

TAX INFORMATION

Bulletin

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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
ED0133	Draft determination: Tax depreciation rates provisional	This draft determination proposes a provisional depreciation rate for a fleet tracking unit.	15 June 2011

IN SUMMARY

Items of interest

Income tax treatment of unsuccessful software development

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“Tax Treatment of Computer Software” published in an appendix to *Tax Information Bulletin* Vol 4, No 10 (May 1993) provided that the cost of unsuccessful software development could be immediately deducted. This notice advises taxpayers that the view taken in that part of the TIB item is incorrect and should be treated as being withdrawn effective from the beginning of the 2011–12 income year.

Legislation and determinations

Special determination S18: Issue of perpetual non-cumulative shares by NZ Co, and related transactions

3

This determination relates to an arrangement involving the issue of perpetual non-cumulative shares by a New Zealand company to its parent company.

Depreciation determination DEP77: Motor vehicles rented for short-term periods of 1 month or less

5

This depreciation determination deletes the old asset classes set out in DEP34 from the “Transportation” asset category, and inserts new asset classes making it clear that the higher depreciation rates that may be used for motor vehicles and trailers used for short-term hire apply only to those assets that are hired only for periods of 1 month or less. The depreciation rates are unchanged.

Foreign currency amounts – conversion to New Zealand dollars

8

This article provides the exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand dollars under the CFC and FIF rules for the 12 months ending 31 March 2011.

Legal decisions – case notes

Persistent litigant discouraged

16

A number of interlocutory applications which attempted to re-open finalised decisions were dismissed by the Court.

Commissioner’s evasion assessments upheld

17

The plaintiff was unable to prove that various amounts paid into bank accounts which he controlled were not his income. The Commissioner established that the plaintiff was liable for evasion shortfall penalties.

High Court finds in favour of retrospective departure orders

17

The non-custodial parent had appealed the findings of the Family Court awarding a departure order from formula assessment in favour of the custodial parent. The non-custodial parent appealed on a number of grounds. The reason the Commissioner intervened in this matter was primarily because of one ground whereby the non-custodial parent argued that there is no jurisdiction for the Commissioner to make retrospective departure orders.

Unclaimed money payable to Commissioner

18

The Supreme Court has followed the Privy Council decision in *Thomas Cook (New Zealand) Ltd* and held that unclaimed foreign exchange drafts and bank cheques are to pass to the Commissioner as custodian six years after legal demand may be made for payment to the payee.

ITEMS OF INTEREST

NOTICE – INCOME TAX TREATMENT OF UNSUCCESSFUL SOFTWARE DEVELOPMENT

“Income Tax Treatment of Computer Software” published in an appendix to *Tax Information Bulletin* Vol 4, No 10 (May 1993) (“the TIB item”) provides that the cost of unsuccessful software development can be immediately deducted (whether the software is commissioned or developed in-house). The TIB item acknowledges that such software is a capital item but allows a deduction on the basis that s 108K of the Income Tax Act 1976 (now s EE 39 of the Income Tax Act 2007) applies. The Commissioner considers that this view is incorrect. Therefore, this part of the item should not be relied on.

Section EE 39 applies to items of depreciable property that have previously been, but are no longer, used in a taxpayer’s income earning process. It does not apply to items (such as incomplete software) that have never been used in a taxpayer’s income earning process.

The principles relating to the deductibility of expenditure incurred in developing or acquiring a capital asset are set out in the interpretation statement IS 08/02: *Deductibility of feasibility expenditure* (published in *Tax Information Bulletin* Vol 20, No 6 (July 2008)). The following summary assumes that the taxpayer is developing software for use in an existing business or income-earning activity.

- Software developed for use in an income-earning process will provide the taxpayer with an enduring benefit, and will generally be a capital asset.
- Expenditure incurred in undertaking feasibility studies to determine whether to develop a capital asset will be prima facie deductible under s DA 1(1) (assuming the asset is to be used in the taxpayer’s income-earning process). In the context of software development this means that expenditure incurred analysing the feasibility of developing a piece of software for use in a business would be deductible. This is consistent with the position set out in the TIB item, which refers to this as the “pre-development phase”.
- Accordingly, expenditure incurred principally for the purpose of placing a taxpayer in a position to make an informed decision about the development of some software will not generally be expenditure incurred in relation to that software. However, once a decision has been made to proceed with the development, any expenditure incurred beyond that point will relate to the

acquisition of the software and/or rights in the software. From that point on, expenditure should be capitalised. The rights in the software (if that is what has been obtained) are then able to be depreciated provided they are “depreciable property” and are used or available for use in the taxpayer’s income-earning process.

- Consequently, it is possible that certain expenditure may never be deductible. This would occur when the expenditure is capital in nature but not depreciable property because the relevant property never came into existence or was never used in the business (see for example *Milburn NZ Ltd v CIR* (2001) 20 NZTC 17,017 and *Softwood Pulp and Paper Co Ltd v FCT* 76 ATC 4,438).

The parts of the TIB item that suggest that a taxpayer is allowed a deduction of expenditure on software development where the software is never implemented or used in the taxpayer’s income earning process should hereby be treated as being withdrawn effective from the beginning of the 2011–12 income year. Taxpayers taking a taxpayer’s tax position after that date should not rely on those parts of the item.

The remainder of the TIB item should be used with some care. The TIB item applies the Income Tax Act 1976. Legislative changes inevitably mean that some parts of the item will no longer be applicable. If in doubt, Inland Revenue recommends that advice from a tax advisor is sought. Inland Revenue intends to update this item as part of its review of PIB and TIB items issued before 1996 see www.ird.govt.nz/technical-tax/pib-review/

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 S18: ISSUE OF PERPETUAL NON-CUMULATIVE SHARES BY NZ CO, AND RELATED TRANSACTIONS

This determination may be cited as “Determination S18: Issue of perpetual non-cumulative shares by NZ Co, 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 PPS) by a New Zealand company (NZ Co) to its parent company (Parent Co). That arrangement is the subject of private ruling BR Prv 11/10 issued on 17 March 2011, and is fully described in that ruling.
2. The PPS are an excepted financial arrangement. The PPS form part of a financial arrangement as contemplated by s EW 6(1) of the Income Tax Act 2007 (the wider financial arrangement). The wider financial arrangement also includes a loan from a related party to Parent Co (the Parent Co Loan), the use of the Parent Co Loan proceeds by Parent Co to subscribe for the PPS, and the use of dividends received on the PPS, plus payments Parent Co is to receive in terms of the letter dated 23 December 2009 issued by NZ Co to Parent Co (the NZ Co Letter), to pay interest on the Parent Co Loan.
3. This wider financial arrangement has excepted financial arrangement components, as defined in s EW 5 of the Income Tax Act 2007. The PPS are an excepted financial arrangement component of the wider financial arrangement.
4. The amount of income derived or expenditure incurred by a person under the financial arrangement rules in respect of a financial arrangement excludes any amount that is solely attributable to an excepted financial arrangement described in ss EW 5(2) to (16) of the Income Tax Act 2007.
5. This determination prescribes a method to be used for determining the part of the consideration payable and receivable by the parties to the wider financial arrangement that is solely attributable to an excepted financial arrangement.

2. Reference

1. This determination is made under s 90AC(1)(h) of the Tax Administration Act 1994.

3. Scope of determination

1. This determination applies specifically to the PPS.
2. This determination applies if the interest paid on the Parent Co Loan is at an arm’s length market rate.

4. Principles

1. The PPS, the Parent Co Loan, and the payment and other obligations under the NZ Co Letter are each part of a wider “financial arrangement” that has excepted financial arrangement components as defined in s EW 5 of the Income Tax Act 2007.
2. Any amount that is solely attributable to an excepted financial arrangement described in ss EW 5(2) to (16) of the Income Tax Act 2007 is not included when calculating income or expenditure under the financial arrangements rules.
3. This determination specifies that the only amounts that are solely attributable to the excepted financial arrangement within the wider financial arrangement are the amounts paid under or with respect to the PPS.
4. This determination specifies that no part of (inter alia) the amount advanced or repaid under the Parent Co Loan, the interest paid on the Parent Co Loan, or the payments or other consideration provided in terms of the NZ Co Letter, 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 PPS are:
 - the issue price of the PPS;
 - the dividends paid on the PPS;
 - any other distributions paid on or with respect to the PPS by NZ Co; and
 - any amounts paid to acquire the PPS.

7. Example

NZ Co raised \$20,000,000 from the issue of the PPS to Parent Co on 29 December 2009. Parent Co funded its acquisition by a loan of the same amount from a related party, at an interest rate of 9.25% per annum, payable quarterly on 28 March, June, September and December each calendar year. Therefore the amount of interest on the Parent Co Loan for each full quarter is \$462,500.

The amounts solely attributable to an excepted financial arrangement are:

- the issue price of the PPS; and
- the dividends paid on the PPS.

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

- the amount of the Parent Co Loan (\$20,000,000);
- the interest paid or capitalised on the Parent Co Loan (\$462,500 per quarter, plus the amount of any interest on any capitalised interest);
- the amount outstanding to be repaid on the repayment of the Parent Co Loan; and
- the payments or other consideration provided in terms of the NZ Co Letter.

This determination is signed by me on the 17th day of March 2011.

HW Davis

Director (Taxpayer Rulings)

DEPRECIATION DETERMINATION DEP77: MOTOR VEHICLES RENTED FOR SHORT-TERM PERIODS OF 1 MONTH OR LESS

Note to determination DEP77

In *Tax Information Bulletin* Vol 10, No 6 (June 1998) we published a general depreciation determination "Determination DEP34: Tax Depreciation Rates General Determination Number 34" for certain classes of motor vehicles and trailers when they are rented for short-term hire periods of 1 month or less.

The determination added those asset classes to both the "Transportation" and "Hire Equipment (where on short-term hire of 1 month or less only)" asset categories. We have been advised that some taxpayers, referring only to the "Transportation" asset category, have been using the depreciation rates set for "short-term" hire even though the assets in question may have been hired for periods longer than 1 month (in this context, 1 month refers to a calendar month).

We have therefore issued a new depreciation determination deleting the old asset classes set out in DEP34 from the "Transportation" asset category, and inserting new asset classes making it clear that the higher depreciation rates that may be used for motor vehicles and trailers used for short-term hire apply only to those assets that are hired only for periods of 1 month or less. The depreciation rates, however, are unchanged.

We have also been asked to clarify whether or not the asset category could be used for assets that are used for both short-term (1 month or less) and longer term hire (periods of longer than 1 month). This issue arises where taxpayers generally hire the motor vehicles/trailers for short-term (1 month or less) periods, but may occasionally hire them for a longer term.

It is the Commissioner's view that the higher depreciation rates available for assets that are used for short-term hire periods should only be used for assets that are exclusively hired for short-term periods. Taxpayers who hire assets for both short and longer terms should not use the depreciation rates that apply for short-term periods.

GENERAL DEPRECIATION DETERMINATION DEP77

This determination may be cited as “Determination DEP77: Tax Depreciation Rates General Determination Number 77”.

1. Application

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

This determination applies for the 2010–11 and subsequent income years.

2. Determination

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

- deleting from the “Transportation” asset category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Transportation	Estimated useful life (years)	DV rate (%)	SL rate (%)
Motor vehicles – Class NA (for transporting light goods that have a gross vehicle mass not exceeding 3.5 tonnes and used for short-term hire).	6.66	30	21
Motor vehicles – Class NB (for transporting medium goods that have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 12 tonnes and used for short-term hire).	8	25	17.5
Motor vehicles – Class NC (for transporting heavy goods that have a gross vehicle mass exceeding 12 tonnes and used for short-term hire).	6.66	30	21
Trailers – Class TA and TB (for transporting very light and light goods that have a gross vehicle mass not exceeding 3.5 tonnes and used for short-term hire) excluding domestic trailers.	10	20	13.5
Trailers – Class TC (for transporting medium goods that have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 10 tonnes and used for short-term hire).	12.5	16	10.5
Trailers – Class TD (for transporting heavy goods that have a gross vehicle mass exceeding 10 tonnes and used for short-term hire).	10	20	13.5
Trailers – domestic. Not exceeding 1 tonne. Used for short-term hire.	6.66	30	21
Motor vehicles (for transporting people, up to and including 12 seats and used for short-term hire).	4	50	40
Forklift trucks (8 tonnes and over used for short-term hire).	8	25	17.5
Forklift trucks (under 8 tonnes used for short-term hire).	6.66	30	21

- adding into the “Transportation” asset category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Transportation	Estimated useful life (years)	DV rate (%)	SL rate (%)
Motor vehicles – Class NA (for transporting light goods which have a gross vehicle mass not exceeding 3.5 tonnes and are used for short-term hire of 1 month or less only).	6.66	30	21
Motor vehicles – Class NB (for transporting medium goods which have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 12 tonnes and used for short-term hire of 1 month or less only).	8	25	17.5
Motor vehicles – Class NC (for transporting heavy goods which have a gross vehicle mass exceeding 12 tonnes and used for short-term hire of 1 month or less only).	6.66	30	21
Trailers – Class TA and TB (for transporting very light and light goods which have a gross vehicle mass not exceeding 3.5 tonnes and used for short-term hire of 1 month or less only) excluding domestic trailers.	10	20	13.5
Trailers – Class TC (for transporting medium goods which have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 10 tonnes and used for short-term hire of 1 month or less only).	12.5	16	10.5
Trailers – Class TD (for transporting heavy goods which have a gross vehicle mass exceeding 10 tonnes and used for short-term hire of 1 month or less only).	10	20	13.5
Trailers – domestic. Not exceeding 1 tonne. Used for short-term hire of 1 month or less only.	6.66	30	21
Motor vehicles (for transporting people, up to and including 12 seats and used for short-term hire of 1 month or less only).	4	50	40
Forklift trucks (8 tonnes and over used for short-term hire of 1 month or less only).	8	25	17.5
Forklift trucks (under 8 tonnes used for short-term hire of 1 month or less only).	6.66	30	21

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 24th day of March 2011.

Rob Wells

LTS Manager, Technical Standards

FOREIGN CURRENCY AMOUNTS – CONVERSION TO NEW ZEALAND DOLLARS

This article provides the exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand dollars under the controlled foreign company (CFC) and foreign investment fund (FIF) rules for the 12 months ending 31 March 2011.

The Income Tax Act 2007 (“2007 Act”) requires foreign currency amounts to be converted into New Zealand dollars applying one of the following methods:

- actual rate for the day for each transaction (including close of trading spot exchange rate on the day), or
- rolling 12-month average rate for a 12-month accounting period or income year (see the table **Currency rates 12 months ending 31 March 2011 – rolling 12-month average**), or
- mid-month actual rate as the basis of the rolling average for accounting periods or income years greater or lesser than 12 months (see the table **Currency rates 12 months ending 31 March 2011 – mid-month actual**).

Legislation was enacted in September 2010 with effect from 1 April 2008 which permits the Commissioner to set currency rates and approve methods of calculating exchange rates. The Commissioner can set rates for general use by taxpayers or for specific taxpayers. The Commissioner’s ability to set rates and approve methods applies in all circumstances, ie, where the Act does not contain a specific currency conversion rule (sections YF 1(5) and (6)), or in circumstances where the Act provides a rate or method for currency conversion (section YF 2).

Inland Revenue uses wholesale rates from Bloomberg for rolling 12-month average, mid-month actual and end of month. These rates are provided in three tables.

You must apply the chosen conversion method to all interests for which you use the FIF or CFC calculation method in that and each later income year.

To convert foreign currency amounts to New Zealand dollars for any country listed, divide the foreign currency amount by the exchange rate shown. Round the exchange rate calculations to four decimal places wherever possible.

If you need an exchange rate for a country or a day not listed in the tables, please contact one of New Zealand’s major trading banks.

Note: All section references relate to the Income Tax Act 2007.

Actual rate for the day for each transaction

The actual rate for the day for each transaction can be used in the following circumstances:

- Where the 2007 Act does not provide a specific currency conversion rule, then foreign currency amounts can be converted by applying the close of trading spot exchange rate on the date that the transaction which is required to be measured or calculated occurs (section YF 1(2)).
- Where a person chooses to use the actual rate for the day of the transaction when calculating their FIF income or loss when applying either: the comparative value method, fair dividend rate method, deemed rate of return method or the cost method (section EX 57(2)(a)).
- Where a person chooses to use the close of trading spot exchange rate to convert foreign income tax paid by a CFC (section LK 3(a)).

Unless the actual rate is the 15th or the last day of the month, these rates are not supplied by Inland Revenue.

The table **Currency rates 12 months ending 31 March 2011 – month end** provides exchange rates for the last day of the month. These are provided for convenience to assist taxpayers who may need exchange rates on those days.

Currency rates 12 months ending 31 March 2011 – rolling 12-month average table

This table is the average of the mid-month exchange rate for that month and the previous 11 months, ie, the 12-month average. This table should be used where the accounting period or income year encompasses 12 complete months.

This table can be used to convert foreign currency amounts to New Zealand dollars for:

- FIF income or loss calculated under the accounting profits method (section EX 49(8)); comparative value method, the fair dividend rate method, the deemed rate of return method or cost method (section EX 57)
- branch equivalent income or loss calculated under the CFC and FIF rules (section EX 21(4)) for accounting periods of 12 months
- foreign tax credits calculated under the branch equivalent method for a CFC or FIF under section LK 3(b) for accounting periods of 12 months.

Currency rates 12 months ending 31 March 2011 – mid-month actual table

This table sets out the exchange rate on the 15th day of the month, or if no exchange rates were quoted on that day, on the preceding working day on which they were quoted. This table can be used as the basis of the rolling average where the accounting period or income year is less than or greater than 12 months (see Example 4). You can also use the rates from this table as the actual rate for any transactions arising on the 15th of the month.

This table can be used as the basis of the rolling average for calculating:

- branch equivalent income or loss calculated under the CFC or FIF rules (section EX 21(4)) for accounting periods of less than or greater than 12 months
- a person's FIF income or loss under: the comparative value method, the fair dividend rate method, the deemed rate of return method or cost method (section EX 57(2)(b)) for accounting periods or income years of less than or greater than 12 months
- foreign tax credits calculated under the branch equivalent method for a CFC or FIF under section LK 3(b) for accounting periods of less than or greater than 12 months.

Example 1

A taxpayer with a 30 September balance date purchases shares in a Philippine company (which is a FIF but does produce a guaranteed yield) on 7 September 2010. Its opening market value on 1 October 2010 or its closing market value on 30 September 2010 is PHP 350,000. Using the comparative value method and applying the actual rate for the day (section EX 57(2)(a)), the opening market value is converted as follows:

$$\text{PHP } 350,000 \div 32.2373 = \$10,856.99$$

(In this example, the rate selected is the month-end rate for September 2010 for PHP. Refer to the table "Currency rates 12 months ending 31 March 2011 – month end".)

Example 2

A CFC resident in Hong Kong has an accounting period ending on 30 June 2010. Branch equivalent income for the period 1 July 2009 to 30 June 2010 is 200,000 Hong Kong dollars (HKD), which converts to:

$$\text{HKD } 200,000 \div 5.4945 = \$36,400.37$$

(In this example, the rate selected is the rolling 12-month average rate for June 2010 for HKD. Refer to the table "Currency rates 12 months ending March 2011 – rolling 12-month average".)

Example 3

A resident individual with a 30 September 2010 accounting period acquires a FIF interest in a Japanese company on 1 October 2009 for 10,500,000 yen. The interest is sold in September 2010 for 10,000,000 yen. Using the comparative value method and applying section EX 57(2)(b), these amounts are converted as:

$$\text{JPY } 10,500,000 \div 64.5675 = \$162,620.51$$

$$\text{JPY } 10,000,000 \div 64.5675 = \$154,876.68$$

(In this example, the rolling 12-month rate for September 2010 has been applied to both calculations. Refer to the table "Currency rates 12 months ending March 2011 – rolling 12-month average".)

Example 4

A CFC resident in Singapore was formed on 21 April 2010 and has a balance date of 30 September 2010. During the period 1 May 2010 to 30 September 2010, branch equivalent income of 500,000 Singaporean dollars was derived. For the conversion to New Zealand dollars the taxpayer chooses the method set out in section EX 21(4)(b).

1. Calculating the average monthly exchange rate for the complete months May–September 2010:

$$0.9815 + 0.9718 + 1.0021 + 0.9619 + 0.9782 = 4.8955$$

$$4.8955 \div 5 = 0.9791$$
2. Round exchange rate to four decimal places: 0.9791
3. Conversion to New Zealand currency:

$$\text{SGD } 500,000 \div 0.9791 = \$510,673.07$$

(In this example, the rates are from the table "Currency rates 12 months ending March 2011 – mid-month actual", from May to September 2010 inclusive for SGD.)

Currency rates 12 months ending 31 March 2011 – rolling 12-month average

Currency	Code	15/04/10	15/05/10	15/06/10	15/07/10	15/08/10	15/09/10	15/10/10	15/11/10	15/12/10	15/01/11	15/02/11	15/03/11
Australia Dollar	AUD	0.7941	0.7955	0.7966	0.7980	0.7960	0.7929	0.7892	0.7881	0.7842	0.7821	0.7806	0.7782
Bahrain Dinar	BHD	0.2609	0.2647	0.2669	0.2694	0.2703	0.2711	0.2715	0.2724	0.2730	0.2739	0.2763	0.2772
Britain Pound	GBH	0.4313	0.4397	0.4468	0.4532	0.4568	0.4602	0.4614	0.4644	0.4671	0.4695	0.4722	0.4713
Canada Dollar	CAD	0.7388	0.7424	0.7425	0.7453	0.7445	0.7440	0.7436	0.7434	0.7415	0.7415	0.7443	0.7448
China Yuan	CNY	4.7267	4.7967	4.8350	4.8783	4.8917	4.9017	4.8967	4.9008	4.9008	4.9017	4.9292	4.9308
Denmark Kroner	DKK	3.6380	3.7236	3.7911	3.8555	3.9029	3.9533	3.9805	4.0245	4.0642	4.1014	4.1316	4.1385
Euporean Community Euro	EUR	0.4888	0.5003	0.5094	0.5181	0.5244	0.5311	0.5347	0.5405	0.5458	0.5507	0.5547	0.5556
Fiji Dollar	FJD	1.3543	1.3649	1.3738	1.3814	1.3830	1.3838	1.3821	1.3822	1.3815	1.3841	1.3878	1.3868
French Polynesia Franc	XPF	58.2824	59.6480	60.7268	61.7661	62.5155	63.3293	63.7538	64.4609	65.0685	65.6675	66.1421	66.2423
Hong Kong Dollar	HKD	5.3675	5.4483	5.4945	5.5478	5.5669	5.5851	5.5931	5.6122	5.6252	5.6444	5.6950	5.7169
India Rupee	INR	32.4644	32.7214	32.9242	33.1301	33.1536	33.1229	33.0446	33.0860	33.0746	33.1632	33.4139	33.5080
Indonesia Rupiah	IDR	6,642.5392	6,670.8175	6,670.1708	6,672.7008	6,639.2867	6,604.5275	6,590.3883	6,587.9550	6,573.8908	6,584.5875	6,623.0417	6,622.3892
Japan Yen	JPY	63.7775	64.5858	64.7675	64.9850	64.6892	64.5675	64.0825	63.8775	63.6792	63.3875	63.4175	63.0473
Korea Won	KOR	820.5452	826.4252	831.2962	835.2204	835.1243	834.5443	832.8594	834.3777	835.9292	838.0365	842.0478	844.9683
Kuwait Dinar	KWD	0.1987	0.2017	0.2034	0.2054	0.2061	0.2068	0.2068	0.2073	0.2075	0.2079	0.2092	0.2093
Malaysia Ringgit	MYR	2.3664	2.3814	2.3863	2.3881	2.3755	2.3598	2.3456	2.3385	2.3265	2.3163	2.3136	2.3063
Norway Krone	NOK	4.1185	4.1679	4.1992	4.2283	4.2501	4.2755	4.2963	4.3339	4.3520	4.3756	4.4004	4.4023
Pakistan Rupee	PKR	57.5853	58.5962	59.3127	60.0884	60.4834	60.8795	61.1467	61.4895	61.6825	61.9531	62.5409	62.8183
Phillippines Peso	PHP	32.3402	32.6789	32.8431	33.0695	33.0193	32.8711	32.7284	32.6498	32.5808	32.5896	32.7320	32.7312
PNG Kina	PGK	1.8443	1.8746	1.8981	1.9264	1.9340	1.9413	1.9427	1.9487	1.9530	1.9598	1.9744	1.9689
Singapore Dollar	SGD	0.9787	0.9887	0.9929	0.9980	0.9965	0.9947	0.9901	0.9882	0.9854	0.9821	0.9821	0.9787
Solomon Islands Dollar*	SBD	5.4879	5.5657	5.6091	5.6592	5.6758	5.6891	5.6873	5.6926	5.6998	5.7110	5.7526	5.7625
South Africa Rand	ZAR	5.3059	5.3259	5.3426	5.3629	5.3356	5.3359	5.3165	5.3071	5.2830	5.2709	5.2841	5.2765
Sri Lanka Rupee	LKR	79.4184	80.3917	80.9668	81.6350	81.7383	81.8485	81.7881	81.9099	81.8535	81.9128	82.3686	82.4224
Sweden Krona	SEK	5.0140	5.0837	5.1227	5.1446	5.1762	5.1999	5.1875	5.2070	5.1960	5.1868	5.1799	5.1548

Currency	Code	15/04/10	15/05/10	15/06/10	15/07/10	15/08/10	15/09/10	15/10/10	15/11/10	15/12/10	15/01/11	15/02/11	15/03/11
Swiss Franc	CHF	0.7302	0.7423	0.7509	0.7561	0.7573	0.7576	0.7551	0.7558	0.7529	0.7514	0.7494	0.7432
Taiwan Dollar	TAI	22.3728	22.6323	22.7805	22.9523	22.9717	22.9933	22.9264	22.8737	22.7696	22.6686	22.6780	22.6214
Thailand Baht	THB	23.1292	23.3505	23.4436	23.5618	23.5145	23.4020	23.2068	23.0661	22.9276	22.8515	22.9128	22.8640
Tonga Pa'anga*	TOP	1.3401	1.3549	1.3603	1.3683	1.3728	1.3757	1.3766	1.3780	1.3778	1.3789	1.3831	1.3824
United States Dollar	USD	0.6922	0.7023	0.7080	0.7147	0.7170	0.7192	0.7202	0.7227	0.7242	0.7265	0.7329	0.7354
Vanuatu Vatu	VUV	69.6383	70.2571	70.7029	71.1680	71.2929	71.5445	71.5011	71.5458	71.7088	71.7964	72.0553	72.0153
West Samoan Tala*	WST	1.7579	1.7692	1.7776	1.7756	1.7700	1.7689	1.7600	1.7602	1.7581	1.7588	1.7558	1.7550

Notes to table:

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The rates provided represent the Bloomberg generic rate (BGN) based on the last price (mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.

Source: Bloomberg CMPN BGN

Currency rates 12 months ending 31 March 2011 – mid-month actual

Currency	Code	15/04/10	15/05/10	15/06/10	15/07/10	15/08/10	15/09/10	15/10/10	15/11/10	15/12/10	15/01/11	15/02/11	15/03/11
Australia Dollar	AUD	0.7618	0.7983	0.8077	0.8245	0.7907	0.7795	0.7633	0.7845	0.7496	0.7747	0.7656	0.7385
Bahrain Dinar	BHD	0.2684	0.2665	0.2635	0.2751	0.2661	0.2758	0.2851	0.2913	0.2788	0.2888	0.2915	0.2759
Britain Pound	GBH	0.4594	0.4862	0.4720	0.4719	0.4527	0.4681	0.4729	0.4814	0.4758	0.4828	0.4777	0.4551
Canada Dollar	CAD	0.7134	0.7323	0.7166	0.7575	0.7354	0.7505	0.7640	0.7804	0.7432	0.7593	0.7643	0.7212
China Yuan	CNY	4.8600	4.8300	4.7700	4.9500	4.8000	4.9300	5.0200	5.1300	4.9300	5.0500	5.0900	4.8100
Denmark Kroner	DKK	3.9038	4.2560	4.2144	4.1971	4.1233	4.1845	4.0340	4.2397	4.1710	4.2629	4.1754	3.8994
Euporean Community Euro	EUR	0.5245	0.5716	0.5668	0.5637	0.5534	0.5621	0.5410	0.5687	0.5598	0.5722	0.5601	0.5228
Fiji Dollar	FJD	1.3559	1.3768	1.3870	1.4243	1.3740	1.3899	1.3864	1.4170	1.3755	1.4114	1.4039	1.3392
French Polynesia Franc	XPF	62.5166	68.0988	67.5006	67.2919	65.9975	67.0523	64.5253	67.9034	66.4957	68.3751	66.7706	62.3792
Hong Kong Dollar	HKD	5.5241	5.5057	5.4453	5.6685	5.4863	5.6818	5.8662	5.9907	5.7517	5.9559	6.0203	5.7062
India Rupee	INR	31.6346	31.9705	32.5427	34.0160	33.0067	33.9232	33.3462	34.9520	33.5750	34.7471	35.2770	33.1044
Indonesia Rupiah	IDR	6417.5900	6455.2600	6380.5500	6595.5700	6334.5500	6557.1000	6776.0500	6940.5500	6672.5900	6943.2900	6974.6100	6420.9600
Japan Yen	JPY	66.2300	65.4000	63.9200	63.7500	60.8300	62.7300	61.5900	64.2000	62.3000	63.4900	63.0600	59.0670
Korea Won	KOR	790.3472	810.7877	859.2546	872.7679	839.5492	847.9236	841.4816	879.4589	859.5790	854.0287	853.1435	831.2971
Kuwait Dinar	KWD	0.2055	0.2053	0.2034	0.2102	0.2033	0.2101	0.2129	0.2175	0.2087	0.2151	0.2162	0.2034
Malaysia Ringgit	MYR	2.2740	2.2576	2.2856	2.3343	2.2358	2.2797	2.3308	2.4250	2.3188	2.3419	2.3519	2.2406
Norway Krone	NOK	4.1690	4.4121	4.4500	4.4925	4.3866	4.4541	4.3823	4.6246	4.4183	4.4752	4.4205	4.1427
Pakistan Rupee	PKR	59.8802	59.5238	59.8802	62.5000	60.6061	62.8931	64.9351	66.2252	63.2911	65.3595	66.2252	62.5000
Phillippines Peso	PHP	31.6097	31.8574	32.2876	33.7606	31.9763	32.3444	32.6959	33.7794	32.4917	33.9467	33.9819	32.0426
PNG Kina	PGK	1.8661	1.9683	1.9702	2.0305	1.9194	1.9801	1.9834	2.0154	1.9497	2.0332	2.0361	1.8747
Singapore Dollar	SGD	0.9781	0.9815	0.9718	1.0021	0.9619	0.9782	0.9800	1.0068	0.9747	0.9866	0.9838	0.9384
Solomon Islands Dollar*	SBD	5.5414	5.5796	5.4989	5.7526	5.5537	5.7873	5.9439	6.0208	5.7995	6.0130	6.0115	5.6484
South Africa Rand	ZAR	5.2022	5.3381	5.3092	5.5092	5.1578	5.1956	5.1736	5.4029	5.0767	5.3129	5.5429	5.0974
Sri Lanka Rupee	LKR	81.3008	80.6452	79.3651	82.6446	79.3651	81.9672	84.7458	86.2069	81.9672	84.7458	85.4701	80.6452
Sweden Krona	SEK	5.0851	5.4696	5.4206	5.2998	5.2584	5.1846	5.0068	5.3201	5.0641	5.1018	4.9629	4.6835

Currency	Code	15/04/10	15/05/10	15/06/10	15/07/10	15/08/10	15/09/10	15/10/10	15/11/10	15/12/10	15/01/11	15/02/11	15/03/11
Swiss Franc	CHF	0.7520	0.8018	0.7919	0.7593	0.7418	0.7335	0.7252	0.7610	0.7161	0.7381	0.7273	0.6707
Taiwan Dollar	TAI	22.3158	22.3730	22.5629	23.4448	22.5433	23.2599	23.1779	23.3962	22.0476	22.2507	22.4474	21.6367
Thailand Baht	THB	22.9358	22.8905	22.6497	23.5207	22.5173	22.5537	22.5779	23.0217	22.2624	23.3400	23.8464	22.2521
Tonga Pa'anga*	TOP	1.3838	1.3933	1.3495	1.4039	1.3872	1.3913	1.3984	1.4102	1.3531	1.3945	1.3922	1.3313
United States Dollar	USD	0.7119	0.7072	0.6990	0.7297	0.7059	0.7315	0.7562	0.7729	0.7397	0.7661	0.7732	0.7318
Vanuatu Vatu	VUV	69.9301	71.9424	72.4638	74.0741	71.4286	72.4638	71.9424	73.5294	70.9220	72.9927	73.5294	68.9655
West Samoan Tala*	WST	1.7279	1.7406	1.7571	1.7955	1.7412	1.7525	1.7647	1.7924	1.7259	1.7754	1.7742	1.7126

Notes to table:

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The rates provided represent the Bloomberg generic rate (BGN) based on the last price (mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.

Source: Bloomberg CMPN BGN

Currency rates 12 months ending 31 March 2011 – month end

Currency	Code	30/04/10	31/05/10	30/06/10	31/07/10	31/08/10	30/09/10	31/10/10	30/11/10	31/12/10	31/01/11	28/02/11	31/03/11
Australia Dollar	AUD	0.7832	0.8045	0.8145	0.8021	0.7849	0.7593	0.7792	0.7747	0.7625	0.7749	0.7388	0.7374
Bahrain Dinar	BHD	0.2741	0.2566	0.2581	0.2737	0.2635	0.2768	0.2889	0.2800	0.2942	0.2912	0.2837	0.2872
Britain Pound	GBH	0.4761	0.4679	0.4581	0.4627	0.4554	0.4672	0.4778	0.4772	0.4998	0.4826	0.4628	0.4752
Canada Dollar	CAD	0.7400	0.7108	0.7282	0.7476	0.7449	0.7558	0.7812	0.7620	0.7787	0.7737	0.7310	0.7392
China Yuan	CNY	4.9600	4.6500	4.6400	4.9200	4.7600	4.9100	5.1100	4.9500	5.1400	5.1000	4.9500	4.9900
Denmark Kroner	DKK	4.0695	4.1138	4.1672	4.1444	4.1042	4.0135	4.0972	4.2634	4.3447	4.2079	4.0638	4.0101
Euporean Community Euro	EUR	0.5466	0.5530	0.5596	0.5563	0.5513	0.5386	0.5495	0.5720	0.5829	0.5644	0.5450	0.5382
Fiji Dollar	FJD	1.3976	1.3611	1.3749	1.3955	1.3656	1.3732	1.4128	1.3926	1.4259	1.4118	1.3719	1.3755
French Polynesia Franc	XPF	65.0902	66.0163	66.7755	66.4388	65.7778	64.2284	65.6483	68.2299	69.6421	67.2744	64.9105	63.9979
Hong Kong Dollar	HKD	5.6441	5.2987	5.3327	5.6387	5.4374	5.6975	5.9407	5.7676	6.0645	6.0249	5.8600	5.9236
India Rupee	INR	32.2384	31.5564	31.8083	33.7316	32.9024	33.0155	34.0461	34.0783	34.8878	35.4570	34.0676	33.9568
Indonesia Rupiah	IDR	6550.1500	6315.3000	6198.7000	6510.2500	6312.0600	6559.8500	6846.8900	6723.5700	7029.5200	6988.6800	6635.7400	6633.1100
Japan Yen	JPY	68.2100	62.1100	60.5400	62.7800	58.8600	61.3300	61.6200	62.1400	63.2200	63.4100	61.5300	63.3090
Korea Won	KOR	808.1041	819.7385	843.0642	858.2825	837.4840	835.6868	858.7928	860.7036	876.3118	865.0109	846.5476	838.0766
Kuwait Dinar	KWD	0.2099	0.1981	0.1994	0.2085	0.2015	0.2090	0.2153	0.2101	0.2196	0.2164	0.2096	0.2114
Malaysia Ringgit	MYR	2.3148	2.2195	2.2160	2.3101	2.2016	2.2670	2.3845	2.3494	2.3903	2.3653	2.2957	2.3038
Norway Krone	NOK	4.2926	4.3960	4.4531	4.4111	4.4051	4.3157	4.4815	4.6099	4.5417	4.4648	4.2104	4.2187
Pakistan Rupee	PKR	60.9756	58.1395	58.4795	62.1118	59.8802	63.2911	65.7895	63.6943	66.6667	66.2252	64.5161	64.9351
Phillipines Peso	PHP	32.3256	31.4901	31.8717	33.0455	31.7071	32.2373	32.8696	32.7526	34.0173	34.1903	32.7902	33.0334
PNG Kina	PGK	1.9984	1.9330	1.8917	1.9637	1.8793	1.9647	2.0311	1.9584	2.0564	2.0340	1.9500	1.9391
Singapore Dollar	SGD	0.9964	0.9524	0.9581	0.9876	0.9478	0.9666	0.9914	0.9805	1.0013	0.9886	0.9567	0.9599
Solomon Islands Dollar*	SBD	5.7237	5.3065	5.3959	5.7525	5.5482	5.8079	6.0204	5.8793	6.0777	6.0483	5.7916	5.9015
South Africa Rand	ZAR	5.3714	5.2297	5.2523	5.2907	5.1548	5.1129	5.3641	5.2754	5.1730	5.5532	5.2434	5.1588
Sri Lanka Rupee	LKR	82.6446	77.5194	77.5194	81.9672	78.7402	81.9672	85.4701	82.6446	86.9565	85.4701	83.3333	84.0336
Sweden Krona	SEK	5.2707	5.3142	5.3363	5.2351	5.1620	4.9498	5.1130	5.2201	5.2362	4.9844	4.7591	4.8160

Currency	Code	30/04/10	31/05/10	30/06/10	31/07/10	31/08/10	30/09/10	31/10/10	30/11/10	31/12/10	31/01/11	28/02/11	31/03/11
Swiss Franc	CHF	0.7833	0.7856	0.7376	0.7559	0.7096	0.7215	0.7529	0.7452	0.7293	0.7297	0.6989	0.6998
Taiwan Dollar	TAI	22.7675	21.7567	22.0021	23.2005	22.4033	22.9288	23.4611	22.6390	22.7537	22.4151	22.4132	22.3949
Thailand Baht	THB	23.5481	22.1299	22.2226	23.4063	21.8587	22.2851	22.9444	22.4336	23.4528	23.9008	23.0247	23.0550
Tonga Pa'anga*	TOP	1.4134	1.3418	1.3369	1.4024	1.3614	1.3866	1.4264	1.3730	1.4145	1.4013	1.3621	1.3776
United States Dollar	USD	0.7270	0.6805	0.6847	0.7260	0.6990	0.7343	0.7665	0.7426	0.7802	0.7729	0.7524	0.7615
Vanuatu Vatu	VUV	72.4638	71.4286	71.4286	73.5294	70.9220	70.9220	73.5294	72.4638	74.0741	73.5294	71.4286	71.9424
West Samoan Tala*	WST	1.7620	1.8108	1.7291	1.7720	1.7268	1.7409	1.7993	1.7626	1.8002	1.7928	1.7498	1.7530

Notes to table:

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The rates provided represent the Bloomberg generic rate (BGN) based on the last price (mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.

Source: Bloomberg CMPN BGN

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.

PERSISTENT LITIGANT DISCOURAGED

Case	Clarence John Faloon v Commissioner of Inland Revenue
Decision date	7 March 2011
Act(s)	High Court Rules, Tax Administration Act 1994
Keywords	Judicial review, strikeout, re-litigation, indemnity costs

Summary

A number of interlocutory applications which attempted to re-open finalised decisions were dismissed by the Court.

Impact of decision

The decision is further confirmation of the approach the Court will take to persistent re-litigation of previously decided and/or unmeritorious matters.

Facts

Mr Faloon's father was the director of two companies, Trade Lines Limited and Central Equipment Company Limited, which are in liquidation.

Mr Faloon claims that there is compensation owing on assets which were once owned by the companies. The compensation relates to a pipe diversion of a stream by the Palmerston North City Council and the taking of land by the Crown for airport extensions. He also claims that he should be compensated by the Commissioner of Inland Revenue for the loss of patent rights which were owned by one of the companies.

Compensation of \$80,000 was paid to Trade Lines Limited for the land in December 1993. The compensation was paid in accordance with the requirements of the Public Works Act 1993.

Mr Faloon remains aggrieved over the loss of company assets and claims that the compensation was inadequate.

He has been involved in litigation against the Crown and the Commissioner for a number of years and despite those claims being rejected by the courts, he continues to re-litigate the issues. There have been over 20 proceedings touching on these matters to date.

On 15 October 2010, Mr Faloon made a Statement of Claim naming the Commissioner as defendant in the High Court in Tauranga. The claim related to correspondence between Mr Faloon and the Commissioner. The claim is similar to the other claims made by Mr Faloon who believes that the correspondence from the Commissioner amounts to a "disputable decision" as defined in the Tax Administration Act 1994.

The Commissioner applied to "strike out" the proceedings and on 8 December 2010, Associate Judge Doogue agreed to hear the Commissioner's application.

- On 13 December 2010, Mr Faloon made an interlocutory application for a judicial review of the decision of Associate Judge Doogue to hear the strikeout.
- On 16 February 2011, Mr Faloon made a second interlocutory application asking the Court to order that a letter sent to him by the Commissioner on 4 February 2011 be declared "void". In the letter, the Commissioner had declined to give Mr Faloon the information requested until Mr Faloon had clarified the "scope" of his request.
- On 24 February 2011, Mr Faloon applied for orders setting aside the Commissioner's memorandum in response to his application dated 16 February 2011.

Decision

Justice Brewer held that rule 15.1 of the High Court Rules gives the Court the power to strike out all or part of a proceeding. He noted that the Tax Administration Act 1994 ("TAA") does not, in any way, "trammel" the defendant's right to do so; Mr Faloon had argued that an extant challenge under Part VIIIA of the TAA could not be struck out. The Commissioner as defendant had every right to apply for a strikeout. Judicial review proceedings were therefore dismissed.

There was held to be no underlying infringement of rights or oppressive conduct which might call for court intervention. The plaintiff's first interlocutory application was therefore dismissed.

His Honour, in dismissing the second interlocutory application, simply set Mr Faloon's memorandum out in full and said: "This is another example of Mr Faloon's passionate but obsessive pursuit of his case. As will be evident from the foregoing, there is no basis in law for the application and accordingly it is dismissed."

Indemnity costs, which are often left as an issue until after the conclusion of a case, were awarded against Mr Faloon. The Court said: "... I believe that something must be done to bring home to Mr Faloon that a litigant who files multiple applications that have no chance of succeeding because they have no basis in law will be held accountable for wasting the Court's time ..."

COMMISSIONER'S EVASION ASSESSMENTS UPHELD

Case	G J Lupton v Commissioner of Inland Revenue
Decision date	24 March 2011
Act(s)	Income Tax Act 1994, Income Tax Act 2004
Keywords	Evasion

Summary

The plaintiff was unable to prove that various amounts paid into bank accounts which he controlled were not his income. The Commissioner of Inland Revenue established that the plaintiff was liable for evasion shortfall penalties.

Impact of decision

There are no particular implications for the Commissioner. The case turns largely on its own facts.

Facts

The Commissioner assessed the plaintiff for income tax (plus evasion shortfall penalties) on the basis that he failed to return income amounts paid into various bank accounts which he controlled. The funds were received into the accounts pursuant to a complex interrelationship between a number of companies and trusts for which the plaintiff worked, or was in some way involved. The plaintiff challenged the assessments on the basis that the amounts were either money held on trust for others or loans to him, which he has not been able to repay.

Decision

The Court found the plaintiff's evidence to be not credible and was unreliable on important points in the case. The Court found that the plaintiff's account of what occurred to be so unlikely that it could be rejected. For example, the Court did not accept the plaintiff's evidence that while he was employed at very senior positions in a company he was paid no salary.

The plaintiff was also unable to produce a signed trust deed with respect to any of the trusts he claimed he borrowed money from. As well, no credible reason was advanced as to why the trusts would grant him interest-free loans. In general the Court found the plaintiff's evidence to be inaccurate and at times untrue. Accordingly, in respect of all except one transaction, the Court found that the plaintiff had failed to discharge his onus.

In respect of one transaction—the sale of a commercial property in Brisbane—the Court found that the plaintiff had discharged his onus by proving that the proceeds of the sale were capital. This finding was made even though the plaintiff had not advanced his case on the basis that the payment was capital; the plaintiff's case was that it was a loan.

In respect of the evasion shortfall penalty the Court found that the plaintiff had gone to great lengths to conceal his taxable income from the Commissioner. Accordingly the Court found that the Commissioner had proved that the plaintiff intentionally evaded the payment of tax and was liable for evasion shortfall penalties.

HIGH COURT FINDS IN FAVOUR OF RETROSPECTIVE DEPARTURE ORDERS

Case	B v X & Commissioner of Inland Revenue
Decision date	16 March 2011
Act(s)	Child Support Act 1991
Keywords	Retrospectivity of departure orders

Summary

The non-custodial parent had appealed the findings of the Family Court awarding a departure order from formula assessment in favour of the custodial parent. The non-custodial parent appealed on a number of grounds. The reason the Commissioner intervened in this matter was primarily because of one ground whereby the non-custodial parent argued that there is no jurisdiction for the Commissioner to make retrospective departure orders.

Impact of decision

There are several differing decisions in the High Court as to whether retrospective departure orders from formula assessments can be made. However, in light of *IPD v KME* [2008] 2 NZLR 523, and now *B v X & Commissioner of Inland Revenue* it does seem clearer that the recent jurisprudence favours retrospectivity.

As this case is under appeal by the respondent, the Commissioner will seek leave of the High Court to have the “retrospectivity” question of law determined by the Court of Appeal.

Facts

This is a child support matter where the non-custodial parent is challenging a Family Court ruling whereby the Family Court granted an application by the custodial parent for a departure from a formula assessment of child support under the Child Support Act 1991. The formula assessment had been varied to be the maximum allowable for the years in question, as well as two other payments to meet the special needs of two of the children. As Fogarty J put it: “At the heart of the dispute is a contention that the father avoided child support by diverting much of his income to a trust, which he controlled, which in turn returned that income to him in a non-taxable character.”

Decision

Issue 1

Fogarty J agreed that departure orders from formula assessments can be granted retrospectively. Although he did emphasise that the criteria regarding the application of departure orders has to take into account the facts and circumstances, not just of the years to which the departure orders will apply but also the facts and circumstances that exist when the application for the departure order is made. This is best summarised in [33] of Fogarty J’s judgment:

I conclude that retrospective orders can be made. However, considerable care has to be made to ensure that at the time they are made the consequences of such orders are just and equitable and appropriate [s 105(4)].

Issue 2

Fogarty J differed with the calculations as to the non-custodial parent’s level of income. He also did not adopt wholeheartedly the evidence of either party’s accountants.

Issue 3

Although obiter and not of primary importance to the Commissioner in this case, it is worth noting that Fogarty J seems to disagree with the reasoning of the High Court in

F v W (where the District Court was found to not have the equitable jurisdiction to declare a trust a sham). Fogarty J states at [73]:

I do not see any issue of sham or not to be resolved by the law of equity. Rather the law of sham is part of the common law of fraud. A sham exists where there is an intention to conceal the true nature of any transaction.

Regarding whether the trust in question was itself a sham, Fogarty J found that while not a sham, he had no problem with the family court attributing the net cashflow of a business as income of the non-custodial parent.

Issue 4

Fogarty J disagreed with the Family Court’s quantum of the lump-sum payment required by the departure order. He felt that it was not just and equitable for such a lump-sum payment, and the financial hardship that entails, to be placed on the non-custodial parent. He therefore varied the near \$300,000 owing, down to \$30,000 plus the two special payments (being \$6,372.21 and \$5,734.08) and interest.

UNCLAIMED MONEY PAYABLE TO COMMISSIONER

Case	Westpac, BNZ & ANZ v Commissioner of Inland Revenue (unclaimed money)
Decision date	7 April 2011
Act(s)	Unclaimed Money Act 1971
Keywords	Unclaimed money

Summary

The Supreme Court has followed the Privy Council decision in *Thomas Cook (New Zealand) Ltd* and held that unclaimed foreign exchange drafts and bank cheques are to pass to the Commissioner as custodian six years after legal demand may be made for payment to the payee.

Impact of decision

It is now clear that bank cheques and foreign currency drafts which remain unclaimed will be treated as unclaimed money under the Unclaimed Money Act 1971.

Facts

The appeal relates to the meaning and effect of s 4(1)(e) of the Unclaimed Money Act 1971 (“UMA”). In the High Court, McKenzie J was satisfied that in respect of bank cheques and foreign currency drafts the issuing banks are holders of unclaimed monies under s 4(1)(e) of the UMA. McKenzie J had held that the decision of the Privy Council in *CIR v Thomas Cook (New Zealand) Ltd* [2006] 2 NZLR 722 (PC)

was dispositive of the case. That case concerned the same provision of the UMA and its operation specifically on unredeemed travellers' cheques.

The Court of Appeal also found for the Commissioner, holding as well that they were bound by the *Thomas Cook* case; that there was no effective difference between travellers' cheques and foreign currency drafts and bank cheques.

The instruments in question are drawn by a bank, issued to a customer, made payable to a person who may or may not be the customer (the payee) and, in the case of foreign currency drafts, cashed by the payee at an overseas bank in that country's currency. In the case of bank cheques, the bank issues a cheque to a customer made payable to a person who may or may not be the customer (the payee) drawn on its own account (having debited the customer's account). A very small minority of drafts and bank cheques are never presented for payment. These, the Commissioner contends, are "unclaimed money".

The years before the Court ranged from 1990 to 2001 for the three banks and the sums in dispute exceed \$7 million, plus interest for that period.

Decision

The Court was concerned that there would have to be compelling reasons to overturn the *Thomas Cook* case. Pivotal to their finding were arguments on the interpretation of s 4(1)(e) of the UMA:

4 Unclaimed money

- (1) Subject to this section, unclaimed money shall consist of—
- ...
- (e) Any other money, of any kind whatsoever, which has been owing by any holder for the period of 6 years immediately following the date on which the money has become payable by the holder: ...

In the *Thomas Cook* case, both the High Court and the Court of Appeal had held that cheques could not be called "unclaimed" until there was a legal liability to pay. This did not occur until the cheque was presented. This finding was based upon an interpretation of certain provisions in the Bills of Exchange Act.

Nonetheless the Court of Appeal also held that after a cheque becomes stale, the requirement for presentment was dispensed with and *Thomas Cook* became liable for payment. In the Privy Council, such reasoning was dismissed and the term "payable" was held to mean no more than legally due if demanded.

In the present matter, the parties being in agreement that the banks are "holders" under the UMA, argument centred

on the meaning of the words "payable" and "owing". The appellants argued that a consistent theme in previous iterations of the UMA led to an interpretation of "a present obligation to pay". The Commissioner supported the *Thomas Cook* interpretation.

In order to resolve the conflicting, tenable, views the Court consulted Hansard and had regard to the purpose of the legislation whereby money paid for but not collected was never intended to be revenue for the holder. Against that, the Court considered earlier legislative definitions prior to consolidation into the 1971 Act, noting also that the UMA also had amending properties. So noting, the Court dismissed interpretations urged by the appellants based upon earlier definitions and banking law [46]:

In these circumstances, the purpose of the 1971 Act, as summarised above, is a more reliable aid to the meaning of "payable" than comparisons with its use in the earlier statutes. To adopt the technical rules of when liability arises, under which there would in all cases have to be a present obligation to pay, would defeat that purpose. And to read s 4(1)(e) as having effect in its application to money payable under foreign currency drafts and bank cheques only if demand is made for the dormant moneys would introduce a self-defeating element to the meaning of the definition that Parliament would not have contemplated.

The Court addressed certain concerns of the appellants as to the scope of such a finding by noting that this interpretation did not extend to conditional liabilities.

The Court emphasised at [49] that the decision was consistent with the maintenance of stability in the law:

Had we favoured the appellants' approach to this difficult question of construction, it would have been necessary to consider whether our preference for that different view was sufficient to justify departure from the meaning which had been adopted by the Privy Council. That would have raised questions concerning, on the one hand, desirability of stability in the law and respect for the principle of *stare decisis* and, on the other, whether there are cogent reasons for reconsideration of, and departure from, that judgment.

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