

# 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.

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## 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 June 2005.

<b>Ref.</b>	<b>Draft type</b>	<b>Description</b>
ED0043	Standard practice statement	Loss offset elections between group companies. (This draft item was previously put out for external consultation in November 2003)
IS0092	Interpretation statement	Whether a standard form agreement for the sale and purchase of real estate constitutes an “invoice” under the GST Act 1985 thus triggering the time of supply under that Act.

Please see page 30 for details on how to obtain a copy.

## 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, Court of Appeal, Privy Council and the Supreme Court.

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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### RESCISSION OF MAREVA INJUNCTION

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<b>Case:</b>	Queen City Properties Group Limited and Others
<b>Decision date:</b>	30 March 2005
<b>Act:</b>	Judicature Act 1908
<b>Keywords:</b>	Interlocutory application, Mareva Injunction, rescission, GST refunds, assessment, account halts, section 43 and section 46 GST Act 1985

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#### Summary

The defendants claimed GST input credits on a number of property transactions. The input credits were accidentally released by the Commissioner before he confirmed the defendants were entitled to them. The Commissioner sought and gained a Mareva Injunction preventing the taxpayers from using or removing the funds. The defendants applied to have the injunction rescinded.

#### Facts

This case concerns a Mareva injunction granted in favour of the Commissioner over the sum of \$177,809.99 paid out in error to the bank of the second defendant, Nigel Asby.

There are 16 defendants in this case. The second defendant, Nigel Asby, is the sole director of 13 defendants and their taxation advice and general tax management stem from him. Their tax affairs are managed by the first defendant, Queen City Property Group Ltd and the third defendant is St George Bank of New Zealand Limited.

The thirteen tax payers claimed GST refunds of \$177,809.99. The 13 taxpayers assert that they are entitled to a refund.

In July 2004 on Commissioner's ex parte application, interim orders were made in the nature of a Mareva injunction on the second and third defendants. The orders were made to restrain the bank from paying out

or dissipating a sum of \$177,809.99 released in error by the Commissioner. Similar orders restrained the second defendant who is co-director of the first defendant and effectively its proprietor. It is the second defendant's bank account with the third defendant where the restrained monies are deposited, the second defendant being the sole signatory of that account.

The Commissioner initially sought to reclaim the monies by issuing the Bank of New Zealand with a section 157 notice.

The dispute is based around the purchase of property. Each of the 13 taxpayers purchased an apartment in a block being developed in Hobson Street, Auckland. The 13 agreements, together with 32 other companies' agreements to purchase, with the same directors and shareholders as the 13 taxpayers, were all conditional. Two days later each of the 13 taxpayers on-sold the properties on a ten year deferred settlement basis to one of two non-associated companies, North Shore Holdings Limited ("NSHL") or Pennylane Investments Limited ("PIL"). These sales were unconditional.

Each of the 13 taxpayers had elected under section 19 of the Goods and Services Tax Act to account for GST on a payments basis, basing this on their anticipated annual turnover. Both NSHL and PIL were registered for GST on an invoice basis.

Both NSHL and PIL paid deposits to the 13 taxpayers. The deposits were in fact paid to the first defendant as agent. It appears that the source of those deposits was GST refunds received on the transactions by NSHL and PIL.

Each of the taxpayers paid output tax on the received deposit. The balance of the deposit was applied by the taxpayers to pay the deposit on the apartments they had purchased.

Two years later, the vendor of the apartments cancelled the agreements with all 13 taxpayers and the transactions did not proceed.

A year later, each of the 13 taxpayers filed GST returns, claiming a refund of input tax in respect of the deposits it had paid on the now cancelled agreements. Four months

later, the 13 taxpayers cancelled their on-sale agreement with NSHL and PIL. They additionally filed GST returns for that taxation period claiming a refund of the output tax paid on the deposits from NSHL and PIL. None of the 13 taxpayers have repaid these deposits they had received to NSHL and PIL and these companies have been placed into liquidation.

While the audit and correspondence continued, account halts had been placed on the amounts claimed. As a result of administrative error, the halts were not renewed and the amount of \$177,809.99 was paid out.

The Commissioner asserts refunds were not payable to the 13 taxpayers; the Commissioner wrote to the taxpayers informing them that the GST refunds would be delayed and the circumstances were being reviewed. No prior conduct by the Commissioner suggested that the money would be forthcoming.

All sixteen defendants applied for rescission of the orders.

## **Decision**

Priestly J concluded the threshold for making the Mareva Injunction had been reached on the evidence before him and the hearing before Williams J.

His reasons were:

- The Commissioner had a good arguable case that the defendants were not entitled to the money
- The assets held were within the jurisdiction
- There were grounds for holding the assets may be dissipated or disposed of before final judgment.

Although the defendants asserted their desire to trade with the money and carry on commercial activities, Priestly J considered there was a lack of evidence as to what those activities would be and how successful they would be. Further reasons for holding these points are set out in paragraphs 76 to 79 of the decision.

His Honour also disposed of the applicant's argument that the Sea Hunter case applied. There too, an account halt failed and the Court of Appeal held that summary judgment against the Commissioner was appropriate. The taxpayer was entitled to retain the \$2.5 million paid out in error. Priestly J distinguished that case noting that there, it was the combined effects of ss 20(5) and 46(1) of the GST Act which operated to deny the Commissioner a remedy. That is, the Commissioner had not, in that case, notified the taxpayer within the statutory 15 day period that further information was needed or that an investigation had begun. In this case there had been notification and a clearly stated intention to investigate the claimed entitlement. Hence section 46(1) could not apply.

Priestly J considered the attempt by the Commissioner to remove the money from Mr Ashby's bank account pursuant to section 43 an unlawful attempt to invoke a statutory power. He considered there was force in the defendant's observation that the Commissioner had 'glossed over' this misguided attempt to retrieve the money.

Priestly J also noted the Commissioner's lack of reference to the simultaneous notices of assessment. Although this was not fatally determinative he considered the Commissioner should have referred to them considered the legal consequences of such notices and the statutory safe guards they are subject to.

While Priestly J found such omissions on behalf of the Commissioner worrying, they were not sufficiently serious or determinative to justify the rescission of the injunction. He considered it clear that the Commissioner had no intention in July 2004 to pay the refunds to the defendants. It was only due to an administrative error that the refunds were paid and it was this error that the Commissioner focussed on in his original ex parte application.

The application to rescind the orders was dismissed as no grounds for rescission had been made out. The evidence did not show the Commissioner had made the refund pursuant to an assessment to which he had turned his mind. There was a risk to the money if it was not restrained.

## NEW LEGISLATION

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### CHILD SUPPORT AMENDMENT ACT 2005

### ESTATE AND GIFT DUTIES AMENDMENT ACT 2005

### GOODS AND SERVICES TAX AMENDMENT ACT 2005

### INCOME TAX AMENDMENT ACT 2005

### TAX ADMINISTRATION AMENDMENT ACT 2005

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#### Introduction

Changes in Inland Revenue legislation have resulted from the enactment of the Relationships (Statutory References) Bill introduced on 21 June 2004. The bill received its first reading on 29 June and its second reading on 8 March 2005. It was divided into 23 bills, which had their third reading on 15 March 2005. The resulting Inland Revenue Acts listed above were enacted on 24 March 2005.

The amendments remove unjustified discrimination in the application of laws on the grounds of marital status or sexual orientation so laws are consistent with human rights obligations.

In the Inland Revenue Acts, that discrimination sometimes created disadvantages for married people or people in de facto relationships.

The amendments also recognise civil unions, following the enactment of the Civil Union Act 2004. Civil unions now have a similar tax status to marriage, but the amendments maintain the distinction between the different types of relationship by not referring to them by one inclusive term.

The term “de facto relationship” is now defined in the Interpretation Act 1999, and applies across all statutes, except where specified. These exceptions are contained in some of the Inland Revenue Acts discussed below, and have effect until 1 April 2007.

A de facto relationship is one between two people (a man and a woman, a man and a man, or a woman and a woman) who live together in a relationship in the nature of marriage or civil union.

In determining whether such a relationship exists, all circumstances of the relationship are taken into account in the context of the relevant legislation. This allows flexibility to deal with other situations. This might include, for example, when the law casts a wide net, such as the associated persons’ rules. Or to a more narrow application, such as the recognition of rights that require a conscious decision to take them up. It may also apply to eligibility tests involving a fair comparison with third parties – the income calculation rules in the family assistance provisions is an example of this.

A de facto relationship involving a person aged 16 or 17 years is not recognised unless that person has obtained consent for the relationship as provided for in the new section 46A of the Care of Children Act 2004.

Couples enter into a civil union in knowledge of the rights and obligations that this formal relationship brings, in the same way that people who marry do. Civil unions are therefore recognised from the enactment date of the various amendments, 26 April 2005. However, there are various rights and obligations that will be imposed on couples already in de facto relationships. These changes will not take effect until 1 April 2007. This will allow de facto couples time to adjust their personal and financial affairs, if necessary.

#### Background

The Human Rights Amendment Act 2001 requires government activities to comply with the anti-discrimination standards set out in section 19 of the New Zealand Bill of Rights Act 1990 for the prohibited grounds of discrimination in section 21 of the Human Rights Act 1993. The prohibited grounds of discrimination include marital status and sexual orientation

The Relationships (Statutory References) Act 2005 and the related Amendment Acts are a significant step towards achieving the government’s objective of having neutral laws on relationships that apply across the board, whether those relationships are marriages, de facto relationships, or same-sex relationships.

#### CHILD SUPPORT AMENDMENT ACT 2005

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The amendments recognise that maintenance of another person is no longer restricted to spouses, by replacing the term “spousal maintenance” with the more neutral term “domestic maintenance”.

Since the Child Support Act 1991 already recognises de facto relationships, and these have been interpreted by the Courts as being gender-neutral, by adopting the definition of “de facto relationship” in the Interpretation Act 1999, same-sex, as well as opposite-sex relationships are expressly recognised.

## Key features

The main changes to the Child Support Act 1991 are the:

- introduction of the term “domestic maintenance”;
- replacement of the defined term “liable spouse” with “liable spouse or partner”; and
- omission of the term “married person”.

## Domestic maintenance

The term “domestic maintenance” is introduced as a new definition in section 2. This recognises that maintenance orders for the support of another person made under the Family Proceedings Act 1980 are not restricted to spouses. The definition of “spousal maintenance” is accordingly omitted and all references to it have been changed to “domestic maintenance”.

Previously, people who had never been married to one another could register a voluntary agreement only if they were the parents of a child. This applied to couples whose de facto relationship had ended as well as those who had never been in a relationship. The amendments to section 47 of the Child Support Act 1991 allow a de facto couple whose relationship has ended to register a voluntary agreement irrespective of whether they have a child. However, those who have never been in a legal or de facto relationship may register a voluntary agreement for domestic maintenance only if they are the parents of a child.

Other sections in which the term “spousal maintenance” is replaced by “domestic maintenance” are: 4, 52, 55, 58, 59, 61, 62, 64, 66, 68, 69, 72, 73, 77, 79, 80, 85, 86, 87, 89, 91, 95, 136, 137, 145, 180, 214 and 215.

## References to “married person” and “marriage”

The defined term “married person” is omitted. Where the phrase “is not a married person” was previously used, it is replaced with the phrase “is not living with another person in a marriage, civil union or de facto relationship”. Similarly, where the phrase “living with the person in a relationship in the nature of marriage” was used, this is replaced by the phrase “living with the person in a marriage, civil union or de facto relationship”.

These changes clarify that the same rights and obligations flow from each type of domestic relationship. However, because “de facto relationship” is itself defined to mean a couple who live together in a relationship in the nature of marriage or civil union, there is effectively no change other than to recognise civil unions.

Amendments to the terms “married” or “marriage” are in sections 5, 8, 10, 25, 30 and 99.

Other amendments in the Child Support Act are: replacement of the definition “liable spouse” with “liable spouse or partner” and the substitution of that new term

in sections 61, 86 and 240; substitution of more neutral terms for “spouse” – “party” in section 113 and “person” in section 119; replacing the reference to “marriage counselling” with “relationship counselling” in section 124; the insertion of a reference to “civil union” in section 230; and omitting the unnecessary term “spousal” in the section headings of sections 267 and 268.

## ESTATE AND GIFT DUTIES AMENDMENT ACT 2005

The amendments to this Act are in two parts. Part 1 gives recognition to civil unions and came into force on 26 April 2005. Part 2 gives recognition to de facto relationships, but does not take effect until 1 April 2007.

Most of the amendments extend exemptions from gift duty: first to civil union partners and secondly, to de facto partners.

Amendments in sections 2, 65 and 68D to replace “marriage” with “marriage or civil union” came into force on 26 April 2005, while those to include de facto relationships take effect from 1 April 2007.

In sections 72, 74, 75 and 75A new references to “civil union partner”, where relevant, came into force on 26 April 2005, with the added reference to “de facto partner” taking effect from 1 April 2007.

A new definition “child of the civil union” has been inserted in section 75A to give it the same meaning as in section 2 of the Property (Relationships) Act 1976.

## GOODS AND SERVICES TAX AMENDMENT ACT 2005

The amendments to this Act are in two parts. Part 1 came into force on 26 April 2005, and Part 2 takes effect from 1 April 2007.

The definition of “relative” for the purposes of the associated persons’ rules already includes those in a relationship in the nature of a marriage. However, case law has interpreted that phrase to mean only opposite-sex couples because same-sex couples cannot marry. Consequently, the Part 1 amendments to section 2A recognise civil unions and preserve the recognition of de facto relationships between a man and a woman. The recognition of same-sex de facto relationships is deferred until 1 April 2007 to give those couples time to adjust their personal and financial affairs, if necessary.

The real effect of the newly defined term depends on the context in which it arises, but generally it imposes extra conditions on those who are “associated persons”.

The definition of “life insurance contract” is also expanded for the purposes of the meaning of the term “financial services” in section 3 to include civil unions from 26 April 2005 and de facto relationships from 1 April 2007.

## INCOME TAX AMENDMENT ACT 2005

The amendments to this Act are in two parts. Part 1 came into force on 26 April 2005, and Part 2 takes effect from 1 April 2007.

Most changes in Part 1 give recognition to civil unions, while those in Part 2 extend recognition to de facto relationships. However, where the defined term “spouse” already applied, especially in the family assistance provisions in subpart KD, the amendments preserve the recognition of de facto relationships between a man and a woman. For those provisions, it is only the recognition of same-sex de facto relationships that is deferred until 1 April 2007, to give those couples time to adjust their personal and financial affairs, if necessary.

Although in Part 1 the defined term “de facto relationship” in section OB 1 takes its meaning from the new section 29A of the Interpretation Act 1999, it is limited for the purposes of the Income Tax Act to relationships between a man and a woman. That term and the related “de facto partner” are omitted in Part 2, with effect from 1 April 2007, when they take their full meaning from the Interpretation Act and include same-sex relationships and partners.

### Replacement of “spouse” with “spouse or civil union partner”

Amendments to replace “spouse” with “spouse or civil union partner” from 26 April 2005 and to also include “de facto partner” from 1 April 2007 are in sections CB 19 (1), CB 20(1), CD 5(1), CD 14(9), CD 19(1), CD 33 (16), CE 5(2) and (3), the definition of “pension” in CF 1, CW 26, CW 38, CX 15, DB 34, DC 2, DC 3, FF 1, GD 4, KC 4, LD 1, OB 1 (the definition “separated person”), and OD 8.

### Replacement of “spouse” with “spouse, civil union partner, or de facto partner” in Part 1

Some amendments in Part 1 include de facto partners as well as civil union partners because they take up the previous definition of spouse that included people in a relationship in the nature of marriage. They are, however, limited to relationships between a man and a woman until 1 April 2007. They are: KC 3, KD 1A, KD 2, KD 2AAA, KD 2AA, KD 2AB, KD 3, KD 3A, KD 4, KD 5, KD 5B, KD 6, KD 7, and OB 1 (replacement paragraph (b) of the definition “eligible period”, the definition “full-time earner”, and the definition “fully employed person”).

### Replacement of “matrimonial agreement” with “relationship agreement”

Amendments to replace “matrimonial agreement” with “relationship agreement”, all in Part 1, are to sections CE 3(4), CZ 6, DZ 1, EE 34, EE 38, EW 10, EZ 11,

EZ 20, EZ 42, FB 4, FC 5, FF 1, FF 2, FF 3, FF 4, FF 5, FF 6, FF 7, FF 8, FF 9, FF 10, FF 11, FF 12, FF 13, FF 14, FF 15, FF 16, FF 18, FF 19, GD 1, and OB 1 (the definitions “date of transfer”, “income year of transfer”, “transferee”, “transferor”, and “type”).

### Inserting references to civil unions and de facto relationships

Amendments to insert a reference to civil union where there are existing references to marriage are in DC 2, DC 3, and OB 3. The provisions are further amended from 1 April 2007 to insert references to de facto relationships. However, the reference to “marriage” in section HH 3F(3) is replaced with “marriage or partnership” because the provision already recognises de facto relationships and is being extended to include civil unions. The meaning of “marriage or partnership” is clarified in new paragraph HH 3F(4)(b).

Section CS 4 is replaced in Part 1 to include reference to civil union and the new section 2AB(2) of the Property (Relationships) Act 1976.

### Unmarried persons

In the definition of “child” in section OB 1, the words “an unmarried person who” are replaced in Part 1 with “a person who is not in a marriage, civil union, or de facto relationship between a man and a woman, and who”. The words “between a man and a woman” are omitted in Part 2, when the term “de facto relationship” takes its full meaning from the Interpretation Act 1999 on 1 April 2007.

### Housekeeper rebate

The definitions in section KC 4 are instrumental in determining entitlement to the tax rebate. The limitation to people who are married has had a two-way effect, with the definition of “communal home” creating a disadvantage for married persons, the definition of “housekeeper” creating a disadvantage for de facto partners, and the definition of “separated person” creating a disadvantage for those who have been in a de facto relationship. Civil union partners are to be included through the amendments in Part 1, while de facto partners are included in the Part 2 amendments.

### Other definitions in section OB 1

There is a new definition of “civil union partner” to make it clear that when the term is used in the specified provisions it does not include a separated person. The definition of “spouse” is also replaced to have the same effect.

The definition “matrimonial agreement” is omitted in Part 1 and the new definition “relationship agreement” is inserted with reference to relevant provisions in the Property (Relationships) Act 1976.



The definition “relative” is amended to include references to civil unions in Part 1 and de facto relationships in Part 2. The most significant effect of the amendment is to broaden the scope of the associated persons’ rules.

## **TAX ADMINISTRATION AMENDMENT ACT 2005**

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The amendments to this Act are in two parts. Part 1 came into force on 26 April 2005, and Part 2 takes effect from 1 April 2007.

Most changes are to provisions that support the administration of the family assistance provisions in subpart KD of the Income Tax Act 2004. Consequently, the Part 1 amendments recognise civil unions and de facto relationships between a man and a woman, with the Part 2 amendments removing the limitation on the recognition of de facto relationships.

However, because the provisions in section 173M for transfer of excess tax already allowed transfers between people in a de facto relationship, the Part 1 amendment extends that only to civil unions.

## LEGISLATION AND DETERMINATIONS

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

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### **DETERMINATION DET-001: STANDARD-COST HOUSEHOLD SERVICE FOR CHILDCARE PROVIDERS CONSUMERS PRICE INDEX ADJUSTMENTS (MARCH 2005)**

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In accordance with the provisions of Determination DET-001, Inland Revenue advises that, for the 2005 income year:

- (a) the *variable standard-cost* component has increased from \$2.67 per hour per child to \$2.74 per hour per child; and
- (b) the *administration and record keeping fixed standard-cost* component has increased from \$260 to \$267 per annum, for a full 52 weeks of childcare services provided.

The above amounts have been adjusted in accordance with the annual movement of the All Groups Consumers Price Index for the twelve months to March 2005, which showed an increase of 2.8 percent. For childcare providers who have a standard 31 March balance date, the new amounts apply for the period from 1 April 2004 to 31 March 2005.

### **NEW INCOME TAX ACT 2004 NOW IN EFFECT**

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On 1 April 2005 the rewritten Income Tax Act 2004 came into effect for those taxpayers with a standard tax balance date of 31 March. The new Act applies to income derived from the 2005–06 tax year and onwards. (The earliest non-standard balance date that the new Act will apply from is 1 October 2005.)

The new Act is the third stage of a programme to rewrite income tax legislation so that it is clear, uses plain language and is structurally consistent. It is anticipated that in the long term this will allow taxpayers and agents to save time and resources, making compliance easier. The remainder of the Income Tax Act 2004 is being rewritten progressively. The projected timetable is for the rewrite to be completed during 2007.

Aside from a small number of intended policy changes listed in Schedule 22A of the Income Tax Act 2004, income tax law remains the same as it did previously.

For more information about the new Act please refer to *Tax Information Bulletin (TIB)* Vol 16, No 5 (June 2004) which is available on [www.ird.govt.nz](http://www.ird.govt.nz)

If you wish to make a submission on a potential unintended legislative change resulting from the rewritten Act, or would like information on the submissions that have already been received please visit the Rewrite Advisory Panel website at <http://www.rewriteadvisory.govt.nz/>

A Standard Practice Statement setting out the treatment of penalties and interest for tax shortfalls arising from unintended legislative change issues has been consulted externally and is currently being finalised for publication in a future edition of the *TIB*.

## **DETERMINATION DET 05/01 AMORTISATION RATES FOR LISTED HORTICULTURAL PLANTS**

This Determination may be cited as “Determination DET 05/01 *Amortisation rates for listed horticultural plants*”.

### **1. Explanation (which does not form part of the Determination)**

This Determination sets out the amortisation rates (on the basis of diminishing values) for listed horticultural plants as determined by the Commissioner of Inland Revenue and listed in the schedule to this Determination.

### **2. Reference**

This Determination is made pursuant to section 91AAB of the Tax Administration Act 1994.

### **3. Scope of Determination**

This Determination shall apply from the 2004 and subsequent income years. Its application will be supplemented or amended by supplementary Determinations pursuant to subsection 91AAB(4) of the Tax Administration Act 1994.

### **4. Interpretation**

In this Determination, unless the context otherwise requires, expressions used have the same meanings as those in sections DO 4, DO 4B, DO 4C, DO 4D, OB 1 and Schedule 7 of the Income Tax Act 1994 and section 91AAB of the Tax Administration Act 1994 in respect of the 2004 and 2005 income years.

In this Determination, unless the context otherwise requires, expressions used have the same meanings as those in sections DO 4, DO 4B, DO 4C, DO 4D, DO 4E, OB 1 and Schedule 7 of the Income Tax Act 2004 and section 91AAB of the Tax Administration Act 1994 in respect of the 2006 and subsequent income years.

### **5. Determination**

Pursuant to section 91AAB of the Tax Administration Act 1994:

- (a) for the purposes of section 91AAB(1)(a), the types of horticultural plant, tree, vine, bush, cane, or similar plant, as set out in the schedule to this Determination, shall be listed horticultural plants; and
- (b) for the purposes of section 91AAB(1)(b), for the 2004 income year, the banded rate set out in column 1 of Schedule 11 of the Income Tax Act 1994 that is to be used to calculate the diminishing value for each type of listed horticultural plant shall be at the election of the taxpayer either:

- (i) the amortisation rates as set out in column 2 of the schedule to this Determination; or

- (ii) 10% (which does not include the 20% loading); and

- (c) for the purposes of section 91AAB(1)(b), for the 2005 income year, for a taxpayer whose return has been furnished on or before 30 June 2005, the banded rate set out in column 1 of Schedule 11 of the Income Tax Act 1994 that is to be used to calculate the diminishing value for each type of listed horticultural plant shall be at the election of the taxpayer either:

- (i) the amortisation rates as set out in column 2 of the schedule to this Determination; or

- (ii) 10% (which does not include the 20% loading); and

- (d) for the purposes of section 91AAB(1)(b), for the 2005 income year, for a taxpayer whose return is furnished after 30 June 2005, the banded rate set out in column 1 of Schedule 11 of the Income Tax Act 1994 that is to be used to calculate the diminishing value for each type of listed horticultural plant shall be the amortisation rates as set out in column 2 of the schedule to this Determination; and

- (e) for the purposes of section 91AAB(1)(b), for 2006 and subsequent income years, the banded rate set out in column 1 of Schedule 11 of the Income Tax Act 2004 that is to be used to calculate the diminishing value for each type of listed horticultural plant shall be the amortisation rates as set out in column 2 of the schedule to this Determination.

This Determination is made by me, acting under delegated authority from the Commissioner of Inland Revenue under section 7 of the Tax Administration Act 1994.

This Determination is signed on the 13<sup>th</sup> day of May 2005.

**Graham Tubb**

National Manager (Technical Standards)

## SCHEDULE TO DETERMINATION DET 05/01

### Amortisation rates for listed horticultural plants

Column 1 Listed horticultural plant	Column 2 Diminishing value amortisation rate (%)*	Column 3 Estimated useful life of horticultural plant (years)
<b>Berryfruit</b>		
Blueberry	12	13
Blackcurrant	18	8
<b>Rubus</b>		
Raspberry	26	5
Blackberry	15	10
Boysenberry	15	10
Loganberry	15	10
Other Rubus	15	10
<b>Citrus</b>		
Grapefruit	7.5	18
Lemon	7.5	20
Lime	7.5	20
Mandarin	6	25
Orange	6	25
Tangelo	6	25
<b>Grapes</b>		
Table grapes	7.5	20
<b>Nuts</b>		
Chestnut	7.5	20
Hazelnut	6	26
Walnut	4	30

\* **Please note** a 20% loading is to be added to the percentage in column 2 to arrive at the total diminishing value amortisation rate available each income year.

<b>Column 1</b> <b>Listed horticultural plant</b>	<b>Column 2</b> <b>Diminishing value amortisation rate (%)*</b>	<b>Column 3</b> <b>Estimated useful life of horticultural plant (years)</b>
<b>Pipfruit</b>		
Apple	9.5	15
European pear	7.5	20
Nashi Asian pear	9.5	15
<b>Summerfruit</b>		
Apricot	9.5	15
Cherry	7.5	20
Plum	9.5	15
Nectarine	12	12
Peach	12	12
<b>Vegetables</b>		
Asparagus	22	6
<b>Other</b>		
Avocado	7.5	20
Feijoa	7.5	18
Hop	15	10
Kiwifruit	7.5	20
Olives		
• < 500 trees per hectare	7.5	20
• > 500 trees per hectare (typically hedges)	9.5	15
Passionfruit	33	4
Persimmon	6	25
Tamarillo	33	4

\* **Please note** a 20% loading is to be added to the percentage in column 2 to arrive at the total diminishing value amortisation rate available each income year.

## COMMENTARY ON DETERMINATION DET 05/01

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### Introduction

This commentary does not form part of the Determination. It is intended to provide assistance in the understanding and application of the Determination.

This Determination sets out the diminishing value amortisation rates (depreciation like deductions) that the Commissioner has determined for each horticultural plant that is listed in the schedule to this Determination.

A 10% amortisation rate, which does not include the 20% loading, applies to most other horticultural plants that are not included in the schedule to this Determination.

For those horticultural plants listed in the schedule to this Determination, taxpayers who have furnished their 2005 income returns on or before 30 June 2005 may elect to apply either the amortisation rate of 10% (plus a 20% loading) or the amortisation rate(s) as set out in column 2 of the schedule to this Determination. This option is also available to all affected taxpayers for the 2004 income year.

### Estimated useful life

The main element the Commissioner has taken into account to establish the amortisation rate for each listed horticultural plant is its estimated useful life. Where appropriate, the following have been taken into account in arriving at the amortisation rates of listed horticultural plants.

- The main purpose for which a listed horticultural plant has been cultivated; and
- The manner in which a listed horticultural plant is cultivated and managed.

The estimated useful life of a listed horticultural plant commences on the day of planting and continues until the plant might reasonably be expected to cease to be useful to a person in deriving income or carrying on a horticultural business.

The main factor that has been taken into account in calculating the estimated useful life of a listed horticultural plant is that it has passed its commercial "use-by" date. This, in essence, is due to the plant's age and the fact that it can no longer deliver an economic crop.

Other factors that have a significant impact on the estimated useful life of a listed horticultural plant have been taken into account. This includes such things as natural and incidental damage, decay, disease and exhaustion.

Inland Revenue has not taken into account any element where a specific deduction is provided for in the legislation. This includes replacement plantings, or where a listed horticultural plant has ceased to exist or be used to derive income.

Crop management techniques, such as regeneration, topworking and reworking where trees are potentially cut back to their stumps, have also been taken into account in determining the estimated useful life of listed horticultural plants. Where the process of topworking or reworking involves grafting a new variety on to the old root system, it is considered that a new plant has been established.

The estimated useful life of each listed horticultural plant has been established by Inland Revenue following extensive consultation with grower organisations and industry experts.

### Amortisation rates

The process adopted in arriving at the amortisation rates of listed horticultural plants commenced with the establishment of an appropriate level of estimated useful life for each listed plant. This data is then translated into an established straight line equivalent rate as set out in column 2 of Schedule 11 *Banded rate of depreciation* of the Income Tax Act 1994 and the Income Tax Act 2004 (*Schedule 11*). The straight line equivalent rate in column 2 is further translated into an appropriate diminishing value depreciation rate as set out in column 1 of *Schedule 11*.

Where a listed horticultural plant's established straight line equivalent rate falls between two rates in column 2 of *Schedule 11*, a rounding process has been adopted whereby the rate is either rounded up or down. Where such a rate falls equally between two straight line equivalents, the rate is rounded up.

The amortisation rates listed in the schedule to this Determination have been established for the widest possible application. Where the estimated useful lives of the various species of a plant variety do not materially differ, only one amortisation rate has been established for that variety.

**Please note** that 20% is to be added to the rates shown for each listed horticultural plant in column 2 of the schedule to the Determination to arrive at the diminishing value amortisation rate available each income year.

### Application of this Determination to the 2004 and 2005 income years

This Determination applies from the 2004 income year.

Most growers of horticultural plants included in this Determination should have already furnished their 2004

income returns when this Determination is promulgated. A few with early balance dates may also have filed their 2005 income returns.

Amortisation rates and replacement planting deductions claimed in those income returns furnished prior to the issue of this Determination should have been based on the previous rules that applied. Consequently, deductions for these items may be over or understated. The level of any adjustment depends on a number of factors. Some adjustments may not result in material changes to deductions already claimed. Whether any adjustment is material is to be based on the judgement of each grower.

Any requests to amend assessments are to be:

- requested in writing; and
- made for the income year where the adjustment arises; and
- made at the earlier of when the next income return is furnished or the last day for furnishing that next return.

Growers will not be expected to follow the disputes resolution process to request these specific adjustments for the 2004 and early balance date 2005 income returns furnished on or before 30 June 2005.

Inland Revenue acknowledges that:

- it may take some time for growers, their associations and advisers to familiarise themselves with this Determination and its effect on the deductions available to them; and
- many of the adjustments may not be material and would not provide the most efficient use of Inland Revenue's resources; and
- the reduction of growers' compliance costs is a primary consideration.

To that end, for the 2004 (and 2005 income returns that have been furnished on or before 30 June 2005), it is possible to use the "old" amortisation rate at the taxpayer's election. The Department will regard an election as having been made by a grower at the later of:

- when their 2004 and/or 2005 income return(s) are furnished; or
- when an amended assessment is requested for those income years. This date will be the earlier of:
  - (a) when the next income return is furnished; or
  - (b) the last day for furnishing that next income return.

## **Additions of new amortisation rates/ amendments to existing amortisation rates**

Where a horticultural plant has not been determined by the Commissioner as a listed horticultural plant, taxpayers may apply in writing to the Commissioner for a specific horticultural plant or category of horticultural plants to be so determined.

Changes may be made to the Determination from time to time by the Commissioner on receipt of written applications from grower organisations. Amendments may include adding further horticultural plants to those already listed, adjusting the estimated useful life of a horticultural plant or removing a plant that is no longer commercially grown. Amendments may be effective for the current or future income years. They will not apply to retrospective income years.

Amendments to this Determination will be made by the Commissioner issuing supplementary Determinations pursuant to subsection 91AAB(4) of the Tax Administration Act 1994.

Applications for changes must include the following information.

- The nature of the amendment to the Determination being sought. This may be a new amortisation rate, amend an existing amortisation rate or remove an existing amortisation rate.
- Applicant's details. This includes full name, IRD number (if applicable), address, land line telephone number, fax number, cell phone number and the contact person for enquiries.
- Horticultural plant information. This includes:
  - (a) describing the horticultural plant;
  - (b) the income year the change is requested to apply from (amendments may be effective for the current or future income years), they will not be made to retrospective income years;
  - (c) the reasons for requesting to amend the Determination (adding further horticultural plants to those already listed, adjusting the estimated useful life of a horticultural plant due to a change or removing a plant that is no longer commercially grown);
  - (d) the organisation's detailed assessment of the plant's estimated useful life (this is to include any evidence to support that assessment);
  - (e) a detailed assessment by an independent industry expert of the plant's estimated useful life (this is to include any evidence to support that assessment).

The application process for a horticultural plant to be determined as a listed horticultural plant or to amend the amortisation rate for an existing listed horticultural plant is summarised in the flowchart attached as appendix “A”.

Applications for changes to the Determination are to be sent to:

The National Manager  
Technical Standards  
National Office  
Inland Revenue  
PO Box 2198  
WELLINGTON

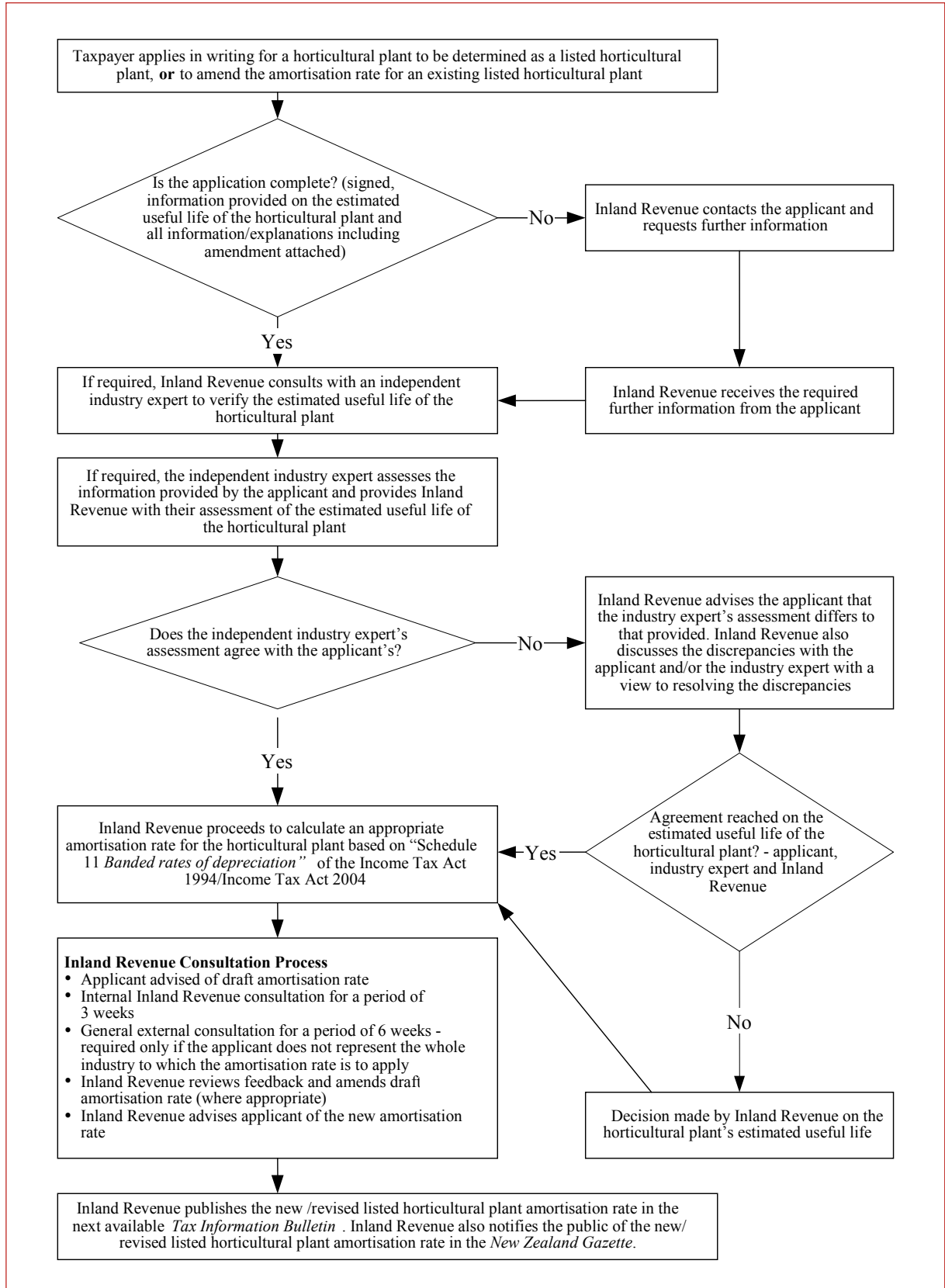
In considering applications for amendment to the listed horticultural plant Determination, the Commissioner will continue to consult with relevant grower organisations and industry experts.

The Commissioner will discuss any amendment that is to be made to the listed horticultural plant Determination with the applicant before it is finalised.



APPENDIX A

Application Process Flowchart



## STANDARD PRACTICE STATEMENTS

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

### RETROSPECTIVE ADJUSTMENTS TO SALARIES PAID TO SHAREHOLDER-EMPLOYEES – SPS 05/05

#### Introduction

1. This Standard Practice Statement (SPS) sets out the criteria for considering whether the circumstances are appropriate for the Commissioner of Inland Revenue to recognise retrospective reductions to salaries paid to shareholder-employees, where a genuine error has been made in the preparation of the company's accounts.

#### Application

2. This SPS addresses the question of when a retrospective reduction in a shareholder-employee's salary may be made. It does not apply to requests for retrospective amendments to PAYE deducted from shareholder-employee's salaries. Furthermore, it does not apply to situations where a company proposes to increase a shareholder-employee's salary due to an increase in the company's income.
3. It also does not apply to situations where other mistakes have been made in a company's accounts and the company is seeking to rectify these mistakes without involving any retrospective reduction in salaries paid to shareholder-employees.
4. This SPS will apply from the 2005-2006 and subsequent income years. For periods prior to the 2005-2006 income year, please refer to SPS *GNL 410 – Retrospective adjustments to salaries paid to shareholder-employees*.

#### Background

5. In the *Tax Information Bulletin* Vol 9, No 4 (April 1997) at page 9, Inland Revenue published an item entitled *Retrospective adjustment to salaries paid to shareholder-employees*. Its effect was that where an error had been made in the preparation of the accounts of a company, Inland Revenue would amend the company's assessment to take account of the additional expenses that should have been included in the original return. However, where the company and the shareholder-employee proposed to reduce the salary amount that was originally agreed to be paid by an amount equal to the additional expenses allowed, Inland Revenue would not agree to these consequential adjustments. In that case, neither the company's nor the individual's assessments would be amended to reflect the fact that a reduced salary would be paid.

6. Subsequent to the publication of the item, the Taxation Review Authority considered the same issue in *Case U27* (1999) 19 NZTC 9,261. Willy DJ arrived at a different conclusion to the item. His Honour held that decisions as to the amounts of a shareholder-employee's salary for two income years that were made mistakenly could be reversed or amended. In that case, the accountant was not fully informed of the company's financial affairs (there was, unknown to him, a tax dispute with Inland Revenue). This led him to prepare end-of-year accounts that did not accurately reflect the company's true position.
7. The company had over several years fallen behind in accounting for PAYE, GST, ACC premiums and FBT to the Commissioner. The accumulated taxes and penalties resulted in a substantial overstatement of the resulting profit. This was important because salaries in this company were only ever paid out of profits. Therefore, the level of salaries was based on incorrect profit figures. Although the resolutions authorising the salaries were prepared, these were never signed. When the accountant discovered his mistake, new resolutions were prepared to authorise the distribution of reduced salaries.
8. The Taxation Review Authority held that section 75 of the Income Tax Act 1976 (section EB 1 of the Income Tax Act 1994, and sections BD 3 and EI 8 of the Income Tax Act 2004), which deemed a person to have derived income when it has been dealt with in the person's interest or on their behalf in various ways (including being "credited in account"), applied, i.e. it operated on the circumstances brought about by the company resolutions correcting the error. His Honour decided that the company was entitled to and did rectify the error when it came to its notice and the shareholder-employee was obliged to pay tax only on the reduced amounts of income for the relevant income years.
9. In the light of *Case U27* and other relevant factors, such as company law, the published item in 1997 was withdrawn and replaced by SPS *GNL-410 – Retrospective adjustments to salaries paid to shareholder-employees*, which was published in the *Tax Information Bulletin*, Vol 15, No 6 (June 2003). This SPS updates and replaces SPS *GNL-410*.

## Legislation

### Income Tax Act 2004

#### BD 3 Allocation of income to particular income years

##### *Application*

- (1) Every amount of income must be allocated to an income year under this section.

##### *General rule*

- (2) An amount of income is allocated to the income year in which the amount is derived, unless a provision in any of Parts C or E to I provides for allocation on another basis.

##### *Interpretation of derive*

- (3) When the time of derivation of an amount of income is being determined, regard must be had to case law, which—
  - (a) requires some people to recognise income on an accrual basis; and
  - (b) requires other people to recognise income on a cash basis; and
  - (c) more generally, defines the concept of derivation.

##### *Income credited in account*

- (4) Despite subsection (3), income that has not previously been derived by a person is treated as being derived when it is credited  in their account or, in some other way, dealt with in their interest or on their behalf.

##### *Role of Part E*

- (5) Part E (Timing and quantifying rules) contains a number of provisions that—
  - (a) specifically modify the allocation of income or have the effect of modifying the allocation of income; or
  - (b) allocate income as part of the process of quantifying it.

##### *Single allocation*

- (6) An amount of income may be allocated only once.

#### EI 8 Matching rule for employment income of shareholder-employee

##### *Matching if company allowed deduction*

- (1) If a company is allowed a deduction for expenditure on employment income that is paid or is payable to a shareholder-employee under section CE 1 (Amounts derived in connection with employment), the income is allocated in the way set out in subsections (2) and (3).

##### *Allocation to deduction year unless unexpired*

- (2) The income is allocated to the income year to which the deduction allowed to the company is allocated, except for an amount equal to any unexpired portion for the income year of the company's expenditure under section EA 4 (Deferred payment of employment income).

##### *Allocation otherwise when ceases being unexpired*

- (3) The remaining income is allocated to the income year or years in which the corresponding amount of the company's expenditure on the income is no longer treated as an unexpired portion.

## Standard Practice

### 10. Where

- a genuine error has been made in the accounts as a result of which a deduction has not been claimed for legitimate expenditure incurred, or a receipt has been incorrectly categorised, and
- the company as a result decides to reduce the amount of salary previously allocated, and
- the company has passed a resolution reflecting the reduction in light of the relationship between the company and the shareholder-employee, and
- a request for correction has been filed with Inland Revenue with a copy of the resolution,

Inland Revenue will consider the request to amend assessments in accordance with the principles set out in a separate SPS (currently this is SPS *INV-510 Requests to amend assessments*), provided full disclosure is made and the relevant financial statements have been amended and lodged.

### 11. It is expected that requests of this nature will be made in a timely fashion. What is timely involves an exercise of judgment. There are two aspects to consider:

- Once a mistake has been discovered the parties should set about attending to it promptly.
- As to how long a mistake may go undetected, the answer is less certain. Timeliness requires that a mistake is discovered when in the course of events and in the circumstances of the taxpayer company, one would have expected it to have been discovered. It could be that many months may go by before the error is detected. For example, in *Case U27*, there was a lack of communication between the accountant and principal shareholder and director. The latter kept certain information about the arrears of taxes to himself.

### 12. Inland Revenue considers the presence of a “genuine error” in the sense of oversight to be a crucial requirement for accepting the taxpayer’s application. It is considered that the shareholder-employee salaries are generally irrevocable, unless a genuine error has been made.

### 13. Whether something is a genuine error is determined by the Commissioner. If, after considering all relevant information, the Commissioner is not satisfied that a genuine error was made, the Commissioner will not amend an assessment.

## Examples

### 14. The following examples provide some guidance on what will not be regarded as “a genuine error” for the purpose of this SPS:

- a. *Fraud committed by a shareholder-employee*  
Where a shareholder-employee has committed fraud in relation to their salaries or other shareholder-employees’ salaries in the company, no genuine error has been made. Inland Revenue will not amend the company’s and shareholder-employees’ assessments.
- b. *Retrospective reduction of a shareholder-employee’s salary with the intention to reduce the shareholder-employee’s child support liabilities or to increase their entitlement to family assistance*

Inland Revenue will not amend the company’s and shareholder-employee’s assessments in the above case. This is because no genuine error exists, merely a changed decision motivated by additional benefit to the employee.

- c. *Retrospective reduction of a shareholder-employee’s salary with the intention to assist with the company’s cash flow*

Inland Revenue will not amend the company’s and shareholder-employee’s assessments in the above case. This is because no genuine error exists.

### 15. Where Inland Revenue agrees to a retrospective adjustment on the shareholder-employees’ salaries, sections BD 3 and EI 8 of the Income Tax Act 2004 will deem the shareholder-employee’s salary to be the amount as determined by the amending resolution and under section 113 of the Tax Administration Act 1994, Inland Revenue will adjust the company’s and employee’s assessments accordingly.

## Examples

### 16. The following examples may give some guidance as to when Inland Revenue will permit adjustments to be made.

- a. *Incorrect treatment of receipt*  
Where there is an error in the categorisation of a capital receipt (e.g. a loan repayment) as revenue and this results in an overstatement of income, an adjustment may be made.
- b. *Omission of expenditure*  
Where an error arises from the omission of deductible expenditure incurred in the current year, an adjustment may be made.

- c. *Company still in profit despite the error made*
- Although an error has been made in the accounts, that error is not sufficient to produce an overall loss and the company still has sufficient profit after the accounts have been corrected to cover the salary originally agreed to be paid. In this situation, Inland Revenue is less likely to exercise the discretion, but will consider each application for an adjustment on its merits. For example, the Commissioner will need to consider the nature of the contract between the parties and past practice. While in this circumstance, there would not be the same pressing need to amend or rescind the salary declaration, nevertheless the company could find the situation inconvenient and desire that the amount credited to the shareholder-employee at least be reduced to some extent. Past company practices of retaining profits may be taken into account. If the genuine error causes non-compliance with these practices (e.g. the excessive shareholder-employee's salary reduces the percentage of company profits normally retained), the Commissioner may allow the adjustment.

However, if the original shareholder-employees disagree with the resolution to reduce their salaries in prior income years, the Commissioner will usually not adjust the company's and the original shareholder-employees' assessments in these cases until the dispute between the original shareholder-employees and the current shareholders is resolved.

This Standard Practice Statement is signed on 5 May 2005.

**Graham Tubb**  
National Manager (Technical Standards)

- d. *Accrual expenditure*
- A company has committed itself to certain expenditure in one year although it has not had to discharge or bear that expense until the following year. If such an item has been overlooked and the accounts need revision, it would be less likely for the shareholder-employee's salary to be revised. There may still be funds available to pay them. This is a matter where circumstances will vary. Where there is accrual expenditure, the answer will depend on the amount of the unexpired portion of that expenditure relating to future income years. The Commissioner will consider each application for an adjustment on its merits.
- e. *Change of shareholding in the company*
- Genuine errors were made by the company before the original shareholder-employees sold their shares to the current shareholders of the company. The current shareholders passed a resolution to retrospectively reduce the original shareholder-employees' salaries in prior income years.
- Provided that the original shareholder-employees were fully informed and agreed to such reductions, the Commissioner may agree to adjust the company's and the original shareholder-employees' assessments.

## NON-STANDARD BALANCE DATES FOR MANAGED FUNDS AND “AS AGENT” RETURNS – SPS 05/06

### Introduction

1. This Standard Practice Statement (SPS) extends operational practice relating to consent for the use of non-standard balance dates to recognise special taxpayer/administrator situations.
2. The SPS provides indicative examples of situations where Inland Revenue may consent to applications by taxpayers to adopt non-standard balance dates for managed funds (unit trusts, group investment funds and superannuation funds) and agents for non-resident insurers (in respect of “as agent” returns).

### Application

3. This SPS applies from the 2005-2006 and subsequent income years. Refer to SPS *GNL-120 Non-standard balance dates for managed funds and “as agent” returns* (SPS *GNL-120*) for periods prior to the 2005-2006 income year only. This SPS applies only to applications by:
  - managed funds to adopt a non-standard balance date in common with the manager or trustee if Inland Revenue recognises a parent-subsidiary like relationship between parties; and
  - entities deemed to be agents of non-resident insurers to file “as agent” returns in terms of section FC 16 of the Income Tax Act 2004.

### Summary

4. Inland Revenue’s practice in relation to providing consent for the use of non-standard balance dates is currently as set out in *Tax Information Bulletins* Vol 3, No 9 (June 1992) and Vol 5, No 11 (April 1994).
5. SPS *GNL-120* extends the parent-subsidiary criteria to include analogous situations that exist between managed funds and the entities that are responsible for their administration.
6. Consent may be given for managed funds and agents for non-resident insurers to adopt a balance date other than 31 March if any of the following applies:
  - Inland Revenue recognises that a parent-subsidiary like relationship exists between the parties e.g. the relationship between the managed fund and its trustee or manager. This is demonstrated by the manager/trustee preparing accounts, promoting the entity, making strategic investment decisions and providing other administration services to the trust; or

- an employer superannuation fund is established for the benefit of the employees and there is a close relationship between the employer and the superannuation fund; or
- the agent of a non-resident insurer is required to file “as agent” returns on behalf of the non-resident.

7. In recognition of the equivalent of a parent-subsidiary relationship, Inland Revenue will consent to applications to adopt the following non-standard balance dates –

Entity	Approved non-standard balance date
Unit trust	Balance date of unit trust manager
Group investment fund	Balance date of group investment fund manager
Employer superannuation fund	Balance date of employer
Other superannuation fund	Balance date of trustee
“As agent” return	Balance date of entity preparing “as agent” return

### Background

8. Prior to the publication of SPS *GNL-120*, taxpayers might adopt a balance date other than 31 March (a “non-standard balance date”) only if:
  - the nature of their business made a 31 March balance date inappropriate; or
  - a subsidiary wished to align its balance date with its parent company; or
  - an estate wished to adopt the deceased’s date of death; or
  - a shareholder-employee wanted the same balance date as the company.
9. Managed funds and agents for non-resident insurers would not qualify for a non-standard balance date under the practice currently as set out in *Tax Information Bulletins* Vol 3, No 9 (June 1992) and Vol 5, No 11 (April 1994). SPS *GNL-120* and this SPS therefore extend the previous practices, in respect of affected taxpayers, to reduce compliance costs.

## Legislation

10. Section 38 of the Tax Administration Act 1994 reads:

### 38. RETURNS TO ANNUAL BALANCE DATE

- (1) Instead of furnishing a tax year return under section 33 on the basis of a corresponding income year that ends on 31 March, a taxpayer (other than a taxpayer to whom section 33A(1) or (5) applies) may, with the consent of the Commissioner, elect to furnish a return based on a corresponding income year that ends with the date of the annual balance of the taxpayer's accounts.
- (2) (Repealed)
- (3) Any election made by a taxpayer for the purposes of this section shall continue in force unless and until it is altered by the taxpayer with the prior approval in writing of the Commissioner.

11. Section OB 1 of the Income Tax Act 2004 defines group investment fund, superannuation fund, superannuation scheme and unit trust as follows:

**group investment fund** means a group investment fund established under the—

- (a) Public Trust Act 2001; or
- (b) Trustee Companies Act 1967; or
- (c) Public Trust Office Act 1957

**superannuation fund**—

- (a) means a superannuation scheme registered under the Superannuation Schemes Act 1989; and
- (b) when referring to a superannuation fund that is a trust, means the trustees of the fund

**unit trust**—

- (a) means a scheme or arrangement, whether made before or after the commencement of this Act, that is made for the purpose or has the effect of providing facilities for subscribers, purchasers, or contributors to participate, as beneficiaries under a trust, in income and gains (whether in the nature of capital or income) arising from the money, investments, and other property that are for the time being subject to the trust; and
- (b) does not include—
  - (i) a trust for the benefit of debenture holders;
  - (ii) the Common Fund of Public Trust;
  - (iii) a Group Investment Fund established by Public Trust;
  - (iv) the Common Fund of the Maori Trustee;
  - (v) a Group Investment Fund established under the Trustee Companies Act 1967;
  - (vi) a friendly society registered under the Friendly Societies and Credit Unions Act 1982;
  - (vii) a superannuation fund;
  - (viii) an employee share purchase scheme;
  - (ix) a fund that satisfies section CW 38 (Funeral trusts);
  - (x) any other trust of any specified kind that is declared by the Governor-General, by Order in Council, not to be a unit trust for the purposes of section HE 1 (Unit trusts)

## Definition of terms

12. “**As agent**” refers to obligations of a person as an agent of a non-resident insurer in accordance with section FC 16 of the Income Tax Act 2004.

13. “**Non-standard balance date**” means a balance date other than 31 March.

## Standard Practice

14. Inland Revenue will consider consent to applications for non-standard balance dates from the following entities.

- The trustee of a unit trust that wishes to align its balance date with that of its manager.
- The trustee of a group investment fund that wishes to align its balance date with that of its manager.
- The trustee of a superannuation fund that wishes to align its balance date with that of its trustee or, where the fund is administered by an employer for the benefit of its employees, the balance date of the employer.
- A taxpayer (who is a resident for taxation purposes) required to file an “as agent” return that wishes to align the balance date of that return with the taxpayer’s own non-standard balance date.

## Indicative examples of recognised relationships

15. A taxpayer may change to non-standard balance dates if one of the following examples applies:

- **A unit trust wishes to align its balance date with that of its manager**

A unit trust may align its balance date to that of its manager. The manager is the entity with responsibility for the management of the unit trust and is appointed under the trust deed. Adoption of the manager’s balance date is appropriate only if the manager has retained the responsibility for day-to-day administration of the unit trust.

- **A group investment fund wishes to align its balance date with that of its manager**

A group investment fund is administered and overseen by a manager. The fund may have a separate trustee, although there is no requirement that the trustee and manager be separate entities. Consent will only be granted to align the fund’s balance date with that of the manager.

As with unit trusts, the concession applies when the manager has retained the responsibility for day-to-day administration of the trust and for preparing the trust’s accounts. When these functions have been contracted out to a third party, it is not appropriate to adopt the manager’s balance date.

- **A managed fund wishes to align its tax balance date for financial reporting purposes**

A managed fund (including unit trusts, group investment funds and superannuation funds) may align its balance date with that for financial reporting purposes if it can be demonstrated that the alignment of balance dates helps reduce the managed fund’s tax risks. The purpose of this concession is to promote voluntary compliance and good tax practices. Inland Revenue expects the managed fund to set out the reasons for changing their balance dates. These reasons will be examined on a case-by-case basis.

However, this concession does not apply if:

- the reason for changing the balance date is to improve the managed fund’s administration of human resources (e.g. smoothing the workflows of their managers).
- the managed fund cannot provide evidence of what the tax risks are and how the change of balance date helps to mitigate these risks.
- the managed fund can identify some of its tax risks but the change of balance date is irrelevant to the mitigation of these risks.

- **Superannuation funds**

- **An employer superannuation fund wishes to align its balance date with that of the employer**

A scheme established for the benefit of employees of an employer may apply to adopt the balance date of that employer.

- **Any other superannuation fund (e.g. a wholesale or retail fund) wishes to align its balance date with that of its trustee**

The trust deed under which a superannuation fund is established will appoint a trustee to supervise the fund. Consent will be given for a fund to align its balance date with that of the trustee, provided that the trustee’s role has not been contracted out to a third party.

- **A taxpayer who is an agent of a non-resident insurer wishes to align the balance date of its “as agent” return to its own non-standard balance date**

A taxpayer who insures with a non-resident insurer is required to return part of the premiums paid as income in a return known



as an “as agent” return (section FC 16 of the Income Tax Act 2004). This income is returned by the taxpayer “as agent” for the non-resident insurer.

Taxpayers with an approved non-standard balance date for their own returns will be granted consent to align the balance dates of their “as agent” returns to this date.

## Applications

16. Applications for consent to non-standard balance dates are to be in writing and should provide the following information:
- full name of the entity seeking the non-standard balance date
  - name of tax agent
  - full details of the reason why consent should be given to the use of a non-standard balance date
  - details of the nature of the relationship between the entity applying for a change in balance date and the entity to which the balance date is being aligned
  - any other reasons to demonstrate why a proposed non-standard balance date is considered appropriate.
17. All requests for consent to non-standard balance date elections for unit trusts, group investment funds, superannuation funds and taxpayers required to file “as agent” returns should be sent to:

Managed Funds Industry Desk  
Financial Sector  
Corporates Group, Inland Revenue  
P O Box 2198  
WELLINGTON

## Indicative examples where consent will not be given for a non-standard balance date

18. Inland Revenue will not normally consent to a taxpayer’s application for a non-standard balance date in the following situations.
- The anniversary date of the commencement of the business is not a valid reason for a non-standard balance date. Inland Revenue will not consent to the use of a non-standard balance date if it is for the reasons of tax deferral or tax avoidance, or to take undue advantage of a tax incentive or concession.
  - Consent will not be given where the election is made to spread the balance dates of a number of funds in order to smooth the workflow of the manager or the trustee of those funds.

- In cases where administrative functions have been contracted out to a third party (for example, a specialist administration manager) Inland Revenue will not provide consent to adopt the manager’s balance date.

19. The adoption of a non-standard balance date will continue until the date is changed by a further election. The process for change of non-standard balance dates is the same as above.

This Standard Practice Statement is signed on 6 May 2005.

**Graham Tubb**

National Manager (Technical Standards)

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## ERRATUM IN RESPECT OF LEGISLATIVE REFERENCES IN SPS 05/04 – DISPUTES RESOLUTION PROCESS COMMENCED BY A TAXPAYER

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The above Standard Practice Statement was published in the *Tax Information Bulletin*, Vol 17, No 3 (April 2005). Please note that the references to sections 89F(3)(aa), (a), (b) and (c) of the Tax Administration Act 1994 in the Standard Practice Statement should be read respectively as sections 89F(3)(a), (b), (c) and (d) of the Tax Administration Act 1994.

This statement is signed on 16 May 2005.

**Graham Tubb**

National Manager (Technical Standards)

## QUESTION WE'VE BEEN ASKED

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This section of the *TIB* sets out answers to some enquiries we've received. We publish these as they may be of general interest to readers. A general similarity to items published here will not necessarily lead to the same tax result. Each case should be considered on its own facts.

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### GST CONSEQUENCES OF A CANCELLED CONTRACT

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#### Sections 8(1), 9(1), 20(3)(a) and 25 of the Goods and Services Tax Act 1985

##### Background

We have been asked to clarify Inland Revenue's views on whether GST is chargeable on the amount of a deposit paid under a contract for the sale and purchase of land, when the contract is cancelled (including where the contract is cancelled as a consequence of the vendor's default or as a consequence of the purchaser's default) but the deposit is retained by the vendor.

##### The question

If a vendor retains a deposit paid under an agreement for the sale and purchase of land, is the vendor required to account for GST on the amount of the deposit and is the purchaser entitled to an input tax credit on the amount of the deposit?

##### The answer

The cancellation of the contract does not relieve the vendor of the obligation to account for GST in respect of the supply of the land or disentitle the purchaser to an input tax credit in respect of the purchase of the land in the period in which the supply was deemed by section 9 to have been made or (in the case of vendors or purchasers who are registered on a payments basis) the period or periods in which payment was made in respect of the supply.

However, where an agreement for the sale and purchase of land has been cancelled, the GST effects of entering into the contract will be reversed in the period in which the agreement is cancelled. Therefore, where a contract has been cancelled, GST will not be chargeable on the amount of the deposit retained by the vendor and the purchaser will not be entitled to an input tax credit on the amount of the deposit.

### Analysis

#### Function of a deposit

Contracts for the sale and purchase of land generally require a deposit to be paid by the purchaser when the contract is entered into. Such contracts also generally provide that if the purchaser fails to complete settlement, the vendor may elect to cancel the agreement and retain the deposit for the vendor's benefit.

The legal interest in land is acquired on registration of the transfer of the title to the land to the purchaser. Before registration the interest of a purchaser under an unconditional contract in the land is known as an "equitable interest" which is still enforceable through the courts although registration has not been effected: *Firth Concrete Industries Ltd v Duncan* [1973] NZLR 188. The passing of equitable ownership is conditional on completion of the contract but the passing of equitable ownership then relates back to the point in time when the purchaser is able to obtain specific performance: *Rayner v Preston* 18 Ch D 1. The purchaser's equitable interest would be terminated by cancellation of the contract: *Field v Fitton* [1988] 1 NZLR 482.

A deposit is part-payment of the purchase price: *Howe v Smith* 27 Ch D 89; *Martin v Finch* [1923] NZLR 570; *Soper v Arnold* [1889] App Cas 429. A deposit does not relate to a separate supply of a chose in action (being the equitable interest in land). The equitable interest in the land is not severable from the legal interest: *Case W11* (2003) 21 NZTC 11,100; *Case W22* (2003) 21 NZTC 11,212 (upheld on appeal: *Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618). A contract for the sale and purchase of land involves only one supply: *Nicholls v CIR* (1997) 18 NZTC 13,265.

Where a vendor cancels a contract as a consequence of the failure of the purchaser to perform the contract, the deposit retained by the vendor relates to compensation for the purchaser's breach and not to any supply under the contract. The deposit represents liquidated damages for the breach of the contract, being a pre-estimate of damages in respect of a breach: *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128; *Stockloser v Johnson* [1954] 1 All ER 630. If the deposit is a penalty, the court may grant relief against forfeiture of the deposit. A deposit of 10 percent is not regarded as being penal in nature: *Worsdale v Polglase* [1981] 1 NZLR 722.

### **GST consequences of entry into the contract**

Where both parties are registered on an invoice basis, the vendor is required to account for GST on the full amount of the sale price and the purchaser is entitled to an input tax credit on the full sale price in the period in which the supply is deemed by section 9(1) to take place (that is, when the deposit is paid or an invoice is issued): *Case L67* (1989) 11 NZTC 1,391; *Case N24* (1991) 13 NZTC 3,199; *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685.

A vendor who is registered on a payments basis is required to return GST on land supplied or deemed by section 9(1) to have been supplied in any period to the extent that a payment is received in respect of the supply of the land during the period. A purchaser who is registered on a payments basis is entitled to an input tax credit in respect of land supplied or deemed to have been supplied to the purchaser in any period to the extent that a payment has been made in respect of the supply of the land: sections 20(3)(b) and 20(4)(b); *Nicholls v CIR* (1999) 19 NZTC 15,233.

### **GST consequences of cancellation of the contract**

Where a contract for the sale of land is cancelled, an actual supply of the land will not be made and no other supply will be made in return for the deposit. For there to be a supply of services to the purchaser in return for the deposit, the vendor must have done something for the purchaser (such as providing a right to the purchaser) rather than against the purchaser: *Case S65* (1996) 17 NZTC 7,408. The Commissioner considers that services would not be provided by the vendor to the purchaser for a deposit forfeited as a consequence of the purchaser's breach. The forfeiture and retention of the deposit because of the purchaser's breach of the contract is an action against the purchaser rather than the provision of a right or a benefit or advantage to the purchaser. Where a contract for the sale of land is cancelled because of the vendor's default, the vendor is required to refund the deposit to the purchaser.

If the purchaser has claimed input tax on the supply of a property under a contract that has been cancelled, the amount of the excess tax charged to the purchaser as a consequence of the cancellation is deemed by section 25(4) to be tax charged in relation to a taxable supply by the purchaser. Such output tax is attributable to the taxable period in which a credit note is issued to the purchaser or the purchaser otherwise receives notice or other knowledge that the input tax deducted by the purchaser exceeds the output tax properly charged. Refer *Case W11*; *Case W22*.

If the vendor has returned output tax on the supply of a property under a contract which has been cancelled, as a result of the cancellation the vendor will have accounted for an incorrect amount of output tax. Therefore,

under section 25(2), the vendor is entitled to make an adjustment deducting the GST previously accounted for in the return for the taxable period during which it has become apparent that the output tax accounted for is incorrect.

The GST consequences do not depend on whether the contract was cancelled as a consequence of the vendor's default or as a consequence of the purchaser's default. In each case the question is whether a supply has been made for the deposit retained by the vendor and under section 25 the reason that a supply was cancelled is irrelevant. The purchaser's inability to recover a deposit paid under an agreement that has been cancelled also does not affect the GST consequences: see *Case W11* (2003) 21 NZTC 11,100 para 82-83.

The purpose of section 25 is to require adjustments to GST where a transaction fails after the time when a supply is deemed by section 9 to have been made. In such circumstances Parliament's intention was that the supplier is not required to pay GST in respect of goods or services not supplied and that the recipient cannot obtain an input tax credit in respect of such goods or services. See *Case W11*.

[This item does not deal with the application of section 76 of the Goods and Services Tax 1985 or the circumstances in which section 76 could apply to vary the above consequences.]

## REGULAR FEATURES

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### DUE DATES REMINDER

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#### June 2005

##### 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

#### July 2005

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

##### 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 calendars 2004–2005 and 2005–2006*. These calendars reflect 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 "Public consultation" in the right-hand navigation bar. Here you will find links to drafts presently available for comment. You can send in your comments by the internet.

Name \_\_\_\_\_

Address \_\_\_\_\_

***Draft standard practice statement***

- ED 0043: Loss offset elections between group companies.  
(This draft item was previously put out for external consultation in November 2003)

***Comment deadline***

30 June 2005

***Draft interpretation statement***

- IS0092: Whether a standard form agreement for the sale and purchase of real estate constitutes an "invoice" under the GST Act 1985 thus triggering the time of supply under that Act.

***Comment deadline***

30 June 2005

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stamp  
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National Office  
Inland Revenue Department  
PO Box 2198  
Wellington



