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It includes three sets of remedial amendments: the legislative changes the government announced on 14 May 2008 to give tax certainty for various entities in the lead-up to the deadline for registration with the Charities Commission; remedial amendments to the portfolio investment entity (PIE) and KiwiSaver rules; and a number of drafting corrections to the Income Tax Act.

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QB 08/02: Commissioner's power to issue a replacement ruling that operates retrospectively

A question has been asked whether the Commissioner may withdraw a ruling and issue a replacement ruling that operates retrospectively for all or some of the same period as the withdrawn ruling. This question applies if the withdrawn ruling contains an error that cannot be dealt with under section 91GI of the Tax Administration Act 1994, the error is not material, and the Commissioner and taxpayer consider that the error does not affect the technical conclusion reached, but agree that the error should still be corrected.

QB 08/03: Application for a private ruling or product ruling on an issue dealt with in a mutual agreement made under a Double Tax Agreement – Tax Administration Act 1994, sections 91E(4)(D)(ii) and 91F(4)(D).

This item addresses the procedure that would be followed by the Commissioner where an application for a binding ruling is made in respect of an issue that is dealt with in a mutual agreement under a Double Tax Agreement. The conclusion is that in such circumstances the Commissioner does not have authority to make a binding ruling.

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NEW LEGISLATION

TAXATION (PERSONAL TAX CUTS, ANNUAL RATES, AND REMEDIAL MATTERS) ACT 2008

The Taxation (Personal Tax Cuts, Annual Rates, and Remedial Matters) Bill 2008 was introduced into Parliament on 22 May 2008 and passed under urgency on 23 May. The resulting Act received Royal assent on 29 May 2008.

The new legislation gives effect to tax measures announced in Budget 2008 – personal tax reductions to be phased in over three and a half years, and changes to Working for Families tax credits to take account of inflation.

It includes three sets of remedial amendments: the legislative changes the government announced on 14 May 2008 to give tax certainty for various entities in the lead-up to the deadline for registration with the Charities Commission; small but necessary remedial amendments to the portfolio investment entity (PIE) and KiwiSaver rules; and a number of drafting corrections arising mainly from the rewrite of the Income Tax Act.

It also confirms the annual rates of income tax for the 2008–09 tax year.

The new Act amends the Income Tax Act 2007, Tax Administration Act 1994, Estate and Gift Duties Act 1968, KiwiSaver Act 2006, Taxation (KiwiSaver) Act 2007, and Taxation (Business Taxation and Remedial Matters) Act 2007.

TAX CUTS FOR INDIVIDUALS

Sections CS 1(7)(b), LC 3(3)(a) and (4), LC 9(1)(b), LC 10(3)(a), LC 11(1)(a), LC 12(1)(a) and (3)(c), ME 3(3)(c)(i), RC 5(4), RC 8(9), RC 10(3)(a)(i) and (ii), RC 11(4), RD 10(2)(a), RD 17(2) and (3), RD 51(3)(b)(i) and RD 51(4)(b)(i), RZ 5B, RZ 5C, YA 1 and YA 3(2)(i), schedule 1, parts A, C and D, and schedule 4, part I of the Income Tax Act 2007

Sections 24B(3)(c) to (e), 33A(1)(b)(iv)(AA), 33A(1)(b)(iv)(A), 33A(1)(b)(iv)(BA), 33A(1)(b)(iv)(B), 33A(1)(b)(v)(AA), 33A(1)(b)(v)(A), 33A(1)(b)(v)(BA), 33A(1)(b)(v)(B), 33A(1)(b)(vi)(AA), 33A(1)(b)(vi)(A), 33A(1)(b)(vi)(BA), 33A(1)(b)(vi)(B), 33A(1)(b)(via), 33A(1)(b)(vib), and 33C(b) and (c) of the Tax Administration Act 1994

In Budget 2008, the government announced a series of personal tax reductions to be phased in over three and a half years. The new legislation gives effect to those announcements by reducing the bottom personal tax rate from 15% to 12.5% and raising the thresholds at which tax rates apply.

Key features

The Income Tax Act 2007 and the Tax Administration Act 1994 have been amended to provide for tax cuts for individuals from 1 October 2008. The main features of the changes are:

- The tax cut package will be rolled out progressively in three stages.
- The new tax rates and thresholds apply to income earned by individuals.
- Some Stage 1 changes apply from 1 October 2008, and others apply for the 2008–09 income year.
- Stage 2 changes apply for the 2010–11 income year (meaning they generally apply from 1 April 2010).
- Stage 3 changes apply from the 2011–12 income year (meaning they generally apply from 1 April 2011).
- The bottom tax rate has been lowered from 15% to 12.5%.
- The thresholds will be raised for each of the three stages, as shown in the table below.

Rate	Thresholds		
	Stage 1 (beginning 1 October 2008) ($)	Stage 2 (1 April 2010) ($)	Stage 3 (1 April 2011) ($)
12.5%	0 – 14,000	0 – 17,500	0 – 20,000
21%	14,001 – 40,000	17,501 – 40,000	20,001 – 42,500
33%	40,001 – 70,000	40,001 – 75,000	42,501 – 80,000
39%	70,001 & above	75,001 & above	80,001 & above

- Consequential changes to other aspects of tax legislation – such as PAYE tax and provisional tax, fringe benefit tax and employer superannuation contribution tax – have been made to coincide with the three stages.
- The existing resident withholding tax rates for interest income and the portfolio investment entity (PIE) tax rates have not been changed, although the government has announced that they will be reviewed.
- The low income rebate[1] has been removed from the 2008–09 income year, to be replaced by the new 12.5% tax rate.

1 This is called "tax credits for persons on low incomes" in the Income Tax Act 2007, but is better known by its previous name, the low income rebate.

Application dates

The personal income tax cuts will be phased in over three and a half years, starting on 1 October 2008, followed by further cuts starting on 1 April 2010, with the final phase of tax cuts starting on 1 April 2011.

Detailed analysis

Personal tax rate reductions

New composite tax rates for the 2008–09 income year (schedule 1, part A, table 1)

Income tax is calculated annually and is based on a person's annual income. Because the tax rates and thresholds are changing part-way through the 2008–09 income year, the statutory tax rates that apply for the whole of the 2008–09 income year are "composite tax rates" that reflect an average of the two income tax rates that are used during the year. The table below shows the income tax rates that will be used during the 2008–09 income year, as well as the composite tax rates for the year. The new composite tax rates are contained in schedule 1, part A, table 1 of the Income Tax Act 2007.

Taxable income ($)	Old tax rates applying to PAYE for the period 1 April 2008 – 30 Sept 2008	New tax rates applying to PAYE for the period 1 Oct 2008 – 31 March 2009	Composite tax rates for 2008–09 income year
0 – 9,500	15%*	12.5%	13.75%
9,501 – 14,000	21%*	12.5%	16.75%
14,001 – 38,000	21%*	21%	21.00%
38,001 – 40,000	33%	21%	27.00%
40,001 – 60,000	33%	33%	33.00%
60,001 – 70,000	39%	33%	36.00%
70,001 & higher	39%	39%	39.00%

*Includes the low income rebate

New tax rates for 2009–10 income year, 2010–11 income year, and 2011–12 income year (schedule 1, part A, table 1)

Schedule 1, part A, table 1 of the Income Tax Act 2007 provides for new tax rates for the 2009–10 income year, the 2010–11 income year, and the 2011–12 income year. The provision is amended each year. The new rates are shown in the table below:

2009–10	
Taxable income ($)	Tax rate
0 – 14,000	12.5%
14,001 – 40,000	21%
40,001 – 70,000	33%
70,001 upwards	39%

2010–11	
Taxable income ($)	Tax rate
0 – 17,500	12.5%
17,501 – 40,000	21%
40,001 – 75,000	33%
75,001 upwards	39%

2011–12 and subsequent years	
Taxable income ($)	Tax rate
0 – 20,000	12.5%
20,001 – 42,500	21%
42,501 – 80,000	33%
80,001 upwards	39%

New PAYE rates from 1 October 2008 – M and ML tax codes

The new tax rates and thresholds apply for the first pay period that ends on or after 1 October 2008. For pay periods that span the 1 October date and are a month or shorter, PAYE should be deducted at the new rates. If the pay period spanning 1 October is longer than a month, PAYE needs to be deducted at the old rate for the part of the pay period before 1 October and at the new rate for the part of the pay period after 1 October.

Tax rates on which PAYE will be based from October 2008 to 31 March 2010	
Taxable income ($)	Tax rate
0 – 14,000	12.5%
14,001 – 40,000	21%
40,001 – 70,000	33%
70,001 upwards	39%

The new thresholds will be progressively raised from 1 April 2010 and 1 April 2011. Inland Revenue's PAYE deduction tables will be updated to reflect the new rates and thresholds, so that the M and ML tax codes reflect the new rates and thresholds.

NEW LEGISLATION

New PAYE rates from 1 October 2008 – secondary tax codes (section 24B(3)(c) to (e) of the Tax Administration Act 1994)

Section 24B(3) of the Tax Administration Act 1994 raises the thresholds for secondary tax codes to reflect the new thresholds. The changes apply from the first pay period that ends on or after 1 October 2008.

Employees can elect a new secondary tax code if they believe that their annual income will be below the new threshold.

The new secondary tax thresholds will be progressively increased from 1 April 2010 and 1 April 2011.

From 1 October 2008 to 31 March 2010		
Taxable income ($)	Tax code	Tax rate
0 – 40,000	S	21%
40,001 – 70,000	SH	33%
70,001 upwards	ST	39%

From 1 April 2010 to 31 March 2011		
Taxable income ($)	Tax code	Tax rate
0 – 40,000	S	21%
40,001 – 75,000	SH	33%
75,001 upwards	ST	39%

From 1 April 2011		
Taxable income ($)	Tax code	Tax rate
0 – 42,500	S	21%
42,501 – 80,000	SH	33%
80,001 upwards	ST	39%

New thresholds for extra pay from 1 October 2008 (sections RD 10(2)(a), RD 17(2) and (3))

Sections RD 10(2)(a) and RD 17(2) and (3) of the Income Tax Act 2007 raise the thresholds at which tax rates on extra pay apply to reflect the new thresholds. The changes apply from the first pay period that ends on or after 1 October 2008.

The new thresholds will be progressively raised from 1 April 2010 and 1 April 2011.

Rates from 1 October 2008 to 31 March 2010	
Taxable income ($)	Tax rate
0 – 40,000	21%
40,001 – 70,000	33%
70,001 upwards	39%

Rates from 1 April 2010 to 31 March 2011	
Taxable income ($)	Tax rate
0 – 40,000	21%
40,001 – 75,000	33%
75,001 upwards	39%

Rates from 1 April 2011	
Taxable income ($)	Tax rate
0 – 42,500	21%
42,501 – 80,000	33%
80,001 upwards	39%

New FBT rates (schedule 1, part C, table 1)

Schedule 1, part C, table 1 of the Income Tax Act 2007 provides for new fringe benefit tax (FBT) rates and thresholds that employers use when calculating FBT under the multi-rate system. These reflect the new bottom rate of 12.5% and the raised thresholds. The changes apply to the 2008–09 income year, the 2009–10 income year, the 2010–11 income year and the 2011–12 income year. For the 2008–09 year, composite rates apply to reflect the two sets of rates being used for that year.

2008–09	
All-inclusive pay ($)	Tax rate
0 – 8,194	0.1594
8,195 – 11,940	0.2012
11,941 – 30,900	0.2658
30,901 – 32,360	0.3699
32,361 – 45,760	0.4925
45,761 – 52,160	0.5625
52,161 upwards	0.6393

2009–10	
All-inclusive pay ($)	Tax rate
0 – 12,250	0.1429
12,251 – 32,790	0.2658
32,791 – 52,890	0.4925
52,891 upwards	0.6393

2010–11	
All-inclusive pay ($)	Tax rate
0 – 15,312	0.1429
15,313 – 33,087	0.2658
33,088 – 56,537	0.4925
56,538 upwards	0.6393

2011–12	
All-inclusive pay ($)	**Tax rate**
0 – 17,500	0.1429
17,501 – 35,275	0.2658
32,276 – 60,400	0.4925
60,401 upwards	0.6393

New employer superannuation contribution tax rates (schedule 1, part D, table 1)

Schedule 1, part D, table 1 of the Income Tax Act 2007 provides for new employer superannuation contribution tax (ESCT) rates and thresholds. These reflect the new bottom rate of 12.5% and the raised thresholds. The changes apply from the first pay period that ends on or after 1 October 2008.

The new thresholds will be progressively raised from 1 April 2010 and 1 April 2011.

From 1 October 2008	
ESCT rate threshold amount ($)	**Tax rate**
0 – 16,800	0.125
16,801 – 48,000	0.210
48,001 upwards	0.330

From 1 April 2010	
ESCT rate threshold amount ($)	**Tax rate**
0 – 21,000	0.125
21,001 – 48,000	0.210
48,001 upwards	0.330

From 1 April 2011	
ESCT rate threshold amount ($)	**Tax rate**
0 – 24,000	0.125
24,001 – 51,000	0.210
51,001 upwards	0.330

Provisional tax (sections RC 5(4), RC 8(9), RC 10(3)(a)(i) and (ii), RC 11(4), RZ 5B, RZ 5C, YA 1)

Taxpayers using the standard or GST ratio methods of calculating provisional tax payments

New sections RZ 5B and RZ 5C amend provisional tax calculations to allow individuals who pay provisional tax using the standard or GST ratio methods to reduce their provisional tax payments from 1 October 2008 to the end of the 2012–13 income year. These sections do not apply to non-individuals such as companies or trustees calculating tax on trustee or beneficiary income.

To calculate the new provisional tax payments, a taxpayer's previous year's residual income tax (RIT) liability is reduced by the dollar amount of the maximum tax cut that a person earning $70,000 would receive for the income year (for example, $730 in 2008-09) before applying the standard uplift. This applies to provisional tax payments that are made on or after 1 October 2008 – the changes to the provisional tax rules in the Income Tax Act 2007 come into force on 1 October 2008. These changes are illustrated in the following example.

Example showing provisional tax payments for the 2008–09 year using standard uplift method

Martin has a standard 31 March balance date, uses the standard 5% uplift approach to calculating provisional tax, and his RIT from the previous year is $15,000. He makes three provisional tax payments: on 28 August, 15 January and 7 May.

Step 1

His provisional income tax liability for the 2008–09 income year before the 1 October 2008 changes is:

$15,000 × 1.05 = $15,750

His provisional income tax liability for the 2008–09 income year after the 1 October 2008 changes is:

($15,000 – $730) × 1.05 = $14,983.50

Step 2

P1 Martin's P1 instalment is due before 1 October 2008, on 28 August 2008, so is calculated as follows:

$15,000 × 1.05 × ⅓ = $5,250

P2 P2 occurs after 1 October 2008, on 15 January 2008 so is calculated as follows:

($15,000 – $730) × 1.05 × ⅔ – payment on P1 = $4,739

P3 His P3 occurs after 1 October 2008, on 7 May 2008 so is calculated as follows:

($15,000 – $730) × 1.05 × 3/3 – payments at P1 and P2 = $4,994.50

In a future income year, the RIT for that year is calculated by taking the previous year's RIT and reducing it by the dollar amount of the previous year's tax cut (column B). This figure is multiplied by the uplift of 105%. If the previous year's return has not been filed, the RIT is calculated by taking the RIT for the year before the previous year and reducing it by the dollar amount of the tax cut that applied to that year (column C). This figure is multiplied by an uplift of 110%.

A. Future year	B. Dollar amount of tax cut: previous year ($)	C. Dollar amount of tax cut: year before previous year ($)
1 October 2008 – end of 2008–09 income year	730.00	730.00
2009–10	730.00	1,460.00
2010–11	597.50	1327.50
2011–12	812.50	1,410.00
2012–13	–	812.50

Similarly, the RIT is reduced by the same amounts when calculating the GST ratio for a provisional taxpayer using the GST ratio method.

Taxpayers using the estimation method of calculating provisional tax payments

Individual taxpayers using this method should use the composite rates when calculating provisional tax instalments for their 2008–09 income year. For their provisional tax instalments for the 2009–10 and later income years, they should use the relevant tax rates specified for that year.

ACC attendant carers (schedule 4, part I, clause 1)

Payments to ACC attendant carers are currently subject to a withholding tax rate of 15%, which reflects the bottom tax rate. Schedule 4, part I, clause 1 reduces the withholding tax rate to 12.5% from 1 October 2008.

Section 33C of the Tax Administration Act 1994 ensures that a taxpayer who has received ACC attendant care payments that have had tax withheld at 15% does not have to file a tax return in certain circumstances. These circumstances are when he or she has earned income of $9,500 or under and is not otherwise required to file a tax return under section 33A(1). Section 33C has been amended to apply to ACC attendant care payments that have had tax withheld at 12.5% from the 2008–09 and subsequent income years. The threshold for this has also been raised to $14,000 in 2008–09 and 2009–10, $17,500 in 2010–11, and $20,000 in 2011–12.

WORKING FOR FAMILIES TAX CREDITS

Sections MD 3(4), MD 13(3),ME 3(3) MF 4B and 4C, MF 7(2)(a) and Schedule 31 of the Income Tax Act 2007.

Working for Families tax credit amounts and abatement thresholds have been increased to reflect rises in the Consumer Price Index (CPI).

Background

The Taxation (Personal Tax Cuts, Annual Rates, and Remedial Matters) Act 2008 makes changes to the Working for Families tax credit package to take account of movements in the Consumer Price Index (CPI). The changes increase the family tax credit entitlement amounts and raise the income threshold above which the family tax credit, in work tax credit and the parental tax credit begin to abate.

The law relating to Working for Families tax credits requires that the abatement threshold and the family tax credit entitlement amounts are adjusted for inflation, as measured by the CPI, from the beginning of the tax year following the CPI movement cumulatively reaching 5% after 1 April 2007. This will occur in the September 2008 quarter, and the change would usually apply from the following 1 April, being 1 April 2009. However, it has been brought forward so that the new income threshold and family tax credit entitlement amounts will apply from 1 October 2008.

Key features

- Family tax credit entitlement amounts have been increased.
- The abatement threshold above which the Working for Families tax credits (other than the minimum family tax credit) abate has been increased.
- The provision that allows future indexation of the threshold and the tax credit entitlement has been amended so that the next adjustment will be when the CPI movement cumulatively reaches 5% after 1 October 2008.

Application date

These changes will apply from 1 October 2008.

Detailed analysis

New family tax credit entitlement amounts (sections MD 3(4), MF 4B and 4C))

A Working for Families tax credit entitlement is calculated on the basis of a full tax year (1 April – 31 March). However, having the new entitlement amounts applying from 1 October 2008 will result in two sets of entitlement amounts applying during the 2008–09 tax year. The amounts before and after 1 October are outlined (shaded) in the table below. New sections MF 4B and 4C provide that these entitlement amounts will be used to calculate a family's entitlement if it wants its family tax credit entitlement paid in instalments during the year (either weekly or fortnightly).

Also outlined in the table are composite entitlement amounts that will apply for the whole of the 2008–09 year and reflect the combination of the entitlement amounts before and after 1 October. These composite amounts will be used by Inland Revenue to calculate entitlements if a family waits until the end of the year to receive its family tax credit, or to square up a family's entitlement if it has received family tax credit instalments during the year. These changes have been made by amending section MD 3(4).

Family tax credit amounts for the 2008–09 year

Children	Current amount 1 April 2008 ($)	New amount 1 October 2008 ($)	Composite amount for the 2008–09 year ($)
First child if under 16	4,264	4,487	4,376
First child if 16 or over	4,940	5,198	5,069
Subsequent child if under 13	2,964	3,119	3,042
Subsequent child if 13 to 15	3,380	3,557	3,469
Subsequent child if 16 or over	4,420	4,651	4,536

How much a family will gain from these changes depends on the number and age of children in the family and whether the family earns above the income abatement threshold.

The new entitlement amounts from 1 October 2008 also apply for the 2009–10 and subsequent years.

Abatement threshold (section MD 13(3) and schedule 31)

In addition, the income threshold above which the family tax credit, in work tax credit and parental tax credit abate has been raised from 1 October 2008 to take account of inflation. The previous abatement threshold was $35,000, and from 1 October 2008 it increases to $36,827. As with the changes to the family tax credit entitlement amounts, changing the abatement threshold part-way through the year (1 October) will result in a composite threshold applying for the 2008–09 year. The composite threshold for this year will be $35,914. These changes have been made by amending section MD 13(3).

For the 2009–10 and subsequent years, the threshold amount will be $36,827.

Schedule 31 of the Income Tax Act 2007 has also been amended to reflect the new abatement threshold of $36,827. This schedule is used to calculate weekly or fortnightly instalments of the Working for Families tax credits based on bands of estimated annual family income.

Calculation of net family scheme income (section ME 3(3))

The definition of "adjusted liability" in the formula for calculating net family scheme income in section ME 3(3)(c) has been amended by repealing subparagraph (ii) as a consequence of the repeal of the low income rebate. Net family scheme income is a component of the formula for calculating the minimum family tax credit.

Future indexation (section MF 7(2)(a))

Section MF 7 of the Income Tax Act 2007 previously required the abatement threshold and the family tax credit entitlement amounts to be adjusted for inflation, by Order in Council, when the CPI movement cumulatively reached 5% after 1 April 2007. Because the CPI indexation has been brought forward, section MF 7 has been changed so that the abatement threshold and the family tax credit entitlement amounts are adjusted for inflation when the CPI movement cumulatively reaches 5% after 1 October 2008.

REMEDIAL AMENDMENTS CLARIFYING THE RULES FOR REGISTRATION OF CHARITIES

Sections CW 41(5), CW 55C, LD 3(2)(bb) and (bc) of the Income Tax Act 2007, sections 32E(2)(kb) and (kc) of the Tax Administration Act 1994, sections 73 (2)(jb) and (jc) of the Estate and Gift Duties Act 1968

Amendments have been made to the Income Tax Act 2007, Tax Administration 1994 and the Estate and Gift Duties Act 1968 to resolve certain tax uncertainties that have emerged in the lead-up to the 1 July deadline for charities to register with the Charities Commission.

Background

Under law that came into force on 1 July 2008, charitable entities had to be registered with the Charities Commission by that date to be entitled to the charity-related income tax exemptions and for gifts to them to be exempt from gift duty. However, a number of associated gaps and uncertainties had been revealed in the lead-up to the 1 July deadline.

A number of different types of entities were unclear about whether they had to register with the Charities Commission to retain their tax-exempt status. Concerns had also been raised by Inland Revenue over how it would deal with charities that had not completed the registration process by the deadline and with non-resident charities that are unable to register with the Charities Commission.

Key features

The amendments provide that:

- Tertiary education institutions and certain non-resident charities will not be subject to income tax.
- Those making gifts to state and state integrated schools, tertiary education institutions and certain non-resident charities will not need to pay gift duty on those gifts.
- Those making cash donations to state and state integrated schools or tertiary education institutions can claim a charitable tax credit on the cash donation.
- The transitional changes allow Inland Revenue, in limited circumstances, to continue to treat an entity as tax-exempt as a charity if it has not completed the registration process by 1 July.

The amendments will mean that tertiary education institutions and state and state integrated schools will not need to register with the Charities Commission to retain their current tax-exempt treatment. However, they may still choose to register as a charitable entity under the Charities Act 2005 to have access to other benefits that flow from registration – for example, registered charity status can be a prerequisite for securing funding from other charitable organisations or can be a means of branding for some organisations.

Application date

The amendments will apply from 1 July 2008, the date on which the tax provisions in the Charities Act 2005 came into force.

Detailed analysis

State and state integrated schools

New tax provisions will apply to state and state integrated schools that are run by boards of trustees constituted under Part 9 of the Education Act 1989.

- Section LD 3(2)(bb) of the Income Tax Act 2007 includes state and state integrated schools in the entities that are donee organisations. Donations made to donee organisations qualify for the charitable donations rebate for individuals and tax deductions for companies and Māori authorities.
- Section 73 (2)(jb) of the Estate and Gift Duties Act 1968 exempts from gift duty gifts made to state and state integrated schools.
- Section 32E(2)(kb) of the Tax Administration Act 1994 allows state and state integrated schools to apply for a Certificate of Exemption for resident withholding tax purposes.

Tertiary education institutions

New tax provisions will apply to tertiary education institutions (universities, polytechnics, specialist colleges and wananga) that are established under Part 14 of the Education Act 1989:

- Section CW 55C of the Income Tax Act 2007 exempts from income tax the income derived by a tertiary education institution.
- Section LD 3(2)(bc) of the Income Tax Act 2007 includes tertiary education institutions in the entities that are donee organisations.
- Section 73(2)(jc) of the Estate and Gift Duties Act 1968 exempts from gift duty gifts made to a tertiary education institution.
- Section 32E(2)(kc) of the Tax Administration Act 1994 allows tertiary education institutions to apply for a Certificate of Exemption for resident withholding tax purposes.

Charities that need more time to complete the registration process

New section CW 41(5)(ii) of the Income Tax Act 2007 deals with transitional tax consequences for charities that need more time to complete the registration process. It applies to entities that:

- started, before 1 July 2008, to take reasonable steps in the process of preparing an application for registering as a charitable entity under the Charities Act 2005
- intend to complete the process of preparing an application in future
- have not been notified by the Inland Revenue that they are not a "tax charity".

Inland Revenue has developed administrative guidelines on what organisations will need to do to be eligible for the transitional relief. These guidelines can be viewed on Inland Revenue's website at **www.ird.govt.nz/news-updates/like-to-know-admin-guidelines-charities-reg.html**

Charities that qualify for this transitional relief will continue to be treated as income tax-exempt, and gifts made to them will not attract gift duty.

Non-resident charities

New section CW 41(5)(iii) of the Income Tax Act 2007 enables Inland Revenue to approve certain non-resident charities as income tax-exempt on grounds of their having charitable purposes. Gifts made to these approved charities will not attract gift duty.

To be eligible for the proposed treatment, a non-resident charity must carry out its charitable activities outside of New Zealand and must not have a strong connection to New Zealand such that the Charities Commission is able to exercise its monitoring and enforcement functions under the Charities Act 2005.

Inland Revenue will develop a set of administrative guidelines on how it will assess whether a non-resident charity is eligible for the exemptions. These guidelines will be available on Inland Revenue's website.

REMEDIAL AMENDMENTS TO PIE RULES

Sections RE 2 and YA 1 of the Income Tax Act 2007 and section 31B(5) of the Tax Administration Act 1994

Several remedial amendments have been made to the portfolio investment entity (PIE) rules. These remedial amendments generally apply from the 2008–09 income year.

Section RE 2 of the Income Tax Act 2007 has been amended to ensure that resident withholding tax does not apply to PIE distributions.

A mistake in the definition of "portfolio investor rate" in section YA 1 of the Income Tax Act 2007 has been corrected by replacing 33% with 30%.

Section 31B of the Tax Administration Act 1994 has been amended to require portfolio tax rate entities to request a tax file number from new investors as soon as is practicable. A related amendment has been made to the definition of "portfolio investor rate" in section YA 1 of the Income Tax Act 2007. This will ensure that the 19.5% "portfolio investor rate" is not available to investors unless they notify the portfolio tax rate entity of their tax file number.

REMEDIAL AMENDMENTS TO KIWISAVER RULES

Section 4(1) of the KiwiSaver Act 2006 and section 2(7) of the Taxation (KiwiSaver) Act 2007

The definition of "salary or wages" in the KiwiSaver Act 2006 has been amended to ensure that an accommodation allowance is not treated as salary or wages for KiwiSaver purposes. This amendment applies from 1 April 2008.

The Taxation (KiwiSaver) Act 2007 has been amended to delay the repeal of section 216 of the KiwiSaver Act 2006 until 1 April 2009.

DRAFTING CORRECTIONS

Sections LP 2(2), OA 18(3), OZ 12(2) and (3), RA 13(1)(b), RE 13(3)(a), RE 19(2) and (3), and schedule 1, part D of the Income Tax Act 2007, section 33A(1)(b) of the Tax Administration Act 1994 and section 2(21) of the Taxation (Business Taxation and Remedial Matters) Act 2007

A number of minor drafting and cross-referencing errors that arise mainly from the rewrite of the Income Tax Act have been corrected. These corrections are being made as a matter of urgency to give certainty to taxpayers. These remedial amendments apply generally from the 2008–09 income year.

ANNUAL INCOME TAX RATES FOR 2008–09

Schedule 1, part A, of the Income Tax Act 2007

The income tax rates (based on whole dollars) that apply for the 2008–09 tax year are:

Taxable income: individuals	Tax rate
0 – 9,500	13.75%
9,501 – 14,000	16.75%
14,001 – 38,000	21%
38,001 – 40,000	27%
40,001 – 60,000	33%
60,001 – 70,000	36%
70,001 upwards	39%
Taxable income: companies	30%
Taxable income: trustees	33%
Taxable distributions: non-complying trusts	45%
Schedular taxable income: category A income of group investment funds	30%
Taxable income: trustees of certain funds (approved unit trusts, widely held group investment funds and widely held superannuation funds)	30%
Taxable income: Māori authorities	19.5%
Schedular taxable income: policyholder income	30%

BINDING RULINGS

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

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

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

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

PUBLIC RULING BR PUB 08/01: GST – WHEN THE SUPPLY OF LEASEHOLD LAND IS AN EXEMPT SUPPLY

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 01/01 which was published in *Tax Information Bulletin*, Vol 13, No 4 (April 2001) and applied until 31 January 2006. This was a reissue of BR Pub 96/7 which was published in *Tax Information Bulletin*, Vol 7, No 12 (April 1996). This ruling will apply for an indefinite period beginning on 1 February 2006.

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

Taxation law

This ruling applies in respect of section 14(1)(ca) of the Goods and Services Tax Act 1985.

The arrangement to which this ruling applies

This ruling applies to the supply of leasehold land, in exchange for rent, by a registered person.

This ruling applies to what are generally referred to as ground leases, where the lease or rental payable under the terms of the lease relate solely to the use of land. The ruling does not apply to any leases of land together with improvements associated with that land.

How the taxation law applies to the arrangement

The taxation law applies to the arrangement in the following manner.

In respect of the supply of leasehold land by way of rental:

- Where the leasehold land that is the subject of the supply is only used for the principal purpose of accommodation in a dwelling erected on that land, the supply is exempt from GST.
- Where the leasehold land that is the subject of the supply is not used, to any degree, for the principal purpose of accommodation in a dwelling erected on that land, the supply is not exempt from GST.
- Where the leasehold land that is the subject of the supply is used for the principal purpose of accommodation in a dwelling erected on that land and for another use, the supply is exempt from GST to the extent that the leasehold land is used for the principal purpose of accommodation in a dwelling erected on that land, irrespective of whether the predominant use of the land is for the principal purpose of accommodation in a dwelling erected on that land.
- Where the leasehold land that is the subject of the supply is used for the principal purpose of accommodation in a dwelling erected on that land and for another use, the apportionment of the value of the supply between the exempt and non-exempt uses must be made on the basis of allocating that proportion of the supply that is properly attributable to the exempt supply.
- Where a lease is entered into for leasehold land, and that land is to be used for the principal purpose of accommodation in a dwelling erected on that land, the supply of that leasehold land pursuant to the lease (or the relevant portion of the lease) is not exempt until the dwelling has been erected.

The words "not being a grant or sale of the lease of that land" in section 14(1)(ca) refer to any payment made for:

- the creation of a leasehold interest in that land, other than a payment of rent, or
- the sale of the leasehold interest in the land.

The period for which this ruling applies

This ruling will apply to a supply of leasehold land by way of rental for an indefinite period beginning on 1 February 2006.

This ruling is signed by me on the 23rd day of June 2008.

Susan Price

Director Public Rulings

COMMENTARY ON PUBLIC RULING BR PUB 08/01

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 08/01 ("the ruling").

The subject matter covered in the Ruling was previously dealt with in Public Ruling BR Pub 96/7 (Tax Information Bulletin, Vol 7, No. 12 (April 1996)) and BR Pub 01/01 (Tax Information Bulletin, Vol 13, No. 4 (April 2001)). The Commissioner's view in this ruling is not intended to differ from the previous rulings. Any changes between this ruling and the previous rulings are only intended to assist the reader's understanding.

A note as to legislative history

This ruling and commentary refers to section 14(1)(ca) of the Goods and Services Tax Act 1985. That section was originally enacted (pursuant to section 12(1) of the Goods and Services Tax Amendment Act 1986 and with effect from 3 December 1985, the date of enactment of the principal Act) as section 14(ca).

The Taxation (GST and Miscellaneous Provisions) Act 2000 amended section 14 and made it section 14(1) (with the subsidiary changes that section 14(ca) became section 14(1)(ca), section 14(c) became section 14(1)(c), etc). This was necessary due to the enactment of the new sections 14(2) and 14(3).

In this commentary, sections 14(ca) and sections 14(1)(ca) will consistently be referred to as section 14(1)(ca). Therefore, where necessary references to section 14(1)(ca) should be read as a reference to section 14(ca).

Similarly, section 14(1)(c) of the Act should be read as, where appropriate, section 14(c).

Background

Section 14(1)(ca) exempts from GST the supply of leasehold land by way of rental, to the extent that that land is used for the principal purpose of accommodation in a dwelling erected on that land. The section expressly excludes from the exemption any grant or sale of the lease of the land.

In the Commissioner's view, section 14(1)(ca) applies to the supply of leasehold land by way of rental when it is supplied separately from any buildings or other improvements to that land. This form of lease is commonly known as a "ground lease". Under a ground lease the rental is generally based on the unimproved value of the land. In such cases the head lessor owns the land, and the head lessee usually owns the buildings and any other improvements to the land.

Section 14(1)(ca) was inserted into the Act [originally as section 14(ca)] by section 12(1) of the Goods and Services Tax Amendment Act 1986. That amendment was effective from 3 December 1985, being the date of enactment of the principal Act and prior to the commencement of GST.

The amendment was enacted to correct a deficiency in the principal Act. In the absence of the amendment, residential lessees of leasehold land would have had to pay GST on their ground lease rental payments. This was seen as inequitable when compared with the position of residential owners of freehold properties, who generally do not pay GST on the acquisition of a private home, and lessees of residential accommodation. The supply of residential rental accommodation is GST exempt under section 14(1)(c). Section 14(1)(ca) was therefore intended to provide an extension to the section 14(1)(c) exemption.

There had been some uncertainty regarding the scope and effect of the section 14(1)(ca) exemption. In particular, when there is a supply of leasehold land that is used for both commercial and residential purposes. Further, uncertainty also occurred regarding the meaning of the words "not being a grant or sale of the lease of that land" in section 14(1)(ca).

Hence, public binding rulings BR Pub 96/7 and BR Pub 01/01 were issued by the Commissioner to clarify the position. This public binding ruling is not intended to change the Commissioner's view of section 14(1)(ca) as expressed in those rulings. Rather, any changes are intended to clarify the Commissioner's view.

Legislation

Section 14(1) exempts certain supplies from GST. Section 14(1)(ca) exempts:

> The supply of leasehold land by way of rental (not being a grant or sale of the lease of that land) to the extent that that land is used for the principal purpose of accommodation in a dwelling erected on that land:

Section 14(1)(c) also exempts:

> The supply of accommodation in any dwelling by way of -
>
> (i) Hire; or
>
> (ii) A service occupancy agreement; or
>
> (iii) A licence to occupy:

Section 2 defines "dwelling" as meaning:

> … any building, premises, structure, or other place, or any part thereof, used predominantly as a place of residence or abode of any individual, together with any appurtenances belonging thereto and enjoyed with it; but does not include a commercial dwelling:

Section 10(18) states:

> Where a taxable supply is not the only matter to which a consideration relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

Application of the legislation

Section 14(1)(ca) exempts "the supply of leasehold land by way of rental … to the extent that that land is "used" for the principal purpose of accommodation in a dwelling erected on that land". The Commissioner's view is that this means that to the extent that leasehold land is "used", by the lessee, "for the principal purpose of accommodation in a dwelling erected on that land" the supply of that land is exempt.

The word "used" in section 14(1)(ca) refers to the actual physical use of the land. The reason for this interpretation is briefly set out below.

The Shorter Oxford Dictionary, 5th edition, Volume 2 (2002), gives the first meanings of "use" as the "Act of using, fact of being used. The action of using something, the fact or state of being used…".

The meaning of "used" in paragraph (ca) was also considered inter alia in Case N22 (1991) 13 NZTC 3,187 by Judge Bathgate who said:

> For instance in sec 14(ca) reference is made to the purpose for which land may be held; in that paragraph reference is to "... land which is used for the principal purpose of accommodation ..." , which is to be distinguished from goods, "applied" for a particular purpose. The "use" of goods, as opposed to the "application" of goods would seem to connote their direct, physical involvement, or use.

This is consistent with the scheme and purpose of section 14(1)(ca) which was to provide an extension to the section 14(1)(c) exemption, by exempting the supply of leasehold land when it is "used" for residential accommodation purposes.

The term "principal purpose of accommodation in a dwelling" refers to the use to which the dwelling, erected on the leasehold land, or a portion of the leasehold land, is being put. It does not refer to the use to which the leasehold land is being put as a whole. Therefore, it is not necessary for the principal purpose to which the leasehold land is being put to be accommodation in a dwelling. It is sufficient if part of the leasehold land is being used for "the principal purpose of accommodation in a dwelling erected on that land".

Therefore, in applying section 14(1)(ca) to any ground lease, the use or uses to which the leasehold land is being put must be considered. Such consideration will allow the extent to which the supply of the leasehold land is exempt to be determined. When all the land and any buildings erected on that land are used for the principal purpose of accommodation in a dwelling, the full rental in respect of the ground lease is exempt from GST. When all the land and any buildings erected on that land are used for commercial or other non-dwelling purposes, the ground lease is subject to GST.

When leasehold land and any building erected on that land are used in part for the principal purpose of accommodation in a dwelling and in part for commercial or other non-exempt purposes, the ground lease is only exempt to the extent that the use to which the leasehold land is being put relates to the provision of accommodation in a dwelling. This requires apportioning the ground lease rental and imposing GST only on that part of the rental that relates to the non-exempt purpose(s).

Alternative interpretation

It is also arguable that section 14(1)(ca) only exempts the supply of leasehold land when all the land is used for the principal purpose, i.e., more than 50%, of accommodation in a dwelling. The exemption then only applies to the extent that the land is so used. For example, the ground lease rental of land on which a building is situated that is used as to 75% for accommodation and 25% for offices, is exempt from GST as to 75%. However, the ground lease rental of land on which a building is situated that is used as to 25% for accommodation and 75% for offices, is not exempt from GST.

While this is an arguable interpretation, the Commissioner considers that it is unduly narrow and restrictive, and that the interpretation that has been adopted (and expressed in the Ruling) better effects the purpose of the section. The Commissioner's view is that the primary focus of the provision is on that portion of the land that is used for accommodation purposes, rather than, as the alternative interpretation proposes, the predominant use of the land as a whole. To limit the exemption to only those instances where accommodation in a dwelling is the primary, or predominant, use to which the land being put would be to effectively ignore the apportionment requirement. It is considered that the better view is that the purpose of the section is to exempt from GST that element of total use that relates to the principal purpose of accommodation and that this purpose is best effected by a broad interpretation.

Apportionment

Section 14(1)(ca) is silent as to the correct way to apportion the lease payments in respect of the supply of the leasehold land between the exempt and non-exempt uses. The section only states that the supply is exempt "to the extent" that the use to which the land is being put is the exempt use.

Section 10(18) of the Act also deals with the apportionment of consideration between exempt and taxable supplies. However, that section similarly does not specify the basis for determining the apportionment – rather it simply deems the taxable supply to be for that part of the consideration as is properly attributable to it.

It is the Commissioner's view that it is not possible to specify a method of apportionment that must be applied in all instances. The appropriate method must be determined on a case by case basis, taking into account the provisions of the lease and bearing in mind that section 14(1)(ca) requires the apportionment to be undertaken taking into account the uses to which the land is being put.

The following examples are intended to be indicative only of the approach that may be taken to apportionment:

- A six-storey building is erected on leasehold land. Calculated on the basis of the floor area used, 60% was used for offices, 20% for a restaurant and the remaining 20% for residential apartments. The residential apartments are used for the principal purpose of private accommodation in a dwelling. Pursuant to section 14(1)(ca), 20% of the ground lease rental is exempt from GST.
- An area of rural leasehold land is used, on an area basis, as to 90% for grazing and 10% for a house and its curtilage. That house is used for the principal purpose of accommodation in a dwelling. Pursuant to section 14(1)(ca), 10% of the ground lease rental is exempt from GST.),

In some cases, the ground lease rental may be expressly calculated with reference to the different uses to which the land is to be put. For example:

- A person leases 10 hectares of rural land. A term of the lease is that one hectare can be used to erect a dwelling, but the remaining nine hectares must be left as pasture. The lease further provides that the pasture is to be leased at the rate of $10 per hectare per week, while the remaining land is leased at $50 per week. While the total rent payable under the lease is $140 per week, $50 will be GST exempt.

A grant or sale of the lease of that land

The words "not being a grant or sale of the lease of that land" create an exception to the exemption under the main body of section 14(1)(ca). The words in section 14(1)(ca) "not being a grant or sale of the lease of that land" refer to any payment made for:

- the creation of a leasehold interest in that land, other than a payment of rent, or
- the sale of the leasehold interest in the land.

Any grant or sale by the head lessor (owner of the land) of a ground lease of that land, where the ground lease is exempt from GST to the extent that it is used for the principal purpose of supplying accommodation in a dwelling, is not exempt from GST. Whether GST is payable on the sale or grant depends on whether the sale or grant is made in the course or furtherance of a taxable activity carried on by the head lessor.

Examples

The following examples do not form part of the ruling.

Example 1

A, a GST registered person, owns a vacant piece of land. She leases that land to S who constructs a building that is used to carry on her business as a drycleaner. The building occupies the entire piece of land, leaving only a narrow alley providing access to the rear entrance. No part of the land is used for the principal purpose of accommodation in a dwelling and therefore no part of the supply from A to S is exempt.

Example 2

S constructs an apartment above her drycleaning business and rents it to E. The floor area of the apartment is exactly the same as that of the drycleaners, so 50% of the ground rent charged by A to S is GST exempt.

Example 3

S sold her drycleaning business and the building, including the apartment, to E. E negotiated a new ground lease with A. 50% of the ground rent was exempt as it related to the apartment.

In addition to the ground lease rental payments, in order to facilitate the negotiation of the new lease E agreed to make a one off payment to A of $5,000. None of that payment is exempt from GST as it relates to the grant of the lease and is excluded from the exemption.

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 08/02: COMMISSIONER'S POWER TO ISSUE A REPLACEMENT RULING THAT OPERATES RETROSPECTIVELY

Tax Administration Act 1994, sections 91E(4)(e) and 91F(4)(e)

1. All legislative references are to the Tax Administration Act 1994 unless otherwise stated.

Background

2. A private or product ruling may be issued that is incorrect because it contains an error not previously detected. This may be a factual error contained in the description of the arrangement, an error in the reference to the taxation laws applied, or an error affecting another aspect of the ruling.

3. Where the error is a minor or typographical error and its correction will not change the meaning of the ruling, section 91GI applies so the ruling may be corrected without being withdrawn and reissued. Where the error results in a materially different arrangement, the ruling will not apply as a result of sections 91EB(2)(a) and 91FB(2)(a), and a new ruling may be reissued for the same period.

Question

4. A question has been asked whether the Commissioner may withdraw a ruling and issue a replacement ruling that operates retrospectively for all or some of the same period as the withdrawn ruling if the withdrawn ruling contains an error that cannot be dealt with under section 91GI, the error is not material, and the Commissioner and the taxpayer consider that the error does not affect the technical conclusion reached, but agree that the error should still be corrected.

Answer

5. In these circumstances, sections 91E(4)(e) and 91F(4)(e) do not prevent the Commissioner from withdrawing a private or product ruling issued under the Income Tax Act 2004 or the Income Tax Act 2007, and issuing an amended replacement ruling with application for some or all of the same period as the previous ruling (apart from the period that the Commissioner is not able to issue a replacement ruling under the Income Tax Act 2007 for a ruling issued under the Income Tax Act 2004).

Analysis

6. The issue is whether the Commissioner may withdraw a ruling that contains an error (as outlined above) and then issue a replacement ruling, or whether this is in breach of sections 91E(4)(e) and 91F(4)(e) when an arrangement has been entered into and the replacement ruling is expressed to apply before the withdrawal of the original ruling. As noted above, this issue does not arise in the case of:
   - errors that can be dealt with under section 91GI, or
   - material errors subject to section 91EB(2)(a) or section 91FB(2)(a).

7. An example would be where a ruling is issued on 1 November 2005 with application from 1 November 2005 to 31 October 2007. On 1 December 2005, an error is discovered, and it is established that section 91GI cannot be applied, it does not result in a materially different arrangement, and the correction of the error will not affect the technical conclusions reached. The Commissioner and the taxpayer agree that the error should still be corrected; so on 6 December 2005, the Commissioner withdraws the original ruling, and then reissues the ruling on the following day with retrospective application from 1 November 2005 to 31 October 2007. The question is whether the Commissioner is precluded from issuing the replacement ruling, because in the period 1 November 2005 to 6 December 2005 the original ruling existed.

8. Section 91E(4)(e) states that the Commissioner may not make a private ruling if:

   > A private ruling already exists on how the relevant taxation law applies to the person and the arrangement, and the proposed ruling would apply to a period or an income year to which the existing ruling applies.

9. Section 91F(4)(e) states that the Commissioner may not make a product ruling if:

   > A product ruling already exists on how the taxation law applies to the arrangement, and the proposed ruling would apply to a period or income year to which the existing ruling applies.

10. This issue arises because sections 91E(4)(e) and 91F(4)(e) prevent the Commissioner from issuing a ruling when a ruling "already exists" that "applies" in that particular instance. It is unclear, in cases where the original ruling is withdrawn, whether the replacement ruling (when operating retrospectively) would breach this restriction. This is because it could be argued that when the replacement ruling is retrospective, the original ruling is still in "existence" in respect of that period. This may prevent the replacement ruling from operating retrospectively.

Sections 91E(4)(e) and 91F(4)(e)

11. Sections 91E(4)(e) and 91F(4)(e) act as a restriction on the powers of the Commissioner to issue a private or product ruling. Summarising these provisions, the Commissioner cannot rule if a private or product ruling "already exists" and the proposed ruling would "apply" to a period to which the "existing ruling" "applies". This difference in terminology suggests that Parliament intended to make a distinction between these terms. It is important to consider how these sections operate in light of this distinction. This terminology also indicates that it is important to note the point in time at which the Commissioner must have regard to the restriction. Under these provisions, the restriction on the Commissioner operates at the time of issuing the replacement ruling. This means that at that point in time, the Commissioner must consider whether a private or product ruling already exists, and whether the replacement ruling will apply to the same period as applies to the existing ruling.

12. This is supported by the term "already exists" being coloured by "existing ruling". The term "existing ruling" is in the present tense and suggests that the ruling needs to be in existence at the point in time at which the replacement ruling is to be issued. As both the phrases "existing ruling" and "already exists" are in the present tense, this would indicate that it is only necessary to consider whether a ruling exists at the point in time the Commissioner is about to issue the replacement ruling, not whether it has existed previously.

Plain ordinary meaning of "exists" and "applies"

13. The ordinary meanings of the terms "exist", "apply" and "withdraw" are consistent with this view.

14. The definitions in the Concise Oxford Dictionary (11th ed) and Shorter Oxford Dictionary (5th ed) indicate that for something to "exist" it must have an objective reality or being. These dictionaries define "withdraw" as meaning to take something back or away. The relevant definitions also refer to discontinuing or rescinding something so it no longer has effect (eg retracting a statement or expression, or rescinding a judgment). On this basis it can be argued that the relevant meaning of a "withdrawn" ruling is one that has been "cancelled" so that it no longer exists. The term "apply" in a legal sense can have a very specific meaning. However, in the context of sections 91EI(3)(b) and 91FJ(4)(b), it means to be relevant or operative in relation to that thing.

15. Applying the meanings of these terms when considering sections 91E(4)(e) and 91F(4)(e), the Commissioner cannot rule if a private or product ruling "has an objective reality or being" and the proposed replacement ruling would "be relevant or operative" in relation to a period to which the existing ruling applies. If the previous ruling has been withdrawn, then it will no longer "exist", meaning that it will not have "an objective reality" at the point that the Commissioner intends to issue a replacement ruling.

16. The Commissioner acknowledges that under sections 91EI(3)(b) and 91FJ(4)(b) a withdrawn private or product ruling (respectively) continues to "apply" for the remainder of the period or income year specified in the ruling, if the arrangement was entered into before the date of withdrawal. However, in the Commissioner's view, the continuing application of the withdrawn ruling does not prohibit the Commissioner from issuing a replacement ruling because of the distinction between the terms "exist" and "apply" as discussed above.

Wider statutory context

17. It is also notable that the original ruling's legislation included provisions dealing with the situation in which two or more private or product rulings applied to a person in relation to an arrangement (sections 91EA(2) and 91FA(2), now repealed). Under these sections, the taxpayer could choose which ruling the Commissioner would be required to apply. These subsections were repealed with application from 20 May 1999.

18. The repeal of these sections was explained both in the Commentary on the Bill and in a statement in Tax Information Bulletin Vol 11, No 6 (July 1999), which stated that these provisions were unnecessary and were repealed on that basis, and that where conflicting rulings exist, the taxpayer has the choice of which ruling to apply. These comments indicate that it was still envisaged that it would be possible to have a situation in which two conflicting rulings apply. That it was envisaged that two rulings could apply further supports the view that it is possible for a replacement ruling to operate retrospectively so that there are two rulings applying at the same time.

Purpose of the Rulings regime

19. The approach taken in this item is consistent with the purpose of the Binding Rulings regime, which is to provide certainty to taxpayers about the way the Commissioner will apply taxation laws and to help taxpayers meet their obligations under those laws. A ruling with an error in it may create uncertainty on the part of a taxpayer as to whether or not the ruling applies to their situation. In cases where section 91GI does not apply, the ability to withdraw the original ruling and then issue a replacement ruling that operates retrospectively provides a taxpayer with certainty about the correctness of the ruling.

Income Tax Act 2007

20. A particular issue arises for rulings issued under the Income Tax Act 2004 that are saved under the Income Tax Act 2007. The Income Tax Act 2007 came into force on 1 April 2008 and first applies to income derived in the 2008-09 income year.

21. Section ZA 4 of the Income Tax Act 2007 saves private or product rulings issued under the Income Tax Act 2004, if the application for the ruling was made before the beginning of the 2008-09 income year on an arrangement that is entered into, or that an applicant seriously contemplates will be entered into, before the commencement of the Income Tax Act 2007. Any ruling saved under section ZA 4 of the Income Tax Act 2007 may be withdrawn and replaced if the saved ruling contains an error that cannot be dealt with under section 91GI of the Tax Administration Act 1994, the error is not material, and the Commissioner and the taxpayer consider that the error does not affect the technical conclusion reached, but agree that the error should still be corrected.

22. However, after a taxpayer's 2008–09 income year begins, the Commissioner will not be able to issue a retrospective replacement ruling under the Income Tax Act 2007 for the same period as the ruling saved under section ZA 4. This is because the Commissioner will require a "fresh" application for the replacement ruling and this will be made after the beginning of the taxpayer's 2008–09 income year. Therefore, the Commissioner will be able to issue a replacement ruling under the Income Tax Act 2007 for a ruling issued under the Income Tax Act 2004 only with effect from, at earliest, the beginning of the taxpayer's 2008–09 income year.

Conclusion

23. Therefore, the Commissioner considers that sections 91E(4)(e) and 91F(4)(e) do not prevent the Commissioner from withdrawing a private or product ruling which contains an error of the type outlined above, and then issuing an amended replacement ruling that applies for some or all of the same period as the previous ruling (apart from the period that the Commissioner is not able to issue a replacement ruling under the Income Tax Act 2007 for a ruling issued under the Income Tax Act 2004 as outlined above). This is based on a consideration of the distinction between the terms "exist" and "apply", the timing requirement inherent in sections 91E(4)(e) and 91F(4)(e), and the wider context and purpose of the Rulings regime.

QB 08/03: APPLICATION FOR A PRIVATE RULING OR PRODUCT RULING ON AN ISSUE DEALT WITH IN A MUTUAL AGREEMENT MADE UNDER A DOUBLE TAX AGREEMENT – TAX ADMINISTRATION ACT 1994, SECTIONS 91E(4)(D)(II) AND 91F(4)(D)

Question

1. We have been asked to clarify the process that the Commissioner will follow when an application for a private ruling or product ruling is sought in relation to a matter that has been dealt with in a mutual agreement between competent authorities under a Double Tax Agreement (DTA).

Answer

2. The Commissioner has no authority to give a ruling on the interpretation or application of a mutual agreement and the Commissioner will not give a ruling on an issue if the issue is within the scope of an existing mutual agreement.

Background

3. The Commissioner, or his authorised representative, is the New Zealand competent authority under New Zealand's DTAs. The competent authority of the other party to a DTA is a person who holds the equivalent position in the other Contracting State. (Each of the parties to a DTA is a Contracting State.)
4. All New Zealand's DTAs contain a provision that is substantially the same as Article 25 of the OECD Model Double Tax Convention.
5. Under Article 25(1) of the Model Double Tax Convention, people who consider that the actions of one or both of the Contracting States will result in taxation "not in accordance with the provisions of the Convention" may present their cases to the competent authority of the Contracting State of which they are a resident or, if the case comes under Article 24(1) (the non-discrimination article), to the competent authority of the Contracting State of which they are a national. The competent authority must endeavour (if the competent authority considers that the objection is justified and the competent authority is not able to arrive at a satisfactory solution) to resolve the case by mutual agreement with the competent authority of the other Contracting State: Article 25(2). Article 25(3) requires the competent authorities of the Contracting States to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention: Article 25(3) first sentence. Article 25(3) also provides that the competent authorities may consult together "for the elimination of double taxation in cases not provided for in the Convention": Article 25(3) second sentence.
6. Article 25(4) provides that the competent authorities may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in terms of Article 25.
7. Agreements made under the procedures outlined in Article 25 are usually referred to as "mutual agreements".

Discussion

8. The Commissioner is authorised to make binding rulings on how a taxation law applies or would apply: sections 91D(1), 91E(1) and 91F(1) of the Tax Administration Act 1994 (TAA). A mutual agreement is not a "taxation law" as defined in section 91B of the TAA, as it is not a provision in any of the statutes specified in section 91C(1) of the TAA. Therefore, the Commissioner does not have the power to make a binding ruling on the interpretation or application of a mutual agreement.
9. Sections 91E(4)(d)(ii) and 91F(4)(d) of the TAA prevent the making of a private or product ruling in respect of a matter that is being dealt with, or in the Commissioner's opinion should be dealt with, by one or both competent authorities of the parties to a DTA. Therefore, in considering an application for a binding ruling, the Commissioner must determine whether an issue relating to the interpretation of a DTA is being dealt with or should be dealt with by the competent authority, rather than in a ruling. Sections 91E(4)(d)(ii) and 91F(4)(d) contemplate that in some circumstances the interpretation of a DTA should be dealt with by the competent authority.
10. A matter "is being dealt with" by the competent authority where the taxpayer applying for the ruling has also presented a case for consideration by the competent authority under the mutual agreement procedure provisions in a DTA or where, at the time a binding ruling is sought, the competent authority is in the process of negotiating a more general mutual agreement on the matter. Consistent with the purpose underlying the legislation, if the application for a binding ruling relates to a matter that is within the

scope of a mutual agreement already entered into by the Commissioner acting as the competent authority, it is considered that the matter should continue to be dealt with by the competent authority and not in the context of a binding ruling application.

11. Therefore, the Commissioner will not give a binding ruling if a mutual agreement exists and the issue in respect of which a binding ruling is sought is within the scope of the mutual agreement.

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.

WHEN DIVIDENDS ARE PAID

Case	TRA Decision 07/08
Decision date	04 June 2008
Act	Income Tax Act 1994
Keywords	Dividends, imputation credits, paid

Summary

When an unconditional dividend is declared, it is automatically credited to the shareholders' current account. Crediting a current account constitutes payment of the dividend.

Facts

On 6 June 2001 the disputant declared a dividend. The directors' resolution required that the dividend would be credited to the appropriate dividend account provided that the shareholders passed a resolution subordinating payment of the dividend to the payments of all liabilities. The shareholders passed a resolution later that morning.

The dividend was fully imputed. The dividend was declared in the morning of 6 June. In the afternoon there was a significant change in the shareholding of the disputant resulting in a breach of shareholder continuity.

Imputation credits attached to dividends are only debited to the imputation credit account when the dividend is "paid" by the company (section ME 5(1) (a) of the Income Tax Act 1994).

Decision

The Commissioner's contention was that the dividend was not paid as no funds were placed unreservedly at the disposal of the shareholders. The Court held that the funds were paid as:

1. An unconditional dividend was declared.
2. Even though the current account entry was only recorded in September 2001, the current account was automatically credited when the dividend was declared.
3. "Credited" is included in the relevant definition of paid in section OB 1 of the Income Tax Act 1994.
4. The "crediting" of the current account also had the legal effect that the taxpayer had paid its shareholder but that the funds were loaned back to the taxpayer.
5. Consequently, the funds were paid on 6 June 2001 prior to the change of shareholder continuity.
6. What was subordinate to the payment of all liabilities and not paid was the current account balance and not the dividend.