prosecution action is being considered (refer Notice "D" attached). A follow-up notice or letter will not be issued in all cases, eg one situation would be where there have been delays in supplying information previously.
27. Where Inland Revenue has issued a follow-up notice, an application for a court order for compliance with the section 17 notice may be made and/or prosecution action may be taken. There are different time limits for laying informations to begin prosecution action:
  - for the offence of knowingly not providing information when required to do so the time limit is 6 months
  - for the absolute liability offence of not providing information when required to do so the time limit is 10 years, and
  - for the offence of knowingly not providing information when required and the offender does so, for example, intending to evade the assessment or payment of tax, there is no time limit.

Once the offence is committed prosecution action should be commenced within a reasonable time of the date of non-compliance unless there are special circumstances, eg the offence not being discovered until a later time.

28. In general where a person complies with the requirement to provide information after the stipulated time but prior to the issue of a summons by the Court commencing the prosecution action foreshadowed in Notice "D", the prosecution would not be commenced.

This Standard Practice Statement is signed by me on 12 August 2004.

**Margaret Cotton**  
National Manager  
Technical Standards



## **Appendix**

### **Section 17 Notices and Third Party Information Request Letter**

This Appendix is not part of the standard practice. The notices and letter are specimens only being provided for the guidance of Inland Revenue officers.

Notice "A": Section 17 Notice

Notice "B": Agreed Change / Amendment to Notice

Letter "C1": Where Recipient other than the Taxpayer

Notice "C2": Where Recipient other than the Taxpayer

Notice "D": Follow-Up Notice for Non-compliance

**Note:** The notice/letter must be typed on Inland Revenue letterhead. The wording in italics may change in individual cases. Notice "C2" is an alternative that may be used to Letter "C1".

## Notice "A": Section 17 Notice

To: [name]  
[address]

### NOTICE TO FURNISH INFORMATION AND PRODUCE BOOKS AND DOCUMENTS

[Brief history explaining why the Notice has been issued.]

Therefore I, [name], [designation], [office], being duly authorised by the Commissioner of Inland Revenue under section 7 of the Tax Administration Act 1994 (the Act), require you under section 17 of the Act (copy attached) to furnish in writing the information sought below, and produce for inspection the following books and documents which I consider necessary or relevant to establish [possible phrase: your correct taxation liability].

The information to be furnished, and the books and documents to be produced for inspection, are as follows:

- 1 . . . . . [List all information required.]
- 2 . . . . .

In addition, please provide a list of all documents required that are not in your possession or under your control and where known, identify the person who possesses or has control of such documents. [As required]

I also require that the written information or particulars furnished be verified by statutory declaration. [Include where appropriate.]

Any document covered by legal professional privilege is outside the scope of this notice. You should consult your legal advisers if assistance is required in determining whether a specific document is covered by legal professional privilege. Please provide a list of all documents for which legal professional privilege is claimed. [This paragraph is inapplicable where the information requested consists of financial documents only.]

[Name] will call at [place and time] on [date] to collect the information. Or Please deliver the information to [postal address, or street address where courier or hand delivery is required, of a particular office or nearest office, where the taxpayer has permission to send to the nearest office, of Inland Revenue] marked for my attention or for the attention of [name] by [date] or within ... days of the date of this notice. Or Please fax the information to [facsimile address] marked for my attention by [date]. If you wish to make other arrangements as to collection will you please telephone [name] on [telephone number].

If gathering this information is going to be time consuming or would otherwise cause you difficulty, please contact [name] on [telephone number] as they are willing to assist. If you wish to discuss the content or detail of this notice, please contact [name] well before the time mentioned in the preceding paragraph as modifications will be agreed to in cases of genuine difficulty or where legal professional privilege has been claimed and is applicable.

If you consider that the amount of information required is significant, you may be permitted to send the [information, books or documents] to the nearest Inland Revenue office. (Where the delivery costs would be reduced by \$20 or more by sending to the nearest Inland Revenue office then it is considered that the amount of documentation is significant.) [Include this paragraph where appropriate.]

I would point out that it is an offence not to comply with this notice. Failure to comply may lead to a court order being requested to enforce compliance and/or prosecution action. I draw your attention to sections 143 and 143A of the Tax Administration Act 1994. These sections state an offence has occurred where a person does not provide, or knowingly does not provide, information to the Commissioner when required to do so by a tax law. Furthermore section 143B provides that it is an offence for a person knowingly not to provide information to the Commissioner or any other person when required to do so under section 17, where that person or any other person do so intending to evade the assessment or payment of tax.

However, sections 143 and 143A of the Act state that no person may be convicted of an offence for not providing information, or knowingly not providing information (other than tax returns and tax forms) to the Commissioner if that person proves they did not, as and when required to provide the information, have that information in their knowledge, possession or control. Control here is used in its wider sense and includes material held by others on your behalf.

I would also point out that once you have complied with this Notice you have the right to inspect the information that you have provided and to correct any such information.

Dated at *[location]* this ... day of *[month]* *[year]*.

*[A notice does not require 'yours faithfully'.]*

*[Name]*

*[Designation of signatory]*

## Notice "B": Agreed Change/Amendment to Notice

[Name and address]

Attention:

NOTICE TO FURNISH INFORMATION

Further to the previous notice to furnish information dated [date] and our conversation of [date] I confirm that the following amendment(s) to the notice to furnish information are agreed:

1. I will now call on [day and date] at [place] to collect the information. *Or* Please deliver the information to [a particular office or nearest office, where the taxpayer has permission to send to the nearest office, of Inland Revenue] by [date] for the attention of [name]. [Note: any change to the date for compliance must be agreed before the expiration of the original date. Beyond this a breach has occurred and an extension of time cannot be given.]
2. ....

If you have any queries please contact me on .....

Dated at ..... this .... day of ....., .....

[Name]

[Designation of signatory]

## Letter "C1": Where Recipient is a Person other than the Taxpayer

[Date]

[Name and Address]

Attention: ...

Dear ...

Re: [Full Names (for individuals include all Christian or first names) / Address (including last known address where possible) / Known Bank Accounts / Telephone Numbers / IRD Numbers / Date of Birth / Date of Incorporation, etc.]

Would you please forward a copy of the following information or produce the following books and documents relating to the above persons:

1. .... [List the information or books or documents required and where applicable include the period for which the information being requested is required.]
2. .... [Etc as required.]

The above information and/or books and documents is/are required by [date, allow at least five working days].

Please send the above information and/or books and documents to [address of particular Inland revenue office or nearest office, where the addressee has permission to send to the nearest office] Or Please fax the information to [facsimile address] marked for my attention by [date].

This information is required in terms of section 17 of the Tax Administration Act 1994. Or My authority for requesting the information is section 17 of the Tax Administration Act 1994. [This paragraph is optional.]

If you have any queries, or if I can assist with collection of the information, please contact me on [phone / fax numbers].

[Signature]

[Name]

[Designation of signatory]

## Notice "C2": Where Recipient is a Person other than the Taxpayer

[Name and Address]

Attention: ...

IRD number(s):...

**Our reference:**...

**Tauranga Branch Office**

*Regency House*

*1 Elizabeth Street*

*Private Bag*

**Tauranga**

*New Zealand*

*Facsimile (07) 577 3001*

### NOTICE TO FURNISH INFORMATION

I, [name], [designation] of ... being duly authorised by the Commissioner of Inland Revenue pursuant to section 7 of the Tax Administration Act 1994 (the "Act"), require you to furnish the following information relating to the above person(s):

1. ....

The above information, which I consider necessary and relevant, is required in terms of Section 17 of the Act.

If you have any queries, or I can assist with collection of the information, please contact me on ph ..., ext ... .

Dated at ... this ... day of ... ..

Yours faithfully

Investigator

## Notice "D": Follow-Up Notice for Non-Compliance

[Name and address]

Attention:

### NOTICE OF IMPENDING COURT ORDER AND PROSECUTION ACTION

A Notice to Furnish Information was sent to you on [date]. My records indicate that this request has not been complied with. Accordingly, I write to inform you that I am considering commencing procedures to obtain a court order for compliance with the request.

I am also considering commencing prosecution action for the following offence(s) [list the offence(s) and relevant section(s)], the penalties for which include maximum fines of:

- \$... for a first offence,
- \$... for a second offence *or* on every other occasion for the same offence,
- \$... for subsequent offences [as required], and
- imprisonment for up to 5 years [as required].

A copy/copies of the relevant section/s is/are attached.

Please advise me immediately of any reasons why you consider the Inland Revenue Department should not take this action.

Dated at ..... this .... day of ..... ..

[Name]

[Designation of signatory]

## REGULAR FEATURES

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### DUE DATES REMINDER

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#### September 2004

##### 20 Employer deductions

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

#### October 2004

##### 20 Employer deductions

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*

##### 29 GST return and payment due

These dates are taken from Inland Revenue's *Smart business tax due date calendar 2004–2005*. The calendar reflects the due dates for small employers only—less than \$100,000 PAYE and SSCWT deductions per annum





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

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

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

**By internet:** Visit [www.ird.govt.nz](http://www.ird.govt.nz)

On the homepage, click on "The Rulings Unit welcomes your comment on drafts of public rulings/interpretation statements before they are finalised." Below the heading "Think about the issues", click on the drafts that interest you. You can return your comments by internet.

Name \_\_\_\_\_

Address \_\_\_\_\_

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### *Draft question we've been asked*

### *Comment deadline*

- QB0028: Residential investment property or properties in Australia owned by NZ resident—NRWT treatment of interest paid to Australian financial institution

30 September 2004

### *Draft public ruling*

- XPB0015: Bad debts—Writing off debts as bad for GST and income tax purposes

30 September 2004

*Items are not generally available once the comment deadline has passed*

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

Put  
stamp  
here

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



