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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 items are available for review/comment this month, having a deadline of 30 June 2008.

Ref.	Draft type	Description
QB0060	Question we've been asked	Application for private/product ruling on issue dealt with in mutual agreement made under DTA – TAA '94 s91E(4)(D)(ii) and s91F(4)(D)
PUB0126	Public ruling	Projects to reduce emissions programme – income tax treatment
PUB0155	Public ruling	Projects to reduce emissions programme – GST treatment

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Determination DEP 67: Tax Depreciation Rates General Determination Number 67

DEP 67 sets out a depreciation rate for "Baby gear for hire (excluding child restraints (capsules and car seats))". It consists of items such as buggies, mountain buggies, strollers, prams, bassinets, highchairs, portacots, hammocks, front packs (for carrying infants), exasaucers, and snap and go wheels. This list is not exhaustive and other similar assets could come within the definition. A new asset category "Hire equipment" is also created.

Determination DEP 68: Tax Depreciation Rates General Determination Number 68

Determination DEP 68 deletes the general asset class "Satellites" from the "Telecommunications" industry category and replaces it with "Satellites (geosynchronous orbit)" and corresponding new economic rates.

Determination 05/03 – 2008 CPI Adjustment: Standard-cost household service for boarding service providers

The *weekly standard-cost* component for the 2008 income year has been retrospectively adjusted.

The Commissioner's Table of Depreciation Rates

The Commissioner's Table of Depreciation Rates is the list of general economic depreciation rates and provisional depreciation rates set by the Commissioner. It has been referred to in the past as "DEP1".

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IS 08/01: GST – role of section 5(14) of the Goods and Services Tax Act 1985 in regard to the zero-rating of part of a supply

The Commissioner's view of the interpretation of section 5(14) is that it applies after it has been determined that:

- there is "a supply" that is charged with GST at the standard rate under section 8, and
- the applicable zero-rating provision requires that part of a supply be charged with GST at the rate of zero percent.

Section 5(14) is then applied with the result that the zero-rated part is to be treated as being a separate supply for the purposes of the Act.

Questions we've been asked

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QB 08/01: Tax Administration Act 1994 – section 91E(4)(f) and self-assessment

Section 91E(4)(f) of the TAA '94 states that the Commissioner may not make a private ruling if an assessment has been made relating to the person, arrangement, and period or income year to which the proposed ruling would apply, before the ruling application has been received by the Commissioner. Under the Taxation Act 2001, with effect from 24 Oct 2001, and with application to the 2002/03 and subsequent income years, taxpayers are required to assess their own income tax liability. Where a taxpayer has filed a tax return that contains their assessment before lodging a binding ruling application regarding a transaction and year that is covered by the return, does section 91E(4)(f) apply to the taxpayer's self-assessment?

Inland Revenue has concluded that where a taxpayer has made a self-assessment before a private ruling application has been received by the Inland Revenue Department, section 91E(4)(f) does apply.

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ANZ National Bank Limited and Ors v The Commissioner of Inland Revenue CIV 2005-485-1037, 1038, 1039; 2006-485-1105, 1108, 1109, 1111. (Strike-out application)
An interlocutory application by the Commissioner to strike out the second cause of action in ANZ's statement of claim was granted.

Qualifying trust and corpus
TRA Decision 05/08
This dealt with the issue of a qualifying trust. The Authority held that BD 1 (2) of the Income Act 1994 included reference to section 242 (c) of the 1976 Income Tax Act as this was permitted by section YB5 (4) of the 1994 Act.

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Central Equipment Company Limited made two applications for special leave in the Court of Appeal for interim relief in relation to two prior decisions of the High Court which put the company into liquidation. These two prior decisions were cause for Mr Faloon to make applications for relief and recall. The High Court found that these proceedings had already been concluded by final judgments and were final.

Child support – retrospective reviews and departures
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A Child Support Act 1991 question of whether a departure order from a formula assessment could be retrospective. The High Court did not follow Aspinall and Johnson, preferring CYF v SKF, WAC v CIR, and Hastings v Morel, and found that there was jurisdiction to make a departure order retrospectively. The matter was remitted to the Family Court for determination on its merits.

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Accountants' advice documents must be discovered
ANZ National Bank Limited and Ors v The Commissioner of Inland Revenue CIV 2005-485-1037, 1038, 1039; 2006-485-1105, 1108, 1109, 111. (Discovery application)
An interlocutory application made by the Commissioner for discovery of ANZ's accountants' advice documents was granted. The documents were held to be relevant and not confidential under the Evidence Act 2006.

Supreme Court decides on taxpayer secrecy
Westpac Banking Corporation Limited, BNZ Investments Limited, ANZ National Bank Limited and Ors v The Commissioner of Inland Revenue SC 66 and 67/2007
The exceptions in the taxpayer secrecy legislation permit the discovery of documents held by the Commissioner in relation to a taxpayer, in defence of the Commissioner's assessment against another taxpayer.

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.

DETERMINATION DEP 67: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 67

Application

This determination applies to taxpayers who own items of depreciable property of the kinds listed in the table below that have been acquired on or after 1 April 2005.

This determination applies for the 2007/2008 and subsequent income years[1].

Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I set in this determination the economic rates to apply to the kinds of items of depreciable property listed in the table below by:

- Creating a new asset category named "Hire equipment".
- Adding into the "Hire equipment" asset category, the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates, listed in the table below.

General asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Baby gear for hire (excluding child restraints (capsules and car seats)).	4	50	40

Interpretation

In this determination, unless the context otherwise requires, words and terms have the same meaning as in the Income Tax Act 2007 and the Tax Administration Act 1994.

This determination is signed by me on the 1st day of May 2008.

Susan Price
Senior Tax Counsel

1 This determination applies both to the 2007/2008 income year, and the 2008/2009 and subsequent income years and is issued pursuant to section 91AAF of the Tax Administration Act 1994, having regard to the application of section ZA 2(2) of the Income Tax Act 2007.

DETERMINATION DEP 68: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 68

Application

This determination applies to taxpayers who own items of depreciable property of the kinds listed in the table below that have been acquired on or after 1 April 2008.

This determination applies for the 2008/09 and subsequent income years.

Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I set in this determination the economic rates to apply to the kinds of items of depreciable property listed in the table below by:

- Inserting into the "Telecommunications" industry category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Telecommunications	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Satellites (geosynchronous orbit)	15	13	8.5

Consequential change

As a consequence of this determination, an existing general asset class is no longer required and so it is necessary to:

- Delete from the "Telecommunications" industry category the general asset class, estimated useful life and diminishing value and straight-line depreciation rates listed below:

Telecommunications	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Satellites	5	33	24

Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2007 and the Tax Administration Act 1994.

This determination is signed by me on the 9th day of May 2008.

Susan Price
Senior Tax Counsel

DETERMINATION 05/03 – 2008 CPI ADJUSTMENT: STANDARD-COST HOUSEHOLD SERVICE FOR BOARDING SERVICE PROVIDERS

In accordance with the provisions of Determination DET-05/03, as published in *Tax Information Bulletin* Vol 17, No 10 (December 2005), Inland Revenue advises that the *weekly standard-cost* component for the 2008 income year, is retrospectively adjusted as follows:

1. The weekly standard-cost for one to two boarders will increase from $213 each to $220 each.
2. The weekly standard-cost for third and subsequent number of boarders will increase from $173 each to $179 each.

The above amounts have been adjusted in accordance with the annual movement of the All Groups Consumers Price Index for the twelve months to March 2008, which showed an increase of 3.4%. For boarding service providers who have a standard 31 March balance date, the new amounts apply for the period from 1 April 2007 to 31 March 2008.

THE COMMISSIONER'S TABLE OF DEPRECIATION RATES

The Commissioner's Table of Depreciation Rates lists the general economic depreciation rates and provisional depreciation rates set by the Commissioner.

The Commissioner sets economic rates (commonly referred to as "general economic rates" because they apply to many taxpayers) in determinations pursuant to section 91AAF of the Tax Administration Act 1994. The Commissioner also sets provisional rates in determinations pursuant to section 91AAG of the Tax Administration Act 1994.

The Commissioner sets provisional rates for items of depreciable property where less information is available about that particular kind of item than is required to set reliably a general economic rate, such as where the item is new technology or new to New Zealand. After a period, the Commissioner reviews the provisional rate and often replaces it with a general economic rate.

Notifications of draft determinations for general economic rates are published for public consultation in the *Tax Information Bulletin* and the draft determinations are available on the Inland Revenue website **www.ird.govt.nz**

When determinations are finalised, they are published in the Tax Information Bulletin and on the Inland Revenue website.

General economic rates and provisional rates are also listed in various publications, including the Inland Revenue's *General Depreciation Rates (IR 265)* which is also available from the Inland Revenue website **www.ird.govt.nz/forms-guides/keyword/businessincometax/companies/ir265-guide-general-depreciation-rates.html** and in the Depreciation Rate Finder on the Inland Revenue website **www.ird.govt.nz/calculators/keyword/depreciation/calculator-depreciation-rate-finder.html**

"Determination DEP1: Tax Depreciation Rates General Determination Number 1" ("DEP1") was the first depreciation rate determination the Commissioner issued. DEP1 was issued on 5 April 1993 and published in the Appendices to *Tax Information Bulletin* Vol 4, No 9 (April 1993). DEP1 lists kinds of items with their corresponding general economic rates set by the Commissioner. Since DEP1 was issued, the Commissioner has set additional general economic rates and provisional rates for other kinds of items in subsequent determinations.

The Commissioner's Table of Depreciation Rates has been referred to as "DEP1", and determinations issued after DEP1 have referred to "amending DEP1" by adding further items and rates. However, more correctly in terms of the legislation, the Commissioner's Table of Depreciation Rates includes not only DEP1, but other subsequent determinations that set general economic rates or provisional rates. Therefore, depreciation rate determinations now state that the Commissioner is "setting rates" rather than "amending DEP1". Consequently the Commissioner's Table of Depreciation Rates is no longer referred to as "DEP1" and is now referred to as the "Commissioner's Table of Depreciation Rates". This change does not affect the application of any depreciation rates to items of depreciable property.

For more information on depreciation, see the Inland Revenue's *Depreciation – A Guide for Businesses (IR 260)*.

INTERPRETATION STATEMENTS

This section of the Tax Information Bulletin contains interpretation statements issued by the Commissioner of Inland Revenue.

These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

IS 08/01: GST – ROLE OF SECTION 5(14) OF THE GOODS AND SERVICES TAX ACT 1985 IN REGARD TO THE ZERO-RATING OF PART OF A SUPPLY

Summary

1. All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.
2. This statement sets out the Commissioner's view of the interpretation of section 5(14). It concludes that section 5(14) does not operate by itself to create standard- and zero-rated supplies, but rather is applied after it has been determined that:
   - there is "a supply" that is charged with goods and services tax (GST) at the standard rate under section 8; and
   - the applicable provision in section 11, 11A, 11AB, or 11B ("the zero-rating provisions") requires that part of a supply be charged with GST at the rate of zero percent.
3. Section 5(14) is applied with the result that the zero-rated part is to be treated as being a separate supply for the purposes of the Act.
4. This statement considers only the interpretation of section 5(14). It does not consider the principles of apportionment that have been developed by the courts. These principles are used to determine whether a "package" of goods and/or services is a single supply, or consists of two or more supplies, for the purposes of the Act: see, for example, *Auckland Institute of Studies v CIR* (2002) 20 NZTC 17,685 (HC); *CIR v Smiths City Group Ltd* (1992) 14 NZTC 9,140 (HC).

Background

5. The Commissioner is aware confusion exists about the correct interpretation of section 5(14). Section 5(14) provides:

   > If a supply is charged with tax under section 8, but section 11, 11A, 11AB or 11B requires part of the supply to be charged at the rate of 0%, that part of the supply is treated as being a separate supply.

6. There are two competing views of the role of section 5(14).
   - Section 5(14) applies after part of a supply has been zero-rated under the zero-rating provisions, and requires that the zero-rated part of a supply be treated as a separate supply.
   - Section 5(14) operates by itself to divide a supply into its standard-rated and zero-rated parts, and requires that these parts be treated as separate supplies. These separate supplies are then zero-rated under the zero-rating provisions.
7. The competing views affect when section 5(14) is applied and the availability of zero-rating. Under the first view, section 5(14) applies only if the relevant zero-rating provision requires part of the supply to be zero-rated. If the relevant zero-rating provision does not, section 5(14) cannot apply and the whole supply must be charged with GST at the standard-rate.
8. Under the second view, section 5(14) would apply even if the relevant zero-rating provision does not by itself require part of the supply to be zero-rated. Section 5(14) would enable the zero-rated parts of the supply to be isolated and then treated as separate supplies under the Act. The zero-rating provisions would then be applied to zero-rate these supplies.

Legislation

9. Sections 5(1) and 5(14) provide:

   > **5 Meaning of the term supply**
   >
   > (1) For the purposes of this Act, the term supply includes all forms of supply.
   >
   > (14) If a supply is charged with tax under section 8, but section 11, 11A, 11AB or 11B requires part of the supply to be charged at the rate of 0%, that part of the supply is treated as being a separate supply.

10. Before it was amended in 2000 and 2003, section 5(14) provided:

    > For the purposes of this Act, where a supply is charged with tax in part under section 8 of this Act and in part under section 11 of this Act, each part shall be deemed to be a separate supply.

11. Section 8(1) provides:

> **8 Imposition of goods and services tax on supply**
>
> (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 12.5 percent on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after the 1st day of October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

12. Sections 11, 11A, 11AB and 11B list the circumstances in which taxable supplies of goods and services must be charged with GST at the rate of zero percent. The zero-rating provisions provide that a "supply" must be zero-rated, but it is possible that only part of a supply must be zero-rated. It is a matter of statutory interpretation whether the relevant zero-rating provision provides for part of a supply to be zero-rated. It is noted that some of the zero-rating provisions expressly indicate that part of a supply can be zero-rated by using the words "to the extent that". These provisions are set out below.

> **11A Zero-rating of services**
>
> (1) A supply of services that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> (b) the services are the transport of passengers from a place in New Zealand to another place in New Zealand to the extent that the transport is by aircraft, as defined in section 2 of the Civil Aviation Act 1990, and is international carriage for the purpose of that Act; or
>
> (c) the services, including ancillary transport activities such as loading, unloading and handling, are the transport of goods from a place in New Zealand to another place in New Zealand to the extent that the services are supplied by the same supplier as part of the supply of services to which paragraph (a)(ii) or (a)(iii) applies; or
>
> (ma) the services relate to goods under warranty to the extent that the services are—
>
> (i) provided under the warranty; and
>
> (ii) supplied for consideration that is given by a warrantor who is a non-resident, not a registered person and who is outside New Zealand at the time the services are performed; and
>
> (iii) in respect of goods that were subject to tax under section 12(1); or
>
> (o) the services are the acceptance of an obligation to refrain from pursuing or exercising in whole or in part rights listed in paragraph (n) to the extent that the rights are for use outside New Zealand; or …
>
> **11B Zero-rating of some supplies by territorial authorities, some supplies involving contributions to local authorities**
>
> (1B) If a supply under section 5(7B) of goods and services by a local authority to a registered person is chargeable with tax under section 8, the supply must be charged at the rate of 0% to the extent that the contribution made by the registered person to the local authority consists of land.

Analysis

Ordinary meaning of the words

13. Section 5(14) provides

> If a supply is charged with tax under section 8, but section 11, 11A, 11AB or 11B requires part of the supply to be charged at the rate of 0%, that part of the supply is treated as being a separate supply.

14. The ordinary meaning of some of the words of section 5(14) appear to be clear. The words "[i]f a supply is charged with tax under section 8" indicates that section 8 has been applied and a supply has been identified that is charged with GST at the standard rate.

15. The words "that part of the supply is treated as being a separate supply" state the result of section 5(14) being applied: the zero-rated part of the supply is deemed to be a separate supply for the purposes of the Act.

16. The meaning of the words "but section 11, 11A, 11AB or 11B requires part of the supply to be charged at the rate of 0%" is less clear.

17. The words "to be charged", being in the future tense, can be read as indicating that the zero-rating provisions have not yet been applied. According to this interpretation, section 5(14) is referred to **after** it has been found that there is a supply charged with GST at the standard rate under section 8 and **before** the zero-rating provisions are applied. Section 5(14) refers the person applying the Act to determine whether any part of the supply comes within any of the zero-rating provisions. If there is such a part, section 5(14) is applied to deem that part to be a separate supply and the zero-rating provisions are then applied to zero-rate this new supply.

18. However, this interpretation appears inconsistent with the words "section 11, 11A, 11AB or 11B **requires** part of the supply" (emphasis added) to be zero-rated. These words suggest that whether part of a supply must be zero-rated is governed by the zero-rating provisions **alone** without reference to section 5(14). When section 5(14) is read as a whole these words qualify the words "to be charged": the zero-rating provisions have been applied to zero-rate part of the supply, but that part has not been treated as a separate zero-rated supply for the purposes of the Act.

19. According to this interpretation, section 5(14) is referred to **after both** section 8 and the zero-rating provisions have been applied. Section 5(14) is applied only if the applicable zero-rating provision requires that part of the supply be zero-rated. Section 5(14) then gives effect to the zero-rating of part of the supply required under the applicable zero-rating provision by deeming the zero-rated part to be a separate supply.

20. This analysis of the ordinary meaning of section 5(14) indicates that the words "but section 11, 11A, 11AB or 11B requires part of the supply to be charged at the rate of 0%" can be interpreted to support two competing views of section 5(14). However, the ordinary meaning of the words seems to be that section 5(14) gives effect to the zero-rating of part of a supply required under the zero-rating provisions, rather than the view that section 5(14) operates by itself to create standard- and zero-rated supplies.

Scheme of the Act

21. Section 8(1) is the core provision by which GST at the standard rate is imposed on supplies of goods and services in New Zealand that have been made by a registered person in the course or furtherance of a taxable activity carried on by that person.

22. Section 5(1) defines "supply" for the purposes of the Act, and the rest of section 5 details particular circumstances that give rise to supplies.

23. Section 8 is subject to the zero-rating provisions, which list the circumstances in which taxable supplies of goods and services must be charged with GST at the rate of zero percent.

24. The view that section 5(14) operates by itself to create standard- and zero-rated supplies is arguably consistent with the role of section 5 in defining the "supply" for the purposes of the Act. According to this view, section 5(14) isolates the zero-rated parts of a supply, and then requires these parts to be treated as separate supplies for the purposes of the Act. Under this interpretation, section 5(14) would assist in defining the "supply" for the purposes of the Act.

25. However, interpreting section 5(14) as giving effect to zero-rating of part of a supply required under the zero-rating provisions is also arguably consistent with the scheme of the Act. According to this interpretation, it would be first determined whether the supply is charged with GST at the standard rate under section 8. If section 8 applies, it would then be determined whether the supply must be zero-rated under the zero-rating provisions. It seems logical for the zero-rating provisions to be applied after section 8 has been applied, because they negate the effect of the tax liability established under section 8. Section 5(14) is then applied only if part of the supply has been zero-rated under the zero-rating provisions.

26. On this basis, section 5(14) has the role of clarifying the status of any zero-rated part of a supply. The Act refers to "a supply" or "the supply" throughout, in particular when defining "input tax", "output tax", and "taxable supply". Without section 5(14) deeming the zero-rated part to be "a supply", it could be unclear whether the zero-rated part must be taken into account in calculating "input tax", "output tax", and a "taxable supply".

27. This purpose is also consistent with the fact that section 5 defines the term "supply" for the purposes of the Act. On this basis, section 5(14) would define what "a supply" is, where "part of a supply" has been zero-rated under the zero-rating provisions, by deeming the zero-rated part of a supply to be a separate supply.

Case law

28. No case law exists on the current wording of section 5(14). There is case law on section 5(14) as it was enacted before its 2000 amendment ("the earlier section 5(14)").

29. The earlier section 5(14) provided:

    For the purposes of this Act, where a supply is charged with tax in part under section 8 of this Act and in part under section 11 of this Act, each part shall be deemed to be a separate supply.

30. The earlier section 5(14) was repealed and substituted by the current section 5(14) by section 86(9) of the Taxation (GST and Miscellaneous Provisions) Act 2000 with application on and after 10 October 2000. The current section 5(14) was amended by section 153 of the Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003 by inserting "11AB".

31. The amendments under the 2000 and 2003 Acts reflected that new zero-rating provisions (ie, sections 11A, 11AB and 11B) had been inserted into the Act. The earlier section 5(14) referred to "where a supply is charged with tax in part under section 8 of this Act and in part under section 11". The 2000 amendment replaced this with "[i]f a supply is charged with tax under section 8, but section 11, 11A, 11AB or 11B requires part of the supply to be charged at the rate of 0%". This change may reflect that the wording of the earlier section 5(14) was incorrect insofar as it suggested that section 11 "charged [part of a supply] with tax".

The reference in the current section 5(14) to the zero-rating provisions requiring part of the supply "to be charged at the rate of 0%" more accurately describes the effect of these provisions.

32. Despite the different wording, there are clear similarities between the wording of the earlier section 5(14) and the current section 5(14). Therefore, the case law on the earlier section 5(14) may be relevant to interpreting the current section 5(14).

33. The earlier section 5(14) was referred to by the Court of Appeal in *CIR v Coveney* (1995) 17 NZTC 12,193 (at pages 12,195–12,196) and the Taxation Review Authority in Case S27 (1995) 17 NZTC 7,189. However, in these judgments, the earlier section 5(14) was not material to the decision and was only restated without further analysis.

34. The High Court decision in *Coveney v CIR* (1994) 16 NZTC 11,328 contains the most extensive discussion of the earlier section 5(14). In this decision the Commissioner submitted that the Act expressly contemplates apportionment when there has been a composite supply of second-hand goods. In his submissions, the Commissioner relied on, amongst other provisions of the Act, sections 10(18) and 5(14) read together.

35. Fraser J rejected the Commissioner's submissions concerning sections 5(14) and 10(18). His Honour recognised that sections 5(14) and 10(18) both dealt expressly with taxable supplies and that apportionment of one sort or another was clearly contemplated, but held (at pages 11,334–11,335):

    Sections 5(14) and 10(18) are applicable to particular circumstances and I do not agree that they provide a basis for determining that in other circumstances to which the sections do not apply, and for which a separate regime is prescribed, the Commissioner is required or permitted to apportion the supply into separate component parts and to deal with them as if they were separate supplies.

36. It is considered that Fraser's J comment that section 5(14) clearly contemplates apportionment casts little light on its interpretation, as it does not indicate whether the authority to apportion derives from section 5(14) or from section 11 (as then enacted). Earlier in the judgment, Fraser J stated "[b]y s5(14) where a supply is charged with tax in part under s8 and in part under s11, each part is deemed to be a separate supply" (at page 11,334). This comment also does not assist in interpreting the current section 5(14) because it merely restates the earlier section 5(14) without further analysis.

37. Elsewhere in the judgment, Fraser J stated (at page 11,335):

    I think that *C of IR v Smiths City Group Ltd* is to be distinguished from the present case. The Court there was dealing with a taxable supply, partly taxed under s8 and partly under s11. Apportionment was seen as appropriate on the basis of s 10(18). Section 5(14) provides that where a supply is charged with tax in part under s8 and in part under s11, each part is deemed to be a separate supply.

38. This comment could be read as suggesting that *CIR v Smiths City Group Ltd* (1992) 14 NZTC 9,140 is relevant to interpreting section 5(14). However, section 5(14) was not mentioned in *Smiths City Group*. This supports the view that Fraser J did not intend his reference to section 5(14) to be considered relevant to his reasons for distinguishing the *Smiths City Group* decision. *Smiths City Group* and section 5(14) appear to have been mentioned in the same paragraph because both section 10(18) (which *Smiths City Group* did consider) and section 5(14) were mentioned together in the Commissioner's submissions.

39. In the Taxation Review Authority decision in Case Q46 (1993) 15 NZTC 5,227, Barber DJ stated (at page 5,233):

    I also note that s 5(14) reads:

    For the purposes of this Act, where a supply is charged with tax in part under section 8 of this Act and is [sic] part under section 11 of this Act, each such part shall be deemed to be a separate supply.

    This enables apportionment or separate valuation of each supply.

40. The above comment could be interpreted as supporting both the view that section 5(14) operates by itself to create standard- and zero-rated supplies and the view that section 5(14) gives effect to zero-rating of part of a supply as required under the zero-rating provisions.

41. If the former interpretation of the comment is correct, *Case Q46* is arguably of little persuasive weight. Barber DJ did not provide reasons for the comment. The comment is moreover obiter, because Barber DJ did not use section 5(14) to create standard- and zero-rated supplies. His Honour referred to the earlier section 5(14) only in order to demonstrate that the Act contemplated apportionment.

Conclusion

42. The Commissioner's view of the interpretation of section 5(14) is that it applies after it has been determined that:
    - there is "a supply" that is charged with GST at the standard rate under section 8; and
    - the applicable zero-rating provision requires that part of a supply be charged with GST at the rate of zero percent.
43. Section 5(14) is then applied with the result that the zero-rated part is to be treated as being a separate supply for the purposes of the Act.
44. The Commissioner acknowledges that the view that section 5(14) operates by itself to create standard- and zero-rated supplies can be seen as consistent with the scheme of the Act. However, the Commissioner considers that the view that section 5(14) gives effect to zero-rating of part of a supply required by the zero-rating provisions is to be preferred. This view is supported by the ordinary meaning of section 5(14), is consistent with the scheme of the Act and is not inconsistent with the case law on the earlier section 5(14).

Example

45. ABC Ltd, a non-resident company, supplies a New Zealand resident a computer system with a warranty to repair any defects that appear within 12 months. A defect appears in the computer system within the 12-month period. The New Zealand resident asks ABC Ltd to repair the computer system under the warranty and to upgrade it at the same time. The New Zealand resident pays ABC Ltd for the cost of the upgrade. ABC Ltd contracts with its preferred computer specialist in New Zealand to provide the repairs and to upgrade the computer system. The computer specialist invoices ABC Ltd for the supply of services it provided in repairing and upgrading the computer system.
46. Section 11A(1) requires that a supply of services be zero-rated where:

> (ma) the services relate to goods under warranty to the extent that the services are—
>
> (i) provided under the warranty; and
>
> (ii) supplied for consideration that is given by a warrantor who is a non-resident, not a registered person and who is outside New Zealand at the time the services are performed; and
>
> (iii) in respect of goods that were subject to tax under section 12(1); or

47. For the purposes of the example, it is assumed that all the requirements of section 11A(1)(ma) are satisfied and no other zero-rating provisions apply and that there is only one supply for the purposes of section 8.
48. The words "to the extent that" in section 11A(1)(ma) indicate that zero-rating of part of the supply is required. Consequently, the supply of services by the computer specialist to ABC Ltd is divided under section 11A(1)(ma) into the part that represents the repairing of the computer system under the warranty, which must be zero-rated, and the part that represents the upgrading of the computer system, which must be standard-rated. Section 5(14) is then applied to deem the zero-rated part of the supply to be a separate supply for the purposes of the Act.

Submissions received

49. Submissions received by Inland Revenue on the exposure draft of this item raised issues concerning the relationship between the item and two other matters.
50. Some submissions queried the relationship between the item and the exercise of determining whether a "package" of goods and/or services is a single supply, or comprises two or more supplies, for the purposes of the Act. The latter exercise involves identifying the supply or supplies to which section 8(1) and the zero-rating provisions are applied. It is undertaken before section 5(14) is applied, so does not concern the interpretation of this provision. For this reason paragraph 4 above now more clearly states that the item is not concerned with the principles of apportionment that the courts have developed to assist them to determine whether a "package" of goods and/or services is a single supply, or comprises of two or more supplies, for the purposes of the Act.
51. Some submissions queried when the zero-rating provisions require part of the supply to be zero-rated. The exposure draft of this item suggested that Parliament intended part of a supply to be zero-rated only when the zero-rating provision contains "apportioning language" such as "to the extent that". However, it is now acknowledged that this view may be too restrictive. Consequently, paragraph 12 above states that whether the relevant zero-rating provision authorises part of a supply to be zero-rated is a matter of statutory interpretation.

QUESTIONS WE'VE BEEN ASKED

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

QB 08/01: TAX ADMINISTRATION ACT 1994 – SECTION 91E(4)(F) AND SELF-ASSESSMENT

Question

Section 91E(4)(f) of the Tax Administration Act 1994 states that the Commissioner may not make a private ruling if an assessment has been made relating to the person, the arrangement, and a period or an income year to which the proposed ruling would apply, before the ruling application has been received by the Commissioner. Under the Taxation (Taxpayer Assessment and Miscellaneous Provisions) Act 2001, with effect from 24 October 2001, and with application to the 2002/03 and subsequent income years, taxpayers are required to assess their own income tax liability. Where a taxpayer has filed a tax return that contains their assessment before lodging a binding ruling application regarding a transaction and year that is covered by the return, does section 91E(4)(f) apply to the taxpayer's self-assessment?

Answer

When a taxpayer has made a self-assessment before a private ruling application has been received by the Inland Revenue Department section 91E(4)(f) applies.

Background

1. Unless otherwise specified, all legislative references are to the Tax Administration Act 1994.

2. A taxpayer may apply for a private ruling that involves a transaction and year for which the taxpayer has already made a self-assessment. Section 91E(4)(f) states that the Commissioner may not make a private ruling if an assessment has been made relating to the person, the arrangement, and a period or an income year to which the proposed ruling would apply, before the ruling application has been received by the Commissioner. The rationale behind section 91E(4)(f) is that if a transaction has been the subject of an assessment, then any dispute over the correct tax treatment of that transaction should be resolved under the tax disputes resolution procedures (Inland Revenue Department, *Binding Rulings on Taxation: A Discussion Document on the Proposed Regime*, June 1994).

Analysis

Application of relevant statutory provisions

3. Section 91E(4)(f) states:

   (4) The Commissioner may not make a private ruling if—

   (f) An assessment relating to the person, the arrangement, and a period or a tax year to which the proposed ruling would apply has been made, unless the application is received by the Commissioner before the date an assessment is made.

4. Section 91E(4)(f), therefore, applies when an income tax return has been filed and an assessment has been made before the Commissioner has received the application for the ruling.

5. Section 3, the interpretation section, defines "assessment" to include:

   an assessment of tax made under a tax law by a taxpayer or by the Commissioner:

6. A reference in the Act, therefore, to an "assessment" means an assessment made by the Commissioner or an assessment made by the taxpayer (ie, a self-assessment).

7. Section 15B outlines a taxpayer's tax obligations. Section 15B(aa) states:

   A taxpayer must do the following:

   (aa) if required under a tax law, make an assessment:

8. Part 3 of the Act refers to information, record-keeping and returns. Section 33 relates to annual returns of income from taxpayers. Section 33(2) states:

   (2) A return must contain a notice of the assessment required to be made under section 92.

9. Sections 92 and 92B provide for self-assessment and are in Part 6 of the Act relating to assessments. Sections 92(1) and (2) and 92B(1) and (2) (as amended by section 112 of the Taxation (Venture Capital and Miscellaneous Provisions) Act 2004) state:

   92 Taxpayer assessment of income tax

   (1) A taxpayer who is required to furnish a return of income for a tax year must make an assessment of the taxpayer's taxable income and income tax liability and, if applicable for the tax year, the net loss, terminal tax or refund due.

   (2) An assessment under this section is made on the date on which the taxpayer's return of income is received at an office of the Department.

92B Taxpayer assessment of GST

(1) A taxpayer who is required under the Goods and Services Tax Act 1985 to provide a GST tax return for a GST return period must make an assessment of the amount of GST payable by the taxpayer for the return period.

(2) An assessment under this section is made on the date on which the taxpayer's GST tax return is received at an office of the Department.

10. On the basis of the above provisions, it is considered that section 91E(4)(f) applies to both Commissioner-made assessments and taxpayer self-assessments.

11. Section 91E(4)(f) applies if an assessment has been made before the ruling application has been received by the Commissioner. "Assessment" is defined as an assessment of tax made by a taxpayer or by the Commissioner. There is an obligation on a taxpayer under section 15B(aa) to make an assessment, if required to do so under a tax law. Sections 92 and 92B stipulate that a taxpayer must make an assessment. Section 92(2) states that an assessment is made on the date on which the income tax return is received at an office of the Inland Revenue Department. The income tax return contains the taxpayer's assessment. The same is true of GST.

Background policy of self-assessment legislation

12. As noted above, self-assessment was brought into the legislation through the Taxation (Taxpayer Assessment and Miscellaneous Provisions) Act 2001 with effect from 24 October 2001, and with application to the 2002/03 and subsequent income years. The rationale behind the changes to the legislation was that, in practice, taxpayers self-assess their liability for tax as part of meeting their return filing obligations. Also, taxpayers are in the best position to assess their liabilities as they have the best information about their activities.

13. This rationale was described in 'Taxpayer self-assessment", *Tax Information Bulletin* Vol 13, No 11 (November 2001), on page 45:

Background

Our tax administration practices are based on the idea that taxpayers have the best information about their own activities. As such, taxpayers are better placed than the Commissioner to assess their tax liabilities by making the appropriate calculations and furnishing their returns each year. Inland Revenue automatically processes these returns and issues notices of assessment generally reflecting the information on each return. This approach is supported by audit processes, which in some cases will mean that the Commissioner amends an assessment.

Despite these practices, self-assessment has not, until now, been reflected in the tax legislation. Instead the tax legislation has been written as if it were the Commissioner who actually performed all assessment activities.

Legislating for self-assessment provides a more consistent framework for our tax laws by aligning the legislation with practice. In this way, taxpayer's obligations are now provided for more clearly and directly in our tax laws.

14. The most significant change to the legislation was that section 92 was amended to require taxpayers to assess their taxable income and income tax liability. The *Tax Information Bulletin* item stated, on page 47:

Detailed analysis

Requiring taxpayers to make assessments

The most significant change is that former section 92 of the Tax Administration Act, which required the Commissioner to make all income tax assessments, has been replaced with a requirement for taxpayers to assess their taxable income and income tax liability.

Definition of "assessment"

The definition of "assessment" has, for the purpose of the Income Tax Act and consequently the Tax Administration Act, been amended to reflect that either the taxpayer or the Commissioner may be performing the assessment function, depending on the context. The definition also includes all amendments to assessments; these can only be made by the Commissioner, although taxpayers can propose adjustments.

15. It is also noted that there are provisions in the Act that are limited to Commissioner-made assessments. For example, sections 111(1) and 114 refer only to Commissioner-made assessments and state:

111 Commissioner to give notice of assessment to taxpayer

(1) As soon as conveniently may be after making an assessment the Commissioner shall cause notice of the assessment to be given to the taxpayer:

114 Validity of assessments

An assessment made by the Commissioner is not invalidated—

(a) through a failure to comply with a provision of this Act or another Inland Revenue Act; or

(b) because the assessment is made wholly or partially in compliance with—

(i) a direction or recommendation made by an authorised officer on matters relating to the assessment:

(ii) a current policy or practice approved by the Commissioner that is applicable to matters relating to the assessment.

16. These provisions can be contrasted with section 92(1), which is limited to a taxpayer self-assessment (quoted in paragraph 9).

Binding rulings and disputes resolution regimes

17. Section 91E(4)(f) refers to an assessment having been made, and does not refer explicitly to either a Commissioner-made assessment or a taxpayer self-assessment. The definition of "assessment" in section 3 includes both Commissioner-made and taxpayer-made assessments.

18. It is noted that when section 91E(4)(f) was introduced with the rest of the binding rulings regime in 1994, only the Commissioner could make an assessment. The power to self-assess was enacted in 2001. However, although this was the position in 1994, it is also noted that one of the general principles of interpretation is that "the law is always speaking". The Interpretation Act 1999 sets out several principles of interpretation, including section 6, which states:

> **6 Enactments apply to circumstances as they arise**
> An enactment applies to circumstances as they arise.

19. Based on the analysis above, it is considered that section 91E(4)(f), therefore, applies to both types of assessment.

20. The conclusion reached that section 91E(4)(f) is applicable to self-assessment is also consistent with the roles of the binding rulings regime and the disputes resolution process in facilitating taxpayer compliance.

21. The rulings regime exists primarily for prospective transactions to enable taxpayers to obtain certainty, and thus comply with their tax obligations. When a taxpayer has already filed their return and made an assessment, the disputes resolution process is available to the taxpayer, should the Service Delivery Group disagree with the assessment. There was a clear legislative policy that the disputes resolution process would be available to ensure that disputes were resolved in these situations, and that the rulings regime would generally be available for situations that were contemplated or occurred before assessment.

Conclusion

22. It is concluded that section 91E(4)(f) applies in the situation where a taxpayer has filed their income tax return or their GST tax return and made a self-assessment before the Inland Revenue Department has received the ruling application. This is because:

- the definition of "assessment" in the Act refers to Commissioner-made assessments or self-assessments, and this definition applies in respect of section 91E(4)(f);
- taxpayers make self-assessments under sections 92(1) and 92B(1), which state (under sections 92(2) and 92B(2)) that the date of assessment is the date the taxpayer's return is received at an office of the Department; and
- the applicability of section 91E(4)(f) to self-assessments is consistent with the clear policy intent to introduce self-assessment, and the legislative policies behind the binding rulings regime and the tax disputes resolution procedure.

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 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.

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.

DELEGATED AUTHORITY

Case	Shirley and Ronald Marshall v The Commissioner of Inland Revenue
Decision date	2 April 2008
Act	Tax Administration Act 1994 (TAA)
Keywords	assessments

Summary

The Adjudication Manager has delegated authority to make assessments.

Facts

On 4 October 1990, the taxpayers purchased 56 Arnold Street which comprised an area of 5,265 square metres and a dwelling house. The property was further subdivided into 11 sub-lots and houses were built on all but two of the sub-lots. The taxpayers separated in April 1991. Shirley Marshall took the major share of the subdivided property and continued with its development. All the subdivided lots were sold by the taxpayers from 1991 onwards. In 1994 Shirley bought another piece of property, at the Esplanade with her new partner. She built a house on it and sold it within two years.

Decision

At the hearing the taxpayers decided to run their case on the sole issue of whether the Commissioner had made valid assessments. On this issue, the Judge considered inter alia the following subsidiary issues:

- whether the Commissioner had the authority to make assessments without the consent of the taxpayers
- whether the Manager of the Adjudication Unit had delegated authority to make the assessments
- whether the two Adjudication Reports of 30 June 2006 could be accepted as assessments.

The Judge held as follows:

- that the Commissioner was empowered to make assessments without the consent of the taxpayers under section 106 (1) or section 113 of the TAA for income tax and under section 27 (1) for GST
- that the Commissioner was not required to cite section 106 or section 113 in making the assessments
- that the Manager of the Adjudication Unit had delegated authority to make the assessments and the evidential presumption under section 7(3) of the TAA applied
- the Adjudication Reports were assessments and by reason of section 110 they could be accepted as evidence even though they were photocopies. Moreover, it was immaterial whether the word "determine" instead of the word "make" was used provided it was clear from the reports a decision was made on the amount of tax.

The Judge dismissed the taxpayers' claim and awarded costs to be fixed on a 2B basis for one counsel only.

ANZ HAS SECOND CAUSE OF ACTION STRUCK OUT

Case	ANZ National Bank Limited and Ors v The Commissioner of Inland Revenue CIV 2005-485-1037, 1038, 1039; 2006-485-1105, 1108, 1109, 1111. (Strike-out application)
Decision date	15 April 2008
Act	Tax Administration Act 1994, Judicature Act 1908
Keywords	strike out, tax avoidance

Summary

An interlocutory application by the Commissioner to strike out the second cause of action in ANZ's statement of claim was granted.

Facts

The ANZ bank ("ANZ") sought a private binding ruling in relation to a structured finance transaction which it planned entering into. This transaction was known as the "Karapiro" transaction. The Commissioner issued a positive ruling to ANZ in relation to the transaction and stated the anti-avoidance provisions in section BG 1 of the Income Tax Act 1994 did not apply to the transaction.

The Commissioner subsequently investigated a number of other similar transactions which ANZ had entered into. Following this investigation, amended income tax assessments were issued on the basis these other transactions constituted tax avoidance arrangements. ANZ has challenged the amended assessments in the High Court.

These proceedings arose out of the second cause of action which ANZ pleaded in its statement of claim. ANZ says reliance was placed on the positive ruling given by the Commissioner in relation to the Karapiro transaction when deciding whether or not to enter into the other transactions. ANZ claimed the Karapiro ruling amounted to a representation made by the Commissioner regarding the legitimacy of the transaction. ANZ also claimed that it was unfair and inconsistent for the Commissioner to reassess the other transactions on the basis of tax avoidance when they shared the same essential features as the Karapiro transaction. ANZ sought to have the reassessments set aside.

Decision

The High Court relied on Harrison J's decision in *Westpac Banking Corporation v CIR* (2008) 23 NZTC 21, 694 where the court struck out a materially similar cause of action pleaded by Westpac. In that case the Commissioner had also issued a positive ruling to Westpac in relation to a structured finance transaction known as the *First Data* ruling. In these proceedings Wild J adopted much of the Harrison J's analysis from the Westpac proceedings.

With regard to the *representation argument*, Wild J noted the Karapiro ruling was confined to the facts and assumptions of that particular transaction and discussed how the nature of the private rulings regime (as it stood at the time) made it clear that a private binding ruling could only apply to a particular arrangement. He stated that to say a private ruling constituted a representation in the way which ANZ pleaded would create an amorphous and uncertain alternative to the private binding rulings regime.

In relation to the *reliance and unfairness* aspects of ANZ's second cause of action, Wild J adopted the reasoning of Harrison J in the *Westpac* decision. ANZ had the opportunity to seek private binding rulings in relation to the other structured finance transactions but failed to do and so could not avail itself of the protection offered by the rulings regime.

The second cause of action in ANZ's fourth amended statement of claim was found to be untenable and was struck out and costs were awarded to the Commissioner.

QUALIFYING TRUST AND CORPUS

Case	TRA Decision 05/08
Decision date	13 March 2008
Act	Tax Administration Act 1994(TAA), Income Tax Acts 1976 and 1994
Keywords	qualifying trust, corpus

Summary

Section BD 1 (2) of the Income Tax Act 1994 includes reference to section 242 (c) of the 1976 Income Tax Act.

Facts

A family trust was set up in 1985 by four children for the benefit of their parents. They each granted a sum of money of US$99,750 to the trust which they termed as an interest free loan. The sole trustee of the trust, one of the children, resided in the United States. The other three children resided in New Zealand.

On 16 January 2004 the death of the children's widowed mother meant the assets of the trust were vested in equal shares in each of the four children. The vesting was treated as repayment of the loans.

It was accepted by the parties that the vesting attracted income tax liabilities for the three children residing in New Zealand and that the amount of tax depended on whether the trust was a "qualifying trust" or a "non-qualifying trust".

Decision

Qualifying trust

The issue of the qualifying trust, in this case, turns on the question of whether the provision excludes foreign-sourced income and non-residence, namely section BD 1(2) [as amended by the Taxation (Core Provisions) Act 1996] in section OB 1 of the Income Tax Act 1994 which picks up the former definition of a qualifying trust in section 242 (c) of the Income Tax Act 1976. If this applies, then the trust is looked at from 1985 to determine whether it is subject to New Zealand income tax in its life time. On the other hand if it does not, the trust is looked at from 1997 and section HH 4(3A) in the 1996 Act [as in section 228 (3) of the 1988 Act] becomes relevant as it deems foreign-sourced income of a non-resident trustee subject to New Zealand income tax if there is a resident settlor.

The Authority held that BD 1 (2) referred to section 242 (c) because section YB5 (4) of the 1994 Act permitted reference to it. This was held to be permissible in this case notwithstanding that section YB 5 (4) did not cover certain income periods of the trust in the legislative scheme of looking back at the life of the trust.

That being the case, it was held that the trust was not subject to New Zealand income tax from 1986 to March 1988 and therefore it was not a qualifying trust.

Corpus

In the context of taxable distribution of the trust, the corpus is a value excluded in its calculation. The definition of corpus means "an amount equal to the market value at the date of settlement of any property".

It was accepted by both parties and was held by the Authority that there were multiple settlements on a yearly basis because of the interest-free nature of the loan.

The taxpayers' method of valuing the corpus was to treat the loan like a commercial loan attracting compound interest on a quarterly basis. At the end of 2004 they estimated the corpus to be $4,048,919. The Commissioner's approach was to take the original amount of the loan in 1985 and to treat the foregone interest of the amount for each year as settled to the trust. He estimated the corpus to be $1,414,174.

The Authority agreed with the taxpayers' methodology but could not accept their figure and invited parties to negotiate or make further submissions.

FINAL DETERMINATION IN THE HIGH COURT STANDS

Case	The Commissioner of Inland Revenue v Central Equipment Company Limited
Decision date	11 April 2008
Act	Court of Appeal (Civil) Rules 2005, Companies Act 1993.
Keywords	leave to appeal, statutory demand set aside, liquidation, standing, party to the proceeding, applications for relief and recall.

Summary

Central Equipment Company Limited made two applications for special leave in the Court of Appeal for interim relief in relation to two prior decisions of the High Court which put the company into liquidation. These two prior decisions were cause for Mr Faloon to make applications for relief and recall. The High Court found that these proceedings had already been concluded by final judgments and were final. The Court could not exercise its jurisdiction in respect of Mr Faloon's two applications.

Facts

This was a Directions Hearing. The purpose of this hearing was for the Court to determine what to do with the two applications made by Mr Faloon in relation to previous decisions of the Court. However, the judge proceeded to deal with the matters substantively.

The hearing was in respect of long-running claims by Mr Faloon concerning certain rights which he asserts arise from his association with Central Equipment Limited. In particular Mr Faloon's applications were:

- for special leave in the Court of Appeal to bring a civil appeal, in particular, an application for the grant of interim relief under r 12(3)(b) of the Court of Appeal (Civil) Rules 2005 in relation to a decision of the Court dated 20 October 2006 which put the defendant company (Central Equipment Company Limited) into liquidation
- for directions under r 425 or r 700ZI (2) of the High Court Rules for allegations of fraud, negligence and misfeasance, or like behaviour against the Commissioner
- to be made a party to an application dated 28 March 2007, and
- for recall of an order dated October 2006 under section 174 of the Companies Act 1993 (Court documents 57), before a formal record of it had been drawn up and sealed.

On 2 October 2006, Judge Faire had ordered that Central Equipment Company Limited be put into liquidation (proceeding CIV 2003-470-923). Mr Faloon applied for leave to appeal this decision in the Court of Appeal. Leave to appeal that decision was dismissed by the Court of Appeal on 3 March 2008.

On 10 May 2006, Judge Faire had also refused Mr Faloon's application to have the Commissioner's statutory demand set aside (proceeding CIV 2003-470-856).

The decisions made in these two proceedings were cause for Mr Faloon to make applications for relief and recall. Judge Faire stated that these proceedings had already been concluded by final judgments, and due to the finality of these judgments Judge Faire could exercise no remaining jurisdiction in respect of Mr Faloon's two applications.

Decision

The applications were struck out. As this was essentially a directions hearing (with a swifter than anticipated outcome) costs were not awarded.

CHILD SUPPORT – RETROSPECTIVE REVIEWS AND DEPARTURES

Case	IPD v KME and The Commissioner of Inland Revenue
Decision date	24 April 2008
Act	Child Support Act 1991 sections 96O, 118(1) (e), 105(2) (c) Child Support Amendment Act 2006 section 49
Keywords	child support, retrospective departure orders

Summary

A Child Support Act 1991 question of whether a departure order from a formula assessment could be retrospective. The High Court did not follow Aspinall and Johnson, preferring CYF v SKF, WAC v CIR, and Hastings v Morel, and found that there was jurisdiction to make a departure order retrospectively. The matter was remitted to the Family Court for determination on its merits.

Facts

Mr IPD and Ms KME separated upon the breakdown in their marriage, with the mother assuming sole care of their two children. The father was subsequently assessed to pay child support from December 1999.

For the years 2002 to 2006, the father was assessed at the minimal rate on the basis of reported nil income or wages.

The father, together with his new partner whom he subsequently married, operating through their company, ran a horse breeding and farming property in South Auckland which had been acquired in about 2001 for $530,000 from a matrimonial property settlement, together with a mortgage of $210,000. That property was sold at a profit of $150,000 in January 2003 and the mortgage repaid. The company then purchased a property near Rotorua for $522,500. That property was run as a farm and mixed bloodstock or horse breeding establishment and sold in November 2005 for $1.2 million. None of this was known to the mother or to the Commissioner of Inland Revenue. The cash derived from the sale of the property was invested short-term in bank accounts and transferred to Australia.

The mother had applied for a departure in an administrative review by the Commissioner on 24 January 2006, and on 9 March 2006 the review decision fixed the father's child support income for the period 1 January to 31 December 2006 at $70,000 on the basis of an estimated 7% return on an investment of $1 million (notionally) over one year, given the Review Officer did not have the father's actual income details.

The father subsequently applied for two administrative reviews. Neither succeeded. A determination in the latter case was refused because the issues were too complex (section 96F). The Review Officer recommended that application for a departure order be made to the Family Court, which was done.

The mother cross-applied and also contended that the formula assessment for the years ended 2001 to 2006 should be departed from as well, that is, the departure order ought to have been "retrospective".

The Family Court considered that there was a need for the High Court to reconsider previous authorities in the context of the legislative provisions, and transferred the proceedings to the High Court for determination.

Decision

Having considered in detail the Judicial pathway on retrospectivity, Counsel's arguments, and an alternative Family Court view, Gendall J observed at [71], [72] and [75]:

> [71] I find much to commend in the reasoning and judgment of Judge Ullrich QC in having to deal with what was proper, just and equitable in the particular circumstances of that case. She held that the Court had jurisdiction to make a departure order retrospective. I am not able to disagree with her reasoning.
>
> [72] Given the wording of s 96O and s 118(1)(e), I do not accept that an intricate grammatical analysis of s 105(2)(c) means that retrospective departures cannot be made. … I agree with the analysis that Judge Ullrich made in CYF v SKF that "would" does not necessarily refer to the future.
>
> [75] The distinction has to be drawn between the jurisdiction and discretion, and Judge Inglis recognised this in Zimmerman when he said the power was "discretionary". The issue is for the careful assessment of the Review Officers or the Family Court. It is not an issue as to jurisdiction. It is incorrect to say, as it appears to have been the case in the authorities referred to, that there is no jurisdiction to enter upon such an inquiry, yet at the same time say there may be cases where discretion to reopen retrospectively a departure order may properly be considered. What those cases or circumstances are must depend upon an assessment of the contents of circumstances that then exist, whether they be "fraud" as identified by Judge Inglis, deliberate withholding of information, or any one of the multitude of circumstances justifying a departure order (either increasing or decreasing).

His Honour summarised at [76]:

a) The bar to there being retrospective departure orders arose from the decision of Taylor v Oliver;

b) The High Court decision of Hastings v Morel, to the opposite effect, was not referred to;

c) Aspinall v CIR followed or approved Taylor v Oliver, which, on its facts may have been the correct outcome;

d) Johnson v CIR also proceeded down that path, and was helpful in analysing the process. But I am satisfied that the Judge may have been lead into error by concluding that the relevant date was the date of application for the departure order rather than the date upon which the formula assessment order was made;

e) a formula assessment does not cease to exist when a liable parent accepts its validity and pays pursuant to it;

f) an application for a departure order is not an application for a "new" formula assessment;

g) a proper application and interpretation of the words "would be", "would result" and "to be provided" do not prevent the Court exercising a jurisdiction to make a departure order retrospective, clearly given to it by s 118, and to the Commissioner by s 96O;

h) I respectfully do not follow the decisions as to retrospectivity in Aspinall and Johnson;

i) the reasoning, and decisions of Judge V H Ullrich QC in CYF v SKF and WAC v CIR, and of Neazor J in Hastings v Morel are to be preferred, and I respectfully concur with them;

j) jurisdiction to make a departure order retrospective exists, but whether or not that discretion is exercised will depend upon an assessment of all the facts and circumstances (which may be infinitely different) so as to ultimately determine whether it is just and equitable and otherwise proper to make such order (whether by the Commissioner [s 96R(b)], or the Court [s 105(1)(b)].

His Honour remitted both the father's appeal and the mother's departure application to the Family Court for determination on the merits, observing (at [77]) that the Family Court had jurisdiction to grant the mother's departure application if it wished (at what level and for what period it decided proper). This decision did not mean that it would necessarily follow that a departure order would be made.

JURISDICTION OF THE DISTRICT COURT IN TAX CLAIM

Case	Diederik Meenken v the District Court, Masterton and The Commissioner of Inland Revenue
Decision date	24 April 2008
Act	Tax Administration Act 1994 (TAA), District Court Rules 1992 and District Courts Act 1949
Keywords	unpaid tax

Summary

"Unpaid tax" constitutes a "debt" for the purpose of section 29 of the District Courts Act 1947. It is the only founding jurisdiction of the District Court for a claim for unpaid tax.

Facts

The Commissioner had commenced proceedings against the taxpayer in the Masterton District Court to recover $5,111.67 for the balance of income tax and penalties in respect of years ended March 2003 and 2004.

The taxpayer took the point at the District Court that it had no jurisdiction to consider the Commissioner's claim. He took the same point to the High Court by applying for the judicial relief of prohibition to preclude the District Court from hearing the Commissioner's claim.

In the High Court the Commissioner applied to strike out the taxpayer's claim for judicial relief.

Decision

Dobson J held that the Commissioner acting under section 106 (1) [assessment in the event of the taxpayer failing to file a return] and section156 (1) of the TAA, was competent to file a claim in the District Court to recover unpaid tax. The District Court had jurisdiction to hear it under section 29(1) of the District Courts Act 1949 as a claim for a debt. As such there was no reasonable cause of action for judicial relief and the taxpayer's case in the High Court was struck out with costs to the Commissioner.

The Judge also discussed the decision of the District Court on the jurisdiction issue. He thought the District Court was wrong to hold that the Commissioner's claim could be supported on the alternative ground that it was a "penalty" under section 30 of the District Court Act.

ACCOUNTANTS' ADVICE DOCUMENTS MUST BE DISCOVERED

Case	ANZ National Bank Limited and Ors v The Commissioner of Inland Revenue CIV 2005-485-1037, 1038, 1039; 2006-485-1105, 1108, 1109, 1111. (Discovery application)
Decision date	15 April 2008
Act	Evidence Act 2006, Tax Administration Act 1994
Keywords	discovery, accountants' advice, relevance, confidentiality, tax avoidance

Summary

An interlocutory application made by the Commissioner for discovery of ANZ's accountants' advice documents was granted. The documents were relevant and not confidential.

Facts

The Commissioner has investigated a number of structured financing arrangements entered into by the ANZ and the National Bank ("ANZ"). Following this investigation amended income tax assessments have been issued. The basis for the reassessments is that the structured finance transactions are tax avoidance arrangements and the Commissioner is able to counteract the tax advantage gained. ANZ has challenged the reassessments but the substantive question relating to whether the transactions amount to tax avoidance has not yet been heard.

These proceedings arose out of the discovery phase of the substantive litigation. ANZ failed to provide for inspection copies of certain documents relating to tax advice it received from KPMG and PWC in relation to the structured finance transactions. The Commissioner sought discovery and inspection of these documents.

ANZ opposed the application for discovery on the grounds that the documents were not relevant and were confidential.

Decision

With regard to the question of relevance the Court proceeded on the basis of the settled law that the test for tax avoidance was objective and was determined by reference to the arrangement itself, not the subjective motives of the parties to the arrangement.

ANZ considered the subjective opinions of their tax advisors regarding the tax consequences as irrelevant to the Court's objective determination of whether the structured finance transactions constituted tax avoidance. However, the Commissioner relied on the proposition that the PWC tax advice documents formed part of the overall tax avoidance arrangement and were therefore relevant. The Commissioner also argued the tax advice documents might prove or disprove a matter which would be of consequence to the determination of tax avoidance. In particular the Commissioner cited eight aspects central to the determination of the substantive case which the PWC and KPMG document might go towards proving or disproving.

The Court accepted that the PWC and KPMG documents might be relevant to the determination of those eight aspects and were therefore relevant.

With regard to whether the documents were confidential ANZ relied on section 69(2)(b) of the Evidence Act 2006 ("EA"). This provision gives the Court the overriding discretion to order non-disclosure if the public interest in disclosure is outweighed by countervailing public interest in preventing harm to a relationship of confidence or maintaining the free flow of information.

ANZ argued the relationship between itself and its accountant tax advisors was one which came within the scope of section 69(2) (b) of the EA. This was rejected by Wild J on the following grounds:

- Accountants' advice is not privileged and is discoverable if it is relevant.
- The clear legislative intent of Parliament is not to extend privilege to accounting advice.
- Given the clear intent of Parliament it would be improper for the Court to exercise its discretion under section 69 of the EA to extend confidentiality to accountant's advice as an entire class of documents.
- There was no evidence that the relationship between ANZ and its accountant tax advisors would be harmed unless confidentiality was ordered.
- The proper evidential foundation was not laid for asserting confidentiality in relation to individual documents.
- The ANZ did not comply with the High Court Rules in relation to its claims of confidentiality.

The PWC and KPMG tax advice documents were held to be relevant and not confidential under the EA. The Commissioner's application for discovery of the PWC and KPMG tax advice documents relating to the structured finance transactions was allowed.

SUPREME COURT DECIDES ON TAXPAYER SECRECY

Case	Westpac Banking Corporation Limited, BNZ Investments Limited, ANZ National Bank Limited and Ors v The Commissioner of Inland Revenue SC 66 and 67/2007
Decision date	14 April 2008
Act	Tax Administration Act
Keywords	taxpayer secrecy, tax avoidance, discovery, integrity of the tax system.

Summary

The exceptions in the taxpayer secrecy legislation permit the discovery of documents held by the Commissioner in relation to a taxpayer in defence of his assessment against another taxpayer.

Facts

The Commissioner has investigated a number of structured financing arrangements entered into by the Westpac, BNZ and ANZ National banks. Following this investigation, amended income tax assessments were issued to each of the banks involved in these proceedings. The basis for the reassessments were that the structured finance transactions entered into by the various banks were a tax avoidance arrangement and the Commissioner was able to counteract the tax advantage gained by the banks. In each case the reassessments have been challenged by the respective banks. The substantive question relating to whether the transactions amounted to tax avoidance has not yet been dealt with by the Courts.

These proceedings arose out of the discovery process in the substantive challenge proceedings where the Commissioner listed and intended to produce for inspection documents relating not only to transactions specific to the particular bank, but also documents relating to similar transactions entered into by the other banks. The basis for this was that the Commissioner considered various classes of these documents were relevant to the determination of tax avoidance across the various banks.

Each of the banks objected to the Commissioner seeking to rely on other bank documents in the defence of his assessments. Proceedings were brought by the banks arguing that the documents of other banks should not be discovered in litigation on the grounds that they were not relevant. The banks also argued that section 81 of the Tax Administration Act 1994 (TAA) prevented the Commissioner from using documents of a bank which was not party to the particular challenge proceedings in the defence of his assessments against another bank.

The High Court rejected all avenues of attack by the banks and held that it was for the Commissioner to decide which documents were relevant and that his actions did not contravene the secrecy provisions of the TAA. With regard to ANZ National Bank's application for declaratory relief and judicial review Wild J found no basis for review and rejected their application for a declaratory judgment.

On appeal the Court of Appeal agreed with the High Court on the question of taxpayer secrecy and said that it was not satisfied that the other bank documents were irrelevant. The Court of Appeal also rejected the contention that the Commissioner's discovery was an abuse of process or was precluded on the common law principle of public interest immunity.

Decision

The Court analysed section 81 of the TAA, the meaning of the provision, the exceptions allowing disclosure of taxpayer secret information and the legislative history behind the provision. The Supreme Court then analysed the Commissioner's secrecy obligations in terms of sections 6 and 6A of the TAA, in particular the Commissioner's obligations to ensure a taxpayer's affairs are kept confidential against the Commissioner's overriding obligation to maintain the integrity of the tax system. The ultimate issue for the Court was to decide how these competing values could be reconciled.

The Court held that disclosure of taxpayer secret information was not permitted unless, and to the extent that it was reasonably necessary for the performance of the Commissioner's statutory functions. The Court recognised the value of taxpayer secrecy but said this value needed to be balanced against the need to maintain the integrity of the tax system.

With regard to whether the common law principle of public interest immunity prevented discovery of the "other banks'" documents, the Court disposed of the argument with reference to an established legal maxim, namely the various banks cannot resort to a common law principle when the statute law adequately deals with the question of law. The answer could be found by reference to the wording of section 81 coupled with the care and management provisions set out in sections 6 and 6A of the TAA.

The Supreme Court unanimously found that the documents the Commissioner wished to discover were part of the wider commercial context of the transactions and that, if in the substantive proceedings issues of commercial sensitivity arose, they could be addressed by the High Court.

The various banks' appeals were dismissed and costs were awarded to the Commissioner.

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