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TAX INFORMATION
Bulletin

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Inland Revenue
Te Tari Taake

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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly 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 a user of that legislation, is highly valued.

A list of the items we are currently inviting submissions on can be found at **www.ird.govt.nz**. On the homepage, click on "Public consultation" in the right-hand navigation. Here you will find drafts we are currently consulting on as well as a list of expired items. You can email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Office of the Chief Tax Counsel
Inland Revenue
PO Box 2198
Wellington 6140

You can also subscribe to receive regular email updates when we publish new draft items for comment.

Below is a selection of items we are working on as at the time of publication. If you would like a copy of an item please contact us as soon as possible to ensure your views are taken into account. You can get a copy of the draft from **www.ird.govt.nz/public-consultation/** or call the Team Manager, Technical Services Unit on 04 890 6143.

Ref	Draft type/title	Description/background information	Comment deadline
INS0102	GST: Time of supply – payments of deposits, including to a stakeholder	This draft interpretation statement considers the application of the time of supply rules for GST purposes to the payment of a deposit in various circumstances, including under conditional and unconditional agreements, where a binding agreement does not exist, and where payment is made to a stakeholder.	
QWB0084	GST treatment of futures contracts	This draft question we've been asked considers the GST treatment of futures contracts. It states that the provision or assignment of a futures contract will generally be an exempt supply. However, where a person supplies a cash settled futures contract to a non-resident who is outside New Zealand, the supply will be zero-rated.	
QWB0083	Fringe benefit tax – value of motor vehicle previously owned by the employer or by an associated person of the employer	This draft question we've been asked discusses when the value of a motor vehicle for fringe benefit tax purposes will be affected by the vehicle having previously been owned by the employer or an associated person of the employer.	
INS0106	Special depreciation rate for an item – estimated useful life and lease terms	This draft interpretation statement addresses whether a lease term is a relevant factor in determining an item's estimated useful life for the purposes of setting a special depreciation rate.	
ED0123	Draft tax depreciation rate general determination: Automated dairy drafting systems	The Commissioner proposes to set a general depreciation rate for automated dairy drafting systems. The draft determination will add the new asset class to the "Agriculture, Horticulture and Aquaculture" industry category and will apply for the 2009–2010 and subsequent income years.	26 March

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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 their 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**

PRODUCT RULING BR PRD 09/10

This product ruling is made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by The Royal New Zealand College of General Practitioners ("the College").

Taxation Law

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of section CW 36.

The Arrangement to which this Ruling applies

The Arrangement is the provision of the Payments (which are made monthly) by the College to the Registrars, for the Registrars' participation in Stage One of the General Practice Education Programme ("the Course"), on terms and conditions that are materially the same as those contained in the following three documents (received by the Taxpayer Rulings Unit on 18 June 2009):

- Letter of Appointment of Registrar, dated 15 August 2008: the letter supplied to the Registrar, by the College, as an agreement of the respective obligations of each party
- Stage 1: General Practice Education Programme Stage One Handbook 2009: the detailed handbook of the aims, structure and syllabus of the Course
- Stage 1: General Practice Education Programme Stage One Terms and Conditions 2009: the terms and conditions to be agreed between the College and all Registrars enrolled in the General Practice Education Programme, Stage One.

Further details of the Arrangement are set out in the paragraphs below.

1. The College was formed in 1974, and obtained a Royal Charter in 1979. The mission of the College is to improve the health of all New Zealanders through the provision of high-quality general practice care.
2. The main purpose of the College is to provide postgraduate general practice education to qualified doctors.
3. The objects and powers of the College (as set out in clause 5.1 of the July 2008 document entitled "The Royal New Zealand College of General Practitioners: Rules") are to:
   (a) promote in all ways the highest standards in general practice in New Zealand;
   (b) sustain and improve the professional competence of members of the medical profession who are engaged in general practice in New Zealand;
   (c) encourage, strengthen and engage in vocational training for general practice;
   (d) conduct, direct, encourage, support or provide for continuing education of general practitioners;
   (e) encourage and assist in the provision of a high standard of teaching and training for all undergraduate medical students in the field of general practice in New Zealand;
   (f) promote activities that encourage the care of members and their families;
   (g) encourage and provide for the training of future teachers of general practice;
   (h) inform the public in New Zealand about general practice and primary health care issues;
   (i) conduct, direct, encourage, support or provide for research in matters relating to general practice;

(j) publish and encourage publication of journals, reports and treatises on matters relating to general practice and allied subjects;

(k) grant diplomas and other certification of proficiency in general practice or any related subject, whether upon examination, thesis, outstanding work or upon other grounds which may be considered sufficient;

(l) establish a register of members of the College and to publish and revise the same from time to time;

(m) acquire, establish, provide and maintain such land and buildings as are deemed necessary and to deal with or dispose of the same with a view to promoting the objects of the College;

(n) acquire and receive property of any kind whether by way of gift, devise, bequest or otherwise howsoever to be applied solely towards the objects of the College provided that no portion thereof shall be paid or transferred directly or indirectly by way of profit to members of the College, but this shall not prevent a member being reimbursed for professional services;

(o) apply annual dues received from members to defray the expenses of the College, and for such other objects as may be deemed proper by the Council; and

(p) undertake all such other lawful acts and things as are incidental or conducive to the attainment of the foregoing objects.

4. The College runs the General Practice Education Programme ("the GPEP") created from the objectives of the College and based on its commitment to maintaining and supporting standards of excellence among general practitioners. It is viewed as a significant part of a comprehensive cycle of vocational and professional education provided by the College, and leads to a Fellow of the Royal New Zealand College of General Practitioners ("FRNZCGP") qualification.

5. The Course is a 42-week practice-based training course established by the College as Stage One of its GPEP. The 42 weeks are divided into two attachments of 21 weeks. The Course is placed at "year nine" of a doctor's standard educational path to gaining the FRNZCGP qualification. The GPEP is regarded as encompassing years nine to eleven of this "path".

6. It is stated by the College (at page 10 of the Stage 1: GPEP 2009 Handbook) that the general aims of the Course are to:

   - improve the health of New Zealanders through the provision of a GPEP which achieves a level of competence sufficient to maintain independent general practice;
   - promote high standards of general practice in New Zealand by ensuring those entering general practice are vocationally trained;
   - ensure Registrars understand the principles of general practice and develop the skills required for continuing professional development and lifelong learning;
   - develop and foster a group of general practice teachers and teaching practices which play a full part in the education of doctors for general practice; and
   - foster an understanding of general practice within the medical profession and primary care purchasers.

7. The Course involves various aspects of training that a Registrar is to complete. Essentially, a Registrar is assigned to a "teaching practice". Each teaching practice is a general practice medical centre for which the College has contracted with a general practitioner to be the Registrar's teacher. The general practitioner teacher ("the Teacher") holds vocational registration and is paid by the College under a separate contract.

8. The standard week for a Registrar under the Course is broken up as follows:

   - Eight half-days per week attendance at the teaching practice to which they are assigned, consisting of:
     - Patient contact. The conditions in respect of this are that a Registrar is to participate in between 5 and 13 patient consultations per half day. In the early weeks of the attachment, to relieve possible pressure on a Registrar, each consultation is to be for a generous period of 20–30 minutes.
     - The Registrar having at least 1 hour and 30 minutes of direct contact teaching time with the Teacher per week, to include discussion, observation, review and feedback.
   - The equivalent of 36 full days in total for attending seminars and workshops that are provided and organised by the College. Registrars are required to "satisfactorily" attend and participate in these seminars and workshops, and are responsible for organising/presenting part of the programme within these seminars and workshops.

9. The Payments a Registrar receives from the College are allocated from the funding the College receives from the Clinical Training Agency ("the CTA"). There are no restrictions on Registrars in relation to earning income from other sources. The total dollar value of the Payments is as follows (Registrars being paid monthly amounts during the period of the Course, the aggregate of which equals that total amount):

Level	For the 42-week course	Annualised (before tax)
1	$42,679	$52,841
2	$45,303	$56,089

10. Part-time Registrars receive 7/10 pro rata Payments, which are paid over the 12 months of their attachment (or according to some other arrangement as negotiated with the Group Manager, Education). The total dollar value of pro rata Payments is as follows:

Level	52 weeks
1	$36,988
2	$50,900

11. Whether the Payments are set at the first or second level is dependent on the level of prior medical experience of a Registrar. However, these amounts are set at a level to provide for the maintenance of the Registrars' standard of living while undertaking the Course. The Payments are at a level lower than that which a doctor with similar experience in appropriate employment would earn during the period of the Course.
12. A doctor who wishes to attend the Course as a Registrar applies to the College at the appropriate time. From the total number of applicants, the College undertakes a selection process to accept only the number of Registrars for which it has funding.
13. Registrars are selected on merit-based criteria, the College taking the perspective of selecting Registrars who will benefit the community in the long term. These criteria include:
    - the intention to enter general practice;
    - experience in various areas of medicine;
    - a demonstrated commitment to general practice addressing priority health areas;
    - a demonstrated commitment to general practice addressing rural health issues; and
    - a demonstrated commitment to general practice addressing Māori health issues.
14. The College initiates an agreement with each individual doctor before the doctor becomes a Registrar in the Course.
15. The obligations of Registrars are contained in the GPEP Stage One Terms and Conditions 2009, which include (among others) that the Registrar:
    - satisfactorily attends, and fully participates in, 80 percent of the seminars and workshops, including the communications skills workshop;
    - completes the "attachment" to teaching practices, and the assessments thereon;
    - be involved in patient contact, by having 5 to 13 consultations with patients per half day;
    - undertakes review sessions with the attachment Teacher each day; and
    - contributes a vignette (a written case study on a specified topic) to the Programme.
16. In exchange for undertaking the above, the Registrars receive from the College the Payments.
17. The College Education Advisory Committee is responsible for setting the educational philosophy and mission statement for its GPEP.
18. With regard to the Course content, the College has developed a curriculum for general practice training in consultation with College Members and Fellows, and with the CTA to ensure that government health priority areas are reflected in the educational programmes.
19. The College determines, in consultation with its Registrars, the methods of delivery for its programme for Stage One. The content of seminars and workshops is based on the syllabus for the Course and the specific learning needs of Registrars. The College also determines the structure of the programme. Materials for the programme are provided by the College and purchased from funding provided by the CTA. Seminars and workshops are held on premises hired by the College for that purpose.
20. Each Registrar's activities while undertaking the Course reflect the agreement reached between the Registrar and their Teacher as to how the Course syllabus will, in their view, be best achieved for that Registrar. Each Registrar's activities are therefore designed to enable them to implement their agreed learning programme. A Registrar's performance of these activities may assist the operation of their Teacher's practice, but the activities are not designed to achieve this.

21. The Course is designed to teach Registrars to translate prior learning to a community-based, primary health team context, as well as to teach them new skills in relation to (among other things) the clinical, communication and professional needs of general practice.
22. The College is responsible for setting the Primex examination (sat at the end of the Course) and, in doing so, sets the standards for entry into Stage II and ultimately for vocational registration. The College also determines the structure and timing of the teaching programme. Furthermore, the College determines the outputs of Registrars in terms of assignments, research projects, presentations and other learning activities.
23. The College selects Teachers to the programme who meet several specific criteria. These include: holding vocational registration with the Medical Council, being a Fellow of the College, and being assessed by the College as being competent and able to provide excellent education to a Registrar. The Teachers are contracted by the College to provide teaching services within the calendar year of the programme. All Teachers must undertake ongoing professional development activities while they remain a Teacher.
24. Medical educators (contracted by the College) are responsible for maintaining contact with the Teachers during the programme and resolving any difficulties that may arise. They do so primarily through meetings and practice visits with Teachers. The medical educators are kept informed by Teachers on the progress of Registrars.
25. The College devotes the majority of its resources (staff, funding and other assets) to the administration and running of the GPEP and the continuing education of doctors in general practice. More than 50 percent of the College's resources are attributed to the GPEP.

Condition stipulated by the Commissioner

This Ruling is made subject to the following condition:

a) The Payments made to the Registrars under the Arrangement are not grants made under regulations made under section 303 of the Education Act 1989, or any enactment in substitution for that section.

How the Taxation Law applies to the Arrangement

Subject in all respects to the conditions stated above, the Taxation Law applies to the Arrangement as follows:

- The Payments made to the Registrars under the Arrangement are exempt income under section CW 36.

The period for which this Ruling applies

This Ruling will apply for the period beginning on 1 January 2010 and ending on 31 March 2015.

This Ruling is signed by me on the 6th day of November 2009.

Jonathan Rodgers
Acting Director (Taxpayer Rulings)

PRODUCT RULING BR PRD 09/11

This product ruling is made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by The Royal New Zealand College of General Practitioners ("the College").

Taxation Law

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of section CW 36.

The Arrangement to which this Ruling applies

The Arrangement is the provision of the Payments (which are made monthly) by the College to the Trainees, for the Trainees' participation in the Postgraduate Rural General Practice Education Programme ("the Rural Course"), on terms and conditions that are materially the same as those contained in the following three documents (received by the Taxpayer Rulings Unit on 18 June 2009):

- Letter of Appointment of Trainee, dated 7 January 2009: the letter supplied to the Trainee, by the College, as an agreement of the respective obligations of each party.
- Postgraduate Rural General Practice Education Programme Handbook: Revised August 2006: the detailed handbook of the aims, structure and syllabus of the Rural Course.
- Postgraduate Rural General Practice Education Programme Terms and Conditions: Revised August 2006: the terms and conditions to be agreed between the College and all Trainees enrolled in the Rural Course.

Further details of the Arrangement are set out in the paragraphs below.

1. The College was formed in 1974, and obtained a Royal Charter in 1979. The mission of the College is to improve the health of all New Zealanders through the provision of high-quality general practice care.
2. The main purpose of the College is to provide postgraduate general practice education to qualified doctors.
3. The objects and powers of the College (as set out in clause 5.1 of the July 2008 document entitled "The Royal New Zealand College of General Practitioners: Rules") are to:
   (a) promote in all ways the highest standards in general practice in New Zealand;
   (b) sustain and improve the professional competence of members of the medical profession who are engaged in general practice in New Zealand;
   (c) encourage, strengthen and engage in vocational training for general practice;
   (d) conduct, direct, encourage, support or provide for continuing education of general practitioners;
   (e) encourage and assist in the provision of a high standard of teaching and training for all undergraduate medical students in the field of general practice in New Zealand;
   (f) promote activities that encourage the care of members and their families;
   (g) encourage and provide for the training of future teachers of general practice;
   (h) inform the public in New Zealand about general practice and primary health care issues;
   (i) conduct, direct, encourage, support or provide for research in matters relating to general practice;
   (j) publish and encourage publication of journals, reports and treatises on matters relating to general practice and allied subjects;
   (k) grant diplomas and other certification of proficiency in general practice or any related subject, whether upon examination, thesis, outstanding work or upon other grounds which may be considered sufficient;
   (l) establish a register of members of the College and to publish and revise the same from time to time;
   (m) acquire, establish, provide and maintain such land and buildings as are deemed necessary and to deal with or dispose of the same with a view to promoting the objects of the College;
   (n) acquire and receive property of any kind whether by way of gift, devise, bequest or otherwise howsoever to be applied solely towards the objects of the College provided that no portion thereof shall be paid or transferred directly or indirectly by way of profit to members of the College, but this shall not prevent a member being reimbursed for professional services;
   (o) apply annual dues received from members to defray the expenses of the College, and for such other objects as may be deemed proper by the Council; and
   (p) undertake all such other lawful acts and things as are incidental or conducive to the attainment of the foregoing objects.

4. The College runs the Postgraduate Rural General Practice Education Programme ("the Rural Course") created from the objectives of the College and based on its commitment to maintaining and supporting standards of excellence among general practitioners. It is viewed as a significant part of a comprehensive cycle of vocational and professional education provided by the College.
5. The Rural Course is a 13-week practice-based training course established by the College, although the length of the course may sometimes be conducted over a period of 12 weeks or 14 weeks. The Rural Course is one part of the house surgeon's training programme, and is the first part of the general practice education pathway.
6. It is stated by the College (at page 9 of the Course Handbook: Revised August 2006) that the general aims of the Rural Course are to enable the Trainees to:
    - experience and participate in rural general practice in a supportive rural general practice environment;
    - acquire medical knowledge and expertise in a rural general practice context;
    - enhance their interpersonal and communication skills, particularly in relation to patient consultations;
    - develop an understanding of the general practitioner/hospital interface and the interface between health professionals in the rural sector;
    - gain an understanding of the relevant cultural context including Māori and rural culture;
    - develop collegial and peer associations and linkages; and
    - develop an understanding of the pathway to a career in general practice.
7. The Rural Course involves various aspects of training that a Trainee is to complete. Essentially, a Trainee is assigned to a "teaching practice" for three months. Each teaching practice, which must rank 35 or more on the Ministry of Health's "rural ranking scale", is a general practice medical centre for which the College has contracted with a general practitioner to be the Trainee's teacher. The general practitioner teacher ("the Teacher") holds vocational registration and is paid by the College under a separate contract.
8. The Rural Course involves Trainees entering a planned and managed learning environment achieved through the interactions between the Trainee, the Teacher and patients, as well as interactions with other health professionals in the local area, and it includes support and guidance to ensure that learning occurs, and that a representative experience is obtained.
9. Trainees are formatively assessed during the Rural Course, and they receive a final assessment from the Teacher. This assessment is available to the resident medical officer coordinator as part of the Trainee's house surgeon training. Trainees completing the programme receive a certificate of completion of this part of their overall training.
10. The standard week for a Trainee undertaking the Rural Course consists almost entirely of patient contact within the teaching practice to which they are assigned. Trainees can also expect to have, on average, two hours each week of "protected teaching time" with the Teacher, sitting in on consultations, and group seminars. In addition to this, Trainees are required to complete a minimum of three "out of hours" supervised sessions. Given that Trainees are geographically distributed throughout New Zealand they attend teleconference (rather than face-to-face) seminars.
11. The Payments a Trainee receives from the College are allocated from the funding the College receives from the Clinical Training Agency ("the CTA"). The CTA has the mandate to purchase educational programmes that will ensure an adequate and stable future workforce. The CTA funds activities based on requirements in respect of the future workforce, and it is expressly prohibited from funding based on current service needs. The CTA undergoes extensive health sector consultation to ensure that all the programmes it funds (including the Rural Course) meet identified training needs.
12. The dollar value of the Payments is $12,500, being paid monthly during the period of the Rural Course (and representing an annualised payment of approximately $50,000). This amount is set at a level to provide for the maintenance of the Trainees' standard of living while undertaking the Rural Course. The Payments are at a level lower than that which a doctor with similar experience in appropriate employment would earn during the period of the Rural Course.
13. A doctor who wishes to attend the Rural Course as a Trainee applies to the College at the appropriate time. From the total number of applicants, the College undertakes a selection process to accept only the number of Trainees for which it has funding.
14. Trainees are selected on merit-based criteria, the College taking the perspective of selecting Trainees who will benefit the community in the long term. These criteria include whether the applicant has:
    - a firm intention to enter general practice and continue general practice vocational education; and
    - completed hospital runs relevant to general practice.

15. The College initiates an agreement with each individual doctor before the doctor becomes a Trainee in the Rural Course.
16. The obligations of Trainees are contained in the Course Terms and Conditions: Revised August 2006. In exchange for undertaking this, Trainees receive from the College the Payments.
17. The College Education Advisory Committee is responsible for setting the educational philosophy and mission statement for the Rural Course.
18. With regard to the Rural Course content, the College has developed a curriculum for general practice training in consultation with College Members and Fellows, and with the CTA to ensure that government health priority areas are reflected in the educational programmes.
19. The College determines, in consultation with its Trainees, the methods of delivery for its programme. The College also determines the structure of the programme. Materials for the programme are provided by the College and purchased from funding provided by the CTA.
20. Each Trainee's activities while undertaking the Rural Course reflect the agreement reached between the Trainee and their Teacher as to how the Rural Course syllabus will, in their view, be best achieved for that Trainee. Each Trainee's activities are therefore designed to enable them to implement their agreed learning programme. A Trainee's performance of these activities may assist the operation of their Teacher's practice, but the activities are not designed to achieve this. As Trainees are unable to work independently without the presence of a supervisor, they are not in the position of providing services.
21. The College selects Teachers to the programme who meet several specific criteria. These include: holding general registration with the Medical Council, being a Fellow of the College, and being assessed by the College as being competent and able to provide excellent education to a Trainee. The Teachers are contracted by the College to provide teaching services within the calendar year of the programme. All Teachers must undertake ongoing professional development activities while they remain a Teacher.
22. Medical educators (contracted by the College) are responsible for maintaining contact with the Teachers during the programme and resolving any difficulties that may arise. They do so primarily through meetings, phone calls, emails and practice visits with Teachers. The medical educators are kept informed by Teachers on the progress of Trainees.

Condition stipulated by the Commissioner

This Ruling is made subject to the following condition:

a) The Payments made to the Trainees under the Arrangement are not grants made under regulations made under section 303 of the Education Act 1989, or any enactment in substitution for that section.

How the Taxation Law applies to the Arrangement

Subject in all respects to the conditions stated above, the Taxation Law applies to the Arrangement as follows:

- The Payments made to the Trainees under the Arrangement are exempt income under section CW 36.

The period for which this Ruling applies

This Ruling will apply for the period beginning on 1 January 2010 and ending on 31 March 2015.

This Ruling is signed by me on the 6th day of November 2009.

Jonathan Rodgers

Acting Director (Taxpayer Rulings)

PRODUCT RULING BR PRD 09/12

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by BNZ Income Securities 2 Limited ("BNZIS 2").

Taxation Laws

All legislative references are to the Income Tax Act 2007, unless otherwise stated.

This Ruling applies in respect of sections BG 1, CX 56(3), GA 1 and GB 35.

The Arrangement to which this Ruling applies

The Arrangement involved the raising of capital by Bank of New Zealand Limited ("BNZ") and its parent company National Australia Bank Limited ("NAB"). BNZIS 2 issued perpetual non-cumulative shares ("BNZIS 2 Shares") to members of the public ("BNZIS 2 Shareholders"). BNZIS 2 lent the proceeds raised from the issue to BNZ Income Management Limited ("BNZIM") under the BNZIM Loan Agreement. BNZIM invested the proceeds of that Loan ("BNZIM Loan") in perpetual preference shares issued by BNZ ("2009 BNZ PPS") and, in turn, the BNZ used the proceeds for general corporate purposes.

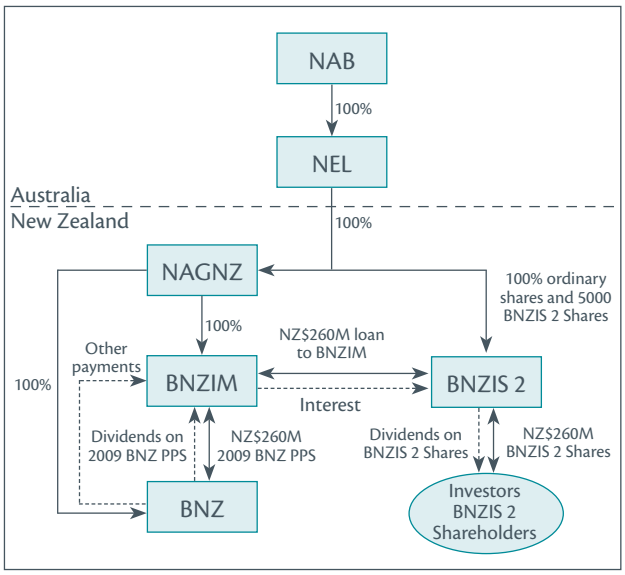
There was, at the time the Arrangement was entered into, and is no intention on the part of the Board of Directors of the BNZ and/or NAB that BNZ and/or NAB would promote the acquisition of BNZIS 2 Shares by providing investors with a loan or other financing from any of the companies in the BNZ or NAB Consolidated Group ("NAB Group").

This Ruling does not apply to any investor who, or which, has funded the acquisition of BNZIS 2 Shares by means of borrowing or other financing from any of the companies in the BNZ or NAB Group of companies, where such borrowing or other financing was part of an express agreement or arrangement (whether in writing or otherwise) with such entity that the proceeds of some or all of such borrowing or other financing would be used for the purposes of acquiring BNZIS 2 Shares.

Further details of the Arrangement are set out in the paragraphs below.

1. The parties to the Arrangement are:
   - NAB, a limited liability company incorporated under Australian law and tax resident in Australia;
   - National Equities Limited ("NEL"), a limited liability company incorporated under Australian law and tax resident in Australia – a wholly owned subsidiary of NAB;
   - National Australia Group (NZ) Limited ("NAGNZ"), a limited liability company incorporated under New Zealand law – a wholly owned subsidiary of NEL and a 100 percent indirectly owned subsidiary of NAB;
   - BNZ, a limited liability company incorporated under New Zealand law – a wholly owned subsidiary of NAGNZ and a 100 percent indirectly owned subsidiary of NAB;
   - BNZIM, a limited liability company incorporated under New Zealand law – a wholly owned subsidiary of NAGNZ and a 100 percent indirectly owned subsidiary of NAB; and
   - BNZIS 2, a limited liability company incorporated under New Zealand law – a wholly owned subsidiary of NEL and a 100 percent indirectly owned subsidiary of NAB.
2. The material terms of the transactions comprising the Arrangement are governed by the following documents, which were provided to Inland Revenue by the Applicant in a letter dated 18 August 2009 (received by Inland Revenue on 20 August 2009):
   - BNZIM Loan Agreement ("Loan Agreement") dated 19 May 2009, between BNZIS 2 and BNZIM, evidencing the loan between BNZIS 2 as lender and BNZIM as borrower (the BNZIM Loan);
   - BNZIS 2 Deed Poll, dated 19 May 2009, entered into by BNZIS 2 in favour of the BNZIS 2 Shareholders;
   - Security Trust Deed, dated 19 May 2009, between BNZIM, BNZIS 2 and New Zealand Permanent Trustees Limited ("Trustee");
   - Clause 26 of the Constitution of BNZ ("BNZ Constitution") registered with the New Zealand Companies Office on 19 May 2009;
   - Constitution of BNZIS 2 ("BNZIS 2 Constitution") registered with the New Zealand Companies Office on 14 May 2009;
   - Committed Cash Advances Facility Agreement, between BNZ and BNZIS 2, dated 19 May 2009;
   - Administration Agreement, between BNZ and BNZIS 2, dated 19 May 2009; and
   - NZX Limited ("NZX") rulings and waivers dated 13 May 2009.

3. Also provided to Inland Revenue by the Applicant in a letter dated 18 August 2009 (received by Inland Revenue on 20 August 2009) was a copy of the Combined Investment Statement and Prospectus regarding the Offer of Perpetual Non-cumulative Shares by BNZIS 2 prepared and dated as at 19 May 2009 for the purposes of the Securities Act 1978 ("Prospectus").
4. The Arrangement is summarised in the diagram below and discussed in subsequent paragraphs.



5. The Australian Prudential Regulatory Authority ("APRA") currently treats the BNZIS 2 Shares as innovative residual tier 1 capital for NAB on a level 2 basis. The Reserve Bank of New Zealand ("RBNZ") currently treats the 2009 BNZ PPS as tier 1 capital for BNZ.

BNZIS 2

Incorporation of BNZIS 2

6. BNZIS 2 is a special-purpose company incorporated on 12 January 2009 under the Companies Act 1993 and intended to be tax resident solely in New Zealand. BNZIS 2 was incorporated with 100 ordinary shares of $1 each, all of which are held by NEL. NEL is a 100 percent subsidiary of NAB and is incorporated and tax resident in Australia. BNZIS 2 subsequently issued a further 6,800,000 ordinary shares to NEL. On 29 September 2009 a further tranche of 135,431 $1 ordinary shares was issued to NEL to cover additional establishment costs in excess of the initial ordinary share issues.
7. The ordinary shares carry all of the voting rights in BNZIS 2 but carry no right to a distribution in any circumstances.
8. Under the relevant accounting standards, BNZIS 2 is a member of the NAB Group.

BNZIS 2 Constitution

9. BNZIS 2 has no power to carry on any business or activity other than that described in the BNZIS 2 Constitution, which was lodged with the Companies Office on 14 May 2009.
10. Clause 4.1 of the BNZIS 2 Constitution states:

> **Limitation on Business:** The only business or activity which the Company may carry on is to:
>
> (a) issue and maintain in existence perpetual non-cumulative shares, including listing (and maintaining a listing of) those shares on any stock or securities exchange in New Zealand or elsewhere;
>
> (b) advance the proceeds of perpetual non-cumulative shares to BNZIM, or a Related Company of that company pursuant to one or more loan agreements;
>
> (c) enter into the Administration Agreement, the Committed Cash Advance Facility Agreement, the Security Trust Deed, the Loan Agreement, the Registration Agreement and the Deed Poll (and any other administration agreements, committed cash advance facility agreements, security trust deeds, loan agreements, registration agreements and/or deed polls in connection with the issue of perpetual non-cumulative shares);
>
> (d) do all other things reasonably incidental to the activities referred to in paragraphs (a), (b), (c) and this Constitution.
>
> The Company has no power to:
>
> (e) carry on any other business or activity; or
>
> (f) apply amounts received by way of interest on, or repayment of, the loans referred to in paragraph (b) for any purpose other than in payments to the holders of the perpetual non-cumulative shares, meeting costs and expenses incurred in connection with the issuance and maintenance in existence of perpetual non-cumulative shares and making income and other tax payments to the New Zealand Inland Revenue Department.

11. BNZIS 2 elected to be a "portfolio listed company" ("PLC") under the "portfolio investment entity" ("PIE") regime (as those terms are defined in section YA 1) with a commencement date of 26 June 2009.
12. To ensure compliance with the PIE regime, the BNZIS 2 Constitution contains certain restrictions on the percentage of the BNZIS 2 Shares that can be held by a person and their associates. Under the BNZIS 2 Constitution, the directors of BNZIS 2 may take the following steps if these restrictions are breached (or would be breached were a transfer permitted to be effected). These steps include:
    - rejecting applications for, or transfers of, BNZIS 2 Shares (clauses 6.16 and 6.17 of the BNZIS 2 Constitution);

- treating the transfer of any BNZIS 2 Shares as void (*ab initio* or from such other date as BNZIS 2 may decide in its complete discretion) (clause 6.17 of the BNZIS 2 Constitution);
- deeming any BNZIS 2 Shares held that exceed the "investor interest size" requirements specified in the Act to be held by the BNZIS 2 Shareholder on trust for any company in the NAB Group appointed by BNZIS 2, and allowing such shares to be sold by that company (clause 6.17 of the BNZIS 2 Constitution);
- allowing BNZIS 2 to request any BNZIS 2 Shareholder to provide such information as it may require to determine whether BNZIS 2 continues to meet the PLC requirements set out in the Act and, where holders do not provide such information within relevant time periods, providing that the relevant BNZIS 2 Shares are held on trust by the holder thereof for any company in the NAB Group appointed by BNZIS 2 and allowing such shares to be sold by that company (clause 6.17 of the BNZIS 2 Constitution).
- taking any of the steps in clause 6.18 of the BNZIS 2 Constitution to ensure any breach of the "investor interest size" requirement is remedied within the period specified in the Act.

13. The BNZIS 2 Constitution was amended from the version provided to Inland Revenue (refer paragraph 2 above) effective from 29 October 2009, so that in accordance with market practice the Record Date for payment of dividends to BNZIS 2 Shareholders is 10 days, rather than 10 *business days*, before Dividend Payment Date. The revised definition of "Record Date" in the BNZIS 2 Constitution is as follows:

> "**Record Date**" means 18 March, 18 June, 18 September and 18 December of each calendar year, or if that date is not a Business Day, the preceding Business Day, or such other date as the Directors may determine in respect of any Dividend;

BNZIS 2 Shares

14. BNZIS 2 offered BNZIS 2 Shares with an issue price of $1 each to members of the public in New Zealand under the Prospectus referred to at paragraph 3 above. The minimum holding amount was $5,000. The offer, which opened on 26 May 2009 and closed on 23 June 2009, was available to both retail and institutional investors. In total 260,000,000 BNZIS 2 Shares were issued under the offer, for a total subscription price of $260,000,000. Of these shares, 5,000 (the minimum parcel) have been subscribed for and are held by NEL.
15. The issue date of the BNZIS 2 Shares was 26 June 2009, and the date of initial quotation and trading on the debt securities market (the "NZDX") operated by the NZX was 1 July 2009. Although the BNZIS 2 Shares are not debt securities for the purposes of the Securities Act 1978, the NZX has given certain rulings on, and waivers of, the Listing Rules in relation to the listing of the BNZIS 2 Shares on the NZDX. The BNZIS 2 Shares are freely transferable, subject to certain ownership limitations.
16. The BNZIS 2 Shares are perpetual, non-cumulative shares and have no fixed term, although the commercial expectation is that the funding raised by means of the issue of the BNZIS 2 Shares will be in place for an initial five-year period, with extensions of further five-year periods, if desired. This is subject to potential exercise of the call option ("Call") referred to in paragraph 46 below. The BNZIS 2 Shares are not redeemable at the option of BNZIS 2 or the BNZIS 2 Shareholders, and in no circumstances will there be any conversion of the BNZIS 2 Shares to ordinary shares.
17. The BNZIS 2 Shares are non-voting shares, other than in respect of amendments that relate to the rights, privileges, limitations and conditions attaching to them, meetings convened in relation to BNZIS 2's liquidation in certain circumstances and certain proceedings under the Security Trust Deed and the BNZIS 2 Deed Poll (clause 6.22 of the BNZIS 2 Constitution).
18. Under the terms of the BNZIS 2 Shares as set out in clause 6 of the BNZIS 2 Constitution, the BNZIS 2 Shares give BNZIS 2 Shareholders the right to a quarterly dividend, with the Dividend Amount (as defined in clause 6.1 of the BNZIS 2 Constitution) payable on each BNZIS 2 Share, for the first five years being calculated in accordance with the following formulae:

    (a) in respect of the first dividend period:

    $$\text{Issue Price} \times \text{Dividend Rate} \times \frac{X}{365} \times (1 - t)$$

    (b) in respect of a dividend period other than the first dividend period:

    $$\frac{\text{Issue Price} \times \text{Dividend Rate}}{4} \times (1 - t)$$

    Where:

    The issue price is $1.00;

    "Dividend Rate" is the aggregate of the five-year swap rate (adjusted as necessary, to a quarterly rate) and the Margin (being 4.09 percent);

    "t" is (in each case) the weighted average basic rate of New Zealand income tax applicable to BNZIS 2 during the period ending on the relevant Dividend Payment Date; and

    "X" is the number of days from (and including) the Issue Date to (but excluding) 28 September 2009.

19. At the expiry of the first five-year period, there will be a further five-year rate set by reference to the five-year swap rate two business days prior to that expiry date (but with no change to the Margin of 4.09 percent). The same process will apply at the end of the second and each subsequent five-year period.

20. On a liquidation of BNZIS 2, the BNZIS 2 Shares give the right to a pro rata share of any surplus after liquidation of BNZIS 2's assets and payment of its debts, in priority and to the exclusion of, the holders of other classes of shares of BNZIS 2 (including any ordinary shares) other than shares expressed to rank equally in a liquidation of BNZIS 2 (under clause 6.8 of the BNZIS 2 Constitution).

21. The Prospectus stated (at page 8):

> Use of Proceeds
>
> ...
>
> Interest payable by BNZIM to BNZIS 2 on the Loan will be the source of cash for BNZIS 2 to pay Dividends to investors. The primary sources of cash for BNZIM to pay interest on the Loan to BNZIS 2 are dividends from BNZ on the 2009 BNZ PPS and other payments received from BNZ (including interest payments on its cash balances with BNZ and tax loss offset payments it receives from BNZ).
>
> ...
>
> How will Dividends be funded?
>
> Cash to pay Dividends on the Shares will be derived by BNZIS 2 from interest it receives on its Loan to BNZIM. The most likely reasons for the directors of BNZIS 2 not declaring a Dividend would be the failure of BNZ to make a distribution or other payment to BNZIM (meaning that BNZIM will have insufficient income to enable it to pay interest on its Loan from BNZIS 2), or a deterioration in the financial condition of the NAB Group, which might lead to the application of a payment condition or to the regulator of Australian banks, APRA, prohibiting the payment of dividends by the NAB Group.

22. Payment of dividends on the BNZIS 2 Shares will not occur if a Dividend Payment Condition occurs. Clause 6.5 of the BNZIS 2 Constitution defines Dividend Payment Condition as any of the following conditions:

> (a) the Directors in their sole discretion do not resolve to pay the Dividend on the relevant Dividend Payment Date;
>
> (b) without limiting section 52(1) of the [Companies] Act [1993], the Directors are not satisfied on reasonable grounds that the Company will satisfy the solvency test (as defined in section 4 of the [Companies] Act [1993]) immediately after the payment of the Dividend;
>
> (c) unless APRA otherwise agrees:
>
> (i) after payment of the Dividend (which for the purposes of this calculation includes both the Dividend Amount in respect of the relevant Dividend and an amount equal to the Imputation Credits to be attached to the Dividend, on the basis that the Dividend is Fully-Credited), the APRA Prudential Capital Ratio or the APRA Tier 1 Capital Ratio of the NAB Group (on an APRA Level 2 or, if applicable, APRA Level 3 basis) would cease to comply with APRA's then current capital adequacy guidelines, as they are applied to the NAB Group at the time; or
>
> (ii) the amount of the Dividend (which for the purposes of this calculation includes both the Dividend Amount in respect of the relevant Dividend and an amount equal to the Imputation Credits to be attached to the Dividend, on the basis that the Dividend is Fully-Credited) would exceed the Distributable Profits of the NAB Group as at the relevant Dividend Payment Date; or
>
> (d) APRA otherwise objects to the payment of the Dividend by the Company.

23. Dividends paid on the BNZIS 2 Shares will not be cumulative, and holders of the BNZIS 2 Shares have no right to put BNZIS 2 into liquidation for their non-payment (clause 6.6 of the BNZIS 2 Constitution).

24. Many of the above features of the BNZIS 2 Shares are required to ensure that the BNZIS 2 Shares are treated by APRA as innovative residual tier 1 capital for the NAB Group on a level 2 basis.

25. The BNZIS 2 Constitution provides that all dividends shall be fully credited.

Relevant provisions from the Constitution are as follows:

> 6.1 **Definitions**
>
> ...
>
> "**Fully-Credited**" means, in relation to a Dividend, that Imputation Credits are validly attached to the Dividend, so that the imputation ratio of the Dividend is the maximum imputation ratio permitted by law.
>
> 6.3 **Dividend to be Fully-Credited**: All Dividend Amounts shall be Fully-Credited.

26. BNZIS 2 is party to the BNZIS 2 Deed Poll in favour of the holders of the BNZIS 2 Shares. Under the BNZIS 2 Deed Poll, BNZIS 2 covenants that, if it fails to fully impute dividends paid to the holders, it will compensate the holders for the additional tax cost incurred by the holders as a result of that failure. Clause 2 of the BNZIS 2 Deed Poll states:

> **COVENANT TO PAY**
>
> BNZIS 2 irrevocably covenants and agrees in favour of each Holder that, if BNZIS 2 fails to attach sufficient Imputation Credits to any Dividend it pays on a Dividend Payment Date so that the Dividend is Fully-Credited, then, subject to clause 3, it will pay to each Holder, within 10 Business Days of its receipt of the Holder's certificate, the amount that the Holder certifies in writing is necessary to compensate the Holder, on an after tax basis, for any additional tax cost the Holder suffers or incurs (or will suffer or incur) as a result of that failure, other than tax withheld by the Holder from a payment to another person.

BNZIM Loan

Details of the BNZIM Loan

27. The proceeds of the issue of the BNZIS 2 Shares were used by BNZIS 2 to make the BNZIM Loan to BNZIM. BNZIM is a company incorporated in New Zealand on 11 February 2008. BNZIM is expected to be resident for tax purposes in New Zealand. All of the shares in BNZIM are held by NAGNZ, also a company incorporated and tax resident in New Zealand. NAGNZ is the immediate holding company of BNZ and holds all of the ordinary shares issued in BNZ.

28. The BNZIM Loan is a perpetual loan (ie, it has no fixed maturity date). The principal amount of the BNZIM Loan is equal to the subscription amount for the BNZIS 2 Shares (being $260 million). The BNZIM Loan is the only material asset of BNZIS 2, and at least 90 percent of the income BNZIS 2 derives will be interest from the BNZIM Loan.

29. Clause 4 of the Loan Agreement provides that interest is payable on the BNZIM Loan at the Interest Rate in equal quarterly instalments on each Interest Payment Date (being 28 March, 28 June, 28 September and 28 December in each calendar year) with the first Interest Payment Date being 28 September 2009. The Interest Amount is calculated in accordance with the following formulae as defined in clause 1.1 of the Loan Agreement:

    (i) in respect of the first Interest Period:

$$\text{Loan} \times \text{Interest Rate} \times \frac{X}{365}$$

    (ii) in respect of an Interest Period other than the first Interest Period

$$\frac{\text{Loan} \times \text{Interest rate}}{4}$$

    Where:

    "Loan" means the principal amount advanced to BNZIM by BNZIS 2 on the Advance Date;

    "Interest Rate" is (in each case):

    (a) in respect of the period from (and including) the Advance Date to (but excluding) the first Rate Start Date, the aggregate of the Benchmark Rate and the Margin; and

    (b) in respect of the subsequent periods from (and including) a Rate Start Date to (but excluding) the immediately succeeding Rate Start date, a fixed rate that is equal to the aggregate of the Reset Benchmark Rate applying on that first mentioned date and the Margin;

    "Benchmark Rate" is the five-year swap rate (adjusted, as necessary to a quarterly rate);

    "Margin" is 4.09 percent;

    "Rate Start Date" means 28 June 2014 and, thereafter, each five-yearly date falling after that date; and

    "X" is the number of days from (and including) the Advance Date of the BNZIM Loan to (but excluding) 28 September 2009.

30. At the expiry of the first five-year period, there will be a further five-year rate set by reference to the then applicable five-year swap rate, such rate setting to take place two business days before that expiry date (but with no change to the Margin). The same process will apply at the end of the second and subsequent five-year periods.

31. The terms of the BNZIM Loan also oblige BNZIM, in consideration for BNZIS 2 making the Loan, to pay on-going expenses incurred by BNZIS 2 (such as expenses for services provided to it by BNZ or its auditors, and any net interest on short-term funding arrangements between it and BNZ) (clause 9 of the Loan Agreement).

32. Under clause 4.3 of the Loan Agreement, interest on the BNZIM Loan will not be payable in respect of a quarterly interest period if an Interest Payment Condition applies. These conditions are if:

    - payment of the corresponding dividend by BNZIS 2 would breach certain APRA requirements or exceed the NAB Group's distributable profits;
    - the payment of the interest would result in BNZIM failing to satisfy the solvency test under the Companies Act 1993;
    - the directors of BNZIS 2 would not be satisfied on reasonable grounds that BNZIS 2 would satisfy the solvency test under the Companies Act 1993 immediately on payment of the corresponding dividend by BNZIS 2; or
    - APRA otherwise objects to BNZIS 2 making the corresponding dividend payment.

33. If, and to the extent that all or any part of any interest on the BNZIM Loan is not paid because any of the above Interest Payment Conditions apply, BNZIM shall have no obligation to pay the Interest Amount in respect of the relevant Interest Period, the unpaid amount shall not accumulate interest or be capitalised and added to the Loan, and BNZIS 2's right to such amount shall be cancelled absolutely.

34. As with the dividends on the BNZIS 2 Shares, interest on the BNZIM Loan is not cumulative.

35. BNZIM invested the proceeds of the BNZIM Loan in the 2009 BNZ PPS (refer paragraph 41 below). Because dividends on the 2009 BNZ PPS will be paid on an after-tax basis, BNZIM will have a cash shortfall and will require additional funds to meet the interest payments

on the BNZIM Loan. This cash shortfall will be funded primarily by way of BNZ (or other profit-making companies in the BNZ Group) making cash payments to BNZIM in exchange for loss-offset elections, whereby BNZIM will elect to offset its tax losses against BNZ's taxable income.

Repayment of BNZIM Loan

36. Clause 6.1 of the Loan Agreement provides that the BNZIM Loan is repayable at the option of BNZIM at any time on or after 28 June 2014, or following the occurrence of a Regulatory Event, a Loan Repayment Event, a Call (refer paragraph 46) or a Tax Event (as these terms are defined in clause 1.1 of the Loan Agreement).

37. BNZIM must repay the BNZIM Loan in whole following the redemption, buy back, or acquisition of the 2009 BNZ PPS. In this regard, clause 6.2 of the Loan Agreement states:

> The Borrower shall repay the Loan (in whole but not in part) together with any unpaid interest (accrued since the last Interest Payment Date) calculated at the applicable Interest Rate on the number of days elapsed since the last Interest Payment Date and on the basis of a 365-day year, immediately following the redemption, buy back or acquisition of the 2009 BNZ PPS.

38. Following the occurrence of a Transfer Event (as described in paragraph 38 below), BNZIM will repay the BNZIM Loan by transferring the 2009 BNZ PPS to BNZIS 2. Such a transfer shall be deemed to be in full satisfaction of BNZIM's obligations under the Loan Agreement.

39. Transfer Events are defined in clause 1.1 of the Loan Agreement as follows:

> Transfer Event means the occurrence of an APRA Event, a Liquidation Event, a Distribution Non-Payment Event or a BNZ Distribution Event;

Broadly, Transfer Events comprise:

- NAB failing to meet certain APRA requirements or being subject to the Australian equivalent of statutory management;
- non-payment of interest where the conditions to payment of interest under the BNZIM Loan have been satisfied;
- BNZIS 2, BNZIM, or BNZ going into liquidation or statutory management; and
- BNZ paying an ordinary dividend when it has not paid dividends on the 2009 BNZ PPS.

40. BNZIS 2's rights under the BNZIM Loan are limited in recourse to the 2009 BNZ PPS, distributions on those 2009 BNZ PPS, or the proceeds of their sale (clause 10 of the Loan Agreement and the definition of "Collateral" in clause 3.1 of the Security Trust Deed). BNZIS 2 does not have recourse to any other assets of BNZIM.

41. BNZIM's obligation to transfer the 2009 BNZ PPS to BNZIS 2 is secured by a security interest over the 2009 BNZ PPS in favour of the Trustee under the Security Trust Deed.

2009 BNZ PPS

42. BNZIM applied the proceeds of the BNZIM Loan to subscribe for $260 million 2009 BNZ PPS issued by BNZ. These shares:

- on a liquidation of BNZ, rank in priority to ordinary shares and equally with the preference shares issued by BNZ in March 2008 for the BNZIS transaction (BNZ PPS) and have a right to receive an amount equal to their issue price plus the dividend accrued from the last dividend payment date (clause 26.9 of the BNZ Constitution);
- are non-voting shares, except as to certain matters such as those affecting their rights, privileges, or limitations (clause 26.10 of the BNZ Constitution);
- pay a dividend on generally the same basis as the BNZIS 2 Shares pay a dividend (but including the condition that directors of BNZ must be satisfied that payment of the dividend will not cause BNZ's capital ratios to cease complying with RBNZ's then current capital adequacy requirements) (clause 26.5 of the BNZ Constitution); and
- have a right to such a dividend in priority to the payment of dividends on the ordinary shares issued by BNZ (clause 26.2 of the BNZ Constitution). They rank equally with the BNZ PPS for dividend purposes.

43. In the event that a dividend is not paid on the 2009 BNZ PPS on a dividend payment date, BNZ is not permitted to declare or make any distributions or payments on, or with respect to, any other shares in the capital of BNZ that rank equally with or junior to the 2009 BNZ PPS (other than pro rata payments or distributions on shares that rank equally with the 2009 BNZ PPS) unless and until:

- BNZ has paid dividends in full on the 2009 BNZ PPS on two consecutive dividend payment dates immediately following that dividend payment date; or
- the Call over the BNZIS 2 Shares is exercised and the BNZIS 2 Shares have been transferred in accordance with the terms of the Call.

44. BNZ used the funds obtained by way of the issue of the 2009 BNZ PPS for general business purposes, which may have included using them to repatriate funds back to the NAB Group in Australia. Any such repatriation may be by way of a dividend, a share or loan repayment, or another mechanism.
45. BNZ and BNZIM are both members of the BNZ "consolidated imputation group" (as defined in section YA 1).

Termination – Call over BNZIS 2 Shares

46. Under the terms of clauses 6.9 to 6.11 of the BNZIS 2 Constitution (and subject to it having obtained the prior written approval of APRA) NAB has the right, on the fifth anniversary of the issue of the BNZIS 2 Shares (the "Initial Call Date", being 28 June 2014) and on any quarterly dividend payment date thereafter, at a price equal to their issue price plus the dividend accrued from the last dividend payment date, to give a Call Notice to all BNZIS 2 Shareholders requiring those holders to transfer all their BNZIS 2 Shares to NAB or a nominated member of the NAB Group (other than BNZIS 2).
47. The Call may be exercised before the fifth anniversary upon the happening of certain events that, broadly speaking, diminish the benefits to the NAB Group of the BNZIS 2 Shares being on issue. These are referred to as Regulatory Events and Tax Events. The Call may also be exercised if certain other structurally significant events affecting BNZIS 2 or BNZIM occur, referred to as Loan Repayment Events, or the 2009 BNZ PPS are redeemed, bought back or acquired.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) During the period of the Ruling, the BNZIS 2 Shares will be listed on the NZDX or another "recognised exchange" as defined in section YA 1.

b) During the period of the Ruling, BNZIS 2 is not treated under a double tax agreement as not being resident in New Zealand.

c) During the period of the Ruling, ordinary shares in BNZIS 2 will only be held by a person who also holds BNZIS 2 Shares.

d) During the period of the Ruling, each BNZIS 2 Shareholder has rights in relation to all the proceeds from the BNZIM Loan.

e) During the period of the Ruling, BNZIS 2 will be an "ICA company" as defined in section YA 1.

f) During the period of the Ruling, any distributions made by BNZIS 2 in respect of the BNZIS 2 Shares will be fully credited for the purposes of section CD 43(26) of the Act to the extent permitted by the imputation credits that the directors of BNZIS 2 determine are available.

g) During the period of the Ruling, income derived by BNZIS 2 will to the extent of 90 percent or more be derived from interest it receives on its loan to BNZIM.

h) During the period of the Ruling, BNZIS 2 will not cancel the election it has made to be a PIE under section HL 11.

i) During the period of the Ruling, the Constitution of BNZIS 2 will not be materially altered or amended from the version provided to Inland Revenue on 18 August 2009 (as part of the application for a binding ruling) in a manner that relates to the eligibility requirements to be a PIE and a PLC set out in the Act.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- A distribution in respect of the BNZIS 2 Shares is "excluded income" under section CX 56(3) of a holder of the BNZIS 2 Shares who is:
  - (i) a New Zealand resident who is a natural person or a trustee and who does not elect to include the amount of such distributions in that holder's return of income for the applicable year; and
  - (ii) a person not referred to in paragraph (i) above to the extent to which the amount of the distribution is not fully imputed as described in section RF 9(2).
- Section GB 35 does not apply to the Arrangement.
- Sections BG 1 and GA 1 do not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 26 June 2009 and ending on 30 June 2014.

This Ruling is signed by me on the 14th day of December 2009.

Howard Davis
Director (Taxpayer Rulings)

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 72: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 72

This determination may be cited as "Determination DEP 72: *Tax depreciation rates general determination number 72*".

1. Application

This determination applies to taxpayers who own items of depreciable property of the kind/s listed in the table below that have been acquired during the 2010 or subsequent income years.

This determination applies for the 2010 and subsequent income years.

2. Determination

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

- adding into the category "Electrical and Electronic Engineering", and to the "Engineering (including automotive)" industry category, and to the "Scientific and laboratory equipment" asset category, the general asset class, the estimated useful life, and diminishing value and straight-line depreciation rates listed below:

General asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Test chambers – acquired during the 2010 or subsequent income years	12.5	16	10.5

3. 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 February 2010.

Rob Wells
LTS Manager, Technical Standards

DETERMINATION PROV19: TAX DEPRECIATION RATES PROVISIONAL DETERMINATION PROV19

This determination may be cited as "Determination PROV19: *Tax depreciation rates provisional determination number PROV19*".

1. Application

This determination applies to taxpayers who own items of depreciable property of the kind listed in the table below.

This determination applies for the 2009–2010 and subsequent income years.

2. Determination

Pursuant to section 91AAG of the Tax Administration Act 1994 I set in this determination the provisional rate to apply to the kind of items of depreciable property listed in the table below by:

- adding into the "Medical and Medical Laboratory" and "Pharmaceuticals" industry categories, the provisional asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Provisional asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Computer controlled tablet dispensing systems	5	40	30

3. 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 February 2010.

Rob Wells
Manager, LTS Technical Standards

LIVESTOCK VALUES – 2010 NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK

The Commissioner of Inland Revenue has released a determination, reproduced below, setting the national standard costs for specified livestock for the 2009–2010 income year.

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

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

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

For bobby calves, information from spring 2009 is used while other dairy NSCs are based on survey data for the year ended 30 June 2009. For sheep, beef cattle, deer and goats, NSCs are based on survey data for the year ended 30 June 2008 which is the most recent available for those livestock types at the time the NSCs are calculated in December 2009.

For the 2009–2010 income year there has been a decrease in the NSC for sheep and beef cattle. This decrease reflects the decrease, in real expenditure, of costs incurred per livestock unit.

The NSC for both rising one and rising two-year dairy cattle has decreased significantly. These decreases have come about largely because of a change in the way in which costs have been calculated for each of these categories of dairy cattle. Only those costs that can be directly attributed to each category of dairy cattle have been taken into account. The NSC for purchased bobby calves has decreased slightly as a result of costs decreases, especially for foodstuffs.

The NSC for both deer and fibre and meat producing goats have both decreased because of a decrease in real expenditure incurred per livestock unit. Decrease in the NSC of dairy goats has been driven by both a decrease in real expenditure per livestock unit and a decrease in the cost of feeding meal to both kids and does. Feed costs have also driven the increase in the NSC for pigs.

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

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

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

NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK DETERMINATION 2010

This determination may be cited as the "National Standard Costs for Specified Livestock Determination 2010".

This determination is made in terms of section EC 23 of the Income Tax Act 2007. It shall apply to any specified livestock on hand at the end of the 2009–2010 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EC 23 of the Income Tax Act 2007 the national standard costs for specified livestock for the 2009–2010 income years is set out in the following table.

National standard costs for 2009–2010 income year

Kind of livestock	Category of livestock	National standard cost
Sheep	Rising 1 year	$24.20
	Rising 2 year	$16.10
Dairy cattle	Purchased bobby calves	$152.40
	Rising 1 year	$428.00
	Rising 2 year	$91.00
Beef cattle	Rising 1 year	$242.20
	Rising 2 year	$135.70
	Rising 3 year male non-breeding cattle (all breeds)	$135.70
Deer	Rising 1 year	$78.30
	Rising 2 year	$39.40
Goats (meat and fibre)	Rising 1 year	$19.00
	Rising 2 year	$13.00
Goats (dairy)	Rising 1 year	$124.70
	Rising 2 year	$20.50
Pigs	Weaners to 10 weeks of age	$97.60
	Growing pigs 10 to 17 weeks of age	$81.20

This determination is signed by me on the 29th day of January 2010.

Rob Wells
LTS Manager, Technical Standards

DETERMINATION S15: ISSUE OF PERPETUAL NON-CUMULATIVE SHARES BY BNZIS 2, AND RELATED TRANSACTIONS

This determination may be cited as "Determination S15: *Issue of perpetual non-cumulative shares by BNZIS 2, and related transactions*".

1. Explanation (which does not form part of the determination)

1. This determination relates to an arrangement involving the issue of perpetual non-cumulative shares (the "BNZIS 2 Shares") by BNZ Income Securities 2 Limited ("BNZIS 2") to members of the public and its parent company National Equities Limited ("BNZIS 2 Shareholders"). That arrangement is the subject of private ruling BR Prv 09/61 and product ruling BR Prd 09/12, issued on 14 December 2009, and is fully described in those rulings.
2. The BNZIS 2 Shares are excepted financial arrangements. The BNZIS 2 Shares form part of a wider financial arrangement including the investment by BNZIS 2 of the proceeds of issue of the BNZIS 2 Shares by way of a loan (the "BNZIM Loan") to BNZ Income Management Ltd ("BNZIM"), and the use of the BNZIM Loan proceeds by BNZIM to subscribe for perpetual preference shares issued by BNZ (the "2009 BNZ PPS"). The BNZIS 2 Shares are also subject to a call option ("Call Option") held by National Australia Bank Ltd ("NAB"). BNZIS 2 has entered into a Deed Poll ("Deed Poll") in favour of the BNZIS 2 Shareholders, which applies if the dividends on the BNZIS 2 Shares are not fully imputed and this results in a loss to a BNZIS 2 Shareholder.
3. This wider financial arrangement has "excepted financial arrangement" components as defined in section EW 5 of the Income Tax Act 2007. The excepted financial arrangements are:
   - the BNZIS 2 Shares;
   - the 2009 BNZ PPS; and
   - the Call Option.
4. The amount of gross income deemed to be derived, or expenditure deemed to be incurred, by a person under the financial arrangement rules in respect of a financial arrangement excludes any amount of income, gain or loss, or expenditure that is solely attributable to an excepted financial arrangement.
5. This determination prescribes a method to be used for determining the part of the consideration receivable by the parties to the arrangement that is attributable to the excepted financial arrangements.

2. Reference

1. This determination is made pursuant to section 90AC(1)(h) of the Tax Administration Act 1994.

3. Scope of Determination

1. This determination applies specifically to:
   - the BNZIS 2 Shares;
   - the 2009 BNZ PPS; and
   - the Call Option.

4. Principle

1. The BNZIS 2 Shares, the 2009 BNZ PPS, the Call Option and the BNZIM Loan are each part of a wider financial arrangement that has "excepted financial arrangement" components as defined in section EW 5 of the Income Tax Act 2007. The excepted financial arrangements are:
   - the BNZIS 2 Shares;
   - the 2009 BNZ PPS; and
   - the Call Option.
2. Any income, gain or loss, or expenditure that is solely attributable to an excepted financial arrangement is not included when calculating gross income or expenditure under the financial arrangement rules.
3. This determination specifies that the amounts that are solely attributable to the excepted financial arrangements are the amounts paid under or with respect to the BNZIS 2 Shares, 2009 BNZ PPS, and Call Option.
4. This determination specifies that no part of (inter alia) the amount advanced or repaid under the BNZIM Loan, or the interest paid on the BNZIM Loan, is solely attributable to an excepted financial arrangement.

5. Interpretation

1. This determination has no specialised terms that need to be defined further.

6. Method

1. The amounts that are solely attributable to the BNZIS 2 Shares are:
   - the issue price per BNZIS 2 Share of $1;
   - the dividends paid on the BNZIS 2 Shares by BNZIS 2;
   - any amount paid by BNZIS 2 under the Deed Poll where BNZIS 2 has not fully imputed the dividends on the BNZIS 2 Shares;
   - any other distributions paid on or with respect to the BNZIS 2 Shares by BNZIS 2; and
   - any amounts paid to acquire the BNZIS 2 Shares, whether pursuant to the Call Option or otherwise.
2. The amounts that are solely attributable to the 2009 BNZ PPS are:
   - the issue price per 2009 BNZ PPS;
   - the dividends paid on the 2009 BNZ PPS by BNZ;
   - any other distributions paid on or with respect to the 2009 BNZ PPS by BNZ; and
   - any amounts paid to acquire the 2009 BNZ PPS.
3. The amounts that are solely attributable to the Call Option are:
   - the amount paid to acquire the BNZIS 2 Shares under the Call Option; and
   - the value of the BNZIS 2 Shares transferred to a person nominated by NAB pursuant to the Call Option.

7. Example

BNZIS 2 raised $260,000,000 from the issue of the BNZIS 2 Shares on 26 June 2009, and lent the same amount to BNZIM, at an interest rate of 9.10 percent per annum, payable quarterly on 28 March, June, September and December. Therefore, the amount of interest on the BNZIM Loan for each full quarter is $6,428,500.

BNZIM used the funds to invest in the 2009 BNZ PPS.

The BNZIS 2 Shares have traded on the debt securities market ("the NZDX") at prices from $1 to $1.06.

The amounts solely attributable to an excepted financial arrangement are:

- the issue price of the BNZIS 2 Shares;
- the dividend paid on the BNZIS 2 Shares;
- the consideration paid for the purchase of BNZIS 2 Shares on the NZDX;
- the issue price of the 2009 BNZ PPS; and
- the dividend paid on the 2009 BNZ PPS.

The amounts not solely attributable to an excepted financial arrangement are:

- the amount of the BNZIM Loan ($260,000,000);
- the interest paid on the BNZIM Loan ($6,428,500 per quarter);
- the amount paid by BNZIM to BNZIS 2 under the BNZIM Loan as reimbursement for expenses incurred by BNZIS 2 (provided that such expenses are not "non-integral fees", as defined in section YA 1 of the Income Tax Act 2007); and
- the amount to be repaid on the repayment of the BNZIM Loan.

This determination is signed by me on the 14th day of December 2009.

Howard Davis
Director (Taxpayer Rulings)

LEGAL DECISIONS – CASE NOTES

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

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

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.

INVALID ASSET TRANSFERS WERE IN REALITY LOANS

Case	Commissioner of Inland Revenue v Allen, Palmer and Silver Fern Trustees Limited
Decision date	16 December 2009
Act	High Court Rules
Keywords	Debt; transfer of assets; trusts

Summary

There were loans owing from Silver Fern Trustees Ltd to Allen and Palmer. Certain assets were to be recorded as assets of Silver Fern Trustees Ltd and the Commissioner was directed to prepare amended financial statements for Silver Fern Trustees Ltd.

Impact of decision

This decision turns on the particular facts of this case. However, it shows judicial consideration of loans purporting to the other transfers.

Facts

Following an investigation into the tax affairs of Mr Allen and Mr Palmer and subsequent assessments of tax, the Commissioner obtained judgment against Mr Allen (for $1,520,693) and Mr Palmer (for $1,519,618). The Commissioner asserted that there were debts owed to Mr Allen and/or Mr Palmer by Silver Fern Trustees Limited ("Silver Fern") and sought a court declaration to that effect.

Mr Allen and Mr Palmer are United States citizens who came to New Zealand on 16 August 1999. While in New Zealand they promoted an investment scheme supposedly involved in the purchase of offshore corporate structures, typically in Panama, through which high-yielding investments were to be made. The investment scheme was fraudulent, but unfortunately significant funds were paid over by unwitting investors.

On 16 April 2004, following a Serious Fraud Office investigation into his activities between August 1999 and August 2001, Mr Allen was found guilty of conspiracy to defraud members of the public and of using a document with intent to obtain a pecuniary advantage. Mr Allen was sentenced to a term of imprisonment and was subsequently paroled and deported in April 2007.

On 23 May 2003 Mr Palmer was convicted in the United States District Court on charges of conspiracy to defraud the Internal Revenue Service and the filing of false and fraudulent tax returns. Mr Palmer was sentenced to 9 years imprisonment and is not due for release until June 2010.

Neither Mr Allen nor Mr Palmer has taken steps to defend the proceedings brought by the Commissioner.

Silver Fern was incorporated on 27 April 2001 with Mr Allen and Mr Palmer as the initial shareholders and directors. By February 2002 the Companies Office records showed Mr Allen as sole shareholder and director. While there were later changes to the directors and shareholders, Mr Allen remained one of the directors and ultimate owner of the shares.

Silver Fern is the Trustee of the Silver Fern Trust ("the Trust") established by Mr Allen on 27 April 2001. The purposes of the Silver Fern Trust included settling the purchase of a property at 46 Puriri Drive, Whenuapai ("the Whenuapai property") to provide a home in New Zealand for Mr Allen's family while visiting or living in New Zealand. The beneficiaries of the Trust included Mr Allen and his family. In early May 2001 Silver Fern settled the purchase of the Whenuapai property.

The Commissioner obtained in April 2002 a charging order nisi on property other than land which included a number of motorcycles owned by Mr Allen and Mr Palmer and a Mareva injunction over various assets of Silver Fern (as well as Mr Allen and Mr Palmer) including the net proceeds of the sale of the Whenuapai property and additional motorcycles and motor vehicles.

The Commissioner sought to either enforce the judgment amounts against Silver Fern in the same manner as if he had judgment against that company, or issue a sale order to seize Mr Allen's and/or Mr Palmer's personal property, including debts owed to them by Silver Fern.

The Commissioner challenged three financial transactions purportedly recorded in the Silver Fern's financial statements which gave rise to the following issues.

Issue 1

Whether a sum of $200,000 paid by Mr Palmer by way of deposit for the purchase of a Whenuapai property was a loan to Silver Fern, and if so whether that loan has since been repaid.

Issue 2

Whether the balance of the purchase price paid to settle the purchase of the Whenuapai property was a loan from Messrs Allen and/or Palmer to Silver Fern as trustee of the Trust or a gift from a company in Panama known as Fortune Management.

Issue 3

Whether Silver Fern as trustee of the Trust owed any moneys to either Mr Allen, or to Mr Palmer, or to both of them, on account of certain motor vehicles and motorcycles that are shown in some versions of the financial accounts as being assets of Silver Fern.

Decision

Issue 1

Wylie J concluded that accounts for Silver Fern for the 2003 year and following should reflect that there was a debt owing by the Trust to Mr Palmer which included the sum of $200,000 paid by Mr Palmer as the deposit on the purchase of the Whenuapai property.

There was clear evidence that the $200,000 paid by Mr Palmer as a deposit on the purchase of the Whenuapai property was a loan. Assertions by Silver Fern that the money had been repaid in part or full were not borne out by any documentation or evidence.

Issue 2

The Commissioner asserted the balance of the consideration by Silver Fern, $1,932,340, for the purchase of the Whenuapai property was a loan to Silver Fern as trustee of the Trust from Messrs Allen and Palmer in proportion to their contributions, and that this loan remained unpaid.

Silver Fern contended that the balance of the consideration was received by Silver Fern as trustee of the Trust as a cash gift or settlement from an entity in Panama.

Wylie J found that the money originated from an entity known as Fortune Management which was based in Panama. While none of the evidence was decisive by itself, collectively they compelled the conclusion that Messrs Allen and Palmer and their financial affairs were inextricably intertwined with Fortune Management Services Inc and probably Fortune Development Services Inc.

There was nothing in evidence to suggest that there was any gift by Fortune Management Services Inc, or that it settled the money on the Trust. Given the absence of any commercial justification for a gift or a settlement and given the deep involvement of Messrs Allen and Palmer in the affairs of Fortune Management Services Inc, Wylie J found that the moneys were in effect a payment by Fortune Management Services Inc, to Messrs Allen and Palmer to enable them to meet their obligations under the agreement for sale and purchase. They in turn advanced the money to Silver Fern so that it could complete the purchase of the Whenuapai property on behalf of the Trust. The money should be treated as a joint advance to the Trust by both Mr Allen and Mr Palmer.

Issue 3

The Commissioner claimed that there was a debt owing by the Trust to Messrs Allen and Palmer in proportion to their contributions to the purchase of the motor vehicles and motorcycles which remains unpaid and can be attached to the net proceeds of the sale held in the name of Silver Fern.

Silver Fern denied that there had been any loan and that the motor vehicles and motor cycles were never properly transferred to Silver Fern and it held them as bare trustee.

The evidence was that the vehicles were either purchased in Mr Palmer's name or from money which came from him. Some of the vehicles had been transferred to the Trust on Mr Allen's instructions and in breach of the Court orders in existence at that time.

Wylie J found where the evidence supported authorisation or approval of the transfer of the motor cycles or motor vehicles to the Trust, the vehicles became an asset of the Trust with a debt created back as a result of the transfer. Without such supporting evidence his Honour concluded the particular asset could not be treated as an asset of the Trust, nor could there be a debt created by the transfer to the Trust.

Conclusion

This judgment was issued as an interim judgment. His Honour's finding means there will need to be alterations to the financial accounts to reflect those findings. The Commissioner was directed to prepare and file amended accounts together with a memorandum raising any further

orders required. Silver Fern could then file its response. A final judgment will then be issued confirming the accounts and addressing any matters arising.

NO "PUBLIC IMPORTANCE"; LEAVE DENIED

Case	JD and CE Henson Partnership and Ors v Commissioner of Inland Revenue
Decision date	15 December 2009
Acts	Tax Administration Act 1994; Supreme Court Rules
Keywords	Leave to appeal, no general or public importance, commercial significance

Summary

The Supreme Court refused the applicants leave to appeal, there being no point of law that was of general or public importance, or of commercial significance.

Impact of decision

The decision confirms that "public importance" is a crucial factor in the grant of leave.

Facts

The Commissioner issued manual (due to a corruption in the FIRST system) notices of assessment for the applicants' 1992–1995 income tax years. The notices of assessment set out the adjustments to be made to the applicants' assessable income as returned, but did not quantify the amount of tax payable. Statements of account were later issued.

Following further investigation and discussion with the applicants, subsequent notices of assessment were issued. These notices of assessment were also manually prepared and specified the applicants' adjusted assessable income, but did not quantify the amount of tax payable. Further statements of account were issued.

The applicants initially commenced judicial review proceedings against the Commissioner. The judicial review proceedings were settled by way of a Settlement Deed in which the Commissioner agreed to accept the applicants' notices of proposed adjustment outside the statutory response period; the Deed stated that the notices of assessment issued on 17 September 1996 were to be treated as if they had been issued after 1 October 1996, which enabled the dispute to be dealt with under the statutory disputes procedure. The applicants' subsequent challenge to the correctness and validity of the assessments was unsuccessful before the Taxation Review Authority and on appeal to the High Court. The applicants appealed to the Court of Appeal, challenging the jurisdiction of the Taxation Review Authority to determine the initial challenge proceedings. That appeal too was unsuccessful.

The applicants then sought leave to appeal to the Supreme Court. The Commissioner opposed the application.

Decision

The Supreme Court refused the application for leave to appeal on the basis that the:

a) case is unusual, in that the notices of assessment were manually issued and not computer generated

b) facts of the case did not give rise to a point of law that was of general or public importance, or of commercial significance

c) Court of Appeal's conclusion that the statements of account issued could, in the circumstances, be properly regarded as notices of assessment was a factual conclusion which did not give rise to an issue of principle.

NON-PARTY INSPECTION OF COURT RECORDS AND DOCUMENTS

Case	BNZ Investments Ltd & Ors v the Commissioner of Inland Revenue
Decision date	2 December 2009
Act	High Court Rules
Keywords	Inspection of court records by non-party

Summary

The High Court granted an application by a non-party to search, inspect and copy statements and transcripts of evidence given by witnesses in the BNZ structured finance case.

Impact of decision

Non-parties will have greater access to search, inspect and copy Court documents.

Facts

On 24 September 2009, Maddocks, an Australian law firm, applied to the High Court under High Court Rule 3.13 to search, inspect and copy statements and transcripts of evidence of eight expert witnesses, forming part of the court file, in the BNZ "structured finance" case. Some of the witnesses had been called by BNZ and some by the Commissioner.

In support of its application, Maddocks gave the reason that it was undertaking research in respect of a potential case in Australia and while the issues in that case were not identical to those in the BNZ case some similar issues may arise.

The Commissioner did not oppose the application. BNZ indicated that it would abide by the decision of the Court but did not regard Maddocks' reason as particularly compelling.

Decision

His Honour, Justice Wild, noted that the High Court (Access to Court Documents) Amendment Rules 2009 came into force on 12 June 2009. The amendment to the High Court Rules concerning access to Court documents was precipitated by the Law Commission's June 2006 Report "Access to Court Records", which recommended open justice and freedom of information be cornerstones of future rules on access to Court records.

Under the new rules Maddocks, a third-party, did not have eligibility to obtain copies of the witness statements: rules 3.7 to 3.9. It was required to seek the Court's permission: rule 3.13. Under rule 3.16 the Court must consider the reasons for an application to access Court documents and take into account certain prescribed matters.

His Honour considered that under the new rules the threshold for a non-party to obtain access to Court documents is now considerably lower for two reasons.

Firstly, the two-step test enunciated in the Court of Appeal decision in *McCully v Whangamata Marina Society Inc* [2007] 1 NZLR 185, has been replaced by a single balancing test. Under the two-step McCully test, an applicant had to first satisfy the Court that he or she had a genuine and proper interest in accessing the Court documents and once made out, the Court had to then have regard to whether other considerations may come into play.

Secondly, the substance of the test has shifted from the nature of the applicant's interest to the nature of the information requested, with the principles of open justice and freedom of information creating an effective presumption of disclosure.

His Honour reviewed the approaches taken in the United Kingdom and Australia and concluded that in both jurisdictions open justice is the paramount consideration in determining access to Court files. His Honour noted that an unintended consequence, although one accepted by the Courts, of making open justice a paramount consideration, instead of focusing on the interest of the applicant, is that it allows applicants acting in their own personal interest, rather than in the public interest, to ride on the coat-tails of "open justice".

His Honour granted the application. He concluded that while the reason for Maddocks' application was not compelling, because it was entirely one of self-interest, the imperatives of open justice and freedom of information prevail.

TAXPAYERS REFUSED LEAVE TO APPEAL TO SUPREME COURT

Case	Chesterfields Preschools Ltd & Ors v the Commissioner of Inland Revenue
Decision date	8 December 2009
Act	Supreme Court Act 2003
Keywords	Leave to appeal; interlocutory decision; interests of justice

Summary

The taxpayers were refused leave to appeal to the Supreme Court on an interlocutory ruling of the Court of Appeal as they failed to demonstrate the appeal was necessary in the interest of justice.

Impact of decision

There are strict criteria in the Supreme Court Act for the grant of leave. This decision clearly sets out those criteria.

Facts

The applicants include companies controlled by the second applicant, David John Hampton, a Christchurch property developer. There have been many court proceedings.

Certain actions and decisions of the Commissioner were judicially reviewed by the applicants. The High Court in Christchurch found for the applicants and directed the Commissioner to re-make certain decisions regarding remission of tax debts. The Commissioner reconsidered these matters and made certain amendments. Nonetheless these decisions were again brought before the Court in a second judicial review. The Court again held that the Commissioner had not followed the Court's directions in the earlier review. Accordingly costs were awarded against the Commissioner which approached the level of indemnity costs.

The Commissioner appealed both the judicial review decision and the award of costs. The judicial review was to be heard by the Court of Appeal in early 2010. In the meantime the Commissioner applied for a stay of the execution of orders for costs. The Court of Appeal granted the stay pending the appeal of the judicial review. The applicants sought leave to appeal that decision to the Supreme Court.

Decision

The entire decision reads as follows:

[1] The applicants seek leave to appeal from an interlocutory decision of the Court of Appeal in which that Court, in its discretion, stayed the execution of orders for costs which the High Court had made against the respondent Commissioner in judicial review proceedings between the parties.

[2] Leave to appeal to this Court should be refused because the applicants have not established that a grant of leave is necessary in the interests of justice. The Court of Appeal's decision was made in the particular context of the present case. No matter of general or public importance or of general commercial importance is involved. Nor is there any appearance of a miscarriage of justice as a result of the applicants being unable to enforce the costs orders made in their favour by the High Court, pending the Court of Appeal's determination of the respondent's substantive appeal.

[3] Furthermore, section 13(4) of the Supreme Court Act provides that this Court must not give leave to appeal from an order made by the Court of Appeal on an interlocutory application unless it is necessary to do so in the interests of justice. That has not been shown in this case. If anything, it would be unjust to the Commissioner to allow the costs orders against him to be enforced before his substantive appeal is determined.

TRA FINDS IN FAVOUR OF TAXPAYER – NO TAX AVOIDANCE

Case	TRA Decision 02/2010
Decision date	15 January 2010
Acts	Income Tax Act 1994, Goods and Services Tax Act 1985
Keywords	Tax avoidance, reversion, prepayment of rent

Summary

The TRA found that the sale of a property on revenue account from a development company to a family trust where it was held on capital account and subject to a prepaid lease was not a tax avoidance arrangement.

Impact of decision

The decision accepts that a sale price for the reversion of less than a fair value could be a pointer to tax avoidance [paragraph 172].

In this case the notion that the valuation of a property must be at market value when between related parties was not in dispute.

It was considered that there was nothing artificial or contrived about the dispositions of property from company to family trust.

Facts

A property development company purchased a luxury lodge, it is accepted by all that this was held on revenue account. Mr T was one of two shareholders of the company, as well as one of three directors.

A separate company was later incorporated to run the business at the luxury lodge.

The development company then granted the separate company a lease for 10 years.

This lease was pre-paid by the separate company partly by a loan from the development company.

Later the development company sold the property to a family trust (the disputant) of which Mr T was settlor. Remembering the lease had been prepaid for 10 years, the family trust had really acquired a right of reversion ("the reversion") once the lease expired.

Ultimately, the trust sold the luxury lodge to a foreign company.

Decision

Judge Barber in making his decision quoted the Supreme Court in Ben Nevis that the:

> ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision in a manner that is inconsistent with Parliament's purpose. [paragraph 186]

In Judge Barber's opinion, on the particular facts of this case there was no tax avoidance arrangement with regard to income tax [paragraph 176] or goods and services tax ("GST") [paragraph 177].

He accepted the disputant's arguments regarding each property transfer:

i) The property was bought on revenue account by a developer.

ii) Upgrade costs ran significantly higher than expected.

iii) The Trust rightly acquired the property on Capital account.

iv) The Trust was entitled to deregister for GST [paragraph 174].

v) The Lease was not for dominant purpose of tax avoidance—it was to give Mr T and his family a suitable structure with which to renovate and operate a viable business [paragraph 178].

vi) Any concerns over the fixing of rent under the lease, the arithmetic regarding prepayment of rent, and the calculation of the value of the reversion are not to be treated "in this particular case" as tax avoidance—rather as matters requiring revaluation for the purposes of gift duty or dividends or such like [paragraph 178].

Accordingly, his Honour held that the income tax and GST assessments must be cancelled.

Paragraph 194 gives Judge Barber's general view:

> As a general comment, Mr T simply organised a sensible purchase of an historic property and renovated it on revenue account through his development company. The renovations probably led to overcapitalisation because they were so well done. He then transferred the property to his family trust, which he controlled, and the trust acquired the property on capital account as is usual. There is no suggestion that the property was not alienated from development company to family trust, or that the structure was a sham, or that Mr T was the alter ego of the entities involved; although the situation must have been approaching that.

TRUST IN BUSINESS OF HOLDING FINANCIAL ARRANGEMENTS AND ALLOWED BAD DEBT DEDUCTION

Case	TRA Decision No. 01/2010
Decision date	13 January 2010
Act	Income Tax Act 1994
Keywords	Activity of carrying on the business of holding financial arrangements, bad debt deduction

Summary

The TRA held that there was "just, and only just" a sufficient level of activity to support the disputant trustees intention of profit from their holding of financial arrangements to constitute a business. Consequently, the trustees were entitled to a bad debt deduction under s DJ 1 and s EH 54 (3) of the Income Tax Act 1994.

Impact of decision

The Commissioner considers that the judgment is confined to its particular facts.

Facts

On 1 January 2000 the disputant Trust was settled.

On 26 April and 5 May 2000, $180,000 and $100,000 respectively were advanced to the disputant Trust, interest free and repayable upon demand.

Mr B, a trustee and the accountant for the disputant Trust, requested Mr O, a mortgage broker, to refer to him interesting opportunities for consideration by the disputant Trust and other entities Mr B was involved with.

The disputant Trust entered into five arrangements:

a) On 16 November 2000 the disputant Trust advanced $100,000 to D W Ltd on the security of a debenture and the personal covenant of the company's director. The principal of $100,000 and interest of $25,000 were to be repaid on 17 May 2001.

b) On 22 February 2001 the disputant Trust loaned $100,000 to Mr L and on 5 April 2001 received back from him $103,041.09 inclusive of interest and principal.

c) On 5 April 2001 the disputant Trust entered into an agreement for sale and purchase of real estate with N Ltd for the disputant Trust to purchase a city unit at $120,000. The agreement provided that N Ltd would repurchase the unit from the disputant Trust for $130,000 no later than 6 June 2001.

d) On 5 July 2001 the arrangement with N Ltd was restructured as a loan with interest payable at an effective rate of 53.36% per annum capitalised monthly until full repayment.

e) On (or about) 4 October 2001 the arrangement with N Ltd was once more restructured, this time as a term loan for $155,000 with interest at 20% per annum (with a penalty rate of 30% per annum). $20,000 was to be repaid on the signing of the loan contract and the balance by 30 November 2001. Second mortgages were to be given over certain properties.

The opportunities concerning D W Ltd, Mr L and N Ltd were referred to Mr B by Mr O.

On 10 April 2002 the disputant received $72,000 from N Ltd in partial repayment of the loan to it.

Trust minutes dated October 2002 noted the loan to D W Ltd and the balance of the loan to N Ltd as unrecoverable and recorded "write off both loans as bad immediately and remind accountant to include in financial accounts this period".

On 16 October 2003 the disputant Trust filed income tax returns (and financial statements) for the income years ended 31 March 2001, 2002 and 2003. The 2003 return and financial statements recorded a bad debt write-off of $100,000. The journal for the disputant Trust's income tax year ended 31 March 2003 recorded bad debt write-offs for the loan to D W Ltd and the balance of the loan to N Ltd. The date the journal entries were made was not known.

The draft accounts and journal for the income tax year ended 31 March 2004 recorded the balance of the loan to N Ltd as a trust asset.

In May 2007 the disputant Trust filed a "revised return" for the income year ended 31 March 2003 recording bad debts written off in the amount of $148,000.

By an assessment dated 12 June 2008, the Commissioner denied the disputant Trust's claim for a bad debt deduction in the 2003 income tax year for the $100,000 loan made to D W Ltd on two grounds:

a) The disputant Trust had failed to satisfy the burden on it that the bad debt was actually written off in the 2003 income year.

b) The activity carried on by the disputant Trust was an investment activity and not that of carrying on a business.

Decision

The disputant Trust and the Commissioner agreed that the:

- loan made by the disputant Trust to D W Ltd was a bad debt
- disputant's loan to D W Ltd was a financial arrangement for the purposes of the Division 2 accruals rules
- loan made by the disputant Trust to Mr L was a financial arrangement for the purposes of the Division 2 accruals rules
- two restructured arrangements with N Ltd were financial arrangements for the purposes of the Division2 accruals rules.

The disputant Trust's activity involved the holding of financial arrangements (the loan to Mr L and the restructured arrangements with N Ltd) with attributes similar to the D W Ltd loan. Those attributes being the:

a) provision by the disputant Trust of money to the borrower at the start of the arrangement

b) borrower being required to repay the money to the disputant Trust at a future date plus interest.

The disputant Trust and the Commissioner disagreed in respect of three issues:

a) The correct characterisation of the 5 April 2001 agreement for sale and purchase between N Ltd and the disputant Trust. On that issue:

   i) The disputant Trust contended that the arrangement was a loan secured by a caveat, and as such, had attributes similar to the D W Ltd loan, the loan to Mr L and the restructured arrangements with N Ltd.

   ii) The Commissioner contended that the arrangement was correctly classified as an agreement for sale and purchase of real estate with a buy-back clause and its attributes were not the same or similar to the loan to D W Ltd, the loan to Mr L and the two restructured arrangements with N Ltd.

   iii) The Authority held that the documented purchase and buy-back of the apartment was as a security for a loan to N Ltd. The Authority observed that such a method of providing security is quite common and well understood in commerce as a form of security for a loan.

b) Whether the disputant Trust's activity in holding the D W Ltd loan, the loan to Mr L and the two restructured arrangements with N Ltd was of sufficient scale and involved sufficient time, effort and money in its ordinary operations (ie not its debt recovery efforts) to be the activity of carrying on a business. On that issue:

   i) The parties agreed that in order to satisfy the burden on it of proving that the disputant Trust carried on, at all material times, the business of holding financial arrangements the disputant must satisfy the business test formulated by Richardson J in *Grieve v CIR* [1984] 1 NZLR 101 (CA).

   ii) The Authority held, having regard to the factors considered in Grieve, that there was "just, and only just" a sufficient level of activity to support the disputant Trust's intention to profit so as to constitute the business of lending money at all material times.

c) Whether the disputant Trust wrote off the D W Ltd debt in the 2003 income year. On that issue the Authority accepted Mr B's evidence that the relevant journal entries, to write off the debts in issue, were made at proper times in the 2003 accounting year.

HIGH COURT FINDS NO REVIEWABLE ERROR MADE BY COMMISSIONER

Case	Larmer v Commissioner of Inland Revenue
Decision date	11 December 2009
Act	Tax Administration Act 1994
Keywords	Serious hardship, minimum living standards, judicial review

Summary

The judicial review proceeding failed as the High Court found that the Commissioner's decision was focused on the correct and appropriate statutory test and no error of law was demonstrated.

Impact of decision

Further consideration is being given by Inland Revenue to its application of the serious hardship provisions. Current procedures should continue to be followed until further notice.

The household expenditure guide is a tool to assist the Commissioner but it is a value judgment for the Commissioner whether or not a particular taxpayer is able to meet the minimum living expenses according to normal community standards.

Facts

The taxpayer had arrears of income tax and goods and services tax ("GST") amounting to $175,641.68. Inland Revenue had commenced debt recovery proceedings in the District Court.

In July 2008, the taxpayer had applied for financial relief under the serious hardship provisions of the Tax Administration Act 1994 ("TAA") claiming that her serious hardship was the result of significant financial difficulty that arose from her inability to meet minimum living expenses according to normal community standards. The Commissioner declined her application for relief and the taxpayer judicially reviewed that decision. At a settlement conference it was agreed that the Commissioner would consider a new application for relief.

In December 2008, the taxpayer filed the new application for relief. The Commissioner determined that she met the criteria for serious hardship in respect of the income years ended 31 March 2000 to 31 March 2003 but not during tax years subsequent to 2003. The taxpayer applied for judicial review of this second decision declining relief for the years subsequent to 2003.

Decision

Global v Year by year

A taxpayer's claim, under section 177(1)(a) of the TAA, must state why recovery of outstanding tax would place the taxpayer in serious hardship. Serious hardship is defined in section 177A as including significant financial difficulties that arise because of the taxpayer's inability to meet minimum expenses according to normal community standards; section 177A(1)(a)(i).

This does not include significant financial difficulties that arise because the taxpayer is obligated to pay tax.

The Commissioner's approach was to consider whether, in the year the obligation to pay the tax arose, the taxpayer was able to meet minimum living expenses according to normal community standards and if not, to grant relief. Each tax year was considered individually, not all tax years together. The Court found that this approach was correct.

Such an approach is a practical way of reconciling the "rather difficult interrelationship" between paragraphs (a) and (b) of section 177A of the TAA. The global approach—considering the position at the time the application is made—would potentially:

1) advantage a taxpayer who failed to pay tax in the year the obligation to pay the tax arose when financially able to do so but was financially unable when applying for relief; or
2) disadvantage a taxpayer who failed to pay tax in the year the obligation to pay the tax arose when financially unable to do so but was financially able when applying for relief.

Such outcomes would be inconsistent with the scheme and purpose of the TAA. The financial hardship regime focuses on the ability of the taxpayer to pay the tax at the time when the tax became payable.

The Court found:

> The exclusion from consideration, as possible grounds of serious hardship, of difficulties arising because of the obligation to pay tax, indicates a clear legislative intention that defaulting taxpayers may be pursued to a point which may result in serious hardship. That suggests the appropriate focus is the ability to pay the tax when the obligation arose, rather than at the point when enforcement proceedings are taken. [paragraph 14]

Minimum living standards

The taxpayer questioned the way in which the Commissioner applied the household debt expenditure guide. The guide sets out figures for the weekly average expenditure on certain items for different categories of household; the relevant one here being a one-person household.

The Court found that the guide is a tool to assist the Commissioner in determining what the minimum living expenses according to normal community standards for the particular taxpayer are. It is, however, a value judgment for the Commissioner.

Judicial review

The Court confirmed that an application for judicial review is not an appeal against the Commissioner's decision. The onus is on the taxpayer to demonstrate the Commissioner has erred in law in adopting the approach that he has. Here, the taxpayer had fallen well short of demonstrating that the use of the household expenditure guide constituted a reviewable error.

The taxpayer's submission that the Commissioner erred in his assessment of the information available is one that goes to the merits that might be relevant to an appeal. However, there was no error of law or principle, within the purview of judicial review that had been demonstrated by the taxpayer.

Finally, there was no substance to the taxpayer's submission that there was no specific reference in the Commissioner's letters to the statutory definition of serious hardship or whether the test had been met. It is clear that the Commissioner's decision was correctly focused on the correct statutory test and no error of law had been demonstrated.

The Court found the application for judicial review failed.

QUESTIONS WE'VE BEEN ASKED

ARE TAX SPARING DISCLOSURES STILL REQUIRED?

Some New Zealand double taxation agreements allow a taxpayer to claim a domestic credit for tax which the agreement deems to have been paid in the other country. New Zealand has, or has had, tax sparing arrangements with the following countries:

- China
- Fiji
- India
- Republic of Korea
- Malaysia
- Philippines (terminated)
- Singapore
- Thailand (terminated).

A taxpayer who has claimed a foreign tax credit in respect of a tax sparing arrangement under a double taxation agreement must file a *Tax sparing disclosure return (IR 486)*. A separate disclosure return is required for each tax spared arrangement entered into.

There has been a recent procedural change. The completed forms are now to be sent to:

Chief Advisor (International Audit)
Inland Revenue Department
PO Box 2198
Wellington 6140

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