

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.

IN SUMMARY

Interpretation guidelines

IG 11/01: Income tax; goods and services tax – determining employment status for tax purposes (employee or independent contractor)

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This interpretation guideline sets out Inland Revenue's position on how taxpayers are to determine their employment status for tax purposes. It analyses the terms "employee" in the Income Tax Act 2007 and "contract of service" in the Goods and Services Tax Act 1985, and discusses the common law tests the courts apply to determine whether a person is engaged under a contract of service (employee) or a contract for services (independent contractor).

New legislation

Student Loan Scheme Amendment Act 2012

26

Excluding losses from the calculation of net income for student loan repayment purposes

Extending pay-period assessments to the salaries and wages of all borrowers

Alternative contact person

Repayment holiday

Use of alternate contact details received via the repayment holiday application process and via StudyLink under section 16A

Other policy matters

Miscellaneous technical amendments

Legislation and determinations

Changes/clarifications to Determination DET 09/02: Standard-cost household service for childcare providers ("Educators")

37

Following feedback on DET 09/02, this notice provides advice on changes and clarifications to accepted practice and the change to depreciation on buildings (to 0%) that impact on the fixed standard-costs for ownerships costs of domestic dwellings.

CPI Adjustment 12/01 for Determination DET 09/02: Standard-cost household service for childcare providers

39

Inland Revenue advises that, for the 2012 income year variable standard-cost component and the administration and record-keeping fixed standard-cost components have been retrospectively adjusted.

Determination DET 05/03: Standard-cost household service for boarding service providers – change to fixed standard-cost formula to reflect the removal of depreciation on buildings

40

The fixed cost percentage of the purchase price of the property used to calculate the ownership costs is reduced from 5% to 4% to reflect the change for depreciation on buildings.

CPI Adjustment CPI 12/02 for Determination DET 05/03: Standard-cost household service for boarding service providers

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Inland Revenue advises that the weekly standard-cost component for the 2012 income year has been retrospectively adjusted.

Legislation and determinations (continued)

Special Determination S21: Spreading of acquisition cost of agreements for the sale and purchase of services

41

This determination relates to the spreading by a certain company of expenditure arising on the acquisition of certain agreements for the provision of property maintenance services.

National average market values of specified livestock determination 2012

43

This determination sets the national average market values to apply to specified livestock on hand at the end of the 2011-2012 income year.

Standard practice statements

SPS 12/01: Recording Inland Revenue Interviews

45

The SPS replaces an earlier version (SPS 10/01 issued in June 2010) and sets out Inland Revenue's standard practice for recording interviews using audio or video technology.

SPS 12/02: Late filing penalty

48

This SPS sets out the Commissioner's practice for imposing late filing penalties under sections 139A and 139AAA of the Tax Administration Act 1994.

Legal decisions – case notes

Court's earlier decision confirmed

52

The appellant sought review of a decision of an Associate Judge, wherein that Associate Judge made an order striking out the appellant's pleading and dismissed the proceeding before him. The appellant's case was that the respondent made a statement in a letter to the appellant that equates to a "disputable decision" for the purposes of the Tax Administration Act 1994 and he sought to challenge that decision accordingly.

Receivers obliged to pay GST on mortgagee sales

53

This case was an appeal from the High Court which had found the receivers were personally liable for goods and services tax ("GST") payable by Capital & Merchants Investments Ltd (in receivership) ("CMI") in relation to five mortgagee sales. The Court of Appeal held that the receivers do not have "personal liability" for the payment to the Commissioner of Inland Revenue of GST payable by CMI but are obliged as receivers of CMI to pay GST to the Commissioner.

Judicial review – not an extremely rare case

55

The High Court confirmed that the Supreme Court decision in *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158 has made it clear that section 109 of the Tax Administration Act 1994 is a complete bar to judicial review proceedings seeking to overturn the Commissioner's assessments unless the claim can come within the category of rare cases where it is not practically possible for a taxpayer to attack an assessment under the disputes and challenge procedures. The Supreme Court had observed that this would be extremely rare.

Items of interest

Tax Information Bulletin reader survey

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The February issue of the *Tax Information Bulletin* (TIB) included a reader survey to help us gauge how well the TIB meets your needs. This article responds to some of your comments and gives a summary of some of the feedback.

INTERPRETATION GUIDELINES

This section of the *TIB* contains interpretation guidelines issued by the Commissioner of Inland Revenue.

Interpretation guidelines discuss the Commissioner's approach to the interpretation of a general area of law where there are also taxation implications. They are intended to clarify general points of interpretation that are causing, or may cause, difficulty for practitioners, taxpayers, and Inland Revenue. An interpretation guideline is Inland Revenue's opinion as to the better view of the law. That view is developed from an appreciation and assessment of the law on a particular topic, as gathered from leading cases.

IG 11/01: INCOME TAX; GOODS AND SERVICES TAX – DETERMINING EMPLOYMENT STATUS FOR TAX PURPOSES (EMPLOYEE OR INDEPENDENT CONTRACTOR)

Relevant legislative provisions are reproduced in the Appendix to this guideline.

Summary

1. This interpretation guideline will help taxpayers to determine their employment status for tax purposes.
2. The guideline updates the 1999 interpretation guideline "Employee or independent contractor?", *Tax Information Bulletin* Vol 11, No 2 (February 1999). The 1999 interpretation guideline outlined the tests for determining whether a person is an employee or independent contractor. This interpretation guideline does not signal a change of approach.
3. The tax obligations of a taxpayer with respect to amounts earned from work done by the taxpayer depend on his or her employment status (ie, whether the taxpayer is an employee or an independent contractor).
4. The Income Tax Act 2007 defines the term "employee". Parts of this definition require it to be determined that the taxpayer is employed under a contract of service. Under the Goods and Services Tax Act 1985, supplies of goods and services under a "contract of service" are not taxable. These provisions do not specify how it is to be determined whether there is a contract of service in any particular case. Therefore, it is necessary to rely on the common law to determine whether there is a contract of service.
5. The common law distinguishes between contracts **of** service and contracts **for** services. A contract of service means there is an employer–employee relationship; a contract for services means there is a principal–independent contractor relationship. At common law, the courts have developed various tests to determine whether there is a contract of service or a contract for services. The case law shows that the main tests are the intention, control, independence, fundamental and integration tests. These tests can be summarised as follows:
 - Intention test – looks at the intentions of each party to the agreement as to the nature of the relationship.
 - Control test – examines the degree of control the person engaged to perform the services exerts over the manner in which the work is done. A high level of control supports the conclusion that the person engaged to perform the services is an employee.
 - Independence test – examines the level of independence the person engaged to perform the services exerts over their work. A high level of independence supports the conclusion that the person engaged to perform the services is an independent contractor.
 - Fundamental test – considers whether the person engaged to perform the services is doing so as a person in business on his or her own account. If the answer is "yes", then this supports the conclusion that the person is an independent contractor; if the answer is "no" this supports the conclusion that the person is an employee.
 - Integration test – looks at whether the person engaged to perform the services is integrated into the business that hired him or her. If the person is integrated into the business, this supports the conclusion that he or she is an employee. By contrast, if the person is not integrated into the business, but rather an accessory to it, this supports the conclusion that he or she is an independent contractor.
6. This interpretation guideline considers decisions on employment status that were delivered after the 1999

guideline was published, most notably the Supreme Court decision in *Bryson v Three Foot Six Ltd*. In *Bryson* the Supreme Court considered whether a person was an “employee” under the Employment Relations Act 2000. The decision is still relevant because the Supreme Court considered the common law tests. *Bryson* is consistent with the Court of Appeal’s decision in *TNT Worldwide Express Ltd v Cunningham*. The 1999 guideline identified *TNT* as the leading New Zealand authority on determining employment status. However, in *Bryson* the Supreme Court held that industry practice is a factor that may be considered in the context of the intention test, because it may assist in determining the parties’ intention as to the nature of their relationship. The relevance of industry practice was not considered in *TNT*.

ANALYSIS

7. This interpretation guideline is divided into the following parts:

- **Types of employment relationship:** discusses the difference between “contracts of service” (which employees have) and “contracts for services” (which independent contractors have).
- **Employment status and tax law:** outlines the significance to taxpayers of their employment status. It also explains how the common law on determining employment status can be relevant when determining taxpayers’ employment status under the Goods and Services Tax Act 1985 and the Income Tax Act 2007.
- **Relevance of Employment Relations Act 2000 case law:** considers s 6 of the Employment Relations Act 2000. Section 6 defines the term “employee” for the purposes of that Act. This part concludes that s 6 decisions are relevant when determining employment status for tax purposes to the extent that those decisions concern the common law on the employee/independent contractor distinction.
- **Common law on determining employment status – leading New Zealand authorities:** discusses the leading New Zealand authorities on determining employment status – *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 (SCNZ) and *TNT Worldwide Express Ltd v Cunningham* [1993] 3 NZLR 681 (CA).
- **Common law tests of employment relationships:** summarises the main tests for deciding employment status – the intention of the parties, control, independence, fundamental and integration tests.

- **Recent cases:** summarises three recent cases so as to illustrate how the courts have applied the common law tests; and lists other decisions on employment status from the Employment Court, Employment Relations Authority and Taxation Review Authority since *Bryson*.

Types of employment relationship

8. Legal rights and obligations can depend on the employment relationship between two persons. The law distinguishes between two types of employment relationship: employer–employee and principal–independent contractor. Which type of employment relationship exists in any particular case depends on whether there is a “contract of service” or a “contract for services” between the persons concerned. In *New Zealand Educational Institute v Director-General of Education* [1981] 1 NZLR 538, the Court of Appeal stated (at 539):

On many occasions over the years the Courts have had to decide whether the relationship between two persons was that of employer and employee or, as it used to be called, master and servant. The inquiry normally involved the distinction between a contract of service in which the relation was that of employer and employee and a contract for services in which the relation was that between employer and independent contractor. A decision in any particular case required an examination of the contract between the two – it might be expressed in words or it might be implicit from the circumstances.

9. Employees have a “contract of service” with their employer. Contracts of service evolved from the earlier concept of a master–servant relationship. Such a relationship required an employee to be continuously available for service and to accept a high degree of control by the employer. A “contract for services” applies to the relationship between an independent contractor and a principal. It emphasises the nature of the services to be provided by a person rather than his or her availability to work as directed.
10. At common law, the courts have developed several tests to determine whether there is a contract of service or a contract for services. The case law shows that the main tests are the intention, control, independence, fundamental and integration tests. These tests are discussed in paragraphs 46–73 below.

Employment status and tax law

Consequences of employment status for tax purposes

11. The tax obligations of a taxpayer with respect to payments received for work done by the taxpayer depend on his or her employment status (ie, whether the taxpayer is an employee or an independent

contractor). Employment status has the following consequences for tax purposes:

- Payments to employees from their employer must have PAYE deducted at source.
- Employees cannot register for GST or charge GST for services they supply as employees.
- Independent contractors may deduct certain expenses incurred in deriving assessable income.
- Independent contractors must account to Inland Revenue for tax and accident compensation earner and employee premiums for themselves and any employees.
- Independent contractors must meet all the requirements of the Goods and Services Tax Act 1985 if the services they supply are in the course of a taxable activity and they are registered (or liable to register) for GST.

12. Taxpayers cannot change their employment status (or the resulting tax implications of that status) merely by calling themselves independent contractors when they are essentially still employees.

Relevance of common law tests under tax law

13. Both the Income Tax Act 2007 and the Goods and Services Tax Act 1985 distinguish between payments made under contracts of service and payments made under contracts for services. They do not however specify how it is to be determined whether there is a contract of service or a contract for services in any particular case. It is therefore necessary to rely on the common law tests for determining employment status.

Income Tax Act 2007

14. The Income Tax Act 2007 ("ITA") defines the term "employee" in s YA 1 as follows:

employee—

- (a) means a person who receives or is entitled to receive a PAYE income payment:
- (b) in sections CW 17, CW 17B, CW 17C, and CW 18 (which relate to expenditure, reimbursement, and allowances of employees) includes a person to whom section RD 3(2) to (4) (PAYE income payments) applies:
- (c) in the FBT rules, and in the definition of shareholder-employee (paragraph (b)), does not include a person if the only PAYE income payment received or receivable is—
 - (i) a payment referred to in section RD 5(1)(b)(iii), (3), (6)(b) and (c) and (7) (Salary or wages):
 - (ii) a schedular payment referred to in schedule 4, parts A and I (Rates of tax for schedular

payments) for which the person is liable for income tax under section BB 1 (Imposition of income tax):

- (d) is defined in section DC 15 (Some definitions) for the purposes of sections DC 12 to DC 14 (which relate to share purchase schemes):
- (db) does not include an owner of a look-through company or a person who has a look-through interest for a look-through company, unless the owner or person is a working owner:
- (e) for an employer, means an employee of the employer

Paragraph (a) defines "employee" for the purposes of the PAYE rules. It uses the term "PAYE income payment", which is defined in s RD 3(1) as follows:

- (1) The PAYE rules apply to a PAYE income payment which—
 - (a) means—
 - (i) a payment of salary or wages, see section RD 5; or
 - (ii) extra pay, see section RD 7; or
 - (iii) a schedular payment, see section RD 8:

15. Parts of the s YA 1 definition of "employee" require it to be determined that the taxpayer to whom the payment was made was employed under a contract of service. These parts are:

- "salary or wages" (s RD 5(1)(a)):

- (1) Salary or wages—
 - (a) means a payment of salary, wages, or allowances made to a person in connection with their employment

- "an extra pay" (s RD 7(1)(a)(i)):

- (1) An extra pay—
 - (a) means a payment that—
 - (i) is made to a person in connection with their employment

- "employee" (s DC 15):

employee—

- (a) means a person employed by a company

(This definition of "employee" is for the purposes of ss DC 12 to DC 14, which concern share purchase schemes between employers and employees.)

16. That the above provisions apply where there is a contract of service is shown by the use of the words "employment" and "employed". This interpretation is supported by *Challenge Realty Ltd v CIR* (1990) 12 NZTC 7,212. In this decision, the Court of Appeal considered the definition of "salary or wages" in s 2 of the Income Tax Act 1976. This definition provided:

‘Salary or wages’, in relation to any person, means salary, wages, or allowances (whether in cash or otherwise), including all sums received or receivable by way of overtime pay, bonus, gratuity, extra salary, commission, or remuneration of any kind, in respect of or in relation to the employment of that person ...

Delivering the judgment of the Court, Bisson J stated (at 7,224):

In the context of sec 2, the word “employment”, in our view, relates to a contract of service ... It is that word which governs the definition: the definition being intended to include all forms of remuneration received under a contract of employment ...

Consequently, the definition of “salary or wages” did not include amounts received as remuneration under a contract for services.

17. The ITA does not specify how it is to be determined whether the taxpayer concerned is employed under a contract of service. It is therefore necessary to rely on the common law on determining employment status. As a general principle of statutory interpretation, where legislation makes use of terms with established meanings at common law, it is presumed that Parliament intended those terms to be given their common law meanings (subject to any contrary legislative intention): *Bank of England v Vagliano Bros* [1891] AC 107; *R v Kerr* [1988] 1 NZLR 270 (CA). As mentioned earlier, the common law distinguishes between contracts of service and contracts for services, and the courts have developed tests to establish whether there is a contract of service or a contract for services.
18. However, it is important to highlight that other parts of the definition of “employee” in the ITA **do not** rely on the common law. The ITA identifies particular classes of persons and payments that are included or excluded from the term “employee”. For example:
 - Section RD 3(1)(b) provides that the term “PAYE income payment” does not include:
 - (i) an amount attributed under section GB 29 (Attribution rule: calculation);
 - (ii) an amount paid to a shareholder-employee in the circumstances set out in subsection (2);
 - (iii) an amount paid or benefit provided, by a person (the claimant) who receives a personal service rehabilitation payment from which an amount of tax has been withheld at the rate specified in schedule 4, part I (Rates of tax for schedular payments) or under section RD 18 (Schedular payments without notification), to another person for providing a key aspect of social rehabilitation referred to in paragraph (c) of the definition of personal service rehabilitation payment in section YA 1 (Definitions).

- Section YA 1 defines the term “employment” (for the purposes of the definition “salary or wages” (s RD 5) and “an extra pay” (s RD 7)) to include:

the activities performed by a member of Parliament or a judicial officer that gives rise to an entitlement to receive a PAYE income payment for the activities.

Similarly, s RD 5(5) provides that the term “salary or wages” includes salary and allowances made to the Governor-General, members of Parliament and judicial officers.

- Section DC 15 excludes from the definition of “employee” for the purposes of ss DC 12 to DC 14:
 - (i) a director of the company; or
 - (ii) a person who, with any associated person, holds 10% or more of the issued capital of the company; or
 - (iii) a company, a local authority, a public authority, or an unincorporated body of persons ...

19. It is noted that the term “PAYE income payment” includes “a schedular payment” as defined in s RD 8 and schedule 4 of the ITA. Schedule 4 sets out payments to a wide variety of workers including, for example, insurance agents and shearers. A worker who receives “a schedular payment” will typically be an independent contractor at common law. If an independent contractor receives “a schedular payment”, then tax must be deducted at source. However, the other consequences of being an independent contractor set out in paragraph 11 remain.

Goods and Services Tax Act 1985

20. Under the Goods and Services Tax Act 1985 (“GSTA”), employees are not liable for GST on supplies of goods and services they make to their employers. This is the result of s 6(3)(b) excluding from the definition of “taxable activity” supplies made by a person pursuant to “any engagement, occupation, or employment under any **contract of service** or as a director of a company” [emphasis added]. The GSTA does not specify how it is to be determined whether there is a “contract of service”. For the reason explained in paragraph 17 above, it is therefore necessary to rely on the common law tests for determining whether there is a contract of service or contract for services.

Relevance of Employment Relations Act 2000 case law

21. The common law tests for determining whether there is a contract of service or a contract for services have been developed by the courts over numerous decisions. In a few of these decisions the

courts were determining employment status for tax purposes. However, in most decisions the courts were determining employment status under the employment legislation. The employment legislation currently in force is the Employment Relations Act 2000 (“ERA”). Section 6(1), (2) and (3) of the ERA defines the term “employee” as follows:

- (1) In this Act, unless the context otherwise requires, *employee*—
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes—
 - (i) a homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who—
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer; and
 - (d) excludes, in relation to a film production, any of the following persons:
 - (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer;
 - (ii) a person engaged in film production work in any other capacity.
- (1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.
- (2) In deciding for the purposes of subsection (1) (a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
 - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

22. As made clear by the words “[i]n this Act” in s 6(1)(a), s 6 defines “employee” for the purposes of only the ERA. Consequently the definition does not affect the interpretation of the term “employee” in the ITA or “contract of service” in the GSTA. However, s 6 case

law can be relevant when determining employment status for tax purposes. In *Bryson v Three Foot Six Ltd* the Supreme Court held (at [32]–[33]) that the definition of “employee” in s 6(1)(a)—“any person of any age employed by an employer to do any work for hire or reward under a contract of service”—reflected the common law. It also held that the common law tests for determining employment status were relevant when determining the “real nature of the relationship” between the parties under s 6(2) and (3). Therefore, s 6 decisions can be relevant when determining employment status for tax purposes to the extent that those decision concern the common law tests.

Common law on determining employment status – leading New Zealand authorities

23. This part of the guideline discusses the leading New Zealand authorities on determining employment status. These authorities are the Supreme Court decision in *Bryson v Three Foot Six Ltd* and the Court of Appeal decision in *TNT Worldwide Express Ltd v Cunningham*.

Bryson v Three Foot Six Ltd

Facts and decision

24. In *Bryson v Three Foot Six Ltd* the Supreme Court considered whether a person was an “employee” under s 6 of the ERA.
25. In this decision, the appellant, Mr Bryson, was a model maker for Weta Workshop. Weta Workshop had a close working relationship with Three Foot Six Ltd, which was the company that administered the production of *The Lord of the Rings*. Mr Bryson was seconded from Weta Workshop to Three Foot Six Ltd and soon took a permanent position there. Mr Bryson was not given a written employment contract when he started, but some months later Three Foot Six Ltd supplied a written contract to all staff (the “crew deal memo”). The crew deal memo set out the conditions of employment and, in particular, it referred throughout to “contractor” and “independent contractor”. Mr Bryson was required to sign the crew deal memo every week to secure payment for work done. A year later Mr Bryson was made redundant and he alleged unjustifiable dismissal. He could bring an unjustified dismissal claim only if he were found to have been an employee.
26. At first instance, the Employment Relations Authority held that Mr Bryson was not an “employee” under the ERA. On appeal, Judge Shaw in the Employment Court reversed this decision: *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581. Her Honour held that Mr Bryson was an “employee” despite references to “independent

contractor” in the crew deal memo. A majority of the Court of Appeal overturned the Employment Court’s decision: *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526. However, the Supreme Court reversed the Court of Appeal’s decision and upheld that Employment Court’s decision: *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

27. The Supreme Court (at [5]) quoted Judge Shaw from the Employment Court as follows:

Judge Shaw said that s 6 changed the tests for determining what constituted a contract of service. She summarised the principles she considered to have been established by Employment Court cases on that section [*Koia v Carlyon Holdings Ltd* [2001] ERNZ 585 and *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114 at [19]] as follows:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

28. The Supreme Court said (at [32]) that Judge Shaw had accurately stated what s 6 requires the courts to do, and had listed the relevant matters to be considered under it. The Supreme Court said that “all relevant matters” certainly include the written and oral terms of the contract between the parties and that the terms will usually contain indications of the parties’ common intention concerning the status of their relationship. The Supreme Court said it was clear from Judge Shaw’s judgment that “she was very much alive to the need to begin by looking at the written terms and conditions which had been agreed to by Mr Bryson and Three Foot Six Ltd”.

29. The Supreme Court made it clear that the common law tests for determining employment status were relevant under s 6 when it stated (at [32]) that “[a]ll relevant matters’ equally clearly requires the Court or Authority to have regard to features of control and integration and to ... the fundamental test”. It also said

(at [33]) that Judge Shaw was correct in saying that the real nature of the relationship could be ascertained by analysing the tests that historically have been applied, such as the control, integration and fundamental tests. The Supreme Court said that Judge Shaw:

obviously was not suggesting that these three customary indicia were to be applied exclusively. She correctly used them, in conjunction with the other relevant matters to which she referred, in an endeavour to determine the real nature of the relationship, as directed by s 6(2).

30. In the Employment Court, Judge Shaw had concluded that the fact Mr Bryson required six weeks training for the position with Three Foot Six Ltd indicated that he could not be said to have been contracting his skills because he did not have the relevant experience. The company closely controlled the work Mr Bryson did, including requirements about attendance at meetings and specific work hours, which included time when his services were not required. If he had been an independent contractor he would not have been paid for the down time and would have been free to get on with his own private business. Judge Shaw emphasised that her decision was based solely on the individual circumstances of Mr Bryson’s employment and was not to be regarded as affecting the status of any other employee in the film industry.

Industry practice

31. The concept of industry practice was given prominence in *Bryson* because the outcome was thought to be critical to the New Zealand film industry. In *Bryson* Three Foot Six Ltd submitted (at [36]) that Mr Bryson was an independent contractor “because that was the invariable practice at Three Foot Six [and] across the film industry”. Judge Shaw in the Employment Court recognised that industry practice was relevant under s 6, but not determinative (at [19]):

Another matter which may assist in the determination of the issue [of the “real nature of the relationship”] is industry practice although this is far from determinative of the primary question.

32. Judge Shaw held (at [21]) that industry practice was also relevant under the common law. In support of this, her Honour cited *Muollo v Rotaru* [1995] 2 ERNZ 414, which she held (at [22]) was authority for the proposition that:

... the Court may consider industry practice when assessing the nature of an employment contract especially where a custom or practice is sufficiently well established. In such a case, the Chief Judge held that such practice could go to establishing the intention of the parties.

33. However, on the facts of the case, Judge Shaw held (at [36]) that the industry practice was of little use in establishing the intention of both parties. Later in the judgment (at [57]–[76]), her Honour reviewed the evidence given by expert witnesses as to industry practice and stated (at [68]):

It is clear from the evidence that the defendant and the film and television industry in general has a real and genuine concern that any changes to the present employment arrangements which have been in place for many years will cause significant disruptions in the film industry with potentially adverse outcomes both in economic terms and in terms of attracting overseas film companies to bring the productions to New Zealand. Mr Binnie submitted that a decision in Mr Bryson's favour [ie, that he was an employee] would "automatically 'unwind'" every existing crew deal memo and any future crew contracts for movie productions.

Judge Shaw held that this evidence did not support finding that Mr Bryson was an employee. Her Honour stated that "[w]hilst these concerns are acknowledged ... in the context of this case, they are overstated". Her Honour therefore gave little weight to industry practice on the facts.

34. The majority of the Court of Appeal held that the Employment Court had not given sufficient weight to the evidence of industry practice. It held that industry practice compelled the conclusion that Mr Bryson was not an employee (at [111], [113] and [117]). The Supreme Court disagreed. It held that the Employment Court had not erred in its treatment of industry practice (at [35]):

The question for this Court is whether the Court of Appeal majority was correct in holding that what the Judge said in relation to industry practice amounted to legal error. We do not believe that it was. She did not overlook or ignore the evidence of industry practice. In rejecting a submission from counsel for Mr Bryson, she in fact said that it could not be completely disregarded, referring with evident approval to a case under the Employment Contracts Act where the Chief Judge had held that industry practice could go to establish the intention of the parties. In the case before her, however, the Judge found that industry practice was not helpful in relation to establishing the common intention of Mr Bryson and Three Foot Six for the reasons given by her and mentioned in para [9] above. Later in her judgment she summarised the evidence on industry practice. It was, as she said, given in general terms. She found that it did not apply to Mr Bryson's situation. He had not been working on projects for several producers. He had not operated like a sole trader.

Summary

35. In summary, the following points can be taken from the Supreme Court's decision in *Bryson*.
36. When determining whether a person is an "employee" as defined in s 6 of the ERA, the common law tests for determining employment status are still relevant. Consequently, s 6 case law is relevant when determining employment status for tax purposes to the extent that it considers and applies the common law tests.
37. Consistent with the common law, s 6 requires the court not to treat as determinative any statement by the parties that describes the nature of their relationship.
38. Also consistent with the common law, s 6 requires the court to consider:
- Matters indicating the intention of the parties, in particular the terms of the contract agreed to (whether in writing or orally) by the parties, and industry practice.
 - Any divergences from, or supplementations of, those terms and conditions that are apparent in the way in which the relationship has operated in practice.
 - Features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

[Following the Supreme Court's decision, Parliament amended s 6 of the ERA to insert provisions concerning film workers. Section 6 (1)(d) excludes from the definition of "employee" persons involved in "film production work". The term "film production work" is defined in s 6(7). However, s 6(2) provides that this exclusion "does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee." As already discussed, s 6 of ERA defines the term "employee" only for the purposes of the ERA.]

TNT Worldwide Express Ltd v Cunningham

39. The other leading New Zealand authority on employment status is the Court of Appeal decision in *TNT Worldwide Express Ltd v Cunningham*. In this decision, the Court of Appeal discussed in detail the intention, control and fundamental tests developed at common law. The Supreme Court in *Bryson* cited *TNT* with approval.
40. In *TNT*, the appellant company, TNT, engaged the respondent as an owner–driver to conduct a courier service for the company. The owner–driver:
- provided his own vehicle and was responsible for the vehicle's maintenance and upkeep;

- was responsible for his own tax and accident compensation payments;
 - claimed deductions as if he were self-employed; and
 - had a contract with TNT that said he was an independent contractor.
41. The company terminated the respondent's contract, and the respondent sought to invoke the personal grievance procedure under the Employment Contracts Act 1991.
42. The Employment Court held that an owner–driver courier for TNT was an employee and not self-employed. In reaching that conclusion, the Court placed considerable emphasis on the rigorous control the company exercised over its owner–drivers. The Employment Court found the company's actions showed that it treated the owner–driver as its employee.
43. On appeal, the Court of Appeal held that the written contract entered into by the parties created a genuine independent contractor relationship. It accepted that an owner–driver courier was an independent contractor rather than an employee where the owner–driver's contract with TNT:
- required the owner–driver to provide his own vehicle, uniform, approved radio telephone, goods service licence under the Transport Act 1962, and insurance;
 - paid the owner–driver mainly on a per trip basis;
 - made the owner–driver responsible for employing any relief driver;
 - referred to the owner–driver as an independent contractor; and
 - gave TNT very extensive control over the owner–driver's operations.
44. The Court of Appeal acknowledged the extensive control TNT exercised over the owner–driver, but concluded that the owner–driver accepted only that degree of control and supervision necessary for the efficient and profitable conduct of the business he was running on his own account as an independent contractor. Casey J cited (at 697) the following statement of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, 447:
- A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.
45. The Court of Appeal said that when the contract is wholly in writing and it is not a sham, then the nature of the relationship intended by the parties is determined from the terms of that contract in the light of all the surrounding circumstances at the time the contract was made. Cooke P noted (at 683) that "it is necessary to consider all the terms of the agreement", and made the following observations (at 686 and 687):
- When the terms of a contract are fully set out in writing which is not a sham (and there is no suggestion of a sham in this case) the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined.
- ...
- In the end, when the contract is wholly in writing, it is the true interpretation and effect of the written terms on which the case must turn.
- Common law tests of employment relationship**
46. In considering how the distinction between contracts for services and contracts of service is to be made, the Court of Appeal in *TNT* noted (at 697) the following observation of the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 382 (PC):
- What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases.
47. The Privy Council in *Lee Ting Sang* quoted with approval from the judgment of Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184–185, where it was said that:
- No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining the question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.
48. Although there is no exhaustive list of considerations, the tests discussed below (established by the case law) provide useful guidance as to the factors that are to be considered in determining whether someone is engaged as an employee or contractor. These are relevant tests to be considered, but, as the cases demonstrate, they may not all be relevant to any one particular enquiry.
49. It is important in each case to determine employment status by balancing all the circumstances of the relationship between the parties. Often there will be competing factors that support differing conclusions as to whether someone is an employee or an

independent contractor. Applying the tests described below to the facts of a case requires an objective weighing of the various relevant factors to determine the true nature of the relationship.

50. Often the terms of the relationship between two persons will be recorded in a written agreement; though this is not necessarily the case. If there is a written agreement, the first step is to analyse its terms and conditions. However, it is important to note that the nature of the relationship may change over time (eg, a person takes on more duties), and this may not be reflected in the written agreement. Changes in regulations and work practices may also cause the employment status of some workers to change. Or, it could simply be that the written agreement does not accurately reflect how the relationship works in practice. It is necessary to consider how the parties actually work together when determining the type of employment relationship between them. As the Supreme Court in *Bryson* stated (at [32]):

It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests. Hence the importance, stressed in *TNT*, of analysing the contractual rights and obligations.

51. In *Bryson* and *TNT* the main common law tests for determining employment status—the intention, control, fundamental and integration tests—were discussed. In the following paragraphs, these tests (along with the independence test) are examined in greater detail.
52. It is important to keep in mind that the application of the common law tests is a weighing up process. Sometimes the facts of a particular case may suggest different characterisations of the relationship, and there may be either overlap or tensions between the tests.
53. Also, as the characterisation of the relationship is dependent on the particular facts at hand, it is crucial that the facts are well understood, including any changes to the relationship that have occurred over time.

Intention of the parties test

54. The intention of the parties test looks at the intentions of each party to the agreement regarding the nature of the relationship. The description given to a relationship by the parties to the contract is a strong, but not conclusive indication of the type of relationship that exists. The fact a written contract

states that a person is an employee or an independent contractor may indicate the intention of the parties, but it is not determinative: *Bryson*, at [32] (SCNZ). Holland J in the High Court in *Challenge Realty Ltd v CIR* [1990] 12 NZTC 7,012, at 7,032 said:

Obviously the Court's function in interpreting a contract is to determine the intentions of the parties. When, however, the question for determination is the legal relationship between the parties created by the contract, the expressed intention of the parties will not be determinative of the question. It is nevertheless an important factor, and if after considering all factors the exact state of the relationship is a matter of some ambiguity, may be decisive. In the present cases before me Harcourts is the only one with a written agreement. Nevertheless I would conclude that in all cases it was the intention of the parties to create an agency relationship rather than an employer/employee relationship. The question remains as to whether that result has been achieved.

55. If the actual circumstances point to an employment relationship, then simply labelling it an independent contract relationship will not alter the true position.
56. In *TNT*, a clause in the written contract that purported to override all other aspects of the agreement stated that the courier was an independent contractor. The Employment Court found that the actual conduct of the relationship showed that TNT imposed a high level of control and supervision of its staff that was inconsistent with any independence or initiative on the part of its staff. However, the Court of Appeal in reversing this decision concluded, after weighing all the circumstances, that the TNT standard form contract created a genuine independent contractor relationship.
57. The taxation arrangements between the parties may be relevant when establishing their intentions. In *Bryson* the Employment Court stated (at [55]) that “tax status can be an indicator of what a person intends his contractual relationship to be”. For example, if the person engaged to perform the services is paid at a set-rate at regular intervals and PAYE is deducted, this may support the view that the parties intended a contract of service. However, in some cases, taxation arrangements between the parties may not be given much weight. In *Bryson*, Mr Bryson completed IR 3 forms, which referred to the taxpayer as being self-employed in business or trade, and had claimed deductions for work related expenses. The Employment Court stated (at [55]) that this was not conclusive evidence that Mr Bryson was an independent contractor, because he had not

registered for GST, and payslips received from Three Foot Six Ltd referred to PAYE deductions having being made. In these circumstances, it could not be said that Mr Bryson had acquiesced to independent contractor status.

58. In some circumstances industry practice may be relevant when determining the intention of the parties. As already discussed, in *Bryson* the Supreme Court agreed with the Employment Court's statement that industry practice could be relevant when considering the parties' intention, but that it was not determinative.
59. In *Bryson* Three Foot Six Ltd submitted that Mr Bryson should be regarded as an independent contractor, because the invariable industry practice was that production workers were hired as independent contractors. Expert witnesses explained that the reason for this practice was the project-based, intermittent nature of screen productions and that production workers normally worked with several different producers during the course of the year. The Employment Court held that the evidence of industry practice was of little use on the facts of this case, because it was "necessarily general" and not consistent with the particular circumstances of Mr Bryson's case. Mr Bryson worked continuously for Three Foot Six Ltd alone and, unlike other workers in the industry, did not own any plant or equipment and did not operate as a sole trader (at [59]–[60]). Mr Bryson's working conditions were therefore not typical of the industry.
60. By contrast, in *Muollo v Rotaru* industry practice was given considerable weight. In *Bryson* the Employment Court cited *Muollo* as authority for the proposition that industry practice was relevant at common law when considering the parties' intention as to their employment relationship. In *Muollo* the Employment Court considered whether Mr Rotaru, who worked as a crew member aboard a fishing vessel, was an employee for the purposes of the Employment Contracts Act 1991 (repealed). There was no written employment agreement. The Employment Court concluded that Mr Rotaru was an independent contractor, and considered this conclusion was supported by the "custom and usage in the commercial fishing industry". It stated that the evidence of industry practice (at 425–426, footnotes omitted):

... presents a picture of an industry in which the co-operative venture is not only prevalent and a typical mode of conducting business but a commercial norm. All parties under such arrangements share in the proceeds. The commercial reasons for it

suggested by Mr Gartrell were five in number, as follows:

- "1. It conduces to business viability;
- "2. ensures proper work attitudes;
- "3. takes cognisance of the fact that work is intermittent, and its duration uncertain;
- "4. acknowledges the seasonal nature of the work; and
- "5. means that there is not a pool of people waiting round in off-times with no work but still having to be paid."

Mr Gartrell urged upon me the good sense of the industry's considerations moving it to adopt this custom, mentioning the sporadic nature of the enterprise and the use of a percentage basis of determining the rewards and sharing productivity and risk. Along much the same lines Mr Gartrell stressed a total of six factors that were particularly important to both appellants:

- "1. work was intermittent;
- "2. duration of work was uncertain;
- "3. no liability for sick and holiday pay;
- "4. the business did not want the liability of an employee when work was not available;
- "5. proper work attitudes;
- "6. business/work cohesion."

61. An expert witness also stated (at 426) that he was not aware of any fishing vessels where a crew member was on a wage or salary. In the expert's opinion, the normal arrangement was for crew members to be paid according to their share of the catch; for withholding tax to be deducted at source; and for crew members to pay their own ACC levies. The Employment Court stated (at 426) that this evidence was consistent with the circumstances in which Mr Rotaru provided his services. It concluded (at 428) that the evidence of industry practice showed that the parties' intention was to enter into a contract for services.
62. In summary, industry practice may be relevant when establishing the parties' intention, especially where the custom or practice is sufficiently well established. Industry practice is not determinative, and it may be given less weight where it is inconsistent with the facts of the particular relationship considered.

Control test

63. The control test looks at the degree of control the employer or principal exerts over the work an employee or contractor is to do and the manner in which it is to be done. The greater the extent to which the principal or employer specifies work content, hours and methods and can supervise and regulate a person, the more likely it is the person is an employee.

64. The control test used to be considered the deciding test, but this is no longer the case. The Court of Appeal in *TNT* emphasised that control is only one of several factors relevant to the interpretation of the contract. The Court endorsed the statement of Cooke J in *Market Investigations Ltd* (at 185) that while control will always have to be considered, it can no longer be regarded as the sole factor in determining the relationship between the parties. The Court of Appeal in *TNT* considered the Employment Court had given this factor too much weight.

Independence test

65. The independence test was not mentioned in *Bryson* or *TNT*, but has been discussed in several Taxation Review Authority cases that determined employment status: *Case U9* (1999) 19 NZTC 9,077; *Case X17* (2006) 22 NZTC 12,224; and *Case Z10* (2009) 24 NZTC 14,113. The independence test is simply the inverse of the control test. A high level of independence on the part of an employee or a contractor is inconsistent with a high level of control by an employer or a principal.
66. A person generally has a high level of independence if they:
- work for multiple people or clients (but the fact the person works for only one person or client does not necessarily mean the person is an employee);
 - work from their own premises;
 - supply their own (specialised) tools or equipment;
 - have direct responsibility for the profits and risks of the business;
 - hire or fire whomever they wish to help them do the job;
 - advertise and invoice for the work;
 - supply the equipment, premises and materials used;
 - pay or account for taxes and government and professional levies.
67. On the other hand, when some independent contractors perform work for a principal, they may agree not to work for a competitor or give away trade secrets. This alone will not make the worker an employee (it actually emphasises that the worker is usually entitled to work for others).

Fundamental test

68. In the Employment Court decision in *Bryson*, Judge Shaw applied *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, in which Cooke J said that the fundamental test for distinguishing an employee and an independent contractor was as follows (at 184–185):

Is the person who has engaged himself to perform these services performing them as a person in business on his own account? If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. ... factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

69. The Privy Council approved the fundamental test in *Lee Ting Sang*. This Privy Council decision was subsequently cited by four of the five judges in the Court of Appeal in *TNT*.
70. The fundamental test is also sometimes described as the "business test" or the "economic reality test". In *Challenge*, the Court of Appeal stated (at 65):
- If it is helpful to look for a test or application in this case, apart from that of control, which is a key feature of the Act, we favour that suggested by Adrian Merritt, Lecturer in Industrial Law, University of New South Wales in his article "*Control v Economic Reality: Defining the Contract of Employment*" in (1982) 10 Australian Business Law Review 105 at p 118:
- The issue that must be settled in today's cases is whether the worker is genuinely in business on his own account or whether he is "part and parcel of" – or "integrated into" – the enterprise of the person or organisation for whom work is performed. The test is, therefore, one of "economic reality".
71. The fundamental test looks at factors such as:
- whether the type of business or the nature of the job justifies or requires using an independent contractor;
 - the behaviour of the parties before and after entering into the contract;
 - whether there is a time limit for completing a specific project;
 - whether the worker can be dismissed;
 - who is responsible for correcting sub-standard work;
 - who is legally liable if the job goes wrong.
72. Usually, an independent contractor agrees to be responsible for their work. An independent contractor cannot usually be "dismissed", although the contract can be terminated if it is broken.

Integration test

73. In *Enterprise Cars Ltd v CIR* (1988) 10 NZTC 5,126, Sinclair J said that the integration test is really whether

the person is part and parcel of the organisation and not whether the work is necessary for the running of the business.

74. According to the integration test, a job is likely to be done by an employee if it is:
- integral to the business organisation;
 - the type of work commonly done by “employees”;
 - continuous (not a “one-off” or accessory operation);
 - for the benefit of the business rather than for the benefit of the worker.
75. In *Bryson* Judge Shaw in the Employment Court quoted Lord Denning’s “classic description of this test” from his judgment in *Stevenson Jordan & Harrison Ltd v MacDonalds* [1952] TLR 101, 111 (CA):

Under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

Recent cases

Three case summaries

76. This part of the guideline discusses three cases heard in the Employment Court since the Supreme Court’s decision in *Bryson*:
- *Tse v Cieffe (NZ) Ltd* [2009] ERNZ 20;
 - *Kiwikiwi v Maori Television Service* (2007) 5 NZELR 6;
 - *Tsoupakis v Fendalton Construction Ltd* (EMC Wellington WC 16/09, 18 June 2009).

These decisions concern employment status under s 6 of the ERA. As already discussed, s 6 decisions can be relevant when determining employment status for tax purposes to the extent that the decisions concern the common law tests.

77. The intention of this discussion is to provide an understanding of how the courts approach the question of employment status following *Bryson*. When considering such decisions, it is important to keep in mind that each case turns on its own facts. As Judge Shaw noted in *Tse v Cieffe (NZ) Ltd* “previous case law is only useful in reiterating the relevant principles” (at [6]).

Tse v Cieffe (NZ) Ltd

Facts

78. In *Tse v Cieffe (NZ) Ltd* the issue was the plaintiff’s employment status. Ms Tse worked for Cieffe (NZ) Ltd from 2005 to 2008.
79. At the beginning of the relationship between the parties there was no written contract between the parties. An oral agreement was reached about the terms of the relationship between the parties. The terms included that Ms Tse would:
- work for 20 hours a week and would be paid at an agreed hourly rate;
 - work on the company’s internal system but also have some reception duties and general office administration duties;
 - invoice Cieffe as a contractor rather than be paid as an employee.
80. In 2007, Cieffe provided Ms Tse with a written consultancy agreement. The agreement provided that Ms Tse’s work would be performed under the general supervision and direction of a Cieffe representative, but that Ms Tse was not an employee of Cieffe. Ms Tse signed the agreement.
81. Ms Tse performed the duties that were agreed between the parties at the outset of the relationship, as well as sharing a variety of other office tasks such as tidying and cleaning with other employees. When the work Ms Tse had originally been engaged for was nearing completion she was asked to provide further ongoing services that were related to the original work. Ms Tse’s work was closely supervised.
82. By her own choice, Ms Tse worked regular hours. She was not instructed to attend the office at any specific time. Over time her hours increased to 40 hours a week with some overtime. When Ms Tse would not be at work she would advise Cieffe that she would not be present; she would not request leave.
83. Ms Tse invoiced Cieffe for the hours that she worked. Initially, Ms Tse invoiced Cieffe through a company that Ms Tse had set up with her partner. After several months Ms Tse began invoicing Cieffe in her own name. For the first year of the relationship Ms Tse added GST to the invoices but she stopped doing this when she discovered that she was not required to be registered for GST.
84. Cieffe provided Ms Tse with branded clothing at work, a credit card (which was used on a business trip), and a business card. The business card had Cieffe’s logo and described Ms Tse as “Office Manager” and later as “Client Relationship Assistant Manager”.
85. At several times throughout the period that Ms Tse worked for Cieffe she referred to herself as a contractor.

Application of law

86. **Intention of the parties:** Judge Shaw found that “at the commencement of the relationship both parties deliberately entered into an independent contracting arrangement”. The arrangement was evidenced by the method of invoicing and Ms Tse’s references to herself as a contractor. Judge Shaw found that the consultancy agreement “confirms the nature of the relationship which had existed from the outset”.
87. **Control:** Ms Tse’s counsel argued that several factors pointed towards Ms Tse being under the control of Cieffe. One factor was that some of the tasks Ms Tse performed were not sufficiently specialised. Another factor was that Ms Tse’s work was supervised by a Cieffe representative. Judge Shaw noted that the non-specific tasks (such as tidying and cleaning) would not generally be performed by a contractor. However, other factors pointed towards a lower level of control by Cieffe than would be expected in an employment relationship. In particular, it was up to Ms Tse when she would undertake the work and she worked a variety of hours each month.
88. **Integration:** The integration test indicated that Ms Tse was an employee of Cieffe. Judge Shaw stated (at [47]):
- In some aspects the evidence points to a degree of integration of Ms Tse into the business. These are the business cards and the Cieffe branded clothing. She used Cieffe equipment and had access to the building. Calling her an office manager or client relationship assistant manager certainly presents an image of her to the outside observer as somebody who was part of the management team rather than running a separate business on their own. Such integration would not normally be expected of a consultant.
89. **Fundamental test:** Judge Shaw found that Ms Tse’s supply of invoices to Cieffe evidenced a business relationship. Ms Tse’s references to herself as a contractor also supported the view that she was in business on her own account.

Conclusion

90. Judge Shaw concluded (at [50]):
- While there were some elements in the conduct of [Tse’s] employment which, viewed in isolation, would not support a finding that she was self-employed, taken in the round I find that the real nature of the relationship between Ms Tse and Cieffe was, as intended, a contract for services.

Kiwikiwi v Maori Television Service

Facts

91. In *Kiwikiwi v Maori Television Service* the issue was whether Mr Kiwikiwi was an employee or an

independent contractor of Maori Television Service (“MTS”). Mr Kiwikiwi worked as a teleprompter for MTS.

92. When Mr Kiwikiwi started working for MTS he was filling an urgent vacancy and had no experience as a teleprompter. There was no written agreement at the beginning of the relationship between the parties. Mr Kiwikiwi understood that he was on a one-month trial period with the prospect of a full-time job at the end of the trial period if he was suitable. He was told he would have at least 30 hours work a week with more at times. (As the volume of work for teleprompters fluctuates seasonally, hours were flexible.)
93. It was agreed between the parties that Mr Kiwikiwi would be operating on a roster that was prepared a month in advance. He would be paid an hourly rate and would present invoices to be paid.
94. Mr Kiwikiwi undertook teleprompting work but also did various ancillary duties such as photocopying and banking. After he expressed concern at the additional tasks he was asked to perform he was given a role profile description. Mr Kiwikiwi worked between 30 and 40 hours a week.
95. After seven and a half months of work, Mr Kiwikiwi was concerned that he still did not have an employment contract. He contacted MTS’s operation manager requesting an employment contract. Following this his rostered hours were reduced. The operation manager began to have issues with Mr Kiwikiwi’s performance and it was decided that Mr Kiwikiwi had to do some re-training before he could be re-rostered.
96. MTS argued that it was typical working practice in the television industry for teleprompters to be freelancers. Only one teleprompter had been an employee of MTS, with all other teleprompters being freelancers. However, the Court heard evidence that TVNZ uses a combination of employees and freelancers as teleprompters.

Application of law

97. **Intention of the parties:** Judge Shaw found that there was no evidence of any common intention by the parties. The parties discussed some “incidents of employment” such as the hourly rate and rostered hours but did not discuss Kiwikiwi’s employment status.
98. **Control:** MTS argued that as Mr Kiwikiwi was free to do his work as he saw fit and was not subject to the control of MTS. Judge Shaw found that Mr Kiwikiwi was controlled by MTS’s systems. Mr

Kiwikiwi was required to comply with the set rosters, had no flexibility within the role and had to perform additional tasks to teleprompting. The role profile description he was given was prescriptive. When standards slipped Mr Kiwikipi had to undergo re-training.

99. **Fundamental test:** Judge Shaw found that Mr Kiwikipi was not in business on his own account as an independent contractor. The factors that lead to this conclusion included:

- Mr Kiwikipi was not registered for GST;
- Mr Kiwikipi did not work for any other employer apart from some shearing work over summer when little work was available from MTS;
- Mr Kiwikipi had no separate accounts and did not operate under a business entity (such as a company);
- Mr Kiwikipi did not bring any experience or skill to the position;
- Mr Kiwikipi took no financial risk with his own capital and could not alter his profits by changing his work habits.

100. Judge Shaw stated that the invoices that Mr Kiwikipi rendered each fortnight were inconclusive as he only rendered them in order to get paid.

101. **Integration:** Judge Shaw found that Mr Kiwikipi's position was an integral part of the production process; it was "not an adjunct which the television station could do without" (at [42]).

102. **Industry practice:** Judge Shaw stated that industry practice can be relevant to both the intention of the parties and to the nature of the continuing relationship. However, the industry practice was not black and white, with MTS having employed a teleprompter as an employee in the past, and with TVNZ using a combination of employees and independent contractors. Therefore, industry practice did not assist in determining Mr Kiwikipi's employment status.

Conclusion

103. Judge Shaw concluded that the real nature of the relationship between Mr Kiwikipi and MTS was one of employer/employee.

Tsoupakis v Fendalton Construction Ltd

Facts

104. The issue in *Tsoupakis v Fendalton Construction Ltd* was whether Mr Tsoupakis was an employee or an independent contractor. Mr Tsoupakis worked as a painter for Fendalton Construction for six months in 2005 and 2006 and then again for a year from 2007 to

2008. It was agreed by the parties that Mr Tsoupakis was an independent contractor during the 2005/2006 period. The issue before the Employment Court was whether Mr Tsoupakis was an employee or an independent contractor for the 2007/2008 period.

105. Fendalton Construction hired both employees and independent contractors to undertake painting work. Contractors were generally paid a higher hourly rate. Fendalton Construction provided both types of staff with mobile phones to keep in touch during jobs.
106. Mr Tsoupakis was not given an employment agreement, despite repeatedly asking for a copy of his contract.
107. Mr Tsoupakis filled out a daily work record, including the hours worked and the address of the jobs worked on. He could reclaim costs of travel to jobs in some circumstances. Mr Tsoupakis submitted weekly invoices to Fendalton Construction for payment.
108. Mr Tsoupakis had his own business card that described him as a director of his own trading entity. There was no evidence that he used the card to solicit business for himself while working for Fendalton Construction. Mr Tsoupakis also had sign writing on his motor vehicle advertising his trading name and personal mobile number. Neither the car sign-writing nor the business card referred to Mr Tsoupakis's association with Fendalton Construction.
109. While on jobs, Mr Tsoupakis was not supervised constantly by Fendalton Construction but on most jobs Mr Tsoupakis's work was inspected by Fendalton Construction.
110. Fendalton Construction provided some of the tools required to do the jobs (although usually not paint brushes) and all of the consumables required (such as paint and rags). Mr Tsoupakis purchased materials as required for jobs using Fendalton Construction's trade accounts.
111. Mr Tsoupakis was given work on a daily basis with detailed work directions. He could be redirected to jobs when Fendalton Construction required. Mr Tsoupakis was expected to meet set criteria such as the time to be taken and the volume of paint to be used. He was required to check in with Fendalton Construction when he finished a job. Mr Tsoupakis could not delegate his work to others to complete, and he was expected not to undertake other work.

Application of law

112. **Intention of the parties:** Chief Judge Colgan found that there was no discernable mutual intention of the parties as there had been no express discussion about the nature of their relationship.

113. **Control:** Chief Judge Colgan found that Fendalton Construction exercised a high degree of control over Mr Tsoupakis's work—both what was done and also how and when it was to be done. Mr Tsoupakis had to account in detail for his hours of work and had no ability to delegate or organise as he chose. In reality he was constrained from working for anyone else or for himself.
114. **Integration:** The facts pointed towards Mr Tsoupakis having some elements of independence from Fendalton Construction—in particular his business cards, the sign-writing on his vehicle, and that he was invited to the contractors' Christmas party (as opposed to the employees' party). Chief Judge Colgan found that despite these elements Tsoupakis was an integral part of Fendalton's business in the same way as would be expected of an employee. Factors pointing towards Mr Tsoupakis's integration were that he was held out as a member of Fendalton Construction's staff and that he was paid for the time that he worked rather than a set fee for each job.
115. **Fundamental test:** Chief Judge Colgan found that Mr Tsoupakis was not in business on his own account. Mr Tsoupakis provided his own paint brushes but other equipment was provided by Fendalton Construction. The fact Mr Tsoupakis was not trained by Fendalton Construction was a neutral factor as Mr Tsoupakis was engaged as an experienced tradesperson.
116. **Industry practice:** Only limited evidence was presented to the Court on industry practice in the painting industry. Chief Judge Colgan found that the evidence of industry practice was neutral as it established that companies (including Fendalton Construction) engaged both independent contractors and employees as painters.

Conclusion

117. Chief Judge Colgan concluded that Mr Tsoupakis was an employee of Fendalton Construction for the 2007/2008 period.

List of other recent cases

118. Below is a list of decisions of the Employment Court ("EMC"), Employment Relations Authority ("ERA") and Taxation Review Authority ("TRA") since Bryson. This list may assist readers to locate decisions concerning occupations similar to the particular case before them. It is important to note that each case turns on its specific facts. Consequently, the outcome reached in a particular case cannot be presumed to indicate the outcome likely to be reached in a case in the same industry but with a different factual background.

Case X17 (2006) 22 NZTC 12,224 (TRA) – relief driver hired by a courier driver.

Rongonui v Te Whata (ERA Christchurch, CA 17/07, 15 February 2007) – shed hand for a shearing gang.

Davis v Canwest Radioworks Ltd (2007) 4 NZELR 355 (EMC) – radio commentator.

Kiwikiwi v Maori Television Service (2007) 5 NZELR 6 (EMC) – teleprompter.

Hollis v JV Hiab Transport Ltd (ERA Auckland AA 394/07, 14 December 2007) – truck driver.

Bambury v Elation Ltd t/a Komodo Premium Bar (ERA Auckland AA 12/08, 17 January 2008) – club manager.

Sage v NZ Underwater Assn Inc (ERA Auckland AA 68/08, 29 February 2008) – business advisor.

Reading v Civil Engineering Solutions Ltd (ERA Auckland AA 128/08, 3 April 2008) – business partner in a civil engineering company.

Evans v Gibbston Valley Wines Ltd (ERA Christchurch CA 54/08, 2 May 2008) – cellar hand.

Hughes v Upper Hutt Cosmopolitan Club Inc (ERA Wellington WA 120/08, 17 September 2008) – caterers.

Cameron v PBT Couriers Ltd (ERA Christchurch CA 143/08, 25 September 2008) – courier driver.

King v Creative Energy Wholesale Ltd (ERA Wellington WA 150/08, 11 November 2008) – sales manager.

Westwell v Wheeler (ERA Auckland AA 10/09, 19 January 2009) – painter/foreperson.

Case Z10 (2009) 24 NZTC 14,113 (TRA) – relocation driver hired by rental vehicle company.

Hughes v Primary Care Development Solutions Ltd (ERA Wellington WA 25/09, 9 March 2009) – medical researcher.

Philpott v London Ltd t/a Ladybirds for Gifts (ERA Wellington WA 34/09, 23 March 2009) – shop attendant.

Tse v Cieffe (NZ) Ltd [2009] ERNZ 20 – office manager.

Pillay v Radius Security Ltd (ERA Auckland AA 153/09, 14 May 2009) – accountant.

Dittmer v Progressive Investment Enterprises Ltd (ERA Auckland AA 179/09, 11 June 2009) – manager.

Smith v Wairarapa Medical Ltd (ERA Wellington WA 84/09, 15 June 2009) – medical practitioner.

Tsoupakis v Fendalton Construction Ltd (EMC Wellington WC 16/09, 18 June 2009) – painter.

Hunapo v Garin Family Trust (ERA Auckland AA 209/09, 26 June 2009) – security officer.

Kelly v Lodge at 199 Ltd (ERA Auckland AA 224/09, 8 July 2009) – lodge managers.

Newcombe v Summit Systems New Zealand Ltd (ERA Christchurch CA 108/09, 21 July 2009) – marketers.

Shearer v Jardin Nous Ltd (ERA Christchurch CA 124/09, 5 August 2009) – gardener.

Poulter v Antipodean Growers Ltd (ERA Auckland AA 348/09, 29 September 2009) – horticulturalist.

Yang v New Zealand College of Chinese Medicine Ltd (ERA Auckland AA 376/09, 29 October 2009) – teacher.

Te Amo v Becon Ltd (EMC Christchurch CC 17/09, 4 November 2009) – manager responsible for establishing a waste sorting plant.

Wickbon v DRH (Northland) Ltd (ERA Auckland AA 10/10, 15 January 2010) – sales and marketing manager.

Singh v Eric James & Associates Ltd (EMC Wellington WRC 18/09, 18 January 2010) – insurance salesperson.

Broad v Financial Gain (Auckland) Ltd (ERA Auckland AA 103/10, 5 March 2010) – salesperson.

Chief of Defence Force v Ross-Taylor (2010) 7 NZELR 232 – medical practitioner.

Keach v Brown & Son Construction Ltd (ERA Christchurch CA 136/10, 29 June 2010) – builder’s labourer.

McDonald v Ontrack Infrastructure Ltd & Allied Work Force Ltd [2010] NZEmpC 132 – labourer.

Baldwin v Bossi’s Hair & Beauty Ltd (ERA Rotorua, AA 486/10, 18 October 2010) – hairdresser.

Webb v Professional Relief Services Ltd (ERA Auckland, AA 457/10, 22 October 2010) – courier van driver.

Ratcliffe v Weber (ERA Auckland, AA 510/10, 14 December 2010) – circus trainer.

Oliver v Brown t/a Autoweb Solutions (ERA Wellington, WA 203/10, 20 December 2010) – website developer.

Wu v JDC New Zealand Co Ltd (ERA Auckland, AA 527/10, 23 December 2010) – restaurant chef.

Brunton v Garden City Helicopters Ltd [2011] NZEmpC 29 – airplane pilot.

Casares v AAV New Zealand Ltd [2011] NZERA Auckland 34, 24 January 2011 – accounts manager.

Jaques v Annandale Logistics Ltd [2011] NZERA Auckland 117, 29 March 2011 – truck driver.

Sanders v Pulp Media Ltd [2011] NZERA Auckland 133, 5 April 2011 – magazine editor.

References

Related rulings/statements
IG0009 – Employee or independent contractor?, <i>Tax Information Bulletin</i> Vol 11, No 2 (February 1999)
Subject references
Employment status for tax purposes; Goods and services tax; Income tax; Meaning of “contract of service”, “employed”, “employee”, “employment”, “PAYE income recipient”, and “taxable activity”.
Legislative references
Employment Relations Act 2000, s 6; Goods and Services Tax Act 1985, s 6; Income Tax Act 2007, ss DC 15, RD 3, RD 5, RD 7 and YA 1 and Schedule 4.
Case references
<i>Bank of England v Vagliano Bros</i> [1891] AC 107
<i>Bryson v Three Foot Six Ltd</i> [2005] NZSC 34, [2005] 3 NZLR 721 (SCNZ)
<i>Bryson v Three Foot Six Ltd</i> [2003] 1 ERNZ 581 (Employment Court)
<i>Case U9</i> (1999) 19 NZTC 9,077
<i>Case X17</i> (2006) 22 NZTC 12,224
<i>Case Z10</i> (2009) 24 NZTC 14,113
<i>Challenge Realty Ltd v CIR</i> (1990) 12 NZTC 7,212
<i>Challenge Realty Ltd v CIR</i> (1990) 12 NZTC 7,022
<i>Enterprise Cars Ltd v CIR</i> (1988) 10 NZTC 5,126
<i>Lee Ting Sang v Chung Chi-Keung</i> [1990] 2 AC 374, 382
<i>Market Investigations Ltd v Minister of Social Security</i> [1969] 2 QB 173
<i>Muollo v Rotaru</i> [1995] 2 ERNZ 414
<i>New Zealand Educational Institute v Director-General of Education</i> [1981] 1 NZLR 538
<i>R v Kerr</i> [1988] 1 NZLR 270
<i>Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance</i> [1968] 1 All ER 433
<i>Stevenson Jordan & Harrison Ltd v MacDonalds</i> [1952] TLR 101
<i>Three Foot Six Ltd v Bryson</i> [2004] 2 ERNZ 526
<i>TNT Worldwide Express Ltd v Cunningham</i> [1993] 3 NZLR 681

APPENDIX – LEGISLATION

Goods and Services Tax Act 1985

1. Section 6 reads:

6 Meaning of term taxable activity

- (1) For the purposes of this Act, the term taxable activity means—
 - (a) any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:
 - (b) without limiting the generality of paragraph (a), the activities of any public authority or any local authority.
- (2) Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.
- (3) Notwithstanding anything in subsections (1) and (2), for the purposes of this Act the term **taxable activity** shall not include, in relation to any person,—
 - (a) being a natural person, any activity carried on essentially as a private recreational pursuit or hobby; or
 - (aa) not being a natural person, any activity which, if it were carried on by a natural person, would be carried on essentially as a private recreational pursuit or hobby; or
 - (b) any engagement, occupation, or employment under any contract of service or as a director of a company:

provided that where any person, in carrying on any taxable activity, accepts any office, any services supplied by that person as the holder of that office shall be deemed to be supplied in the course or furtherance of that taxable activity; or
 - (c) any engagement, occupation, or employment—
 - (i) pursuant to the Civil List Act 1979 or the Governor-General Act 2010:
 - (ii) as a Judge, Solicitor-General, Controller and Auditor-General, or Ombudsman:
 - (iia) pursuant to an appointment made by the Governor-General or the Governor-General in Council and evidenced by a warrant or by an Order in Council or by a notice published in

the Gazette in accordance with section 2(2) of the Official Appointments and Documents Act 1919:

(iii) as a Chairman or member of any local authority or any statutory board, council, committee, or other body; or

(d) any activity to the extent to which the activity involves the making of exempt supplies.

Income Tax Act 2007

2. The definition of the term “employee” in s YA 1(1) reads:

employee—

- (a) means a person who receives or is entitled to receive a PAYE income payment:
- (b) in sections CW 17, CW 17B, CW 17C, and CW 18 (which relate to expenditure, reimbursement, and allowances of employees) includes a person to whom section RD 3(2) to (4) (PAYE income payments) applies:
- (c) in the FBT rules, and in the definition of **shareholder-employee** (paragraph (b)), does not include a person if the only PAYE income payment received or receivable is—
 - (i) a payment referred to in section RD 5(1)(b)(iii), (3), (6)(b) and (c) and (7) (Salary or wages):
 - (ii) a schedular payment referred to in schedule 4, parts A and I (Rates of tax for schedular payments) for which the person is liable for income tax under section BB 1 (Imposition of income tax):
- (d) is defined in section DC 15 (Some definitions) for the purposes of sections DC 12 to DC 14 (which relate to share purchase schemes):
- (db) does not include an owner of a look-through company or a person who has a look-through interest for a look-through company, unless the owner or person is a working owner:
- (e) for an employer, means an employee of the employer

3. The definition of the term “employee” in s DC 15 reads:

DC 15 Some definitions

Definitions

- (1) In this section, and in sections DC 12 to DC 14,—

employee—

- (a) means a person employed by a company:
- (b) does not include—
 - (i) a director of the company; or
 - (ii) a person who, with any associated person, holds 10% or more of the issued capital of the company; or

- (iii) a company, a local authority, a public authority, or an unincorporated body of persons

4. Section RD 3 reads:

RD 3 PAYE income payments

Meaning generally

- (1) The PAYE rules apply to a **PAYE income payment which—**
 - (a) means—
 - (i) a payment of salary or wages, see section RD 5; or
 - (ii) extra pay, *see* section RD 7; or
 - (iii) a schedular payment, see section RD 8:
 - (b) does not include—
 - (i) an amount attributed under section GB 29 (Attribution rule: calculation):
 - (ii) an amount paid to a shareholder-employee in the circumstances set out in subsection (2):
 - (iii) an amount paid or benefit provided, by a person (the **claimant**) who receives a personal service rehabilitation payment from which an amount of tax has been withheld at the rate specified in schedule 4, part I (Rates of tax for schedular payments) or under section RD 18 (Schedular payments without notification), to another person for providing a key aspect of social rehabilitation referred to in paragraph (c) of the definition of **personal service rehabilitation payment** in section YA 1 (Definitions).

When subsections (3) and (4) apply: close companies

- (2) Subsections (3) and (4) apply for an income year when a person is a shareholder-employee of a close company, and—
 - (a) they do not derive as an employee salary or wages of a regular amount for regular pay periods—
 - (i) of 1 month or less throughout the income year; or
 - (ii) that total 66% or more of the annual gross income of the person in the corresponding tax year as an employee; or
 - (b) an amount is paid as income that may later be allocated to them as an employee for the income year.

Income in current tax year

- (3) The person may choose to treat all amounts paid to them in the income year in their capacity as employee of the close company as income other than from a PAYE income payment.

Income in later tax years

- (4) All amounts paid to the person in later income years in their capacity as employee of the close company are treated as income other than from a PAYE income payment.

If questions arise

- (5) If a question arises whether the PAYE rules apply to all or part of a PAYE income payment, other than an amount referred to in subsections (2) to (4), the Commissioner must determine the matter.

5. Section RD 5 reads:

RD 5 Salary or wages

Meaning

- (1) **Salary or wages—**
 - (a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and
 - (b) includes—
 - (i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; and
 - (ii) a payment described in subsections (2) to (8); and
 - (iii) an accident compensation earnings-related payment; and
 - (c) does not include—
 - (i) an amount of exempt income:
 - (ii) an extra pay:
 - (iii) a schedular payment:
 - (iv) an amount of income described in section RD 3(3) and (4):
 - (v) an employer's superannuation contribution other than a contribution referred to in subsection (9):
 - (vi) a payment excluded by regulations made under this Act; and
 - (d) is defined in section RD 65(13) for the purposes of that section.

Employees' expenditure on account

- (2) A payment of expenditure on account of an employee is included in their salary or wages.

Payments to working partners

- (3) A payment to a working partner under section DC 4 (Payments to working partners) is included in their salary or wages.

Payments to working owners

- (3B) A payment to a working owner under section DC 3B (Payments to working owners) is included in their salary or wages.

Payments to past employees

- (4) A periodic payment of a pension, allowance, or annuity made to a person or their spouse, civil union partner, de facto partner, child, or dependant in connection with the past employment of the person is included in their salary or wages.

Payments to Governor-General, members of Parliament, and judicial officers

- (5) The following payments made under a determination of the Remuneration Authority are included in salary or wages
- (a) salary made to the Governor-General:
- (a) salary or allowances made to a member of Parliament:
- (b) salary and principal allowances made to a judicial officer.
- (5B) A payment to a person made under section 7 of the Governor-General Act 2010 is included in the salary and wages of that person.

Certain benefits and grants

- (6) A payment of the following benefits or grants is included in salary or wages
- (a) a gratuitous payment as described in paragraph (a) of the definition of **pension** in section CF 1(2) (Benefits, pensions, compensation, and government grants):
- (b) an income-tested benefit:
- (bb) a veteran's pension, other than a veteran's pension paid under section 74(2)(b) of the War Pensions Act 1954:
- (bc) New Zealand superannuation, other than New Zealand superannuation paid under section 26(2)(b) of the New Zealand Superannuation and Retirement Income Act 2001:
- (bd) a living alone payment:
- (c) a basic grant and independent circumstances grant made under regulations made under section 193 of the Education Act 1964 or section 303 of the Education Act 1989.

Parental leave payments

- (7) A parental leave payment made under Part 7A of the Parental Leave and Employment Protection Act 1987 is included in salary or wages.

Accommodation benefits

- (8) A benefit treated as income under section CE 1(1)(c) (Amounts derived in connection with employment) is included in salary or wages.

Cash contributions

- (9) An amount of an employer's superannuation cash contribution that an employee chooses to have treated as salary or wages under section RD 68 is included in salary or wages.

6. Section RD 7 reads:

RD 7 Extra pay*Meaning*

- (1) An **extra pay**—
- (a) means a payment that—
- (i) is made to a person in connection with their employment; and
- (ii) is not a payment regularly included in salary or wages payable to the person for a pay period; and
- (iii) is not overtime pay; and
- (iv) is made in 1 lump sum or in 2 or more instalments; and
- (b) includes a payment of the kind described in paragraph (a) made—
- (i) as a bonus, gratuity, or share of profits; or
- (ii) as a redundancy payment; or
- (iii) when the person retires from employment; or
- (iv) as a result of a retrospective increase in salary or wages, but only to the extent described in subsection (2); and
- (c) includes an amount of income that a person derives under section CE 9 (Restrictive covenants) or CE 10 (Exit inducements) if the income is derived in connection with an employment relationship between the person and the person who paid the amount; and
- (d) does not include a payment of exempt income.

Limit on retrospective increase in salary or wages

- (2) A payment described in subsection (1)(b)(iv) is included in extra pay only to the extent to which,—
- (a) it accrues from the start of the increase until the start of the first pay period in which the increase is included in salary or wages; and
- (b) when a week ends with a Saturday, the total of the increase for the week, and of the salary or wages for the week excluding the increase, and of any other salary or wages that the person earns for the week, is more than \$4.

7. Section RD 8 reads:

RD 8 Schedular payments

Meaning

(1) A **schedular payment**—

- (a) means—
 - (i) a payment of a class set out in schedule 4 (Rates of tax for schedular payments); and
 - (ii) in relation to a sale, the net amount paid after subtracting from the purchase price all commission, insurance, freight, classing charges and other expenses incurred by the seller in connection with the sale; and
- (b) does not include—
 - (i) salary or wages; or
 - (ii) an extra pay; or
 - (iii) a payment for services provided by a public authority, a local authority, a Maori authority, or a company, other than a non-resident contractor, a non-resident entertainer, or an agricultural, horticultural, or viticultural company; or
 - (iv) a payment covered by an exemption certificate provided under section 24M of the Tax Administration Act 1994; or
 - (v) a payment for services provided by a non-resident contractor who has full relief from tax under a double tax agreement, and is present in New Zealand for 92 or fewer days in a 12-month period; or
 - (vi) a contract payment for a contract activity or service of a non-resident contractor when the total amount paid for those activities to the contractor or another person on their behalf is \$15,000 or less in a 12-month period.

Protected payments

- (2) The fact that a schedular payment may be protected against assignment or charge does not override a person's obligation to withhold the amount of tax for the payment.

Determination of expenditure incurred

- (3) The Commissioner may determine from time to time the amount or proportion of expenditure that a person incurs in deriving a particular schedular payment or class of schedular payments.

8. Schedule 4 reads:

Schedule 4

Rates of tax for schedular payments

Part A

Payments to non-resident contractors

- 1 A contract payment that relates to a non-resident contractor's contract activity or service has a 0.15 rate of tax for each dollar of the payment, if the payment is—
 - (a) to the non-resident contractor;
 - (b) to an agent of the non-resident contractor;
 - (c) to a person acting on behalf of the non-resident contractor.

Part B

Payments of company directors' fees, examiners' fees, honoraria, and other payments

- 1 A payment of a company director's fee, or an examiner's fee, or an honorarium, has a 0.33 rate of tax for each dollar of the payment.
- 1B A payment has a 0.33 rate of tax for each dollar of the payment, if it is for work or services performed by—
 - (a) a local government elected representative;
 - (b) an official of a community organisation, society, or club;
 - (c) a chair or member of a committee, board, or council;
 - (d) an official, chair, or member of a body or organisation similar to one described in paragraph (b) or (c).
- 2 In this part, **examiner's fee** means fees or remuneration for work or services that relate to examining an examination candidate, if the work or services have the following nature:
 - (a) setting an examination paper or question;
 - (b) marking a candidate's answer;
 - (c) examining a candidate orally;
 - (d) examining a candidate's practical work or performance.

Part C

Payments for work or services relating to primary production

- 1 A payment for work or services referred to in the following paragraphs has a 0.15 rate of tax for each dollar of the payment:
 - (a) farming contract work;
 - (b) cultivation contract work;
 - (c) shearing;
 - (d) droving;
 - (e) [Repealed]

- (f) forestry or bush work (including bush felling, road and tramway work, removal of timber, undergrowth cutting, burning, or clearing):
 - (g) planting or cutting flax:
 - (h) work described in section DO 1 or DO 2 that is related to land that is used or intended to be used for farming or agriculture.
- 2 In this part,—
- cultivation contract work—**
- (a) means work or services provided under a contract or arrangement—
 - (i) for the supply of labour, or substantially for the supply of labour; and
 - (ii) on or in connection with land that is used or intended to be used for the cultivation of fruit crops, vegetables, orchards, or vineyards:
 - (b) excludes work or services provided by—
 - (i) a post-harvest facility:
 - (ii) a management entity under a formal management agreement under which the entity is responsible for payment for the work or services provided

farming contract work means work that is related to land that is used or intended to be used for farming or agriculture, if the work has the following nature

- (a) firewood cutting, or post or rail splitting:
- (b) cutting down trees incidental to work under paragraph (a):
- (c) grass or grass seed cutting:
- (d) hedge cutting:
- (e) planting trees:
- (f) planting or cutting flax:
- (g) threshing, chaffcutting, hay making, hay baling, or harvesting or gathering crops

Part D

Payments for commercial cleaning and maintenance work, or for general contracting

- 1 A payment for commercial cleaning or maintenance work has a 0.20 rate of tax for each dollar of the payment.
- 2 A payment for work or services referred to in the following paragraphs has a 0.15 rate of tax for each dollar of the payment:
 - (a) mail delivery or collection:
 - (b) transporting school children:
 - (c) milk delivery:
 - (d) refuse removal:
 - (e) caretaking or acting as a guard:
 - (f) street or road cleaning.

- 3 In this part,—
 - commercial cleaning or maintenance work** means work or services that are related to schedular commercial land, if the work or services have the following nature
 - (a) cleaning all or part of premises:
 - (b) cleaning or laundering plant, vehicles, furniture, furnishings, fittings, or equipment:
 - (c) gardening (including grass cutting and hedge cutting):
 - (d) destroying vermin:
 - (e) destroying weeds
 - schedular commercial land** means land that—
 - (a) is not used for farming or agriculture purposes:
 - (b) is not a dwellinghouse:
 - (c) is not premises that are used exclusively for residential purposes.

Part E

Payments for labour-only building work, or for labour-only fishing boat operating

- 1 A payment for labour-only building work, or for labour-only fishing boat work, has a 0.20 rate of tax for each dollar of the payment.
- 2 In this part,—
 - labour-only fishing boat work** means work or services under a contract, arrangement, or agreement for profit-sharing which is exclusively or substantially for the supply of labour in connection with operating or maintaining a fishing boat that is required to be registered under section 103 of the Fisheries Act 1996
 - labour-only building work** means work or services under a contract or arrangement which is exclusively or substantially for the supply of labour in connection with a building or a construction (including pre-fabrication and pre-cutting for the relevant building or construction), if the work or services have the following nature
 - (a) work or services that, customarily, may form part of the work or services of a carpenter under a building contract:
 - (b) work or services connected with roof-fixing, steel-fixing, erecting fences, or laying concrete, bricks, blocks, tiles, slabs, or stones, if the relevant building or construction is not land that is used or intended to be used for farming or agriculture:
 - (c) work or services connected with hanging wallpaper, hanging decorative wall coverings or furnishings, or painting or decorating (including plastering):

- (d) work or services connected with installing fibrous plaster, wallboard, insulating material, interior tiles, interior lining, floor tiles, carpet, linoleum, or floor coverings.

Part F

Payments for activities related to sports, media, entertainment, and public speaking

- 1 A payment of a media contribution fee, or of a promotional appearance fee, has a 0.25 rate of tax for each dollar of the payment.
- 2 A payment that relates to media production work has a 0.20 rate of tax for each dollar of the payment, if part A of this schedule, and clauses 4 and 5 of this part do not apply to the payment.
- 3 A payment of a modelling fee has a 0.20 rate of tax for each dollar of the payment.
- 4 A payment for services connected with a non-resident entertainer providing or performing a Part F activity has a 0.20 rate of tax for each dollar of the payment, if the payment is—
 - (a) to the non-resident entertainer:
 - (b) to an agent of the non-resident entertainer:
 - (c) to a person acting on behalf of the non-resident entertainer.
- 5 A payment for services connected with a New Zealand resident providing or performing a Part F activity has a 0.20 rate for each dollar of the payment, if clause 6 does not apply to the payment and it is—
 - (a) to the New Zealand resident:
 - (b) to an agent of the resident:
 - (c) to a person acting on behalf of the resident.
- 6A payment for services connected with a New Zealand resident providing or performing a Part F activity has a 0.15 rate for each dollar of the payment, if the payment relates to shares of riding or driving fees and it is—
 - (a) to the New Zealand resident, and the resident is an apprentice jockey or an apprentice driver:
 - (b) to an agent of the apprentice jockey or apprentice driver:
 - (c) to a person acting on behalf of the apprentice jockey or apprentice driver.
- 7 In this part,—

media contribution fee means fees or remuneration, paid to a contributor, that relate to a contribution for television, radio, theatre, stage, or printed media

media production work means work or services that relate to television, videos, or films, if the work or services have the following nature

- (a) on-set and off-set pre-production work or services:
- (b) on-set and off-set production work or services:
- (c) on-set and off-set post-production work or services

modelling fee means fees or remuneration that relate to modelling, including a personal attendance for any promotional purpose, for photography, for supplying personal photographs, or for supplying personal endorsements or statements

Part F activity means an activity or performance—

- (a) connected with—
 - (i) a sporting event or competition:
 - (ii) making speeches or giving lectures or talks for any purpose:
 - (iii) acting, singing, playing music, dancing, or entertaining generally, for any purpose and whether alone or not; and
- (b) undertaken by a person who meets the requirements of any of the following paragraphs:
 - (i) they are not fully or partly sponsored under a cultural programme of an overseas government or the Government of New Zealand:
 - (ii) they are not an official representative of a body that administers a game or sport in an overseas country:
 - (iii) they are not undertaking an activity or performance under a programme of a foundation, trust, or organisation outside New Zealand which exists for the promotion of a cultural activity and is not carried on for individual profit of the member or shareholder:
 - (iv) if they are an employee, officer, or principal of a company, firm, or other person, includes the company, firm, or other person

promotional appearance fee means fees or remuneration that relate to a personal attendance for exhibiting or demonstrating goods

Part G

Sales commission

- 1 A payment of commission or remuneration to an insurance agent or sub-agent, or to a salesperson has a 0.20 rate of tax for each dollar of the payment.

Part H**Payments to purchase natural products**

- 1 A payment that relates to a purchase of schedular natural products has a 0.25 rate of tax for each dollar of the payment, if the payment is made to the seller and it is not an exempt natural products payment.
- 2 A payment that relates to a purchase of game has a 0.25 rate of tax for each dollar of the payment, if the payment is made to the seller.
- 3 In this part,—

exempt natural products payment means a payment that relates to the purchase of schedular natural products, if the payment is made—

- (a) to a natural products dealer:
- (b) on a purchase that occurs after a disposal by a natural products dealer:
- (c) to an auctioneer or a dealer acting as agent for the seller:
- (d) at retail, in a shop

game means all or part of a wild deer, wild pig, or wild goat, whether dead or alive

natural products dealer means a person who—

- (a) is registered under any Act or regulation as a broker, dealer, or trader in relation to schedular natural products:
- (b) holds a natural product dealer certificate, issued by the Commissioner under section 44D of the Tax Administration Act 1994:
- (c) holds an unrevoked certificate from the Commissioner showing that the person would be a licensed dealer for purposes of the Income Tax (Withholding Payments) Regulations 1979 if those regulations had not been revoked by this Act

schedular natural products means—

- (a) greenstone (nephrite):
- (b) eel:
- (c) whitebait:
- (d) sphagnum moss.

Part I**Personal service rehabilitation payments**

- 1 A personal service rehabilitation payment for a person under the Accident Compensation Act 2001 has a 0.105 rate of tax for each dollar of the payment.

NEW LEGISLATION

This section of the *TIB* covers new legislation, changes to legislation including general and remedial amendments, and Orders in Council.

STUDENT LOAN SCHEME AMENDMENT ACT 2012

The Student Loan Scheme Amendment Bill was introduced into Parliament on 7 September 2011, receiving its first reading on 15 September 2011, its second reading on 27 March 2012 and the third reading on 3 April 2012. It received Royal assent on 11 April 2012.

The new legislation brings into effect a number of measures to increase repayment levels by borrowers and make the Student Loan Scheme fairer. They include:

- reducing the repayment holiday from three years to one year for borrowers who go overseas, and requiring them to apply for the repayment holiday and provide a contact person at the same time;

- removing the ability for New Zealand-based borrowers to offset losses against their income to reduce their liability for student loan purposes; and
- ensuring that Inland Revenue receives from StudyLink (the loan manager) details of a borrower's alternative contact person.

Clarification of the bill's commencement date was made by Supplementary Order Paper No. 15.

The new Act amends the Student Loan Scheme Act 2011. All section references in the following items are to the Student Loan Scheme Act 2011 unless otherwise stated.

EXCLUDING LOSSES FROM THE CALCULATION OF NET INCOME FOR STUDENT LOAN REPAYMENT PURPOSES

Sections 4 and 73, new section 88A, section 46(2)(a), sections 101 to 104 (repealed), sections 149(2) and 219, and schedule 6

The changes introduced by the new legislation are intended to increase personal responsibility for debt repayment, maximise repayments from New Zealand-based borrowers and ensure fairness across the student loan scheme.

Broadening the income base from which student loan repayments are made contributes to maximising repayments from New Zealand-based borrowers. Under the new rules business and investment losses such as rental losses will be excluded from the calculation of net income for student loan repayment purposes.

Background

In Budget 2011, the Government announced that, as a first step to maximise repayments from New Zealand-based borrowers, business and investment losses (such as rental losses) would be excluded from the calculation of net income when determining the repayment obligation for a student loan.

The previous definition of "net income" in the Student Loan Scheme Act 2011 was based on the "net income" definition for income tax purposes. It includes income such as salary and wages, income-tested benefits, NZ superannuation,

interest, dividends and income such as business profits. In determining "net income" losses can be offset, but not carried forward.

The new legislation removes the ability to offset losses against income when calculating a repayment obligation, making the legislation fairer for all student loan borrowers irrespective of how they arrange their financial matters.

Key features

When a borrower has one or more business or investment activities, the income and expenditure from an activity which results in a net loss should be ignored when calculating the net amount earned from both "other income" (business income) and pre-taxed income (for example, interest and dividends) for student loan purposes. For "other income", this is achieved by replacing the definition of "net income" with a new definition of "adjusted net income". For "pre-taxed income" the definition of "net pre-taxed income" also reflects that losses can no longer be offset against income.

Application date

The amendments apply from 1 April 2012.

Detailed analysis

Other income (business income)

Subpart 3 of part 2 determines the repayment obligation of New Zealand-based borrowers with “other income” (business income).

New section 88A replaces the definition of “net income” with a new definition of “adjusted net income”.

Section 88A(1) contains the formula that borrowers with “other income” should use to determine their “adjusted net income”. The borrower’s annual total deductions should be subtracted from the borrower’s annual gross income (other than from salary and wages) to arrive at their “adjusted net income”.

Section 88A(2) contains a proviso which states that if the income and deductions from any investment or business activity result in a net loss, the income and deductions should be ignored when calculating the borrower’s adjusted net income.

Example

Ingrid owns a café which makes a profit of \$55,000 a year. She also owns a rental property. For the 2012–13 income year the rental property makes a loss of \$10,000. In calculating her “adjusted net income” for student loan repayment purposes, Ingrid can no longer use the \$10,000 loss to offset against her café profits which would have meant her student loan repayment obligation is based on \$45,000. Ingrid must make repayments based on her café profits of \$55,000.

When two or more business or investment activities are normally carried on in association with each other, the Commissioner may treat those activities as a single activity (section 88A(3)). For example, a car sales yard and a car rental agency.

When applying subsections (2) and (3) above, deductions relating to an asset used in carrying on two or more activities must be appropriately apportioned between those activities on the basis of the use of that asset in those activities.

Pre-taxed income

Subpart 2 determines the repayment obligation for pre-taxed income (that is, income from interest, dividends, a taxable Māori authority distribution, salary or wages from employment as a casual agricultural employee, or salary or wages from employment as an election day worker).

New section 73 sets out the meaning of “net pre-taxed income”.

Section 73(1) contains the formula that borrowers with pre-taxed income should use to determine their net pre-taxed income. A borrower’s allowable expenses should be subtracted from the borrower’s pre-taxed income to determine their net pre-taxed income.

Section 73(2) contains a proviso which states that if the income and deductions from any investment activity result in a net loss, the income and deductions should be ignored when calculating the borrower’s net pre-taxed income.

When two or more investment activities are normally carried on in association with each other, the Commissioner may treat those activities as a single activity (section 73(3)).

As a consequence of denying the ability to offset losses, sections 101 to 104 have been repealed because they contemplate being able to apply for a reduction of deduction rate as a consequence of incurring a loss from “other income”.

Sections 46, 149(2), 219 and schedule 6 have also been amended to remove references to sections 101 to 104, following their repeal.

EXTENDING PAY-PERIOD ASSESSMENTS TO THE SALARIES AND WAGES OF ALL BORROWERS

Sections 4, 42(1), 54(1), 90, 91, 119(2), and section 125 (repealed)

Background

Pay-period assessments were introduced in the Student Loan Scheme Act 2011 and are a significant simplification measure, removing the need for the annual square-up assessment for most borrowers' salary and wage earnings. Pay-period assessments focus on ensuring correct repayment deductions are made at source.

Previously, borrowers with salary and wages who also had business income would continue to receive an annual square-up because they could offset losses against their salary and wages.

As a consequence of denying the ability to offset losses in the new legislation, there is no longer the need to "ring fence" borrowers with sources of income other than salary and wages from the pay-period assessment policy. Therefore, extending the pay-period assessment to salary and wage deductions of all borrowers, regardless of the income they derive, required a number of consequential amendments to the 2011 Act.

Application date

These amendments apply from 1 April 2012.

Detailed analysis

Sections 90 and 91 have been repealed and replaced with new sections 90 and 91. The new sections change the way the repayment obligation is calculated for borrowers with "other income" so that salary and wage earnings are excluded.

Section 90 applies when a borrower has other income and any salary or wages are below the annual repayment threshold. The formula calculates the borrower's repayment obligation by applying the repayment percentage to however much of the person's other income is over the annual repayment threshold after taking their salary or wages into account.

Section 91 applies when a borrower has other income and any salary or wages are equal to or above the annual repayment threshold. The formula calculates the repayment obligation by applying the repayment percentage to the borrower's other income as their salary or wages are already above the annual repayment threshold. The borrower's salary or wages and student loan repayment deductions are excluded from the formula, reflecting that

student loan repayment deductions are based on a pay-period assessment.

Section 42 has been amended to give borrowers with "other income" access to the procedure by which any unused repayment threshold from a borrower's primary employment earnings can be allocated to the borrower's secondary employment earnings. Borrowers with "other income" were denied the ability to apply for any unused repayment threshold to be allocated to secondary employment earnings because these borrowers could rely on the annual end-of-year square-up to address any over- or under-deductions with their secondary employment earnings.

Section 54 ensures that full-time students who earn income over the threshold for a short period of time are exempted from salary or wage deductions, as their annual income would be below the repayment threshold. The amendment gives borrowers with "other income" access to this process by notifying the Commissioner in a declaration. Previously borrowers with "other income" could rely on the end-of-year square-up to ensure that deductions were made only on income earned over the threshold.

Section 125 ensures that borrowers who would have been eligible for the excess repayment bonus of 10% but for an error made by their employer, are not disadvantaged. As a borrower's repayment deductions are now based on a pay-period assessment, employer errors will no longer have this effect. Therefore this section is no longer necessary and has been repealed. Sections 118 and 129(2) have been amended as a consequence of repealing section 125.

The definition of "significant over-deduction" has been amended to ensure that over-deductions can be refunded to borrowers with other income. Previously, borrowers with other income could rely on the end-of-year square-up to receive any refund due to a significant over-deduction.

As a consequence of extending the pay-period assessment policy to all salary and wage earnings, section 119(2)(a)(ii) has been repealed. Borrowers who earn "other income" no longer need to have their salary and wage deductions treated differently when determining if a borrower has made an excess repayment for a tax year.

ALTERNATIVE CONTACT PERSON

New section 16A

The new legislation allows alternate contact details provided to the loan manager (StudyLink) as a condition of accessing a student loan to be received and used by Inland Revenue once the loan is transferred to Inland Revenue.

Background

As part of Budget 2011, the Government announced that as a condition of accessing the student loan scheme, borrowers would be required to provide details of an alternative contact person.

While borrowers are required to keep their contact details current, often these become out of date after the person completes their study. This can be a particular problem if the borrower goes overseas.

Having a contact person provides another way for Inland Revenue to locate borrowers who have lost touch, to help them manage their loan.

Application date

The amendment applies from 1 January 2013.

Detailed analysis

Receipt of alternate contact details

New section 16A allows Inland Revenue to receive details of a borrower's contact person from the loan manager (StudyLink). The loan manager is appointed by the "lender" (the Government) under the Student Loan Scheme Act 2011 to establish and administer loan balances that have not been transferred to Inland Revenue for collection.

To the extent that they are available, the loan manager must provide the Commissioner with the following details of the borrower's contact person:

- their name;
- their postal address;
- telephone number;
- an electronic address; and
- any further information specified in regulations.

Section 16A(2) allows the Commissioner and the loan manager to determine the frequency and the form in which the notification must be supplied.

REPAYMENT HOLIDAY

New sections 106 to 108A, sections 110, 112 and 115(1), and schedule 6 clause 9

The new rules reduce the repayment holiday for overseas-based borrowers from three years to one, and require borrowers to apply for a repayment holiday. Borrowers must apply before the expiry of 183 days (six months) from the date of departure, and as part of the application process, they must supply details of a contact person who resides in New Zealand.

Background

Under the previous rules, borrowers received an automatic three-year holiday from any repayment obligation when they left New Zealand. The three-year holiday was considered generous and could result in borrowers not resuming repayments when the repayment holiday came to an end. As part of the Budget 2011 student support package, it was announced that the repayment holiday would be reduced, and that borrowers would need to apply for it. The changes in the new legislation seek to improve repayments from overseas-based borrowers, and signal to borrowers the importance of repaying the loan when the repayment holiday comes to an end.

Key features

Sections 106 to 108 have been repealed and replaced with new sections 106 to 108A. The “opt-in” and “opt-out” provisions have been replaced with an application process. A borrower may apply for a repayment holiday within 183 days from the date of departure, meaning that an overseas-based borrower may not apply for a repayment holiday. New section 107B provides for the Commissioner to grant a repayment holiday if satisfied that the borrower has nominated a contact person and has not reached the borrower’s repayment holiday limit. The repayment holiday has been reduced from three years to one.

Application date

The changes apply from 1 April 2012.

Detailed analysis

A borrower may apply for a repayment holiday within 183 days from their date of departure (section 107).

When an application is made, the borrower must appoint a New Zealand-based contact person (section 107A).

The Commissioner may grant a repayment holiday if the borrower has nominated a contact person, and has not reached their repayment holiday limit (section 107B(1)).

Section 107B(3) prescribes when the borrower has reached their repayment holiday limit as follows:

1. The borrower has had a repayment holiday of one year (365 days).
2. The borrower has had a three-year repayment holiday under the Student Loan Scheme Act 1992.
3. The borrower has had a repayment holiday for less than three years under the Student Loan Scheme Act 1992, and has had their entitlement set to the lesser of one year or their remaining entitlement under the Student Loan Scheme Act 1992.
4. The borrower has had the repayment holiday continued under the transitional provisions in section 108A(2).

For borrowers who are on a repayment holiday as at 1 April 2012, their entitlement will be set to the lesser of one year or their remaining entitlement (section 108A(2)). For example, if a borrower has been overseas for one year as at 1 April 2012, under the 1992 Act they would have had two years remaining of their repayment holiday. On 1 April 2012, their entitlement will be set to one further year, rather than two years.

Section 108A(1) applies to borrowers who have used part of their repayment holiday and have not exceeded their repayment holiday limit—they must now apply for a repayment holiday if they intend to go overseas.

A borrower is deemed to be “overseas-based” when the borrower has been overseas for 184 or more consecutive days. Section 107B(2) recognises that to be granted a repayment holiday a borrower must be overseas-based. Despite this, section 108 deems the repayment holiday to have commenced on the first day of the period of the borrower’s physical absence from New Zealand.

The repayment holiday ends on the earlier of the day that the borrower reaches their limit and the day on which the borrower ceases to be overseas-based.

Sections 110, 112 and 115 have been amended as a consequence of reducing the repayment holiday to one year.

USE OF ALTERNATE CONTACT DETAILS RECEIVED VIA THE REPAYMENT HOLIDAY APPLICATION PROCESS AND VIA STUDYLINK UNDER SECTION 16A

New sections 193A and 193B, section 59 of the Student Loan Scheme Amendment Act 2012 (transitional provision) and schedule 9

Background

This item details when Inland Revenue will get in touch with a nominated contact person received from StudyLink or when a borrower applies for a repayment holiday. It also explains what will be required if the contact person is requested to assist.

Application date

The changes apply from 1 April 2012.

Detailed analysis

New section 193A prescribes when the alternative contact details will be used, and what is required of the alternative contact person, if contacted by Inland Revenue.

Section 193A allows the Commissioner to advise that a person has been nominated as a contact person. This initial contact with the person is also an opportunity for Inland Revenue to explain what the role of the contact person is and when they will be requested to assist.

The contact person may be requested to assist if the borrower has an unpaid amount, Inland Revenue does not have up-to-date address details, or if Inland Revenue is uncertain about the accuracy of the address details. The contact person will only be asked:

- to notify the Commissioner of the borrower's current address details; or
- to ask the borrower to get in touch with Inland Revenue and update their contact details.

Before requesting the assistance of the contact person, the contact person must first *confirm* that they are willing to act as the borrower's contact person. The fact that the contact person must confirm that they are willing to act on behalf of the borrower reflects that the onus is on the borrower to have asked if the contact person is willing to act before providing those details to Inland Revenue. No details of the loan such as the loan balance or the amount of the default will be given to the contact person.

The borrower has a continuing obligation to keep details of the contact person up-to-date. This requirement reflects the ability of the contact person to withdraw from being a contact person for the borrower. The borrower must keep details up-to-date if the contact person dies or for whatever

reason is ineligible, unable or unwilling to act in that capacity (section 193B).

Section 193(A)(6) defines "contact person" as an individual whose name has been received from StudyLink under section 16A, or an individual nominated by the borrower under section 107A (repayment holiday provisions) or section 193B.

Section 59 of the Student Loan Scheme Amendment Act 2012 is a transitional provision and recognises that the ability to receive contact details from StudyLink applies from 1 January 2013. Therefore, until 31 December 2012, the definition of "contact person" in section 193A(6) of the Student Loan Scheme Act 2011 must be read without reference to the contact person details received from StudyLink under section 16A. Section 59 will then be repealed from 1 January 2013.

Schedule 9 has been amended to include reference to new section 193A in section 81 of the Tax Administration Act 1994.

OTHER POLICY MATTERS

OFFSETTING A SIGNIFICANT OVER-DEDUCTION AGAINST UNPAID AMOUNTS

Section 67

When a borrower has both a significant over-deduction for one period and either a significant under-deduction for another period or an unpaid amount, the Commissioner will be able to offset a borrower's significant over-deduction against the significant under-deduction or unpaid amount.

This change ensures that borrowers do not receive a refund of their significant over-deduction while still owing amounts to Inland Revenue.

Application date

The amendment applies from 1 April 2012.

MEANING OF "EXCESS REPAYMENTS"

Section 119(2) and (3)

An amendment has been made to the excess repayment rules to correct an error in the legislation that determines repayment obligations for purposes of calculating excess repayments and the excess repayment bonus.

The excess repayment legislation incorrectly refers to repayment obligations from salary and wages being what *should* have been deducted not what *was* actually deducted. The result is that if a borrower has an under-deduction, whether significant or not, they will not have met their repayment obligation in relation to their salary and wage income and their bonus entitlement will be reduced or cancelled. This was not the policy intent.

Any repayment deductions made from salary and wages should satisfy a borrower's repayment obligation. If there is a significant under-deduction, there are other mechanisms available for collection. The legislation has been amended to provide this outcome.

Application date

The amendment applies from 1 April 2012.

DATE PAYMENT CREDITED FOR CALCULATING INTEREST

Section 195

A drafting oversight has resulted in the legislation that prescribes how loan interest is calculated, incorrectly deeming payments to be made on the due date rather than the day after the due date as currently occurs.

To ensure consistency between the student loan administrative system and the new legislation, an amendment provides that for the purposes of calculating loan interest, payments are treated as being received on the day after payment was made. For salary or wage deductions this is the 16th of the month in which that deduction was made.

When the student loan system imposes loan interest it is imposed up to and including the date of payment, or for deductions up to and including the 15th of the month in which the deduction was made. For example, if an overseas-based borrower makes a payment on the 10th of August, loan interest is imposed on the outstanding loan balance up to and including the 10th of August.

Application date

The amendment applies from 1 April 2012.

DECLARATION OF WORLDWIDE INCOME

Section 25(2) and schedule 1

A borrower who is non-resident may be treated as physically in New Zealand when certain conditions are met for the purpose of being treated as a New Zealand-based borrower. These include when the borrower is working for an approved overseas charity, undertaking full-time study overseas (including study at undergraduate or post-graduate level), or living in Niue, the Cook Islands, Tokelau or the Ross Dependency.

Schedule 1 of the Student Loan Scheme Act 2011 contains the obligations that must be fulfilled before a non-resident borrower can be treated as physically in New Zealand. Due to a drafting oversight, the requirement to file a declaration of worldwide income was omitted from the new Act. The amendment corrects this omission.

Application date

These amendments apply from 1 April 2012.

TREATMENT OF NEW ZEALAND-BASED BORROWERS WHO ARE NON-RESIDENT

Sections 94, 114A, 155 and 156

Two amendments have been made in relation to New Zealand-based borrowers who are non-resident, in order to reflect the original policy intent of the legislation. The first relates to the provision of an extension of time to

provide information and the second relates to the due date for remaining repayments.

A borrower who is non-resident but is treated as being physically in New Zealand—such as a borrower studying overseas or working for an overseas aid agency—is required to provide the Commissioner with a declaration of their worldwide income within the same timeframe as New Zealand-based borrowers who file an IR 3 tax return. For most non-resident borrowers, this is 7 July.

While New Zealand-based borrowers who reside here are able to apply for an extension of time to file their income tax return, no similar extension of time applies to the provision of income and allowable expenses information of New Zealand-based borrowers who are non-resident.

The first amendment enables non-resident borrowers who are treated as New Zealand-based to apply for and be granted an extension of time.

The second amendment clarifies that New Zealand-based borrowers who are non-resident must pay their repayment obligation on the same dates that New Zealand-resident borrowers with other income pay their remaining repayments.

Application date

The amendment applies from 1 April 2012.

USE OF THE SL CODE AND SPECIAL REPAYMENT CODE (STC)

Sections 34, 35(2), 36(1), 37, 45(a) and 148(2)

Amendments clarify that the repayment rate specified on the special rate certificate issued for income tax and student loan purposes determines the correct code employers should use on the employer monthly schedule and the correct student loan deductions rate. The changes reflect current administrative practice.

Application date

The amendments apply from 1 April 2012.

DATE STUDYLINK CEASES CHARGING LOAN INTEREST

Schedule 5, clause 2

The role of charging loan interest on borrowers who are still studying was to transfer from StudyLink to Inland Revenue from 1 January 2012. The date this was to take effect was changed with effect from 1 April 2012.

Previously, StudyLink charged loan interest only while the borrower was studying and Inland Revenue continued

this once the loan was transferred to Inland Revenue for collection. If a borrower was a New Zealand-based borrower, the loan interest charged was written off by Inland Revenue, leaving loan interest charged on overseas-based borrowers only.

StudyLink was to cease charging loan interest with effect from 1 January 2012, and Inland Revenue was to begin charging loan interest from that date. However, it was decided to be more administratively efficient for both agencies if StudyLink ceased charging loan interest from 1 April 2012 rather than 1 January 2012. For the three-month period from January to March 2012, StudyLink continued to charge loan interest and Inland Revenue delayed charging it until 1 April 2012.

Application date

As the change was enacted after January 2012, this amendment applies retrospectively from 1 January 2012.

TRANSITIONAL PROVISIONS FOR DETERMINING DUE DATE FOR PURPOSES OF IMPOSING LATE PAYMENT INTEREST

Schedule 7, clause 4A

The Student Loan Scheme Act 2011 changes the way late payment interest is imposed from 1 April 2013. However, payments for the 2012–13 tax year (interim payments, remaining repayments, and instalments of overseas-based borrower repayment obligations) could occur both before and after 1 April 2013. Having different late payment interest rules for repayment obligations that relate to the same tax year, depending on when the payment is due, could cause confusion and be difficult for borrowers to understand and comply with.

To ensure that borrowers are not disadvantaged, the late payment interest rules for the 2012–13 tax year clarify that late payment interest imposed for late payment of interim payments, remaining repayments, and instalments of overseas-based borrower repayment obligations apply from the final instalment date onwards. That is, the old rules will continue to apply during the transitional year.

Application date

The amendment applies from 1 April 2013.

MISCELLANEOUS TECHNICAL AMENDMENTS

CERTAIN INFORMATION THAT MUST BE DISCLOSED IN A LOAN CONTRACT

Section 13

Section 13 prescribes that certain information must be disclosed in the loan contract. The amendment ensures that the student loan contract states that borrowers can object to the details of a loan advance. The amendment also clarifies the timeframe within which an objection must be received by the loan manager.

Application date

The amendment applies from 1 April 2012.

THE ORDER IN WHICH DEDUCTIONS AND PAYMENTS ARE OFFSET AGAINST THE CONSOLIDATED LOAN BALANCE

Section 117(3) and schedule 7, clause 2

Two corrections to the Student Loan Scheme Act 2011 deal with the order in which payments are to be offset against a borrower's consolidated loan balance.

The first correction relates to a legislative oversight whereby the section that deals with overseas-based borrower deductions satisfying their repayment obligations (section 117) incorrectly overrides the general ordering rules (section 194) from 1 April 2012.

The second correction relates to an error whereby from 1 April 2013 section 117 incorrectly overrides sections 194 to 194D instead of only overriding section 194A(1) and (2).

Application date

The first amendment applies from 1 April 2012 and the second amendment applies from 1 April 2013.

HOW INTEREST IS CALCULATED, CHARGED AND COMPOUNDED

Sections 4, 135, 196(2) and schedule 7, clause 1AA

An amendment inserts a new term "accrued" into the Student Loan Scheme Act 2011 to reflect the current administrative practice for statements to show the amount of interest calculated up to the date of the statement but not yet charged.

For the 2012–13 tax year, interest on outstanding loan balances is calculated daily, and charged and compounded annually.

However, statements also show the amount of interest that has accrued to date. To ensure the legislation reflects the current administrative practice, a new term of interest "accrued" has been inserted into the Act to reflect the interest calculated up to the date of the statement.

The way interest on outstanding loan balances is charged and compounded will change from the 2013–14 tax year onwards and the term "accrued" will not be required. Therefore this change will only apply for a year.

Application date

The change applies for the 2012 tax year only.

STUDENT LOAN REPAYMENT CODES

Sections 38, 39, 40 and schedule 2, clause 1

Changes have been made to the Student Loan Scheme Act 2011 to correct some minor legislative errors. The first change is to remove the references to "tax code" which is an income tax term, and replace them with "repayment code".

The second change removes the requirement for income-tested beneficiaries to apply a "SL" repayment code to their benefit income when they are not required to have repayment deductions made from their benefit income. This will ensure that beneficiaries will not incur the costs of complying with this requirement.

Application date

The amendments apply from 1 April 2012.

NOTIFICATION PERIOD FOR SIGNIFICANT OVER-DEDUCTIONS

Section 65(2)

The provision enabling borrowers to request that the Commissioner investigate whether a significant over-deduction has occurred has been amended. The change ensures that the borrower has six months from the date the over-deduction occurred to request the Commissioner investigate the over-deductions. Previously the legislation incorrectly gave the borrower six months from the date they identified the error to request that the Commissioner investigate.

Application date

The amendment applies from 1 April 2012.

REPAYMENT OBLIGATIONS OF OVERSEAS-BASED BORROWERS

Sections 110(6)(b)(iii) and 111(5)(b)(iii)

An amendment has been made to clarify that an overseas-based repayment obligation for a year is based on a borrower's consolidated loan balance at the end of the previous tax year. The consolidated loan balance is limited to:

- the loan balance at that time;
- plus the annual administration fee; and
- reduced by the amount of the excess repayment bonus.

Previously it could be construed that for the purpose of determining a borrower's overseas-based repayment obligation, the excess repayment bonus is added to the borrower's loan balance instead of being subtracted from it as intended.

Application date

This amendment applies from 1 April 2012.

ISSUING AN ADDITIONAL DEDUCTION RATE OR A SPECIAL ASSESSMENT TO COLLECT A SIGNIFICANT UNDER-DEDUCTION

Sections 49(1)(a)(i), 50(2) and 51(1)(a)(i)

Three amendments have been made to the provisions enabling an additional deduction rate notice to be issued.

The first amendment clarifies that when a significant under-deduction has occurred because of an employer/PAYE intermediary or borrower error or omission, the Commissioner can issue an additional deduction rate notice for the recovery of the under-deducted amount.

The second provides that the Commissioner can also issue a special assessment to a borrower if the significant under-deduction occurred due to a deliberate action or omission by the borrower or employer/PAYE intermediary.

Previously there was a risk that the additional deduction rate and special assessment provisions would not apply in situations when the employer omitted or deliberately intended not to make a deduction, as this is not an employer "error". This was not the policy intent as the special assessment provisions should be available for all situations when significant under-deduction occurs.

The third amendment clarifies that when the Commissioner issues an additional deduction rate notice, that notice replaces all previous notices issued to that employer in relation to a borrower. This amendment would overcome

the situation where a notice issued to one employer could replace all previous notices issued to all employers of the borrower, which was not intended.

Application date

The changes apply from 1 April 2012.

TRANSITIONAL PROVISION FOR SMALL AMOUNTS OF UNPAID AND UNCOLLECTED REPAYMENTS OBLIGATIONS

Schedule 6, clause 6

When changes were made to the Student Loan Scheme Act 2011 to defer the application date of some of the reforms for a year, a legislative oversight resulted in the transitional provision relating to small amounts of unpaid repayment obligations applying from 31 March 2012 instead of 31 March 2013. Also, the provision incorrectly referred to only one of two legislative references, omitting the reference to section 139(1) of the Student Loan Scheme Act 2011.

Application date

The change applies from 1 April 2012.

COMMISSIONER MAY GRANT RELIEF FROM LATE PAYMENT INTEREST

Section 146(3) and (4), and schedule 7, clause 6

For the 2012–13 tax year, an amendment has been made to ensure that when a borrower has applied for and been granted relief from that late payment interest, any interest already paid is offset against any unpaid amount and then against any current year repayment obligation before being refunded. This ensures that amounts are not refunded to borrowers while they still owe money to Inland Revenue.

Changes have also been made to schedule 7, clause 6, which amends section 146 with effect from 1 April 2013. This amendment corrects a minor drafting error to ensure that the relief applies when the late payment interest has been added to a borrower's unpaid amount.

Application date

The amendments apply from 1 April 2012 and 1 April 2013 respectively.

REFERENCE TO CONSOLIDATED LOAN BALANCE

Section 189(1)

An amendment has been made to the annual administration fee provision to correct a drafting error by replacing “loan balance” with the term “consolidated loan balance” as the intent of the annual administration fee policy was that the fee applies to borrowers whose consolidated loan balance was \$20 or more.

Application date

The amendment applies from 1 April 2012.

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.

CHANGES/CLARIFICATIONS TO DETERMINATION DET 09/02: STANDARD-COST HOUSEHOLD SERVICE FOR CHILDCARE PROVIDERS (“EDUCATORS”)

Background

Legislation enacted in November 2003 (with effect from 1 April 2003) allows the Commissioner to issue a determination of standard-costs for specified home-based services to provide a consistent and legal framework for the taxation of home-based service providers, including the home-based childcare industry.

Standard-cost determinations are intended to be used by service providers who are generally paid a low hourly rate and consequently their tax obligations may be disproportionate to the amount of tax involved. The availability of a standard-cost determination enables those taxpayers to meet their tax obligations with minimal compliance costs. For example, if a person who provides childcare services in their own home elects to use the standard costs in Determination 09/02 (“DET 09/02”) and payments received are below the annual calculation, they will not have to pay income tax and will not be required to file an income tax return for that year, provided they do not have other income.

In accordance with the new provisions, in May 2004 Inland Revenue issued Determination DET-001 (May 2004) which set out the components of expenditure (standard costs) that are typically incurred by educators who provide childcare services in their own domestic accommodation. Those standard costs were based on the requirements for care by educators who operate in accordance with the Education (Home-based Care) Order (“the Order”) and/or the Education (Early Childhood Services) Regulations 2008 (“the Regulations”) and Licensing Criteria for Home-based Education and Care Services 2008¹. Determination DET-001 was replaced by DET 09/02 issued April 2009, with application to the 2009 and subsequent income years.

A person who provides private childcare in their own home and is not part of a licensed service provider network, is **not** able to use DET 09/02. These providers must keep full records of actual income and may claim a deduction for actual expenditure.

Changes/clarifications

Following feedback on DET 09/02, this notice provides advice on changes and clarifications to accepted practice and the change to depreciation on buildings (to 0%) that impact on the fixed standard-costs for ownerships costs of domestic dwellings.

a) That the application of DET 09/02 include before and after school care and recreation for school-aged children (Change)

The scope of DET 09/02 is consistent with the Order, which specifies the standard of care for children up to five years of age (or six if starting school then). At the time of the original determination (DET-001) there were no additional licensing requirements for school-aged children cared for by chartered home-based providers. Provided the home-based care organisation was eligible to receive Work & Income (“WINZ”) childcare subsidies, it was accepted that if they were approved for preschool care, they were automatically approved for school-aged care.

From the 1980s through to early 2000s, many home-based care organisations offered before and after school care to families. Child, Youth and Family produced the *Standards for Out of School Care and Recreation* (“OSCAR”). At the time of issuing the original determination, OSCAR services for children aged 5–13 years was a common feature of home-based childcare activity but never considered as part of the scope of the determination.

As the OSCAR activities are similar in nature to the home-based childcare services for preschool-aged children, some educators have extended their childcare activity to include OSCAR care for school-aged children. For these reasons the application of DET 09/02 is extended to cover payments received by educators for OSCAR activities. The extension of DET 09/02 to include OSCAR services will only apply to educators who have expanded their activity to provide care to school-aged children before or after school, and/or for school holiday programmes. The change will assist to simplify the tax obligations of educators providing care for

¹ As services are gradually being re-licensed under the 2008 Regulations and Licensing Criteria, the Order will become obsolete by 2014.

school-aged children as an extension of their home-based childcare activity. DET 09/02 does not apply to educators who only provide OSCAR care to school-aged children as they were not the focus of the original standard-cost determination.

b) Retainer payments to educators (Clarification)

- i) Payments made to educators to preserve a child's placement in a childcare programme for absent children, or paid when an educator (or a family member) is sick, are to be treated as income (being payments for lost income) related to their home-based childcare activity. In these circumstances, an educator may also claim the related variable standard-costs as if the child(ren) had attended.
- ii) Retainer payments to an educator while they are on vacation are also income related to an educator's home-based childcare activity. As they are on a planned absence from the home-based childcare activity while on vacation, they are not permitted to claim the variable standard-costs in these circumstances but are able to offset the full annualised fixed standard-cost amount for the use of their domestic property.

c) Claiming of additional costs (Clarification)

Where an educator has incurred additional costs, which have not been identified as being regularly incurred and therefore not specifically listed in the standard-cost set out in DET 09/02, such additional costs will be allowed (being income related expenditure) as an additional standard-cost of providing their home-based childcare service. Examples are expenses incurred to meet the training requirements of the Order/Regulations for First Aid courses, qualification and on-going professional development and ACC levies (when applicable).

However, an educator is not permitted to claim additional expenditure for costs already provided for under DET 09/02 in the variable and fixed standard-cost categories. For example, digital cameras, printers, cell-phones and car-seat harnesses as an alternative to car seats for small children, are already covered by the variable standard-cost components for "equipment" and "outings and associated transport costs".

The appendix to DET 09/02 provides an explanation of the variable standard-costs that refers to what each item within the cost elements is intended to cover. The examples are indicative only and every element refers to examples as being inclusive of those items.

d) Apportionment of annualised fixed standard-cost for use of domestic dwelling and administration costs (Change and clarification)

A worksheet is available to assist educators to work out whether they are required to return income for an income year. The first part of these worksheets is used to tally gross payments received each month and the childcare hours provided each month. The second part has a calculation for claiming variable standard-costs for the total hours of childcare provided. These worksheets also include an apportionment of the fixed standard-cost to the number of weeks childcare provided during an income year by educators. Some organisations (whether they use this worksheet or not) may advocate an apportionment of 52 weeks whereas others use a 48-week apportionment (presumably after allowing for vacation of 4 weeks each year).

The fixed standard-cost is calculated on an annual basis and does not vary for the number of children in care. It is acknowledged that educators incur some static costs (storage of educational resources and ongoing administration costs) for use of their domestic dwelling regardless of whether they are providing childcare services or on vacation or sick leave.

Change/clarification

- An apportionment should be calculated on a 52-week basis consistent with the number of weeks in an income year; not 48 weeks.
- That educators operating a home-based childcare activity for a full year (ignoring vacation breaks and absences due to sickness) may claim the full annualised fixed standard-cost amount.
- That educators who commence or exit a home-based childcare activity part-way through an income year (1 April to 31 March) are required to apportion the fixed standard-cost amount relative to the number of weeks (or part weeks) their activity has been operated in an income year (52-week period).

e) Adjustment to fixed standard-cost to reflect removal of depreciation on buildings (Change)

The current fixed standard-cost formula for calculating the notional costs of using a domestic dwelling for a home-based childcare activity allows 5% of the purchase price to represent the expenditure normally incurred in owning a domestic property.

There have been changes to depreciation on buildings since the issue of DET 09/02 that impact on the fixed standard-cost component for use of a domestic dwelling. *Tax Information Bulletin* Vol 22, No 7 (August 2010) provided comment on the changes to building depreciation enacted in the Taxation (Budget Measures) Act 2010. The changes were intended to make New Zealand's tax rules more neutral by recognising that allowing depreciation on long-lived buildings provides tax depreciation rates in excess of true economic depreciation rates. The depreciation rate of buildings (including domestic dwellings) with long estimated useful lives of 50 years or more, has been changed to 0%, with effect to the 2012 income year (for most taxpayers this will apply from 1 April 2011).

DET 09/02 provides for depreciation as a notional cost as a component of the fixed standard-cost in applying a domestic dwelling to a home based childcare activity. As a consequence of the May 2010 Budget change it is no longer appropriate to provide for depreciation on buildings in the standard-costs.

With the removal of depreciation on buildings in Budget 2010, some adjustment is required to the fixed standard-cost. The adjustment should have regard to increased property ownership costs that include maintenance of the land and related service costs. As the fixed cost amount is 5% of the purchase price of the property, which includes the cost of land and improvements, the effect of removal of the depreciation element is a reduction to 4%.

The fixed costs percentage of the purchase price of the property used to calculate the ownership costs is reduced from 5% to 4% to reflect the change for depreciation on buildings.

The changes/clarifications have effect from 1 April 2011 and apply to the 2012 and subsequent income years.

CPI ADJUSTMENT 12/01 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 2012 income year:

- a) the variable standard-cost component will increase from \$3.29 per hour per child to \$3.34 per hour per child; and
- b) the administration and record-keeping fixed standard-cost component will increase from \$321 per annum to \$326 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 2012, which showed an increase of 1.6%. For childcare providers who have a standard 31 March balance date, the new amounts apply for the period from 1 April 2011 to 31 March 2012.

DETERMINATION DET 05/03 STANDARD-COST HOUSEHOLD SERVICE FOR BOARDING SERVICE PROVIDERS – CHANGE TO FIXED STANDARD-COST FORMULA TO REFLECT THE REMOVAL OF DEPRECIATION ON BUILDINGS

The current fixed standard-cost formula for calculating the notional costs of using a domestic dwelling for a home-based boarding service activity allows 5% of the purchase price to represent the expenditure normally incurred in owning a domestic property.

There have been changes to depreciation on buildings since the issue of DET 05/03 that impact on the fixed standard-cost component for use of a domestic dwelling. *Tax Information Bulletin* Vol 22, No 7 (August 2010) provided comment on the changes to building depreciation enacted in the Taxation (Budget Measures) Act 2010. The changes were intended to make New Zealand's tax rules more neutral by recognising that allowing depreciation on long-lived buildings provides tax depreciation rates in excess of true economic depreciation rates. The depreciation rate of buildings (including domestic dwellings) with long estimated useful lives of 50 years or more, has been changed to 0%, with effect to the 2012 income year (for most taxpayers this will apply from 1 April 2011).

DET 05/03 provides for depreciation as a notional cost as a component of the fixed standard-cost in applying a domestic dwelling to a home-based boarding service activity. As a consequence of the May 2010 Budget change it is no longer appropriate to provide for depreciation on buildings in the standard-costs.

With the removal of depreciation on buildings in Budget 2010, some adjustment is required to the fixed standard-cost. The adjustment should have regard to increased property ownership costs that include maintenance of the land and related service costs. As the fixed cost amount is 5% of the purchase price of the property which includes the cost of land and improvements, the effect of removal of the depreciation element is a reduction to 4%.

The fixed cost percentage of the purchase price of the property used to calculate the ownership costs is reduced from 5% to 4% to reflect the change for depreciation on buildings.

This change has effect from 1 April 2011 and applies to the 2012 and subsequent income years.

CPI ADJUSTMENT CPI 12/02 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 2012 income year, is retrospectively adjusted as follows:

- a) The weekly standard-cost for one to two boarders will increase from \$243 each to \$247 each.
- b) The weekly standard-cost for third and subsequent number of boarders will increase from \$198 each to \$202 each.

The above amounts have been adjusted in accordance with the annual movement of the Consumers Price Index for the 12 months to March 2012, which showed an increase of 1.6%. For boarding service providers who have a standard 31 March balance date, the new amounts apply for the period from 1 April 2011 to 31 March 2012.

SPECIAL DETERMINATION S21: SPREADING OF ACQUISITION COST OF AGREEMENTS FOR THE SALE AND PURCHASE OF SERVICES

This determination may be cited as Special Determination S21: "Spreading of acquisition cost of agreements for the sale and purchase of services".

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

1. This determination relates to the spreading by a certain company (the Company) of expenditure arising on the acquisition of certain agreements for the provision of property maintenance services.
2. The Company acquired the businesses of two other companies on 1 April 2011 pursuant to separate sale and purchase and novation agreements (the Agreements). The first of those companies (and its shareholders) is not, and has never been, associated with the second of those companies (and its shareholders) for the purposes of the Income Tax Act 2007. Two-thirds of the Company is owned by the shareholders of the first company, and one-third by the shareholders of the second company.
3. Part of the purchase price under the Agreements was allocated on an arm's length basis to the acquisition of existing contracts for the provision of maintenance services (the Contracts). The Contracts were for a fixed term beginning on 1 July 2010 and ending on 30 June 2012, with a two-year right of renewal (subject to the satisfaction of certain performance and other criteria).
4. The Company must now provide the relevant maintenance services over the remaining term of the Contracts. The Company issues regular invoices, and payment is due within 21 working days of the date on which the invoice is received.
5. The Company has adopted the International Financial Reporting Standards for the purpose of preparing its accounts.

2. Reference

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

3. Scope of determination

1. This determination applies to the tax treatment of the Contracts and any other short-term agreements for sale and purchase with the same term as the Contracts.
2. The Company acquired the Contracts from two other companies pursuant to the Agreements.

3. The first of the two other companies (and its shareholders) is not, and has never been, associated with the second of those companies (and its shareholders) for the purposes of the Income Tax Act 2007.
4. This determination is made subject to the following conditions:
 - a) The consideration the Company paid for the acquisition of the Contracts was not greater than the amount that a wholly unrelated arm's length party in the place of the Company would have agreed to pay the two other companies for those Contracts.
 - b) The Company will treat the Contracts and any other short-term agreements for sale and purchase with the same term as the Contracts as financial arrangements under s EW 8 of the Income Tax Act 2007.
 - c) The Company will continue to recognise income derived from the Contracts and deduct expenditure incurred in relation to the Contracts under general principles (other than amounts dealt with under this determination).

4. Principle

1. The Company treats the Contracts and any other short-term agreements for sale and purchase with the same term as the Contracts as financial arrangements under s EW 8 of the Income Tax Act 2007.
2. This determination specifies that the only amounts payable to or by the Company for or under the Contracts that are required to be spread under the financial arrangements rules are the amounts allocated to the acquisition of those Contracts in the Agreements. Those amounts must be allocated to an income year on a pro-rata basis applying the principles of Determination G1A (on a 365-day basis) from 1 April 2011 to 30 June 2014.
3. If any one or more of the Contracts is not renewed in accordance with its terms, the Company must apply the principles of Determination G25 as if the term of the relevant Contract had been varied from four years to two years.

5. Interpretation

1. In this determination (and the Explanation), unless the context otherwise requires:
 - a) Words and expressions used (that have not been defined elsewhere in the determination) have the same meaning as in s YA 1 of the Income Tax Act 2007.
 - b) "Agreements" means the separate sale and purchase and novation agreements under which the Company acquired the businesses of the other two companies on 1 April 2011.
 - c) "Contracts" means the contracts for the provision of maintenance services.

6. Method

1. The amounts allocated to the acquisition of the Contracts in the Agreements must be allocated to an income year on a pro-rata basis applying the principles of Determination G1A (on a 365-day basis) from 1 April 2011 to 30 June 2014.
2. If any one or more of the Contracts is not renewed in accordance with its terms, the Company must apply the method in Determination G25 as if the term of the relevant Contract had been varied from four years to two years.

7. Example

This example illustrates the application of the method (set out in this determination) for determining the expenditure attributable to the Contracts in each income year.

The example is based on the following parameters:

Acquisition date	1 April 2011
End date	30 June 2014
Aggregate acquisition cost of Contracts	\$5,000,000
Balance date	31 March
Deduction allocated to the income year ending:	
31 March 2012	\$1,538,785.83
31 March 2013	\$1,538,785.83
31 March 2014	\$1,538,785.83
31 March 2015	\$383,642.51

This determination is signed by me on 3 May 2012.

Howard Davis
Director (Taxpayer Rulings)

NATIONAL AVERAGE MARKET VALUES OF SPECIFIED LIVESTOCK DETERMINATION 2012

This determination may be cited as “The National Average Market Values of Specified Livestock Determination, 2012”.

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 2011–2012 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 2011-2012 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	119.00
	Ram and wether hoggets	101.00
	Two-tooth ewes	191.00
	Mixed-age ewes (rising three-year and four-year old ewes)	166.00
	Rising five-year and older ewes	138.00
	Mixed-age wethers	78.00
	Breeding rams	305.00
Beef cattle	<i>Beef breeds and beef crosses:</i>	
	Rising one-year heifers	558.00
	Rising two-year heifers	807.00
	Mixed-age cows	1025.00
	Rising one-year steers and bulls	665.00
	Rising two-year steers and bulls	921.00
	Rising three-year and older steers and bulls	1100.00
Breeding bulls	1992.00	
Dairy cattle	<i>Friesian and related breeds:</i>	
	Rising one-year heifers	1234.00
	Rising two-year heifers	1806.00
	Mixed-age cows	2155.00
	Rising one-year steers and bulls	521.00
	Rising two-year steers and bulls	822.00
	Rising three-year and older steers and bulls	1077.00
Breeding bulls	1526.00	

Type of livestock	Classes of livestock	Average market value per head \$
	<i>Jersey and other dairy cattle:</i>	
	Rising one-year heifers	955.00
	Rising two-year heifers	1620.00
	Mixed-age cows	1923.00
	Rising one-year steers and bulls	412.00
	Rising two-year and older steers and bulls	662.00
	Breeding bulls	1198.00
Deer	<i>Red deer:</i>	
	Rising one-year hinds	243.00
	Rising two-year hinds	413.00
	Mixed-age hinds	455.00
	Rising one-year stags	276.00
	Rising two-year and older stags (non-breeding)	497.00
	Breeding stags	1464.00
	<i>Wapiti, elk, and related crossbreeds:</i>	
	Rising one-year hinds	286.00
	Rising two-year hinds	469.00
Mixed-age hinds	506.00	
Rising one-year stags	323.00	
Rising two-year and older stags (non-breeding)	540.00	
Breeding stags	1447.00	
<i>Other breeds:</i>		
Rising one-year hinds	151.00	
Rising two-year hinds	231.00	
Mixed-age hinds	259.00	
Rising one-year stags	178.00	
Rising two-year and older stags (non-breeding)	260.00	
Breeding stags	646.00	
Goats	<i>Angora and angora crosses (mohair producing):</i>	
	Rising one-year does	73.00
	Mixed-age does	91.00
	Rising one-year bucks (non-breeding)/wethers	58.00

Type of livestock	Classes of livestock	Average market value per head \$
	Bucks (non-breeding)/wethers over one year	68.00
	Breeding bucks	340.00
	<i>Other fibre and meat producing goats (Cashmere or Cashgora producing):</i>	
	Rising one-year does	63.00
	Mixed-age does	85.00
	Rising one-year bucks (non-breeding)/wethers	56.00
	Bucks (non-breeding)/wethers over one year	61.00
	Breeding bucks	321.00
	<i>Milking (dairy) goats:</i>	
	Rising one-year does	500.00
	Does over one year	500.00
	Breeding bucks	300.00
	Other dairy goats	18.00
Pigs	Breeding sows less than one year of age	221.00
	Breeding sows over one year of age	266.00
	Breeding boars	286.00
	Weaners less than 10 weeks of age (excluding sucklings)	70.00
	Growing pigs 10 to 17 weeks of age (porkers and baconers)	138.00
	Growing pigs over 17 weeks of age (baconers)	203.00

This determination is signed by me on the 16th day of May 2012.

Rob Wells

LTS Manager, Technical Standards

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 12/01: RECORDING INLAND REVENUE INTERVIEWS

Introduction

1. For the purpose of administering the Inland Revenue Acts¹ it is often necessary for Inland Revenue officers to conduct interviews with taxpayers and others. The purpose of an interview will range from general information exchanges to resolve queries to formal interviews where there is the potential for litigation.
2. Interviewees will generally be asked to attend an interview on a voluntary basis, although section 19 of the Tax Administration Act 1994 gives the Commissioner the authority to require any person to attend an interview. Compulsory interviews conducted under section 19 are held when it is considered appropriate by the Commissioner to obtain information from taxpayers or other parties. As a matter of course, all section 19 interviews will be recorded, either by audio or video technology.
3. As statements made by taxpayers and others during an interview may be admissible as evidence in litigation it is important that all interviews are carried out in a fair and open manner and in a way that will not make the statement inadmissible. It is also important that interviews are clearly recorded and that the questions and answers are unambiguous.
4. Not all interviews conducted by Inland Revenue will be electronically recorded. In many cases hand-written notes will be sufficient. However, Inland Revenue does record interviews using modern recording technology and this will increasingly become our usual practice in an investigative interview.
5. This Standard Practice Statement (SPS) sets out Inland Revenue's standard practice for using technology to record interviews where it is considered to be necessary or appropriate to make an electronic recording of an interview.
6. Unless specified otherwise, all legislative references in this SPS refer to the Tax Administration Act 1994 ("the TAA").

Application

7. This SPS applies from 19 April 2012. It replaces SPS 10/01: *Recording Inland Revenue interviews* which

was published June 2010 and also produced in *Tax Information Bulletin* Vol 22, No 7 (August 2010).

8. It does not apply to independent contractors conducting interviews on behalf of Inland Revenue, such as a research company contracted to carry out a customer survey, or an external solicitor contracted to carry out a Child Support Review.

Legislation

9. Section 19 of the TAA provides:

19 Inquiry by Commissioner

- (1) The Commissioner may, for the purpose of obtaining any information with respect to the liability of any person for any tax or duty under any of the Inland Revenue Acts or any other information required for the purposes of the administration or enforcement of any of those Acts or for the purpose of carrying out any other function lawfully conferred on the Commissioner, by notice, require any person to attend and give evidence before the Commissioner or before any officer of the Department authorised by the Commissioner in that behalf, and to produce all books and documents in the custody or under the control of that person which contain or which the Commissioner or the authorised officer considers likely to contain any such information.
- (2) The Commissioner may require any such evidence to be given on oath and either orally or in writing, and for that purpose the Commissioner or the authorised officer may administer an oath.
- (3) No person summoned or examined under this section shall be excused from answering any question on the ground that the answer may incriminate the person or render the person liable to any penalty or forfeiture.
- (4) No statement made by any such person in answer to any question put to the person shall in criminal proceedings be admissible against the person, except upon a charge of perjury against the person in respect of the person's testimony upon that examination.
- (5) The provisions of the Crimes Act 1961 which relate to perjury are applicable to any inquiry under this section.

¹ As set out in the Schedule to the Tax Administration Act 1994.

- (6) A person required to attend before the Commissioner or an authorised officer may receive out of money appropriated by Parliament for the purpose such sum on account of travelling expenses and loss of time as the Commissioner thinks reasonable and orders accordingly.

10. Principle 6 of the Privacy Act 1993 provides:

Principle 6 Access to personal information

- (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
- (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
 - (b) to have access to that information.
- (2) Where, in accordance with subclause (1)(b) of this principle, an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
- (3) The application of this principle is subject to the provisions of Parts 4 and 5 of this Act.

11. Section 27 of the Privacy Act 1993 provides for exceptions to Principle 6, one of which may sometimes apply to Inland Revenue responsibilities for administering the Revenue Acts:

- (1) An agency may refuse to disclose any information requested pursuant to principle 6 if the disclosure of the information would be likely—
- ...
- (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; ...

Standard practice

12. The electronic recording of interviews either in audio or video format is common practice by regulatory and investigative agencies. There are advantages for both parties in electronically recording an interview, such as:

- an interview which is electronically recorded will take less time than one in which the notes are taken by hand;
- an electronic recording provides a more accurate record of what was said at the interview and by whom;
- those parties at the interview are able to concentrate fully on the interview instead of there being delays while taking full written notes;
- an electronic copy of the interview will, in most cases, be made available to the interviewee shortly after the interview is concluded.

13. Whilst in many instances it will not be necessary to electronically record an interview it is increasingly becoming Inland Revenue's usual practice to record interviews where:

- the issues to which the interview relates are complex or contentious;
- there are inconsistencies in evidence gathered or statements made to date;
- there are language issues necessitating the use of an interpreter;
- the relationship between the interviewee and Inland Revenue has deteriorated;
- the subject matter of the interview will potentially be used in litigation.

14. The above are examples only and a desire by Inland Revenue staff to record an interview is not limited to those situations. Further, other than in a section 19 interview, taxpayers who are not comfortable that an interview is to be recorded may decline to attend the interview or may decide to discontinue an interview. So far as is possible, where Inland Revenue intends to record an interview, the taxpayer will be advised of that in advance of the interview.

15. An interviewee may request that a voluntary interview be recorded. Such requests should be made before the interview so as to allow sufficient time to arrange recording equipment.

16. Generally, the interviewee will be provided with a copy of the interview recording at the conclusion of the interview, or as soon as practicable afterward.

17. The purpose of recording an interview is to:

- keep the time required to conduct the interview to a minimum;
- ensure that there is an accurate and impartial record of the questions asked and the responses given and the conduct of the parties at the interview.

18. Aside from a section 19 interview, attendance at and participation in interviews is voluntary. However, a decision about whether or not to record the interview will be made having regard to the factors listed above. If the interviewee does not agree to the interview being recorded the interviewer will decide whether to cancel or terminate the interview, or to proceed on some alternate basis, such as using hand-written notes.

Preliminary matters

19. Compulsory interviews under section 19 will always be electronically recorded, using audio or video recording technology. The interviewee's consent is not required for electronically recording section 19 interviews.

20. Other than a section 19 interview, if Inland Revenue intends to electronically record an interview the interviewee will usually be advised of that intention when the interview is arranged.
21. If a decision about electronically recording an interview subsequently changes, the interviewee is to be advised of that decision as soon as practicable before the interview starts.
22. Where an interviewee is attending an interview voluntarily the interview will only be electronically recorded with the interviewee's consent and co-operation. If the interviewee declines to consent to recording of a voluntary interview, Inland Revenue will respect that decision. There will be no secret recording of interviews.

The recording process

23. There are two ways in which an interview may be recorded—either in handwriting (which may later be transcribed into a more formal memorandum of the interview), or by electronic means, using either audio or video recording technology.
24. As has been noted, in many situations it is preferable to electronically record interviews rather than using hand-written notes. Video recording is not regularly used but may be used when it is appropriate, such as when the interview is likely to be used evidentially.
25. Hand-written notes may be taken even when an interview is being recorded electronically.

The interview

26. After the formal introduction to the interview, the interviewer will ask the interviewee to acknowledge that the interview is being electronically recorded (and in the case of a voluntary interview, with the consent of the interviewee).
27. As the interview may be admitted in evidence, it is important that everyone involved in the interview speaks clearly and slowly.
28. If more than one interviewer is asking questions, they will need to identify themselves for purposes of transcription.

Copies

29. The purpose of an interview is to obtain information to assist in fulfilling the Commissioner's duties. For this reason copies of interviews are kept for reference and for use in potential litigation.
30. Under Principle 6 of the Privacy Act 1993² a person is entitled to ask for a copy of any material that relates to them held by, for example, a government agency or an employer.

31. **Hand-written interview notes:** If an interview is recorded in writing, the statement will be read back to the interviewee, or the interviewee should be asked to read it. The interviewee will be asked to initial each page except the last, which should be signed with the interviewee's full name. If the handwriting is easily legible, it may not be necessary to have the record typed. If requested, the interviewer, in most cases, will give the interviewee a copy of the statement immediately. If copying facilities are not immediately available, a copy may be posted to the interviewee.
32. **Digitally recorded interviews:** If a digital recording system is used, the original recording on the hard drive of a laptop computer or hand-held recorder cannot be sealed but will be moved to a permanent and secure storage repository. The technology used by Inland Revenue creates tamper proof recordings and these are transferred to permanent storage under strict controls to ensure future security of related records. The interviewee must be told this. In such cases the interviewer should immediately make copies to CD or DVD (depending on the technology available). One copy is to be sealed in the interviewee's presence. The other copy will become an Inland Revenue file copy.
33. **Copy of the interview record to the interviewee:** Inland Revenue will, in most cases, give the interviewee a copy of a recorded interview. However, in some cases there may be reason to suspect that giving an interviewee a copy may prejudice the maintenance of the law, which in Inland Revenue's case means the administration of the Inland Revenue Acts.
34. In cases such as these, the Privacy Act 1993 and the Official Information Act 1982 allow the agency to withhold copies until the investigation has been completed.
35. Where it is decided not to provide a copy immediately, an interviewee will be told of the decision to withhold that copy, and that one will be supplied at the conclusion of the investigation. The interviewee will be advised of their right under section 67 of the Privacy Act 1993 to seek an investigation and review by the Privacy Commissioner of the Commissioner's decision to withhold the copy.

This Standard Practice Statement is signed on 19 April 2012.

Rob Wells

LTS Manager, Technical Standards
Legal and Technical Services

² There is a similar provision in section 5 of the Official Information Act 1982 (the "Principle of Availability").

SPS 12/02: LATE FILING PENALTY

Introduction

1. This Standard Practice Statement (SPS) sets out the Commissioner's practice for imposing late filing penalties under sections 139A and 139AAA of the Tax Administration Act 1994.
2. In this SPS all legislative references are to the Tax Administration Act 1994 unless otherwise stated.

Application

3. This SPS applies from 9 May 2012 and replaces Standard Practice Statement 05/01 *Late filing penalty*, published in *Tax Information Bulletin* Vol 17, No 1 (February 2005).

Background

4. The New Zealand tax system is based on voluntary compliance. It relies on taxpayers voluntarily meeting their obligations under the tax laws, for example, by filing tax returns by the due date. Sections 139A and 139AAA impose a penalty on a taxpayer for not filing certain returns by the due date. The purpose of the penalty is to promote voluntary compliance and to ensure penalties for breaches are imposed impartially and consistently.
5. Late filing penalties for not filing GST returns by due date came into force on 1 April 2008. A late filing penalty may be imposed when GST returns for taxable periods, special returns or other returns due on or after 1 April 2008 are not filed on time. The Inland Revenue, may, however, issue default assessments when GST returns are not filed by the due date.

Legislation

Tax Administration Act 1994

139A Late filing penalties for certain returns

- (1) This section applies to tax returns required to be furnished under sections 33, 41 to 44, and 79 (in this Part, "annual tax returns"), the annual ICA return required to be furnished under section 69(1) and (2)(a) by an Australian ICA company that is not required to furnish a return of income for a tax year, the reconciliation statement required to be provided under regulation 3 of the Accident Rehabilitation and Compensation Insurance (Earnings Definitions) Regulations 1992 or regulation 15 of the Accident Insurance (Premium Payment Procedures) Regulations 1999 or any successor to that regulation made under the Injury Prevention, Rehabilitation, and Compensation Act 2001, and the employer monthly schedule required to be provided under section RD 22(1) to (5) of the Income Tax Act 2007.

- (2) A taxpayer is liable to pay a late filing penalty if—
 - (a) The taxpayer does not complete and provide on time—
 - (i) an annual tax return;
 - (ii) an annual ICA return required to be furnished under section 69(1) and (2) (a);
 - (iii) a reconciliation statement;
 - (iiib) a return required to be furnished under section 57B
 - (iv) an employer monthly schedule; and
 - (b) The Commissioner notifies the taxpayer that the penalty is payable.
- (3) The late filing penalty for an annual tax return for a taxpayer with net income—
 - (a) below \$100,000 is \$50;
 - (b) between \$100,000 and \$1,000,000 (both figures inclusive) is \$250;
 - (c) above \$1,000,000 is \$500.
- (4) The late filing penalty for an ICA return or reconciliation statement, or employer monthly schedule is \$250.
- (5) Except in the case of a late filing penalty resulting from an employer monthly schedule or from a tax return required under sections 16 to 18 of the Goods and Services Tax Act 1985, the Commissioner must, not less than 30 days before imposing a late filing penalty,—
 - (a) send notice to a taxpayer that a late filing penalty may be imposed if a return specified in the notice is not filed; or
 - (b) publicly notify that a late filing penalty may be imposed on taxpayers who omit to file the required return.
- (6) In the case of a late filing penalty for failing to file an employer monthly schedule by the due date, the Commissioner must—
 - (a) give notice to the taxpayer that a late filing penalty will be payable for a further failure to file an employer monthly schedule on time, if the taxpayer has filed on time all employer monthly schedules due for filing in the period—
 - (i) beginning with the later of 1 April 1999 and the day 12 months before the due date; and
 - (ii) ending before the due date; or
 - (b) give notice to the taxpayer that the penalty is payable, if the taxpayer has not filed on time all employer monthly schedules due for filing in the period referred to in paragraph (a).

139AAA Late filing penalty for GST returns

- (1) This section applies to a tax return (a **GST return**) required to be furnished by a registered person under sections 16 to 18 of the Goods and Services Tax Act 1985.
- (2) A registered person is liable to pay a late filing penalty if—
 - (a) the registered person does not complete and provide a GST return by the due date for filing the GST return; and
 - (b) the GST registered person has failed to file on time a GST return due in the period—
 - (i) beginning with the later of 1 April 2008 and the day 12 months before the due date; and
 - (ii) ending before the due date; and
 - (c) the Commissioner notifies the registered person that the penalty is payable.
- (3) The late filing penalty for a GST return for a registered person is—
 - (a) \$250, if on the due date for filing the GST return the registered person accounts for tax payable on an invoice basis or hybrid basis; or
 - (b) \$50, if on the due date for filing the GST return the registered person accounts for tax payable on a payment basis.
- (4) The Commissioner must—
 - (a) give notice to the registered person that a late filing penalty will be payable for a further failure to file a GST return on time, if the registered person has filed on time all GST returns due for filing in the period—
 - (i) beginning with the later of 1 April 2008 and the day 12 months before the due date; and
 - (ii) ending before the due date; or
 - (b) give notice to the registered person that the penalty is payable, if the registered person has not filed on time all GST returns due for filing in the period referred to in paragraph (a).

Due date for payment of late filing penalty

6. The following sections set out the due dates for payment of late filing penalties:
 - Section 142 (1) – due date in respect of returns and reconciliation statements;
 - Section 142(1A) – due date in respect of employer monthly schedules;
 - Section 142(1B) – due date in respect of GST returns required by sections 16 to 18 of the Goods and Services Tax Act 1985.

Discussion

7. Under section 139A, a late filing penalty applies to:
 - annual tax returns;
 - ACC reconciliation statements;
 - employer monthly schedules;
 - annual ICA returns required to be filed under section 69(1) and (2)(a) by an Australian ICA company that is not required to file a return of income.
8. Although section 139A provides for late filing penalties to be imposed in respect of outstanding ACC reconciliation statements, Inland Revenue no longer collects these statements on behalf of the Accident Compensation Corporation. Therefore, Inland Revenue will not impose late filing penalties in respect of these statements.
9. The Commissioner must give at least 30 days notice to the taxpayer of the intention to impose a late filing penalty for an annual tax return or ICA return required to be filed by an Australian ICA company. The Commissioner must provide such a notice either in writing or by public notification to a taxpayer or group of taxpayers. If the outstanding return is filed within the 30-day period, or an extension of time is granted to file the outstanding return, the penalty will not be imposed.
10. For employer monthly schedules, the Commissioner must notify the taxpayer that the late filing penalty is payable where a taxpayer fails to file an employer monthly schedule on time. If the taxpayer has filed on time all monthly schedules due in the past 12 months, the taxpayer will be notified that a late filing penalty will be payable on any further failure to file on time.
11. The amount of the late filing penalty for annual tax returns is based on the amount of net income. If the net income is:
 - below \$100,000, the penalty is \$50
 - between \$100,000 to \$1,000,000 (both figures inclusive), it is \$250
 - above \$1,000,000, it is \$500.
12. The amount of the late filing penalty for an employer monthly schedule and an annual ICA return required to be filed by an Australian ICA company is \$250.
13. Under section 139AAA a late filing penalty is imposed when GST returns for taxable periods, special returns or other returns (sections 16, 17 and 18 of the Goods and Services Tax Act 1985) are not filed on time. If the registered person has filed on time all GST returns

in the past 12 months, the Commissioner must notify the registered person that the late filing penalty will be payable on any further failure to file a return on time.

14. The amount of the late filing penalty for a GST return is:
 - \$250 for registered persons who account for GST using the invoice or hybrid basis;
 - \$50 for registered persons who account for GST using the payment basis.

Standard practice

Imposing the late filing penalty

15. The Commissioner's practice is that a late filing penalty is imposed on the following:
 - income tax returns for individuals (IR 3)
 - income tax returns for companies (IR 4)
 - employer monthly schedules (IR 348 and IR 349)
 - annual ICA returns required to be filed under section 69(1) and 69(2)(a) by an Australian ICA company that is not required to file a return of income for an income year that corresponds to an imputation year (IR 4); and
 - GST returns.
16. A late filing penalty will be imposed in the following circumstances.

Income tax returns

17. A late filing penalty will be imposed in respect of an outstanding IR 3 or IR 4 income tax return in the following circumstances:
 - (a) the return is not filed by the due date, and is not subject to an extension of time arrangement; or
 - (b) the return is subject to an extension of time arrangement, and is not filed by the date agreed to in that arrangement; or
 - (c) an extension of time arrangement is withdrawn from a client/all clients of a tax agent, and the return(s) are not filed by the date specified when the extension of time was withdrawn; or
 - (d) the return is for a client of a tax agent with an extension of time arrangement and is not filed by the 31st of March in the year immediately following the income year to which the return applies.
18. Before imposing a late filing penalty the Commissioner will provide written notification of at least 30 days, either by public notification or directly to the taxpayer.
19. The amount of the penalty for outstanding income tax returns is determined from the taxpayer's previous

year's net income based on the return filed. Once the return is received the amount of the penalty is checked and if the net income is in a different bracket to the previous year's return, the penalty is amended.

20. If Inland Revenue has no information on which to base the late filing penalty, or the previous year's return has not been filed, the minimum penalty of \$50 is imposed. When the return is received the amount of the penalty is checked and increased where appropriate. If the amount of the late filing penalty is increased, time will be given to pay any additional penalty. The minimum penalty remains payable if the return is subsequently filed and shows a loss.
21. The due date for payment of a late filing penalty is the later of a date specified by the Commissioner, not being less than 30 days after the date of the notice informing of the imposition of the penalty, and the terminal tax date for the tax year to which the return relates.

Employer monthly schedules

22. The first time an employer fails to file an employer monthly schedule by the due date, the Commissioner will issue a warning notice to the employer advising a late filing penalty will not be imposed this time, but in future if schedules are not filed on time a late filing penalty will be imposed. However Inland Revenue will take a liberal approach in regard to imposing late filing penalty in respect of an employer monthly schedule.
23. If, within 12 months of the warning notice being issued, a further default in filing a schedule occurs, a late filing penalty will be imposed in respect of that schedule.
24. If following the warning notice the employer files all employer monthly schedules on time for 12 months and then defaults a further warning notice will be issued.
25. The due date for payment of a late filing penalty is the 5th or 20th of the month following the month in which the schedule was due to be filed, depending on whether the employer pays PAYE deductions monthly or twice monthly.

Annual ICA returns

26. A late filing penalty will be imposed when the ICA return has not been filed by the due date and at least 30 days written notification of the intention to impose the penalty has been given, either directly to the taxpayer or by public notification.
27. The due date for payment of a late filing penalty is the later of a date specified by the Commissioner, not being less than 30 days after the date of the notice

informing of the imposition of the penalty, or the date by which the company is required to file the annual ICA return.

GST returns

28. The first time a registered person files their GST return late, they will be advised that if they are late in filing another of their GST returns within the next 12 months a late filing penalty will be imposed on that second late return. If the registered person files all their GST returns on time for the 12 months following a warning notice and then defaults again, a further warning notice will be issued.
29. The amount of the late filing penalty for GST returns is:
- \$250 if the invoice or hybrid basis is used at the time the return is due; or
 - \$50 if the payments basis is used at the time the return is due.
30. The penalty is due by the 28th of the second month following the end of the relevant taxable period (or 15 February if the return was due 15 January or 7 June if the return was due 7 May).

Reversal or remission of late filing penalty

31. The Commissioner's practice is that the late filing penalty may be reversed if:
- the return was filed before the date the late filing penalty was imposed, but had not been "lodged" by Inland Revenue; or
 - the return or employer monthly schedule was not required to be filed; or
 - In respect of an employer monthly schedule, the taxpayer did not pay any salary or wages even though a registered employer.
32. The Commissioner's practice is that the late filing penalty may be remitted if the legislative criteria in regards to the remission of penalties and interest contained in sections 183A or 183D are met. Remission of penalties and interest is discussed in Standard Practice Statement 05/10.

33. The Commissioner's practice is that the late filing penalty will not be remitted if:
- the taxpayer has an extension of time arrangement as a client of a tax agent, but the agent had not notified the Commissioner that the taxpayer was their client before the late filing penalty was imposed;
 - the taxpayer was granted an extension of time arrangement (either as a client of a tax agent or individually), after the late filing penalty was imposed.

This Standard Practice Statement is signed on 9th May 2012.

Rob Wells

LTS Manager, Technical Standards

LEGAL DECISIONS – CASE NOTES

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

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

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

COURT'S EARLIER DECISION CONFIRMED

Case	Clarence John Faloon v Commissioner of Inland Revenue
Decision date	29 February 2012
Act(s)	Tax Administration Act 1994, High Court Rules
Keywords	Appeal, disputable decision, mischievous, frivolous, vexatious, strike out

Summary

Mr Falloon ("the appellant") sought review of a decision of an Associate Judge, wherein that Associate Judge made an order striking out the appellant's pleading and dismissed the proceeding before him. The appellant's case was that the respondent made a statement in a letter to the appellant that equates to a "disputable decision" for the purposes of the Tax Administration Act 1994 ("TAA") and he sought to challenge that decision accordingly.

The Associate Judge held that:

- it was not reasonably arguable that the statement in the letter was a "disputable decision"; and
- the pleading was mischievous, frivolous, vexatious and an abuse of the process of the Court.

Peters J of the High Court agreed with the Associate Judge and dismissed the appellant's application for review.

Impact of decision

This decision provides confirmation that the Associate Judge was correct in his earlier judgment. It also confirms the willingness of the Court to consider applications to strike out, in their entirety, before dismissing proceedings as frivolous or vexatious.

Facts

The appellant commenced judicial review proceedings in the High Court against the Commissioner of Inland Revenue

("the Commissioner") on 15 October 2010. He claimed he was entitled to a review of a decision by the Commissioner not to assess him for income that the Commissioner says he did not receive.

Rather than filing a statement of the defence, the Commissioner applied in November 2010 to have proceedings struck out.

On 8 August 2011, the appellant filed an amended statement of claim. No further applications were made by the Commissioner and the matter was heard before an Associate Judge on 3 November 2011.

The appellant argued the following with regard to the amended statement of claim:

- He is a trustee of a trust named "the 1977-Year Diversion of Kawau Stream Trust" ("the trust") and that for the purposes of income tax legislation, he, as a trustee, is an "associated person" of a "holder" of a "financial arrangement" for the "disposition" of land and therefore, must file returns in respect of accrued income (alleged \$8,790,852.46) as is due to the trustee.
- His Notice of Proposed Adjustment ("NOPA") (which proposed to adjust the income of the trust by \$7,677,702.90) was not rejected by a Notice of Response ("NOR") within two months and therefore, the Commissioner was deemed to have accepted the NOPA.
- The Commissioner's decision to decline to take any further action regarding the NOPA is itself a "disputable decision".

The Associate Judge considered the arguments raised by the appellant. However, he ultimately struck out his pleading because:

- it was not reasonably arguable that a statement made in a letter from the Commissioner to the appellant was a disputable decision; and
- the pleading was mischievous, frivolous, vexatious and an abuse of the process of the Court.

Decision

Peters J was satisfied that the Associate Judge was correct to strike out the pleading in the basis that it was frivolous, vexatious or otherwise an abuse of process.

When looking at the appellant's second ground of review, Peters J held that although there is a real controversy, the Court may have regard to wider considerations and held that the Associate Judge correctly exercised this consideration. Further, her Honour was satisfied (after reviewing the Commissioner's bundle of authorities) that the Court's previous findings were as the Associate Judge described them.

When considering the appellant's additional grounds for consideration, Peters J held:

- the Associate Judge made his statements based on the authorities which were made available to him (as well as knowledge from previous proceedings) therefore there was no error in judgement;
- on an application to strike out, the Court tends to proceed on the basis that the matters alleged in the statement of claim will be established, unless it is plain that they cannot be correct;
- it was for the Judge to receive such authorities as he saw fit;
- there was no contradiction or relevancy to the issues which arise on an application for review;
- the Associate Judge was aware and considered the amended statement of claim as he referred to it in his decision; and
- it was clear that the Associate Judge was striking out the statement of claim under rule 15.1 as mischievous, frivolous, vexatious and an abuse of Court process.

After the above findings, Peters J accordingly dismissed the appellant's application for review.

RECEIVERS OBLIGED TO PAY GST ON MORTGAGEE SALES

Case	Simpson and Downes as receivers of Capital & Merchant Investments Ltd (in receivership) v Commissioner of Inland Revenue
Decision date	30 March 2012
Act(s)	Goods and Services Tax Act 1985, Receiverships Act 1993, Property Law Act 2007
Keywords	Creditor, liability, receivership, mortgagee sale

Summary

This case was an appeal from the High Court which had found the receivers were personally liable for goods and services tax ("GST") payable by Capital & Merchants Investments Ltd (in receivership) ("CMI") in relation to five mortgagee sales. The Court of Appeal held that the receivers do not have "personal liability" for the payment to the Commissioner of Inland Revenue of GST payable by CMI but are obliged as receivers of CMI to pay GST to the Commissioner.

Impact of decision

This decision confirms that receivers are not "personally liable" for payments of GST when conducting mortgagee sales as agents of companies in receivership. However, the receivers are obliged to pay GST on mortgagee sales to the Commissioner.

Facts

Capital & Merchant Investments Ltd was placed into receivership by the general security agreement holder, Fortress Credit Corporation (Australia) II Pty Ltd ("Fortress"). Simpson and Downes, of Grant Thornton New Zealand Ltd, was appointed as receivers.

Five properties, which CMI held mortgages over, were sold by mortgagee sale and GST was incurred in respect of each sale. CMI filed returns under section 17 of the Goods and Services Tax Act 1985 ("GST Act") but no GST was paid with the returns.

The Commissioner and the receivers agreed that the receivers would pay GST to the Commissioner and the receivers would apply to the High Court for directions under the Receiverships Act 1993. The issue agreed upon in the application to the High Court was whether the receivers had "personal liability" to the Commissioner for the GST payable by CMI in relation to the mortgagee sales. If the receivers were not personally liable, the GST would be refunded within seven days.

The High Court¹ found the receivers had “personal liability” to the Commissioner for the GST incurred in the five mortgagee sales. The receivers appealed to the Court of Appeal.

Issues

The Court of Appeal considered three issues:

1. Did the receivership of CMI mean that the Commissioner became an unsecured creditor for the GST with Fortress, as secured creditor, entitled to receive the GST in priority?
2. Did the receivers have “personal liability” to pay the GST to the Commissioner as the High Court held?
3. What answer should be given to the agreed issue in the context of an application for directions under section 34 of the Receiverships Act 1993?

Decision

Does CMI's receivership mean Fortress is entitled to GST?

The Court determined that Fortress was not entitled to the GST and CMI was liable for the GST for the following reasons:

- Even though CMI, as a finance company, was not registered for GST they were still required to pay the GST. This is because under sections 5(2) and 17 of the GST Act, CMI was required to return and pay the GST regardless of whether it was registered for GST or not.
- Under section 185 of the Property Law Act 2007, CMI must pay all amounts reasonably paid by CMI “with a view to the realisation of the security”, which includes the GST.
- Lastly, GST paid to a mortgagee on a mortgagee sale must be paid by the mortgagee to the Commissioner.

Applying *Edgewater*², the GST payment must be made to the Commissioner as a cost of sale and “simply does not reach the general funds of the mortgagee”. The differences between section 104 of the Land Transfer Act 1952 (which has been repealed) and section 185 of the Property Law Act 2007 (which replaced section 104) are immaterial.

The Court found that the application of sections 5(2) and 17 of the GST Act and section 185 of the Property Law Act 2007 in accordance with *Edgewater* is not altered by the appointment of receivers because of the following:

- The judgment in *Edgewater* makes it clear that there is no policy in the GST Act of protecting secured creditors and

the Commissioner is in a better position than secured creditors with respect to GST.

- Under clause 12.1 of the general security agreement between Fortress and CMI, Fortress was entitled to receive the “net proceeds of the sale” which excludes GST and any other payments made to third parties on the sales of the properties. Fortress therefore had no contractual right to the GST payments on the mortgagee sales and the GST payment must be made to the Commissioner as separate from the general funds of the mortgagee. The GST simply did not reach the general funds of the mortgagee.
- The Court distinguished the facts of *Stiassny*³ because that case did not involve a mortgagee sale nor the application of section 185 of the Property Law Act 2007. The Court also distinguished the Australian case of *PM Developments*⁴ because in that case there was no provision equivalent to section 185.
- The view that as a matter of principle a receiver is obliged to account to the Commissioner for the GST received on a mortgagee sale is consistent with the English case of *Sargent v Customs and Excise Commissioners*⁵ and there is force in the view that a receiver is obliged to pay GST even if no personal liability is imposed.

Because of these reasons, the Court found that the receivers were obliged to pay the Commissioner GST under sections 5(2) and 17 of the GST Act and not to the secured creditor. The terms of agreement by which the secured creditor released its caveats could not influence the application of the statutory provisions.

The personal liability of the receivers

The Court did not consider the receivers had “personal liability” for the payment of GST:

- Section 58(1) of the GST Act provides that a receiver is personally liable for the payment of GST incurred during the receivership; this does not apply to a mortgagee sale made by a company not carrying on a taxable activity and therefore is not relevant in this case.
- Section 5(2) requires that goods shall be deemed to be sold by the first person (the mortgagor) if sold by a second person who can exercise the power to sell the property. The receivers were acting as agents of CMI and therefore could not be the person by whom the power to sell can be exercised as referred to in section 5(2).

¹ *Simpson and Downes v CIR* HC Wellington CIV 2010-485-1860, 17 May 2011.

² *Commissioner of Inland Revenue v Edgewater Motel Ltd* [2003] 1 NZLR 425 (CA); and [2004] UKPC 44, (2004) NZTC 18,644.

³ *Commissioner of Inland Revenue v Stiassny and Graham* [2012] NZCA 93.

⁴ *Deputy Commissioner of Taxation v PM Developments Pty Ltd* [2008] FCA 1886.

⁵ *Sargent v Customs and Excise Commissioners* [1994] 1 WLR 235 (HC) and [1995] 1 WLR 821 (CA).

- Section 17 requires that “the person selling the goods” file a return and pay GST. As agents for CMI, the receivers did not, themselves, sell the properties. Therefore, the receivers have no personal liability to pay the GST.
- Because section 51B only applies to Parts 3 and 6 of the GST Act, and not to section 58, CMI cannot be deemed to be a registered person for the purposes of section 58.
- CMI was never registered for GST and never conducted any taxable activity in its own right. The mortgagee sale was taxable activity of the mortgagor (the first person) under section 5(2), not CMI.
- Finally, because the receivers have an obligation to pay GST to the Commissioner under sections 5(2) and 17 of the GST Act and section 185 of the Property Law Act 2007, it is unnecessary to impose personal liability on the receivers. It would be unlikely that Parliament would intend liability under the GST Act to be implied.

The answer to the agreed issue

Simpson and Downes, as receivers of CMI, does not have “personal liability” for payment to the Commissioner of the GST payable by CMI.

However, the Court found that, while the agreed issue referred to the “personal liability” of the receivers in their capacity “as receivers” to account for the GST, in the view of the Court, the question is whether the receivers “as receivers” are obliged to account. The Court found that the receivers are obliged to account to the Commissioner for the GST received.

The Court took a wide interpretation of section 34 of the Receiverships Act 1993, approached the issue as a matter of substance over form and gave a direction that Simpson and Downes, as receivers of CMI, is obliged to pay the GST received on the five mortgagee sales to the Commissioner.

JUDICIAL REVIEW – NOT AN EXTREMELY RARE CASE

Case	Ali & Fa’agutu v Commissioner of Inland Revenue
Decision date	16 April 2012
Act(s)	Judicature Amendment Act 1972, Tax Administration Act 1994
Keywords	Judicial review, challenge procedures, genuine assessments, interviews

Summary

The plaintiffs alleged the Commissioner’s assessments were not genuine assessments and sought judicial review.

The High Court confirmed that the Supreme Court decision in *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158 has made it clear that section 109 of the Tax Administration Act 1994 (“TAA”) is a complete bar to judicial review proceedings seeking to overturn the Commissioner’s assessments unless the claim can come within the category of rare cases where it is not practically possible for a taxpayer to attack an assessment under the disputes and challenge procedures. The Supreme Court had observed that this would be extremely rare.

Facts

The Commissioner made default assessments against each of the plaintiffs in June 2007 on the basis the plaintiffs were engaged in a joint-venture business buying and selling properties.

The plaintiffs issued a Notice of Proposed Adjustment (NOPA) in September 2007. The Commissioner rejected the NOPA, noting tax returns had not been filed. However, the Commissioner advised the plaintiffs that the assessments would be considered under section 113 of the TAA. The Commissioner ultimately amended some of the assessments for Ms Fa’agutu but confirmed that the remaining assessments would not be amended. The plaintiffs did not take any formal steps to dispute or challenge the assessments.

Over the following two years, the Commissioner and the plaintiffs had various meetings, discussions and correspondence regarding the debt. Ultimately, no amount was paid by the plaintiffs.

On 9 March 2010, the Commissioner filed Notices of Claim in the District Court seeking judgment for the debts. Judgment was obtained in October 2010.

Following a number of further discussions and correspondence, a settlement offer was made by the

plaintiffs in February 2011. This offer was declined as the Commissioner had been made aware by the plaintiffs that they held substantial equity in their residential property. The Commissioner made a counter offer which was left open for 20 days. This was rejected by the plaintiffs. The Commissioner proceeded to seal the District Court judgments in August and September 2011. Bankruptcy notices were then filed in the High Court in respect of the plaintiffs in October 2011.

On 11 November 2011, the plaintiffs filed judicial review proceedings seeking the High Court remit the matter back to the Taxation Review Authority ("TRA") for assessment and review.

The pleadings

The statements of claim filed by the plaintiffs alleged that the Commissioner, in filing proceedings in the District Court, had denied the plaintiffs their right to fully exhaust all the options and procedures provided under Parts 8 and 8A of the TAA. Further, it was alleged that at the time the District Court proceedings were issued, the plaintiffs believed negotiations with the Commissioner regarding the debt were still proceeding.

However, in submissions, counsel for the plaintiffs advanced the plaintiffs' case on the basis the Commissioner's assessments were not genuine assessments.

At issue was whether the Commissioner's assessments were genuine assessments.

Decision

Toogood J referred to section 109 of the TAA and confirmed that the Supreme Court decision in *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158 has made it clear that section 109 is a complete bar to judicial review proceedings seeking to overturn the Commissioner's assessments unless the claim could come within the category of rare cases where it is not practically possible for a taxpayer to attack an assessment under the disputes and challenge procedures. It was observed by the Supreme Court that this would be extremely rare.

The plaintiffs in this case submitted that these proceedings were not an attack on the merits of the assessments, but rather on the legitimacy of the process and the integrity of the Commissioner's decision-making. With regard to the arguments in relation to legitimacy, the plaintiffs raised a number of points:

- Given the weight and seriousness of an investigation, the plaintiffs were entitled to basic rights afforded by natural justice, including being adequately represented.

- The plaintiffs are humble laypersons and the transactions were not the sort of sophisticated commercial arrangements which gave rise to some of the relevant leading cases. It was also asserted that Mr Ali is in poor health.
- The plaintiffs were only interviewed once before the initial default assessments were made.
- The Commissioner should have disclosed the information he had already obtained during his investigation prior to the interviews and should not have asked the plaintiffs open-ended questions when he already knew the answer.

Toogood J confirmed that there is no statutory or other authority suggesting the Commissioner was obliged to disclose information in initial interviews. His Honour also referred to the initial audit letter (which set out the nature of the audit and invited voluntary disclosure), the advice given at the outset of the interview that this was voluntary, that the plaintiffs were entitled to have an adviser present, and that they could refuse to answer and further that any information could later be used in evidence.

As to representation, Toogood J confirmed that in fact the plaintiffs were accompanied by their tax agent at their interviews. His Honour also stated that the assessments were made on the basis of the information obtained during the interviews, information subsequently supplied by the plaintiffs and information from third parties.

His Honour also confirmed that the Commissioner was not obliged to make full disclosure of all information he holds until he provides a statement of position pursuant to section 89M of the TAA.

Toogood J concluded from the undisputed facts that the Commissioner had been more than patient with the plaintiffs and that they had been given every opportunity to avail themselves of the disputes and challenge procedures in the TAA.

As to the argument the assessments were no more than arbitrary conjecture or demonstrably unfair, the plaintiffs claimed that the Commissioner had predetermined the income based on information obtained prior to the interview with Mr Ali and thereafter had a closed mind. Toogood J rejected this argument, confirming the Commissioner went to considerable lengths to provide the plaintiffs with opportunities to satisfy him as to the nature and extent of the property dealings. Further, the Commissioner considered the plaintiffs' health and financial circumstances pursuant to the hardship provisions and was tolerant over approximately four years of investigation and discussion. In addition, the Commissioner had considered

assertions made by the plaintiffs for the purposes of section 113 of the TAA, despite their failure to file returns, and was prepared to amend assessments for Ms Fa'agutu. The Court considered that this demonstrated the Commissioner's careful consideration of the evidence submitted.

Ultimately, his Honour concluded that, this was not a claim within the category of "extremely rare" cases envisaged by the Supreme Court in *Tannadyce* and accordingly section 109 was a complete bar to these proceedings.

ITEMS OF INTEREST

TAX INFORMATION BULLETIN READER SURVEY

The February issue of the *Tax Information Bulletin* (TIB) included a reader survey to help us gauge how well the TIB meets your needs. Thank you to the many who responded, your feedback was most appreciated. The following are responses to some of your comments and a summary of some of the feedback. We have yet to consider if any changes are required to the current publication.

Frequency and format

An overwhelming majority agree that the TIB should be published monthly.

The printed copy was found to be very useful to those who completed the survey in hard copy. The PDF format was preferred by those who completed the survey online.

Content

The information most useful to readers is new legislation, interpretation and standard practice statements, questions we've been asked, determinations, foreign currency exchange tables, revenue alerts and mileage rates.

Information that is sometimes useful is case notes, binding rulings, operational statements, and orders in council. Equally useful and not useful were the livestock costs and market values.

The least useful information is the opportunity to comment section. The international tax disclosure exemptions were sometimes useful or not at all (in roughly similar numbers).

TIB index

Quite a few readers were unaware that the TIB index is available online. If you have trouble remembering where it is, there's a note about how to find it on the inside back cover of the printed TIB under the heading "Get your TIB sooner on the internet". You can find it at www.ird.govt.nz/aboutir/newsletters/tib but you do need to scroll down to the bottom of the page.

The index is only available as a PDF and is broken up into three files (A–E, F–M, N–Z) to make it smaller to download. The whole index now runs to 121 pages, which makes it a very large file, and we're required by government web standards to minimise file sizes where possible. We do not currently have the resources to update it more frequently or to print it annually, but we will look at ways to make it more searchable. The latest PDF has alphabetical bookmarks and a slightly larger font to make it easier to read and find the section you want.

Some comments seemed to relate to the contents page of the actual TIB. We currently print the short contents on the front cover, with the long version inside in the "In summary" section. Although this can't change (there's only limited space on the cover so it's better to keep the main titles there) the "In summary" could be expanded as needed. We may consider including more page numbers here for long items to make it easier to find key sections.

Email alert

Anyone can subscribe to receive an email when the latest issue has been published to the website. You can subscribe (or unsubscribe) for all our newsletters at www.ird.govt.nz/aboutir/newsletters/subscriptions

If you don't receive an email you may have typed in an incorrect email address. Unfortunately we can't find and correct these, you will need to subscribe again with the correct address.

Our email guidelines prevent us from attaching the PDF but we are in the process of changing our email system to improve our email content.

Thank you to all those who offered their email addresses for later consultation.

REGULAR CONTRIBUTORS TO THE TIB

Office of the Chief Tax Counsel

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

Legal and Technical Services

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

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

Policy Advice Division

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

Litigation Management

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

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

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

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

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