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This *Tax Information Bulletin* is also available on the internet in PDF. Our website is at **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

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 item is available for review/comment this month, with a deadline of 22 August 2005

Ref.	Draft type	Description
ED 0077	Standard practice statement	Income equalisation deposits and refunds

Please see page 53 for details on how to obtain a copy.

The following draft items are available for review/comment this month, with a deadline of 31 August 2005.

Ref.	Draft type	Description
QB0042	Question we've been asked	FBT—Value of brokerage provided by sharebrokers to employees
QB0043	Question we've been asked	The meaning of "benefit" for FBT purposes

Please see page 53 for details on how to obtain a copy.

BINDING RULINGS

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

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

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

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

TAXABILITY OF PAYMENTS UNDER THE HUMAN RIGHTS ACT 1993 FOR HUMILIATION, LOSS OF DIGNITY, AND INJURY TO FEELINGS

PUBLIC RULING – BR PUB 05/12

Note (not part of ruling): This ruling is essentially the same as Public Ruling BR Pub 01/09 published in Tax Information Bulletin Vol 13, No 11 (November 2001). However, the new ruling has been updated to take into account amendments to the Human Rights Act 1993 as a result of the Human Rights Amendment Act 2001. This new ruling also applies the Income Tax Act 2004, which came into force on 1 April 2005, rather than the Income Tax Act 1994 provisions. The changes between the 1994 and 2004 provisions affecting this ruling do not affect the conclusions previously reached.

The ruling applies for an indefinite period.

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

Taxation Laws

All legislative references are to the Income Tax Act 2004 unless otherwise stated.

This Ruling applies in respect of sections CA 1 and CE 1.

The Arrangement to which this Ruling applies

The Arrangement is:

- The payment of an award of damages to a complainant or aggrieved person as granted by the Human Rights Review Tribunal for humiliation, loss of dignity, and injury to feelings under section 92M(1)(c) of the Human Rights Act 1993, where the complaint involves an employer/employee relationship; or
- The making of a payment to a complainant or aggrieved person for humiliation, loss of dignity, and injury to feelings pursuant to an out of court settlement genuinely based on the complainant or aggrieved person's rights to damages under section 92M(1)(c) of the Human Rights Act 1993 where the complaint involves an employer/employee relationship.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Payments for damages or out of court settlements that are genuinely and entirely awarded for humiliation, loss of dignity, and injury to feelings under section 92M(1)(c) of the Human Rights Act 1993 are not income under section CE 1 of the Income Tax Act 2004.
- Payments for damages or out of court settlements that are genuinely and entirely awarded for humiliation, loss of dignity, and injury to feelings under section 92M(1)(c) of the Human Rights Act 1993 are not income under ordinary concepts under section CA 1(2).

The period for which this Ruling applies

This Ruling will apply to payments received on and after 1 April 2005 for an indefinite period.

This Ruling is signed by me on the 29th day of June 2005.

Susan Price
Senior Tax Counsel

COMMENTARY ON PUBLIC RULING BR PUB 05/12

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 05/12 ("the Ruling").

The subject matter covered in the Ruling was previously dealt with in Public Ruling BR Pub 01/09 published in *TIB* Vol 13, No 11 (November 2001). This Ruling applies for an indefinite period.

Background

The Human Rights Act 1993 ("the HRA") provides protection for people against discrimination on the grounds of sex, marital status, religious or ethical belief, race, colour, ethnic or national origins, age, disability, political opinion, employment status, family status, and sexual orientation.

Under the Act people can make a complaint to the Human Rights Commission ("the Commission") regarding breaches of the provisions of the Act. If the Commission is unable to settle the complaint, the matter may proceed to the Human Rights Review Tribunal ("the Tribunal").

The Tribunal is an independent body that hears and determines complaints that have been made to the Commission. The Tribunal has the power of a court similar to the District Court, and its decisions can be enforced in the District Court if parties fail to comply with its orders or directions.

Significant changes were made to the HRA in 2001, including changes to the functions and powers of the Commission, the merging of the office of the Race Relations Conciliator with the Human Rights Commission and establishing the Office of Human Rights Proceedings. Changes were made to the way complaints are received and resolved. The Complaints Review Tribunal also became the Human Rights Review Tribunal following the amendments.

The Government's exemption from full compliance with the HRA also expired on 31 December 2001. The new Part 1A makes the Government, government agencies and anybody who performs a public function accountable, subject to certain exceptions, for unlawful discrimination.

There were certain consequential changes to the sections of the HRA referred to in BR Pub 01/09 and the Ruling now refers to the current sections.

Legislation

Section 92I of the HRA provides a number of remedies for the Tribunal when the Tribunal determines that a breach of any of the provisions of Part 1A and Part 2 of that Act has been committed or where there has been a breach of the terms of a settlement of complaint. Section 92I of the HRA provides:

92I. Remedies—

(1) This section is subject to sections 92J and 92K (which relate to the only remedy that may be granted by the Tribunal if it finds that an enactment is in breach of Part 1A).

(2) In proceedings before the Human Rights Review Tribunal brought under section 92B(1) or (4) or section 92E, the plaintiff may seek any of the remedies described in subsection (3) that the plaintiff thinks fit.

(3) If, in proceedings referred to in subsection (2), the Tribunal is satisfied on the balance of probabilities that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint, the Tribunal may grant 1 or more of the following remedies:

(a) a declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint:

(b) an order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order:

(c) damages in accordance with sections 92M to 92O:

(d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach:

(e) a declaration that any contract entered into or performed in contravention of any provision of Part 1A or Part 2 is an illegal contract:

(f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act:

(g) relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties:

(h) any other relief the Tribunal thinks fit.

(4) It is no defence to proceedings referred to in subsection (2) or subsection (5) that the breach was unintentional or without negligence on the part of the party against whom the complaint was made, but, subject to section 92P, the Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant.

(5) In proceedings before the Human Rights Review Tribunal brought, under section 92B(3), by the person against whom a complaint was made, that person may seek a declaration that he or she has not committed a breach of Part 1A or Part 2.

Section 92M(1) of the HRA provides the circumstances in which damages may be awarded under the Act, including damages payments for humiliation, loss of dignity, and injury to feelings:

> **92M. Damages—**
>
> (1) In any proceedings under section 92B(1) or (4) or section 92E, the Tribunal may award damages against the defendant for a breach of Part 1A or Part 2 or the terms of a settlement of a complaint in respect of any 1 or more of the following:
>
> (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the aggrieved person for the purpose of, the transaction or activity out of which the breach arose:
>
> (b) loss of any benefit, whether or not of a monetary kind, that the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach:
>
> (c) humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.
>
> (2) This section applies subject to sections 92J, 92N, and 92O.

Part 1A of the HRA provides for the compliance and accountability of the legislative, executive and judicial branches of the government of New Zealand; or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law. Part 2 of the HRA sets out what constitutes "unlawful discrimination" under that Act. Section 21 of that Act sets out the general prohibited grounds of discrimination, and sections 22 to 74 go on to deal with discrimination in specific situations.

Section 92M(1) of the HRA also refers to "the breach of Part 1A or Part 2 or the terms of a settlement of a complaint". Section 83 of that Act provides that the "Commission must use its best endeavours to assist the parties to secure a settlement". "Settlement" is defined in that section to mean "the agreement of the parties concerned on actions that settle the matter, which may include the payment of compensation" and includes "a satisfactory assurance by the person to whom the complaint relates against the repetition of the conduct". Section 89 provides that a "settlement between parties to a complaint may be enforced by proceedings before the Tribunal brought under section 92B(4)" of the HRA, which provides:

> **92B. Civil proceedings arising from complaints—**
>
> …
>
> (4) If parties to a complaint under section 76(2)(a) have reached a settlement of the complaint (whether through mediation or otherwise) but one of them is failing to observe a term of the settlement, another of them may bring proceedings before the Tribunal to enforce the settlement.

In respect of section 92M(1)(c) of the HRA, any such breach of a settlement of a complaint would equally relate to damages for humiliation, loss of dignity and injury to feelings.

The Ruling considers whether payments granted under section 92M(1)(c) of the HRA for humiliation, loss of dignity, and injury to the feelings of the employee are "amounts derived by a person in connection with their employment or service", for the purposes of section CE 1 or, alternatively income under ordinary concepts under section CA 1(2). Section CE 1 provides:

> The following amounts derived by a person in connection with their employment or service are income of the person:
>
> (a) salary or wages or an allowance, bonus, extra pay, or gratuity:
>
> (b) expenditure on account of an employee that is expenditure on account of the person:
>
> (c) the market value of board that the person receives in connection with their employment or service:
>
> (d) a benefit received under a share purchase agreement:
>
> (e) directors' fees:
>
> (f) compensation for loss of employment or service:
>
> (g) any other benefit in money.

Section CA 1(2) states that "[a]n amount is also income of a person if it is their income under ordinary concepts".

Application of the Legislation

If payments for humiliation, loss of dignity, and injury to feelings, under section 92M(1)(c) of the HRA were "amounts derived by a person in connection with their employment or service", they would be included under section CE 1 as income of the person.

Section CE 1(g) includes in income amounts that are "any other benefit in money", if they are "amounts derived by a person in connection with their employment or service". Payments under section 92M(1)(c) of the HRA are a benefit in money. The issue is, therefore, whether these payments are "amounts derived by a person in connection with their employment or service".

While many of the categories of discrimination in the HRA may relate, directly or indirectly, to an employer/employee relationship, it is clear that many of them are intended to apply to much wider situations. Consequently, in many instances of complaints under the HRA, payments awarded will be completely outside any employment relationship and will clearly not be, in respect of a recipient taxpayer, "in connection with their employment or service". In such cases payments under section 92M(1)(c) will not fall within the income of the person under section CE 1. The Ruling does not consider such situations.

However, it is likely that complaints heard by the Tribunal under the HRA will often involve an employee/employer relationship. The question to be answered in the Ruling, therefore, is whether payments under section 92M(1)(c) of the HRA where the complaint involves an employee/employer relationship are made "in connection with their employment or service".

Relationship with Income Tax Act 1994

The Income Tax Act 2004 introduces the concept of an amount received by a person "in connection with their employment or service" being income of a person. Previously, the 1994 Act referred to an amount being monetary remuneration, and thus gross income, if it was an amount derived by a person "in respect of or in relation to" their employment or service.

The wording of the 2004 Act provision is different to that in the 1994 Act. However, while the 2004 Act has replaced the 1994 Act, section YA 3(3) of the 2004 Act nevertheless provides that provisions of the 2004 Act are the provisions of the 1994 Act in rewritten form. The provisions of the 2004 Act are intended to have the same effect as the corresponding provision of the 1994 Act. The exception is, pursuant to section YA 3(5), where an "identified policy change", as specified in schedule 22A, exists.

In this instance no identified policy change has been specified in schedule 22A. Therefore, the presumption is that the adoption of the term "in connection with" was not intended to give rise to an interpretation that differs from that which would apply if the term "in respect of or in relation to", as used in the definition of "monetary remuneration" under the 1994 Act, still applied. It is therefore relevant to consider the meaning of the phrase "in respect of or in relation to" in the interpretation of the phrase "in connection with" in this situation.

The meaning of "in connection with"

The phrase "in connection with" is not defined in the Act. However, it has been considered in other contexts.

In *Strachan v Marriott* [1995] 3 NZLR 272, Hardie Boys J stated, at page 279:

"In connection with" may signify no more than a relationship between one thing and another. The expression does not necessarily require that it be a causal relationship: *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465, 479 per Wilcox J. But, as Davies J warned in *Hatfield v Health Insurance Commission* (1987) 15 FCR 487, at p 491:

> "Expressions such as 'relating to', 'in connection with' and 'in respect of' are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute.... The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated, and to the object or purpose of the statutory provision in which they appear."

In *Case E84*, Bathgate DJ noted at page 59,445:

It is a matter of degree whether, on the interpretation of a particular statute, there is a sufficient relationship between subject and object to come within the words "in connection with" or not. It is clear that no hard and fast rule can be or should be applied to the interpretation of the words "in connection with". Each case depends on its own facts and the particular statute under consideration.

In *Hatrick (A) & Co v R* [1923] AC 213, the Privy Council considered the meaning of "in connection with" in the context of section 10 of the Government Railway Act 1908, which empowered the Minister of Railways to fix charges to be paid for goods stored in any shed or store "in connection with a railway". Their Lordships stated, at page 225:

In the view of their Lordships these words cannot apply to something done on a space or in a building merely contiguous to or abutting upon a railway, even though it be the property of a railway; if the thing done forms no part of or has no connection with the property business or a railway, as a carrier of passengers and goods by rail, or in other words that the expression "in connection with a railway" means connect with, subserving and being ancillary to, the business of a railway as such carriers … These words … must be direct to something different from propinquity or contiguity, and in their Lordships' view, having regard to all the provisions of the statute, mean in s 10 in connection with the business and operations of a railway as a carrier of goods by rail.

In *Hammington v Ross* (1992) 2 NZ ConvC 191,150, the High Court considered whether a lawyer's omission to disclose his investment in the client's product to the client was a "civil liability incurred in connection with the provision of professional services". McGechan J stated, at page 191,162:

One next goes to the operative clause. It provides cover for claims arising from civil liability incurred "in connection with" provision of "professional services". The clause is a broad one. It extends to "civil liability", not mere classical "neglect, error or omission". It extends to claims incurred "in connection with" the provision of professional services, as contrasted with "in the" provision of professional services. It is not limited to strict integral components of those very services themselves. With that wider wording it was conceded, and rightly, that activity covered would include omission to provide, and "ancillary conduct not strictly professional work – eg, the business advice here". Clearly however there must be a nexus between such wider activity giving rise to liability and the professional services. The wider activity must be related, and not merely co-existent.

In *Pan Pacific Forest Industries (NZ) Ltd v Norwich General* (1997) 7 TCLR 560, the High Court considered whether an insurance policy applied where the product supplied was faulty. The relevant policy applied to "accidental loss of…property…resulting from accidents in connection with the business". Paterson J stated at page 569:

The operative provisions of the policy apply of the accident was "in connection with the business". Giving those words their natural and ordinary meaning the accident did arise in connection with the business if it arose because the business supplied faulty materials and parts and gave faulty advice.

The phrase "in connection with", has also been considered in the context of section DJ 5 of the Income Tax Act 1994, a provision that allows a tax deduction for costs incurred "in connection with" the determination of a liability to tax. In that context, Bathgate DJ found in *Case E84* that the term required a narrow interpretation. He said, at page 59,445:

> It may be that only an empirical and common sense approach to the interpretation of the words can be applied in each particular case to determine where, if at all, the line should be drawn to allow or not allow expenditure "in connection with" an assessment. However I believe that a narrow interpretation of the words "... any expenditure ... in connection with ... the assessment ..." is the correct interpretation: only expenditure closely and immediately connected to the assessment itself is intended to be allowed as a deduction, and expenditure more remote, as for instance in this case, the expenditure of O in making his trip to visit A, is not expenditure allowed as a deduction under the section.

This case suggests that, in the context of section DJ 5, the phrase "in connection with" requires a close linkage between the expenditure and the "determination" or "calculation" of a liability to tax.

The above cases suggest that for something to be "in connection with" something else, a relevant nexus is required, and that the two things must be related to each other in some way. Overall, the Commissioner considers that they suggest a broad interpretation should be given to the term.

The meaning of "in respect of or in relation to"

It is also necessary to consider the relevant words that were used in the Income Tax Act 1994. As noted, in that Act the relevant test was whether an amount was "in respect of or in relation to" employment, and thus "monetary remuneration".

The Court of Appeal endorsed a very wide meaning of the phrase "in respect of or in relation to". In *Shell New Zealand Limited v CIR* (1994) 16 NZTC 11,303, where lump sum payments had been made by Shell to employees who transferred at the request of Shell, the Court discussed the relevant part of the definition of "monetary remuneration". McKay J, delivering the judgment of the Court, said at page 11,306:

> The words "in respect of or in relation to" are words of the widest import.

Although McKay J acknowledged that the payments in *Shell* were not made under the contract of employment in that case, this did not mean that the employees received the payment outside the employee relationship. The learned Judge had earlier referred to the fact that the payments were not expressly provided under the employees' written employment contracts, but were made pursuant to Shell's employment policy as a matter of discretion. They were still made "because he or she is an employee".

Other cases have also stressed the width of the words "in respect of or in relation to". In the Queens Bench case of *Paterson v Chadwick* [1974] 2 All ER 772, Boreham J considered the meaning of the phrase "in respect of" in relation to discovery, and adopted the comments of Mann CJ in the Australian case *Trustees, Executors & Agency Co Ltd v Reilly* [1941] VLR 110, where the learned Chief Justice said:

> The words "in respect of" are difficult of definition but they have the widest possible meaning of any expression intended to convey some connection or relation in between the two subject-matters to which the words refer.

Similarly, in *Nowegijick v The Queen* [1983] CTC 20 at page 25, the Supreme Court of Canada described the phrase "in respect of" as "probably the widest of any expression intended to convey some connection between two related subject-matters".

Other New Zealand cases (*Case U38* (2000) 19 NZTC 9,361 and *CIR v Kerslake* (2001) 20 NZTC 17,158) have also considered the phrase "in respect of or in relation to". Both cases are consistent with the authorities cited above in this commentary.

Context may affect the meaning

However, many cases have demonstrated that the meaning to be given to the phrase "in respect of or in relation to" may vary according to the context in which it appears.

In *State Government Insurance Office v Rees* (1979) 144 CLR 549, the High Court of Australia considered the meaning of the phrase "in respect of" in determining whether the debt due to the Government Insurance Office fell within section 292(1)(c) of the Companies Act 1961-1975 (Q.) as "amounts … due in respect of workers' compensation under any law relating to workers' compensation accrued before the relevant date". The Court held that amounts which could be recovered by the Government Insurance Office from an uninsured company pursuant to section 8(5) of the Workers' Compensation Act 1916-1974(Q.) for money paid to workers employed by the uninsured company were not amounts due "in respect of" workers' compensation under the Companies Act.

At page 561 Mason J observed that:

> ... as with other words and expressions, the meaning to be ascribed to "in respect of" depends very much on the context in which it is found.

Stephen J also discussed the meaning of the phrase "in respect of", noting at pages 553-554 that it was capable of describing relationships over a very wide range of proximity, and went on to say:

> Were the phrase devoid of significant context, it could, I think, be taken to be descriptive of the relationship between the present indebtedness owed to the State Government Insurance Office

and the subject matter of workers' compensation. However a context does exist which is in my view sufficient to confine the operation of s 292(1)(c) to bounds too narrow to be of service to the appellant.

In *TRA Case R34* (1994) 16 NZTC 6,190, certain payments were made to a New Zealand distributor by its overseas parent in relation to repairs which had to be made to cars sold to the New Zealand subsidiary and then sold to dealers. The issue was whether the payments were zero-rated for GST purposes. The definition of "consideration" in section 2 of the Goods and Services Tax Act 1985 was relevant. Part of the definition of "consideration" states:

…any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services …

The TRA stated at page 6,200 that:

A sub-issue is whether the reimbursing payment from the overseas manufacturer (MC) was made "in respect of, in response to, or for the inducement of" the repair work in the sense required by the definition of "consideration" in s 2 of the Act. … Although the definition of consideration creates a very wide potential link between a payment and a particular supply it is, in any case, a matter of degree, commonsense, and commercial reality whether a payment is direct enough to have the necessary nexus with a service, i.e, whether the link is strong enough.

The High Court's decision on the appeal of *Case R34* is *CIR v Suzuki New Zealand Ltd* (2000) 19 NZTC 15,819, which was later upheld by the Court of Appeal. In the High Court McGechan J said:

…it is necessary there be a genuine connection. The legislature is not to be taken as taxing on an unrealistic or tenuous connection basis.

In *Cleland v CIR* (2001) 20 NZTC 17,086, the High Court considered the tax treatment of sums awarded to the taxpayer by the Employment Court for a personal grievance he brought against his employer. The Employment Court awarded a total amount of $126,000, comprising $46,000 for loss of wages, $50,000 for loss of benefits, and $30,000 for humiliation.
There was no issue regarding the amount paid for humiliation before Hammond J in the High Court, and accordingly he made no comment on this amount. He concluded that the amount paid for lost wages was therefore assessable as "monetary remuneration". In respect of the further amount of $50,000, Hammond J concluded that it was compensation for loss of office or employment. In order to reach this conclusion Hammond J had to consider whether the amount was "in respect of or in relation to" the taxpayer's employment or service.

Hammond J referred to the Court of Appeal decision in *Shell* and noted that those words are to be interpreted widely. Counsel for the taxpayer relied heavily on the Full Federal Court decision in *Rowe*. Hammond J stated at paragraphs 46 to 48 of his judgment:

The award is clearly a "rolled up" one by the Employment Court in respect of or in relation to Mr Cleland's past employment.

…

As a sub-part of the argument, it was said for Mr Cleland that, because the award was calculated on future wages and benefits, it was not compensation for (past) loss of office or employment. That is not the test. The test is whether the wages and benefits actually awarded arose out of Mr Cleland's employment. It does not at all follow that, because the award was made relating to a period after the termination of the employment, it was not made in respect of, or in relation to, the employment. As Mr Almao said, "compensation for loss of office or employment by its very nature encompasses future benefits; benefits that an employee might have received had his or her employment continued".

Similarly, the meaning of the words "in connection with" can be affected by the context in which they are used. In this regard, the context in which the words "in connection with" are used is to provide that a benefit in money will be income of a person where it is derived "in connection with their employment or service". Therefore, as noted above the term "in connection with" has a wide meaning, but only, in this context, in respect of "employment or service".

Not all payments to employees are "in connection with" employment or service

However, there is authority to support the view that not all payments made by an employer to an employee are in connection with employment, or previously within the definition of "monetary remuneration". In *Fraser v CIR* (1995) 17 NZTC 12,356, at page 12,363, Doogue J in the High Court said:

There is no dispute that the words "emolument (of whatever kind), or other benefit in money, in respect of or in relation to the employment or service of the taxpayer" are words of the widest possible scope: see Shell New Zealand Ltd v C of IR (1994) 16 NZTC 11,303 at page 11,306, and Smith v FC of T 87 ATC 4883; (1987) 164 CLR 513; (1987) 19 ATR 274. Mr Harley does, however, submit, correctly, that it does not follow that all payments made are necessarily income and refers, for example, to reimbursement payments.

In *FC of T v Rowe* (1995) ATC 4,691 the taxpayer was employed as an engineer for the Livingston Shire Council. As a result of a number of complaints against him he was suspended. An inquiry was commenced, and he incurred legal costs as a result of engaging counsel to defend himself against dismissal during the course of the inquiry. The taxpayer was cleared of any charges of misconduct but was dismissed a year later. The taxpayer claimed his legal costs as a deduction. Although the Council refused to reimburse the taxpayer for his legal costs, the Queensland government subsequently made an ex gratia payment.

The Full Federal Court considered, amongst other things, whether the ex gratia payment constituted assessable income. By majority, the Court concluded that the payment was not assessable under section 25(1) of the

Australian Income Tax Assessment Act 1936 as income in accordance with ordinary concepts, nor was it assessable under section 26(e) of that Act as being compensation "in respect of, or for or in relation directly or indirectly to" any employment. Accordingly, Burchett and Drummond JJ (with Beaumont J dissenting) held that the payment was not assessable. Burchett J held that the payment was **not a reward for the taxpayer's services but was a recognition of the wrong done to him**. The payments were not remuneration but a reparation, and they were not sufficiently related to the performance of income-earning activities. On the same reasoning, it was too remote from the employment to be caught by section 26(e). Further, the payment was not assessable under section 26(e) because the employer/employee relationship between the Council and the taxpayer was merely part of the background facts against which the ex gratia payment was made. On appeal, the majority of the Full High Court confirmed the Federal Court's decision: *FC of T v Rowe* (1997) ATC 4,317.

In the Australian case of *FCT v Dixon* (1954) 5 AITR 443, the taxpayer received payments from his prior employer topping up his military pay. It would appear from the judgment that the Australian Commissioner argued that even a slight relationship to employment was sufficient to satisfy the test in section 26(e) of the Australian Income Tax Assessment Act 1936 [which made assessable certain sums granted to the taxpayer "in respect of, or for or in relation directly or indirectly to, any employment…".]. This argument was rejected by Dixon CJ and Williams J, who stated at page 446 that:

> We are not prepared to give effect to this view of the operation of s.26(e) …There can, of course, be no doubt that the sum of £104 represented an allowance, gratuity or benefit allowed or given to the taxpayer by Macdonald, Hamilton and Company. Our difficulty is in agreeing with the view that it was allowed or given to him in respect of, or in relation directly or indirectly to, any employment of, or services rendered by him …We are not prepared to give s.26(e) a construction which makes it unnecessary that the allowance, gratuity, compensation, benefit, bonus or premium shall in any sense be a recompense or consequence of the continued or contemporaneous existence of the relation of employer and employee or a reward for services rendered given either during the employment or at or in consequence of its termination.

In the same case, at page 450, McTiernan J stated that:

> The words of paragraph (e) are wide, but, I think, not wide enough to prevent an employer from giving money or money's worth to an employee continuing in his service or leaving it, without incurring liability to tax in respect of the gift. The relationship of employer and employee is a matter of contract. The contractual relations are not so total and all embracing that there cannot be personal or social relations between employer and employee. A payment arising from those relations may have no connexion with the donee's employment.

These principles have also been applied by the courts in cases involving contracts for services. In *Scott v FCT* (1969) 10 AITR 367, Windeyer J in the High Court of Australia considered the meaning of the words "in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him" in section 26(e) of the Income Tax and Social Services Contribution Assessment Act 1936-1961. The case concerned a solicitor who received a gift of £10,000 from a grateful client. Windeyer J stated at page 374 that the meaning of the words of the legislation "must be sought in the nature of the topic concerning which they are used". Windeyer J at page 376 referred to a passage from the judgment of Kitto J in *Squatting Investment Co Ltd v FCT* (1953) 5 AITR 496, at 524, where Kitto J (speaking of certain English cases) said:

> The distinction these decisions have drawn between taxable and non-taxable gifts is the distinction between, on the one hand, gifts made in relation to some activity or occupation of the donee of an income-producing character … and, on the other hand, gifts referable to the attitude of the donor personally to the donee personally.

Adopting this as a general principle, his Honour held that the £10,000 was not given or received as remuneration for services rendered and it did not form part of the taxpayer's assessable income.

J & G Knowles & Associates Pty Ltd v FC of T (2000) ATC 4,151 discusses the words "in respect of the employment" in the Australian FBT legislation. This case concerned interest-free loans to directors of a corporate trustee. Units in the trust fund were held by discretionary family trusts established by the directors. The lower courts were satisfied by a causal relationship, or a discernible and rational link between the loans and each director's employment. However, the Full Federal Court said that there had to be more than just *any* causal relationship between the benefit and the employment: the link had to be *sufficient* or *material*.

In the Commissioner's view, the term "in connection with", in the context of a payment being made "in connection with" a person's employment or service, is to be given a very broad interpretation and has a very wide operation. However, it is still necessary for there to be a sufficient relationship or nexus between the payment and the person's employment or service.

The nature and context of the payments

For an amount to be "in connection with employment" there must be a sufficient or material relationship between the payment and the employment.

Under section 92M of the HRA, damages may be awarded by the Tribunal for a breach of any of the provisions of Part 1A and Part 2 of that Act or where there has been a breach of the terms of a settlement of a complaint. As discussed above, breaches may not necessarily be in an employee/employer situation. If a claim is brought in the Tribunal which does not involve an employee/employer relationship it is clear that payment under section 92M(1)(c) cannot be described as monetary remuneration.

Where the complaint brought before the Tribunal does occur in the context of an employee/employer relationship, the connection of the employment relationship with payments under the HRA is tenuous. The HRA is not "employment legislation", although it may often operate in the employment context. Payments under section 92M(1)(c) of the HRA for humiliation, loss of dignity, and injury to feelings are **not** compensation for services rendered or for actions that occur in the normal course of the employment relationship. Rather the payments would be in the nature of reparation for a wrong done to the complainant and so would not be in respect of employment.

Payments of damages awards under section 92M(1)(c) of the HRA differ markedly from the situation in Shell v CIR. In that case at page 11,306, McKay J said:

> It is true …that the payment is not made under the contract of employment.…It is nevertheless paid to an employee only because he or she is an employee, and is paid to compensate for the loss incurred in having to change the employee's place of residence in order to take up a new position in the company. (Emphasis added)

Thus, in the Shell case, the employees received the payments as employees, **and** in order to compensate for the loss sustained as a result of the employment-related relocation.

The Commissioner considers payments under section 92M(1)(c) of the HRA to be too remote from the employment relationship to be regarded as being an amount derived by a person "in connection with their employment or service". This is consistent with the view previously reached that such amounts are not within the definition of "monetary remuneration" under the Income Tax Act 1994. If a complaint is brought in the Tribunal which involves an employee and an employer, the employment relationship in such instances is merely part of the background facts against which the damages payments are made. The payments are not made "in connection with their employment or service".

Income under ordinary concepts

Payments for damages made under section 92M(1)(c) of the HRA are not "income under ordinary concepts" under section CA 1(2).

Although the legislation does not define "income under ordinary concepts", a great number of cases have identified the concept by reference to such characteristics as periodicity, recurrence, and regularity, or by its resulting from business activities, the deliberate seeking of profit, or the performance of services (*Scott v C of T* (1935) 35 SR (NSW) 21 and *Reid v CIR* (1985) 7 NZTC 5,176). It is clear that payments under section 92M(1)(c) will not generally be made periodically or regularly, or generally recur. Nor as we have seen above, are they compensation for services.

Capital receipts do not form part of a person's income unless there is a specific legislative provision to the contrary. And by analogy with common law damages, damages payments under section 92M(1)(c) of the HRA are of a capital nature as Barber DJ acknowledged in *Case L92*, where he stated at page 1,536 that:

> I appreciate only too well that it is possible to interpret the evidence as showing that the $7,179.30 was formulated as a payment in the nature of common law damages for human hurt and breach and unfairness… I appreciate that the latter concepts are akin more to payments of capital than to wage revenue.

Out of court settlements

The Commission endeavours to settle disputes between parties and sometimes, the parties negotiate a settlement before the dispute is referred to the Tribunal. The settlement agreement may state that the payment is for humiliation, loss of dignity, or injury to feelings. In return for the complainant or aggrieved person surrendering his or her rights under the HRA, the other party will agree to pay a sum of money. There should be no difference in the tax treatment of the payments dependent on whether or not the parties use the Tribunal. A payment can be for humiliation, loss of dignity, or injury to the feelings of the complainant or aggrieved person whether the Tribunal is involved or not.

Shams

The Ruling will not apply to payments which are akin to sham payments. A sham is a transaction set up to conceal the true intention of the parties and is inherently ineffective. The nature of a sham was discussed by Diplock LJ in *Snook v London and West Riding Investment Ltd* [1967] 1 All ER 518 at 528 where he stated:

> I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham", which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

Richardson J, in the New Zealand case of *Mills v Dowdall* [1983] NZLR 154, stated that the "essential genuineness of the transaction is challenged" in a sham situation.

It is noteworthy that, in the Taxation Review Authority decision, *Case S 96* (1996) 17 NZTC 7,603, Judge Barber stated at page 7,606:

> Of course, seemingly excessive allocations to compensation for feelings injury should be reopened by the IRD.

If the parties to an agreement agree to characterise or describe payments as being for humiliation, loss of dignity, or injury to feelings when they are in reality for lost wages, this transaction would be a sham which would be open to challenge by the Commissioner. Where

the Commissioner has some doubt about the amount attributed to humiliation, loss of dignity, or injury to feelings, he may ask the parties to an agreement what steps they took to evaluate objectively what would be a reasonable amount to attribute to humiliation, loss of dignity, or injury to feelings. This would be so regardless of whether the payment was made as a result of an out of court settlement and whether or not the agreement is settled by the Human Rights Commissioner under the HRA. The onus of proof regarding the taxability of any such payment would be on the taxpayer.

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THE IMPACT OF COMPANY AMALGAMATIONS ON BINDING RULINGS

Summary

This interpretation statement considers whether an amalgamated company is entitled to rely on a private, product, or status ruling which was issued to an amalgamating company prior to the amalgamation.

This statement concludes that an amalgamated company is entitled to rely on private, product, or status rulings which an amalgamating company was previously entitled to rely on. However, the ability to rely on a pre-amalgamation ruling is subject to the continued fulfilment of any conditions and assumptions, and the Arrangement not being materially different to the Arrangement ruled upon.

Legislation

Tax Administration Act 1994 ("the TAA")

The relevant provisions of the TAA in relation to binding rulings are as follows:

76 AMALGAMATED COMPANY TO ASSUME RIGHTS AND OBLIGATIONS OF AMALGAMATING COMPANY

76 Where any amalgamating company ceases to exist on an amalgamation, the amalgamated company shall, in accordance with section 209G of the Companies Act 1955 or section 225 of the Companies Act 1993,—

(a) Comply with all obligations of and meet all liabilities of, and be entitled to all rights, powers and privileges of, the amalgamating company under the Inland Revenue Acts with respect to the income year in which the amalgamation occurs and all preceding income years; and

(b) In particular but without limitation, make a return of income in respect of the amalgamating company and the income year in which the amalgamation takes place.

…

91EA EFFECT OF A PRIVATE RULING

91EA(1) Notwithstanding anything in any other Act, if—

(a) A private ruling on a taxation law applies to a person in relation to an arrangement; and

(b) The person applies the taxation law in the way stated in the ruling,—

the Commissioner must apply the taxation law in relation to the person and the arrangement in accordance with the ruling.

…

91EB(2) A private ruling does not apply to a person in relation to an arrangement if—

(a) The arrangement is materially different from the arrangement identified in the ruling; or

(b) There was a material omission or misrepresentation in, or in connection with, the application for the ruling; or

(c) The Commissioner makes an assumption about a future event or another matter that is material to the ruling , and the assumption subsequently proves to be incorrect; or

(d) The Commissioner stipulates a condition that is not satisfied.

…

91EI WITHDRAWAL OF A PRIVATE RULING

91EI(1) The Commissioner may at any time withdraw a private ruling by notifying the person to whom the ruling applies in writing that the ruling has been withdrawn.

91EI(2) The private ruling is withdrawn from the date specified in the notice of withdrawal. That date may not be earlier than the date on which the person could reasonably be expected to receive the notice of withdrawal.

91EI(2A) A status ruling on a withdrawn private ruling does not apply on and after the date specified in the notice of withdrawal.

91EI(3) If the Commissioner withdraws a private ruling—

(a) The ruling does not apply if the arrangement was entered into after the date of withdrawal; but

(b) The ruling continues to apply, for the remainder of the period or income year specified in the ruling, if the arrangement was entered into before the date of withdrawal; and

(c) A status ruling that has been made on the private ruling continues to apply, for the remainder of the period or income year specified in the private ruling, if the arrangement was entered into before the date of withdrawal.

…

91FA EFFECT OF A PRODUCT RULING

91FA(1) Notwithstanding anything in any other Act, if—

(a) A product ruling on a taxation law applies to an arrangement; and

(b) A person who enters into the arrangement applies the taxation law in the way stated in the ruling,—

the Commissioner must apply the taxation law in relation to the arrangement in accordance with the ruling.

…

91FB(2) A product ruling does not apply to an arrangement if—

(a) The arrangement is materially different from the arrangement identified in the ruling; or

(b) There was a material omission or misrepresentation in, or in connection with, the application for the ruling; or

(c) The Commissioner makes an assumption about a future event or another matter that is material to the application of the ruling, and the assumption subsequently proves to be incorrect; or

(d) The Commissioner stipulates a condition that is not satisfied.

…

91FJ WITHDRAWAL OF A PRODUCT RULING

91FJ(1) The Commissioner may at any time withdraw a product ruling.

91FJ(2) The Commissioner must notify the withdrawal by giving adequate notice in the Gazette.

91FJ(3) A product ruling is withdrawn on the date stated in the notice of withdrawal. The date cannot be before the date on which notice is given under subsection (2).

91FJ(3A) A status ruling on a withdrawn product ruling does not apply on and after the date specified in the notice of withdrawal.

91FJ(4) If the Commissioner withdraws a product ruling—

(a) The ruling does not apply to an arrangement entered into after the date of withdrawal; but

(b) The ruling continues to apply, for the remainder of the period or income year specified in the ruling, to any arrangement to which it previously applied that was entered into before the date of withdrawal; and

(c) A status ruling that has been made on the product ruling continues to apply, for the remainder of the period or income year specified in the product ruling, if the arrangement to which it previously applied was entered into before the date of withdrawal.

91FJ(5) A notice of withdrawal must specify—

(a) That it is a withdrawal of a product ruling under this section; and

(b) The ruling that is being withdrawn; and

(c) The original period or income year for which the ruling applied; and

(ca) Any status ruling that applied to the product ruling; and

(cb) That the status ruling is also being withdrawn; and

(d) The date of the withdrawal.

Anything that does not contain these statements is not a notice of withdrawal of a product ruling.

91FJ (6) The Commissioner shall also notify the withdrawal in writing to the person who applied for the product ruling.

…

91GH EFFECT OF STATUS RULING

91GH If a person applies a taxation law in accordance with a status ruling, the Commissioner must also apply the taxation law in accordance with the status ruling.

Income Tax Act 2004 ("the ITA")

FE 1 AMALGAMATION OF COMPANIES: PURPOSE

FE 1(1) Subject always to the express provisions of the amalgamation provisions, those provisions are intended—

(a) to specify certain taxation consequences of the amalgamation of companies; and

(b) in the case of a qualifying amalgamation, to permit certain property to be transferred to an amalgamated company on a concessional taxation basis and an amalgamated company to succeed to the net losses and imputation credit account and other credits of amalgamating companies, subject to tests of continuity and commonality of ownership being met; and

(c) to apply notwithstanding anything to the contrary in section 225(d) of the Companies Act 1993.

…

FE 8 AMALGAMATED COMPANY TO ASSUME RIGHTS AND OBLIGATIONS OF AMALGAMATING COMPANY

FE 8 Where any amalgamating company ceases to exist on an amalgamation, the amalgamated company must, in accordance with section 209G of the Companies Act 1955 or section 225 of the Companies Act 1993, comply with all obligations of and meet all liabilities of, and be entitled to all rights, powers, and privileges of, the amalgamating company under the Inland Revenue Acts with respect to the tax year in which the amalgamation occurs and all preceding tax years.

…

OB 1 DEFINITIONS

OB 1 For the purposes of this Act, unless the context otherwise requires,—

...

amalgamated company means the 1 company that results from and continues after an amalgamation and that may be 1 of the amalgamating companies or a new company

amalgamating company means a company that amalgamates with 1 or more other companies under an amalgamation

amalgamation means an amalgamation to which both the following apply:

(a) it—

(i) occurs under Part 13 or 15 of the Companies Act 1993; or

... and

(b) it causes 2 or more companies to amalgamate and continue as 1 company

Companies Act 1993 ("the Companies Act")

219. Amalgamations—

Two or more companies may amalgamate, and continue as one company, which may be one of the amalgamating companies, or may be a new company.

…

225. Effect of certificate of amalgamation—

On the date shown in a certificate of amalgamation,—

…

(d) The amalgamated company succeeds to all the property, rights, powers, and privileges of each of the amalgamating companies; and

(e) The amalgamated company succeeds to all the liabilities and obligations of each of the amalgamating companies; and

…

Application of the legislation

Binding rulings

Where a company which is entitled to rely on a private, product, or status ruling is amalgamated, an issue arises as to whether the amalgamated company is entitled to rely on that ruling. This issue is directly relevant to the applicants of private, product, and status rulings, as well as to the consumers of product rulings (being persons who are entitled to rely on product rulings).

There are two possible scenarios in relation to amalgamations involving companies which are entitled to rely upon a binding ruling:

- firstly, where a company which is entitled to rely upon a binding ruling undergoes an amalgamation as an amalgamating company which "ceases to exist"; and
- secondly, where a company which is entitled to rely upon a binding ruling undergoes an amalgamation and continues as the amalgamated company.

The conclusions in this interpretation statement are equally applicable to either situation.

The issue of whether an amalgamated company is entitled to rely on a ruling the amalgamating company could previously rely on is obviously relevant from the perspective of the amalgamated company. It is also relevant in the context of the Commissioner considering new ruling applications from amalgamated companies, as the TAA precludes the Commissioner from issuing private or product rulings if one already exists in relation to how the taxation laws apply, and the proposed ruling would apply to a period or income year already covered by an existing ruling (sections 91E(4)(e) and 91F(4)(e) of the TAA).

Application to private rulings

Section FE 8

It is noted that there is nothing in either the TAA or the amalgamation provisions of the ITA which specifically addresses the issue of whether an amalgamated company is entitled to rely on a ruling after the amalgamation of the company that was originally entitled to rely on that ruling. However, section FE 8 of the ITA provides as follows:

FE 8 Where any amalgamating company ceases to exist on an amalgamation, the amalgamated company must, in accordance with section 209G of the Companies Act 1955 or section 225 of the Companies Act 1993, comply with all obligations of and meet all liabilities of, and be entitled to all rights, powers, and privileges of, the amalgamating company under the Inland Revenue Acts with respect to the tax year in which the amalgamation occurs and all preceding tax years.

Amalgamating company previously entitled to rely on ruling ceasing to exist

If the entitlement to rely on a ruling can be considered to be a "right, power or privilege under the Inland Revenue Acts", an amalgamated company may, pursuant to section FE 8, be entitled to rely on a ruling which could previously have been relied upon by an amalgamating company which ceases to exist on the amalgamation.

However, the question then arising is whether it may be argued that section FE 8 *restricts* the assumption of Inland Revenue Act rights, powers and privileges to those with respect to the income year in which the amalgamation occurs and preceding income years.

"rights, powers and privileges"

The phrase "rights, powers and privileges" is not defined in the ITA [1]. There is also nothing in the TAA which specifically states whether the entitlement to rely on a ruling gives rise to a "right, power or privilege". However, one of the ordinary meanings of the word "right" is *"a moral or legal entitlement to have or do something"* (the *Concise Oxford Dictionary* (10th ed, Revised)). It is considered that the entitlement to rely on a ruling can be considered a "right", in line with the ordinary meaning of that word, because it gives rise to a moral or legal entitlement to have or do something. Sections 91EA(1) and 91FA(1) of the TAA state that, where the requirements of those respective provisions have been met, the Commissioner must apply the taxation law in relation to the person and the Arrangement, and the

[1] Section OB 1 of the ITA does define a "right" in relation to a film, however this is obviously not relevant in an amalgamation context.

Arrangement, respectively, in accordance with the ruling. Therefore, it is considered that the entitlement to rely on a ruling gives rise to a "right".

Income year in which the amalgamation occurs and all preceding income years

Because the entitlement to rely on a ruling can be considered a "right", it is clear from section FE 8 that an amalgamated company will be entitled to the rights arising under a ruling originally relied on by an amalgamating company (which ceases to exist on the amalgamation) with respect to the year in which the amalgamation occurs and all preceding income years.

However, section FE 8 is silent in relation to the assumption of "rights, powers and privileges" for future years. It is potentially arguable that by specifically stipulating that an amalgamated company will be entitled to Inland Revenue Act rights, powers and privileges in respect of the income year of amalgamation and preceding income years, the implication is that those are the only years in respect of which Inland Revenue Act rights etc will be assumed by the amalgamated company. It could possibly be argued that section FE 8 is intended to exhaustively stipulate which Inland Revenue Act rights etc will pass to the amalgamated company.

Alternatively, it may be that section FE 8 was intended only to clarify that Inland Revenue Act rights, powers and privileges of amalgamating companies (which cease to exist on an amalgamation) with respect to past years will also become rights, powers and privileges of the amalgamated company. In particular, it is noted that some rights with respect to the income year of amalgamation and preceding years may not in fact arise until subsequent years—for example, rights relating to disputes procedures.

This latter view is considered preferable. If Parliament had intended section FE 8 to alter what would otherwise be the position at company law, it is considered that this would have been done in unambiguous terms. As it is, section FE 8 uses the phrase *"... **in accordance with** ... section 225 of the Companies Act 1993"* (emphasis added), which it is considered further supports the view that section FE 8 is intended to clarify the succession of Inland Revenue Act rights with respect to past income years, rather than limit the succession of rights in the case of amalgamations to those particular years.

This would seem consistent with what might be expected to be the case, as it would arguably seem somewhat unusual if an amalgamated company could rely on the ruling of an amalgamating company with respect to past income years, but not going forward.

It is noted that section 76 of the TAA has the same effect as section FE 8—though it does, in addition, give an example of an obligation with which an amalgamated company must comply (that is, to make a return of income in respect of the amalgamating company and the year of amalgamation).

On the basis of the above, it is concluded that section FE 8 does not restrict the assumption of Inland Revenue Act rights, powers and privileges to those with respect to the year of amalgamation and previous years, as opposed to what would otherwise be the position under company law. Accordingly, where an amalgamating company to which a private ruling applies ceases to exist upon an amalgamation, the amalgamated company will be entitled to the benefit of the ruling (which can be considered to be a right under the Inland Revenue Acts).

Amalgamated company previously entitled to rely upon a binding ruling

It is noted that section FE 8 does not explicitly provide for the situation where an amalgamating company continues as the amalgamated company. However, where an amalgamating company continues as an amalgamated company it continues to exist as a legal entity, and so, subject to there being any material differences to the Arrangement ruled upon, and subject to any conditions or assumptions, it may continue to rely upon any pre-amalgamation rulings applicable to it.

The above conclusions are consistent with the company law principle of "continuance", which (as discussed below) is considered to be *prima facie* applicable for the purposes of the ITA.

The above conclusions are subject to the continued fulfilment of any conditions and assumptions, and the Arrangement not being materially different to the Arrangement ruled upon (see further below).

The principle of "continuance"

In any event, it is considered that the same result arises by virtue of the principle of "continuance", which is discussed briefly below.

Companies Act 1993

Section 219 of the Companies Act provides that two or more companies may amalgamate and continue as one company, which may be either one of the amalgamating companies, or a new company. Section 225(d) of the Companies Act provides that on the date shown in a certificate of amalgamation, the amalgamated company succeeds to all the property, rights, powers, and privileges of each of the amalgamating companies. The concept of "continuance" provided for in the Companies Act 1955 (the predecessor to the Companies Act) was considered by the Court of Appeal in *Carter Holt Harvey Ltd v McKernan* [1998] 3 NZLR 403 ("*Carter Holt Harvey*"), where the Court of Appeal noted as follows (at 411):

… In a short form amalgamation involving a parent (under s 209D(1)), **the entity "succeeds" to property and liabilities which have been its property and liabilities beforehand, as well as succeeding to those of the other entities**. But, as the parent continues and is not deemed to be dissolved, it is clear that "succeeds", a word used in Canadian case law though not

in the legislation in that country to which we have been referred, is not to be read as requiring that there be a predecessor and a successor. **The merged entity succeeds to the assets and liabilities because that is where they are to be recognised as being or remaining as a result of the continuance of all parties to the amalgamation**.

[Emphasis added]

Amalgamating company previously entitled to rely on ruling ceasing to exist

As noted above, it is considered that the entitlement to rely on a binding ruling is a "right". Accordingly, at company law, an amalgamated company would be entitled to rely on a binding ruling on which an amalgamating company was previously entitled to rely.

Amalgamated company previously entitled to rely on a ruling

The same can be said in relation to a company that has continued after an amalgamation as the amalgamated company. It is apparent from the amalgamation provisions in the Companies Act that an existing company which continues after an amalgamation as the amalgamated company is also regarded as an amalgamating company. In particular, it is noted that section 219 of the Companies Act states that the amalgamated company may be one of the amalgamating companies or a new company. Accordingly, if a company which continues as an amalgamated company was a previously existing company entitled to rely upon a binding ruling, the principle of continuance means that, at company law, the company would be entitled to continue to rely upon the ruling after the amalgamation.

Having considered the position under the Companies Act in terms of the effect an amalgamation would have on the ability to continue to rely on a pre-amalgamation ruling, it is necessary to consider if this is modified in any way by the amalgamation regime in the ITA.

Income Tax Act 2004

Section FE 1(1) of the ITA sets out the purpose of the amalgamation provisions. It is noted that section FE 1(1)(c) states that the amalgamation provisions are intended to apply *"notwithstanding anything to the contrary in section 225(d) of the Companies Act 1993"*. Whilst section FE 1(1)(c) indicates that there may be a divergence between the position in relation to the succession to rights, powers and privileges under the Inland Revenue Acts, and what would otherwise be the case under company law, the analysis below will conclude that there is in fact no such divergence.

"ceases to exist"

Throughout the amalgamation provisions in the ITA, there is wording which indicates that an amalgamating company may "cease to exist". This description could, *prima facie*, suggest that an amalgamated company is not entitled to rely on a ruling previously relied on by an amalgamating company.

However, it is noted that section OB 1 of the ITA defines "amalgamation" as meaning any amalgamation under certain laws (including the Companies Act) which causes two or more companies to *"... amalgamate and continue as 1 company"*. Therefore, it is not considered that the use of the words "ceases to exist" suggests that the principle of continuance is modified for income tax purposes. It is considered that the words "ceases to exist" in the ITA refer only to the fact that an amalgamating company may cease to exist as a separate entity, not that it will cease to exist as a legal entity (within the amalgamated company). Indeed, the fact that an amalgamating company will continue to exist in the form of the new amalgamated entity seems apparent from the definition of "amalgamation" in section OB 1, which is consistent with the company law concept of an amalgamation. If Parliament had intended the principle of continuance not to be *prima facie* applicable for tax purposes, it would be expected to have done so in more explicit terms.

Whilst it is considered that the *prima facie* position is that the concept of continuance remains applicable for ITA purposes, it is noted that in some circumstances the Act alters what would otherwise be the tax consequences of an amalgamation by deeming the effect of an amalgamation to be other than what would be the case at company law. It is considered that the principle of continuance is applicable for the purposes of the Act only to the extent that that principle is not altered by specific provisions in the Act.

Why is the amalgamation issue relevant in the product rulings context?

Product rulings are made in relation to how a taxation law applies either to an "arrangement", or to the "consumer" of the product that is the subject of the ruling and to the "arrangement" (section 91FC (1) of the TAA).

Amalgamation of "applicant"

In the product rulings context there is no specifically identifiable "person" to whom the ruling applies. This differs from private rulings, which apply to a "person" in relation to an "arrangement".

However, the applicant for a product ruling is named in the product ruling. Section 91FH(1) of the TAA 1994 states:

91FH CONTENT AND NOTIFICATION OF A PRODUCT RULING

91FH(1) A product ruling must state—

(a) That it is a product ruling made under section 91F; and

(b) The name of the person who applied for the ruling; and

(c) The taxation law and the arrangement to which the ruling applies; and

(d) How the taxation law applies to the arrangement; and

(e) The period or income year for which the ruling applies; and

(f) Material assumptions about future events or other matters made by the Commissioner; and

(g) Conditions stipulated by the Commissioner.

Anything that does not contain these statements is not a product ruling.

In addition, the applicant must intend to be a party to the proposed Arrangement. Section 91FC of the TAA 1994 states:

91FC APPLYING FOR A PRODUCT RULING

91FC(1) A person, in their own right or on behalf of a person who is yet to come into legal existence, may apply to the Commissioner for a product ruling on how a taxation law applies, or would apply—

(a) To an arrangement; or

(b) To the consumer of the product that is the subject of the ruling, and to the arrangement.

91FC(1A) A person making an application under subsection (1) or a prospective person, as the case may be, must intend to be a party to the proposed arrangement.

91FC(1B) For the purpose of subsection (1)(b), a "consumer" is a party to the arrangement who is not the applicant.

…

Therefore, there is an issue of whether the subsequent amalgamation of the "applicant" for a product ruling will mean that the product ruling no longer applies. That is, whether in the event of an amalgamation the company that applied for the ruling (and is required to be a party to the Arrangement) continues in existence so that the consumers are still entitled to rely on the product ruling.

As stated above, a product ruling applies to an Arrangement and the consumers who enter into an Arrangement. In contrast to private rulings, there is no requirement that a product ruling applies to a particular person. Arguably, if an applicant does "cease to exist" this will not affect the entitlement of a "consumer" to continue to rely upon the ruling as there is no legislative requirement that the applicant continues to exist for the duration of the ruling. On this basis there would be no issue about whether a product ruling will apply if the original applicant "ceases to exist".

In any event, it is considered that the above analysis in relation to private rulings and the continuance of amalgamating entities would also apply in the product ruling context in respect of applicants.

It is also noted for completeness that in most instances the applicant for a product ruling is the promoter or manager of a particular product. Where this is the case, it is unlikely that the amalgamation of the applicant would result in any material differences to the Arrangement, and so such an amalgamation would be unlikely to affect the application of the product ruling.

Amalgamation of "consumer"

Section 91FA(1) of the TAA states that if a product ruling on a taxation law applies to an Arrangement, and a person (ie the consumer) who enters into the Arrangement applies the taxation law in the way stated in the ruling, the Commissioner must apply the taxation law in relation to the Arrangement in accordance with the ruling.

Therefore, if a consumer, who has entered into the Arrangement and applied the taxation law in the way stated in the ruling, subsequently undergoes an amalgamation, this would not appear to affect the application of the product ruling, as that person will have fulfilled the requirements in section 91FA(1). The conclusion that the product ruling will remain applicable is, again, subject to the continued fulfilment of any conditions and assumptions, and the Arrangement not being materially different to the Arrangement ruled upon.

In addition, section 91F(1) of the TAA provides that the Commissioner can only make a product ruling where it is not practicable to identify the taxpayers who may enter into the Arrangement, and where the characteristics of the taxpayers who may enter into the Arrangement would not affect the content of the ruling. This provides further support for the view that the amalgamation of a person who enters an Arrangement the subject of a product ruling (ie a consumer) will not affect the application of the ruling to the amalgamated company, provided that any conditions and assumptions are satisfied, and the Arrangement is not materially different to the Arrangement ruled upon.

Based on the analysis above, it is concluded that the entitlement to rely upon a product ruling will continue after the amalgamation of either the applicant for the ruling or a consumer of the Arrangement. However, notwithstanding this conclusion, if the Arrangement is materially different to that ruled upon (whether by virtue of the amalgamation or otherwise) the ruling will no longer apply. This will need to be considered on the specific facts.

Status rulings

The effect of a status ruling is the same as that of private rulings (section 91EA of the TAA) and product rulings (section 91FA of the TAA). Section 91GH of the TAA states, in relation to the effect of status rulings:

91GH EFFECT OF STATUS RULING

91GH If a person applies a taxation law in accordance with a status ruling, the Commissioner must also apply the taxation law in accordance with the status ruling.

Therefore, the above analysis is equally applicable to status rulings.

It has already been concluded that an amalgamated company will be entitled to rely upon a private or product ruling after the amalgamation of the applicant/consumer. For the same reasons, a status ruling made in respect of either a private or a product ruling can also continue to be relied upon.

Material difference to Arrangement

However, notwithstanding the above analysis, if the amalgamation causes a material difference to the Arrangement, the ruling will not apply. Sections 91EB (2)(a) and 91FB(2)(a) of the TAA state that private and product rulings, respectively, do not apply if the Arrangement is materially different to the Arrangement identified in the ruling.

Whether a ruling can continue to be relied on after an amalgamation will depend on the new characteristics of the surviving entity. If these characteristics are such that they result in a material difference to the Arrangement identified in the ruling, the ruling can no longer be relied on. This would need to be considered on the specific facts. However, some direction can be given as to what might be considered to be a material difference in this context.

For example, where the ruling concerns the capital or revenue nature of an activity and the amalgamation is of a company (the subject of a ruling) which is trading, with a non-trading enterprise, the new characteristics of the surviving entity may result in a material difference to the Arrangement. In this situation the characteristics of the amalgamated taxpayer could be different, which could alter whether the activities are reported on revenue account or capital account. This could constitute a material difference to the Arrangement.

Another example may be where the ruling concerns whether a capital asset is depreciable and a company (the subject of a ruling) amalgamates with a company that deals in these assets, and so holds them on revenue account. If the classification of the asset changes as a result of the characteristics of the new amalgamated entity, this may also constitute a material difference to the Arrangement.

Conditions

Sections 91EB(2)(d) and 91FB(2)(d) of the TAA state that private and product rulings, respectively, do not apply to an Arrangement if the Commissioner stipulates a condition that is not satisfied. Therefore, notwithstanding the above conclusions that a ruling will apply after the person to whom the ruling applies has undergone an amalgamation, if a condition is not satisfied (whether by virtue of the amalgamation or otherwise), the ruling will not apply.

References in any condition to an amalgamating company which ceases to exist upon the amalgamation should, after the amalgamation, be treated as references to the amalgamated company. For example, a condition that the amalgamating company will do something should, after the amalgamation, be read as requiring that the amalgamated company do it, rather than the ruling being precluded from applying because the amalgamating company has not satisfied that condition.

Withdrawal of a ruling

Sections 91EI and 91FJ of the TAA state that the Commissioner may at any time withdraw private and product rulings, respectively, by giving the required notice. These sections also provide that a status ruling on a withdrawn ruling will not apply from the date specified in the notice of withdrawal. However, if the Commissioner withdraws a private or product ruling, but the Arrangement was entered into before the date of the withdrawal, the ruling continues to apply for the remainder of the period or income year specified in the ruling, and any status ruling made on that ruling will also continue to apply.

In the case of an amalgamation, this raises the issue of when the amalgamated company entered into the Arrangement—ie whether at the date the amalgamating company to which the ruling applies entered into the Arrangement, or at the date of the amalgamation (when the amalgamated company succeeded to the property, rights, powers and privileges of the amalgamating companies).

As discussed above, section FE 8 of the ITA confirms the succession of Inland Revenue Act rights with respect to past income years, where the amalgamating company ceases to exist upon the amalgamation. Therefore a ruling in respect of an Arrangement which has been entered into by an amalgamating company will be effectively saved, for the benefit of the amalgamated company. It is considered that this suggests that the Arrangement should be considered to have been entered into by the amalgamated company at the date the amalgamating company to which the ruling applied entered into it, and not at the time of the amalgamation.

Further, as discussed above, the application of the principle of "continuance" means that the amalgamated company is a continuation of all the amalgamating companies. The Court of Appeal decision of Carter Holt Harvey confirms that all the amalgamating companies "continue as one company", and the amalgamated company "succeeds to" all the benefits and obligations of the amalgamating companies. It is noted (as discussed above) that the ITA retains the principle of "continuance" for income tax purposes (except to the extent that it is altered by specific provisions in the Act). This further supports the view that the Arrangement should be considered to have been entered into by the amalgamated company at the date the amalgamating company to which the ruling applied entered into it (and not at the time of the amalgamation).

Conclusion

Based on the above analysis, it is concluded that an amalgamated company is entitled to rely on private, product, or status rulings which an amalgamating company was previously entitled to rely on.

However, the ability to rely on a pre-amalgamation ruling is subject to the continued fulfilment of any conditions and assumptions, and the Arrangement not being materially different to the Arrangement ruled upon.

NEW LEGISLATION

LOCAL AUTHORITY GST DEADLINE EXTENDED

The Goods and Services Tax (Local Authorities Accounting on Payments Basis) Order 2005, made on 13 June 2005, allows eight local authorities further time to change from a payments basis to an invoice basis of accounting for GST. It provides for the Far North, Gisborne, Kaipara, Opotiki, Ruapehu, Waitomo, Western Bay of Plenty and Whakatane District Councils to continue to account for GST on a payments basis until 30 June 2009.

The Order replaces an earlier Order in Council, the Goods and Services Tax (Local Authorities Accounting on Payments Basis) Order 2001 (SR 2001/85), and allows the eight listed local authorities a further four years to resolve transitional problems associated with the shift to invoice basis accounting.

From 1 July 2001, the Goods and Services Tax Act 1985 required all local authorities to account for GST on an invoice basis rather than the payments basis, unless otherwise provided for under an Order in Council.

Notice of the Order was made on 16 June 2005 in the *New Zealand Gazette*. The Order comes into force on 1 July 2005.

Goods and Services Tax (Local Authorities Accounting on Payments Basis) Order 2005 (2005/155)

LEGAL DECISIONS – CASE NOTES

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

TAXPAYERS REFUSED LEAVE TO APPEAL TO THE SUPREME COURT

Case:	Jarod Peter Hester & Ors v The Commissioner of Inland Revenue, SC 2/2005
Decision date:	3 May 2005
Act:	Supreme Court Act 2003
Keywords:	General or Public Importance

Summary

The Supreme Court refused the taxpayers' application for leave to appeal. The proposed appeal did not raise any matter of general or public importance.

Facts

The applicants were the trustees of the Church of Jesus Christ of Latter-day Saints ("the Church") Deseret Benefit Plan ("the Plan"). The Plan is a defined benefit and contributory superannuation scheme providing retirement income to employees of the Church. The applicants claimed the Plan was a "trust for charitable purposes" and therefore exempt from income tax in the 2001 year. The Commissioner disagreed.

Both the High Court *(Hester & Ors v CIR* (2004) 21 NZTC 18,421) and the Court of Appeal *(Hester & Ors v CIR* (2005) 22 NZTC 19,007) found for the Commissioner. The applicants sought leave from the Supreme Court to appeal the Court of Appeal's decision.

The Supreme Court can only hear an appeal if it considers that "it is necessary in the interests of justice for the Court to hear and determine the proposed appeal" (section 13 Supreme Court Act 2003). In this case it would be necessary for the Court to hear the appeal if the appeal involved "a matter of general or public importance".

The applicants argued that an appeal would involve a matter of general or public importance while the Commissioner argued that it would not.

Decision

The Supreme Court's decision was given by Elias CJ. Her Honour briefly set out some background to the application and noted that to be ultimately successful the applicants would have to show that the income of the Plan was held by the trustees for charitable purposes.

Elias CJ noted that though the Court of Appeal had doubted the correctness of a case the applicants were relying on (*Presbyterian Church of New Zealand Beneficiary Fund v CIR* [1994] 3 NZLR 363) all Judges were content to apply it to the present facts and that on the present facts the wide scope of the beneficiaries of the Plan exceeded any charitable purpose. At paragraph [5] Elias CJ stated:

> [I]n concurrent findings of fact in the cases below it has been held that the scope of the trust was so broad that, whether or not some members of the fund would have fallen within the *Presbyterian Church* principles, some clearly would not.

Elias CJ concluded that it was well open for the lower courts to make the findings they did and that the proposed appeal did not raise any point of general importance. Leave to appeal was not granted.

APPLICATION FOR LEAVE TO APPEAL TO SUPREME COURT DISMISSED

Case:	Motorcorp Holdings Ltd & Ors v CIR
Decision date:	1 June 2005
Act:	Supreme Court Act 2003
Keywords:	Leave to appeal; change to tax law, whether proposed appeal involved a question of general or public importance, whether miscarriage of justice

Summary

The prospective appellants wished to argue the decision of the Full Court of the Court of Appeal in *Suzuki (New*

Zealand) Ltd v CIR (2001) 20 NZTC 17,096 was wrongly decided. The Court observed the proposed appeal had no precedential effect for two reasons. Firstly, the law had been changed since the *Suzuki* decision and only affected transactions before 1 August 2002. Secondly, the contractual arrangements adopted by the parties were determinative, and it could not be assumed those arrangements had significance to other parties. For both reasons, no question of general or public importance was involved and the application for leave to appeal was dismissed.

Facts

The applicants are importers and distributors in New Zealand of new motor vehicles. Their contractual arrangements provide for reimbursement by the overseas manufacturers of the vehicles for all or part of the costs of labour and replacement parts incurred in meeting warranty obligations in respect of the vehicles. They sought leave to appeal against a decision of the Court of Appeal determining that GST is payable in respect of the manufacturer's reimbursement payments as being in consideration for the supply of services.

The same issue was before the Court of Appeal in *Suzuki New Zealand Ltd v CIR* (2001) 20 NZTC 17,096 where the Court decided the payments were subject to tax. After that decision, the legislation was amended with effect from 1 August 2002 to provide that services provided under warranty for consideration given by a warrantor outside New Zealand and not GST-registered are zero-rated. The Court noted that would seem to constitute legislative adoption of the reasoning in *Suzuki* that under section 11 of the Act the supply is charged with tax, but at the rate of 0%.

The applicants sought leave to advance an argument not considered in *Suzuki* – that the reimbursement payments are payments under contracts of insurance as defined in the Act and so exempt from tax. This argument succeeded before Venning J, but was reversed by a majority in the Court of Appeal. The applicants also wished to argue *Suzuki* was wrongly decided and should be overruled. They also wished to present further arguments which were put to the Court of Appeal by way of cross appeal but rejected on the basis of the *Suzuki* decision.

Decision

The Court held the criteria for leave to appeal were not met in this case. The issues cannot be said to be of general public or commercial importance. The law had been changed, so the proposed appeal could only affect transactions before 1 August 2002. Any decision would have no precedential effect, because the issue involves the tax implications for particular contractual structures which cannot be assumed to have been adopted beyond the parties.

The Court noted that both a Full Court of the Court of Appeal in *Suzuki* and the Court of Appeal in this case had extensively reviewed the issues so the Court was not persuaded there was any miscarriage of justice warranting a second appeal. Accordingly, the application for leave to appeal was dismissed.

SECTION 99(4) ARGUMENT FAILS

Case:	Panmure Consultants Limited
Decision date:	23 June 2005
Act:	Companies Act 1993, Income Tax Act 1976
Keywords:	disputable debt

Summary

The taxpayer could not contest a debt outside the taxation procedures to do so and, even if this was possible, the argument advanced was flawed and could not succeed.

Facts

This was a debt recovery proceeding after the Commissioner's success in a Russell template case (*Withey* reported at (1998) 18 NZTC 13,606 and 13,732).

The taxpayer argued there was a dispute as to the quantum of the debt, notwithstanding that the debt was now unable to be disputed as its appeal rights in respect of the tax case had expired, and that the Commissioner's statutory demand should be set aside.

The taxpayer argued that under sec 99(4) ITA 1976 there was double taxation. Section 99(4) provided:

> 99(4) [Deemed derivation of income]Where any income is included in the assessable income of any person pursuant to subsection (3) of this section, then, for the purposes of this Act, that income shall be deemed to have been derived by that person and shall be deemed not to have been derived by any other person.

This section is now section GB 1 (2) of the 2004 Act.

In the taxpayer's submission the fact the taxpayer was not allowed a deduction for consulting fees paid to Mr Russell and that Mr Russell was assessed for those fees resulted in illegal double taxation that was prohibited by section 99(4).

Decision

In a concise decision Associate Judge Sargisson dismissed the taxpayer's argument on the grounds it was both procedurally unable to raise it and that the argument was flawed anyway.

Having exhausted its objection rights, section 27 ITA 1976 (now section 109 TAA 1994) prevented the taxpayer from disputing the debt and from raising a fresh ground of objection.

In any event the Associate Judge considered the argument was "untenable" explaining:

> "subsection (4) deems the relevant income item to be derived from a single person to avoid another person being assessed in respect of that same income item.
>
> …
>
> "the taxable income we are concerned with in this case is the income of [the taxpayer] which it used to pay consulting fees to Mr Russell. The income is distinct from the payment of those fees, which when received, is income in the hands of Mr Russell. The argument [for the taxpayer] thus fails to recognise that two separate taxpayers are involved and the income falls to be assessed in respect of both the payer and payee.
>
> "In this respect the comment by the Court of Appeal in *Miller v CIR* [1999] 1 NZLR 275 at 304 is apposite:
>
> "A payment by one taxpayer which is not deductible is frequently assessable in the hands of the recipient."
>
> The fact that Mr Russell received the consulting fees, which as such are assessable as income in Mr Russell's hands, does not trigger the application of section 99(4), and thus has no effect on [the taxpayer]'s own liability for tax on the monies it paid Mr Russell for the fee. That distinct liability arises simply because the fees could not be deducted from its income as a legitimate deductible expense." [paragraph 20 to 23]

STANDARD PRACTICE STATEMENTS

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

NON-DISCLOSURE RIGHT FOR TAX ADVICE DOCUMENTS – SPS 05/07

Introduction

1. This Standard Practice Statement (the "Statement") refers to the recently enacted statutory right enabling taxpayers to claim non-disclosure for certain tax advice contained in documents prepared by tax advisors. The statutory right also extends to certain documents created by taxpayers for the purpose of seeking tax advice from tax advisors. The right to claim non-disclosure is a statutory right introduced in the Taxation (Base Maintenance and Miscellaneous Provisions) Act 2005 and is effective from 22 June 2005 and enacted in sections 20B to 20G of the Tax Administration Act 1994 ("the Act"). The non-disclosure right belongs to taxpayers. It will apply to tax advice documents which the Commissioner seeks to have disclosed under his statutory powers to obtain information.

2. The requirement to disclose the information to the Commissioner will be made pursuant to a notice requiring either access to or disclosure of information under sections 16 – 19 of the Act (collectively referred to in this Statement as an "Information Demand"). An Information Demand should contain a legislative reference to one or more of sections 16 –19 of the Act. An Information Demand includes information sought under section 16 and 16B of the Act. Refer to paragraphs 87 – 88 which deal specifically with this type of Information Demand.

3. Documents or other communications which are legally privileged under section 20 of the Act are not subject to these requirements.

4. This Statement outlines the process and operational guidelines to be followed when the Commissioner issues Information Demands to taxpayers, tax advisors and third parties which require disclosure of documents which may contain tax advice and therefore may be subject to the right to claim non-disclosure.

5. This Statement should be read in conjunction with the SPS 05/08 – *Section 17 Notices*, or any updated equivalent statement if the Information Demand relates to a notice issued under section 17 of the Act.

6. The Commissioner sees this Statement as a reference guide for both taxpayers and officers of Inland Revenue. The practices outlined in this Statement will be followed by officers of Inland Revenue.

Application

7. This Statement applies to Information Demands issued after 21 June 2005 and to documents which may be tax advice documents whether created on, before or after 21 June 2005 created by or sent to tax advisors who are subject to an approved advisor group's code of conduct and disciplinary procedures. It replaces with effect from 22 June 2005 the protocol agreed with the New Zealand Society of Accountants, called *Commissioner's Policy on Access to Advice and other Workpapers Prepared by Accountants* ("the Protocol"), issued on 6 September 1993 to the extent that the Protocol does not apply to Information Demands issued after 21 June 2005. This Statement also applies to tax advisors who are not Chartered Accountants but are subject to an approved advisor group's code of conduct and disciplinary procedures.

8. Information Demands made prior to or on 21 June 2005 will remain subject to the Protocol.

9. This Statement is not intended to replace the Commissioner's policy statement on Access to Audit Work Papers, issued on 15 August 1991 because generally audit work papers should not include tax advice documents. However if an inconsistency arises between this Statement and the Access to Audit Work Papers policy statement in applying the Commissioner's policy in seeking tax advice documents, this Statement shall be applied where appropriate.

10. Unless specified otherwise, all legislative references in this Statement refer to the Act.

Background

11. The Act contains in addition to general administrative powers implied by the Commissioner's obligations in relation to the care and management of the Inland Revenue Acts, certain specific legislative provisions which deal with obtaining information related to taxpayers' affairs. These provisions play an important role in enabling Inland Revenue to administer the Inland Revenue Acts.

12. The Commissioner may choose to limit his inquiries in respect of independent advice on the interpretation of tax laws sought by taxpayers from tax advisors. Previously Inland Revenue, has where applicable, applied the Protocol to Information Demands. The Protocol provides limited administrative protection to accountants from disclosing their advice workpapers to Inland Revenue officers.

13. A request to a taxpayer specifically for tax advice documents should usually only be made when the information provided previously by the taxpayer, their tax advisor or a third party does not lead to a complete factual description of the transactions under review or where the taxpayer, their tax advisor or a third party refuses to answer questions in relation to the transactions under review. This factual information can include where appropriate information relevant to establishing the purpose or effect of the transaction or intent of the taxpayer involved if that is relevant to the statutory provisions under consideration (such as recording what has been stated to be the reason for acquiring an item of property). Where tax advice documents are referred to in an Information Demand, there will generally be a two-step process. This two-step process involves the taxpayer (or their authorised tax advisor) claiming the right of non-disclosure for documents eligible to be tax advice documents and then subsequently disclosing the factual content (ie the tax contextual information) of the tax advice documents if required to do so by the Commissioner. This process is outlined in paragraphs 50 – 64; 75 – 86 of this Statement.

14. In general, Inland Revenue officers are not concerned with the substance of the tax advice contained in the tax advice documents, but rather with the relevant facts which relate to the taxpayer's tax positions. Tax advice documents often contain factual information. Tax advice documents may therefore be required to be disclosed in an Information Demand (subject to the right to claim non-disclosure) to resolve issues in more complex situations and where there are apparent material gaps in the factual material otherwise available to the Commissioner.

15. Where an Information Demand is issued directly to a taxpayer's tax advisor, Inland Revenue will be as specific as practicable based on the information already held by Inland Revenue about the transactions to which the Information Demand relates and in a manner consistent with the Commissioner's information gathering powers and standard practices. While not limited to cases of potential evasion or avoidance, such requests will generally involve more complex matters and will usually only be made when direct inquiry from the taxpayer has not yielded the level of information which in the Commissioner's view is reasonably required to complete his inquiry.

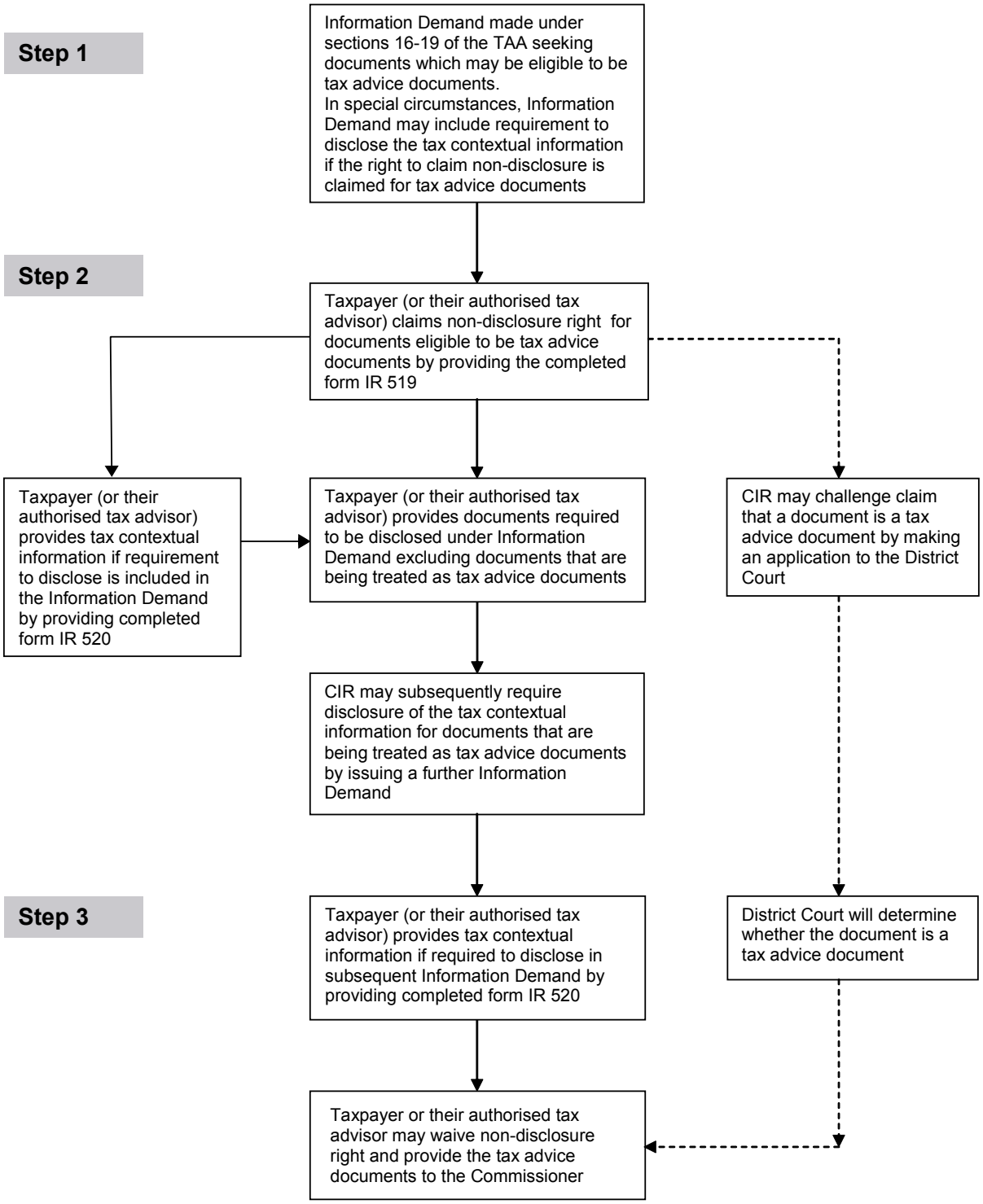
16. The issuing of the Information Demand must be approved by the appropriate delegated Inland Revenue officer on behalf of the Commissioner after careful consideration of the statutory requirements of the provisions which provide for the information-gathering powers of the Commissioner (ie sections 16 – 19) and the Commissioner's Standard Practice and other policy statements if any.

Standard Practice and Analysis

Contents

Non-disclosure right for tax advice documents

The right to claim non-disclosure



Meaning of key terms

Meaning of tax advisor

17. A "tax advisor" is defined in subsection 20B(4) to mean a natural person who is subject to the code of conduct and disciplinary process of an "approved advisor group" (refer to paragraphs 21 - 25 for the definition of "approved advisor group").

18. Generally, due to the professional standards imposed through the approved advisor group's code of conduct in giving tax advice, a tax advisor will be someone who is technically qualified, experienced and competent to advise on the operation and effect of tax laws.

19. The definition covers tax advisors in public practice such as tax advisors within professional firms but also professionals holding in-house positions who are involved in tax planning or tax advisory work for their employer.

20. When complying with an Information Demand, in-house tax advisors will need to ensure that they distinguish documents which are commercial or transactional in nature such as a sale and purchase agreement as opposed to those documents being created for the main purpose of giving tax advice such as a tax opinion.

Meaning of approved advisor group

21. The entitlement of a taxpayer to exercise their right to claim non-disclosure depends on the tax advisor who gave the advice being subject to an approved advisor's group code of conduct and disciplinary procedures at the time the tax advice document was created.

22. Typically, a tax advisor will be subject to an approved advisor group's code of conduct and disciplinary procedures because they are a member of the approved advisor group. Some organisations may allow non-members to be subject to an approved advisor group's code of conduct and disciplinary procedures under certain circumstances such as where a non-member is practising in partnership with a member of an approved advisor group.

23. An "approved advisor group" is defined in section 20B(5) as a group that includes natural persons who meet all of the following requirements:

    - have a significant function of giving advice on the operation and effect of tax laws; and
    - are subject to a professional code of conduct in giving that advice; and
    - are subject to a disciplinary process that enforces compliance with the code of conduct.

24. The group must be approved by the Commissioner before a tax advisor who is subject to an approved advisor group's code of conduct and disciplinary procedures can claim the right of non-disclosure on behalf of a taxpayer. The Commissioner will exercise this power of approval at a high level of delegated authority having regard to the statutory requirements and such other relevant considerations as may be applicable.

25. A list comprising of the groups that have been approved by the Commissioner as approved advisor groups will be available on Inland Revenue's website **www.ird.govt.nz**

Meaning of tax advice document

26. Any given book or document either is or is not a "tax advice document". If it is not a tax advice document it must be disclosed if required to be disclosed under an Information Demand. This depends on careful application of the eligibility rules discussed below.

27. A "book or document" is defined in section 3 of the Act (in this Statement the use of the term "document" refers to the items included in this definition) and includes:

> All books, accounts, rolls, records, registers and 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:

28. The definition therefore applies to both paper and electronic recorded communications such as letters, faxes, reports, memos, file-notes, photographs, images, e-mails and other data however stored.

29. The right of non-disclosure only applies to books and documents that are "tax advice documents". It is not intended to limit the Commissioner's ability to ask general questions about a taxpayer's affairs either to a taxpayer or their tax advisor.

30. Under section 20B(3), in order for a document to be a tax advice document, three requirements must be met. These are:

- the document is **eligible** to be a tax advice document; and
- the person (ie either the taxpayer or their authorised tax advisor) **makes a claim** that the document is a tax advice document (refer to paragraphs 59 – 60 which set out the claim requirements); and
- the person satisfies according to law the **disclosure requirements** for tax contextual information (if such a disclosure is required) and disclosure of documents or parts of documents that do not meet the tax advice document requirements (refer to paragraphs 42 – 43 which set out the disclosure requirements).

31. In order to be eligible to be a tax advice document the document must meet the following requirements:

    - the document was intended to be confidential, ie it was intended to be treated as a private document for non-public purposes in the same way that a section 20 communication is required to be a confidential communication before privilege attaches to it. Typically, tax advice is given to clients by a tax advisor other than for the purpose of disclosure of that tax advice to the public at large; **and**
    - the document was created by a person ("the client") for the main purpose of instructing a tax advisor to act for the client by giving the client advice about the operation and effect of tax laws; **or**
    - the document was created by a tax advisor (or where the tax advisor is in public practice, an employee of the tax advisor's firm whether this is a company, partnership or other business entity) for the main purpose of giving the client confidential advice about the operation and effect of tax laws; **and**
    - the document records tax advice previously provided to the taxpayer by their tax advisor; **or**
    - the document records research or analysis of tax laws by a tax advisor (or where the tax advisor is in public practice, an employee of the tax advisor's firm) and the document was created for the main purpose of the tax advisor providing tax advice to the client; **and**
    - the document was not created for the purpose of committing, or promoting or assisting the committing of, an illegal or wrongful act. Tax evasion would be an example of an illegal or wrongful act, but it would also extend to tax advice given in the course of committing some other illegal or quasi-illegal act, such as a wider act of fraud or some other crime.

32. Therefore the types of confidential documents to which the right to claim non-disclosure attaches will be those which are created in order to seek or obtain tax advice, and would not have been created except for such purpose, even though they may serve ancillary functions such as conveying factual information.

33. Documents which simply record decisions or transactions, set out calculations or summarise facts, whether or not they are part of the process of generating tax advice will not be eligible to be tax advice documents. Document or forms completed for the main purpose of meeting tax compliance obligations will also not be eligible to be tax advice documents.

34. Other examples of documents which will not be tax advice documents are: tax calculations and worksheets, transfer pricing reports, reports on factual matters in support of tax returns, financial statements (including the tax notes, tax worksheets and tax provisioning calculations), board minutes, valuation reports, invoices, agreements and other transaction documents, structure diagrams, memoranda of understanding, tax indemnity agreements, term sheets, guarantees, compliance forms and certificates, communications with third parties, employment contracts, confidentiality agreements, bank statements and other similar documents. All these types of documents will still need to be disclosed in full (any advice referred to or contained in them may not be deleted or blanked out) if subject to an Information Demand. The above list is not intended to be an exhaustive list.

35. It is fundamental that the document must have been intended to be and remain confidential between the tax advisor and the taxpayer, and not intended to be read by third parties or members of the public. The expression "third parties" in this context however does not include the taxpayers' other advisors such as their legal advisors, financial advisors, employees of the taxpayer or the taxpayers' shareholders or owners or where the third party is subject to a confidentiality agreement. The way in which the document is treated by the taxpayer and/or the tax advisor is relevant in determining whether confidentiality has been maintained. A confidentiality obligation should exist on the part of the third party, such as is commonly the case in due diligence exercises, joint venture arrangements, insurance proposals etc.

36. If the document is eligible to be a tax advice document, the taxpayer or their authorised tax advisor must make a claim that the document is a tax advice document. Refer to paragraphs 55 – 64 which outline the procedure for making a claim. If the claim is not made in the required time period the right to claim non-disclosure will not apply to the document after the expiry of that period even if a further Information Demand is issued in relation to the same document or a claim for the right of non-disclosure is later made.

37. If the taxpayer or their authorised tax advisor has made a claim that a document is a tax advice document, the taxpayer or their authorised tax advisor must in some cases also satisfy the tax contextual information disclosure requirements if required to do so by the Commissioner. The tax contextual information disclosure requirements are outlined in paragraphs 42 – 43.

Meaning of tax laws

38. "Tax law" is a defined term in section 2 of the Act and means:

(a) A provision of the Inland Revenue Acts or an Act that an Inland Revenue Act replaces:

(b) An Order in Council or a regulation made underanother tax law:

(c) A non-disputable decision:

(d) In relation to an obligation to provide a tax return or a tax form, also includes a provision of the Accident Rehabilitation and Compensation Insurance Act 1992 or a regulation made under that Act or the Accident Insurance Act 1998 or a regulation made under that Act of the Injury Prevention Rehabilitation and Compensation Act 2001 or a regulation made under that Act.

39. The tax advice must only be about New Zealand tax rules as they affect the taxpayer in question. Advice about the effect and application of tax laws in another jurisdiction (such as a country in which a controlled foreign company is resident) will not be subject to the right to claim non-disclosure.

40. Advice provided to taxpayers about non-tax issues such as accounting treatment (including materiality, provisioning, related party disclosures), insolvency law, company and trust law will constitute tax contextual information, as discussed below. If the main purpose of the document is to give such advice, it will not be subject to the right to claim non-disclosure.

Meaning of tax contextual information

41. Tax contextual information may be required to be disclosed as a result of one of the following:

- in special cases, where the Commissioner issues a subsequent Information Demand requiring disclosure of the tax contextual information after the taxpayer or their authorised tax advisor has made a claim for the non-disclosure right; or
- in rare cases, where the Commissioner requires the tax contextual information as part of the original Information Demand.

The circumstances in which Inland Revenue may require disclosure of the tax contextual information under either of the above situations is discussed at paragraphs 77 – 78.

42. Tax contextual information from a tax advice document is to be disclosed to the Commissioner in a statutory declaration in the prescribed form (form IR 520). A copy of this form can be found on Inland Revenue's website www.ird.govt.nz.

43. Tax contextual information means information **relating to** a tax advice document ie the information is either contained in or necessarily implied (by reference from the words used in the document), that falls into any of the following categories:

- Facts or assumptions relating to the transaction identified in the Information Demand and to which the advice relates, whether the transaction has occurred, will or is expected to occur or is assumed to have occurred by the creator of the tax advice document (i.e. either the tax advisor or the taxpayer);
- A description of steps involved in the performance of the transaction whether the transaction has occurred will or is expected to occur or is assumed to have occurred by the creator of the tax advice document (ie either the tax advisor or the taxpayer);
- Advice related to the operation and effect of laws other than tax laws on the taxpayer and any related facts or assumptions that this advice is based on;
- Advice related to the operation and effect on the taxpayer of tax laws relating to the collection of debts payable to the Commissioner (ie debt recovery issues) and any related facts or assumptions that this advice is based on;
- Facts or assumptions from, or relating to the preparation of the taxpayer's financial statements, supporting worksheets or other source documents or documents containing information that the taxpayer is required to provide the Commissioner under an Inland Revenue Act. This is intended to apply equally to advisors' accounting and tax workpapers which support the financial statements and/or tax return.

44. Generally, the Commissioner will seek tax contextual information in order to establish the facts relating to a transaction or series of transactions (though Information Demands may relate to wider matters) including relevant information such as whether the transaction took place, who were the parties, the purpose of the transaction, relevant dates, amounts, conditions, formulae, etc.

45. "Assumptions" are statements or propositions that have been accepted or assumed as true for the purpose of the tax advice whether the basis for the statement or proposition is factual or not.

46. Tax contextual information may be provided in relation to one or more tax advice documents requested in the same Information Demand.

47. If an authorised tax advisor is providing the tax contextual information, the tax contextual information should reflect the tax advisor's understanding of the transaction. Verbatim extracts from transaction documents may be included if the tax advisor considers that the extracts are the best

representation of the information in order to meet the disclosure requirements of the tax contextual information. This is optional and is a matter for the judgment of the tax advisor.

Meaning of information holder

48. An Information Holder is a person who has been issued with an Information Demand pursuant to sections 16 to 19 requiring the Information Holder to disclose information in relation to a taxpayer. The Information Holder may be a taxpayer, a taxpayer's tax advisor or an unrelated third party such as a bank.

49. Irrespective of the relationship of the Information Holder to the taxpayer, the non-disclosure right must be claimed by the taxpayer to whom the Information Demand relates or their authorised tax advisor. In circumstances where the taxpayer and their authorised tax advisor disagree or dispute the right to claim non-disclosure or any of the disclosure requirements related to the right to claim non-disclosure, the taxpayer's position will take precedence.

PROCESS FOR CLAIMING THE RIGHT OF NON-DISCLOSURE

Step 1: the Commissioner must issue an information demand requiring disclosure of a document which may be eligible to be a tax advice document

50. In order for a claim that a document is a tax advice document to be made, the Commissioner must have issued the Information Holder with an Information Demand under any of the following sections:

- section 16 inspection and section 16B warrant;
- section 17 notice requiring production of information;
- section 17A Court order for production of information or return;
- section 18 inquiry before a District Court Judge; or
- section 19 inquiry by the Commissioner.

51. If the Information Demand is a section 17 notice then the Commissioner must follow the practice set out in the Standard Practice Statement *SPS 05/08 – Section 17 Notices*, or any statement published in substitution for that Standard Practice Statement.

52. Any Information Demand may in specific cases be issued directly to a tax advisor but this action must be approved in accordance with the exercise of delegated powers conferred to Inland Revenue officers by the Commissioner. Generally, Inland Revenue will only issue an Information Demand direct to a tax advisor seeking documents which may be eligible to be tax advice documents in circumstances where the information has not been provided voluntarily or in a timely manner by the Information Holder and cannot reasonably (in the opinion of the Commissioner) be obtained or verified elsewhere. For example records may have been lost, the taxpayer may no longer be available or may have left the country, or the taxpayer or Information Holder is being uncooperative with reasonable inquiries made by the Commissioner.

53. Other examples of when an Information Demand may be issued to a tax advisor include cases involving suspected tax evasion or fraud, suspected tax avoidance, and cases involving complex international transactions or transfer pricing.

54. In certain circumstances the Information Demand may require from the outset disclosure of the tax contextual information for any document that is subject to a non-disclosure right claim (discussed below at paragraphs 77 – 78). This requirement will be clearly stated in the Information Demand, and the issue of such an Information Demand must be approved under the appropriate delegated authority.

Step 2: notification to Commissioner that taxpayer or their authorised tax advisor is claiming the non disclosure right

55. A claim that a document is a tax advice document for a taxpayer must be made by either the taxpayer or a tax advisor who is authorised to act on the taxpayer's behalf for the purposes of the non-disclosure right. This is also the case where the Information Holder is a third party, as a third party cannot make such a claim. The Commissioner's view is that the taxpayer must make the claim either directly or through the agency of an authorised tax advisor.

56. It is expected that on most occasions taxpayers will direct their tax advisor to claim the non-disclosure right on their behalf. When making the claim, a tax advisor must also include a statement that the tax advisor is authorised to act on behalf of the taxpayer for the purposes of the non-disclosure right.

57. The Commissioner expects and prefers that the tax advisor authorised to claim non-disclosure should be the tax advisor who created the tax advice document. However if this tax advisor is unavailable because the tax advisor is not in New Zealand, or

has left the organisation originally instructed to provide the advice or that organisation has ceased to operate, then an appropriate alternative tax advisor may be the authorised tax advisor.

58. Although the legislation does not provide for the claim to be made on a prescribed form, the Commissioner suggests that the claim that a document is a tax advice document should be made on the form IR 519 which has been designed for this purpose. A copy of the form is available on Inland Revenue's website **www.ird.govt.nz**

59. The claim that a document is a tax advice document must contain certain information. If the document was **created** by the **taxpayer** (ie a document instructing a tax advisor to provide advice on the operation and effect of tax laws), the claim must contain the following:

- a brief description of the form (such as a letter, email, report) and content (such as request for tax advice concerning fringe benefit tax) of the document;
- the name of the tax advisor for whom the document was intended; and
- the date on which the document was created (that is, finalised or sent to the taxpayer's tax advisor).

60. If the document was **created** by a **tax advisor** or by an employee of a tax advisor's public practice firm, the claim must contain the following:

- a brief description of the form (such as a letter, research paper, summary of phone conference, email) and content (such as tax advice concerning fringe benefit tax, depreciation, treatment of bloodstock) of the document; **and**
- the statute, enactment or regulation and the type of revenue such as income tax, fringe benefit tax, GST, PAYE or withholding tax which was the subject of the tax advice; **and**
- the name and if possible the contact details of the tax advisor who gave the tax advice in relation to the document; **and**
- the name of the approved advisor group that the tax advisor belonged to when the document was created; **and**
- the date on which the document was created (that is, finalised or sent to the taxpayer) .

61. Different versions of the "same" tax advice document created by either a taxpayer or their tax advisor in the course of finalising tax advice, may each need to be separately identified in the form IR 519 where the content of the different versions of the tax advice document is significantly different from other versions.

62. The following table sets out the time periods for which a claim that a document is a tax advice document must be made by:

Information Demand issued under section 16 and/or section 16B	**Information Demand issued under section 17**	**Information Demand issued under section 17A or section 18**	**Information Demand issued under section 19**
The date for either of the following: • the date on which the section 16 and/or section 16 B power is exercised; **or** • a later date with agreement by the Commissioner	The date which is the later of the following: • the date specified in the section 17 notice; **or** • 28 days after the date of the section 17 notice	The date on which the Court requires production of the information	The date on which the Commissioner requires production of the information

63. If the taxpayer or their authorised tax advisor does not notify the Commissioner within the above stated time periods, the claim that a document is a tax advice document is invalid. If the taxpayer or their authorised tax advisor fails to make a claim that a document is a tax advice document within the above time periods, the taxpayer or their authorised tax advisor may not make a further claim that the document is a tax advice document at a later date (even if the document happens to be the subject of a later Information Demand) and the document can no longer be treated as a tax advice document. Accordingly it is anticipated that the taxpayer or their authorised tax advisor will notify the Commissioner as soon as practicable of a claim that a document is a tax advice document.

64. The Commissioner may extend the above time periods for making a claim of non-disclosure if requested to do so by the taxpayer. An extension will be granted at the discretion of the Commissioner and any change to the time period should be notified to the taxpayer in writing. The Commissioner may take the following matters into account when extending the time period for making a claim of non-disclosure:

- the complexity of the situation;
- the compliance history of the taxpayer;
- issues related to the timing of the notice;
- the difficulty which the taxpayer may have in making the claim; and
- other factors generally relevant to the exercise of the relevant statutory power.

Limitations on the right to claim non-disclosure

65. If a document required to be disclosed under an Information Demand does not meet the requirements of being a tax advice document, that document is ineligible to be a tax advice document. In such circumstances, the Information Holder is required to disclose that document pursuant to the requirements of the Information Demand. This includes attachments to tax advice documents where the attachment is not eligible to be a tax advice document.

66. Examples of documents (including those that are attached to another document which is a tax advice document) that are not eligible to be tax advice documents include, but are not limited to:

- business and management records;
- financial statements, workpapers, and notes to the financial accounts;
- letters of engagement;
- numerical calculations compiled for the purpose of calculating a taxpayer's tax liability;
- transfer pricing calculations;
- legal transaction documents such as contracts, licence agreements, loan documentation, guarantees, deeds, title documents, tax indemnity agreements and letters between the transaction parties;
- databases and spreadsheets;
- diagrams demonstrating transactions;
- documents created by the tax advisor for main purposes other than giving a client advice on the operation and effect of tax laws, such as advising on employment law, company law, securities law, other regulatory requirements, or the accounting or financial treatment of transactions, etc.

67. Documents attached to or forming part of a tax advice document and which are themselves ineligible to be tax advice documents, are required to be disclosed as separate documents (refer to paragraphs 26 – 37 which deal with the meaning of tax advice document). This includes appendices, schedules and notes attached to tax advice documents where those appendices, schedules and notes are not themselves tax advice documents. Attaching or incorporating a document capable of being treated as a separate document to a tax advice document does not extend the right to claim non-disclosure to that attached or incorporated document when that attached or incorporated document does not independently meet the tax advice document requirements.

68. If the taxpayer or their authorised tax advisor does not disclose the documents or part of a document which are not a tax advice document by the required date set out in the Information Demand, the taxpayer or their tax advisor may be liable for penalties as set out in Part IX of the Act. It is therefore critical that care is taken in identifying documents which may be tax advice documents and documents or parts of documents which are ineligible to be tax advice documents.

Treatment of potential tax advice document

69. Section 20C contains specific provisions dealing with the treatment of a potentially eligible tax advice document while the claim that the document is a tax advice document is being established.

70. The document must be treated as a tax advice document from the date of the Information Demand until the earlier of:

- the date by which the taxpayer or their authorised tax advisor is required to claim the document is a tax advice document; or
- the date on which the taxpayer or their authorised tax advisor informs the Commissioner that the person is waiving the right to claim non-disclosure over the document.

71. As advised above, if the taxpayer or their authorised tax advisor fails to make a claim within the statutory time frame as provided for in the Information Demand, the document loses its tax advice document status, and is no longer subject to the right to claim non-disclosure.

72. If the taxpayer or their authorised tax advisor claims a document is a tax advice document within the statutory time frame provided for in the Information Demand, the document must be treated as a tax advice document from the date the Commissioner is advised of the claim until one of the following events occurs:
    - the District Court rules that the document is not a tax advice document;
    - the taxpayer or their authorised tax advisor agrees in writing that the document is not a tax advice document;
    - the taxpayer or their authorised tax advisor withdraws in writing the claim that the document is a tax advice document;
    - an approved advisor group informs the Commissioner that the authorised tax advisor is or was not a member of the approved advisor group at the time that the authorised tax advisor claimed and was required to be a member of the approved advisor group.

73. If the document is required to be treated as a tax advice document a copy of the document must be held in a secure place for the period that the document is treated as a tax advice document by a tax advisor.

74. A "secure place" includes a lockable cupboard, locker or safe at the tax advisor's business premises but can also include the non-public parts of a tax advisor's offices where access to that area is limited, and protected or controlled by the tax advisor.

Step 3: provision of tax contextual information in statutory declaration

75. An Information Holder who is required to disclose information under an Information Demand must also disclose tax contextual information from a document that the taxpayer or their authorised tax advisor claims to be a tax advice document, i**f required to do so by the Commissioner**. The Commissioner may require disclosure of the tax contextual information either as part of the original Information Demand or may require disclosure through a subsequent Information Demand at a later date.

76. The discretion to require disclosure of the tax contextual information will be exercised sparingly in order to minimise compliance costs, and so as not to undermine the spirit of the non-disclosure right rules. Accordingly, exercising this discretion will be limited to officers at an appropriately high level of delegated authority.

77. The Commissioner will notify the taxpayer or their authorised tax advisor if disclosure of the tax contextual information is required either as part of the original Information Demand or in a separate Information Demand. The Commissioner will require disclosure of the tax contextual information generally after having assessed the information otherwise provided under the Information Demand and considered the nature of the documents for which the right to claim non-disclosure has been claimed. Generally the Commissioner may require the disclosure of tax contextual information after the Information Demand has been issued if, for example:
    - he believes there are material gaps in the information available to the him;
    - there is an issue of credibility in respect of the information already held by Inland Revenue;
    - inconsistent information provided needs to be verified; or
    - there is considerable factual complexity requiring clarification and there are no other reasonable sources for that information

78. In some unusual cases where the Commissioner considers it necessary to protect the integrity of the Inland Revenue Acts, he may require the tax contextual information to be disclosed as a requirement of the original Information Demand. This is likely to occur:
    - in circumstances involving suspected evasion or other suspected criminal action;
    - where sections 16 or 16B are being applied;
    - where the transactions in question are particularly complex and the evidence is inconsistent, and there may reasonably be thought to be insufficient time for the Inland Revenue to properly complete the investigation within the timebar period; and/or

- where there is a history of non-compliance by the taxpayer or associated persons.

79. Refer to paragraph 43 for the definition of tax contextual information for the detail of what is required in the tax contextual information.

80. The disclosure of the tax contextual information must be in a statutory declaration in the prescribed form. The prescribed form is the IR 520. A copy of this form can be found on Inland Revenue's website: **www.ird.govt.nz**

81. The statutory declaration contained in form IR 520 must be made by an authorised tax advisor who has not been barred from making a statutory declaration. A tax advisor may be barred from making a statutory declaration if a Court has so ordered where the tax advisor has previously been convicted of an offence under one or more of the following provisions:

- section 111 of the Crimes Act 1961 [*false statements or declarations*];
- section 143(1)(b) [not s*upplying information when required to by tax law*];
- section 143A(1)(b) or (c) [*knowingly does not provide information when required to by law or knowingly provides altered, false, incomplete or misleading information*];
- section 143B(1)(b) or (c); [knowingly not supplying information when required to by tax law, or providing altered, false, incomplete or misleading information]; or
- section 143H [obstruction].

82. Generally, the Commissioner prefers that the authorised tax advisor making the statutory declaration should be the same tax advisor or a member of the same firm which created the tax advice document for which the non-disclosure right is claimed (and where possible be the same authorised tax advisor who claimed the non-disclosure right on behalf of the taxpayer).

83. The statutory declaration must be sworn before one of the following:

- a Solicitor of the High Court of New Zealand;
- a Justice of the Peace; or
- any other person authorised by law under the Oaths and Declarations Act 1957 to take a statutory declaration but not including officers of Inland Revenue.

84. If the Information Demand requires disclosure of the tax contextual information, this may be delivered together with any documents which are not tax advice documents and that are required to be disclosed under the Information Demand to the officer of the Department authorised by the Commissioner to receive the documents within the time periods outlined below. This generally will be the officer listed in the Information Demand.

85. The table on page 35 sets out the time periods for which disclosure of the tax contextual information must be made by.

86. The Commissioner may extend the above time periods for providing the tax contextual information in exceptional circumstances if requested to do so by the taxpayer. An extension will be granted at the discretion of the Commissioner and any change to the time period will be notified to the taxpayer in writing. The Commissioner may take the following matters into account when extending the time period for making a claim of non-disclosure:

- the complexity of the situation;
- the compliance history of the taxpayer;
- issues related to the timing of the notice;
- the difficulty which the taxpayer may have in making the claim; and
- other factors generally relevant to the exercise of the relevant statutory power.

Special rules for section 16 information demands

87. Where the Commissioner exercises his powers under sections 16 or 16B, the Commissioner will automatically require disclosure of the tax contextual information in the Information Demand related to the exercise of the section 16 or 16B powers.

88. A taxpayer or their authorised tax advisor will need to ensure that they have met the following requirements by the relevant statutory time period(s) set out in the Information Demand in relation to sections 16 and 16B:

- provided all documents required to be disclosed under the Information Demand which are not eligible to be tax advice documents;
- notified the Commissioner if the non-disclosure right is being claimed and provided the required information in the form IR 519; and
- provided the tax contextual information for all documents which are subject to the non-disclosure right.

<table>
<tr><th>Information Demand issued under section 16 and/or section 16B</th><th>Information Demand issued under section 17</th><th>Information Demand issued under section 17A or section 18</th><th>Information Demand issued under section 19</th></tr>
<tr><td rowspan="2">The date determined by the Commissioner when requiring the statutory declaration</td><td>Where the Information Demand requires disclosure of the tax contextual information, the date which is the later of the following:
the date specified in the section 17 notice (where applicable); or
28 days after the date of the section 17 notice (where applicable)
OR</td><td rowspan="2">The date on which the Court requires production of the information</td><td rowspan="2">The date on which the Commissioner requires production of the information</td></tr>
<tr><td>Where the Commissioner subsequently requires disclosure of the tax contextual information, the date which is the later of the following:
the date specified in the notice requiring disclosure of the tax contextual information; or
28 days after the date specified in the notice requiring disclosure of the tax contextual information</td></tr>
</table>

Voluntary disclosures

89. Nothing in this Statement precludes a taxpayer or their authorised tax advisor from voluntarily disclosing documents which may be eligible to be tax advice documents. However taxpayers and their authorised tax advisors should be aware that any voluntary disclosure of documents which may be eligible to be tax advice documents constitutes a waiver of the right to claim non-disclosure over these particular documents.

90. Nothing in this Statement precludes a taxpayer from meeting their obligations under Part IX of the Act. For example, it will commonly be the case that tax advice documents need to be disclosed to demonstrate that the taxpayer took reasonable care in taking a particular tax position.

Challenge by Commissioner

91. The legislation provides that the Commissioner may apply to the District Court (this may be included in the course of a section 18 inquiry) for an order determining one or more of the following:

- Whether the document is a tax advice document for the taxpayer;
- Whether information provided by a taxpayer or their authorised tax advisor is tax contextual information for a tax advice document; or
- Whether the taxpayer or their authorised tax advisor is required to provide a more detailed or better description of tax contextual information in relation to a document.

92. As part of the application by the Commissioner, the District Court Judge may require disclosure to the court of the document which is the subject of the order.

Disclosure of information to approved advisor group

93. The secrecy provisions contained in section 81 have been amended to allow the Commissioner to supply information to an approved advisor group about an action or omission by a person who is or purports to be a member of the approved advisor group and the Commissioner considers that act or omission to be a breach of the tax advisor's responsibilities in relation to the non-disclosure right.

94. The Commissioner would only consider this type of disclosure in specific circumstances such as:

- providing false or incomplete information in the statutory declaration required for the disclosure of tax contextual information;
- knowingly failing to disclose facts or assumptions relating to a transaction which is the subject of the tax advice document; or
- failing to provide tax contextual information when required to do so by the Commissioner under or pursuant to an Information Demand.

This Standard Practice Statement is signed on 13 July 2005.

Graham Tubb
National Manager
Technical Standards

SECTION 17 NOTICES – SPS 05/08

Introduction

1. This Standard Practice Statement (the "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.

2. This Statement has been updated to incorporate changes to the procedures followed by Inland Revenue when issuing section 17 notices as a result of the introduction of the taxpayer's statutory right to claim non-disclosure of certain tax advice documents. The statutory provisions are contained in sections 20B to 20G of the Tax Administration Act 1994.

Application

3. This Statement applies from 22 June 2005 and replaces GNL – 440 *Section 17 Notices* published in *Tax Information Bulletin* Vol 16, No 7 (August 2004).

4. The references to the right to claim non-disclosure for tax advice documents applies to section 17 notices issued after 21 June 2005 which require disclosure of documents that may be eligible to be tax advice documents. For further information on the right to claim non-disclosure refer to the SPS 05/07 *Non-disclosure right for tax advice documents* published in *Tax Information Bulletin* Vol 17, No 6 (August 2005) and available on Inland Revenue's website: www.ird.govt.nz

5. Unless specified otherwise, all legislative references in this Statement refer to the Tax Administration Act 1994.

Background

6. 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.

7. 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.

8. If 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. Non-compliance with the section 17 notice will result in Inland Revenue invoking the statutory remedies. Inland Revenue reserves the right in some cases to commence the information gathering process with a section 17 notice, for example in cases where it knows of prior instances of non-cooperation from the taxpayer and/or their advisers.

9. Any request for information with express reference to section 17 should contain a reference to the taxpayers' right to claim non-disclosure to ensure the recipient of the notice is aware of this statutory right belonging to the taxpayer unless the nature of the request does not warrant a reference to the right to claim non-disclosure (ie the request for information relates purely to information which is not contained in tax advice documents). Refer to the SPS 05/07 *Non-disclosure right for tax advice documents* for further information on what constitutes a tax advice document. If a reference to the non-disclosure right in the request for information is required, the level of detail contained in that reference will depend on the nature of the request, the type of information being requested and the recipient of the request.

10. The process for making a claim of non-disclosure is set out in the SPS 05/07 *Non-disclosure right for tax advice documents*. The claim must be made in the specified time period after the Commissioner has issued a section 17 notice requiring disclosure of these documents which may be eligible to be tax advice documents.

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 held by 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 held by 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

11. Section 17 gives the Commissioner 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.

12. 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:

12.1 The reason for requiring the information

i. Inland Revenue will only require disclosure of information considered necessary or relevant and that is reasonably required in the circumstances of the case.

12.2 The impact of the demand on the suppliers of information

i. Inland Revenue will be reasonable in relation to the quantity of information sought and the 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.

12.3 Previous requests for information or attempts to resolve disputes

i. Generally, apart from where the taxpayer or their authorized tax advisor wishes to claim the right of non-disclosure, 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, e.g. where there have been prior instances of non-cooperation from the taxpayer and/or their advisers, 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.) Where the taxpayer's adviser 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.

ii. 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.

12.4 Whether the information is available publicly

i. 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 Information New Zealand, 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.

12.5 Whether the Commissioner requires disclosure of the tax contextual information

i. Where the section 17 notice contains a reference to the non-disclosure right, the section 17 notice should also refer to when the tax contextual information (ie the factual and non tax advice content of the documents) would be required to be disclosed if the Commissioner requires such a disclosure. The section 17 notice should generally advise that disclosure of the tax contextual information (if required by the Commissioner) will be required in a subsequent notice or in rare cases, the section 17 notice will contain a requirement to disclose the tax contextual information as part of the disclosure requirements for the section 17 notice. For further information on the operation of the right to claim non-disclosure and the definition of key terms refer to the *SPS 05/07 Non-disclosure right for tax advice documents*.

ii. Notice "A" in the attached Appendix includes a standard paragraph referring to the disclosure of the tax contextual information. In rare cases, where the Commissioner requires disclosure of the tax contextual information

as part of the disclosure requirements in the section 17 notice, an alternative paragraph (as set out in Notice "A" in the attached Appendix) should replace the standard paragraph included in the section 17 notice.

12.6 The effect upon the disputes resolution process

i. 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.

ii. Section 17 may also be used during the disputes process to ensure that all relevant information is gathered and available to Inland Revenue. The disputes process may be truncated and an amended assessment issued where a taxpayer has failed to comply with a section 17 notice during the disputes process.

12.7 Inland Revenue's intention to ensure compliance with the notice

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

12.8 The use of section 16 powers

i. 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.

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

14. 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

15. 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. [1]

16. 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 with the exception of section 17 notices requiring disclosure of the tax contextual information.

Legal professional privilege

17. 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 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.

Right to claim non-disclosure for tax advice documents

18. The statutory right to claim non-disclosure relates to tax advice documents required to be disclosed under the Commissioner's information gathering powers including the issuing of section 17 notices. A claim for non-disclosure involves certain disclosures by the taxpayer or their authorised tax advisor. The right to claim non-disclosure belongs to the taxpayer. The statutory provisions contain specific time periods in which the taxpayer (or their authorised tax advisor) is required to make the necessary disclosures. These time periods reflect the need for taxpayers (and their authorised tax advisors) to have sufficient time to ascertain whether particular books or documents otherwise required to be disclosed under a section 17 notice are eligible to be tax advice documents. The taxpayer or their authorised tax advisor will be given at least 28 days to claim the non-disclosure right for those books or documents eligible to be tax advice documents and required to be disclosed under the section 17 notice.

[1] 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.

This time period will be specified in the section 17 notice. The taxpayer or their authorised tax advisor can make the claim for non-disclosure by completing the form *Tax advice document claim (IR 519)*.

19. Typically, the Commissioner will then decide after having reviewed the documents and information received pursuant to the section 17 notice, including the information provided on the form IR 519 whether disclosure of the tax contextual information from the documents eligible to be tax advice documents is required. If the tax contextual information is required, a subsequent section 17 notice (refer to Notice "E" in the attached Appendix) will be issued for the tax contextual information and will allow at least another 28 days to provide the tax contextual information.

20. The tax contextual information must be provided on the prescribed form which is the *Tax contextual information disclosure (IR 520)*. The form IR 520 contains a statutory declaration which needs to be completed by a tax advisor. For further information on tax contextual information and the necessary disclosure requirements, refer to the SPS 05/07 *Non-disclosure right for tax advice documents* or consult your tax advisor. A copy of the SPS can be found on Inland Revenue's website www.ird.govt.nz

21. In rare cases, if warranted, the Commissioner may require both the claim for the non-disclosure right and the disclosure of the tax contextual information from those documents potentially eligible to be tax advice documents in the one section 17 notice. In such a case, a taxpayer (and their authorised tax advisor) will be given at least 28 days to comply with all the disclosure requirements of the section 17 notice.

22. The discretion to require disclosure of the tax contextual information from documents eligible to be tax advice documents will be exercised sparingly in order to minimise compliance costs, and so as not to undermine the spirit of the non-disclosure right rules. Accordingly, an exercise of this discretion will be limited to officers of Inland Revenue at an appropriately high level of delegated authority.

Advice and other work papers prepared by accountants

23. The Commissioner's policy statement referred to as *Commissioner's Policy on Access to Advice and other Workpapers Prepared by Accountants*, issued on 6 September 1993 applies to section 17 notices issued on or before 21 June 2005.

24. Any section 17 notice issued after 21 June 2005 may be subject to the statutory right of non-disclosure and taxpayers and officers of Inland Revenue should follow the practices outlined in the SPS 05/07 *Non-disclosure right for tax advice documents*.

25. The Commissioner's policy statement on Access to Audit Work Papers, issued on 15 August 1991 applies in so far as the section 17 notice requires disclosure of auditors' workpapers. The Commissioner is currently considering updating this policy statement to reflect changes in legislation and within Inland Revenue since the publishing of that statement.

Correction of information

26. 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

27. 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.

28. 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.

29. Where modification of the notice is agreed it will be recorded in writing (refer to specimen Notice "B" in the attached Appendix).

30. Any change to the date for compliance as set out in the section 17 notice should consider the impact of the change of date on the time periods allowed for claiming the right of non-disclosure.

Requests to persons other than the taxpayer

31. 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.

32. 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.

33. Any section 17 notice issued to a third party such as a bank should refer to the non-disclosure right subject to paragraph 9 of this Statement. The recipient of the section 17 notice may then choose (if appropriate) to contact the taxpayer to confirm whether the taxpayer (or their authorised tax advisor) is wanting to claim the non-disclosure right over the books or documents required to be disclosed under the section 17 notice issued to the third party.

Controlled non-residents

34. 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.[2] 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.

35. 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

36. 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 a section 17 notice

37. It is an offence not to comply with a section 17 notice. Sections 143 and 143A state that 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 does 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.

38. If the non-compliance with a section 17 notice relates to a requirement to disclose the tax contextual information from tax advice documents, a number of offences may have occurred, including:

    (a) Offences under sections 143 to 143B; or

    (b) An offence under section 143H (obstruction); or

    (c) An offence under section 111 of the Crimes Act 1961 (false statements or declarations).

39. Refer to the SPS 05/07 *Non-disclosure right for tax advice documents* for further information on breaches of tax advisor's responsibilities in relation to the non-disclosure right.

40. 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.

41. 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. A follow-up notice does not entitle the taxpayer (or their authorised tax advisor) to claim (for the first time or to make a subsequent claim) the non-disclosure right for tax advice documents that were required to be disclosed under the original section 17 notice.

42. 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 information to begin prosecution action:

[2] See *Tax Information Bulletin* Vol 15, No 5 (May 2003) at pages 55 and 56 for a brief discussion of this amendment.

- 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.

43. 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. 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 on 13 July 2005.

Graham Tubb
National Manager
Technical Standards

APPENDIX

Section 17 Notices and related notices

This Appendix is not part of the Statement. 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 section 17 notice
Letter "C1":	Where recipient other than the taxpayer (third party letter)
Notice "C2":	Where recipient other than the taxpayer (third party formal section 17 notice)
Notice "D":	Follow-up notice for non-compliance
Notice "E"	Section 17 notice requiring disclosure of the tax contextual information

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]

IRD Number:

Our reference:

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*.]

Taxpayers' non-disclosure rights

Any document covered by legal professional privilege as provided for in section 20 of the Act 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.*]

Taxpayers have a statutory right of non-disclosure which applies to certain documents containing tax advice. The statutory provisions are contained in sections 20B to 20G of the Act. If any document required to be disclosed under this notice is eligible for non-disclosure under these provisions, the form *Tax advice document claim (IR 519)* should be completed to make the claim of non-disclosure. A copy of this form can be found on Inland Revenue's website www.ird.govt.nz The claim is required to be made within [*28 days insert date after this if applicable*] of the date of this notice. The claim should be provided to Inland Revenue as per the delivery instructions below. For further information on the right to claim non-disclosure refer to the SPS 05/07 *Non-disclosure right for tax advice documents* or consult your tax advisor. A copy of this SPS can be found on Inland Revenue's website www.ird.govt.nz [*If it is known that the taxpayer intends to make a claim for the right of non-disclosure, a copy of the form Tax advice document claim (IR 519) should be included with this notice.*]

If there is a claim to exercise the right of non-disclosure, the Commissioner may subsequently require disclosure of the tax contextual information from the documents which are subject to a claim of non-disclosure. The Commissioner will notify you in writing if a disclosure of the tax contextual information is required. Refer to the SPS 05/07 *Non-disclosure right for tax advice documents* for further information on the meaning of tax contextual information and the disclosure requirements.

Or

[Insert this paragraph and delete the above paragraph if the tax contextual information is required as part of the disclosure requirements for section 17 notice. This should only occur in special circumstances when the appropriate delegated authority has authorised this action.]

If there is a claim to exercise the right of non-disclosure, the Commissioner requires disclosure of the tax contextual information from the documents which are subject to a claim of non-disclosure by [*insert date which needs to be at least 28 days from the date of this notice*]. The tax contextual information must be provided on the form *Tax contextual information disclosure (IR 520)* which contains a statutory declaration. Refer to the SPS 05/07 *Non-disclosure right for tax advice documents* for further information on the meaning of tax contextual information and the disclosure requirements.

Delivery/Collection Instructions

[*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 28 days from 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.

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.*]

Non-compliance

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 section 17 notice

[*Name and address*]

IRD Number:

Our reference:

Attention:

AMENDMENT TO 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 [*including the form IR 519 Tax advice document claim (if applicable)]*. *Or* Please deliver the information [*including the form IR 519 Tax advice document claim (if applicable)*]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 date a breach has occurred, [and a claim for the right of non-disclosure cannot be made (if applicable)*], *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 (3rd party letter)

[*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*.]

Taxpayers have certain statutory rights of non-disclosure for documents containing tax advice. If any document required to be disclosed under this notice contains tax advice, you should seek further advice on this matter. For further information on the right to claim non-disclosure refer to the SPS 05/07 *Non-disclosure right for tax advice documents* or consult your tax advisor. A copy of the SPS can be found on Inland Revenue's website: www.ird.govt nz.

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 (3rd party section 17 notice)

[*Name and Address*]

Attention: …

I**RD number(s):** …

Our reference: …

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) [*legislation requires at least 28 days after the date of issue of this notice*]:

1. …..

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

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*].

If any of the above is covered by legal professional privilege, you should seek further advice on this matter. If the privilege does apply to any document, please provide a list of all documents for which the privilege is claimed.

Taxpayers have certain statutory rights of non-disclosure for documents containing tax advice. If any document required to be disclosed under this notice contains tax advice, you should seek further advice on this matter. For further information on the right to claim non-disclosure refer to the SPS 05/07 *Non-disclosure right for tax advice documents* or consult your tax advisor. A copy of the SPS can be found on Inland Revenue's website www.ird.govt.nz

Failure to comply with this notice by the required date advised above could result in an offence being committed against the Act. However, no third party may be convicted of an offence for not providing information to the Commissioner, whether knowingly or not, if that person proves that they did not have that information in their knowledge, possession or control.

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

[*Signature*]

[*Name*]

[*Designation of signatory*]

Notice "D": Follow-up notice for non-compliance

[*Name and address*]

Attention:

IRD number(s): …

Our reference: …

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*]

Notice "E": Section 17 notice requiring disclosure of tax contextual information

To: [name]

[address]

IRD number(s): …

Our reference: …

NOTICE REQUIRING DISCLOSURE OF THE TAX CONTEXTUAL INFORMATION

[*Brief history referring to date of original section 17 notice and receipt of claim for non-disclosure*]

Having considered the information provided under the section 17 notice dated [*insert the date of the section 17 notice*] and the details provided in the claim for the right of non-disclosure (i.e. the details contained in the form IR 519), the Commissioner requires you to disclose the tax contextual information for the following documents:

1. [List documents from the form IR 519 which require disclosure of the tax contextual information]
2. …

The disclosure of the tax contextual information must be in a statutory declaration in the prescribed form. The prescribed form is the form IR 520 *Tax contextual information disclosure*. A copy of this form has been included with this notice. Additional copies are available from Inland Revenue's website www.ird.govt.nz
[*A copy of the form IR 520 should be included with this notice*]

The statutory declaration in the form IR 520 must be made by an authorised tax advisor who has not been barred from making a statutory declaration. Refer to the SPS 05/07 *Non-disclosure right for tax advice documents* for further detail on who is an authorized tax advisor. A copy of the SPS can be found on Inland Revenue's website: www.ird.govt.nz

The completed form IR 520 must be provided by [*insert date – must be at least 28 days after the date of this notice*]. Please send the completed form IR 520 to [*address of particular Inland Revenue office*].

If you have any queries related to the provision of the tax contextual information, please contact me on [*phone/fax numbers*].

[*Signature*]

[*Name*]

[*Designation of signatory*]

REGULAR FEATURES

DUE DATES REMINDER

August 2005

22 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

31 GST return and payment due

September 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

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 $100,0000 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**
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	*Comment deadline*
☐ ED 0077: Income equalisation deposits and refunds	22 August 2005

Draft question we've been asked	*Comment deadline*
☐ QB0042: FBT—Value of brokerage provided by sharebrokers to employees	31 August 2005

Draft question we've been asked	*Comment deadline*
☐ QB0043: The meaning of "benefit" for FBT purposes	31 August 2005

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

Put stamp here

Public Consultation
National Office
Inland Revenue Department
PO Box 2198
Wellington

INLAND REVENUE NATIONAL OFFICE PO BOX 2198 WELLINGTON TELEPHONE (04) 498 5800