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THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

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

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

The following draft item is available for review/comment this month, having a deadline of 27 March 2007.

Ref.	Draft type	Description
ED 0095	Question we've been asked	Whether the minor beneficiary rule exemption in Section HH 3B of the Income Tax Act 2004 applies on a $1,000 "per beneficiary" or on a $1,000 "per beneficiary per trust" basis.

The following draft item is available for review/comment this month, having a deadline of 13 April 2007.

Ref.	Draft type	Description
PU0149	Public ruling	Legal services provided to non-residents relating to transactions involving land in New Zealand

Please see page 17 for details on how to obtain a copy.

LEGISLATION AND DETERMINATIONS

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

LIVESTOCK VALUES – 2007 NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK

The Commissioner of Inland Revenue has released a determination, reproduced below, setting the national standard costs for specified livestock for the 2006-2007 income year.

These costs are used by livestock owners as part of the calculation of the value of livestock on hand at the end of the income year, where they have adopted the national standard costs (NSC) scheme to value any class of specified livestock.

Farmers using the scheme apply the one-year NSC to stock bred on the farm each year, and add the rising two-year NSC to the value of the opening young stock available to come through into the mature inventory group at year-end. Livestock purchases are also factored into the valuation of the immature and mature groupings at year-end, so as to arrive at a valuation reflecting the enterprise's own balance of farm bred and externally purchased animals.

NSCs are developed from the national average costs of production for each type of livestock farming based on independent survey data. Only direct costs of breeding and rearing rising one-year and two-year livestock are taken into account. These exclude all costs of owning (leasing) and operating the farm business, overheads, costs of operating non-livestock enterprises (such as cropping) and costs associated with producing and harvesting dual products (wool, fibre, milk and velvet).

For bobby calves, information from spring 2006 is used while other dairy NSCs are based on survey data for the year ended 30 June 2006. For sheep, beef cattle, deer and goats, NSCs are based on survey data for the year ended 30 June 2005 which is the most recent available for those livestock types at the time the NSCs are calculated.

For the 2006-2007 income year there has been a slight increase (in dollar terms) in the NSC for sheep and beef cattle. The increases line up with the general inflationary trend of fuel prices and other on-farm costs such as fertiliser costs.

The values for dairy cattle rising one-year and rising two-year animals have changed slightly from the previous year. For the rising one-year class the decrease reflected slightly lower overall costs per livestock unit coupled with a 2.3 percent increase in the number of calves reared.

The rising 2-year dairy cattle NSC at $93.34 increased 7.1% over last year. This increase incorporated the share of the lower partial absorption costs noted above but was offset by the portion of rising 2-year dairy cattle relative to the cows in milk. This effectively assigned more of the partial absorption costs to the rearing and growing of the two-year old group and less to milk production.

The NSC values for the other livestock types (deer, meat and fibre goats and pigs) have increased in relation to the inflationary effects of higher input costs, such as fuel and other farm costs.

The new NSCs calculated each year only apply to that year's immature and maturing livestock. Mature livestock valued under this scheme effectively retain their historic NSCs until they are sold or otherwise disposed of, albeit through a FIFO or inventory averaging system as opposed to individual livestock tracing. It should be noted that the NSCs reflect the average costs of breeding and raising immature livestock and will not necessarily bear any relationship to the market values (at balance date) of these livestock classes. In particular, some livestock types, such as dairy cattle, may not obtain a market value in excess of the NSC until they reach the mature age grouping.

One-off movements in expenditure items are effectively smoothed within the mature inventory grouping, by the averaging of that year's intake value with the carried forward values of the surviving livestock in that grouping. For the farm-bred component of the immature inventory group, the NSC values will appropriately reflect changes in the costs of those livestock in that particular year.

The NSC scheme is only one option under the current livestock valuation regime. The other options are market value, the herd scheme and the self assessed cost (SAC) option. SAC is calculated on the same basis as the NSC but uses a farmer's own costs rather than the national average costs. There are restrictions in changing from one scheme to another and before considering such a change livestock owners may wish to discuss the issue with their accountant or other adviser.

National Standard Costs for Specified Livestock Determination 2007

This determination may be cited as "The National Standard Costs for Specified Livestock Determination 2007".

This determination is made in terms of section EC 23 of the Income Tax Act 2004. It shall apply to any specified livestock on hand at the end of the 2006-2007 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EC 23 of the Income Tax Act 2004 the national standard costs for specified livestock for the 2006-2007 income year are as set out in the following table.

Kind of livestock	Category of livestock	National standard cost
		$
Sheep	Rising 1 year old	24.70
	Rising 2 year	17.00
Dairy Cattle	Purchased bobby calves	138.00
	Rising 1 year	652.00
	Rising 2 year	93.30
Beef Cattle	Rising 1 year	243.80
	Rising 2 year	143.30
	Rising 3 year male non-breeding cattle (all breeds)	143.30
Deer	Rising 1 year	79.80
	Rising 2 year	39.20
Goats (Meat and Fibre)	Rising 1 year	19.50
	Rising 2 year	13.60
Goats (Dairy)	Rising 1 year	122.60
	Rising 2 year	19.90
Pigs	Weaners to 10 weeks of age	82.50
	Growing pigs 10 to 17 weeks of age	63.90

This determination is signed by me on the 31st day of January, 2007.

Susan Price
Senior Tax Counsel

NEW LEGISLATION

ORDERS IN COUNCIL

New double tax agreements with Chile, Poland and Spain, new protocols to Australia and Singapore agreements

Three new double tax agreements (DTAs) between New Zealand and Chile, Poland and Spain have entered into force. Two protocols amending existing double tax agreements with Australia and Singapore have also recently entered into force.

The new DTAs with Chile, Poland and Spain are expected to play an important part in facilitating increased bilateral trade and investment between those countries and New Zealand. They are designed to provide certainty of tax treatment and prevent the double taxation of cross-border transactions. By providing for the exchange of information on tax matters, the agreements will also play a valuable role in preventing tax evasion.

The Protocol to the DTA with Australia updates the exchange of information article and introduces a tax collection article between the two countries, which will help extend Australia's Wine Equalisation Tax rebate to New Zealand wine producers.

The Protocol to the Singapore DTA updates the agreement to resolve certain difficulties over the interpretation of the agreement covering entities providing consultancy services.

New double tax agreements with Chile, Poland and Spain

The agreement with Chile was signed on 10 December 2003 and incorporated into New Zealand law by Order in Council on 21 June 2004. Double tax agreements do not come into force until the necessary legal procedures have been completed in both countries. Those procedures having also been completed in Chile, the agreement came into force on 21 June 2006. The agreement has effect for New Zealand withholding taxes from 1 January 2007 and for other New Zealand taxes for income years beginning on or after 1 April 2007.

The agreement with Poland was signed on 21 April 2005. The agreement with Spain was signed on 28 July 2005. These agreements were incorporated into New Zealand law by Orders in Council made on 26 June 2006. The necessary legal procedures have also been completed in both Poland and Spain. The DTA with Poland therefore came into force on 16 August 2006. It has effect for New Zealand withholding taxes from 1 January 2007 and for other New Zealand taxes for income years beginning on or after 1 April 2007. The agreement with Spain came into force on 31 July 2006 and has effect for New Zealand withholding taxes from 1 September 2006 and for other New Zealand taxes for income years beginning on or after 1 April 2007.

Protocols amending existing double tax agreements with Australia and Singapore

Protocols setting out changes to New Zealand's existing DTAs with Australia and Singapore were signed on 15 November 2005 and 5 September 2005 respectively. Orders in Council incorporating those protocols into New Zealand law were made on 26 June 2006.

The Protocol with Australia updates the Exchange of Information Article in the existing DTA and broadens the application of that Article to all taxes. In addition, an Assistance in Collection of Taxes Article has been added. These changes will assist the extension of Australia's Wine Equalisation Tax Rebate to New Zealand wine producers. The protocol also gives Australia most favoured nation status in respect of withholding taxes on dividends, interest and royalties. The protocol came into force on 22 January 2007 and has effect from that date, except for Article 4, which inserts new Article 27 (Assistance in Collection of Taxes), which will take effect from a later date, to be agreed between Australia and New Zealand.

The Protocol with Singapore updates the existing DTA to cover New Zealand entities providing consultancy services in Singapore and Singapore entities providing those services in New Zealand. It came into force on 17 August 2006 and the changes it introduced apply to income derived on or after 1 January 2006.

The full text of the DTAs and Protocols is available at:

http://www.taxpolicy.ird.govt.nz/international/DTA/index.html

Double Taxation Relief (Republic of Chile) Order 2004 (2004/175), Double Taxation Relief (Poland) Order 2006 (2006/169), Double Taxation Relief (Spain) Order 2006 (2006/170), Double Taxation Relief (Australia) Amendment Order 2006 (2006/171), Double Taxation Relief (Singapore) Amendment Order 2006 (2006/172)

Use-of-money interest rates to rise

Use-of-money interest rates on underpayments and overpayments of tax are to rise in line with current market interest rates. The new rates are:

Underpayment rate: 14.24% (up from 13.08%)

Overpayment rate: 6.66% (up from 5.71%)

The new rates apply from 8 March 2007. The rates are reviewed regularly to ensure that they are aligned with market interest rates and are based on the Reserve Bank survey of interest rates.

The changes were made by Order in Council on 12 February 2007.

Taxation (Use-of-Money Interest Rates) Amendment Regulations 2007 (2007/13)

STANDARD PRACTICE STATEMENTS

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

SPS 07/01 TAX PAYMENTS — WHEN RECEIVED IN TIME

Introduction

1. This Standard Practice Statement ("SPS") sets out the Inland Revenue's practice for accepting tax payments as having been made in time.

Application

2. This SPS replaces SPS *PRC 101 Tax payments – when received in time*, which was published in *Tax Information Bulletin*, Vol 15, No 12 (December 2003), and will apply from 12 February 2007. (For GST return periods refer paragraph 4.)

Background

3. SPS *PRC 101* set out when Inland Revenue would accept payments as having been received in time, including:

   - Payments by post,
   - Electronic payments (from New Zealand and overseas),
   - Physical delivery,
   - Post-dated cheques,
   - Weekends and public holidays,
   - Tax pooling, and
   - Tax transfers.

4. Since the publication of SPS *PRC 101*, there have been legislative changes in GST return filing and payment due dates. The Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Act 2006 and then the Taxation (Annual Rates, Savings Investment, and Miscellaneous Provisions) Act 2006 amended section 16 of the Goods and Services Tax Act 1985 ("GST Act"). For taxable periods ending on or after 31 March 2007, the GST return filing and payment due dates are:

   - The 28th day of the month following the end of the taxable period, if the taxable period does not end in March or November; or
   - The 7th day of May, if the taxable period ends in March; or
   - The 15th day of January, if the taxable ends in November.

5. The changes in GST return filing and payment due dates represent the first step in preparation for the later alignment of GST and provisional tax payment due dates, which will take effect from the 2008-09 tax year. The objective of these changes is to make tax compliance easier for small businesses that operate in New Zealand.

6. Inland Revenue's practice in respect of when payments have been received in time remains unchanged and will apply to GST payments, as they are treated the same as other tax payments after the legislative changes in the return filing and payment due dates.

Standard Practice

7. This SPS applies to all tax types, including Goods and Services Tax ("GST") and Child Support payments.

Payments by post

8. Payments will be accepted as being received in time if mailed and postmarked on or before the due date.

9. For Rural Delivery taxpayers, the date of payment is when it is received by New Zealand Post or similar providers. Inland Revenue does not treat the payment as received when the taxpayer places the payment in their personal mail box for collection.

Overseas payments by post

10. An overseas postmark cannot be used to determine the date a payment was received by Inland Revenue from a taxpayer living or working overseas. Accordingly, the time of actual receipt by Inland Revenue will be used.

Electronic payments

11. Taxpayers may make payments electronically, including by internet banking. A payment will be received in time when it has been electronically paid or direct credited into an Inland Revenue account either on or before the due date. Internet payments must be completed prior to the end of the banks' online business hours to be recorded as received on that specific day. Internet payments after these online business hours will be processed on the next business day.

12. In the context of electronic payments, "business hours" means the hours a bank makes available to customers to initiate electronic payments on any given day. Payments made after these hours will be processed by the bank as at the next business day.

Overseas electronic payments

13. A payment will be received in time when it has been electronically paid or direct credited into an Inland Revenue account either on or before the New Zealand due date.

Physical delivery

14. A payment will be accepted as being received in time if it is deposited into an Inland Revenue drop box by the close of business on the due date.

Westpac payments

15. Taxpayers may also make payments at most branches of Westpac. Payments can be made over the counter or via drop boxes. The payment is received in time if it is physically handed into a Westpac branch by the close of business on the due date.

Post-dated cheques

16. Inland Revenue will not bank post-dated cheques until the specified date. A cheque that is post-dated after the due date, even though it is received on or before the due date, will be treated as late. This applies to payments that are posted or physically delivered.

Weekends and public holidays

17. If a due date falls on a weekend or a public holiday (including a provincial anniversary day), Inland Revenue will accept a payment as in time when it is physically delivered or posted on the next working day.

18. If a due date falls on a weekend or a public holiday (including a provincial anniversary day), then an electronic payment will be accepted as in time when it is credited into an Inland Revenue account on the next working day.

Tax pooling

19. In cases of tax pooling, the date of payment is when the intermediary makes the tax payment to Inland Revenue. For more information on the implications of tax pooling please refer to *Tax Information Bulletin*, Vol 15, No 5 (May 2003).

Tax transfers

20. For the rules regarding the transfers of overpaid taxes please refer to *Tax Information Bulletins*, Vol 14, No 11 (November 2002) and Vol 16, No 1 (February 2004).

This Standard Practice Statement was signed on 12th February 2007.

Graham Tubb
Assurance Manager (Group Tax Counsel)
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.

COUNTERCLAIM ACTION DURING LIQUIDATION PROCEEDINGS

Case	The Commissioner of Inland Revenue v Churton Farms Limited. The Commissioner of Inland Revenue v Ngaturi Properties Limited
Decision date	31 October 2006
Act	Rule 146, High Court Rules
Keywords	Counterclaim, liquidation proceedings.

Summary

During the course of liquidation proceedings Rule 146 of the High Court Rules prevents a defence from being raised on the ground of counterclaim or set-off once the liquidation proceeding is issued.

Facts

The Commissioner served a statutory demand upon the taxpayer companies in May 2006 claiming amounts for GST, income tax and also PAYE tax deductions for Churton Farms Limited.

On 25 July 2006 the Commissioner issued Statements of Claim to put the companies into liquidation. The requisite advertising of the liquidation proceedings took place in August 2006.

Churton Farms Limited at this time filed a Statement of Defence disputing the amount claimed, and counterclaimed various amounts from the Commissioner for GST refunds. The counterclaim was withdrawn.

Ngaturi Properties Limited filed a Statement of Defence and a counterclaim to the effect that the amount of $230,000 was due from the Commissioner for the loss resulting from not purchasing some property. The company contended that the Commissioner had failed to allow the company from completing the purchase of the Reynolds Road property.

Decision

With regard to the company Churton Farms Limited, Gendall AJ noted that no application to set aside the statutory demand on the basis that the debt was not due was made by the company. There was no evidence before the Court indicating on what basis the amounts may not be due, nor any evidence of the company's financial position or solvency.

Further, Gendall AJ was satisfied that the company had every opportunity since the statutory demand was served to take appropriate steps to properly dispute the debt due. He was further satisfied that the company had no defence to the Commissioner's claim and an order placing the defendant company into liquidation was appropriate.

With regard to the company Ngaturi Properties Limited, Gendall AJ held that the counterclaim could not possibly succeed. It was barred by Rule 146 of the High Court Rules which prevents a defence from being raised on the ground of counterclaim or set-off once the liquidation proceeding is issued. (*The Commissioner of Inland Revenue v Carswell Investment Co Ltd.*) It also lacked a factual basis as the loss of the opportunity to purchase the property was caused by the bankruptcy of the vendors and not due to any action taken by the Commissioner. There was no evidence to suggest that the Commissioner interfered with the attempted purchase of the property by the taxpayer.

Ngaturi Properties Limited had failed to comply with the statutory demand and had failed to produce any evidence of its financial position or solvency. It was therefore appropriate to make an order placing the taxpayer into liquidation.

COMMISSIONER DIRECTED TO CONSIDER REMISSION OF PENALTIES AND INTEREST

Case	Chesterfields Pre-Schools Limited and Other v The Commissioner of Inland Revenue
Decision date	15 December 2006
Act	Judicature Act 1908
Keywords	Arrangement, penalties and interest, remission

Summary

The taxpayer obtained directions against the Commissioner regarding aspects of their tax affairs

Facts

This was a judicial review started by five entities associated with David Hampton.

The facts of the case are complex. As the judgment recognises "For the most part the current indebtedness of the taxpayers in these proceeding reflects an automatic consequence of returns not being made on time and tax paid on due date" [par 31]

In 1993 the Chesterfields Partnership overclaimed a GST input and was obliged to repay $33,333.34 to the Commissioner. This was not done, although the taxpayer expected to offset another input tax credit to make the payment. This other input tax credit did not become available due to an audit into the claimed input.

Several years of investigation into other input tax credits in other entities (usually arising from transactions within the Hampton entities) meant that planned offsets never occurred. Mr Hampton's entities have relied upon tax refunds to pay indebtedness and have not actually paid tax [par 148]. Other revenue periods for other entities fell into arrears as the inter-entity transactions "moved" debt between entities.

Various arrangements were entered into but many issues were left unresolved between the parties. The situation was aggravated by inaction by the department in failing to complete various audits and investigations while, at the same time, awaiting the outcome of those audits and investigations to determine the availability of possible tax credits which may or may not be available to pay tax due.

In addition, one entity, Anolbe Enterprises Limited was struck off the Companies Register in 1996 and not restored until 2000. The company's GST registration was ceased in 1996 and in 2000 an informal application for re-registration (together with a request for $92,222.22 of input tax refunds) was made, but it was not until 2004 that a formal re-registration was sought. The Commissioner declined to backdate the re-registration.

Finally, the Hampton entities sought remission under section182A of the Tax Administration Act 1994 ("TAA") which was declined in June 2004. Those entities sought judicial review of this decision.

Decision

The Judge noted the departmental scepticism in dealing with Mr Hampton and also noted that Mr Hampton is "an extremely difficult 'taxpayer' to deal with". [par 132 and 144].

He concluded, after reviewing circumstances of the section 182A remission decision, that the decision contained no reviewable error of law. He came to no concluded view regarding the various arrangements entered into.

Regarding the accumulation of penalties and interest his honour considered that:

> "In my view, the correct perspective for (sic) the Commissioner should take in this case is that parliament has provided for late payment penalties as incentives on taxpayers to pay core tax liability…. The Commissioner needs to appreciate that rightly or wrongly for long periods of time, particularly between 1993 to 1998, the various officers were treating the debts as uncollectable because of the pending audit assessments of GST inputs. The Audit department did not make its decisions promptly and in some, if not most cases, did not make decisions at all in respect of the disputed GST refunds. Mr Hampton was given comfort in that respect, and became naively confident his claims would prevail, and the mounting penalties would be remitted." [par 149]

The Court concluded that "the various neglects or failures [of the Commissioner] cumulatively justify intervention by this Court by way of judicial review directing the Commissioner to complete processing input claims, and to consider associated reduction of penalties and interest payments." [par156]

The Court considered the delay in processing Anolbe's re-registration was aggravated by the Commissioner's failure to advise Anolbe of the need to make a formal application for GST registration. It is in terms of this that the relief is granted to the plaintiffs. [par 159]

The Commissioner is directed to reconsider Anolbe's re-registration and the Anolbe returns, together with any other unresolved claims by the other entities. Any resultant refunds are to be applied to the best advantage of the plaintiffs. He is to make a decision under section 182 TAA (as applicable before 23 September 1997) regarding remission of penalties—this will probably need to go to the Minister of Inland Revenue. He is to consider further remission under section 182A for penalties accruing over the periods of the hearing.

STRIKE-OUT APPLICATION

Case	J A Reid & Others v The Commissioner of Inland Revenue
Decision date	19 December 2006
Act	High Court Rule 186
Keywords	Misfeasance in public office, strike-out application, vicarious liability, public office, malicious prosecution.

Summary

The plaintiff alleged misfeasance in public office against the Commissioner in relation to the tax investigation and Serious Fraud Office referral of the plaintiff's investment scheme.

Fact

This decision relates to an application by the Commissioner of Inland Revenue to strike out the plaintiffs' proceedings.

The proceedings in question relate to the Digi-Tech and NZIL investments promoted by the plaintiffs in the mid-1990s. The Commissioner investigated the transactions and made a referral to the Serious Fraud Office (SFO), which then prosecuted the plaintiffs on two counts of conspiracy to defraud the public and the Commissioner. The case was heard in 2004 and the plaintiffs were acquitted. The plaintiffs have filed proceedings against the Commissioner claiming damages for the tort of misfeasance in a public office.

The plaintiffs (in the substantive proceeding) claim that the Commissioner and his employees exercised their power with an improper motive, with intent to injure the plaintiffs.

The Commissioner applied for an order striking out the proceeding on the grounds that the statement of claim discloses no reasonable cause of action and is an abuse of process.

Decision

Counsel for the Commissioner argued that the plaintiffs' claim could not possibly succeed, because the Commissioner cannot be vicariously liable for acts done by his subordinates as they are employed by the Crown, not the Commissioner. Plaintiffs' Counsel argued that the Commissioner is directly liable, not vicariously liable.

Counsel for the Commissioner further argued that the employees of the Commissioner do not hold "public office", which is a requirement for the tort. In addition, it was submitted that the alleged actions were not "in the exercise of public office" which is another requirement.

A further ground advanced by the Commissioner's Counsel was that the alleged improper motive (to encourage investors to concede their tax disputes and to deter promoters in comparable investment schemes) was *intra vires*, so could not found the tort. Counsel for the plaintiffs submitted that the "improper motive" lay in the means by which the Commissioner sought to encourage investors to concede disputes and to deter promoters in other schemes, and referred to sections 6(2)(a),(b) and (f) of the TAA.

The Commissioner's final argument was that the claim was really one of malicious prosecution and could not be brought against the Commissioner as it was the SFO which prosecuted the plaintiffs. This was refuted by the plaintiffs.

Andrews J was not sufficiently convinced by any of the Commissioner's arguments that the plaintiffs' claim could not possibly succeed, as this was a very high test for the applicant to meet. The application was dismissed.

SOLICITOR'S UNDERTAKING

Case	Manu Chhotubhai Bhanabhai & Douglas Mark Andrew Burgess v The Commissioner of Inland Revenue
Decision date	20 December 2006
Act	GST Act 1985
Keywords	Solicitor's undertaking, abuse of process

Summary

The Court of Appeal upheld the High Court decision that Mr Bhanabhai had breached the undertaking given and the amount of the compensation awarded was upheld.

Facts

The defendants were barristers and solicitors acting for two companies, Nautilus Developments Limited ("NDL") and Golden Gate Holdings Limited ("GGH"). The companies were group registered for GST purposes under Nautilus. Both companies were involved in a construction project of a block of residential apartments in Hobson Street, Auckland.

The companies accounted for GST output tax on the erroneous understanding that it was payable only when sales were settled. On 17 April 1997 the matter was finally resolved between the parties and it was agreed that GST would be payable on settlement in respect of the units with contracts entered into prior to July 1996, a concession on the part of the Commissioner. GST on

agreements after July 1996 was to be accounted for on the basis of the normal time of supply rules, being the receipt of the deposit (July 1996 being the date on which the company had received a letter outlining an original proposal for agreement).

As a result of the agreement being reached a GST refund was due to NDL. However, to ensure that GST payments in respect of the pre-July 1996 contracts were actually paid on settlement an undertaking was required to be given by the defendants, and it was given, signed by Mr Bhanabhai. The undertaking given on 17 April 1997 was written in the following terms:

> "We are the solicitors for Golden Gate Holdings Ltd. We have been instructed to settle the sale of the units in the development and we undertake that on settlement of units 3F, 5A, B, C, D, E, F, 6A, B, C, D, E and F, we will forthwith pay to you the GST component of the sale consideration."

The arrangements made on 17 April were supplemented by further arrangements made in a meeting on 21 April between Mr Cunningham and Mr Davison and confirmed by correspondence on the same day between Mr Cunningham and the accountant.

UDC was the principal lender to the development. On 9 June 1998 s92 Property Law Act Notices were served calling up the mortgage. On 9 June 1999 UDC had not enforced the Notices and Parkhurst Investments Limited (the defendant being a director and shareholder) took over the securities. On 10 June 1999 GGH went into liquidation, NDL already being liquidated in September 1998.

The liquidator, Mr Montgomerie, issued proceedings against the Directors of NDL seeking to recover over $2 million on behalf of the unsecured creditors, including over $1 million claimed by the Commissioner. This proceeding was later settled for $500,000. The settlement monies were sufficient only to cover the liquidator's costs and no dividends were paid to the creditors.

The undertaking of 17 April 1997 was not met and the Commissioner sought an order that the defendants pay the GST which it undertook to pay or damages for the equivalent sum.

Decision

In the High Court, Laurenson J found for the Commissioner and the amount of $300,000 was awarded. This reflected the contribution already made by Mr Bhanabhai towards the liquidator's settlement. Costs and interest were also awarded to the Commissioner.

The case was appealed by Mr Bhanabhai and the Commissioner cross-appealed on the amount of costs awarded.

The appeal raised the following issues:

(a) Was the undertaking given by Mr Bhanabhai personally or on behalf of the developers?

(b) If given personally, did the undertaking apply if UDC insisted on (and was entitled to) all proceeds of sale or to settlements not effected through the firm?

(c) If given personally, was the undertaking overtaken by subsequent events?

(d) Should the Judge in the High Court have granted relief to the Commissioner on orthodox principles associated with undertakings?

(e) Is the claim by the Commissioner an abuse of process given the settlement of the proceedings brought earlier by the liquidator?

With regard to (a), the Court of Appeal was not minded to interfere with the factual findings made by Laurenson J. They read it also as an undertaking by the firm as if it was on behalf of the developers there was no reason for it to be given by the solicitors.

With regard to (b), the Court concluded that if Mr Bhanabhai was not prepared to ensure that he was in a position to give effect to the undertaking, or to accept the consequences of not being able to do so, then he should not have given the undertaking. Mr Bhanabhai was in a far better position than Mr Cunningham, both to recognise the practical contingencies which might affect his ability to give effect to the undertaking and to assess the risk that those contingencies might crystallise. Mr Bhanabhai was in a position at least to influence the timing of the settlements.

With regard to (c) the Court held that there was nothing in the latter arrangements made on 21 April which impugns the continuing effectiveness of the undertaking. The arrangements entered into on 21 April were primarily addressed to units which were not the subject of the 17 April undertaking.

With regard to (d) the Court held that the undertaking was unconditional and the firm simply failed to honour it. The undertaking was relied on by the Commissioner and should be enforced.

With regard to (e) the Court held that the claim on the undertaking was not an abuse of process for the reasons that the liquidator in the first proceedings was acting independently and settlement was not assented to by the Commissioner. The claim by the liquidator was different to that of the Commissioner conceptually. The liquidator was seeking relief based on the contention that the directors had breached their duties to the company whereas the Commissioner's claim is that Mr Bhanabhai incurred a direct responsibility to the Commissioner in respect of the undertaking.

With regard to (f) the Court saw no basis to interfere with the discretionary determination of the Judge in awarding costs on a 2B scale.

HIGH COURT SUBSTANTIALLY UPHOLDS VALIDITY OF SECTION 17 NOTICE ISSUED TO TAXPAYER

Case	Lupton v Commissioner of Inland Revenue
Decision date	22 December 2006
Act:	Tax Administration Act 1994, S 17
Keywords	Investigations, section 17 notice, validity of notice

SUMMARY

The Commissioner issued a notice under section 17 of the Tax Administration Act (TAA) 1994 requiring a taxpayer under investigation to complete a statement of assets and liabilities in form IR 110, and to respond to specific requests for information. The High Court upheld the validity of the notice on most issues, and where the notice was found invalid, the Court accepted the invalid parts could be severed leaving the rest of the notice valid and enforceable. It was left to the Commissioner to decide whether he should withdraw the existing notice and issue a fresh one in the interests of clarity.

Facts

This decision relates to an application by the taxpayer for judicial review of a section 17 TAA notice issued to the taxpayer.

The Commissioner is investigating the taxpayer's tax affairs. The taxpayer is connected with a group of around 40 companies; the group operates in several countries with the holding company thought to be located in the British Virgin Islands. The Commissioner has been seeking information about remuneration and benefits derived by the taxpayer from the group and certain other companies and trusts with which the Commissioner believes the taxpayer is connected. The Commissioner seeks to establish whether the taxpayer has met his obligations under New Zealand tax legislation.

The Commissioner issued a formal notice under section 17 seeking specific information, books and documents. The notice also required the completion and signature of a statement of assets and liabilities in form IR 110. The taxpayer now challenges the validity of the notice as served.

Decision

The notice is invalid in respect of specific issues, ruling that it will be a matter for the Commissioner to decide whether to withdraw the existing notice in its entirety or amend it.

The Commissioner has not exceeded his powers in seeking estimates of values of assets in form IR 110. The taxpayer has knowledge of his assets, the Commissioner requires "a bona fide and genuine attempt with a reasonable measure of accuracy". The notice was not invalidated by the request for details of the taxpayer's wife's credit card as the notice provides for the taxpayer to identify where relevant records are located if not in his possession/control.

The notice is invalid to the extent that it requires the taxpayer's wife to sign a declaration that the information is true and correct. Section 17 does not authorise the Commissioner to require a person, other than the person named in the notice to vouch for the correctness of the information given.

The taxpayer challenged a number of specific questions in the notice on various grounds involving uncertainty, oppression and abuse of power. Four of the questions were held to be invalid. The questions that were deemed to be expressed too widely or required the taxpayer to speculate or guess were held to be invalid for uncertainty. Attention was draw to the fact that criminal sanctions apply for non-compliance. The Judge agreed with taxpayer's Counsel that the question relating to naming other parties who have control or equitable interests in certain trusts was wrong in law and could not be validly called upon to answer in the manner in the form.

The Judge found the Commissioner intended expressions used in the form to be interpreted by their natural and ordinary meaning. Not specifying the time periods for information requested did not of itself demonstrate that the questions were unreasonably burdensome. The question relating to separately specifying items over $500 purchased in the last four years is not too burdensome. Although the notice informs the taxpayer they can contact the department in the event of difficulty, this does not overcome lack of clarity in the notice.

REGULAR FEATURES

DUE DATES REMINDER

March 2007

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

20 Employer deductions

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

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

30 GST return and payment due

April 2007

10 End-of-year income tax

7 April 2007

- 2006 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

These dates are taken from Inland Revenue's *Smart business tax due date calendar 2006–2007* and *Smart business tax due date calendar 2007–2008.* These calendars reflects the due dates for small employers only—less than $100,000 PAYE and SSCWT deductions per annum.

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Question we've been asked	***Comment deadline***
☐ ED 0095: Whether the minor beneficiary rule exemption in Section HH 3B of the Income Tax Act 2004 applies on a $1,000 "per beneficiary" or on a $1,000 "per beneficiary per trust" basis.	27 March 2007

Draft public ruling	***Comment deadline***
☐ PU0149: Legal services provided to non-residents relating to transactions involving land in New Zealand	13 April 2007

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