

# TAX INFORMATION BULLETIN

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## CONTENTS

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<b>Get your TIB sooner on the internet</b>	3
<b>This month's opportunity for you to comment</b>	4
<hr/>	
<b>Legislation and determinations</b>	
General depreciation determination DEP53	5
<hr/>	
<b>Notice of withdrawal</b>	6
<hr/>	
<b>Standard practice statement</b>	
Income equalisation deposits and refunds – SPS 05/09	7
<hr/>	
<b>Legal decisions – case notes</b>	
Use of section 17 Notices upheld Vinelight Nominees Limited v CIR	15
Struck-off company has no rights Wire Supplies and Waikato Brokers Ltd v TRA and CIR	16
Taxpayer unsuccessful in appealing TRA decision on Russell template N T H Douglas v CIR	17
<hr/>	
<b>Question we've been asked</b>	
Henderson Group PLC (formerly HHG PLC) capital reduction—confirmation of tax implications for New Zealand shareholders	19
<hr/>	
<b>Regular features</b>	
Due dates reminder	20



## **GET YOUR TIB SOONER ON THE INTERNET**

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

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

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

## THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

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

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

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The following draft item is available for review/comment this month, having a deadline of 25 October 2005.

<b>Ref.</b>	<b>Draft type</b>	<b>Description</b>
ED 0082	Determination	Amortisation rates for landfill cell construction expenditure

The following draft item is available for review/comment this month, having a deadline of 27 October 2005.

<b>Ref.</b>	<b>Draft type</b>	<b>Description</b>
ED 0080	Standard practice statement	Instalment arrangements for payment of tax debt

The following draft item is available for review/comment this month, having a deadline of 30 November 2005.

<b>Ref.</b>	<b>Draft type</b>	<b>Description</b>
QB0044	Question we've been asked	Exemption from gift duty for dispositions of property made by or under an order of the Court: section 75A(5) Estate and Gift Duties Act 1968

Please see page 22 for details on how to obtain a copy.

## LEGISLATION AND DETERMINATIONS

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

### DAIRY FARM MILKING SHED BUILDING, PLANT AND MACHINERY – GENERAL DEPRECIATION DETERMINATION

In *TIB* Vol 13, No 8 (August 2001) we published proposed new depreciation rates for the dairy farm milking shed building, plant and machinery, and invited *TIB* readers to make submissions on this proposal.

Here is the finalised determination. Please note that the determination only applies to assets acquired on or after 14 September 2005, and does not apply to existing assets acquired before 14 September 2005.

### GENERAL DEPRECIATION DETERMINATION DEP53

This determination may be cited as “Determination DEP53: Tax Depreciation Rates General Determination Number 53”.

#### 1. Application

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

This determination applies to “depreciable property” other than “excluded depreciable property” acquired on or after 14 September 2005.

#### 2. Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

- Deleting from the “Agriculture, Horticulture and Aquaculture” industry category the general asset class, estimated useful life and diminishing value and straight-line depreciation rates listed below:

Agriculture, Horticulture and Aquaculture	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Milking machinery	8	22	15.5

- Inserting into the “Agriculture, Horticulture and Aquaculture” industry category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Agriculture, Horticulture and Aquaculture	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Milking plant	12.5	15	10
Wash-down unit	10	18	12.5
Wash-down unit (portable)	3	50	40
Water heaters	12.5	15	10
Milk storage vat/silo	15.5	12	8
Compressor (refrigerant)	12.5	15	10
Rotary dairy shed milking platforms (turntables)	25	7.5	5.5
Dairy shed and yard (including pipe work bails, railings and gates)	33.3	6	4
Teat sprayers (automatic)	6.66	26	18

- Inserting into the “Dairy Plant” industry category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Dairy Plant	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Milk storage vat/silo (on farm)	15.5	12	8
Compressor (refrigerant) (on farm)	12.5	15	10

### **3. Interpretation**

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2004.

This determination is signed by me on the 14<sup>th</sup> day of September 2005.

**Martin Smith**  
Chief Tax Counsel

## **NOTICE OF WITHDRAWAL**

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The Commissioner gives notice of the withdrawal of the item entitled “Gift Duty Exemption Clarified” published in *Taxation Information Bulletin* Vol 9, No 6, June 1997 and of the item entitled “Gift Duty Exemption Further Clarified” published in *Taxation Information Bulletin* Vol 9, No 8, August 1997. The Commissioner considers that the interpretation of the law in those two items is incorrect.

Consequently, the Commissioner has issued an Exposure Draft that discusses the exemption from gift duty under section 75A(5) Estate and Gift Duties Act 1968 for dispositions of property made by or under an order of the Court (see QB0044). Comments on the technical content of that Exposure Draft are welcomed. See page 22 of this issue for details of how to obtain a copy. It should be noted that the Exposure Draft does not constitute the Commissioner’s final view of the subject matter as comments received from public consultation will be taken into account in forming that view.

The former policy is withdrawn as from 5 October 2005.

**Martin Smith**  
Chief Tax Counsel

# STANDARD PRACTICE STATEMENT

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This statement describes how the Commissioner will, in practice, exercise a discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

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## INCOME EQUALISATION DEPOSITS AND REFUNDS – SPS 05/09

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### Introduction

1. This Standard Practice Statement (SPS) sets out the Commissioner's practice in regard to the statutory powers to:
  - accept income equalisation deposits for a tax year outside the specified period, and
  - accept refund applications for a tax year outside the specified period.

### Application

2. This SPS applies from the 2005-2006 and subsequent income years. Refer to *GNL-400 Income equalisation deposits and refunds* for periods prior to the 2005-2006 income year.
3. Unless specified otherwise, all legislative references in this SPS are to the Income Tax Act 2004.
4. Subject to the exceptions in paragraph 5, this SPS applies to income equalisation deposits and refunds made under:
  - the main income equalisation scheme (under sections EH 3 to EH 37), and
  - the thinning operations income equalisation scheme (under sections EH 65 to EH 81).
5. This SPS does not apply to:
  - the adverse event income equalisation scheme (under sections EH 38 to EH 64)
  - refunds from the main income equalisation account to:
    - persons who retire, die or are adjudicated bankrupt (under sections EH 17 to EH 24), or
    - companies which are put into liquidation (under sections EH 25 and EH 26)
  - refunds from the thinning operations income equalisation account to companies which carry on a forestry business on land in New Zealand and are put into liquidation (under sections EH 77 and EH 78).

### Summary

6. The main income equalisation scheme applies to taxpayers who are farmers, fishers or foresters.
7. The thinning operations income equalisation scheme applies to taxpayers who are companies that carry on a forestry business on land in New Zealand and derive income from carrying out thinning operations on the land.

### Deposits

8. In some cases, an eligible taxpayer (as described in paragraphs 6 and 7) may make a deposit into the applicable income equalisation scheme after the end of the specified period for a tax year. The specified period is set in sections EH 37 and EH 81. Where the eligible taxpayer seeks to make a deposit after the specified period, the deposit has to be made by the date that the Commissioner sets by exercising the discretion in sections EH 4(4)(c)(i) and EH 66(4)(c)(i) (for the purpose of this SPS, this is to be referred to as "the required deposit date"). Furthermore, the taxpayer must, at the time of making the deposit, give the Commissioner notice that the deposit is for that tax year.
9. Subject to paragraphs 11 and 12, where the Commissioner exercises the discretion, the required deposit date is the earlier of:
  - one month from the date of filing the tax return for that tax year, and
  - one month from the date that the relevant tax return is due to be filed.
10. The due date for filing a tax return will include any extension of time arrangements agreed to by Inland Revenue.
11. However, the Commissioner will generally not exercise the discretion to allow the taxpayer to make deposits into the applicable income equalisation scheme after the end of the specified period if the specified period ends on a date later than the date determined by paragraph 9. In these cases, the required deposit date is the date on which the specified period ends.
12. The Commissioner will consider a taxpayer's request to make a late deposit on a case-by-case basis. The merits of the taxpayer's particular situation will be considered. A decision will be made on whether to

accept the deposit for the requested tax year after taking full account of the taxpayer's particular circumstances.

13. Deposits made after the required deposit date and not accepted by the Commissioner as applying to the requested tax year may still be accepted by the Commissioner and applied to the tax year in which the deposits are made. The Commissioner will first contact the taxpayer to give them the option of continuing with the deposit or having it refunded back to them.
14. Where a taxpayer makes a deposit into the applicable income equalisation scheme and the deposit is physically received by Inland Revenue:
  - by the required deposit date, or
  - after the required deposit date and is accepted by the Commissioner,

the taxpayer is allowed a deduction of the deposit made for the tax year, as set out in the taxpayer's notice when making the deposit.

## Refunds

15. In some cases, an eligible taxpayer may apply for a refund from the applicable income equalisation scheme after the end of the specified period for a tax year. The specified period is set out in sections EH 37 and EH 81. Where the eligible taxpayer seeks to make an application for a refund after the specified period, the application has to be made by the date that the Commissioner sets by exercising the discretion in sections EH 14(2)(a) and EH 74(2)(a) (for the purpose of this SPS, this is to be referred to as "the required application date"). Furthermore, the taxpayer must elect in the application that the refund is deemed to be income in respect of that tax year.
16. Subject to paragraphs 17 and 18, where the Commissioner exercises the discretion, the required application date is the earlier of:
  - one month from the date of filing the tax return for that tax year; and
  - one month from the date that the relevant tax return is due to be filed.
17. However, the Commissioner will generally not exercise the discretion to allow the taxpayer to apply for a refund from the applicable income equalisation scheme after the end of the specified period if the specified period ends on a date later than the date determined by paragraph 16. In these cases, the required application date is the date on which the specified period ends.
18. The Commissioner will consider a taxpayer's late application for a refund on a case-by-case basis. The merits of the taxpayer's particular situation will be considered. A decision will be made on whether to

accept the application for the refund after taking full account of the taxpayer's particular circumstances.

19. Where a taxpayer makes an application for a refund from the applicable income equalisation scheme and the application is physically received by Inland Revenue:
  - by the required application date, or
  - after the required application date and is accepted by the Commissioner,the refund is income derived by the taxpayer in the elected tax year.
20. Applications for refunds made after the required application date and not accepted by the Commissioner as applying to the elected tax year, may still be accepted by the Commissioner and applied to the tax year in which the applications are made. The Commissioner will first contact the taxpayer to give them the option of continuing with or withdrawing the application for a refund.
21. If the taxpayer continues with the application, the refund is income to the taxpayer in the tax year in which the Commissioner receives the application for the refund.

## Background

22. The income equalisation scheme was introduced in 1965. At the time of introduction of the scheme it was stated that it would:
  - enable farmers to iron out rates of tax due to rises and falls in income,
  - encourage farmers to put aside part of their income in good years and to use this money for farm development in years when farm income falls,
  - help to remove a cause of inflation and therefore help to maintain a steadier rate of economic growth.
23. The scheme enables an eligible taxpayer to make income equalisation deposits with the Commissioner and claim a deduction against their income in the tax year in which the deposit is made or in the tax year requested by the taxpayer in their notice to the Commissioner when making a deposit.
24. When a refund is made from the scheme, the amount is included as part of the taxpayer's income in the tax year in which the application for refund is received or in the tax year elected by the taxpayer and this election is accepted by the Commissioner.
25. Since the implementation of the scheme, use-of-money interest (UOMI) has been introduced. Farmers are usually not in a position to know their final financial position until after liability for UOMI applies. Also, many farmers do not receive



the bulk of their income until near the end of their tax year, meaning that they have not had the use of that money throughout the year. The income equalisation scheme provides an avenue for farmers to limit their exposure to UOMI.

## Legislation

26. The relevant legislative provisions are:
- Sub-part EH,
  - Sections BC 24, CX 43, DQ 1, DQ 3 and OB 1 (definitions of “specified period” and “tax year”), and
  - Sections 37 and 38 of the Tax Administration Act 1994 (the TAA).

## Discussion

### Main income equalisation scheme

27. The following is a discussion of the issues surrounding deposits and refunds in relation to the main income equalisation scheme.
28. Section EH 1(1) allows an eligible taxpayer to reduce their income for any tax year by making an income equalisation deposit.
29. Pursuant to section EH 3(1), eligible taxpayers are:
- (a) farmers who carry on a farming or agricultural business on land in New Zealand,
  - (b) fishers who carry on the business of fishing, and
  - (c) foresters who derive income from forestry and who are not a company, or a public authority, or a Māori authority, or an unincorporated body.

### Deposit

30. An eligible taxpayer may make a payment to the income equalisation scheme at any time during the tax year. (Refer to section EH 4(4)(a).)
31. Sections EH 4(4)(b) and (c) also allow an eligible taxpayer to make a deposit during the specified period (set in section EH 37) for the tax year, or within such later time as the Commissioner may allow after the end of the specified period. In either case, the taxpayer must, at the time of making the deposit, give the Commissioner notice that the deposit is for that tax year. Sections DQ 1 and EH 7 allow the taxpayer a deduction of the amount of the deposit in that tax year.
32. On a case-by-case basis, a taxpayer can request the Commissioner to accept a deposit of income equalisation after the specified period for a tax year and after the further time allowed by the Commissioner under section EH 4(4)(c).

33. Where such a request has not been accepted by the Commissioner, the deposit may, subject to consultation with the taxpayer, be applied to the tax year in which the deposit is made. Pursuant to sections DQ 1 and EH 7, the taxpayer is allowed a deduction of the amount of the deposit in that tax year.

## Refund

34. Section EH 12 allows a taxpayer at any time, subject to certain restrictions, to make an application in writing for a refund from sums deposited in the scheme. Section EH 14 states that the refund is income derived by the taxpayer in the tax year in which the Commissioner receives their application for the refund.
35. Where an application for a refund is received:
- in the specified period (set in section EH 37) for a tax year, or
  - within such later time as the Commissioner allows after the end of the specified period,
- section EH 14(2) and (3) states that any refund made, if the taxpayer so elects, is income derived by the taxpayer in the elected tax year.
36. A taxpayer can make an application for a refund on a case-by-case basis after the specified period for a tax year and after the further time allowed by the Commissioner under section EH 14(2)(a).
37. Where such an application has not been accepted by the Commissioner, the refund may, subject to consultation with the taxpayer, be applied to the tax year in which the application for the refund is made. Pursuant to sections CB 24 and EH 14, the refund is income derived by the taxpayer in that tax year.

### Thinning operations income equalisation scheme

38. The following is a discussion of the issues surrounding deposits and refunds in relation to the thinning operations income equalisation scheme. The rules on the thinning operations income equalisation scheme are similar to those that apply for deposits and refunds to the main equalisation scheme as discussed above.
39. Pursuant to section EH 65(1), eligible taxpayers to this scheme are companies that carry on a forestry business on land in New Zealand and derive income from carrying out thinning operations on the land.
40. The thinning operations income equalisation scheme does not apply to taxpayers who are natural persons.

### Deposit

41. An eligible taxpayer may make a payment to the Commissioner for entry in their thinning operations

income equalisation account during the tax year. (Refer to section EH 66.)

42. Sections EH 66(4)(b) and (c) also allow an eligible taxpayer to make a deposit during the specified period (set in section EH 81) for the tax year, or within such later time as the Commissioner may allow after the end of the specified period. In either case, the taxpayer must, at the time of making the deposit, give the Commissioner notice that the deposit is for that tax year. Sections DQ 3 and EH 69 allow the taxpayer a deduction of the amount of the deposit in that tax year.
43. On a case-by-case basis, a taxpayer can still request the Commissioner to accept a deposit of income equalisation after the specified period for a tax year and after the further time allowed by the Commissioner under section EH 66(4)(c).
44. Where such a request has not been accepted by the Commissioner, the deposit may, subject to consultation with the taxpayer, be applied to the tax year in which the deposit is made. Pursuant to sections DQ 3 and EH 69, the taxpayer is allowed a deduction of the amount of the deposit in that tax year.

## Refund

45. Section EH 72 allows a taxpayer at any time, subject to certain restrictions, to make an application in writing for a refund from sums deposited in the scheme. Section EH 74 states that the refund is income derived by the taxpayer in the tax year in which the Commissioner receives the application for the refund.
46. Section EH 74(2) states where an application for a refund is received in the specified period (set in section EH 81) for a tax year, or within such later time as the Commissioner allows after the end of the specified period, any refund made, if the taxpayer so elects, is income derived by the taxpayer in the elected tax year.
47. On a case-by-case basis, a taxpayer can make an application for a refund after the specified period for a tax year and after the further time allowed by the Commissioner under section EH 74(2)(a).
48. Where such an application has not been accepted by the Commissioner, the refund may, subject to consultation with the taxpayer, be applied to the tax year in which the application for the refund is made. Pursuant to sections CB 24 and EH 74, the refund is income derived by the taxpayer in that tax year.

## Specified period

49. "Specified period" is defined in section OB 1, which refers to other legislative provisions for the purposes of different income equalisation schemes.

For example, the definition of "specified period" for the purposes of the thinning operations income equalisation scheme is found in section EH 81.

50. The definition of "specified period" for the purposes of the main income equalisation scheme and the thinning operations income equalisation scheme are similar. The relevant "specified period" for an eligible taxpayer is the shorter of:
  - the period of six months after the end of the accounting year that corresponds to the tax year, and
  - the period from the end of the accounting year (which corresponds to the tax year) to the date one month after the due date of filing the taxpayer's return of income (including any extension of time arrangements agreed to by Inland Revenue).
51. This is demonstrated by the following examples:

### Example 1

30 June 2006 balance date (with an extension of time arrangement for filing the return of income to 31 March 2007). The specified period is the shorter of:

- the period of six months after the end of the accounting year that corresponds to the tax year – 1 July to 31 December 2006, and
- the period from the end of the accounting year to one month after the tax return is due – 1 July 2006 to 30 April 2007.

### Example 2

30 June 2006 balance date (without extension of time arrangement). The specified period is the shorter of:

- the period of six months after the end of the accounting year that corresponds to the tax year – 1 July to 31 December 2006, and
- the period from the end of the accounting year to one month after the tax return is due – 1 July to 7 November 2006 (being one month after return filing due date of 7 October 2006 (see section 37(1) of the TAA)).

52. In the first example the specified period ends on 31 December 2006, whereas in the second example the specified period ends on 7 November 2006.

## Commissioner's discretion

53. The Commissioner may accept a deposit or an application for refund for a particular tax year outside the specified period. For example, section

EH 4(4)(c)(i) allows an eligible taxpayer to make a deposit in the main income equalisation scheme “within a time that is after the end of the specified period but that is allowed by the Commissioner in a case or class of cases”.

54. What needs to be considered is how the Commissioner should exercise that discretion.
55. Case law has determined that a statutory power conferred to a public authority (eg discretion) cannot be unfettered or arbitrary. Also, discretion must be used reasonably. In *Roberts v Hopwood* [1925] AC 578, Lord Wrenbury stated:

“A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.”

56. When an authority (such as Inland Revenue) considers whether it will exercise the discretion, it needs to consider each case on its own merits. Blindly dismissing cases as being not within policy is an abuse of power. An authority may make policies but the policies cannot be over-rigid. This is highlighted in *Gisborne Mills Ltd v CIR* (1989) 11 NZTC 6,194. Robertson J found that the Commissioner had failed to exercise a discretion which Parliament had given him. By failing to discharge a statutory responsibility, an abuse has arisen and the Commissioner’s decision was subject to review by the Court.
57. In *Lawton v CIR* [2003] 2 NZLR 48, the Court of Appeal held that the Commissioner had not properly exercised the discretion in section 30(2) of the Income Tax Act 1976, which deals with acceptance of a late objection.
58. Glazebrook J, delivering the unanimous judgment of the Court, reiterated the dicta in *CIR v Wilson* (1996) 17 NZTC 12,512, which stated that:

“the merits of a proposed [late] objection must be considered unless the explanation for the lateness of the objection is so inadequate that this is unnecessary.”

59. In *Lawton*, it was held that the taxpayer had given a full and credible explanation for the lateness of the objection. The Court held:
 

“... In such a case, unless [the] explanation was palpably untrue or quite unjustified, it would be rare for the explanation to be deemed so inadequate that the merits need not be examined.”
60. The *Lawton* case contains some recent judicial comments on the manner in which the Commissioner should exercise discretions in the Inland Revenue Acts.

61. In considering whether to accept a taxpayer’s request for a deposit after the required deposit date or a taxpayer’s application for a refund after the required application date, the Commissioner is obliged to consider the merits of the taxpayer’s explanation for the lateness of the request or the application. The request or the application cannot simply be dismissed. The Commissioner, after considering the merits of the explanation, may or may not accept the deposit or refund for the elected tax year.

### What is reasonable?

62. For the purpose of the main income equalisation scheme, section EH 3 allows an eligible taxpayer to make payments, during any tax year, to the scheme in respect of that tax year. Section EH 4 allows the taxpayer to make a deposit of income equalisation within the tax year or during the specified period. Section EH 4(4)(c)(i) grants the Commissioner discretion to extend the time for eligible taxpayers to make deposits after the end of the specified period.
63. Similarly, in section EH 66(4)(c)(i), for the purpose of the thinning operations income equalisation scheme, the Commissioner has discretion to extend the time for eligible taxpayers to make deposits after the end of the specified period.
64. Commonly, it will not be until the taxpayer’s set of accounts and tax return are completed before the taxpayer’s financial situation for an accounting year will be known. From this, the decision on whether to make a deposit to the applicable income equalisation scheme, and of how much, would be made.
65. Taking this into consideration, it would be reasonable to expect an eligible taxpayer to make a deposit to the scheme (for that particular tax year) at the time of filing their tax return, provided the tax return is filed by the filing due date. This date could potentially be 31 March of the following year if the taxpayer has an extension of time arrangement.
66. However it may not be possible or practicable for the deposit to be sent in with the tax return. An example is e-filed tax returns and it may also take a tax agent some time to arrange the sending in of the deposit. Therefore a reasonable period of time after the tax return filing date should be allowed, so that the eligible taxpayer can forward the deposit to Inland Revenue.
67. Where the specified period is shorter than the period of six months from the end of the accounting year that corresponds to the tax year, the legislation allows one month after the due date for filing a return in the definition of a specified period. (Refer to sections EH 37 and EH 81.) No deduction will be allowed until the deposit is physically received by Inland Revenue. The return will be reassessed to allow the deduction when the deposit is received.

68. Subject to paragraph 74, it seems reasonable to allow eligible taxpayers to make income equalisation deposits after the end of the specified period and by the earlier of:

- one month from the date of filing the tax return for that tax year, and
- one month from the date that the relevant tax return is due to be filed.

69. The following example illustrates the effect of this practice:

Example 3

A taxpayer has a tax agent. The taxpayer has a balance date of 31 March. For the 2006 income year, the tax agent has an extension of time arrangement to file the taxpayer's tax return until 31 March 2007. The tax return for the taxpayer is filed on 31 October 2006.

The specified period for making deposits into the income equalisation scheme is the shorter of:

- the period of six months after the end of the accounting year that corresponds to the tax year – 1 April to 30 September 2006, and
- the period from the end of the accounting year to one month after the tax return is due – 1 April 2006 to 30 April 2007 (being one month after return filing due date of 31 March 2007 (see section 37(1) of the TAA)).

For an income equalisation deposit to be accepted for the 2006 income year, the Commissioner exercises the discretion under section EH 4(4)(c) to allow the taxpayer to make the deposit by 30 November 2006, which is the earlier of:

- one month from the date of filing the tax return (ie 30 November 2006), and
- one month from the due date of filing the tax return (ie 30 April 2007).

In the same scenario but where instead the return is filed on 1 May 2007, a deposit would need to be paid by 30 April 2007, which is the earlier of:

- one month from the date of filing the tax return (ie 1 June 2007), and
- one month from the due date of filing the tax return (ie 30 April 2007).

In both of the above scenarios, if the taxpayer cannot make the deposit within the time allowed by the Commissioner and there are

valid reasons for it, the Commissioner will consider the merits of the taxpayer's situations and may accept the late deposits on a case-by-case basis.

70. For taxpayers without extension of time arrangements, deposits in respect of a tax year will be accepted up to the end of the specified period, which is the shorter of six months immediately following the end of the accounting year that corresponds to the tax year and one month after the return is required to be filed. These taxpayers may also make deposits after the end of the specified period. (Refer to paragraph 68.)

71. However, in some cases, the taxpayer is required to make the deposit into the income equalisation scheme by the end of the specified period. The Commissioner will generally not exercise the discretion under section EH 4(4)(c) because the specified period ends on a date later than the date that would be determined by exercising the Commissioner's discretion. This is illustrated by the following example:

Example 4

A taxpayer with a 30 June 2006 balance date will be required to file their tax return by 7 October 2006 (see section 37(1) of the TAA). The taxpayer files their tax return on 30 September 2006. Pursuant to section EH 4(4)(b), the taxpayer may make a deposit to the main income equalisation scheme during the specified period, which is the shorter of:

- the period from the end of the accounting year that corresponds to the tax year to one month after the tax return is due – 1 July 2006 to 7 November 2006, and
- six months from the accounting year that corresponds to the tax year – 1 July to 31 December 2006.

The taxpayer should generally make the deposit by the end of the specified period, ie 7 November 2006. This is a later date than the date that would be determined by exercising the discretion under section EH 4(4)(c), ie 31 October 2006, which is the earlier of:

- one month from the date of filing the tax return (ie 31 October 2006), and
- one month from the due date of filing the tax return (ie 7 November 2006).

However, if the taxpayer cannot make the deposit by 7 November 2006 and there are valid reasons for it, the Commissioner will consider the merits of the taxpayer's situations and may accept the late deposits on a case-by-case basis.

72. The Commissioner will exercise the discretion under section EH 4(4)(c) if the specified period ends on a date earlier than the date determined by exercising that discretion. The following example illustrates this:

**Example 5**

A taxpayer with a 30 November 2005 balance date will be required to file their tax return by 7 July 2006 (see section 37(1) of the TAA). The taxpayer files their tax return by 30 June 2006. Pursuant to section EH 4(4)(b), the Commissioner exercises the discretion to allow the taxpayer to make a deposit to the main income equalisation scheme during the specified period, which is the shorter of:

- the period from the end of the accounting year that corresponds to the tax year to one month after the tax return is due – 1 December 2005 to 7 August 2006, and
- six months from the accounting year that corresponds to the tax year – 1 December 2005 to 31 May 2006.

However, the taxpayer may make a deposit after the end of the specified period, i.e 31 May 2006. Pursuant to section EH 4(4)(c), the taxpayer may make an income equalisation deposit by 31 July 2006, which is the earlier of:

- one month from the date of filing the tax return (ie 31 July 2006), and
- one month from the due date of filing the tax return (ie 7 August 2006).

If the taxpayer cannot make the deposit by 31 July 2006 and there are valid reasons for it, the Commissioner will consider the merits of the taxpayer's situations and may accept the late deposits on a case-by-case basis.

73. For taxpayers who do not have a tax agent and require an extension of time to file their income tax return, please refer to the separate SPS on extension of time applications from taxpayers without tax agents.
74. Where an eligible taxpayer makes a deposit after the required deposit date, the Commissioner will take into account the merits of the taxpayer's situation and the reasons why the deposit was not made before the required deposit date. The Commissioner will consider these on a case-by-case basis.
75. Reasons could include, but are not limited to, incorrect advice from the taxpayer's tax agent or a sudden or unexpected change in circumstances. However, these examples are not indicative of situations when a request for a late deposit will automatically be accepted. All factors must be

considered before the Commissioner accepts the deposit as being made in the requested tax year.

76. The Commissioner will apply similar principles (as stated in paragraphs 62 to 75 of this SPS) to an eligible taxpayer's application for a refund after the required application date.

## Standard Practice

The following standard practice has been developed from the above principles.

77. The main income equalisation scheme applies to taxpayers who are farmers, fishers or foresters.
78. The thinning operations income equalisation scheme applies to taxpayers, who are companies that carry on a forestry business on land in New Zealand and derive income from carrying out thinning operations on the land.

## Deposits

79. Eligible taxpayers may make a deposit to the applicable income equalisation scheme for any tax year at any time during that tax year.
80. A deposit made during the specified period in relation to any tax year will be treated as having been made in respect of that tax year. The specified period is set in sections EH 37 and EH 81.
81. In some cases, an eligible taxpayer may make a deposit into the applicable income equalisation scheme by the required deposit date after the end of the specified period for a tax year. Furthermore, the taxpayer must, at the time of making the deposit, give the Commissioner notice that the deposit is for that tax year.
82. The required deposit date, which is determined by exercising the Commissioner's discretion in sections EH 4(4)(c)(i) and EH 66(4)(c)(i), is the earlier of:
- one month from the date of filing the tax return for that tax year, and
  - one month from the date that the relevant tax return is due to be filed.
83. However, the Commissioner will generally not exercise the discretion to allow the taxpayer to make deposits into the applicable income equalisation scheme after the end of the specified period if the specified period ends on a date later than the date determined by paragraph 82. In these cases, the required deposit date is the date on which the specified period ends.
84. Generally, the Commissioner will not accept a deposit for a tax year after the required deposit date. The Commissioner will consider, at a taxpayer's request, to make a late deposit on a case-by-case basis. The merits of the taxpayer's particular

situation will be considered. A decision will be made on whether to accept the deposit for the requested tax year after taking full account of the taxpayer's particular circumstances.

85. Deposits made after the required deposit date and not accepted by the Commissioner as applying to the requested tax year, may still be accepted by the Commissioner and applied to the tax year in which the deposits are made. The Commissioner will first contact the taxpayer to give them the option of continuing with the deposit or having it refunded back to them.
86. Where a taxpayer makes a deposit into the applicable income equalisation scheme and the deposit is physically received by Inland Revenue:
- by the required deposit date, or
  - after the required deposit date and is accepted by the Commissioner,

the taxpayer is allowed a deduction of the deposit made for the tax year, as set out in the taxpayer's notice when making the deposit.

## Refunds

87. Eligible taxpayers may make an application for a refund from the applicable income equalisation scheme for any tax year at any time during that tax year although the Commissioner can only refund amounts which have been deposited for at least 12 months. The Commissioner may need to wait for the expiry of this period in order to make the refund, after receiving an application.
88. Generally, a refund is treated as having been made in the tax year in which the Commissioner receives the application for the refund. An application for a refund made during the specified period in relation to any tax year will be treated as having been made in respect of that tax year. The specified period is set out in sections EH 37 and EH 81.
89. In some cases, an eligible taxpayer may apply for a refund from the applicable income equalisation scheme by the required application date after the end of the specified period for a tax year. Furthermore, the taxpayer must elect in the application that the refund is deemed to be income in respect of that tax year.
90. The required application date, which is determined by exercising the Commissioner's discretion in sections EH 14(2)(a) and EH 74(2)(a), is the earlier of:
- one month from the date of filing the tax return for the tax year, and
  - one month from the date that the relevant tax return is due to be filed.
91. However, the Commissioner will generally not exercise the discretion to allow the taxpayer to apply for a refund from the applicable income equalisation scheme after the end of the specified period if the specified period ends on a date later than the date determined by paragraph 90. In these cases, the required application date is the date on which the specified period ends.
92. Generally, the Commissioner will not accept an application for a refund for an elected tax year after the required application date. However, the Commissioner will consider a taxpayer's late application for a refund on a case-by-case basis. The merits of the taxpayer's particular situation will be considered. A decision will be made on whether to accept the application for the refund after taking full account of the taxpayer's particular circumstances.
93. Where a taxpayer makes an application for a refund from the applicable income equalisation scheme and the application is physically received by Inland Revenue:
- by the required application date, or
  - after the required application date and is accepted by the Commissioner,
- the refund is income derived by the taxpayer in the elected tax year.
94. Applications for refunds made after the required application date and not accepted by the Commissioner as applying to the elected tax year, may still be accepted by the Commissioner and applied to the tax year in which the applications are made. The Commissioner will first contact the taxpayer to give them the option of continuing with or withdrawing the application for a refund.
95. If the taxpayer continues with the application, the refund is income to the taxpayer in the tax year in which the Commissioner receives the application for the refund.

This Standard Practice Statement is signed on 2 September 2005.

**Graham Tubb**  
National Manager, Technical Standards

## LEGAL DECISIONS – CASE NOTES

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

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

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

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### USE OF SECTION 17 NOTICES UPHeld

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**Case:** Vinelight Nominees Limited v CIR  
**Decision date:** 14 July 2005  
**Act:** Tax Administration Act 1994  
**Keywords:** Section 17, litigation, discovery

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#### Summary

The Commissioner was entitled to issue section 17 Notices despite the existence of court proceedings.

#### Facts

On 30 March 2005, the Commissioner formed the opinion under section 108(2) of the Tax Administration Act ("the Act") that returns filed by the plaintiff for tax years ending in 1998 and 1999 were either fraudulent or wilfully misleading. The Commissioner was therefore entitled to issue a new assessment for those years.

On 25 May 2005 the plaintiff filed proceedings in the High Court challenging the Commissioner's decision under section 108(2). It was said the "re-opening" decision under section 108(2) is a disputable decision under the Act, and the plaintiff is entitled to challenge it, independent of any challenge to a consequent assessment.

Accompanying the primary proceedings, the plaintiff filed two other applications. The first application was seeking two questions of law to be determined prior to trial.

The second application (determined in this Judgment), sought the Court's direction that the Commissioner is not entitled to use his powers under section 17 of the Act.

This application sought orders:

1. restraining the Commissioner from using or purporting to use his powers in section 17 to require the production of information relevant to the subject matter of this litigation and/or
2. declaring that the defendant Commissioner has no power to issue notices under section 17 and/or

3. requiring the defendant Commissioner to withdraw notices already issued since the commencement of this proceedings and relevant to its subject matter; and
4. costs.

Counsel for the Commissioner challenged the Court's jurisdiction to deal with the application.

#### Decision

His Honour first considered the Commissioner's challenge of the Court's jurisdiction to deal with the application. It was considered that there was a matter being raised by the plaintiff concerning the conduct of a party to proceedings before the Court, and that it was appropriate for the Court to hear it.

In relation to the primary issue, the plaintiff submitted that the Commissioner is not entitled to use his powers in relation to the subject matter of existing proceedings. He sought some form of declaration from the Court to this effect. The primary focus of his argument was that the Commissioner would be in contempt in issuing or enforcing the Notices.

The Commissioner submitted that the Act contains a scheme of information-gathering leading to an assessment. It then contains capacities to challenge that assessment. Section 17 Notices are part of that process. It would subvert the whole scheme if a taxpayer could, by means of issuing proceedings, stop the information gathering and prevent the issuing of proper processes. It would also disadvantage the Commissioner if material that ought to be available under a section 17 Notice were only obtainable, if at all, under the rules of discovery with its restrictions on subsequent use. The Commissioner submitted that the existing authority is clear that the Commissioner can use his power in order to obtain evidence for upcoming Court proceedings, and this is so even if the new assessment has already been issued. *A fortiori*, he must be able to use them pre-assessment and this is unaffected by the taxpayer issuing proceedings.

His Honour considered the statutory scheme in his analysis. The present scheme was introduced in 1996 and

is summarised in *CIR v Delphi Fishing Co Limited* (2004) 21 NZTC 18,525. The Commissioner stressed that one of the objectives of the new scheme was that communication between the taxpayer and Inland Revenue is to be direct and open to ensure that all information relevant to the dispute is available as soon as possible.

The Commissioner submitted that this scheme contemplates an information-gathering process that allows the Commissioner to confirm or amend his earlier opinion as to fraud. The use of a section 17 Notice is a part of the information-gathering process and ensures that the assessment is taken on the basis of all the relevant information. In his submission it is not correct to seek to circumvent the process by restricting use of section 17 prior to assessment.

The plaintiff although accepting this analysis to a point, focused on a different aspect of the scheme. The plaintiff referred to the concept introduced in 1996 of a “disputable decision”. This broadened the range of decisions that could be the subject of a challenge before a “hearing authority”. Included in “disputable decision” was the re-opening decision. The plaintiff submitted that it can be challenged in its own right, and that the new process of reassessment contemplates that it may be many months before all required steps have been taken. The plaintiff’s pivotal proposition is provided in section 138F. Section 138F provides that a disputant may challenge an assessment made by the Commissioner that takes account of or relies on a disputable decision.

His Honour was referred to decisions *CIR v McDougall’s Holdings Limited* (1983) 6 NZTC 61,505 and *Green v Housden* (1993) 15 NZTC 10,053 in support of the Commissioner’s right to continue to use section 17. These confirmed the ability to use section 17 after assessment and expressly for the purpose of obtaining information for upcoming Court proceedings.

The plaintiff submitted that the Commissioner’s position failed to take into account the statutory change that allows a taxpayer to institute proceedings, and at an earlier stage. The cases relied on by the Commissioner dealt with notices issued prior to Court proceedings commencing, and in circumstances where control of the proceedings lay with the Commissioner.

The plaintiff’s strongest authority was *Bramble Holdings Ltd*. This was a decision of Franki J of the Federal Court of Australia. Notices were served upon the defendants, which is broadly comparable to section 17 of the Act. The Court ruled that the statutory power to issue the Notices did not extend to situations where proceedings had been commenced.

In conclusion His Honour stated it would not be correct to say that section 17 must generally be read down so that the power is not available when the intended subject matter of the Notices is also the subject of concurrent proceedings. His Honour looked at the motivation for the Notices and was satisfied that the purpose is not to gain an

advantage as a litigant, but rather to assist the making of a revised assessment. The Department’s evidence is that the Notices are in respect to the plaintiff advising them of the variation on 30 May 2005 and His Honour received no evidence from the plaintiff to the contrary.

His Honour also found the timing of the Notices to be relevant. The Notices were issued in response to a Notice of Response filed by the taxpayer after issue of the proceedings.

His Honour accepted it cannot be enough for the Department to simply point to an alternative or second purpose. There must be an enquiry as to the dominant reason for the notices.

Other facts that were taken into consideration were whether the present primary proceedings are available at this stage of the process, and whether based on the facts there is a real issue. His Honour also acknowledged the potential for proceedings to be used to thwart the statutory dispute process. The possible advantage that might accrue to the Commissioner as litigant as a by-product of the Notices was also taken into consideration.

His Honour after weighing up all the factors declined to make the declaration sought by the plaintiff.

## STRUCK-OFF COMPANY HAS NO RIGHTS

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<b>Case:</b>	Wire Supplies and Waikato Brokers Ltd v TRA and CIR
<b>Decision date:</b>	1 September 2005
<b>Act:</b>	Companies Act 1955, Companies Act 1993
<b>Keywords:</b>	struck-off company, restoration

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### Summary

A struck-off company has no existing rights and the prospect of future restoration is irrelevant to their present status. Attempts to assignment of objection rights are ineffective.

### Facts

This is a Russell-related matter.

Five taxpayer companies which are party to Russell litigation have been struck off the Companies Register under either the 1955 or the 1993 Companies Act. These have not been restored to the Register but proceedings are in train to apply for these to be restored. In the meantime the companies purported to assign their objection rights to another Russell company.

The Commissioner sought to strike them out of the tax proceedings on the basis that these companies have no standing.



## Decision

Courtney J considered the facts of each case are agreed the companies were properly struck off the register under the various Acts.

Her Honour accepted the Commissioner's submission that the deeds of assignment were ineffective relying upon *Suzy Speed* (1994) 16 NZTC 11,108. [19]

If the companies are restored the deeds would be irrelevant anyway. [20]

As to the removal from the register, Her Honour reviewed the legislation and said:

"... Removal from the register finally extinguishes any legal status. The fact that a company may later be restored and be deemed at that point to have always remained on the register does not alter the fact that at the moment it is removed it ceases to have any legal status." [26]

"For present purposes I do not see any difference between the provisions of the Companies Act 1955 in its pre-1 July 1994 form and the Companies Act 1993. In my view removal of a company from the register under both Acts has the same effect, namely that the company ceases to exist for all relevant legal purposes. I do not see any basis for resisting the obvious effect that removal of a company from the register has. That effect cannot be denied simply because the company concerned may one day be restored to the register." [29]

However Her Honour did not accept the Commissioner's submission that this meant the taxpayer companies must be struck out as Her Honour considered whether to strike them out was at her discretion. [30-31]

Her Honour ordered that if the Companies did not get an order restoring them to the register before 1 December 2005, then there would be an automatic strike-out of the proceedings. [34]

## TAXPAYER UNSUCCESSFUL IN APPEALING TRA DECISION ON RUSSELL TEMPLATE

**Case:** N T H Douglas v The Commissioner of Inland Revenue

**Decision date:** 1 September 2005

**Act:** Income Tax Act 1976

**Keywords:** Tax avoidance, Russell template, res judicata, issue estoppel.

## Summary

The taxpayer was unsuccessful in appealing the TRA's decision regarding the Russell template for tax avoidance

## Facts

This is a Russell template-related matter. It is an appeal from Case T59 and Case V2.

## Decision

The taxpayers were part of the Russell template which has been found to be a tax avoidance arrangement in *Miller* (1998) 18 NZTC 13,961 and *O'Neil* (2001) NZTC 17,051. Despite an attempt to distinguish this arrangement from the template Courtney J found insufficient difference to justify a different treatment of these taxpayers. [41]

The Commissioner argued that the case was subject to *res judicata* through *issue estoppel* as the Russell template was the same for all issuers and because Mr Russell was the common factor (as agent) for all litigants. The effect of this is to preclude any argument regarding the characterisation of the template. Her Honour concluded that while these litigants were not parties to the earlier cases there was a public interest in preventing case after case advancing the same arguments. Accordingly, emphasis was placed upon the identical nature of the template and Mr Russell's role in it and the earlier litigation to conclude that *res judicata* did apply. [42-61]

Her Honour rejected a submission that the fact the taxpayers did not know the scope of the arrangement was relevant [62-65] and one that the earlier decisions were in judicial review and not tax objections meant *res judicata* could not apply. [62-70].

The taxpayers next argued the Commissioner's assessments were unintelligible (submission broken down into five subparts). Her Honour considered whether or not this was the case was a factual inquiry [76] but judged objectively the assessments were in fact intelligible and none of the five grounds of unintelligibility advanced by the taxpayers applied. [76-117]

In response to the taxpayers' submission that the introduction of a Track C assessment rendered the Track B assessments (the subject of the appeal) incorrect Her Honour concluded that the *BASF* principle (see (1995) 17 NZTC 12,136) would render the Track C assessment invalid to the extent they re-opened any issue being determined as part of Track B. [118-125]

Her Honour declined to address an argument regarding the exhaustion of the Commissioner's discretion under section 99(3) as it was not within the ambit of the TRA case and therefore not properly part of the appeal. [126-127]

The taxpayers' reiterated unsuccessful submissions regarding a named officer of Inland Revenue giving evidence made in a judicial review (see *Wire Supplies* CP 526/SD99). These were unsuccessful here. [128-132]

The taxpayers sought access to legal opinions by two departmental solicitors on the basis the privilege had been waived when these were referred to in internal memos. However, Her Honour considered that the officers preparing the internal memos probably did not consider the prospect of those reports being part of litigation so there was no waiver of the privilege: “I do not consider that the reference in a discoverable document to a privileged document is sufficient to amount to a waiver of the privileged document”. [133-151]

The TRA had observed that a funding charge for interest-free funding by Russell entities to the taxpayers would be an allowable deduction but, for lack of evidence did not allow one. This was not changed on appeal where there was still no evidence more than the “speculative” to justify any such a deduction. [152-159] A similar result was given on the issue of apportioning the administrative charge, the taxpayers had failed to discharge the burden of proof on them. [160-174]

The taxpayers accepted they could not directly challenge the time bar [175] but sought to challenge the officer’s re-opening the time bar as not evidenced appropriately (the Commissioner relied upon certificates of re-opening). Her Honour was satisfied the certificates were sufficient. [181]

## QUESTION WE'VE BEEN ASKED

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

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### HENDERSON GROUP PLC (FORMERLY HHG PLC) CAPITAL REDUCTION – CONFIRMATION OF TAX IMPLICATIONS FOR NEW ZEALAND SHAREHOLDERS

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This statement confirms the Commissioner's position in "HHG PLC Capital Reduction Proposals — Tax Implications for New Zealand Shareholders" *Tax Information Bulletin* Vol 17, No 2 (March 2005).

On 21 February 2005, HHG PLC ("HHG") shareholders voted to sell the Life Services business which formed part of HHG (now known as Henderson Group Plc) and return approximately £875 million of the proceeds to shareholders and CDI ("CHESS depository interest") holders in exchange for the cancellation of shares. This process was done through two transactions, the Return of Cash and the Reduction of Investor Base.

On the basis of the information provided by Henderson Group Plc, including the HHG Shareholder Circular, and certain specific assumptions advised to HHG, the Commissioner now confirms the following about the HHG Capital Reduction:

- Inland Revenue is satisfied that the cancellation amounts paid to CDI holders under the Return of Cash are not dividends for New Zealand tax purposes under section CD 3 of the Income Tax Act 2004, by virtue of section CD 14.
- Inland Revenue also confirms that the cancellation amounts paid in respect of the second transaction (Reduction of Investor Base) to CDI holders, whose total CDIs remaining after the Return of Cash were reduced by 15% or more, are not dividends for New Zealand tax purposes under section CD 3, by virtue of section CD 14. However, for New Zealand CDI holders whose cancellation amounts represent less than 15% of their total CDIs remaining after the Return of Cash, the payment will constitute a dividend.

## REGULAR FEATURES

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### DUE DATES REMINDER

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#### October 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*

##### 31 GST return and payment due

#### November 2005

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

##### 21 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 \$100,000 PAYE and SSCWT deductions per annum.



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

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

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

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

On the homepage, click on "Public consultation" in the right-hand navigation bar. Here you will find links to drafts presently available for comment. You can send in your comments by the internet.

Name \_\_\_\_\_

Address \_\_\_\_\_

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***Draft determination***

- ED 0082: Amortisation rates for landfill cell construction expenditure

***Comment deadline***

25 October 2005

***Draft standard practice statement***

- ED 0080: Instalment arrangements for payment of tax debt

***Comment deadline***

27 October 2005

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

- QB0044: Exemption from gift duty for dispositions of property made by or under an order of the Court: section 75A(5) Estate and Gift Duties Act 1968

***Comment deadline***

30 November 2005

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