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CONTENTS

Inland Revenue
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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.

IN SUMMARY

BINDING RULINGS

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

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

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

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

PRODUCT RULING BR PRD 11/01: STOCKCO LIMITED

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

Name of the person who applied for the Ruling

This Ruling has been applied for by StockCo Limited (StockCo).

Taxation Laws

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

This Ruling applies in respect of sections BG 1, DA 1(1), DA 2, EA 3, EC 6 to EC 27, EC 32 to EC 37 and EJ 10, subpart EW, and sections FA 6 to FA 11, FA 12 and GC 1.

Because this is a product ruling affecting the deductibility of lease payments for the customers of StockCo (ie, the farmers), the ruling does not consider the effect of the Arrangement on StockCo, StockCo Holdings Limited (StockCo Holdings) or StockCo Residual Limited (StockCo Residual).

The Arrangement to which this Ruling applies

The Arrangement is a sale and lease-back transaction involving livestock. The Arrangement mainly involves dairy cattle, but may also involve sheep. Under the Arrangement StockCo purchases livestock from a farmer and then leases that livestock back to the farmer. (There is also a variation of the Arrangement where StockCo purchases livestock from a third party and leases it to the farmer.)

Once the lease is executed, StockCo assigns the lease income to StockCo Holdings in consideration for the discounted present value of the cashflow receivable under the lease. Further, StockCo sells the residual interest in the livestock to StockCo Residual.

At the end of the lease (after the Lease Termination Date, as defined in the lease agreements), StockCo Residual may sell the livestock to the farmer or a third party. There is no obligation on StockCo to sell, or on the farmer or buy, the livestock. If StockCo Residual does sell the livestock to the farmer, the sale will be at the Residual Value. The Residual Value is an agreed estimate of the value of the livestock at the end of the lease term.

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

1. StockCo is in the business of livestock leasing and financing and is the face of the StockCo leasing business. StockCo Holdings and StockCo Residual are both subsidiaries of StockCo.
2. StockCo has identified a market for livestock leasing in the farming industry.
3. Leases result from one or a combination of the two transactions outlined below:
   a) StockCo and the farmer enter into a sale and lease-back transaction (for all or part of the farmer's livestock), whereby StockCo buys livestock from the farmer and then leases the livestock back to the farmer; or
   b) StockCo purchases livestock from a third party, at the farmer's request, and then leases the livestock to the farmer.
4. In the case of the first type of transaction, the Arrangement allows the farmer to realise capital that was tied up in livestock. This capital could be used to retire external debt or fund the expansion of herds, land or the business in general. Farmers also gain certainty of income and expenditure that is not guaranteed under current livestock valuation methods.
5. In the case of the second type of transaction, the Arrangement may assist a new farmer to set up their business, as capital set-up costs can be a barrier for entry into the market. This second type of transaction may also assist existing farmers if, for example, they wish to expand their herd.

Sale of livestock

6. The Master Deed of Dairy Herd Lease is the lease document relating to dairy livestock. Clause 2 of the lease sets out the purchase and ownership provisions in relation to the initial sale of the livestock to StockCo:

2. PURCHASE AND OWNERSHIP OF THE HERD.

(a) We will purchase the relevant Cows for the Purchase Price on the Commencement Date.

(b) We will EITHER:

(i) Purchase the relevant Cows from you for the Purchase Price and will create a buyer generated invoice and will pay the Purchase Price to you on the Commencement Date or on any other agreed settlement date;

OR

(ii) Purchase the relevant Cows from another person/s and provide the same to you on the Commencement Date or any other agreed settlement date;

OR

(iii) Undertake a combination of purchase methods set out in subparagraphs 2(b)(i) and (ii) above.

(c) You covenant that the Herd will upon acquisition pursuant to this Deed be our absolute property free from any security interest and other encumbrance. You will do all things necessary and further warrant that pursuant to the transfers under clause 2(b) clear title to the Herd has been or will be transferred to us free of any security interest or other encumbrance.

(d) You covenant that all Progeny will be our absolute property free from any security interest and other encumbrance. You will do all things necessary and further warrant that pursuant to the transfers under clause 2(b) clear title to all Progeny has been or will be transferred to us free of any security interest or other encumbrance.

(e) You covenant that the Cow Herd Schedule is accurate, the Herd is located on the Land and the Herd is healthy and free from disease.

(f) Legal and beneficial ownership of the Herd, free of any security interest or other encumbrance will be deemed to be transferred to us on the Commencement Date. We own the Herd.

Lease of livestock

7. Clause 3 of the lease sets out the general lease provision:

3. LEASE OF THE HERD. On completion of the purchase contemplated in clause 2, we will lease the Herd and any applicable Cows to you for the Term in consideration of you paying the Lease Payments, and subject to the covenants, conditions, terms, reservations and restrictions contained in this Deed.

8. Once the lease is executed, the farmer must make lease payments based on their individual cash flow. Dairy farmers usually make the lease payments from December to May each year of the lease. Sheep and beef farmers usually make the lease payments from February to May each year of the lease.

9. The length of each lease may vary. However, the maximum lease periods are five years for cattle and four years for sheep. Supplementary leases may be entered into in respect of replacement or additional livestock.

Assignment of lease and sale of residual interests in livestock

10. StockCo assigns the right to receive the lease payments to StockCo Holdings for the discounted present value of the lease payments receivable under the lease. The discount is equivalent to the market rate offered by third-party companies providing such financing facilities. The assignment is on a non-recourse basis, so StockCo is not liable to StockCo Holdings in the event of default by lessees. StockCo Holdings receives all the rights contained in the lease as applicable during the term of that agreement.

11. StockCo then sells the residual interest in the livestock (the right to the livestock after the termination of the lease) to another subsidiary company, StockCo Residual. The sale price is the present value of the Residual Value (the agreed estimate of the value of the livestock at the end of the lease term). The present value is calculated using market rates used by third-party companies.

12. Clause 23 of the lease allows for the assignment of StockCo's interest in the lease without notice to the farmer:

23. ASSIGNMENT,TRANSFER AND AGREEMENT. You agree that:

(a) we may, without giving you or any guarantor notice or obtaining your consent or the consent of any guarantor, at any time, sell, assign, transfer or otherwise dispose of or deal with our interest in this Deed, any related document and any Herd, cows, Progeny or other property the subject of this Deed or any related document;

(b) notwithstanding any privacy laws or other requirement of confidentiality, you and any guarantor consent to our disclosing information about you and any guarantor and otherwise in connection with this Deed and any related document for this purpose;

(c) neither you nor any guarantor may assign any of your rights or purport to assign or transfer any of your obligations under this Deed or any related document or any Herd, cows, Progeny or other property the subject of this Deed or any related document without our prior written consent;

(d) you and any guarantor continue to be bound by this Deed and any related document in all respects following any sale, assignment or other disposal or dealing by us.

(e) following any sale, assignment, transfer or other disposal or dealing by us that the assignee or transferee of those rights will have the same rights, powers, discretions and remedies against you and any guarantor that we have under this Deed and any related document as if it were named as StockCo Limited in this Deed and those related documents; and

(f) following any sale, assignment or other disposal or dealing by us that each reference to "we", "us" or any other reference to StockCo Limited in this Deed and any related document shall include the assignee or transferee (including, for the avoidance of doubt, under and in respect of any indemnity granted by you).

13. The assignment of the right to receive lease payments and the sale of the residual interest will return funds to StockCo. This will provide StockCo with working capital.

Use and maintenance of livestock

14. The farmer is responsible for maintaining the livestock. The farmers must maintain the number, quality and type of the herd that is the subject of the lease. In the event of any loss of livestock, a farmer must either replace the livestock or pay StockCo an amount equal to the remaining lease payments. In addition, with StockCo's permission, the farmer may cull stock throughout the life of the lease. In doing so, the lease requires that the farmer acts as agent for StockCo and that any proceeds from the cull are returned to StockCo. Unless exempted by StockCo, the farmer must replace any culled livestock.

15. Clause 4 of the lease provides for the protection of StockCo's interest in the livestock and the circumstances under which the farmer has enjoyment over the stock without interruption or disturbance from StockCo:

4. PROTECTION AND QUIET ENJOYMENT

(a) You must protect our ownership of the Herd and not attempt to sell, hire or otherwise dispose of, or deal with the Herd, or any Cows, in any way other than in accordance with this Deed. You will not use, or attempt to use, the Herd or any of the Cows as security for any loans or other obligation, sell or part with possession of any Cows otherwise than in accordance with this Deed, or register, attempt to register or allow to be registered, any security interest on the Personal Property Securities Register in respect of the Herd or any of the Cows other than by us.

(b) As long as you make all Lease Payments and duly and punctually observe and perform all your obligations under this Deed, you may peaceably possess and enjoy the Herd without interruption or disturbance from us on the terms contained in this Deed.

16. Clause 8 of the lease contains provisions relating to the farmer's expected use and maintenance of the leased livestock:

8. USE AND MAINTENANCE OF HERD

(a) You will farm the Herd according to the best principles of good animal husbandry and take all possible care for the safety, well-being and security of the Herd and maintain the Herd's number, quality and type.

(b) You will do all things necessary to maintain a Pregnancy Rate of not less than 80%.

(c) All costs regarding the farming, health, levies, taxes and any other maintenance or compliance costs are payable by you.

(d) We may, at any time, determine whether you are in compliance with clause 8(a) or 8(b) and may employ such consultants or persons as in our absolute discretion we think fit to assist in making that determination. You must reimburse us for any fees paid by us to any such persons upon receipt of a written demand, and will pay any fees due direct to any such persons upon request by us. Any determination by us that you are not in compliance with clause 8(a) and 8(b) will in the absence of manifest error be final and binding on you.

17. Clause 9 of the lease sets out the actions that the farmer must take if there is a loss of any leased livestock:

9. STOCK LOSSES.

(a) Following the death or loss of any Cow you will immediately notify us of such death or loss setting out the circumstances in which such death or loss took place and whether remedial steps have been taken to protect the remainder of the Herd. If requested by us, you will forthwith produce a report certified by a Veterinary Surgeon as to the fact and cause(s) of death. When a Cow dies or is lost, irrespective of the cause of death or loss, you are responsible for the value thereof and you will within 30 days either:

(i) replace the Cow with a similar cow, ensuring continuing compliance with clauses 8 and 14; or

(ii) pay to us by way of liquidated damages an amount equal to the total agreed lease payments relating to the Cow, less any lease payments received to date and less any rebate which we may in our absolute discretion allow you.

(b) You are responsible for the removal and disposal of any Cow which has died.

18. Clause 10 of the lease sets out the rights and obligations of the farmer in relation to annual culls and the replacement and variations of leased livestock:

10. ANNUAL CULLS, REPLACEMENTS AND VARIATIONS.

10.1 It is agreed that the Herd may be varied by progressive Culling and replacement of dairy Cows forming part of the Herd, provided prior written consent is first obtained from us.

(a) **Culls**. You may from time to time seek our approval to Cull Cows from the Herd. Following notification (and where approval is given) you are authorised and agree to act as our agent for the removal and disposal of any Cows Culled for any reason from time to time.

(b) You must notify us annually before the 31st day of May in every year, with full particulars of the number, age, breed and type of each Cow that you wish to Cull.

(c) Following notification (and where approval is given) we will calculate and send you an invoice outlining the residual amount owed by you for each Cow Culled calculated as the total agreed lease payments relating to the Cow, less any lease payments received to date and less any rebate which we may in our absolute discretion allow you.

(d) You will pay the residual amount calculated by direct debit from your bank account on a date that is mutually agreed.

(e) You are responsible for the removal and disposal of any Cows Culled from the Herd. Upon the receipt of any proceeds received as consideration for the Cows Culled, you agree to hold the proceeds as constructive trustee for us.

(f) You shall pay to us GST payable on all payments due under the Deed relating to the Cows which are culled.

(g) **Replacements**. You may from time to time seek our approval to lease from us additional Cows or Herds (whether purchased from you or otherwise acquired).

(h) Unless otherwise consented to by us, you must replace any Culled Cows, and otherwise ensure that you comply with the requirements as to maintenance of the Herd in clause 8 and to identification as set out in clause 14.

10.2 You covenant that all Cows which you provide to replace any Culled Cows or which we provide as additional Cows or Herds:

(a) form part of the Herd;

(b) are procured by StockCo in accordance with the same provisions and covenants as are contained in clauses 2 and 3 of this Deed.

19. Clause 14 of the lease sets out the farmer's obligations in relation to the identification and annual verification of the leased livestock:

14. IDENTIFICATION AND ANNUAL VERIFICATION.

(a) You must at all times ensure that the Herd is separately identifiable from any other cows that may be depastured on the Land.

(b) You must maintain complete and up to date records and details of each Cow.

(c) You shall also identify the Herd by means of the Animal Health Board (AHB) Identification System (approved by the Chief Technical Officer on 3 October 1999 and notified in the Gazette1999, at page 3579) or any other identification system that is approved in its place under the Bio-Security (Animal Identification Systems) Regulations 1999, in the same manner as required in relation to cattle beasts being moved from the herd of origin to another herd. Progeny should also be subject to identification requirements.

(d) We may request at any time, that you will send to us a written report that certifies the number of Cows and the breed, age, quality, pregnancy status and type. Following such request, you will supply the same within 7 days.

(e) If, following such report, any Cows are missing then you will be deemed to have Culled the number of Cows so missing and the provisions of clause 10 will apply.

(f) You must at all times ensure that identification of all Progeny is effected and maintained in accord with all the provisions of clauses 14(a), (b), (c), (d) and (e).

20. Clause 15 of the lease sets out the rights of the parties in relation to the progeny of leased livestock:

15. PROGENY.

(a) StockCo owns the Progeny and leases to you the Progeny with effect from their birth (until transfer thereof).

(b) StockCo holds a first ranking security interest over the Progeny.

(c) StockCo may upon your written request transfer to you ownership of any Progeny, for nil consideration, which are not now and will not at any time in the future be Cows provided that you are not in default or in breach of this Deed.

(d) You are entitled to revenue from the Progeny.

Termination

21. After the termination of the lease, the farmer may offer to purchase the livestock from StockCo Residual (as noted above, StockCo Residual purchases the residual value of the livestock from StockCo at the beginning of the lease). StockCo Residual is under no obligation to accept the farmer's offer (see clause 13 set out in

paragraph 22). If the farmer does not purchase the livestock after the lease expires, StockCo Residual will try to sell the livestock for at least the Residual Value of the livestock. If the sale price StockCo Residual receives is less than the Residual Value, the farmer must pay the difference to StockCo Residual. If the sale price is greater than the Residual Value, StockCo Residual must pay the excess to the farmer. In either case, the net proceeds received by StockCo Residual will generally be equal to the Residual Value, no more and no less.

22. Clause 13 of the lease sets out the termination provisions:

> **13. TERMINATION.** At the expiry or earlier termination of this Deed you must, at your cost, deliver to us the Herd forthwith, and in any event within 5 business days.
>
> (a) If you fail to deliver the Herd to us in the time period specified, we may collect and remove the Herd from the Land or any land where we believe the Herd may be located, and you hereby authorise us to do so, and you will be liable to us for any cost, loss, expense or liability in so collecting and removing the Herd.
>
> (b) Upon termination of this Deed, whether by way of early termination, or otherwise we may sell the Herd to any person we choose, in our absolute discretion, using any reasonable method.
>
> (c) Upon termination by expiry, we reserve the right to sell the Herd at then current market value, AND in the event that we exercise such right then we will endeavour to effect sale for a price no less than the Residual Value and to do so within 30 days after termination. Upon sale of the Herd, if the Net Proceeds:
>
> (i) are less than the Residual Value, you must pay us the difference between the Residual Value and the Net Proceeds;
>
> (ii) are greater than the Residual Value, we must pay to you the difference between the Residual Value and the Net Proceeds.
>
> (d) You may offer to purchase the Herd, but we are under no obligation to sell the Herd to you.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) At the time the lease is entered into the Residual Value of the stock is a reasonable, and the parties' best, estimate of the likely market value of the stock at the Lease Termination Date.

b) The customer is in the "business" (as defined by section YA 1) of farming.

c) The customer has entered into the lease for the sole purpose of undertaking a farming business and intends to use the leased stock in the production of assessable income.

d) The lease payments are genuine, arm's length amounts for the possession and use of the stock.

e) The customers will enter into the leases for one or more of the following business reasons that are, in each case, the main reason or reasons for entering into the Arrangement. The possible reasons are the need:
- to refinance livestock already owned for further investment in the farming business or to retire existing debt;
- for certainty of cash flows through structuring the lease payments;
- for certainty of income and expenditure; and/or
- to reduce the initial level of cash required to enter the farming industry or to purchase new livestock.

f) With one exception, neither StockCo, StockCo Residual, nor StockCo Holdings will, directly or indirectly, assign or otherwise dispose of any livestock lease interest to a lessee farmer or a person associated with a lessee farmer. The exception is a sale of the residual interest in the livestock to a lessee farmer on the termination of the lease and as contemplated in the livestock lease. For the purposes of this condition, a livestock lease interest includes the right to receive lease payments, the residual interest or any other interest in the lease.

g) The livestock becomes the property of the customer only if the customer makes payment of the Residual Value after the Lease Termination Date, subject to approval by StockCo.

h) The customer is not in the "business" (as defined in section YA 1) of selling or exchanging leases.

i) At the time of entering into each lease, the customer does not intend to dispose of the lease.

j) The customer is not carrying on or undertaking a scheme of trading leases entered into or devised for the purpose of making a profit.

k) The livestock, when purchased by the customer after the Lease Termination Date, are not used in, or as part of, a stock-dealing "business" (as defined in section YA 1).

How the Taxation Laws apply to the Arrangement

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

- The livestock lease payments are deductible under section DA 1(1) and none of the general limitations in section DA 2 applies to prevent deductibility, provided that:
  - no provision in subparts DB to DZ applies to prevent a deduction in section DA 1(1); and
  - the income arising from the Arrangement is derived by the taxpayer in New Zealand.
- The valuation provisions in sections EC 6 to EC 27 apply to the customer when the "specified livestock" (as defined in section YA 1) is purchased by payment of the Residual Value after the Lease Termination Date.
- The valuation provisions in sections EC 32 to EC 37 apply to the customer when the "high-priced livestock" (as defined in section YA 1) is purchased by payment of the Residual Value after the Lease Termination Date.
- The cost price of the "specified livestock" (as defined in section YA 1) for the purposes of sections EC 6 to EC 27, for customers purchasing that livestock at the end of the lease, is the Residual Value stated in the lease.
- The cost price of the "high-priced livestock" (as defined in section YA 1) for the purposes of sections EC 32 to EC 37, for customers purchasing that stock at the end of the lease, is the Residual Value stated in the lease.
- At the end of an income year, unless excused from this requirement pursuant to a determination issued by the Commissioner, section EA 3 applies to require the unexpired portion of any lease payments paid in advance to be included in the customer's income in the current income year and to be an amount for which the customer is allowed a deduction in the following income year.
- The financial arrangements rules in subpart EW do not apply to the Arrangement.
- Section EJ 10 does not apply to the Arrangement because the lease is not an operating lease.
- Sections FA 6 to FA 11 do not apply to the Arrangement because the lease is not a finance lease.
- Section FA 12 does not apply to the Arrangement because the lease is not a hire purchase agreement.
- Section GC 1 does not apply to the sale of livestock by StockCo Residual to the farmers.
- Section BG 1 does not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 April 2011 and ending on 31 March 2016.

This Ruling is signed by me on the 1st day of April 2011.

Martin Smith
Chief Tax Counsel

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.

CPI ADJUSTMENT – CPI 11/01 FOR DETERMINATION DET 09/02: STANDARD-COST HOUSEHOLD SERVICE FOR CHILDCARE PROVIDERS

In accordance with the provisions of Determination DET 09/02, as published in *Tax Information Bulletin* Vol 21, No 4 (June 2009), Inland Revenue advises that, for the 2011 income year:

a) the *variable standard-cost* component will increase from $3.15 per hour per child to $3.29 per hour per child; and

b) the *administration and record-keeping fixed standard-cost* component will increase from $307 per annum to $321 per annum, for a full 52 weeks of childcare services provided.

The above amounts have been adjusted in accordance with the annual movement of the Consumers Price Index for the 12 months to March 2011, which showed an increase of 4.5%. For childcare providers who have a standard 31 March balance date, the new amounts apply for the period from 1 April 2010 to 31 March 2011.

CPI ADJUSTMENT – CPI 11/02 FOR DETERMINATION DET 05/03: STANDARD-COST HOUSEHOLD SERVICE FOR BOARDING SERVICE PROVIDERS

In accordance with the provisions of Determination DET 05/03, as published in *Tax Information Bulletin* Vol 17, No 10 (December 2005), Inland Revenue advises that the weekly standard-cost component for the 2011 income year, is retrospectively adjusted as follows:

a) The weekly standard-cost for one to two boarders will increase from $232 each to $243 each.

b) The weekly standard-cost for third and subsequent number of boarders will increase from $189 each to $198 each.

The above amounts have been adjusted in accordance with the annual movement of the Consumers Price Index for the 12 months to March 2011, which showed an increase of 4.5%. For boarding service providers who have a standard 31 March balance date, the new amounts apply for the period from 1 April 2010 to 31 March 2011.

NATIONAL AVERAGE MARKET VALUES OF SPECIFIED LIVESTOCK DETERMINATION 2011

This determination may be cited as "The National Average Market Values of Specified Livestock Determination, 2011".

This determination is made in terms of section EC 15 of the Income Tax Act 2007 and shall apply to specified livestock on hand at the end of the 2010–2011 income year.

For the purposes of section EC 15 of the Income Tax Act 2007 the national average market values of specified livestock, for the 2010–2011 income year, are as set out in the following table.

National average market values of specified livestock

Type of livestock	Classes of livestock	Average market value per head $
Sheep	Ewe hoggets	120.00
	Ram and wether hoggets	107.00
	Two-tooth ewes	160.00
	Mixed-age ewes (rising three-year and four-year old ewes)	142.00
	Rising five-year and older ewes	124.00
	Mixed-age wethers	99.00
	Breeding rams	353.00
Beef cattle	*Beef breeds and beef crosses:*	
	Rising one-year heifers	509.00
	Rising two-year heifers	786.00
	Mixed-age cows	997.00
	Rising one-year steers and bulls	599.00
	Rising two-year steers and bulls	883.00
	Rising three-year and older steers and bulls	1049.00
	Breeding bulls	1931.00
Dairy cattle	*Friesian and related breeds:*	
	Rising one-year heifers	1035.00
	Rising two-year heifers	1494.00
	Mixed-age cows	1766.00
	Rising one-year steers and bulls	459.00
	Rising two-year steers and bulls	767.00
	Rising three-year and older steers and bulls	998.00
	Breeding bulls	1370.00
	Jersey and other dairy cattle:	
	Rising one-year heifers	792.00
	Rising two-year heifers	1344.00
	Mixed-age cows	1631.00
	Rising one-year steers and bulls	363.00
	Rising two-year and older steers and bulls	616.00
	Breeding bulls	1140.00
Deer	*Red deer:*	
	Rising one-year hinds	253.00
	Rising two-year hinds	420.00
	Mixed-age hinds	481.00
	Rising one-year stags	297.00

Type of livestock	Classes of livestock	Average market value per head $
	Rising two-year and older stags (non-breeding)	469.00
	Breeding stags	1218.00
	Wapiti, elk, and related crossbreeds:	
	Rising one-year hinds	305.00
	Rising two-year hinds	466.00
	Mixed-age hinds	535.00
	Rising one-year stags	352.00
	Rising two-year and older stags (non-breeding)	537.00
	Breeding stags	1409.00
	Other breeds:	
	Rising one-year hinds	156.00
	Rising two-year hinds	245.00
	Mixed-age hinds	265.00
	Rising one-year stags	185.00
	Rising two-year and older stags (non-breeding)	291.00
	Breeding stags	638.00
Goats	*Angora and angora crosses (mohair producing):*	
	Rising one-year does	65.00
	Mixed-age does	84.00
	Rising one-year bucks (non-breeding)/wethers	56.00
	Bucks (non-breeding)/wethers over one year	61.00
	Breeding bucks	379.00
	Other fibre and meat producing goats (Cashmere or Cashgora producing):	
	Rising one-year does	61.00
	Mixed-age does	82.00
	Rising one-year bucks (non-breeding)/wethers	53.00
	Bucks (non-breeding)/wethers over one year	61.00
	Breeding bucks	386.00
	Milking (dairy) goats:	
	Rising one-year does	150.00
	Does over one year	250.00
	Breeding bucks	300.00
	Other dairy goats	18.00
Pigs	Breeding sows less than one year of age	200.00
	Breeding sows over one year of age	280.00
	Breeding boars	329.00
	Weaners less than 10 weeks of age (excluding sucklings)	72.00
	Growing pigs 10 to 17 weeks of age (porkers and baconers)	129.00
	Growing pigs over 17 weeks of age (baconers)	192.00

This determination is signed by me on the 20th day of May 2011.

Rob Wells
LTS Manager, Technical Standards

NEW LEGISLATION

ORDERS IN COUNCIL

FIF DEEMED RATE OF RETURN SET FOR 2010–11

The deemed rate of return for taxing foreign investment fund interests is 8.52% for the 2010–11 income year, down from the previous year's rate of 9.12%.

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 May 2011.

Income Tax (Deemed Rate of Return on Attributing Interests in Foreign Investment Funds, 2010–11 Income Year) Order 2011 (SR 2011/133)

CORRECTIONS TO COMMENTARY ON THE TAXATION (GST AND REMEDIAL MATTERS) ACT 2010

The following corrections have been made to the Taxation (GST and Remedial Matters) Act 2010 commentary published in the *Tax Information Bulletin* Vol 23, No 1 (February 2011).

These corrections relate to the "New apportionment rules", which was part of the section "Changes to the GST rules". Emphasis has been added to show the changes.

Page 37, Example 8, first line, the printed amount $800,000 should read **$500,000**.

Page 37, Example 8, under the subheading "Fourth adjustment period", the printed percentage 86.6% should read **85.2%**.

Page 39, Example 10, sixth paragraph, the printed section 21E(6) should read section 21E**(7)**.

Page 41, third bullet point, the printed amount of $5,000 or less should read **more than $5,000**.

STANDARD PRACTICE STATEMENTS

These statements describe how the Commissioner will, in practice, exercise a discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

SPS 11/04: COMPULSORY DEDUCTIONS FROM BANK ACCOUNTS

Introduction

1. This Standard Practice Statement ("SPS") sets out Inland Revenue's practice on the use of statutory notices (referred to in this statement as "deduction notices") which are issued to banks requiring them to make deductions from their customers' accounts.

Application

2. This SPS outlines the Commissioner's powers to require a bank to make deductions from amounts that are payable, or will be payable, to a taxpayer who has arrears. This statement applies to deduction notices issued to banks under the following enactments:
   - Tax Administration Act 1994 ("the TAA")
   - Child Support Act 1991 ("the CSA")
   - Gaming Duties Act 1971 ("the GDA")
   - Goods and Services Tax Act 1985 ("the GSTA")
   - Student Loan Scheme Act 1992 ("the SLSA").
3. This SPS applies to deduction notices issued from 29 April 2011. It replaces SPS 09/01 published in the *Tax Information Bulletin* Vol 21, No 2 (April 2009), which is withdrawn with effect from the date of this SPS.

Legislation

4. The relevant sections which grant the Commissioner the power to issue a deduction notice are as follows:
   - Section 157 of the TAA
   - Section 151(2) of the CSA
   - Section 154 of the CSA
   - Section 12L of the GDA
   - Section 43 of the GSTA
   - Section 46 of the SLSA.

Discussion

5. A deduction notice is an important debt collection tool for Inland Revenue. The relevant legislative provisions grant the Commissioner of Inland Revenue ("Commissioner") the power to require a third party to make deductions from amounts that are payable, or will become payable by that third party, to a taxpayer who has tax arrears.
6. Amounts payable includes all monies deposited with a bank to the credit of the taxpayer, including funds on term deposit even though that term may not be due to mature.
7. Inland Revenue will not require deductions from a bank account that would put the taxpayer into, or further into, overdraft. Although if Inland Revenue issues a deduction notice for an account which is in credit and the taxpayer attempts to avoid complying with that notice by transferring funds from that account so that it will go into overdraft, then the deduction notice will take priority.
8. The deduction notice may require deductions to be made by the way of lump sum or by instalments, and will require the bank to check their customer's account(s) and deduct any funds according to the notice. If no funds are available the bank is required to advise Inland Revenue.
9. A deduction notice may require deductions to be made to cover daily interest. The interest starts on the date of the deduction notice and ends on the day on which the amount required to be deducted, has been deducted. If interest is to be calculated, the rate of interest will be advised in the deduction notice.
10. The notice will continue to apply until a deduction is made by the bank in respect of a notice requiring deduction by lump sum, or in respect to an on-going notice, until the amount required pursuant to the notice has been deducted or the notice is either revoked or withdrawn by Inland Revenue.
11. With recovery of funds under the TAA, GDA, GSTA and SLSA, deductions made by the bank are held in trust for the Crown until they are forwarded to Inland Revenue. If the deduction is not made by the bank, the amount required to be deducted is recoverable by Inland Revenue from the bank as if it were tax payable by that bank.
12. Furthermore, Inland Revenue has the power to prosecute the bank for not complying with the terms of the deduction notice under section 157A of the TAA.

13. The bank does not however, incur liability in this manner if they fail to comply with a deduction notice for child support arrears under section 168(2) of the CSA.

Standard practice

Decision to issue a deduction notice

14. The decision to take any debt collection action, including the use of a deduction notice, is made only after consideration of all relevant information, including any previous communication between the department and the taxpayer, the amount and the age of the arrears and any known hardship or hardship likely to be experienced by the taxpayer.

15. Inland Revenue will not issue a deduction notice for tax arrears that are subject to an instalment arrangement between the taxpayer and the Commissioner, so long as the arrangement is being adhered to by the taxpayer.

One-off and on-going notices

16. The deduction notice may require deductions to be made either in a lump sum (one-off notice) or by instalments (on-going notice). The manner of the deduction will be specified in the notice. The bank is required to forward the deducted funds to Inland Revenue according to the date specified on the notice.

Account monitoring

17. A deduction notice issued under the appropriate act may require deduction from amounts held on the date of the notice, or from amounts deposited after the date of the notice. Inland Revenue is able to require daily monitoring of accounts where it is considered necessary. If Inland Revenue does require daily monitoring this will be communicated to the bank at the time of issuing the deduction notice.

18. Inland Revenue acknowledges that compliance with a deduction notice can result in a cost to the bank, especially if constant monitoring of their customers' account(s) is required. In light of this, daily monitoring will only be requested where such monitoring is considered necessary.

19. If daily monitoring is required, it will usually be for a maximum of 10 working days. However, Inland Revenue reserves the right to require an account to be monitored over a longer period where that may be necessary. If a longer period of monitoring is required, this will be communicated at the time of issuing the deduction notice.

Deductions from joint bank accounts

20. A deduction notice issued under the TAA, GDA, GSTA and SLSA can be placed on joint bank accounts when the money is able to be withdrawn from that account by the defaulting person without the signature or other authorisation of the other joint bank account holder(s).

21. A deduction notice can only be placed on a partnership account in respect of the partnership's liability as a taxpayer under the relevant act. A partnership account is defined in section 157(12) of the TAA as a joint account that files a return of income under section 33(1) of the TAA. A deduction notice cannot be placed on a partnership bank account to satisfy a partner's personal tax liability.

What is "other authorisation" for the purpose of account access?

22. The term "other authorisation" as used in the TAA, GDA, GSTA and SLSA[1], ensures that deduction notices can, and will be, applied to accounts which are accessed electronically. This ensures that any alternative methods of account authorisation are not excluded from the scope of deduction notices.

Deductions for Child Support arrears

23. Under section 154 of the CSA, the Commissioner is able to require banks to make deductions from money payable to a liable parent. Under section 155 of the CSA this deduction power extends to money held in joint bank accounts in the name of the liable parent and one or more other persons, when the liable parent can draw from that account without the signature of the other person(s). Overpayments made to payees may also be recovered in the same manner as liable parent debt under section 151(2) of the CSA.

24. The absence of the term "other authorisation" in the CSA does not change the construction of the law. The Electronic Transactions Act 2002 achieves functional equivalence with regard to electronic and paper transactions and in setting up their banking arrangements, the taxpayer consents to the use of an electronic signature to authorise transactions. Therefore, the omission of the term "other authorisation" in the CSA does not exclude the ability to place a deduction notice on accounts based electronically.

[1] The term "other authorisation" for the purposes of section 46 of the SLSA, has been introduced through reference of sections 157 to 165 of the TAA.

Deductions for Working for Families tax credits

25. Section MF 5(2) of the Income Tax Act 2007 provides that both the primary caregiver and their partner or spouse throughout the income year to which the overpayment relates, are jointly and severally liable for any overpayment of Working for Families tax credits. The Commissioner may place a deduction notice on the bank accounts of the primary caregiver and/or their spouse for the income year, and any joint account held in the names of either the primary caregiver or the spouse for the income year.

Term investments

26. A deduction notice will apply to money that is held in a term investment whether or not that investment is due to mature.

Prosecution

27. If a bank fails to make the deductions required by the deduction notice, and there was an amount payable, or an amount became payable, Inland Revenue has the power to prosecute the bank for not complying with the terms of the deduction notice under section 157A of the TAA.

This Standard Practice Statement is signed on 29 April 2011.

Rob Wells
LTS Manager, Technical Standards

OPERATIONAL STATEMENTS

2011 REVIEW OF THE COMMISSIONER'S MILEAGE RATE FOR EXPENDITURE INCURRED FOR THE BUSINESS USE OF A MOTOR VEHICLE

The Operational Statement OS 09/01 published in the *Tax Information Bulletin* Vol 21, No 3 (May 2009) provides the Commissioner's statement of a mileage rate for expenditure incurred for the business use of a motor vehicle. OS 09/01 can be viewed on Inland Revenue's website at **www.ird.govt.nz/technical-tax/op-statements/**

Inland Revenue has reviewed the motor vehicle mileage rate reflecting on the average cost of running a motor vehicle, including the average fuel prices for the 2011 income year, and has amended the current mileage rate to 74 cents per kilometre, which is to apply to both petrol and diesel fuel vehicles.

Inland Revenue will continue to monitor fuel prices and publish a rate at least once a year.

Taxpayers are not obliged to use the Commissioner's mileage rate. They may use actual costs if they consider that the Commissioner's mileage rate does not reflect their true costs. It is accepted that employers may use the motor vehicle running cost data published by other reputable sources, for example the New Zealand Automobile Association Incorporated, as an alternative reasonable estimate for reimbursement of employees.

The mileage rate does not apply in respect of motorcycles.

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.

COURIER DID NOT BUY GOING CONCERN

Case	TRA 19/10 [2011] NZTRA 3
Decision date	5 April 2011
Act(s)	Goods and Services Tax Act 1985
Keywords	Going concern

Summary

A courier did not buy a going concern as the vendor could not supply a going concern.

Impact of decision

This is one of a number of going concern cases. This case turned on the finding that the vendor did not have a contract with the company (MF) capable of being assigned to the disputant. Without that contract there could be no going concern.

Facts

This was a "going concern" case.

The disputant was a one-person company which purchased courier-driver business assets from a courier driver in 2008. No contract existed between the vendor and MF (the company he drove for) and the disputant did not get a contract with MF from the vendor. However, prior to the contract being entered, the disputant was introduced to MF and "approved" by MF as a driver that MF would work with.

The sale was originally treated as a sale of a going concern and zero rated. However, the disputant later concluded that the sale was not zero rated but was goods and services tax ("GST") inclusive. The disputant then sought a GST input credit and a resulting GST refund.

Decision

Judge Barber concluded that there was no going concern supplied and that the disputant was entitled to an input tax credit.

The Judge acknowledged that this was a simple business structure, which meant many of the considerations of a more complex business were not present. He also accepted the Commissioner's submission that the intention of the parties was that the supply should be zero rated but his honour continued that "the intent of the parties cannot overcome the need for the relatively seamless transfer of a functioning taxable activity".

On these facts the Judge concluded that while the supplier (vendor) was in business, the disputant established another business. The Judge considered that the disputant "established a new activity, albeit on a structure acquired from the vendor".

The Judge accepted the taxpayer's argument that, as MF did not contract with its drivers, the vendor did not have a contract guaranteeing work so it was impossible for the vendor to assign his taxable activity to the disputant; as a consequence the disputant did not get a going concern but used the asset it had bought to start its own taxable activity.

His Honour concluded:

> It seems to me that, in terms of the criteria of section 11(1)(m) of the Act, the taxable activity of the vendor was not a going concern at the date of the vendor's sale of the truck and its equipment to the disputant. This is because the vendor's contract with [MF] … ended at the point of sale of the truck. There is no dispute that generally, [MF] would offer a fairly similar activity to a purchaser of a truck from one of its team of drivers. However, any such arrangement obtained by the purchaser of the truck with [MF] is a new activity entered into by [MF] with the new driver. The new arrangement is provided by [MF] and is not provided by the vendor of the truck. [55]

VALID TIMELY NOPA A PREREQUISITE TO DEEMED ACCEPTANCE

Case	TRA 37/09 [2011] NZTRA 04
Decision date	11 April 2011
Act(s)	Income Tax Act 1994, Income Tax Act 2004, Income Tax Act 2007 and Tax Administration Act 1994
Keywords	Notice of proposed adjustment, deemed acceptance, ultra vires

Summary

There was no acceptance of the disputant's late Notice of Proposed Adjustment ("NOPA") because a valid timely NOPA is a prerequisite to deemed acceptance and the Commissioner had not agreed to accept the disputant's late NOPA.

Impact of decision

The decision is confirmation that a valid timely NOPA is a prerequisite to deemed acceptance even if the Commissioner does not reject a late NOPA with a compliant Notice of Response ("NOR") within the applicable response period.

Facts

The disputant claimed that the Taxation Review Authority should reduce her tax liability in accordance with her NOPA, which she acknowledged had been filed out of time. The disputant claimed that she had been invited by the Commissioner to file a late NOPA.

The disputant's late NOPA had been rejected by the Commissioner as being out of time. Accordingly he did not issue a NOR.

Decision

Judge Barber dismissed the disputant's challenge and confirmed the Commissioner's assessments.

Is a valid timely NOPA a prerequisite to deemed acceptance?

Judge Barber held that a valid timely NOPA is a prerequisite to deemed acceptance under section 89H(2) of the Tax Administration Act 1994 ("TAA").

His Honour held that if an invalid late NOPA were sufficient to result in deemed acceptance under section 89H(2) of the TAA then the time limits, which are a design feature of the disputes process, would be significantly undermined and meaningless.

Did the Commissioner agree to accept the late NOPA?

Judge Barber held that the Commissioner did not agree to accept the disputant's late NOPA.

His Honour further held that it was unlikely that the Commissioner's consent could have been given because such consent needed to be based on the existence of an exceptional circumstance. No such circumstance was discussed or outlined. His Honour held that for an extension of time to be effective it needed to be clear and firm, preferably in writing, based on reason and set in credible circumstances.

Assuming the Commissioner agreed to accept a late NOPA from the disputant was such an acceptance ultra vires?

Judge Barber held that the Commissioner did not agree to accept a late NOPA from the disputant so this issue did not need to be addressed. Nevertheless, His Honour held that the Commissioner is only entitled to accept a late NOPA if the requirements of section 89K of the TAA are satisfied. If the Commissioner were to accept the disputant's late NOPA without satisfying himself that an exceptional circumstance had prevented the disputant from issuing her NOPA within the applicable response period, then the Commissioner would be acting ultra vires.

COURT OF APPEAL DISMISSES TAXPAYER'S APPEAL IN RELATION TO AN ENTITLEMENT TO DE-REGISTER FROM GST

Case	Lewis Gaire Herdman Thompson v Commissioner of Inland Revenue
Decision date	5 April 2011
Act(s)	Goods and Services Tax Act 1986
Keywords	GST de-registration, *Lopas* test, section 52, Court's power to vary interest and penalties, GST outputs/inputs

Summary

The Court of Appeal found that the taxpayer was not entitled to deregister on 30 November 1999 and was not entitled to deregister until he could satisfy the Commissioner that his taxable supplies would not exceed $30,000 in the forthcoming year. On this basis, the Court determined that the Commissioner's assessments, which assessed output tax on three property transactions sold in the goods and services tax ("GST") period after the Taxpayer's de-registration, were correct. The Court of Appeal upheld the High Court's decision that the

Commissioner was required to make output tax credit adjustments to the Taxpayer's GST returns in the relevant GST return periods.

Impact of decision

The test in section 52 of the Goods and Services Tax Act 1986 ("GST Act") is not whether a sale was "planned" or "contemplated", but whether the Commissioner has reason to be satisfied that no transaction taking **all** taxable supplies over the (then) $30,000 limit would occur.

Facts

The land in issue was purchased in 1979 by the appellant, before the advent of GST.

Application to deregister for GST purposes

In 1999, the appellant completed a form requesting deregistration for GST purposes with effect from 30 November 1999. When setting out the basis for the request, the appellant selected the statement which read: "I am conducting a taxable activity but my turnover for the next 12 months will be under $30,000".

On 22 December 1999, Inland Revenue sent the appellant a standard form notification of cancellation of his GST registration with effect from 30 November 1999.

The land sales transactions of the Rolleston farm

The three separate sales of land effected by the appellant after 30 November 1999 were:

1. the sale of a 49 hectare block to interests associated with Mr. Horsbrugh (settlement occurred in June 2000);
2. the sale of a 15 hectare parcel to a family company called Armagh Investments Ltd ("Armagh") (agreement signed on 31 March 2000); and
3. the sale of the remaining 138 hectare area to Armagh (on 29 September 2000).

Decision

The Court of Appeal, having noted that the appellant acted in accordance with the professional advice he received, discussed the *Lopas v CIR* [2006] 22 NZTC 19,726 (CA) decision and section 52 of the GST Act.

When considering the obligation to pay GST in respect of taxable supplies, the Court confirmed (following *Lopas*) that the reference in section 52(1) of the GST Act to "the amount specified for the purposes of section 51(1)" is referring to the amount specified in section 51(1)(a), namely $30,000 and that section 52(1) referred to all taxable supplies and did not exclude any sales of capital assets in the running of the business which occurred as a result of the cessation or winding down of the business.

The Court held that:

> … it was common ground before us that Mr Thompson was entitled to deregister at 30 November 1999 only if there was a proper basis for the Commissioner to be satisfied that the value of his taxable supplies in the ensuing 12 months would not be more than $30,000. [24]

The Horsbrugh sale

Lopas identified two conditions that must be met before the Commissioner could be satisfied under section 52(1) that deregistration was appropriate. It must be the case that no sale is planned as at the date of deregistration (or at least not a sale that would mean the $30,000 threshold was exceeded) and the taxable supplies must otherwise be less than $30,000 in the next 12 months.

The appellant focused on whether a sale was planned at the date of deregistration. However, he did not deal with the other condition that if no sale proceeded, the taxable supplies would have been less than $30,000. The appellant continued to receive rent that, in the event that a sale was not planned on the proposed deregistration date, would have still exceeded $30,000.

The Court noted that the appellant emphasised the use of the word "planned" in *Lopas* whereas the Commissioner argued "contemplated" as used in *Lopas* better summarised the test. The Court, with respect to both counsel, considered that too much significance was being attached to the wording in *Lopas*. It was a judicial decision, not legislation, the Court in *Lopas* properly characterised the proposed sale, on the facts in that case, as "planned" but did not suggest that this was a gloss to be placed on the statutory wording of section 52.

After applying the statutory test the Court held that it was required:

> … to determine whether, on the facts of the case, the relevant statutory test was met. In the present case, that requires us to assess whether there were grounds for the Commissioner to be satisfied that the value of Mr Thompson's taxable supplies in the 12 months beginning on 30 November 1999 would be not more than $30,000. Given the impending sale of part of the Rolleston property for well over $30,000, there obviously were not. That is all we need to say about this aspect of the appeal. [35]

The first Armagh sale

The Court upheld Dobson J's decision that the appellant's deregistration on 30 November 1999 was ineffective and that the Commissioner had properly reversed it:

> … the first Armagh transaction took place before the subsequent deregistration date of 31 July 2000 and therefore at a time when Mr Thompson remained registered for GST purposes. [37]

The Court noted that Dobson J considered whether the first Armagh sale was "planned" but observed that, as previously noted, the statutory test is not whether a transaction is planned but whether the Commissioner has reason to be satisfied that no transaction taking all taxable supplies over the $30,000 limit would occur and in the present case, the appellant would not have been able to satisfy the statutory test at any time before the first Armagh sale.

The second Armagh sale

The Court, for the reasons given in relation to the first Armagh sale, considered that the appellant could not satisfy the Commissioner as at 30 November 1999, as at 30 July 2000 or at any time in between that he would not have taxable supplies exceeding $30,000 in the forthcoming year.

However, there had been a dispute between the appellant and the Commissioner over the request to deregister from 30 November 1999 and on 22 October 2002 the Commissioner sent an automatically generated letter that said:

> Your registration for GST has been cancelled, in terms of Section 52 of the Goods and Services Act 1985, with effect from the taxable period ending 31 JUL 2000.

The Court found that the appellant appeared to have been deregistered by an Inland Revenue Department officer holding the proper authority and was satisfied the Commissioner did deregister the appellant from 31 July 2000.

The appellant argued that a taxpayer must be registered for the relevant GST period before the Commissioner can make an assessment and that he was deregistered at the time of the second Armagh sale. The Commissioner was now time barred from overriding the 31 July 2000 deregistration and validly assessing the appellant for GST on the second Armagh sale.

The Court looked at the effect of section 108A of the Tax Administration Act 1994, which prevents the Commissioner from making an assessment after a four-year period has elapsed from the end date of the relevant taxable period. The relevant taxable period here was 1 August 2000 to 31 January 2001 and the Commissioner did make an assessment within four years of this. A letter confirming this was sent on 24 January 2005.

After interpreting section 108A, the Court held:

> … The focus of s 108A is on the assessment, not on the registration … As Mr Thompson made taxable supplies in the relevant period having a value exceeding the statutory period [sic], he was a "person who is required to provide a GST tax return" for the period ending on 31 January 2001. [55]

Even someone who has never registered for GST can be assessed if they have made supplies of sufficient value to make them liable to register. The GST Act does not oblige the Commissioner to register a person before making him or her liable for GST, the obligation to apply to register falls on the taxpayer alone.

It was concluded by the Court that the assessment for the period from 1 August 2000 to 31 January 2001 is valid and should have been upheld, and allowed the Commissioner's cross-appeal on this point.

Results

The appeal by the appellant was dismissed by the Court.

The cross-appeal by the Commissioner was allowed in part upholding the assessment for the GST period ending 31 January 2001.

The cross-appeal by the Commissioner against the High Court decision that the assessment for the period ending 31 July 2000 wrongly included output tax and did not take into account input credits was dismissed.

The alternative tax avoidance argument was not considered. The Court also agreed with the High Court's view that a number of other circumstances might make remission of penalties appropriate and that the there is a "strong basis" for the Commissioner to "acknowledge his Department's contribution to the non-payment of GST … by any appropriate remission of penalties".

Costs were awarded to the Commissioner.

COMMISSIONER'S APPLICATION OF THE SERIOUS HARDSHIP PROVISIONS UPHELD BY THE COURT OF APPEAL

Case	Jillian Claire Larmer v Commissioner of Inland Revenue
Decision date	19 April 2011
Act(s)	Tax Administration Act 1994
Keywords	Financial relief, serious hardship, minimum living standards, judicial review

Summary

The appeal failed as the Court of Appeal found that the Commissioner correctly applied section 177 of the Tax Administration Act 1994 ("TAA") and contrary to the argument by the taxpayer, had considered the most recent information available to him in applying section 177.

Impact of decision

This decision confirms the following.

The purpose of section 177 of the TAA is to enable the Commissioner to give financial relief to a taxpayer who would otherwise be placed in serious hardship, as defined in section 177A(1) of the TAA.

Partial relief is still relief for the purposes of section 177.

While not expressly mentioned, it would appear that the Commissioner may continue with assessing applications for financial relief at the date the application is made and considering all outstanding tax owing by a taxpayer as a global sum. However, where it is appropriate and results in partial relief for a taxpayer, the year-by-year approach to applications for financial hardship is open to the Commissioner to adopt.

In interpreting section 177A(1) of the TAA, regard must be had to what caused a taxpayer's significant financial difficulties.

The year-by-year approach represents a practical way of granting relief and applying section 177 of the TAA, where the facts allow such an application.

Facts

Inland Revenue commenced debt recovery proceedings against the taxpayer in respect of income tax and goods and services tax amounting to $175,641.68.

On 8 July 2008 the taxpayer applied for financial relief under the serious hardship provisions of the TAA claiming that her serious hardship was the result of significant financial difficulty that arose from her inability to meet minimum living expenses accord to normal community standards. The Commissioner declined the taxpayer's application for relief and the taxpayer responded by applying to the High Court for judicial review. On 23 October 2008, a judicial settlement conference resolved the taxpayer's application on the basis that the Commissioner would reconsider his decision after giving the taxpayer an opportunity to provide further information.

On 10 December 2008, the taxpayer filed a new application for relief. The Commissioner determined that she met the criteria for serious hardship in respect of the tax years ended 31 March 2000 to 31 March 2003 but not during tax years subsequent to 2003. The taxpayer applied for judicial review of this second decision declining relief for the years subsequent to 2003.

In the High Court, McKenzie J found that there was no reviewable error by the Commissioner in considering whether in the year in which the obligation to pay the tax arose the taxpayer was in serious hardship and accordingly allowing the taxpayer relief in the 2000 to 2003 tax years and not the tax years subsequent to 2003. The taxpayer appealed the decision of McKenzie J.

Decision

The Court of Appeal found in favour of the Commissioner and dismissed the Appellant's appeal.

Was the year-by-year approach taken by the Commissioner available to him in applying s 177?

The taxpayer argued that McKenzie J's decision in the High Court on this aspect was wrong for the following reasons:

1. The TAA required the Commissioner to asses the taxpayer's requests for financial relief at the date they were made, and in respect of "recovery of outstanding tax". That meant all outstanding tax as a global sum.
2. Accordingly, the taxpayer's requests for financial relief cannot be assessed on a year-by-year approach.
3. The effect of the scheme of the TAA is that the Commissioner is not entitled to accept the taxpayer's requests for relief in respect of some tax years and decline them in respect of other tax years.
4. Having accepted the taxpayer's requests for relief made in 2008, the Commissioner cannot decline those requests for relief in respect of the tax years ended 31 March 2004 to 31 March 2008.

The Court did not agree and upheld McKenzie J's analysis in the High Court for four reasons:

1. Firstly, McKenzie J's interpretation of section 177 of the TAA was purposive as required by section 5(1) of the Interpretation Act 1999. The purpose of section 177 is to enable the Commissioner to give financial relief to a taxpayer who would otherwise be placed in serious hardship, as defined in section 177A. A consequence of the taxpayer's argument that all outstanding tax as a global sum be assessed at the date a request for financial relief is made, could result in a taxpayer being denied relief. The Court could not view "relief" to be an all or nothing concept as argued by the taxpayer, rather the Court considered "some relief is still relief".
2. Closely related to the first point, the Court considered that McKenzie J's interpretation of section 177 of the TAA accords with sections 6 and 6A of the TAA. The Court referred particularly to section 6(2)(b) and (f)—the right of taxpayers to have their liability determined fairly, impartially and according to the law; and the reciprocal responsibility of the Commissioner and Inland Revenue to administer the TAA in that manner.

3. The Court in explaining their third reason, noted the explanation by McKenzie J that the Commissioners year-by-year approach represented a practical way of granting relief where section 177A(1)(a) applied, while denying it where section 177A(1)(b)(i) applied. The Court stated that the key to interpreting section 177A and applying it is causation, namely what caused the taxpayer's financial difficulties? The Court agreed with McKenzie J's finding that in some years the cause was the taxpayer's low income, but in others it was her tax liabilities. The Court noted that this was essentially an application of section 177A to the facts before McKenzie J.
4. Lastly the Court rejected the taxpayer's argument that the Commissioner's approach is proscribed by section 177(3). The Court considered that construing section 177 purposively in order to facilitate financial relief where it could be properly granted, permitted a year-by-year approach. Accordingly, the Commissioner could accept the taxpayer's request for one tax year and decline if for another. Further, the Court stated that even if that interpretation is not open, the Commissioner's approach can be viewed as a counter offer made under section 177(3)(c) of the TAA.

The Court noted that the year-by-year approach, which was taken in considering the taxpayer's application for financial relief, will not be appropriate in every case. An example given by the Court of when the year-by-year approach will not be appropriate is where the taxpayer's difficulties do not span more than one tax year. Otherwise, where it is appropriate and results in partial relief for the taxpayer, the Court stated the year-by-year approach is open for the Commissioner to adopt.

BIAS APPEAL DISMISSED ON THE BASIS OF CAUSE OF ACTION ESTOPPEL

Case	John George Russell v Commissioner of Inland Revenue
Decision date	19 April 2011
Act(s)	N/A
Keywords	Bias, cause of action estoppel

Summary

An appeal from the High Court for judicial review of the Taxation Review Authority has been dismissed on the basis of cause of action estoppel and any possible bias was cured by the appeal of the substantive case to the High Court.

Impact of decision

The law in the area of bias by a judicial decision maker is reasonably well established since the *Saxmere* and *Muir* cases. The law regarding appeal by way of re-hearing is that in *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141 at [16].

Facts

This was an appeal from the High Court (Cooper J (2009) 24 NZTC 23,284).

The taxpayer was the designer and promoter of the "Russell template" tax avoidance scheme. Additionally his personal tax affairs were subject to reassessment for the years 1985 to 2000 on the basis there was a tax avoidance arrangement. His personal tax affairs have little relationship to the Russell template litigation. The personal assessments have been upheld by the Taxation Review Authority ("TRA") (*Case Z19* (2009) 24 NZTC 14,217) and High Court (Wylie J (2010) 24 NZTC 24,463) and are under appeal to the Court of Appeal.

Mr Russell made an application to the TRA prior to the commencement of his personal tax challenge seeking that the TRA Judge (Judge Barber) recuse himself. The Judge considered the application but declined to recuse himself (see *Case Z3* (2009) 24 NZTC 14,027). The High Court, on two occasions, reviewed the TRA's decision and affirmed the decision, the last being that before Cooper J.

The taxpayer appealed, arguing that the Judge was actually—albeit unconsciously—biased as a consequence of many years exposure to the Russell template litigation and, if not actually biased, there was the risk of the appearance of bias such that the Judge should have recused himself.

The Commissioner argued there was no actual bias (conscious or unconscious) and no appearance of bias if the test in *Saxmere Co Ltd v Wool Board Disestablishment Co* [2009] NZSC 72, [2010] 1 NZLR 35 (also *Muir v Commissioner of Inland Revenue* [2007] NZCA 334; [2007] 3 NZLR 495) was applied.

Additionally it was argued that any risk of actual bias or the appearance of bias was cured by the appellate process which saw the High Court consider the tax assessments and affirm their correctness.

It was also argued that due to the taxpayer abandoning the recusal point in his substantive appeal, he was now cause of action estopped from proceeding with it in this appeal. This operates as follows:

> … cause of action estoppel … prevents a party … from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given upon it, it is … merged in the judgment … If it is determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is stopped … [27]

Decision

The Court of Appeal decided that the determination of Mr Russell's tax challenge by the High Court before Wylie J cured any apparent bias in the TRA [3]. The appeal was dismissed.

The Court referred to the appeal of the substantive tax challenge and its hearing before Justice Wylie at the High Court concluding:

> … The effect of his rehearing those issues was that he formed his own opinion on them. And he did that, not upon facts which had been found by Judge Barber at the TRA, but upon agreed facts … It follows that, even if apparent bias affected Judge Barber's decision, and Cooper J erred in holding that Judge Barber was not required to recuse himself, the situation has been cured by the judgment of Wylie J on appeal. Upon undisputed facts Wylie J decided the issues with a fresh mind, unaffected by any suggestion of apparent bias or predetermination. [45]

Additionally the Court thought that Mr Russell would have been cause of action estopped given the fact he did not pursue his bias allegation at the time of the substantive appeal before Wylie J as it was a ground of appeal in that matter but was abandoned by him. But the Court preferred to address the matter in a substantive way [25] to [29], [44].

The Court did not determine the bias issue. They considered there was an arguable case for recusal but because the appeal before Wylie J of the substantive tax challenge was by way of rehearing this cured any suggestion of bias.

EXCEPTIONAL CIRCUMSTANCES EXAMINED BY THE TAXATION REVIEW AUTHORITY

Case	TRA 27/08; TRA 28/08; TRA 53/08 [2011] NZTRA 05
Decision date	28 April 2011
Act(s)	Tax Administration Act 1994
Keywords	Exceptional circumstances

Summary

The Taxation Review Authority ("TRA") considered there were arguable exceptional circumstances that existed in respect of late served Points of Objection Notices but sought further evidence prior to deciding the application for an extension of time.

Impact of decision

While about the old objection procedures, there is a useful discussion drawing together the cases in the area of "exceptional circumstances" that is of wider interest

Facts

The three taxpayers affected by this ruling had sought cases stated to the TRA under the old objection procedure.

Under that procedure the taxpayer had to complete a Points of Objection Notice and deliver it to the Director, Litigation Management, at a specified address provided in the TRA Regulations 1998, within a specified statutory time frame. Failure to do so automatically ended the objection. However it was possible for a taxpayer to seek an extension of time to file their Points of Objective Notice from the TRA.

In each of these cases the taxpayers failed to serve timely Points of Objection Notices upon the Director, Litigation Management. They also failed to seek an extension of time for filing their Points of Objection Notice from the TRA. The Commissioner took as a preliminary point this failure and asked the TRA to dismiss the objections.

The taxpayer argued that there had been timely service as the calculation of time did not commence until the Commissioner provided the taxpayer with a Points of Objection Notice form; that the Commissioner has "declined" rather than "disallowed" their objections which had confused the tax agent; and that in one case the Commissioner had provided the wrong due date for the Points of Objection Notice. On the facts the Points of Objection Notice in that case was provided several weeks after either the correct or the incorrectly advised date. The taxpayers also sought an extension of time on the basis of exceptional circumstances.

Decision

Judge Barber found as follows:

1. The Points of Objection Notices had not been served in a timely manner as the time for serving a Points of Objection Notice ran from the date the taxpayer gave notice that it wanted a case stated and not from receipt of a Points of Objection form from the Commissioner [56]. The TRA Act and Regulations did not require the Points of Objective Notice to be supplied by the Commissioner to the taxpayer and "put the onus on the objector to complete a Points of Objective Notice and there is no requirement for the IRD to supply an objector with one".
2. There was no merit in an argument trying to distinguish "declined" from "disallowed': "If an objection is declined it is disallowed".
3. While the Commissioner provided an incorrect (and later) date for service, this made no difference as the Points of Objective Notice was supplied a few weeks after even the incorrect date.

His Honour reviewed the law addressing what constituted exceptional circumstances (at par [28]) and accepted that it was essential there be:

> [a] An event or circumstance which is unusual or out of the ordinary, but not so rare as to be categorised as extraordinary, which operates alone or together with other circumstances (unusual or not);
>
> [b] Which must be beyond the control of the taxpayer;
>
> [c] So as to provide the taxpayer with a reasonable justification for not commencing the objection or challenge within the required period;
>
> [d] An act or omission of an agent of the taxpayer is only exceptional circumstance if it was caused by an event or circumstance beyond the agent's control and could not have been anticipated and the effect of which could not have been avoided by compliance with accepted standards of business organisation and professional conduct.

The Court was concerned that the Commissioner's pre-printed blank Points of Objection Notice forms had an incorrect address for service upon the Director, Litigation Management. While accepting it is the legislation that must be complied with and not Inland Revenue's publications, the incorrect address on an Inland Revenue form may amount to an exceptional circumstance.

The Judge then gave the taxpayers leave to reconvene to provide evidence that the incorrect address on Inland Revenue's form led them into error and as such was an exceptional circumstance which would justify the TRA granting an extension of time.

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