TAX INFORMATION BULLETIN

Vol 18, No 3
April 2006

CONTENTS

Get your TIB sooner on the internet 3

New legislation

Student Loan Scheme Amendment Act 2005 4
"Interest-free" student loans for borrowers living in New Zealand 4
Refunds of student loan over-payments 7
Interest rate formula 8
Amnesty on student loan penalties 8

Taxation (Annual Rates of Income Tax 2005-06) Act 2005 10

Taxation (Urgent Measures) Act 2005 11
Wine producer rebate 11
Enhancements to Working for Families 12

Orders in Council 12
Student loan interest rates formula 12
Student loan interest rates for 2006-07 12

Operational statement

GST treatment of supplies of telecommunications services 13

Legal decisions – case notes

Casual relief driver is employee
TRA 003/05 Decision No 001/2006 25

Section 17 notice served upon a liquidator
Re: Next Generation Investments Ltd (in liq) v The Commissioner of Inland Revenue (Judicial Review) 27

High Court discusses Commissioner's ability to settle tax litigation
Accent Management Limited & Ors v The Commissioner of Inland Revenue 28

Regular features

Due dates reminder 30

Inland Revenue
Te Tari Taake

ISSN 0114–7161

GET YOUR TIB SOONER ON THE INTERNET

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.

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 **tibdatabase@ird.govt.nz** with your name, details and the number recorded at the bottom of the mailing label.

NEW LEGISLATION

STUDENT LOAN SCHEME AMENDMENT ACT 2005

The Student Loan Scheme Amendment Act 2005 is one of the three Acts to result from the passage of the Taxation (Urgent Measures) Bill, introduced in November 2005. The new Act received Royal assent on 21 December 2005.

"INTEREST-FREE" STUDENT LOANS FOR BORROWERS LIVING IN NEW ZEALAND

Sections 37, 38, 38AA to 38AK, 41, 65A and 69 of the Student Loan Scheme Act 1992

New legislation gives effect to the government's decision not to charge interest on student loans for borrowers living in New Zealand. This will be achieved by way of Inland Revenue giving a full interest write-off for the period during which a borrower qualifies. With a small number of exceptions, borrowers living overseas will not be entitled to the interest write-off.

If borrowers do not qualify for the new interest write-off, they may still be eligible for a full interest write-off if they are studying, or a base interest write-off or reduction. Borrower eligibility for a base interest write-off or reduction has been restricted to two years for each.

Background

The legislation addresses one of the government's stated objectives of encouraging student loan borrowers to remain in, or return to, New Zealand. The new legislation also addresses the government's concern over the affordability of tertiary education. Efforts to reduce debt have been limited for some borrowers because of the need to service interest payments. The removal of interest will reduce total debt and reduce the repayment times of borrowers.

Key features

From 1 April 2006, all borrowers personally present in New Zealand for 183 or more consecutive days (the 183-day requirement) will qualify for a full interest write-off. If a period that would have been 183 or more consecutive days in New Zealand is broken by a period or periods in the aggregate of 31 days or less overseas, the time spent overseas will be treated as having been spent in New Zealand. Borrowers must be personally present in New Zealand for the first day of that 183-day period.

Borrowers who qualify will have all interest charges written off from the day they first met the 183-day requirement.

Once borrowers have qualified for the full interest write-off they will continue to be eligible for the write-off until they have been overseas for 184 consecutive days or more (a 184-day absence). If a period that would have been 184 or more consecutive days overseas is broken by a period or periods in the aggregate of 31 days or less in New Zealand, the time spent in New Zealand will be treated as having been spent overseas. Borrowers must be personally present overseas on the first day of a 184-day absence.

When borrowers cease to be eligible for the interest write-off, any interest charged from the first day of the 184-day absence will not be written off or, if already written off, will be reinstated.

Borrowers who are present in New Zealand for part of a day will be treated as being present in New Zealand for the whole of that day and not absent from New Zealand for any part of that day.

Example one

Scott has been living in England for the last two years and returns to New Zealand to live here permanently on 1 June 2006. Scott meets the 183-day requirement on 30 November 2006 and is eligible to have all interest charged from 1 June 2006 written off.

Example two

Maria lives in New Zealand and travels to Australia for two weeks in May 2006. Maria would have spent 183 consecutive days in New Zealand from 1 April 2006 if she had not gone overseas. Because she spent 31 days or less overseas, in what otherwise would have been 183 days in New Zealand, the time spent in Australia is treated as if she had stayed in New Zealand. Maria will be eligible for a full interest write-off from 1 April 2006.

Example three

Lucy has been living in Fiji for two years. On 1 September 2006 Lucy returns to New Zealand for three months. Lucy does not meet the 183-day requirement and is not eligible for the interest write-off.

Example four

Tom lives in New Zealand and has met the 183-day requirement. On 1 December 2006 Tom goes to the UK to travel. Once Tom has been out of New Zealand for 184 days he ceases to be eligible for the interest write-off because he does not meet the criteria for an exemption. Any interest written off since 2 December 2006 (the day after he left New Zealand) will be reinstated.

Example five

Emily lives in New Zealand and has met the 183-day requirement. She moves to Australia on 1 January 2007. In March 2007 she returns to New Zealand for a one-week holiday before returning to Australia. Emily would have spent 184 consecutive days in Australia from 2 January 2007 if she had not returned to New Zealand for the one-week holiday. Because she spent 31 days or less in New Zealand, the time spent in New Zealand is treated as if she had stayed in Australia. Emily ceases to be eligible for the interest write-off, and any interest written off from 2 January 2007 will be reinstated.

Exemptions

The Commissioner of Inland Revenue may grant an exemption to the 183-day requirement in certain circumstances. Borrowers who are granted an exemption will qualify for the full interest write-off for the period for which the exemption is granted, even if they have a 184-day absence. For borrowers to be granted an exemption they must meet certain conditions and provide proof, as outlined below, to Inland Revenue that they meet these conditions. Borrowers must also provide any other information that the Commissioner of Inland Revenue may reasonably require to establish if an exemption applies.

All borrowers who meet the 183-day requirement or are granted one of the following exemptions will have an interest write-off credited to their student loan account after the end of each tax year (31 March).

Exemptions can be granted in the following circumstances:

Full-time study overseas at post-graduate level

Post-graduate study must be at levels equivalent to 8, 9 or 10 on the New Zealand Register of Quality Assured Qualifications under section 253(1)(c) of the Education Act 1989. For borrowers to be granted an exemption under this category they must provide the following proof:

- documentation from New Zealand Qualifications Authority (NZQA) verifying that the post-graduate course is equivalent to levels 8, 9 or 10; and
- evidence from the overseas education provider verifying full-time, post-graduate enrolment, for the course verified by the NZQA.

Example six

Louise does not meet the 183-day requirement because she is doing her Masters in Arts at the London School of Economics and Political Science. She provides proof to Inland Revenue that she meets the criteria for the full-time study at post-graduate level exemption. She is granted an exemption and is eligible for the interest write-off.

Working for the New Zealand government

Borrowers who are away from New Zealand in the service in any capacity of the government of New Zealand – for example, a member of the armed forces – may qualify for an exemption.

Example seven

John does not meet the 183-day requirement because he is working for the Ministry of Foreign Affairs and Trade at the New Zealand Embassy in the Cook Islands. John applies for, and is granted, an exemption. John is eligible for the interest write-off.

Unexpected delay in returning to New Zealand

Borrowers who are unexpectedly delayed in returning to New Zealand because of events or circumstances beyond their control may be eligible for the exemption. They must be resident for income tax purposes during the time in question and must provide proof:

- of their intended return to New Zealand; and
- that, had they returned to New Zealand as intended, they would have met the 183-day requirement; and
- of the unexpected delay that resulted in their not being able to return to New Zealand as intended; and
- that the unexpected delay was due to an event or circumstance beyond their reasonable control, such as:
  - an airline strike;
  - personal illness;
  - death of a family member;
  - fire, flood, storm, earthquake, landslide, volcanic eruption or other act of God;
  - an explosion or nuclear, biological, or chemical contamination; or
  - sabotage, terrorism or an act of war (whether declared or not).

Example eight

Robert has met the 183-day requirement. He planned to travel overseas for five months but becomes unwell while overseas and cannot travel home to New Zealand for another two months. Robert has a 184-day absence overseas but applies to the Commissioner of Inland Revenue for an exemption. He provides proof that he was unexpectedly delayed in returning to New Zealand, is granted an exemption and continues to be eligible for the interest write-off for the entire time he was overseas.

Unplanned absence

Borrowers who have an unplanned absence owing to an event or circumstances beyond their control may be eligible for the exemption. They must be resident for income tax purposes during the time in question and must provide proof:

- of the duration of their unplanned absence from New Zealand; and
- that the absence was due to an event or circumstance beyond their reasonable planning or control, such as:
  - the illness or death of a family member overseas;
  - their employer requiring attendance at a conference overseas.

Example nine

Liz has met the 183-day requirement and travels to Brazil for a holiday. She was overseas for 180 days and returns permanently to New Zealand. After one week back in New Zealand she has to go to Australia for her grandmother's funeral and stays there for 10 days. Because Liz spent less than 31 days in New Zealand in what otherwise would have been 184 or more consecutive days overseas, the time spent in New Zealand is treated as having been spent overseas. Liz has a 184-day absence overseas. She provides proof to Inland Revenue of her unplanned absence overseas and is granted an exemption. She remains eligible for the interest write-off while she was overseas.

Absence because of employment or occupation

Borrowers who are required to be absent from New Zealand because of their employment or occupation may be eligible for the exemption. They must be resident for income tax purposes during the time in question and have a permanent place of abode only in New Zealand. They must provide proof:

- that they receive either a source deduction payment (such as salary or wages) as defined in section OB 2(1) of the Income Tax Act 2004; or
- income from a business that has a permanent place of business in New Zealand; and
- the majority of their absences from New Zealand are because of their employment or occupation.

Example ten

Billy has met the 183-day requirement. Billy's New Zealand employer sends him to Australia to work in the Sydney office for seven months. He stays in a hotel in Sydney and keeps in regular contact with his wife and children, who have remained in their family home in Auckland. (Billy's permanent place of abode is in New Zealand only.) He continues to receive salary from his New Zealand employer. He has a 184-day absence overseas but provides proof to Inland Revenue that he meets the conditions for the absence because of employment exemption. He is granted an exemption and remains eligible for the interest write-off while he is overseas.

Working or volunteering for a charitable organisation

Borrowers who are working as a volunteer or for token payment for a charitable organisation named in the regulations made under section 87 of the Student Loan Scheme Act 1992 can receive an exemption under this category for a maximum aggregate period of 24 months.

Partner of someone who would meet one of these exemptions

Borrowers who go overseas with partners who would meet the conditions for one of the earlier exemptions may be eligible for the exemption. They must be resident for income tax purposes during the time in question and provide proof:

- of their relationship with their wife or husband, civil union partner or de facto partner (hereafter referred to as "partner"); and
- that the absence from New Zealand resulted because they accompanied their partner overseas; and
- the partner was absent from New Zealand –
  - undertaking full-time study overseas at post-graduate level and satisfies the conditions of the full-time study overseas at post-graduate level exemption (as outlined earlier); or
  - in the service in any capacity of the government of New Zealand; or
  - as a result of employment or occupation (as outlined earlier); or
  - because the partner was working as a volunteer or for token payment for a charitable organisation named in regulations (as outlined earlier).

Borrowers can receive an exemption for a maximum aggregate period of 24 months if their partner was working as a volunteer or for token payment for a charitable organisation listed in the regulations to the Student Loan Scheme Act 1992.

Transitional provision

A transitional provision gives the Commissioner of Inland Revenue the discretion to grant a full interest write-off to borrowers who fail to meet the 183-day requirement from 1 April 2006. An interest write-off may be granted for up to 183 days during the period 1 April 2006 to 30 September 2006. This provision will ensure that

borrowers are treated the same as if the "interest-free" student loans policy was implemented as a true interest-free policy, with borrowers not being charged interest on their loans until they have been overseas for 184 days.

Example eleven

Sam has lived in New Zealand all of his life. On 1 September 2006 he moves to the United States permanently. He has not met the 183-day requirement from 1 April 2006. Under the transitional provision, the Commissioner of Inland Revenue grants Sam an interest write-off for the period 1 April 2006 to 1 September 2006. This is because if interest was not charged, Sam would have been entitled to an interest-free loan until he moved to the United States.

Example twelve

Belinda has also lived in New Zealand all of her life. On 1 May 2006 she leaves New Zealand, travels around Asia for four months, returning to New Zealand on 31 August 2006. She has not met the 183-day requirement from 1 April 2006. Under the transitional provision, the Commissioner of Inland Revenue grants Belinda an interest write-off for the period 1 April 2006 to 30 August 2006. This is because if interest was not charged, Belinda would have been entitled to an interest-free loan for this period. Belinda meets the 183-day requirement on 1 March 2007 and is eligible for an interest write-off from 31 August 2006 onwards.

Objections to decisions made by Inland Revenue

Borrowers will be able to challenge the decision made by Inland Revenue not to grant an exemption to the 183-day requirement.

Consequential changes

All borrowers are required to advise Inland Revenue when they have been, or expect to be, overseas for more than three months. All borrowers who have advised Inland Revenue of their absence, or expected absence, overseas are required to advise Inland Revenue when they return to New Zealand.

From 1 April 2006, a base interest write-off or an interest reduction can be granted for a maximum aggregate period of two tax years each.

Example thirteen

Alex does not meet the 183-day requirement because he spends all of the 2007 tax year in South America. He remains a resident for income tax purposes because he has a permanent place of abode in New Zealand. He works part-time and his income is below the repayment threshold. He is eligible for a base interest write-off for the 2007 tax year. On 1 April 2007 he returns to New Zealand, meets the 183-day requirement on 30 September 2007, and is eligible for the full interest write-off from 1 April 2007. On 1 April 2008 he leaves for a one-year holiday in Australia and remains a resident for income tax purposes. He has a 184-day absence and is not eligible for the full interest write-off from 2 April 2008 (the day after he left New Zealand) but is eligible for a base interest write-off for the 2009 tax year because his income is below the repayment threshold.

Application date

The new interest write-off applies to interest charged on or after 1 April 2006.

REFUNDS OF STUDENT LOAN OVER-PAYMENTS

Sections 21, 57A to 57D, 58A and 66B of the Student Loan Scheme Act 1992

New legislation introduces new rules regarding refunds of student loan over-payments that relate to the 2005-06 and prior tax years. An over-payment is any amount deducted or paid in excess of a borrower's repayment obligation for a year.

Background

The changes were made to protect the integrity of the Student Loan Scheme following reports of a borrower seeking to arbitrage between the interest rate charged when an over-payment was made and the "interest-free" student loans policy.

They were added to the Taxation (Urgent Measures) Bill by means of Supplementary Order Paper.

Key features

Refunds can no longer be issued for student loan over-payments that relate to the 2003-04 and prior tax years.

Refunds of over-payments which relate to the 2004-05 and 2005-06 tax years are not eligible for the new full interest write-off, except in the case of significant financial hardship. Significant financial hardship includes difficulties that arise because of:

- borrowers' inability to meet minimum living expenses; or
- their inability to carry out their usual occupation because of illness, injury, or disability; or
- their inability to meet mortgage repayments on their primary residence, resulting in the mortgagee seeking to enforce the mortgage on the residence; or

- the cost of modifying a residence to meet special needs arising from a disability of a borrower or a borrower's dependant; or
- the cost of medical treatment for an illness or injury of a borrower or a borrower's dependant; or
- the cost of palliative care for a borrower or a borrower's dependant; or
- the cost of a funeral for a borrower's deceased dependant.

Any student loan repayments will go first to the portion of a borrower's loan that is not eligible for the new interest write-off.

Any amount refunded that is not eligible for the new interest write-off will be eligible for the full interest write-off while the borrower is studying and for the base interest write-off and reduction provisions. Borrowers must be resident for income tax purposes to qualify for any of these exemptions.

Borrowers whose repayment obligation is reduced upon reassessment for periods prior to 1 April 2006 are able to claim a refund of the difference in the assessed repayment obligations.

Borrowers are not able to apply for a special student loan repayment deduction rate below the standard deduction rate of ten percent until 1 April 2006.

Example one

In the 2006 tax year Pita has a repayment obligation of $6,000. He made total repayments for the year of $10,000. On the 1st May 2006 he requests and then receives a refund of his $4,000 over-payment to pay for an overseas holiday. His loan balance increases by $4,000. Because the amount refunded was not due to significant financial hardship, interest charged on $4,000 of Pita's loan is not eligible for the new interest write-off. Any repayments Pita makes on his student loan go first to the portion that is not eligible for the new interest write-off (the $4,000 portion).

Objection to decisions made by Inland Revenue

Borrowers will be able to object to the decision made by Inland Revenue that an over-payment refunded was not because of significant financial hardship.

Application date

The changes apply to refunds of over-payments requested on or after 30 November 2005.

INTEREST RATE FORMULA

Sections 2 and 87 of the Student Loan Scheme Act 1992

The Student Loan Scheme Amendment Act 2005 allows the student loan scheme interest rates to be set by a formula adopted by Order in Council.

Application date

The amendments allow a formula to be adopted for the 2006-07 and future tax years.

AMNESTY ON STUDENT LOAN PENALTIES

Sections 45A to 45D and 66A of the Student Loan Scheme Act 1992

Borrowers who are not resident in New Zealand for income tax purposes on 31 March 2006 will be able to apply to have penalties on any overdue student loan assessment remitted. Remission will be dependent on their giving an undertaking, and adhering to that undertaking, that all future liabilities arising under the Student Loan Scheme Act 1992 for the next two years will be met as they fall due.

Background

The purpose of the amnesty is to give non-resident borrowers in arrears the chance of a "fresh start". The penalty rate is equivalent to an annual interest rate of 26.82 percent, which means that once borrowers fall behind in their payments, the level of debt rapidly gets out of control. For many borrowers the amount of their overdue debt, including penalties, is a barrier to their return to New Zealand.

Key features

The amnesty will apply to borrowers who are not resident in New Zealand for income tax purposes on 31 March 2006.[1] It will include borrowers who are non-resident, but are not being treated as such as they have failed to advise Inland Revenue that they have left New Zealand, and therefore their correct residency status has not been determined.

Borrowers will be required to give an undertaking (and adhere to it) to meet all their obligations under the Student Loan Scheme Act for a two-year period to qualify for the amnesty. For borrowers returning to New Zealand this will mean meeting their income-contingent liability, including having repayment deductions made from their salary and wages. For borrowers remaining overseas it

[1] Borrowers are considered to be resident if they have a permanent place of abode in New Zealand. Borrowers who do not have a permanent place of adobe in New Zealand will cease to be resident if they are personally absent from New Zealand for more than 325 days in any 12-month period. Further information on residence can be found in Inland Revenue's *New Zealand tax residence guide* (IR292), which can be found on our website – www.ird.govt.nz

will mean making each quarterly instalment as it falls due. A combination of the two will be allowed – for example, one year overseas and one year in New Zealand – provided the relevant liability is kept up-to-date.

When an application for the amnesty is received and accepted, any penalties incurred up to that time will be remitted, and the overdue assessments on which the penalties were charged will be "returned" to the loan balance. As interest would have ceased once an assessment became subject to penalties, interest will be charged in place of the remitted penalties. If borrowers fail to meet their liability as it falls due for the two-year period, the original assessments and penalties proportional to the degree of non-compliance can be reinstated.

The amnesty will apply for the period 1 April 2006 to 31 March 2007. It will apply to both those non-resident borrowers who return to New Zealand and those who do not. Borrowers who return to New Zealand will be entitled to interest-free student loans once they have been back in New Zealand for a continuous period of 183 days or more (subject to the 31-day rule referred to earlier relating to interest-free student loans).

Borrowers will be able to challenge the following decisions made by Inland Revenue:

- not to write-off penalties;
- the amount of penalties written off;
- that the amnesty conditions have been breached; and
- to reinstate penalties if the amnesty conditions were breached.

Application date

The amnesty applies to applications received during the year ending 31 March 2007.

Example one: Borrower returning to New Zealand

Rachel moved to live long-term in Australia in January 2004. On 1 April 2004 her student loan balance was $15,000, and she has been issued with non-resident assessments for the 2004-05 and 2005-06 tax years of $2,050 and $1,980 which she has failed to pay. As at 1 April 2005 the 2004-05 assessment ceased to be subject to standard interest (of 7.0%) and instead became subject to compounding late payment penalties of 2% per month. The 2005-06 assessment became subject to penalties one year later on 1 April 2006. Her total late payment penalties on 1 April 2006 are $641. Her loan, excluding the overdue assessments, is $13,000, making her total debt $17,671.

On 2 April 2006 Rachel returns to New Zealand and applies for her penalties to be remitted under the amnesty provisions. Inland Revenue accepts Rachel's application and reverses the penalties and overdue assessments. Interest is charged in place of the penalties. Overall, Rachel's loan balance on 1 April 2006 is reduced by $498 (penalties of $641 less interest of $143 charged in place of penalties), to $17,173.

Rachel starts working for salary and wages on 1 May 2006. After she has been back in New Zealand for 183 continuous days she qualifies for an interest-free student loan, backdated to the date she returned.

Rachel's repayment obligation (based on her income) is $2,200 for the 2006-07 tax year and $2,400 for the 2007-08 tax year, which she has deducted each fortnight by her employer. By having the correct repayment deductions made each fortnight, Rachel has met her obligations. Her loan balance on 31 March 2008 will have reduced to $12,573.

Example two: Borrower remaining overseas

Same as in example one, but Rachel remains overseas. Because she has remained overseas, her loan remains subject to interest.

Rachel will have non-resident assessments for the 2006-07 and 2007-08 tax years. These assessments will be due in four equal instalments at the end of June, September, December and March during each tax year. Rachel's two-year period runs until 2 April 2008. She must therefore make all payments for these two tax years as they fall due, with the last instalment falling due on 31 March 2008.

Example three: Borrower failing to meet the two-year test

Same as example one, but 12 months after having her application for the amnesty accepted Rachel changes jobs and fails to give her new employer the correct deduction code. Despite reminders from Inland Revenue, Rachel continues to fail to do so.

As the conditions were met for only half the amnesty period, Inland Revenue decides to reinstate half the non-resident assessments and the associated penalties previously remitted.

Example four: Borrower not entitled to the amnesty

Mike left New Zealand on 20 February 2003 to live in the UK for three years. Mike advised Inland Revenue of his departure and he was determined to be a non-resident from that date. He was issued with non-resident assessments for each of the 2003-04, 2004-05 and 2005-06 tax years, but he failed to pay anything. Mike returned to New Zealand permanently on 21 February 2006 and regains his New Zealand tax residence from that date. On 30 April 2006 he contacts Inland Revenue and asks to come within the amnesty.

Mike is ineligible as he was not a non-resident on 31 March 2006. However, once he has been back in New Zealand for 183 days, he will be entitled to have interest charged on his loan from 1 April 2006 written off.

TAXATION (ANNUAL RATES OF INCOME TAX 2005-06) ACT 2005

The Taxation (Annual Rates of Income Tax 2005-06) Act 2005 is one of the three Acts to result from passage of the Taxation (Urgent Measures) Bill, introduced in November 2005. The new Act received Royal assent on 21 December 2005.

Schedule 1, Income Tax Act 2004

The income tax rates that will apply for the 2005-06 tax year are as follows:

Policyholder income	33 cents for every $1 of schedular taxable income
Maori authorities	19.5 cents for every $1 of taxable income
Companies, public authorities and local authorities	33 cents for every $1 of taxable income
Trustee income (including that of trustees of superannuation funds)	33 cents for every $1 of taxable income
Trustees of group investment funds in respect of category A	33 cents for every $1 of schedular taxable income
Taxable distributions from non-qualifying trusts	45 cents for every $1 of taxable income
Other taxpayers (including individuals)	
– Income not exceeding $38,000	19.5 cents for every $1 of taxable income
– Income exceeding $38,000 but not exceeding $60,000	33 cents for every $1 of taxable income
– Income exceeding $60,000	39 cents for every $1 of taxable income
Specified superannuation contribution	
Where the employee has made an election under section NE 2AA	39 cents for every $1 of the withholding tax contribution
Where the employer has made an election under section NE 2AB and the amount of salary or wages given by section NE 2AB is:	
– not more than $9,500	15 cents for every dollar of contribution
– more than $9,500 and not more than $38,000	21 cents for every dollar of contribution
– more than $38,000	33 cents for every dollar of contribution
Where no such election is made	33 cents for every $1 of contribution

The income tax rates confirmed are the same as those that applied for the 2004-05 tax year.

TAXATION (URGENT MEASURES) ACT 2005

The Taxation (Urgent Measures) Act 2005 is one of the three Acts to result from passage of the Taxation (Urgent Measures) Bill, introduced in November 2005. The new Act received Royal assent on 21 December 2005.

WINE PRODUCER REBATE

Sections CV 3 and CV 4 of the Income Tax Act 2004 and sections 3, 4B and 85J of the Tax Administration Act 1994

Changes to the Income Tax Act 2004 and the Tax Administration Act 1994 will enable Inland Revenue to assist in the extension of the Australian wine producer rebate to New Zealand wine producers whose wine is exported to Australia.

Background

Wine equalisation tax is an Australian tax that is charged on wholesale sales of wine in Australia. New Zealand wine that is exported to Australia is also subject to the wine equalisation tax. The tax is paid in Australia either by wine importers or any other wine wholesalers.

In 2004, Australia passed legislation giving a wine producer rebate to Australian wine producers to partially compensate for the wine equalisation tax. Qualifying Australian wine producers are eligible for a rebate of 29 percent of the wholesale value of wine produced, up to a maximum of $290,000 each year. Since New Zealand producers did not receive a similar rebate, it was considered that New Zealand wine would be commercially disadvantaged in the Australian wine market.

The Australian government therefore agreed to extend the wine producer rebate to New Zealand wine producers selling in the Australian market. It was also decided that New Zealand will assist Australia in the administration of the rebate to New Zealand producers.

To extend the rebate to New Zealand producers, legislative changes were required in both countries. The Australian legislation, extending the wine producer rebate to New Zealand producers, received Royal assent on 19 December 2005.

The corresponding New Zealand changes were added to the Taxation (Urgent Measures) Bill by means of a Supplementary Order Paper.

Key features

New section CV 3 of the Income Tax Act 2004 ensures that the wine producer rebate derived by a New Zealand wine producer is included as income for the purposes of that Act.

New section CV 4 enables the Commissioner of Inland Revenue to prescribe regulations for the administration of the wine producer rebate. The regulations will relate to:

- claiming the rebate;
- approval or verification of a NZ wine producer's entitlement to a rebate; and
- any other matters necessary to give effect to a provision relating to a wine producer rebate in an agreement between the governments of New Zealand and Australia for the avoidance of double taxation and prevention of fiscal evasion.

For the provisions of the Tax Administration Act to apply to the wine producer rebate, the definition of "tax" in section 3(1) of the Tax Administration Act has been amended to include the Australian wine producer rebate.

New section 4B of the Tax Administration Act governs the application of that Act and regulations to the rights and obligations of a person in relation to the wine producer rebate. The Act and regulations apply to the rights and obligations of a person as if:

- claims for approval by a New Zealand wine producer to be a New Zealand participant were an application for registration for a tax imposed by an Inland Revenue Act;
- claims for payment of a wine producer rebate were an application for a refund of tax imposed by an Inland Revenue Act;
- a decision concerning a person's entitlement to a wine producer rebate were a decision by the Australian Taxation Office concerning an entitlement of the person to a refund of Australian tax;
- a payment to a person of a wine producer rebate was a refund by the Australian Taxation Office of Australian tax.

New section 85J of the Tax Administration Act overrides the general secrecy provisions to enable the Commissioner of Inland Revenue to transfer information to the Australian Taxation Office and the New Zealand Customs Service. The information transferred will be that which is relevant to the claim by a New Zealand wine producer for a wine producer rebate or for the purposes of the approval or verification of an entitlement to the wine producer rebate.

Application date

These provisions apply from 21 December 2005, the date of assent of the Act.

ENHANCEMENTS TO WORKING FOR FAMILIES

Section KD 2(6) of the Income Tax Act 2004

The Working for Families package has been extended to provide additional income assistance for working families, including middle-income families that will become entitled to family assistance for the first time.

As a result, the income threshold at which the rate of family assistance begins to abate has been raised to $35,000 and the rate at which assistance abates for income that is over the new threshold has been reduced to 20 percent.

Background

The family assistance provisions enhance changes that were already scheduled to come into effect on 1 April 2006 as part of the phased implementation of Working for Families, which began in 2004.

Application dates

The amendments to the threshold and the abatement rate will take effect from the tax year beginning 1 April 2006.

Key features

The first amendment increases the income threshold at which family assistance begins to abate to $35,000. This is an increase from the threshold of $27,500 that was scheduled to apply from 1 April 2006.

The second amendment reduces the rate at which family assistance abates for income that is over the new threshold to 20 cents in the dollar. This reduces the abatement rate from the 30 cents in the dollar that was scheduled to apply from 1 April 2006.

Schedule 12 of the Income Tax Act 2004 has been updated to reflect the new income threshold.

ORDERS IN COUNCIL

STUDENT LOAN INTEREST RATES FORMULA

Section 87 of the Student Loan Scheme Act 1992 allows a formula to be made by regulation for setting the student loan interest rates.

The formula which has been made for setting the interest rates for the 2006-07 and future tax years is as follows:

- the five-year average of the ten-year bond rate to December in the year preceding the tax year to which the rate will apply (to two decimal places) plus a margin of 0.74 percent (to cover administration costs). This number is then rounded to the nearest decimal place and is the total interest rate;
- the interest adjustment rate is determined by the annual movement in the Consumer Price Index (excluding credit services) for the year to December preceding the tax year to which the rate will apply rounded to one decimal point.
- the base interest rate is the difference between the total interest rate and the interest adjustment rate.

(Student Loan Scheme (Interest Rates Formulas) Regulations 2006, SR 2006/36)

STUDENT LOAN INTEREST RATES FOR 2006-07

Section 87 of the Student Loan Scheme Act 1992 allows the student loan interest rates that apply for a tax year to be set by regulation in accordance with the student loan interest rate formula (as outlined earlier).

The student loan interest rate for the 2006-07 tax year has been set at 6.9%, down from 7.0% for the 2005-06 tax year. The base interest rate is 3.8% and the interest adjustment rate 3.1%.

The new interest rates were calculated using the recently adopted formula.

(Student Loan Scheme (Interest Rates) Regulations 2006, SR 2006/51)

OPERATIONAL STATEMENT

GST TREATMENT OF SUPPLIES OF TELECOMMUNICATIONS SERVICES

Introduction

1. This Operational Statement (OS) sets out Inland Revenue's operational practice and provides guidelines as to the Goods and Services Tax (GST) treatment of cross-border supplies of telecommunications services under the Goods and Services Tax Act 1985 (the GST Act). In particular, it provides operational guidelines on the ordering rule that determines the person who initiates a supply of telecommunications services.

Application

2. This OS sets out Inland Revenue's position on the application of the law in this area.

3. Unless specified otherwise, all legislative references in this OS refer to the GST Act.

Background

Background to the GST legislation in the context of telecommunications services

4. Before 2003, the general "place of supply" rule and zero-rating provisions in the GST Act were not easily applied to cross-border supplies of telecommunications services. This led to uncertainty as to when supplies of telecommunications services were subject to GST in New Zealand.

5. Besides the need for certainty, an important GST principle in the context of telecommunications services is neutrality. A different GST treatment between resident and non-resident telecommunications suppliers would be undesirable because it would distort the behaviour of consumers and suppliers of telecommunications services. For example, if GST did not apply to imported telecommunications services, New Zealand consumers would be encouraged to substitute these services for the services supplied by local telecommunications suppliers.

6. The New Zealand Government published a discussion document, *GST and Imported Services – a challenge in an electronic commerce environment* in June 2001. The discussion document considered the GST treatment of telecommunications services.

7. The GST treatment of cross-border telecommunications services was clarified in the Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003 by inserting into the GST Act specific "place of supply" rules, zero-rating provisions and definitions relating to the context of telecommunications services.

Legislation

8. The relevant legislative provisions in the GST Act are:
   - the definitions of "content", "non-resident", "resident", "telecommunications services" and "telecommunications supplier" in section 2, and
   - sections 8, 8A, 11A, 11AB and 51.

9. For the purpose of the definitions of "non-resident" and "resident" in the GST Act, sections OE 1 and OE 2 of the Income Tax Act 2004 (the ITA 2004) are also relevant.

Discussion

"Telecommunications services" for GST purposes

10. It is important to distinguish "telecommunications services" from other services. As discussed later, "telecommunications services" are subject to specific "place of supply" and zero-rating rules for GST purposes. Suppliers of telecommunications services are also subject to a specific GST registration exception (see section 51(1)(e)).

11. The term "telecommunications services" is defined in section 2(1):

> "**Telecommunications services**" means the transmission, emission or reception, and the transfer or assignment of the right to use capacity for the transmission, emission, or reception, of signals, writing, images, sounds or information of any kind by wire cable, radio, optical or other electromagnetic system, or by a similar technical system, and includes access to global information networks but does not include the content of the telecommunication.

12. Based on this definition, examples of "telecommunications services" include a telephone call, accessing the internet via an internet service provider, a video conference, or a facility such as a leased lines agreement, website hosting or server hosting.

13. "Telecommunications services" exclude the content of the telecommunication. The term "content" is further defined in section 2(1):

> "**Content**" means the signals, writing, images, sounds or information of any kind that are transmitted, emitted or received by a telecommunications service.

14. Examples of telecommunications content include information obtained via an 0800 toll free number and images downloaded from an internet server. These do not form part of the "telecommunications services".

Telecommunications supplier

15. The term "telecommunications supplier" is defined in section 2(1):

> "**Telecommunications supplier**" means a person whose principal activity is the supply of telecommunications services.

16. Examples of telecommunications suppliers include landline and mobile phone service providers and internet service providers.

Residency rules for GST purposes

17. The residency rules for GST purposes are relevant to the determination of the GST treatment of cross-border supplies of telecommunications services. As discussed later, the application of the general "place of supply" rule in section 8(2) and the specific GST rules on supplies of telecommunications services depends upon the GST residency of the supplier.

18. Section 2 defines the terms "resident" and "non-resident" for GST purposes. These terms make cross-references to sections OE 1 and OE 2 of the ITA 2004, so that a taxpayer resident in New Zealand for income tax purposes under sections OE 1 and OE 2 of the ITA 2004 will also be resident in New Zealand for GST purposes.

19. Section OE 2 applies to companies. The discussion in this OS is limited to the GST residency rules that apply to companies, as most suppliers of telecommunications services are companies, rather than natural persons.

20. In addition to section OE 2, a company may be treated as a resident in New Zealand if paragraph (a) of the proviso to the definition of "resident" in section 2 applies. The company is deemed by paragraph (a) of the proviso to be resident in New Zealand to the extent that:

    (a) the company carries on a taxable activity or any other activity in New Zealand, and

    (b) it has a fixed or permanent place in New Zealand which relates to that taxable activity or other activity.

21. Paragraph (a) of the proviso contemplates apportionment. A company can be a resident to the extent that paragraph (a) of the proviso applies. The company can also be a non-resident to the extent that paragraph (a) of the proviso does not apply (but only if it is not otherwise a New Zealand resident under section OE 1 or OE 2 of the ITA 2004).

GST treatment of supplies of telecommunications services made by a resident in New Zealand

22. Section 8(2) states the general "place of supply" rule for GST purposes. That legislative provision treats services (including telecommunications services) provided by a person, who is a New Zealand resident, as services supplied in New Zealand.

23. If the person, being a New Zealand resident, is GST-registered and makes supplies in the course or furtherance of their taxable activity, the supplies are *prima facie* subject to GST at 12.5% under section 8(1).

24. However, telecommunications services can be zero-rated under section 11AB if they are made to:

    (a) an overseas telecommunications supplier (see section 11AB(a)), or

    (b) a person who is not an overseas telecommunications supplier for a telecommunications service that is initiated outside New Zealand (see section 11AB(b)).

25. The term "overseas telecommunications supplier" is not defined in the GST Act. The term refers to a telecommunications supplier who is a non-resident in New Zealand for GST purposes.

26. It should be noted that under section 11A(5), other GST zero-rating rules do not apply to supplies of telecommunications services.

GST treatment of supplies of telecommunications services made by a non-resident in New Zealand

27. The general "place of supply" rule in section 8(2) treats supplies of telecommunications services made by a person, who is non-resident in New Zealand, as services supplied outside New Zealand. *Prima facie*, these supplies are not subject to GST under section 8(1).

28. However, section 8(6) overrides the general "place of supply" rule under section 8(2). The provision treats telecommunications services as being supplied in New Zealand if:

    (a) the supplier is a non-resident of New Zealand, and

    (b) a person, who is physically in New Zealand, initiates the supply of telecommunications services from a telecommunications supplier.

29. Section 8(6) applies notwithstanding that the person may initiate the supply of telecommunications services on behalf of another person. Section 8(9)

determines the person who initiates the supply of telecommunications services. It also determines whether the specific "place of supply" rule in section 8(6) applies. (Please refer to paragraphs 34 to 39 for details.) Section 8(6) is subject to a number of exceptions however (as set out in paragraph 33 below).

30. Where the specific "place of supply" rule in section 8(6) applies (i.e. the telecommunications services are initiated in New Zealand under section 8(9)), the telecommunications services supplied by a non-resident supplier are treated as being supplied in New Zealand and are therefore subject to GST at 12.5% under section 8(1) if the non-resident supplier is registered or required to be registered for GST.

31. Where a non-resident telecommunications supplier makes supplies of telecommunications services that are treated as supplied in New Zealand and the total value of supplies exceed $40,000 (GST exclusive) in any 12-month period, the supplier must register for GST under section 51.

32. However, GST registration is not required, where the $40,000 registration threshold is exceeded solely as a result of making supplies of telecommunications services to non-residents, who are physically in New Zealand, or to persons whose physical location cannot be determined, but whose billing address (excluding post office boxes) is in New Zealand. For example, non-resident telecommunications companies do not have to register for GST in New Zealand solely because they make supplies to non-resident customers who use "roaming" services while staying in New Zealand (see example 11 in this OS).

Exceptions to the application of the specific "place of supply" rule section 8(6)

33. Where a non-resident telecommunications supplier makes supplies of telecommunications services, the specific "place of supply" rule in section 8(6) does not apply in the following three situations:

    (a) supplies between telecommunications suppliers: where a non-resident telecommunications supplier makes a supply of telecommunications services to another telecommunications supplier, section 8(7) provides that the supply is not treated as being made in New Zealand under section 8(6). Accordingly, the supply will not be subject to GST. This result applies even if the supply is initiated in New Zealand.

    (b) telecommunications services supplied by a non-resident to a GST-registered person for the purposes of carrying on that registered person's taxable activity: section 8(8) provides that unless the supplier and the recipient of the supply agree otherwise, the services are treated as being supplied outside New Zealand and will not be subject to GST.

    (c) subject always to the rules in paragraphs (a) and (b) above, where it is impractical for the telecommunications supplier to determine the physical location of the initiator due to the type of service or class of customer: section 8A(1) provides that the services must be treated as being supplied in New Zealand if the person's address for receiving invoices from the telecommunications supplier (excluding a post office box) is in New Zealand.

The ordering rule under section 8(9)

34. Determining which party has initiated a supply of telecommunications services is fundamental to the operation of the specific GST rules on telecommunications services. It determines whether a supply made by a non-resident telecommunications supplier is treated as being made in New Zealand under section 8(6). It is also relevant for determining whether a supply of telecommunications services can be zero-rated pursuant to section 11AB(b).

35. Section 8(9) sets out the ordering rule to determine the person who initiates a supply of telecommunications services:

> For the purposes of subsection (6) and section 11AB, the person who initiates a supply of telecommunications services is the person who–
>
> (a) Is identified by the supplier of the services as being–
>
> (i) The person who controls the commencement of the supply:
>
> (ii) The person who pays for the services:
>
> (iii) The person who contracts for the supply; and
>
> (b) If more than 1 person satisfies paragraph (a), is the person who appears highest on the list in that paragraph.

36. In order to apply the ordering rule, it is first necessary to determine what is being supplied. Is it a telecommunications service and what is the telecommunications service?

37. Once the supply has been identified as a telecommunications service, the next step is for the telecommunications supplier to determine who initiates the supply. Where the service supplied is a discrete voice, data or other telecommunications transmission, a telecommunications supplier may be able to identify a person who controls commencement by undertaking an action that clearly enables the service to be provided such as

dialling the telephone number or accepting a reverse charges call. It is likely that this person also pays for the service and has organised for the service to be provided.

38. However, in other situations, there may be no clear action or person that can be identified by the telecommunications supplier as controlling commencement. This may occur particularly where the service supplied is the facility to make or receive voice, data or other telecommunications transmissions (which may also include such transmissions).

39. Where the telecommunications supplier cannot identify the person who controls the commencement, the initiator of the supply will be the person who pays for the telecommunications services. The contractual arrangements between the parties need to be considered when it is not possible to ascertain the payer for the telecommunications services. In this situation, the person who contracts for a supply of telecommunications services is the person who initiates the supply.

GST treatment of regional telecommunications services arrangements

40. Regional telecommunications services arrangements may exist where a telecommunications supplier supplies telecommunications services to a company, which has branches and/or subsidiaries in a number of countries. The company receives only one invoice covering all branches and/or subsidiaries to which telecommunications services are supplied. The company then recharges the cost of telecommunications services to its branches and/or subsidiaries. (Please note that a recharge is a separate supply for the purpose of the "reverse charge" provisions and is discussed below in paragraph 104.)

41. The telecommunications services supplied under the regional telecommunications services arrangements will be subject to the specific "place of supply" and zero-rating rules in sections 8, 11A and 11AB as discussed above.

42. As a consequence of the regional telecommunications services arrangements, the company may supply recharge/cost allocation services to its branches and/or subsidiaries. The cost allocation services are not "telecommunications services".

43. However, the recharge/cost allocation services may be subject to the reverse charge mechanism under section 8(4B). This is because under section 8(4C), a recharge/cost allocation from a non-resident to a resident is treated as a supply of services that satisfy section 8(4B)(a) and (c).

44. The GST treatment of supplies of telecommunications services under regional billing arrangements is explained further in example 8 of this OS.

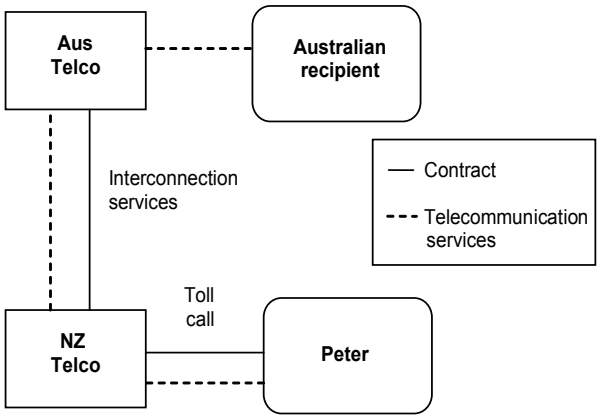
Operational Practice

45. Inland Revenue's operational practice in relation to the application of the ordering rule and the GST rules on telecommunications services is illustrated in the examples below.

Examples

Example 1: international toll call from New Zealand

46. Peter, a New Zealand resident, uses his New Zealand home telephone to call a friend in Australia. Peter is charged by his telecommunications supplier, NZ Telco, for making the call. NZ Telco (a New Zealand resident company) routes the call to the international destination, via Aus Telco's network. Aus Telco charges NZ Telco an interconnection fee.



International toll call – supply by NZ Telco to Peter

47. The supply is an international toll call and is supplied by NZ Telco to Peter. As NZ Telco is a New Zealand resident, section 8(2) deems this to be a supply made in New Zealand. The supply is subject to GST at 12.5% under section 8(1) and cannot be zero-rated under section 11AB because:

    (a) There is no supply of telecommunications services to an overseas telecommunications supplier.

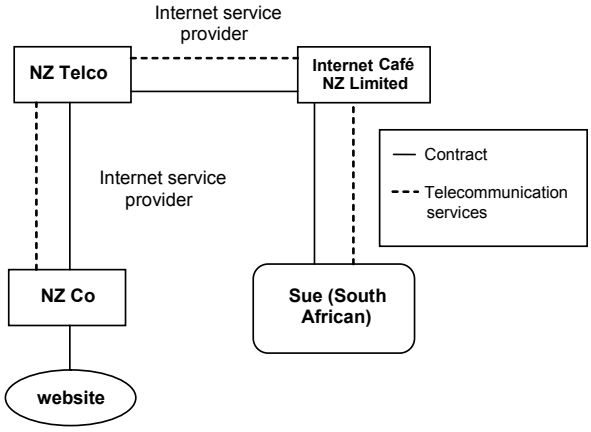
    (b) The supply of telecommunications services is not initiated outside New Zealand. Peter controls the commencement of the supply by dialling the international telephone number in New Zealand (being the action which clearly enables the service to be provided) and therefore initiates the supply under section 8(9).

Interconnection services – supply by Aus Telco to NZ Telco

48. Aus Telco is a non-resident for GST purposes. Therefore, the interconnection services supplied by Aus Telco to NZ Telco are deemed to be a supply outside New Zealand under section 8(2). As interconnection services fall within the definition of "telecommunications services", the additional place of supply rules in sections 8(3), (4) and (4B) do not apply (see section 8(5)). Furthermore, the specific telecommunications "place of supply" rule in section 8(6) does not apply, as both Aus Telco and NZ Telco are telecommunications suppliers (see section 8(7)). Therefore, the supply of interconnection services is not subject to GST in New Zealand.

Example 2: using the internet

49. Sue is a South African resident. She is on holiday in New Zealand and uses a computer in an internet café ($2 per hour) to download rugby results from a New Zealand website (NZ Co). The internet service provider (ISP) for the New Zealand website is NZ Telco, a New Zealand resident company. NZ Telco charges NZ Co a hosting fee and also charges Internet Café NZ Limited a monthly internet connection fee.



Internet access – supply by Internet Café NZ Limited to Sue

50. The supply is hourly access to the internet (a global information network) and, accordingly, is a telecommunications service under section 2(1). Internet Café NZ Limited is a New Zealand resident company. Therefore, under section 8(2), the supply of telecommunications services is deemed to be made in New Zealand.

51. The supply is subject to GST at 12.5% under section 8(1) and cannot be zero-rated under section 11AB(b) because the supply of telecommunications services is not initiated outside New Zealand. Sue controls the commencement of the supply by connecting to and accessing the internet (being the actions which clearly enable the service to be supplied). Therefore, Sue initiates the supply in New Zealand under section 8(9).

ISP service - supply by NZ Telco to Internet Café NZ Limited

52. An ISP service, being the provision of access to the internet, falls within the definition of "telecommunications services" in section 2(1). As NZ Telco is a New Zealand resident company, the service is deemed to be supplied in New Zealand under section 8(2).

53. The supply is subject to GST at 12.5% under section 8(1). It cannot be zero-rated under section 11AB because it is not a supply to an overseas telecommunications supplier and the supply is not initiated outside New Zealand. Both NZ Telco as the provider of the service and Internet Café NZ Limited as the recipient could be considered to control commencement of the supply. Accordingly, there is no clear action or person that can be identified by NZ Telco as controlling commencement. Therefore, Internet Café NZ Limited is the initiator as they pay for the service.

ISP hosting service - supply by NZ Telco to NZ Co

54. The supply is the provision of an ISP hosting service and is supplied by NZ Telco to NZ Co. This is a telecommunications service, being access to a global telecommunications network. NZ Co is charged a hosting fee.

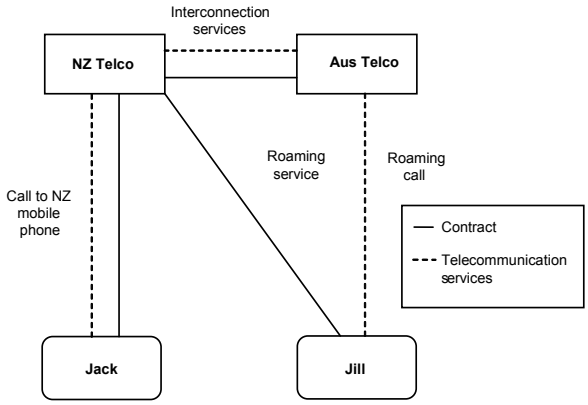
55. As NZ Telco is a New Zealand resident, the ISP hosting service is deemed to be supplied in New Zealand under section 8(2).

56. The supply is not zero-rated under section 11AB because NZ Co is not an overseas telecommunications supplier and the supply is initiated in New Zealand. Both NZ Telco as the provider of the service and NZ Co as the recipient could be considered to control commencement of the supply. Accordingly, there is no clear action or person that can be identified by NZ Telco as controlling commencement. Therefore, NZ Co is the initiator as they pay for the service.

Example 3: call to a person using an international roaming service

57. Jack, a New Zealand resident, uses his New Zealand home telephone to call Jill's mobile phone. Jill is a New Zealand resident and is on holiday in Australia. As her mobile phone has international roaming capability, she answers the call in Australia. Jack is charged by his telecommunications supplier, NZ Telco, for making a call to a New Zealand mobile phone number. The call is routed by NZ Telco to Aus Telco and then to Jill's mobile phone. NZ Telco charges Jill

a roaming charge for delivering the call to her in a foreign destination. Aus Telco charges NZ Telco an interconnection fee.



Mobile phone call - supply by NZ Telco to Jack (New Zealand resident)

58. The supply by NZ Telco to Jack is a call to a New Zealand mobile phone. As NZ Telco is a New Zealand resident, section 8(2) deems this supply to be made in New Zealand.

59. The supply is subject to GST at 12.5% under section 8(1). It cannot be zero-rated under section 11AB because it is not a supply to an overseas telecommunications supplier and the supply is not initiated outside New Zealand. Jack controls the commencement of the supply when he dials the mobile phone number. The supply is therefore initiated in New Zealand under section 8(9).

Roaming service - supply by NZ Telco to Jill (New Zealand resident roaming in Australia)

60. The supply is an international roaming service (connecting Jack's call to Jill) and is supplied by NZ Telco to Jill. As NZ Telco is a New Zealand resident, section 8(2) deems this supply to be made in New Zealand.

61. The supply is zero-rated under section 11AB(b). This is because Jill, who is not an overseas telecommunications supplier, initiates the supply of a telecommunications service (international roaming) outside New Zealand. Although Jill does not make the mobile phone call, she controls commencement of the international roaming service. This is through answering the call in Australia, having taken her mobile phone to Australia and connected to the overseas network (being actions which enable Jack's call to be connected to Jill.)

62. It is important to note in applying the ordering rule under section 8(9), that contractual arrangements do not determine who controls the commencement of the supply. The contractual arrangements are relevant to the determination of who initiates the supply only when it is not clear as to who controls the commencement of the supply and who pays for the telecommunications services.

63. In this example, Jill has entered into a contract with NZ Telco in New Zealand. The contract allows international roaming while Jill is overseas. This, however, does not mean that the international roaming service is initiated in New Zealand.

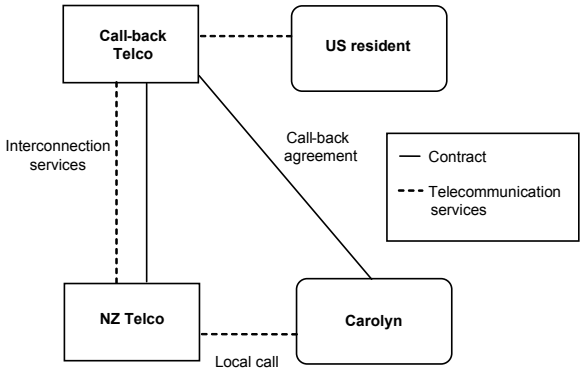
Interconnection services – supply by Aus Telco to NZ Telco

64. As Aus Telco is a non-resident, the interconnection services are deemed to be a supply outside New Zealand under section 8(2).

65. As interconnection services fall within the definition of "telecommunications services", the additional place of supply rules in sections 8(3), (4) and (4B) do not apply (see section 8(5)). Furthermore, the specific telecommunications "place of supply" rule in section 8(6) does not apply, as both Aus Telco and NZ Telco are telecommunications suppliers (see section 8(7)). Therefore, the supply of interconnection services is not subject to GST in New Zealand.

Example 4: international call-backs

66. Carolyn, who is New Zealand resident and not GST-registered, enters into a contract with a non-resident "call-back" telecommunications company (Call-back Telco) to make international telephone calls from New Zealand. Carolyn dials Call-back Telco's New Zealand local number and enters the details of a USA telephone number. Carolyn then hangs up her telephone. The non-resident call-back operator, using favourable international calling rates, places the call to the USA telephone number advised by Carolyn and then calls back Carolyn's original phone number to complete the call circuit between New Zealand and the USA.



Interconnection services – supply by NZ Telco to Call-back Telco

67. Call-back Telco contracts with NZ Telco to enable it to supply a calling service in New Zealand. Carolyn is not a party to this contract. The supply is the provision of interconnection services by NZ Telco to Call-back Telco. As NZ Telco is a New Zealand resident, section 8(2) deems this supply to be made in New Zealand. However, as it is supplied to an overseas (i.e. non-resident) telecommunications supplier, the service can be zero-rated under section 11AB.

Call-back service – supply by Call-back Telco to Carolyn (a NZ caller)

68. The supply is the provision of a call-back service which is supplied by Call-back Telco to Carolyn. As Call-back Telco is a non-resident for GST purposes, section 8(2) deems this supply to be made outside New Zealand.

69. As the call-back service falls within the definition of "telecommunications services", the additional place of supply rules in sections 8(3), (4) and (4B) do not apply (see section 8(5)). However, under the specific telecommunications "place of supply" rule in section 8(6), the supply will be deemed to be made in New Zealand if it is initiated by a person in New Zealand.

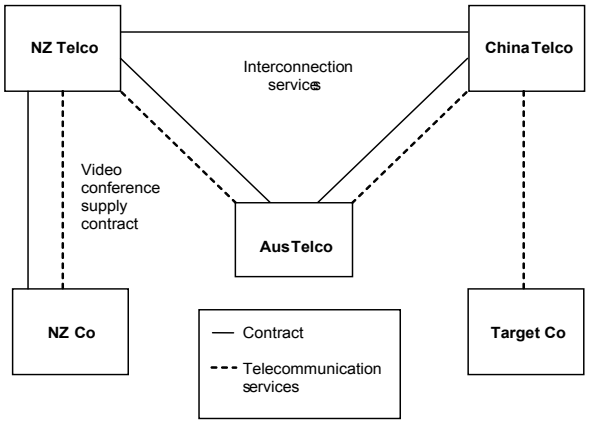
70. Although Call-back Telco dials the USA telephone number, Carolyn controls the commencement of the call-back service. This is through making the original telephone call and providing the USA telephone number (being actions which clearly enable the service to be supplied). Therefore, Carolyn initiates the supply of the call-back service under section 8(9).

71. Consequently, section 8(6) applies and the supply of the call-back service is treated as being made in New Zealand. Section 8(8) does not apply because Carolyn is not GST-registered. The supply is not zero-rated under section 11AB because it is not made to an overseas telecommunications supplier or initiated outside New Zealand.

72. Therefore, Call-back Telco will be required to register for GST under section 51 and charge GST on the supply of the call-back service, if their supplies exceed the registration threshold of $40,000 (GST exclusive) in a 12-month period.

Example 5: video conference

73. NZ Co contacts a New Zealand resident telecommunications company (NZ Telco) to arrange a video conference between its sales staff in New Zealand and a potential customer in China (Target Co). NZ Co arranges the video conference for a set time and is the registered contact and chairperson for the video conference. In order to provide the video conferencing service between New Zealand and China, NZ Telco obtains access to a bridge (a facility using interconnection software that is part of the overall telecommunications service) supplied by Aus Telco in Australia. In addition, NZ Telco's video conferencing facilities and China Telco's facilities are used to provide the service. NZ Co's sales staff in New Zealand dials the bridge and the customer in China dials the bridge to start the video conference. NZ Co pays for the video conferencing service (including the related video conferencing facilities).



Video conferencing service – supply by NZ Telco to NZ Co

74. The supply is the provision of a video conferencing service (including necessary facilities), and is supplied by NZ Telco to NZ Co. As NZ Telco is a New Zealand resident, the service is deemed to be supplied in New Zealand under section 8(2).

75. Under section 11AB, the supply will be zero-rated if it is made to an overseas telecommunications supplier or initiated outside New Zealand.

76. The video conference service is provided following a number of steps, including:

- negotiation between NZ Co and NZ Telco,
- communication of arrangements for the video conference,
- NZ Co's sales staff dialling the bridge to start the video conference, and
- the customer in China dialling the bridge to start the video conference.

77. As both NZ Co and Target Co dial the bridge to start the video conference, there is no clear action or person that can be identified by NZ Telco as controlling commencement. Therefore, NZ Co is the initiator as they pay for the service. The supply cannot be zero-rated under section 11AB(b) and will be subject to GST at 12.5%.

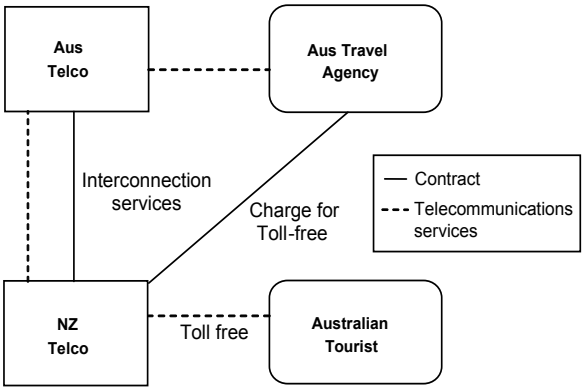
Interconnection services – supplies by Aus Telco and China Telco to NZ Telco

78. In respect of the interconnection services from Aus Telco and China Telco to NZ Telco, the suppliers are non-residents. Under section 8(2) both supplies are deemed to occur outside New Zealand.

79. Pursuant to section 8(7), the "place of supply" is not altered by section 8(6) as the supplies of interconnection services are made between telecommunications suppliers. The supplies of interconnection services by Aus Telco and China Telco to NZ Telco are not subject to GST.

Example 6: toll-free calling service

80. An Australian travel agency (Aus Travel Agency) has entered into an agreement with a New Zealand resident telecommunications company (NZ Telco) for a toll-free calling service. The arrangement allows customers of Aus Travel Agency, Australians on holiday in New Zealand, to call the toll-free number and be put through to Aus Travel Agency. Aus Travel Agency pays all charges for this service which may include a charge for setting up the toll-free arrangement, a monthly fee and any additional usage charges.



Toll-free service – supply by NZ Telco to Aus Travel Agency

81. In setting up and providing the service, NZ Telco is supplying a toll-free calling service to Aus Travel Agency. Under section 8(2), as NZ Telco is a resident, the supply is deemed to occur in New Zealand.

82. The toll-free calling service is provided following a number of steps, including:

- negotiation between Aus Travel Agency and NZ Telco,
- allocation of a toll-free number,
- setting up a call-centre, and
- advertising the toll-free number.

83. Both Aus Travel Agency's customers and Aus Travel Agency could be considered to control commencement of the toll-free service. Accordingly, there is no clear action or person that can be identified by NZ Telco as controlling commencement. Therefore, it is necessary to determine who pays for the service. In this example, Aus Travel Agency pays for the service and, therefore, also initiates the supply.

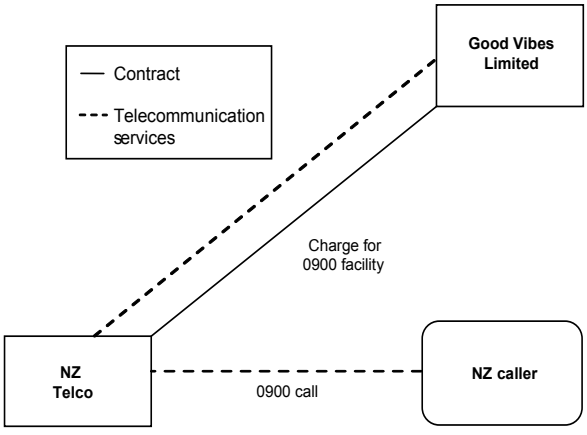
84. As Aus Travel Agency initiates the supply outside New Zealand, NZ Telco will be able to zero-rate this supply under section 11AB(b).

Interconnection services – charge by Aus Telco to NZ Telco

85. The supply of interconnection services by Aus Telco to NZ Telco is deemed to be a supply outside New Zealand under section 8(2) as the supplier is a non-resident. Under section 8(7), as the supply is between telecommunications suppliers, section 8(6) does not apply. Accordingly, the supply by Aus Telco is not subject to GST.

Example 7: 0900 service

86. An Australian clairvoyant (Good Vibes Limited) has entered into an agreement with a New Zealand resident telecommunications company (NZ Telco) for an 0900 number service. The service allows New Zealand callers to dial an 0900 number to access a message or speak to a Good Vibes Limited's employee for clairvoyant advice. Good Vibes Limited pays all the charges for this service which may include a charge for setting up the 0900 service, a monthly fee, and any additional usage charges. Good Vibes Limited charges the New Zealand caller, often using NZ Telco as an agent. The New Zealand caller is not registered for GST.



0900 service – supply by NZ Telco to Good Vibes Limited

87. The supply is the provision of an 0900 service and is supplied by NZ Telco to Good Vibes Limited. Under section 8(2), as NZ Telco is a New Zealand resident, the supply is deemed to be made in New Zealand.

88. Under section 11AB, the supply can be zero-rated if it is made to an overseas telecommunications supplier or initiated outside New Zealand.

89. The establishment of the 0900 service involves a number of steps, including:

- negotiation between Good Vibes Limited and NZ Telco,
- allocation of an 0900 number,
- setting up a call-centre, and
- advertising the 0900 number.

90. In setting up and providing the service, NZ Telco is supplying an 0900 service to Good Vibes Limited. Both Good Vibes Limited's customers and Good Vibes Limited could be considered to control commencement of the supply of the 0900 service. Accordingly, there is no clear action or person that NZ Telco can identify as controlling commencement. Therefore, it is necessary to determine who pays for the service. In this example, Good Vibes Limited pays for the service and therefore, initiates the supply.

91. Consequently, as Good Vibes initiates the supply outside New Zealand, NZ Telco will be able to zero-rate this supply under section 11AB(b).

Clairvoyant advice via an 0900 service – charge by Good Vibes Limited to the New Zealand caller (via NZ Telco as agent)

92. The 0900 service enables the New Zealand caller to access a message or speak to a Good Vibes Limited employee for clairvoyant advice. Thus, the supply of services is the provision of clairvoyant advice via an 0900 service.

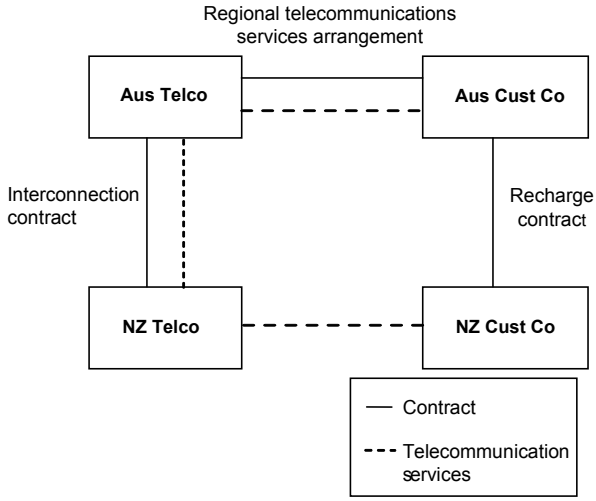
93. The clairvoyant advice is "the content of the telecommunications service". This is specifically excluded under the definition of "telecommunications services" in section 2(1). Accordingly, the general "place of supply" rules in the GST Act apply to these services.

94. As Good Vibes Limited is a non-resident, the supply is deemed to be made outside New Zealand under section 8(2). As the services are not physically performed by a person in New Zealand, section 8(3)(b) does not apply. Section 8(4) also does not apply as the New Zealand caller is not registered for GST.

95. However, the 0900 service supplied by Good Vibes Limited to the New Zealand caller may still be treated as being made in New Zealand and subject to GST if section 8(4B), commonly known as the "reverse charge" mechanism, applies. In the present case, as the New Zealand caller is not currently registered for GST, section 8(4B) will not apply to treat the 0900 service as supplied in New Zealand unless the New Zealand caller's acquisition of the 0900 services causes it to exceed the GST registration threshold.

Example 8: regional telecommunications services arrangements

96. Aus Telco enters into an arrangement with an Australian customer (Aus Cust Co) for the provision of trans-Tasman telecommunications services. These services typically allow the transmission of voice and data and also include other regional telecommunications services for use by Aus Cust Co and NZ Cust Co (a New Zealand resident member of the Aus Cust Co Group). Under the arrangement, Aus Cust Co is to be billed for the trans-Tasman telecommunications services. Aus Telco subcontracts with a New Zealand resident telecommunications company (NZ Telco) to provide the necessary New Zealand telecommunications services. Aus Cust Co recharges a portion of the services back to its New Zealand resident subsidiary, NZ Cust Co. NZ Cust Co is GST registered. (Please note that a recharge is a separate supply for the purpose of the "reverse charge" provisions and is discussed below in paragraph 104.)



Regional telecommunications services – supply by Aus Telco to Aus Cust Co

97. The supply is a regional telecommunications service which allows the parties to make or receive voice, data or other telecommunications transmissions. The regional telecommunications service is supplied by Aus Telco to Aus Cust Co. These supplies are treated as being made outside New Zealand under section 8(2), as Aus Telco is a non-resident for GST purposes.

98. The additional place of supply rules in sections 8(3), (4) and (4B) do not apply to telecommunications services (see section 8(5)). However, under the specific telecommunications "place of supply" rule

in section 8(6), the supply will be deemed to be made in New Zealand if it is initiated by a person in New Zealand.

99. The provision of the regional telecommunications service involves a number of steps, including:

- negotiation between Aus Telco to Aus Cust Co,
- negotiation between Aus Telco and NZ Telco,
- advising the Aus Cust Co Group of the new regional telecommunications service, and
- telephone calls and transmission of data by Aus Cust Co Group staff.

100. Aus Telco must, as always, start by considering whether it can accurately establish who controls commencement of the supply. The regional telecommunications service is organised by Aus Cust Co and also includes the services supplied to the Aus Cust Co group. As such, both Aus Cust Co and staff of Aus Cust Co group could be considered to control commencement of the regional telecommunications service. Accordingly, there is no clear action or party that can be identified by Aus Telco as controlling commencement. Therefore, it is necessary to determine who pays for the regional telecommunications service. In this example, Aus Cust Co pays for the service, and therefore, initiates the supply.

101. As Aus Cust Co initiates the supply outside New Zealand, section 8(6) does not apply and the supply is not subject to GST in New Zealand.

Outsourcing services – supply by NZ Telco to Aus Telco

102. The supply of the outsourcing services is deemed to be made in New Zealand, as NZ Telco is a New Zealand resident under section 8(2). However, the supply is zero-rated under section 11AB(a) because it is made by a resident telecommunications supplier (NZ Telco) to an overseas telecommunications supplier (Aus Telco).

Recharge agreement – supply by Aus Cust Co to NZ Cust Co

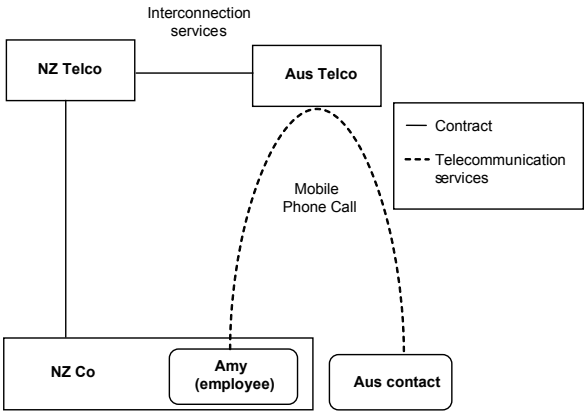
103. Aus Cust Co recharges a portion of the services back to NZ Cust Co. The recharge is a cost allocation and not the supply of telecommunications services.

104. The reverse charge mechanism in section 8(4B) needs to be considered if the supplies are not physically performed in New Zealand. Pursuant to section 8(4C), a cost allocation is a deemed supply of services that satisfies paragraphs (a) and (c) of section 8(4B).

105. If NZ Cust Co makes a total value of taxable supplies less than 95% of all supplies in the last 12 months, section 8(4B) would treat the supply as being made in New Zealand. NZ Cust Co must then pay GST on the supply at the rate of 12.5%.

Example 9: international roaming

106. A New Zealand resident company (NZ Co) has a mobile phone agreement with a New Zealand telecommunications supplier (NZ Telco). Amy, an employee of NZ Co, uses her work mobile phone outside New Zealand to call an Australian business contact (Aus contact). The call is made using a foreign telecommunications supplier (Aus Telco) who has an interconnection agreement with the NZ Telco.



Mobile roaming call - supply by NZ Telco to NZ Co

107. The supply is the provision of an international mobile roaming call by NZ Telco to NZ Co. As NZ Telco is a New Zealand resident, the international mobile roaming call service is deemed to be supplied in New Zealand under section 8(2).

108. However, the supply is zero-rated under section 11AB(b). Amy, initiates the supply of the international mobile roaming call service under section 8(9). She controls the commencement of the supply in Australia by taking her mobile phone to Australia, connecting to the international network and dialling the Australian telephone number (being actions which clearly enable the service to be supplied.)

109. Similarly, if Amy calls someone in New Zealand while staying in Australia, the charge to NZ Co for the call will be zero-rated. Furthermore, if NZ Co is charged in respect of a call by someone to Amy while overseas, the charge will be zero-rated. Amy controls commencement by answering the call in Australia, having taken her mobile phone to Australia and connecting to the international network. These are the actions which enable the service to be supplied.

110. Amy controls commencement of the supply notwithstanding that the contractual relationship in respect of the international mobile roaming call service is between NZ Telco and NZ Co.

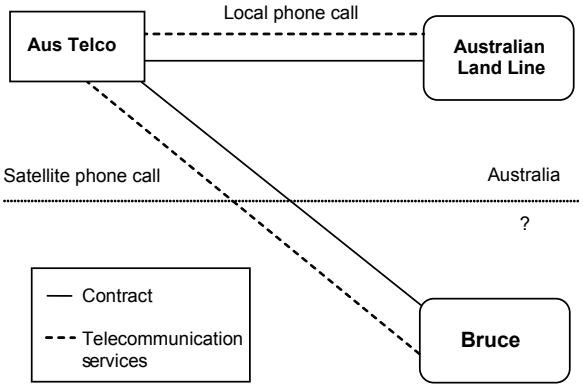
Interconnection services – supply by Aus Telco to NZ Telco

111. Aus Telco is a non-resident for GST purposes. Therefore, the interconnection services supplied by Aus Telco to NZ Telco are deemed to be a supply outside New Zealand under section 8(2).

112. As interconnection services fall within the definition of "telecommunications services", the additional place of supply rules in sections 8(3), (4) and (4B) do not apply (see section 8(5)). Furthermore, the specific telecommunications "place of supply" rule in section 8(6) does not apply, as both Aus Telco and NZ Telco are telecommunications suppliers (see section 8(7)). Therefore, the supply of interconnection services is not subject to GST in New Zealand.

Example 10: satellite telephone

113. Aus Telco supplies Bruce, a New Zealand resident, with a satellite phone for use on his private yacht. Bruce uses the satellite phone to call a friend in Australia while on a trans-Tasman crossing. While Aus Telco is able to identify Bruce as the person controlling the commencement and initiating the supply of the satellite telephone call, it is unable to identify his physical location when the service is initiated. The billing address for the satellite phone service is Bruce's home address in Auckland.



Satellite phone call – supply by Aus Telco to Bruce

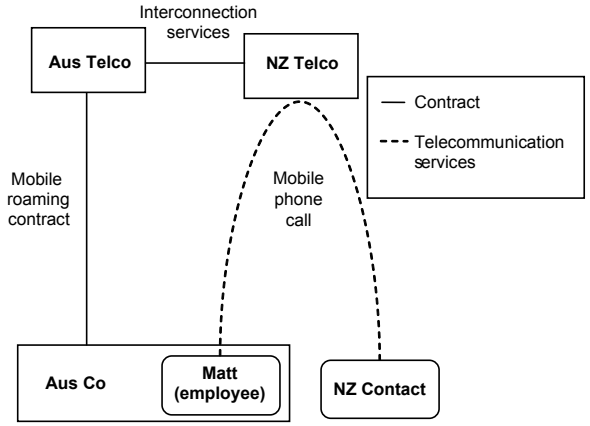
114. Under section 8(2), the supply of the satellite phone call is deemed to be made outside New Zealand because Aus Telco is a non-resident.

115. However, if Bruce initiated the supply of the satellite phone call while he was physically in New Zealand, section 8(6) would deem the supply to be made in New Zealand.

116. In this example, it is impractical for Aus Telco to identify the location at which Bruce initiates the supply of the satellite phone call. Pursuant to section 8A(1), as Bruce's billing address for the service is a physical address in New Zealand (and not just a post office box), the service is treated as being supplied in New Zealand. The supply of the satellite phone call will be subject to New Zealand GST at 12.5% if Aus Telco is registered or required to be registered for GST.

Example 11: international roamer in New Zealand

117. An Australian resident company (Aus Co) has a mobile phone agreement with an Australian telecommunications supplier (Aus Telco). Matt, an employee of the Australian company, while on business in New Zealand, uses his work mobile phone to call a New Zealand business contact. He accesses telecommunications services via a New Zealand resident telecommunications supplier (NZ Telco) who has an interconnection agreement with Aus Telco.



Mobile roaming service – supply by Aus Telco to Aus Co

118. Matt, who is an employee of Aus Co, initiates the supply of the mobile roaming service from a telecommunications supplier when he is physically in New Zealand. Matt controls the commencement of the supply by dialling the New Zealand telephone number after taking his mobile phone to New Zealand and connecting to the New Zealand network (being the actions which clearly enable the service to be provided.) As such, section 8(6) applies and the supply of the mobile roaming service by Aus Telco to Aus Co is treated as being made in New Zealand. *Prima facie*, the supply is subject to GST at 12.5% under section 8(1). The supply is not zero-rated under section 11AB because it is not made to an overseas telecommunications supplier or initiated outside New Zealand.

119. Similarly, if Matt calls someone in Australia while staying in New Zealand, the charge to Aust Co for the call is treated as being made in New Zealand and *prima facie* subject to GST at 12.5% under section 8(1). Furthermore, if Aus Co is charged in respect of a call by someone to Matt while in New Zealand, the charge will also be treated as being made in New Zealand and *prima facie* subject to New Zealand GST at 12.5%.

120. Normally this would require Aus Telco to register for and charge GST in New Zealand. However, under section 51(1)(e), if the sole reason for exceeding the $40,000 registration threshold is the supply of telecommunications services to non-residents who are physically present in New Zealand, the supplier of these services is not required to register for GST in New Zealand.

121. Assuming that Aus Telco has no other taxable activities in New Zealand, they fall under section 51(1)(e) and therefore, no New Zealand GST is required to be charged on the mobile roaming call.

Interconnection services – supply by NZ Telco to Aus Telco

122. The supply of interconnection services by NZ Telco to Aus Telco is deemed to be made in New Zealand under section 8(2), as NZ Telco is a New Zealand resident for GST purposes.

123. However, the supply would be zero-rated under section 11AB(a) because it involves a supply of telecommunications services by a resident telecommunications supplier (NZ Telco) to an overseas telecommunications supplier (Aus Telco).

This Operational Statement is signed on 14 March 2006.

Graham Tubb
National Manager, Technical Standards

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.

CASUAL RELIEF DRIVER IS EMPLOYEE

Case: TRA 003/05 Decision No 001/2006

Decision date: 10 January 2006

Act: Income Tax Act 1994 and the Employment Relations Act 2000.

Keywords: Casual employee, independent contractor, PAYE, relief driver.

Summary

The TRA found that the relief courier driver was a casual employee of the disputant.The disputant was therefore responsible for PAYE.

Facts

The disputant, a self-employed courier driver for a courier company, contested his PAYE assessments for the years ended 31 March 1999 to 2002 inclusive, at $259.87, $432.83, $1,465.73 and $940.81 respectively, as employing a relief driver but failing to deduct and pay PAYE to the defendant.

The disputant worked for the courier company pursuant to terms of a contract ("the agreement"). The disputant engaged the services of a relief driver to cover any period when he was sick or on holiday. There was no written contract between the disputant and the relief driver and the terms of the agreement and practice between them were:

I). The relief driver:

a) Would fill in for the disputant by completing his "run" making deliveries and pick-ups, complying with the guidelines and instructions of the courier company.

b) Was paid a fixed rate of $125 for each day he worked for the disputant irrespective of the number of pick-ups or deliveries made.

c) Worked the number of hours that were required to complete the deliveries and pick-ups for the day.

d) Was responsible for finding a replacement driver if he was unavailable. The agreement between the disputant and the courier company provided that if a relief driver fails to carry out his duties, then the courier company may appoint its own relief driver (at the disputant's cost).

e) Was able to refuse a request to relief drive.

f) Used the disputant's courier vehicle.

g) Did not supply any invoice for completed work.

h) Used the disputant's fuel card for fuel for the disputant's courier vehicle.

i) Was not liable for fines in respect of the vehicle, communications equipment or trailer.

j) Did not incur ordinary business expenses, for example; telephone, electricity, repairs, maintenance and courier tickets.

k) Only undertook the deliveries and pick-ups for the disputant in the latter's absence and was not required to undertake further activities and obligations (specified in the agreement between the courier company and the disputant).

II). The relief driver was not required to:

a) Hold a goods and services licence.

b) Meet the outgoings in respect of the courier vehicle or provide another courier vehicle approved by the courier company or the disputant if required.

c) Paint, at the relief driver's own expense, the courier vehicle with the courier company's colours and display advertising as may be required by the courier company.

d) Install and maintain communication, data processing or other equipment at the relief driver's own expense, if required by the courier company.

e) Ensure the courier vehicle had a current warrant of fitness and complied with all statutory regulatory requirements.

f) Take out and maintain insurance cover in respect of the courier activities.

III). Other important facts are:

a) The disputant's insurance policy covered the relief driver's use of the courier vehicle.

b) If the relief driver had failed to perform his courier duties, the procedure would be that the courier company would query this with the disputant who would then take appropriate action against the relief driver.

c) The method of calculating remuneration for the disputant and the relief driver was different. The disputant was paid by the courier company for the services rendered in terms of the number of pick-ups and deliveries made; the relief driver was paid a fixed amount of $125 for each day of relief driving regardless of how many pick-ups and deliveries he did.

d) The agreement between the disputant and the courier company expressly provided that the disputant was an "independent self-employed contractor" to the courier company and was not an employee.

Decision

The Authority considered a number of tests which assist the courts in deciding whether a person is engaged as an employee or as an independent contractor. Judge Barber stated that in deciding whether a worker is an employee or an independent contractor a consideration of the relevant facts in "*a balancing exercise overall*" needs to be considered: *Case T13* (1997) 18 NZTC 8,080 at p.8,058.

Historically the "control test" has been applied to determine whether a person is an employee. This has, with other tests, been subsumed by the "fundamental test". For example, in *Case U9* (1999) 19 NZTC 9,077, at paragraph 44:

> "TNT Worldwide express (NZ) Ltd v Cunningham *makes it clear, in terms of the established tests for deciding status, that the 'fundamental test' largely subsumes the others, called the control test, the organisation test, the multiple or mixed test, and the label or intention test.*"

The Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 at p.382 quoted with approval Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 Q.B 173, 184-185 that:

> "*the fundamental test 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'... although it can no longer be regarded as the sole determining factor…*".

The Authority considered how the disputant paid the relief driver for work performed. Method of payment is a factor that has been taken into account by the courts to determine employment status. Fixed payments, irrespective of the actual work done or revenue created, are usually an indication of an employment contract. In *James Bryson v Three Foot Six Ltd* [2005] NZSC 34 the Supreme Court reinstated a decision of the Employment Court which found that Mr Bryson was an employee in part because "*his income was not linked in any way to the profits or losses of Three Foot Six*".

In this instance, unlike the taxi drivers in *Case U9* (1999) 19 NZTC 9,077 the relief driver was unable to make a profit from the sound management of his relief driving. If he drove more efficiently he would still be paid $125. In *Case U9* relief drivers for taxis were held to be independent contractors. Barber DJ stated, at p 9,084: "*The arrangement whereby a percentage of gross takings is paid to the objector, indicates to me an independent contractor set-up or structure". And; "I conclude that the reality of this situation is that each driver has the opportunity to profit from sound management of a taxi operating activity and from his or her own efforts*". The relief driver also took no business risk.

The Authority considered the fact that the disputant provided all equipment used by the relief driver and the disputant paid all: maintenance and other expenses incurred in respect of the vehicle; the vehicles insurance; all fuel costs; including all other business expenses. That the disputant paid those expenses supports the proposition that the disputant was an independent contractor who employed the relief driver to relieve him.

The Authority looked at the fact the relief driver did not provide the disputant with an invoice for the work completed. Judge Barber said this indicated the relief driver did not see himself functioning in a capacity separate from the business of the disputant. In *Enterprise Cars Ltd v The Commissioner of Inland Revenue* (1998) 10 NZTC 5;126 (HC), Sinclair J noted that, in support of the mechanics being independent contractors, they submitted accounts for the work they performed.

Judge Barber stated that the disputant had "substantial control" over the relief driver. Such control included: the relief driver having to comply with all the guidelines and instructions of the courier company, for example diligence and care with which the service is provided, dress code; the depot instructed at which address pick-ups and deliveries were to be made, and the disputant controlled the appearance of the vehicles in that the disputant provided the vehicle to the relief driver.

The Authority considered whether the relief driver was a casual employee. Casual employees do not work fixed hours of work but work only when required. As noted by the Court of Appeal in *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 1 ERNZ 324 at p.325 to 326, casual employees:

> "*…have no guarantee of continuous work, or indeed any work. They only have the opportunity of casual assignments. When one assignment ends, there is no certainty another will follow. No wages are paid for the period between assignments…each assignment is a separate engagement…*"

It is not inconsistent with being a casual employee that the relief driver drove for other courier firms. In *Drake personnel (New Zealand) Ltd v Taylor*, McKay J delivering the judgment of the Court, noted at p.326 that Drake "*accepts that they (the casual employees) may also be enrolled with other agencies and work for those agencies' clients*".

An indicator of the status of a work relationship is the intention of the parties. The authority found that in the present case neither party gave any real consideration to the nature of their relationship nor did they evidence their intention in writing in anyway. Therefore the intentions of the disputant and the relief driver are not clear. Unlike in *Case U9* the intention of the parties was to create the status of independent contractors for the relief drivers. Intention was evidenced by the wording of the contracts between the relief taxi driver and the taxpayer (owner of the taxi).

In view of the relevant tests, case law and consideration of the facts, Judge Barber concluded that the relief driver was not carrying on business for his own account but, simply, earning daily pay as a casual employee of the disputant. The relief driver was a casual employee of the disputant at all material times.

SECTION 17 NOTICE SERVED UPON A LIQUIDATOR

Case:	Re: Next Generation Investments Ltd (in liq) v The Commissioner of Inland Revenue (Judicial Review)
Decision date:	15 February 2006
Act:	Tax Administration Act 1994; Companies Act 1993
Keywords:	Section 17 Notice, lliquidation, audit, creditor

Summary

The Commissioner may employ section 17 notices during the liquidation of a company even though he is a creditor of the company. Section 17 prevails over section 256 Companies Act 1993 ("CA"). A as long as the Commissioner's status as a creditor is merely incidental to the subject matter of the notice.

Facts

The applicants are the liquidators of Next Generation Investments Limited ("NGI"). The Commissioner filed a proof of debt in the liquidation for $415,866.77 but was of the view that NGI's GST liability required further investigation. NGI was notified of a forthcoming GST audit about a week before the shareholders appointed a liquidator.

As part of the audit, the Commissioner issued a section 17 Tax Administration Act 1994 ("TAA") notice. The liquidators declined to comply stating they were prevented by section 256 CA which requires a creditor to seek court orders before inspecting the records of a company in liquidation. The liquidators believed that they were prohibited from allowing such records to be released by the earlier decision of the High Court in *re Tasman Pacific Airlines of NZ Ltd* [2002] 1 NZLR 688.

Decision

His Honour Priestley J discussed the broad ambit of section 17 as approved by the Privy Council in *The Commissioner of Inland Revenue v New Zealand Stock Exchange; The Commissioner of Inland Revenue v The National Bank of New Zealand Ltd* [1990] 3 NZLR 333, 337 where it rejected a submission designed to limit section 17 to situations where the Commissioner had a serious question in mind as to a specified taxpayer's tax liability

The recent decisions of the High Court in *Vinelight Nominees Ltd v The Commissioner of Inland Revenue* (2005) 22 NZTC 19,298 and *Chesterfield Preschools Ltd and Others v The Commissioner of Inland Revenue* (2005) 22 NZTC 19, 500 were also discussed as relevant to the present matter. In the former, the applicants sought to limit the operation of section 17 where court proceedings were commenced on the grounds that it gave the Crown, as a litigant an advantage. In the latter case, a similar argument was deployed regarding the use of section 17 notices which the Commissioner issued in support of an application for a Mareva injunction. In both cases, the use of section 17 notices was supported by the Court.

Regarding the *Chesterfield* decision, Priestley J said:

> "[17] If Fogarty J's dicta were to be advanced in support of a proposition that section 17 is tantamount to a procedural nuclear weapon which can be deployed by the Commissioner in an unfettered way on a civil litigation battlefield, then I disagree. The power to issue a section 17 notice is a conferred statutory power. As such it is clearly reviewable under the Judicature Amendment Act 1972. The TAA has specific purposes. The Commissioner has defined statutory duties including the duty to protect the integrity of the tax system (section 6). An *ultra vires* or improper use of section 17 which might, as Simon France J has observed, be discernible on a case by case analysis, to gain an otherwise unachievable advantage in a civil proceeding might well be amenable to judicial review."

There are then, certain limits to the operation of section 17 but His Honour declined to specify what they might be other than hinting at illegality or impropriety.

Regarding the operation of section 256 CA, His Honour accepted both parties' proposition that the purpose of the section is to ensure that no creditor obtains company information to the detriment of other creditors. In the *Tasman Pacific* case, as a matter of statutory interpretation Laurenson J held that section 256 was dominant, with the result that the inspection right contained in section 131 of the Insolvency Act 1967 was not incorporated into the CA by section 302(1).

He accepted however, that although the Commissioner is a creditor, his status as a creditor of the company is purely incidental. He seeks to inspect the company's accounts and records, not as a creditor, but for the legitimate purpose of advancing an investigation. That purpose is clearly permitted under section 17 of the TAA.

> "[26] I am satisfied that the Commissioner is legitimately invoking section 17 for the purpose of investigating a company's taxation liability. Significantly, the Commissioner signalled a GST audit just over a week before the company appointed a liquidator."

The applicants submitted that nonetheless, the CA is binding on the Crown and that for whatsoever purpose, the Commissioner must apply to the court first. This would allow the court to both oversee the liquidation and check on any potential abuse of section 17. His Honour declined to place such an obstacle before the Commissioner:

> "[35] However, the obligations which flow from a valid section 17 notice such as that issued by the Commissioner on 3 June 2005 cannot, in my judgment, be avoided merely because the Commissioner is a creditor to whom section 256(1)(a) applies.
>
> [36] In cases where the Commissioner is arguably invoking his section 17 power unreasonably or for questionable or improper reasons, then the appropriate redress is to seek judicial review. This is not such a case.
>
> [37] The Commissioner, pursuant to his statutory duties, is endeavouring to ascertain the company's correct taxation liability. To that end he is entitled to use section 17.
>
> [38] In my judgment, the fact that the Commissioner might be a creditor in a company's liquidation, who would otherwise have to obtain permission to inspect materials in possession of the liquidator under section 256(1)(a)(ii), does not make obtaining such an order a condition precedent to complying with section 17 of the TAA."

Accordingly, the Court declined the liquidator's application.

HIGH COURT DISCUSSES COMMISSIONER'S ABILITY TO SETTLE TAX LITIGATION

Case:	Accent Management Limited & Ors v The Commissioner of Inland Revenue
Decision date:	13 February 2006
Act:	Tax Administration Act 1994
Keywords:	Recall, care and management, settlement, Trinity scheme

Summary

The plaintiffs made two applications. The first was that Venning J disqualify himself from hearing the non-party costs award against Dr Muir, and also that he should not have heard the substantive case. The second was an application that the substantive Trinity scheme judgment be recalled. Both applications were refused. This summary only considers the recall application.

Facts

The Trinity scheme involved a large number of taxpayers. Immediately prior to the hearing, several of the plaintiffs in the designated test cases approached the Commissioner to discuss settlement. After negotiations, the Commissioner reached settlement with these plaintiffs and issued assessments to reflect the terms of the settlement.

The plaintiffs sought to have the substantive judgment recalled. It was submitted the case was defended by the Commissioner on a false basis as the assessments issued to the taxpayers who settled were inconsistent with those he was defending in the litigation. It was argued that had the plaintiffs known the terms of settlement, they would have seriously considered settling. However, Venning J found that the plaintiffs had been aware since 2001 that the Commissioner would have considered any approaches to settle the litigation. The plaintiffs were also aware that other taxpayers had settled.

Decision

The plaintiffs sought to have the judgment recalled under rule 542(3) of the High Court Rules. It was submitted that section 6A(3) of the Tax Administration Act did not authorise the Commissioner to settle on terms with some of the litigants different to the assessments the Commissioner sought to defend at the hearing.

Venning J accepted that prior to the enactment of section 6A the Commissioner was not able to opt out of his statutory obligations to assess what he believed to be the correct amount of tax: *Brierley Investments v Bouzaid* [1993] 3 NZLR 655. However, section 6A was enacted to rectify that position and allow the Commissioner to make decisions by way of care and management.

His Honour also considered that the decision in *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409 was not confined to the question of costs awards. The Court of Appeal had stated that the Commissioner was entitled by sections 6 and 6A to make sensible litigation decisions, including settlement. This includes taking into account factors such as litigation risk and cost.

The decision also states that section 89C(d) of the TAA provides the machinery for the Commissioner to document and record the settlement in the form of an assessment.

With regards to multi-party litigation, it must also be recognised that the circumstances of individual taxpayers will vary. Venning J held that, as a matter of principle,

the Commissioner must be able to settle complicated multi-party litigation with only some plaintiffs. If not, the considerations in section 6A(3) would be defeated as the desire of one unreasonable taxpayer to litigate could prevent all other taxpayers from reaching a settlement with the Commissioner.

REGULAR FEATURES

DUE DATES REMINDER

April 2006

7 End-of-year incme tax

2005 end-of-year income tax due for clients of agents with a March balance date

20 Employer deductions

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

28 GST return and payment due

May 2006

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

These dates are taken from Inland Revenue's *Smart business tax due date calendar 2006–2007.* This calendar reflects the due dates for small employers only—less than $100,000 PAYE and SSCWT deductions per annum.

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