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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
QWB0090	Elections for qualifying company status	This draft question we've been asked clarifies the Commissioner's position on who should sign shareholders' elections for qualifying company (QC) and loss attributing qualifying company (LAQC) status where nominees or bare trustees are involved.
PUB0165	Deductibility of break fee paid by a landlord to exit early from a fixed interest rate loan on sale of rental property	This draft public ruling considers the deductibility of a break fee paid by a landlord to a lender to exit early from a fixed interest rate loan used to purchase a rental property, in order to sell the property and therefore cease deriving rental income from it.

IN SUMMARY

Binding rulings

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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**

PUBLIC RULING BR PUB 10/09: LEGAL SERVICES PROVIDED TO NON-RESIDENTS RELATING TO TRANSACTIONS INVOLVING LAND IN NEW ZEALAND

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

Taxation Law

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Ruling applies in respect of section 11A(1)(k).

The Arrangement to which this Ruling applies

The Arrangement is the supply by a registered person of legal services to a non-resident (who is outside New Zealand at the time the services are performed) relating to:

- transactions involving the sale or purchase of land in New Zealand or the lease, licence, or mortgage of land in New Zealand, or
- easements, management agreements, construction agreements, trust deeds, guarantees and other agreements concerning land in New Zealand, or
- disputes arising in relation to land in New Zealand.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows.

Under section 11A(1)(k) the supply of the following types of legal services to a non-resident who is not in New Zealand at the time the legal services are performed is zero-rated:

- legal services relating to transactions involving the sale and purchase of land in New Zealand (including the drafting of agreements for the sale and purchase of land, the provision of legal advice in relation to the sale and purchase transaction and ancillary and related services leading up to the completion of the sale and purchase transaction);
- legal services relating to transactions involving the lease, licence, or mortgage of land in New Zealand;
- legal services relating to easements, management agreements, construction agreements, trust deeds, guarantees and other agreements relating to land in New Zealand; and
- legal services relating to disputes arising in relation to land in New Zealand (including drafting court documents, court appearances, representation in negotiations and settlements and general advice in relation to such disputes).

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 23 May 2010 and ending on 23 May 2015.

This Ruling is signed by me on the 2nd of September 2010.

Susan Price
Director, Public Rulings

COMMENTARY ON PUBLIC RULING BR PUB 10/09

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 10/09 ("the Ruling").

Background

Under section 11A(1)(k), GST is chargeable at the rate of 0% on services supplied to a non-resident who is outside New Zealand at the time the services are performed. However, section 11A(1)(k) does not apply to services that are supplied "directly in connection with" land situated in New Zealand: section 11A(1)(k)(i)(A).

New Zealand legal firms may provide legal services to clients who are non-residents and who are outside New Zealand at the time the services are performed. Such legal services could include:

- legal services relating to transactions involving the sale and purchase of land in New Zealand (including the drafting of agreements for sale and purchase of land, the provision of general legal advice in relation to the sale and purchase transaction and ancillary or related services leading up to the completion of the sale and purchase transaction);
- legal services relating to transactions involving the lease, licence, or mortgage of land in New Zealand;
- legal services relating to easements, management agreements, construction agreements, trust deeds, guarantees and other agreements in relation to land in New Zealand (including the drafting of documents and the provision of legal advice in relation to such transactions);
- legal services relating to disputes arising in relation to land in New Zealand (including drafting court documents, court appearances, representation in negotiations and settlements and the provision of general legal advice in relation to such disputes).

This ruling concerns the meaning of the phrase "directly in connection with" in section 11A(1)(k)(i) and the degree of connection between legal services and land in New Zealand necessary before such services would be regarded as services that are supplied "directly in connection with" land in New Zealand.

Legislation

Section 11A(1)(k)(i) provides:

> (1) A supply of services that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> …
>
> (k) subject to subsection (2), the services are supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed, not being services which are—
>
> (i) supplied directly in connection with—
>
> (A) land situated in New Zealand or any improvement to the land; or
>
> (B) moveable personal property, other than choses in action or goods to which paragraph (h) or (i) applies, situated in New Zealand at the time the services are performed; …

Subsections 11A(2) and (3) provide:

> (2) Subsection (1)(k) and (1)(l) do not apply to a supply of services under an agreement that is entered into, whether directly or indirectly, with a person (person A) who is a non-resident if—
>
> (a) the performance of the services is, or it is reasonably foreseeable at the time the agreement is entered into that the performance of the services will be, received in New Zealand by another person (person B), including—
>
> (i) an employee of person A; or
>
> (ii) if person A is a company, a director of the company; and
>
> (b) it is reasonably foreseeable, at the time the agreement is entered into, that person B will not receive the performance of the services in the course of making taxable or exempt supplies.
>
> (3) For the purpose of subsection (1)(k), (1)(l) and (1)(ma), and subsection (1)(n) as modified by subsection (4)(b), **outside New Zealand**, for a company or an unincorporated body that is not resident, includes a minor presence in New Zealand, or a presence that is not effectively connected with the supply.

Application of the legislation

Meaning of "directly in connection with"

In Case E84 (1982) 5 NZTC 59,441, Judge Bathgate discussed the meaning of the phrase "in connection with" in the context of the Income Tax Act 1976 in the following terms:

> It is a matter of degree whether, on the interpretation of a particular statute, there is a sufficient relationship between subject and object to come within the words "in connection with" or not. **It is clear that no hard and fast rule can be or should be applied to the interpretation of the words "in connection with". Each case depends on its own facts** and the particular statute under consideration.
>
> ...
>
> Its proper interpretation depends on the context in which the phrase is used. It may mean "substantial relation in a practical business sense", or it may have [a] far more restricted meaning, depending on its context ... [p 59,446]
>
> [Emphasis added]

Judge Bathgate considered that it is a question of fact and degree and impression whether there is a sufficient relationship between two things so as to be "in connection with" each other and that the evaluation of whether two things are "in connection with" each other requires a common sense assessment of the factual situation.

However, in section 11A(1)(k)(i) the phrase "in connection with" is qualified by the word "directly".

The interpretation of the phrase "directly in connection with" in the GST context was considered in *Auckland Regional Authority v CIR* (1994) 16 NZTC 11,080; *Wilson & Horton Ltd v CIR* (1994) 16 NZTC 11,221 (HC); (1995) 17 NZTC 12,325 (CA); *Case S88* (1996) 17 NZTC 7,551 (appealed as *CIR v Suzuki New Zealand Ltd* (2000) 19 NZTC 15,819 (HC); (2001) 20 NZTC 17,096 (CA)); *Malololailai Interval Holidays New Zealand Ltd v CIR* (1997) 18 NZTC 13,137 and *Case T54* (1998) 18 NZTC 8,410. These cases illustrate how the phrase is to be interpreted in the context of section 11A(1)(k)(i)(A).

The issue considered in the *Auckland Regional Authority* case was whether landing dues, terminal services charges and international garbage disposal charges levied by the ARA (the operator of Auckland International Airport) were paid for services that were supplied "directly in connection with" the service of international transportation. Barker J held that landing dues (which were paid for the use of runways, turnoffs, taxiways and holding bays) were supplied "directly in connection with" international transportation, since the service of international transportation could not be supplied without the provision of runways etc. However, he considered that the terminal services charge (which related to the use of terminals and equipment used for embarkation or disembarkation from international aircraft, maintenance and cleaning of luggage carousels, gate lounges, baggage makeup, distribution and storage areas) were "ancillary" (in the sense of being secondary or subservient) to the supply of international transportation. Barker J also considered that the garbage disposal service was a separate service from the supply of international transportation and that, although an essential service, it was ancillary to the service of transportation.

The *Auckland Regional Authority* case is not directly on point as it addresses the issue of whether two services are supplied "directly in connection with" each other, rather than whether a service is supplied "directly in connection with" land or other goods in New Zealand. However, by analogy, the case suggests that a service would not necessarily be "in connection with" an item even if the service could not have been performed without the existence of the item.

In *Wilson & Horton*, the issue was whether the supply of advertising space in a newspaper was "directly in connection with" the goods advertised. In the High Court, Hillyer J considered that the goods that were the subject of the advertising were "at least one step removed from the services supplied by the newspaper proprietor" and that, therefore, the advertising services were not supplied "directly in connection with" land or any moveable personal property situated in New Zealand (p 11,224). Hillyer J saw a distinction between the painting of a vessel (which would be directly connected with the vessel) and services supplied to the passengers or crew of the vessel (which would not be directly connected with the vessel).

On appeal, it was accepted by both parties that the High Court's conclusion was correct. Therefore, this aspect of the High Court's judgment was not addressed by the Court of Appeal.

The legislation was amended to overturn the result in *Wilson & Horton* (based on the Court of Appeal's interpretation of the phrase "for and to" which was previously contained in section 11(2)(e) (now section 11A(1)(k))). However, the phrase "directly in connection with" was retained in the provision. This suggests that the "one step removed" test applied by the High Court in *Wilson & Horton* reflects the intention of the legislation.

In *Case S88*, Judge Barber considered the phrase "directly in connection with" in relation to an arrangement involving warranties in respect of imported vehicles. The non-resident manufacturer (MC), from whom the importer (SNZ) purchased vehicles, provided a service warranty to SNZ under which it agreed to reimburse SNZ for certain repairs. SNZ on-sold the vehicles to a dealer, who in turn

sold the vehicles to the public. The warranty given by SNZ was wider than the warranty which SNZ received from MC. If SNZ was required to reimburse the dealer for the cost of repairs covered by SNZ's warranty and if the particular repairs were also within MC's warranty, SNZ would claim reimbursement from MC. The issue was whether the payment received from MC was for services supplied "directly in connection with … moveable personal property" (the vehicles) in New Zealand.

Judge Barber considered that the service provided by SNZ was the repair of the vehicles (which was carried out by the dealer on behalf of SNZ) and that there was a direct relationship between the repair service and the vehicle. He noted that the repair service could not be performed but for the existence of the vehicle:

> In my view, **the repair services effected by the dealer are directly in connection with the vehicles** originally manufactured by MC but which, at the time of repair, are owned by the customer as purchaser from the dealer. The latter has, shortly before, purchased the vehicle from the objector. The moveable personal property in question is the repaired vehicle. **There is a direct relationship or connection between the service of the repairs and the vehicle.** Accordingly, the said "proviso" to s 11(2)(e) must apply to the facts of this case and prevent the objectors from relying on the zero-rating provisions of the s 11(2)(e). **The repair service could not be performed but for the existence of the vehicle.** The repairs were carried out for the objector (and others) which was carrying them out for MC (and others). **The objector was not merely arranging for the repairs to be carried out, but was responsible under warranty to make the repairs**—as was MC. That activity, or supply, meets the statutory nexus between goods and the service. **The service is the actual repair of vehicles even though that work was performed by a contractor—usually the dealer.**
>
> I agree … that s 11(2)(e) requires the existence of a linkage between the non-resident for whom the services are supplied and the moveable personal property, situated in New Zealand, in relation to which the services are performed. However, there is no requirement in s 11(2)(e) or anywhere else, that at the time the services are performed, the moveable property must be owned by the non-resident person, or that the non-resident person must be entitled to use or possession of the property. [p 7,558]
>
> [Emphasis added]

The High Court upheld Judge Barber's decision (*Suzuki New Zealand v CIR*). McGechan J considered that the repair services provided by the importer were analogous to the "painting the ship" example given in *Wilson & Horton*:

> I have no doubt that **repair services were carried out directly in connection with moveable personal property situated in New Zealand at the time the services were performed**. Quite simply, they were repairs carried out on cars within New Zealand. **The situation equates [to] "painting the ship".**
>
> **The nexus could not be closer** … The duality involved is not prohibitive … while there was one repair, it arose under and met two quite separate contracts with two different persons. So far as SMC is concerned, the repair was a service to SMC, quite irrespective of the other contract with an SNZ customer likewise discharged. I see no reason why a provision of services to SMC under one contract should be viewed differently because of provision of services to a customer under another. They are concurrent but different supplies. The facts that SMC is non-resident, and a non-owner, are of no present consequence given the way s 11(1)(e)(ii) is worded. [p 15,830]
>
> [Emphasis added]

The Court of Appeal agreed that the repair services were supplied "directly in connection with" moveable personal property in New Zealand. Blanchard J, giving the judgment of the Court, said:

> **There is a nexus in both cases between the performance and the consideration given by the other party.** In the present case there is a more than sufficient financial and legal connection, as demonstrated by the evidence, between SMC's payments and the carrying out of the repairs on behalf of SNZ by its dealers. **The repairs may have been done for the customers**, in practical terms, under SNZ's standard warranty, **but they were also done for SMC under its warranty**.
>
> …
>
> It follows from what we have said that we also reject the argument, made in relation to s 11(2)(e), that the services were not supplied directly in connection with movable personal property situated in New Zealand. **The repair services were obviously supplied in relation to goods, namely motor vehicles, which were situated in New Zealand. The supply of repairs could hardly be more directly connected with the motor vehicles.** The fact that they may have no longer been owned by SMC or SNZ is irrelevant. Section 11(2)(e) therefore has no application. [pp 17,102, 17,103]
>
> [Emphasis added]

In *Malololailai Interval Holidays*, a New Zealand company had supplied services relating to the marketing of timeshare interval holidays at a resort in Fiji to another New Zealand company. The issue was whether the marketing services were "supplied directly in connection with land, or any improvements thereto, situated outside New Zealand". If so, the services would be zero-rated under section 11(2)(b) (now section 11A(1)(e)). (As the phrase "directly in connection with" has the same meaning throughout section 11A (*Wilson & Horton Ltd v CIR* (1994) 16 NZTC 11,221, 11,224), the *Malololailai* case is relevant to the interpretation of the phrase in the context of section 11A(1)(k)(i).)

In *Malololailai* Neazor J referred to *Case E84* and said:

> A good deal of the debate in that case about whether a narrow or wide interpretation of the statutory phrase was appropriate might have been seen as unnecessary if the word "directly" had

> been used, as it is in s 11 of the Goods and Services Tax Act 1985. [p 13,144]

These comments highlight the importance of the addition of the word "directly". The use of the word "directly" narrows the scope of what might be considered to be "in connection with" the land and confirms that there must be a direct relationship between the relevant services and land.

The *Malololailai* case also confirms that the recipient of a service need not acquire a legal interest in land before the service would be regarded as one that is "directly in connection with" the land. At page 13,143 Neazor J commented:

> It is not in my view necessary to consider the first point of Mr McLay's argument further than that, because the issue is not whether the purchaser acquires land or an interest in land, but whether the services provided by the marketer on behalf of the objector are "directly in connection with land", which may involve much less than acquiring an interest in the land. By way of example, the provision of gardening services would surely come within the statutory words.

Neazor J considered that a transaction between the New Zealand vendor and the purchaser of an interval holiday would be "directly in connection with" land outside New Zealand, but that the marketing services supplied by the marketing company (although essential to bring together the vendor and purchaser and although closely related to the sale and purchase transaction) were not "directly in connection with" the land. The marketing services merely facilitated a transaction that was directly connected to the land (the transaction between vendor and purchaser). Neazor J considered that (as with the advertising services in *Wilson & Horton*) the marketing services were one step removed from a transaction that directly related to the land:

> **I would regard the contractual transaction between [the New Zealand selling company] and the purchaser of an interval holiday as within the descriptive words "directly in connection with land or any improvement thereto"**, although that determination is not essential to this decision, but when attention is paid to the services supplied by [the marketing company] to [the NZ selling company] consider that those services are not within the statutory description. What [the marketing company] does is to advertise and promote interval holidays for [the NZ selling company] and negotiate the contract for individual holidays (including the consideration for that contract between the purchaser and [the NZ selling company]) up to the point where the contract is effected between those two parties.
>
> The services provided by [the marketing company] are not directly in connection with the land or the improvements. The transaction of those considered which would be in that category is the transaction between [the NZ selling company] and the purchaser. **The transaction between [the marketing company] and [the NZ selling company] is one which brings about the transaction which has direct effect**, but in my view is of a kind to which Hillyer J's words may properly be applied—it is **one step removed from the direct transaction**.
>
> If one of the analogies referred to needs to be chosen I would take that of the publication of advertisements in the *Wilson & Horton* case. The newspaper proprietor's services facilitated or opened the way to the transactions between vendor and purchaser, and that in my view is what [the marketing company] did, although it was more closely involved in the transaction to which the statutory words apply than the publisher of an advertisement would be. Nevertheless the transaction having direct effect was not that of the publisher, or in this case of the sales agent. [p 13,146]
>
> [Emphasis added]

The *Malololailai* case was decided before the High Court and the Court of Appeal judgments in *Suzuki*. Although *Malololailai* was referred to in submissions to the High Court in the Suzuki case, it was not discussed in detail by the High Court and the case was not referred to by the Court of Appeal. The Commissioner considers that the approach in *Malololailai* is consistent with the approach taken in the *Wilson & Horton* case and is not inconsistent with the *Suzuki* decisions. These cases support a narrow interpretation of the phrase "directly in connection with".

Case T54 concerned the service of producing a video of Japanese honeymoon couples holidaying in New Zealand supplied by a Japanese company. Judge Barber considered that the services were not supplied "directly in connection with" the video camera or the blank tape used to create images (which were later edited to create the final video). Judge Barber considered that the video camera and blank tape were merely tools used to carry out the services and were not the object or objective of the services. He considered that the service provided was the creation of the final video. The judge concluded that the taxpayer had not provided services "directly in connection with" moveable personal property situated in New Zealand at the time services were performed. This was because the video did not come into existence until after the taxpayer's services had been performed and at that time the video was outside New Zealand:

> The resultant video cassette did not come into existence until after the relevant services had been performed. It was not "situated inside New Zealand at the time the services are performed". Until then it was only a blank tape. There is no other relevant moveable personal property to which the objector's service could be regarded as supplied "directly in connection with". Insofar as there is a connection between the said videoing services and the said blank tape (which fills up during the day) and camera and equipment, that connection is not a "direct" connection. That particular tape is only part of the equipment involved in the process of creating another tape – the resultant videotape cassette. Tools and equipment are aids to the supply of such videoing services, and are

> not the objects of such services. Those services could be regarded as supplied directly in connection with the Japanese tourists who, of course, are not moveable personal property. [pp 8,414–8,415]

Case T54 is distinguishable on its facts from the types of situations addressed in this item, because it is not possible to argue that land did not exist before legal services are provided (an argument that was accepted in *Case T54*).

Test of whether services are "directly in connection with" land in New Zealand

The following principles on the interpretation of the phrase "directly in connection with" can be drawn from the above cases:

- Whether there is sufficient relationship between two things, so as to be "in connection with" each other, is a matter of fact and degree and impression and the evaluation of whether there is a sufficient relationship between two things requires a common sense assessment of the factual situation (*Case E84*).
- The inclusion of the word "directly" in section 11A(1)(k)(i) indicates that a close connection would be required between a service and land for the service to be regarded as a service that is supplied "directly in connection with" the land (*Malololailai*).
- Although there must be a direct relationship between the service and the property, for the service to be directly in connection with that property, the non-resident to whom the service is provided need not own or be entitled to the use or possession of the particular property (*Suzuki*).
- The recipient of the service need not acquire a legal interest in land before the service would be regarded as a service that is "directly in connection with" the land. Services that are "directly in connection with" land include services that have a physical effect on the land, such as gardening or repairs to improvements to land (*Malololailai*).
- Services that merely bring about or facilitate a transaction that has direct effect on land and which are one step removed from a transaction that has a direct effect on the land are not supplied "directly in connection with" the land (*Wilson & Horton*, *Malololailai*).
- If the service could not have been performed but for the existence of the land, this may suggest that the service is supplied "directly in connection with" the land, but this factor is not conclusive (*ARA*; Suzuki).

As a close relationship is required between the relevant services and land in New Zealand, the services must be supplied directly in connection with specific land in order to fall within section 11A(1)(k)(i)(A).

Legal services

Legal services that may be supplied to non-residents include:

- *Legal services relating to transactions involving the sale and purchase of land in New Zealand*

  An analogy can be drawn between the marketing services considered in the *Malololailai* case and legal services in respect of the sale and purchase of land in New Zealand. In *Malololailai*, it was held that the marketing services did not have a direct effect on the land and that they merely facilitated a transaction that had a direct effect on the land (that is, the sale and purchase between the vendor and purchaser). Legal services relating to the sale and purchase of land facilitate or give effect to a transaction between the vendor and purchaser which has a direct effect on the land but are one step removed from that transaction.

  Accordingly, legal services relating to the sale and purchase of land in New Zealand (including the drafting of an agreement for the sale and purchase of land in New Zealand, legal advice in relation to a sale and purchase transaction and ancillary or related services leading up to the completion of a sale and purchase transaction) are not services that are supplied "directly in connection with" the land that is the subject of the transaction. Therefore, such services are zero-rated under section 11A(1)(k).

- *Legal services relating to transactions involving the lease, licence or mortgage of land in New Zealand or legal services relating to easements, management agreements, construction agreements, trust deeds, guarantees and other agreements concerning land in New Zealand*

  The same reasoning applies to legal services relating to transactions involving the lease, licence, or mortgage of land in New Zealand or legal services relating to easements, management agreements, construction agreements, trust deeds, guarantees and other agreements concerning land in New Zealand. These services are provided to a person who enters into a transaction that would have direct effect on the land. However, such legal services are at least one step removed from the land that is the subject matter of the transactions. These services merely assist in bringing about or facilitating a transaction that has direct effect on the land.

Accordingly, legal services relating to transactions involving the lease, licence or mortgage of land in New Zealand or legal services relating to easements, management agreements, construction agreements, trust deeds, guarantees and other agreements concerning land in New Zealand (including the drafting of agreements relating to these transactions and the provision of legal advice in respect of such transactions) are not supplied "directly in connection with" the land that is the subject of these transactions. Such services are zero-rated under section 11A(1)(k).

- *Legal representation in disputes in relation to land in New Zealand*

  Legal services involving representation in disputes relating to land in New Zealand (including drafting court documents, court appearances, representation in negotiations and settlements, and general advice) are also one step removed from the land to which the dispute relates. These services may be supplied as a consequence of a transaction that has direct effect on the land. However, consistent with the approach taken in *Malololailai*, the services are not supplied "directly in connection with" the land to which the dispute relates. Therefore, these services are also zero-rated under section 11A(1)(k).

Subsections (2) and (3)

The Arrangement to which this Ruling applies states that the non-resident recipient of the supply is outside of New Zealand at the time that the services are performed. Section 11A(2) and section 11A(3) are relevant when considering whether a person is outside New Zealand or whether the services are received in New Zealand.

Section 11A(2) ensures that GST is charged on the supply of services that are consumed in New Zealand but are contracted for by a non-resident who is outside New Zealand. It provides that section 11A(1)(k) does not zero-rate services supplied to a non-resident if another person (including an employee or company director of the non-resident) receives the performance of those services in New Zealand.

Section 11A(3) defines the phrase "outside New Zealand" in relation to section 11A(1)(k). For the purpose of these provisions a non-resident company or unincorporated body that has a minor presence in New Zealand, or whose presence is not effectively connected with the supply of services, will remain "outside New Zealand".

What constitutes a minor presence will be very much determined by the facts of the particular case. "Minor" is a relative expression. What is minor is therefore a question of degree and should be regarded as relative to the size or volume of the supplies. A "minor presence" is a presence that is relatively small or unimportant or incidental to the services being supplied. In determining whether a presence is minor, it is necessary to consider the relative size or importance of the presence of the non-resident company when compared with the presence of the New Zealand supplier. This will involve a consideration of, inter alia, the relative numbers of people connected with the supply, the amount of time spent in connection with the supply by those people and the relative importance of the people to the services being supplied.

The test of "effectively connected" is also a question of fact. The relationship of the supply with the presence in New Zealand must be more than remotely connected but can be more than one step removed from the presence. The phrase is therefore broader than the phrase "directly in connection with". If the presence is attributable to the supply in question then it is very likely that the presence will be effectively connected with that supply.

Discussion of these provisions and some relevant examples are set out in *Taxation Information Bulletin* Vol 11, No 9 (October 1999), in the "New legislation" section under the heading "GST – Treatment of exported services".

Example

Steve, who is a US resident, comes to New Zealand with a view to purchasing land for investment purposes. He returns to the US and continues to carry on negotiations for the purchase of land from a distance. Tracey, a New Zealand solicitor, arranges for searches of the land in Land Information New Zealand's records to be carried out and obtains a LIM report from the local authority. She provides advice in relation to tax issues relating to the purchase, advice on whether Overseas Investment Commission consent to the purchase is required and general legal advice in relation to the transaction. Tracey then drafts an agreement for sale and purchase which is signed by both parties. She also advises Steve regarding a mortgage to be secured over the land, drafts a transfer to be signed by the vendor and attends to settlement of the transaction.

After settlement, Steve telephones a real estate agent and arranges for the property to be leased. Tracey drafts the lease and negotiates with the lessee's solicitor regarding the form of the lease. The lease is signed and the lessee takes occupation of the property. During a brief visit to New Zealand, Steve discovers that the lessee is using the property for a purpose that is not authorised by the lease. Tracey drafts a notice to the lessee terminating the lease and arranges for the notice to be served. The lessee then applies to the court for an injunction preventing Steve from terminating the lease. Steve instructs Tracey to draft documents opposing the injunction. Tracey provides advice in relation to the management of the dispute and represents Steve in settlement negotiations with the lessee. Ultimately, the dispute is settled out of court.

The legal services provided by Tracey either facilitate transactions between Steve and the vendor, the mortgagee or the lessee which have a direct effect on the land (by creating or changing legal interests in respect of the land) or arise as a consequence of these transactions. However, Tracey's legal services are one step removed from transactions which directly affect the land. The legal services are not supplied directly in connection with land in New Zealand. Therefore, provided Steve is outside New Zealand at all times when these services are performed, the services will be zero-rated under section 11A(1)(k).

NEW LEGISLATION

TAXATION (DEFINITIONS OF DEPENDENT CHILD) ACT 2010

The Taxation (Definitions of Dependent Child) Act 2010 was enacted on 23 August 2010. It was formerly part of the Social Assistance (New Work Tests, Incentives and Obligations) Amendment Bill 2010.

The new legislation amends the definition of "dependent child" in a number of Income Tax Acts. The new definition applies when determining eligibility for Working for Families tax credits and validates past payments of family support tax credits in specific circumstances.

Background

The Family Court determined that the practice of the Ministry of Social Development to treat a child who has been returned to the care, but not the custody, of his or her parents under the Children, Young Persons, and Their Families Act 1989 as a dependent child for benefit and tax credit purposes, was not supported by the previous legislation. This means the parent would be unable to claim family support tax credits or Working for Families tax credits for that child.

Key features

The Taxation (Definitions of Dependent Child) Act 2010 amends the definition of "dependent child" in section YA 1 of the Income Tax Act 2007. The definition now includes a child or young person, as defined in section 2(1) of the Children, Young Persons, and Their Families Act 1989 ("CYPF Act"), when that child or young person has been placed in the charge of his or her parent under sections 361 and 362 of the CYPF Act. This will allow the parent to apply for Working for Families tax credits in relation to that child or young person.

Similar changes have been made to the definition of "dependent child" in:

- section 374 A of the Income Tax Act 1976;
- section OB 1 of the Income Tax Act 1994; and
- section OB 1 of the Income Tax Act 2004.

In these earlier Acts, the change in definition of "dependent child" is only for the purpose of validating payments of family support tax credits made in the relevant income years.

Application dates

The change to the Income Tax Act 1976 applies for the 1991–92 and later income years.

The change to the Income Tax Act 1994 applies for the 1995–96 and later income years.

The change to the Income Tax Act 2004 applies for the 2005–06 and later income years.

The change to the Income Tax Act 2007 applies for the 2008–09 and later income years.

ORDERS IN COUNCIL

FIF DEEMED RATE OF RETURN SET FOR 2009–10

The deemed rate of return for taxing foreign investment fund interests is 9.12% for the 2009–10 income year, down slightly from the previous year's rate of 9.18%.

The deemed rate of return is set annually and is one of the methods that can be used to calculate income from foreign investment fund interests. The rate is based on taking an average of the five-year Government stock rate at the end of each quarter, to which a 4% margin is added.

The new rate was set by Order in Council on 9 August 2010.

Income Tax (Deemed Rate of Return on Attributing Interests in Foreign Investment Funds, 2009–10 Income Year) Order 2010 (SR 2010/242)

FBT RATE FOR LOW-INTEREST LOANS

The prescribed rate used to calculate fringe benefit tax on low-interest employment-related loans has been raised from 6% to 6.24%. The new rate applies from the quarter beginning 1 October 2010.

The rate is reviewed regularly to align it with the results of the Reserve Bank's survey of variable first mortgage housing rates.

The new rate was set by Order in Council on 30 August 2010.

Income Tax (Fringe Benefit Tax, Interest on Loans) Amendment Regulations 2010 (SR 2010/300)

REMISSION OF USE-OF-MONEY INTEREST FOR CANTERBURY EARTHQUAKE VICTIMS

The Canterbury earthquake has been declared an emergency event for the purposes of section 183ABA of the Tax Administration Act 1994. This section allows the Commissioner to remit use-of-money interest payable on late tax payments following emergency events.

Taxpayers may apply for remission once their tax returns and payments are up to date. Different rules apply in cases of financial hardship.

Find out more about Inland Revenue's tax relief measures at **www.ird.govt.nz/earthquake**

Tax Administration (Emergency Event-Canterbury Earthquake) Order 2010

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.

MARINE FENDER SYSTEMS – DEPRECIATION DETERMINATION

The Commissioner has set a general economic depreciation rate for marine fender systems. Marine fender systems are attached to wharves. Their function is to absorb large amounts of kinetic energy and to protect the wharf and vessels moored or being moored to the wharf from being damaged should the vessel collide with the wharf. The marine fender systems consist of a series of steel box frames with plastic or rubber fenders behind. These are mounted on a structural steel frame and may be further supported by chains. They may also use high-strength plastic tanks as pneumatic buffers.

DETERMINATION DEP 75: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 75

This determination may be cited as "Determination DEP 75: *Tax depreciation rates general determination number 75*".

1. Application

This determination applies to taxpayers who own items of depreciable property of the kind listed in the table below that have been acquired during the 2009/2010 and subsequent income years.

2. Determination

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

- adding into the "Building and structures" asset category the asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Marine fender systems	20	10	7

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 on the 10th day of September 2010.

Rob Wells
LTS Manager, Technical Standards

LEGAL DECISIONS – CASE NOTES

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

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

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.

APPLICATION TO COMMENCE PROCEEDING UNDER SECTION 138D OF THE TAX ADMINISTRATION ACT 1994

Case	TRA No. 11/09
Decision date	16 August 2010
Act(s)	Section 138D of the Tax Administration Act 1994
Keywords	Exceptional circumstances

Summary

The taxpayer did not adequately address the question of why she did not file her notice of response (NOR) or notice of proposed adjustments (NOPA) on time. There were no "exceptional circumstances" in this case.

Impact of decision

A taxpayer's inaction in filing a NOR on time would not normally constitute "exceptional circumstances".

Facts

GST (goods and services tax)

On 19 July 2007 the Commissioner issued a NOPA to Mrs S for GST for the periods ending 31 May 2003, 30 June 2003, 31 July 2003, 31 August 2003, 30 September 2003, 29 February 2004, 30 September 2005 and 31 October 2005.

The due date for responding to the NOPA by a NOR was 18 September 2007.

On 19 September 2007, the Commissioner received a letter from Mrs S's husband, which purported to be a NOR. The letter said that Mrs S did not agree with the proposed assessment and that her lawyer was out of the country and would provide a response on his return.

No further response was received from Mrs S or her lawyer.

By a letter dated 16 October 2007, the Commissioner advised Mrs S that his NOPA was deemed accepted because the purported NOR was not valid and legitimate response was out of time.

Income tax

Mrs S had not filed any tax returns for the income years 2004 to 2007. By a letter dated 27 August 2007, the Commissioner informed Mrs S that default assessments had been made for those periods. Notices of the assessments were later issued by the Commissioner to Mrs S on 28 August, 29 August and 31 August 2007 respectively.

Nearly a year later, on 1 July 2008, Mrs S issued a purported NOPA and her income tax returns to the Commissioner.

By a letter dated 1 August 2008, the Commissioner informed Mrs S that her purported NOPA was out of time.

Challenge proceedings

On 5 March 2009 Mrs S applied to the Taxation Review Authority under section 138D, "exceptional circumstances" to commence challenge proceedings out of time, in respect of the GST and income tax assessments.

Decision

Judge Barber considered that the facts relied on to equate to "exceptional circumstances" were in fact a "tactical response to the Commissioner's action for tax recovery".

His Honour held that he had jurisdiction to hear a section 138D application but he did not consider that in this case the disputant had made out "exceptional circumstances". No reasonable justification was demonstrated for not filing a challenge within the response period. Additional grounds raised went to the merits of the underlying assessments. His Honour agreed that these were "irrelevant" and it was "difficult to conclude Mrs S had been treated unjustly".

SUPREME COURT DECLINED LEAVE TO APPEAL

Case	Avowal Administrative Attorneys Ltd & N Petroulias v the District Court at North Shore & the Commissioner of Inland Revenue
Decision date	16 August 2010
Act(s)	Tax Administration Act 1994
Keywords	Section 16, double tax agreement

Summary

An application for leave to appeal was declined on the basis that the legal propositions raised did not have a sufficient factual basis and that overall there was an insufficient prospect of success.

Facts

Following access operations carried out by both the Commissioner of Inland Revenue ("Commissioner") pursuant to section 16 of the Tax Administration Act 1994 in 2006 involving the removal of hard copy documents and hard drives for copying, the relevant taxpayers filed a judicial review on a number of grounds, culminating in a judgment of the Court of Appeal in favour of the Commissioner issued on 11 May 2010.

The taxpayers applied for leave to appeal the decision to the Supreme Court.

Decision

The Supreme Court declined the application for leave on the basis that the legal points raised by the applicants did not have a sufficient factual basis and in some respects were inconsistent with factual findings made in the High Court and upheld in the Court of Appeal. The Court was ultimately satisfied that there was an insufficient prospect that the proposed appeal would succeed and it would not be in the interests of justice to grant leave in the circumstances.

REGULAR CONTRIBUTORS TO THE TIB

Office of the Chief Tax Counsel

The Office of the Chief Tax Counsel (OCTC) produces a number of statements and rulings, such as interpretation statements, binding public rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The OCTC also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal and Technical Services

Legal and Technical Services contribute the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters.

Legal and Technical Services also contribute to the "Your opportunity to comment" section.

Policy Advice Division

The Policy Advice Division advises the government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as the Orders in Council.

Litigation Management

Litigation Management manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

GET YOUR TIB SOONER ON THE INTERNET

This *Tax Information Bulletin (TIB)* is also available on the internet in PDF at **www.ird.govt.nz**

The *TIB* index is also available online at **www.ird.govt.nz/aboutir/newsletters/tib/** (scroll down to the bottom of the page). The website has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

If you would prefer to get the *TIB* from our website, please email us at **tibdatabase@ird.govt.nz** and we will take you off our mailing list.

You can also email us to advise a change of address or to request a paper copy of the *TIB*.