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TAX INFORMATION *Bulletin*

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Inland Revenue
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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents. Because we are keen to produce items that accurately and fairly reflect taxation legislation and are useful in practical situations, your input into the process, as a user of that legislation, is highly valued.

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

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

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

IN SUMMARY

Items of interest

Instalment arrangements for provisional tax 3

Standard Practice Statement SPS 11/01: *Instalment arrangements for payment of tax* has been reviewed. As a consequence, SPS 11/01 has been changed and now states that Inland Revenue will accept instalment arrangements for the payment of provisional tax when that provisional tax is able to be calculated in accordance with the rules in subpart RC of the Income Tax Act 2007.

Binding rulings

Product ruling BR Prd 12/01: AA Smartfuel Programme 4

This product ruling applies to the AA Smartfuel Programme, a rewards scheme whereby customers obtain entitlements to buy fuel at a discounted price from certain fuel providers by purchasing goods or services.

Product ruling BR Prd 12/03: Newmont Mining Amenity Effect Programme 7

This product ruling applies to the payment by Newmont Mining NZ Companies to persons measurably affected by mining activity, pursuant to their Amenity Effect Programme.

Legislation and determinations

Determination CFC 2012/01: Non-attributing active insurance CFC status (TOWER Insurance Limited) 8

This determination applies to TOWER Insurance Limited and grants non-attributing active CFC status to the specified insurance CFCs resident in Fiji for the 2011–12 and 2012–13 income years.

Determination CFC 2012/02: Non-attributing active insurance CFC status (TOWER Insurance Limited) 9

This determination applies to TOWER Insurance Limited and grants non-attributing active CFC status to the specified insurance CFCs resident in Papua New Guinea for the 2011–12 and 2012–13 income years.

Operational statements

2012 review of the Commissioner's mileage rate for expenditure incurred for the business use of a motor vehicle 10

Inland Revenue has reviewed the motor vehicle mileage rate to reflect the average cost of running a motor vehicle, including the average fuel prices, and has changed the mileage rate for the 2012 income year to 77 cents per kilometre for both petrol and diesel fuel vehicles.

Legal decisions – case notes

Rental property partnership a business

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The disputant owned several rental properties in a partnership, which was operating at a net loss. The losses were offset against other income, which increased her entitlement to Working for Families Tax Credits (WfFTC). Despite the losses, the rental properties were found to be a business because they were an undertaking for making a pecuniary profit. The losses could not therefore be offset against other income for WfFTC purposes.

Onus on taxpayer

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The disputant conducted a property development business, operated companies, sold cars and had boarders. He failed to register for GST or to return the relevant income. Assessments were made by the Commissioner after a review of his bank accounts was undertaken. The disputant later attempted to claim GST for expenditure incurred but he had no invoices. He also claimed some of the money in the bank accounts was from re-banking. It was found that the re-assessment by the Commissioner using the information available was the most reliable. Some extra expenditure was allowed but generally the disputant had failed to prove the extra expenditure, to show that money paid into the bank was not income or to provide evidence or tax invoices which would allow him to claim GST input tax credits.

Statement of position response period

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The disputant issued his Statement of Position ("SOP") on 20 November 2009. The Commissioner issued his SOP via fax on the last date of the response period, 19 January 2010, at 11.07 pm and also posted it at 11.25 pm. The disputant contended the High Court Rules applied to the dispute and that the Commissioner's SOP being issued after 5 pm was out of time.

Accrual rules – applied to reinsurance treaties

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The plaintiffs challenged the Commissioner's assessments made following completion of the disputes process. The plaintiffs had treated the cash flows in their tax returns on the basis that refundable commissions were assessable income and commission repayments were deductible expenditure. The High Court confirmed the Commissioner's position that the commission arrangements were to be considered separately from other components of the money flows under the applicable treaties. As such, the commission arrangements constituted a financial arrangement for the purposes of the accrual rules. The accrual rules required the commission repayments to be spread over the relevant period with refundable commissions being netted off against the commission repayments, and only the sums attributable to the interest debited to the bonus account remained and could be deductible by the plaintiffs.

Strike out declined

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The plaintiffs claimed that the Commissioner had failed to act on a Notice of Proposed Adjustment ("NOPA") they issued in response to a memorandum of decision issued to them by the Commissioner. The alleged NOPA was issued at a time when several other proceedings involving the same issues were being reviewed by the Courts. The Commissioner applied for strike out on the grounds of abuse of process and no reasonable cause of action. The strike-out application was dismissed.

ITEMS OF INTEREST

INSTALMENT ARRANGEMENTS FOR PROVISIONAL TAX

A recent query about Standard Practice Statement SPS 11/01: *Instalment arrangements for payment of tax*, in respect of our position that Inland Revenue will not enter into an instalment arrangement where the taxpayer has outstanding returns, prompted us to review that part of the SPS.

That review established that the position, as currently set out in SPS 11/01, of not accepting instalment arrangements for the payment of provisional tax, is not consistent with the general tenor of section 177B of the Tax Administration Act 1994.

As a consequence, SPS 11/01 has been changed and now states that Inland Revenue will accept instalment arrangements for the payment of provisional tax when that provisional tax is able to be calculated in accordance with the rules in subpart RC of the Income Tax Act 2007.

The electronic version of the SPS on Inland Revenue's website (**http://www.ird.govt.nz/technical-tax/standard-practice/returns-debt/sps-11-01-instalment-arrangements-for-payment-of-tax.html**) has been updated and the parts that have been changed have been highlighted.

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently. The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates their tax liability based on it.

For full details of how binding rulings work, see *Adjudication & Rulings: A guide to binding rulings (IR 715)* or pages 1–6 of the *TIB* Vol 6, No 12 (May 1995) or pages 1–3 of Vol 7, No 2 (August 1995). You can download these publications free from our website at **www.ird.govt.nz**

PRODUCT RULING BR PRD 12/01: AA SMARTFUEL PROGRAMME

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by BP Oil New Zealand Limited and AA Smartfuel Limited.

Taxation Laws

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

This Ruling applies in respect of sections 2, 3A, 6, 8, 20 and 25(1)(b).

The Arrangement to which this Ruling applies

The Arrangement is the AA Smartfuel Programme (the Programme), which is a rewards scheme whereby customers obtain entitlements to buy fuel at a discounted price from certain fuel providers by purchasing goods or services from certain retailers (Participating Reward Providers (PRPs)). The fuel providers may also be PRPs in respect of both fuel and non-fuel purchases.

This Ruling applies only to PRPs that are "registered persons" (as defined in s 2).

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

Parties to the Arrangement

1. The Arrangement involves the following parties:
   - AA Smartfuel Limited (AASL) as the scheme operator and administrator;
   - various fuel providers, currently BP Oil New Zealand Limited (BP) and Chevron New Zealand (which operates its retail fuel business under the Caltex brand);
   - various PRPs, which currently includes BP; and
   - individual people who join the scheme (customers).
2. The AA Smartfuel website (**www.AAsmartfuel.co.nz**) will list participating PRPs and fuel providers current at any time. PRPs and fuel providers may be subject to change.
3. Individuals will be able to join the Programme through one of the following two ways:
   - All AA members are automatically enrolled in the Programme.
   - Non-AA members can obtain a free AA Smartfuel card at PRPs and fuel providers, and will need to complete an application form online or in hard copy to be able to redeem their discounts.

Documents relevant to the Arrangement

4. The documents relevant to the Arrangement are the:
   - AA Smartfuel Terms and Conditions, which relate to customers;
   - AA Smartfuel Merchant Agreement, entered into between AASL and PRPs (PRP Agreement);
   - AA Smartfuel National Fuel Merchant Agreement, entered into between BP and AASL (BP Agreement); and
   - AA Smartfuel Fuel Merchant Agreement, entered into between Chevron New Zealand and AASL (Chevron Agreement).

   At the time this Ruling was issued, these documents were in the process of being amended. The finalised documents will not be materially different to the draft documents provided to Inland Revenue on 30 August 2011 and 14 December 2011.

Summary of the AA Smartfuel Programme

5. The Programme is a nationwide rewards scheme, which was launched to the public on 7 November 2011. Under the Programme, a customer will earn an entitlement to a discount on the purchase of fuel from fuel providers by purchasing qualifying goods or services from a PRP. The fuel discount entitlements will be credited to a card issued to the customer on presentation to the PRP when making qualifying purchases.

6. All fuel discount entitlements earned from all PRPs accumulate on the customer's card as they make qualifying purchases from PRPs. Fuel discount entitlements expire at the end of the month following the month in which the purchases are made (eg, a fuel discount entitlement earned in August will expire on 30 September).
7. The fuel discount entitlements will provide the customer with the right to a discount on the GST-inclusive price of fuel from fuel providers, expressed as cents per litre, limited to a maximum of 50 litres of fuel. For example, a PRP may credit the customer's card with a fuel discount entitlement of 4 cents per litre, which amounts to a $2 discount including GST on a purchase of 50 litres of fuel. Each PRP can set the level of fuel discount entitlement they offer, and can set special fuel discount entitlements (eg, if a promotion is done over a period of time) by logging into the AA Smartfuel platform and adjusting the cents discount per dollar spent.
8. Customers will be able to check their fuel discount entitlement balance online. Generally, both types of customers (AA and non-AA members) will be entitled to the same deals, but AA may occasionally offer a special deal to its members.
9. When a customer purchases fuel from a fuel provider and presents the provider with their card, the accumulated discounts on the card will be credited against the purchase price of the fuel (petrol, diesel or both), up to a maximum of 50 litres, such that the customer pays a discounted amount. Accumulated discounts on the reward card could be sufficient to discount up to 50 litres of fuel purchased.

Payment flows involving AA Smartfuel Limited

10. When a customer makes a qualifying purchase from a PRP and earns a fuel discount entitlement, under clause 4.1 of the PRP, BP and Chevron Agreements, the PRP must pay an amount equivalent to the value of the discount entitlement to AASL. Each week on Sunday night, AASL will determine the total amount of discounts provided to customers in the preceding week and either:
    - AASL will send a tax invoice to the PRP; or
    - (if s 24(2) is satisfied) the PRP will send a buyer created tax invoice to AASL.

    The PRP will pay the amount on Tuesday night.
11. Clause 4.1 of the PRP Agreement states:

    > 4.1 In consideration of us undertaking to procure the Participating Redemption Parties' agreement to honour the rights arising from AA Smartfuel Discounts awarded by you each week, you undertake to pay us an amount equal to the aggregate amount of AA Smartfuel Discounts sponsored and awarded by you to AA Smartfuel Members at each of the Business Premises each week (including any AA Smartfuel Discounts awarded under clause 16.2) which amount will be paid irrevocably by you to the AA Smartfuel Account by direct debit, weekly in arrears on Tuesday of the week following the week in which the relevant AA Smartfuel Discount Award Transactions occurred.
12. When a customer redeems their discount entitlement by purchasing fuel from a fuel provider and presenting their AA Smartfuel card, AASL will pay the fuel provider an amount equivalent to the discount given, under clause 4.4 of the BP and Chevron Agreements. The AA Smartfuel system will identify transactions when fuel discount entitlements are redeemed, and each week either:
    - the fuel provider will issue a tax invoice to AASL; or
    - (if s 24(2) is satisfied) AASL will issue a buyer created tax invoice to the fuel provider.

    The payment to the fuel provider is made on Thursdays by AASL.
13. Clause 4.4 of the BP Agreement states:

    > 4.4 In consideration of you redeeming AA Smartfuel Discounts, we will pay you an amount equal to the aggregate amount of AA Smartfuel Discounts redeemed by you at each of the Business Premises each week, less the aggregate value of any AA Smartfuel Discounts awarded by you on transactions where AA Smartfuel Discounts have been awarded and redeemed in the same transaction. We will pay you from the AA Smartfuel Account by direct debit, weekly in arrears on the Thursday of the following week.
14. Clause 4.4 of the Chevron Agreement is materially the same as the BP Agreement, other than the reference to discounts being awarded and redeemed in the same transaction.
15. To the extent any fuel discount entitlements are not used before expiry, either:
    - AASL will issue a credit note to the PRP, or
    - (if s 25(3A) is satisfied) the PRP will issue a buyer created credit note to AASL.

    AASL will then refund an amount equivalent to the unused discount to the relevant PRP, under clause 4.2 of the PRP, BP and Chevron Agreements. This amount is then paid out within 10 days.

16. Clause 4.2 of the PRP Agreement states:

    4.2 Where the AA Smartfuel Discounts sponsored and awarded by you (and paid for under clause 4.1) have expired (by passage of time or because they are in excess of your Pro Rata Share of the AA Smartfuel Discounts redeemed in an AA Smartfuel Discount Redemption Transaction), the amount of the consideration payable by you under clause 4.1 will be reduced by an amount equal to the amount of such expired AA Smartfuel Discounts and an amount equal to the amount of such reduction will be paid to you in respect of the relevant Business Premises by direct credit on or about the 10th of the month following the month in which the AA Smartfuel Discounts expired.

17. The fuel providers and PRPs also make additional payments to AASL for other services AASL provides in respect of the information technology platform that enables it to operate the Programme, as well as administration, establishment, transaction and other sundry fees.

Instant discounts by fuel providers

18. The Ruling does not apply to the provision of an "instant discount" by a fuel provider, being part of any discount on the price of goods or services supplied by a fuel provider to a customer, which is not referable to points accumulated under the Programme and does not result in a PRP having to reimburse the fuel provider.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The sale of goods and services by a PRP results in the customer providing "consideration" (as defined in s 2) for a single supply of goods and services and the right to buy fuel at a discount, under s 6. To the extent the PRP makes a taxable supply to the customer, the amount paid by the customer is subject to GST under s 8.
- Payments AASL makes to a fuel provider are "consideration" (as defined in s 2) for a taxable supply of services from the fuel provider to AASL. The amount AASL pays to the fuel provider is therefore subject to GST under s 8.
- In calculating the amount of tax payable in a taxable period under s 20, AASL will be entitled to an input tax (as defined in s 3A) deduction for all the GST charged in respect of supplies made by a fuel provider to AASL in that taxable period.
- Where a customer uses fuel discount entitlements to purchase fuel at a discounted price, under s 8(1) GST on that supply is chargeable only on the discounted price payable by the customer to the fuel provider.
- Payments a PRP makes to AASL are "consideration" (as defined in s 2) for a supply of services from AASL to the PRP. The amount the PRP pays to AASL is therefore subject to GST under s 8.
- To the extent that the single supply (comprising of goods and services and the right to buy fuel at a discount) made by a PRP to a customer is a taxable supply, in calculating the amount of tax payable in a taxable period under s 20, the PRP will be entitled to an input tax (as defined in s 3A) deduction, or (where s 20(3) applies) a deduction from the amount of output tax payable by that PRP, for the GST charged on supplies made by AASL to the PRP in that taxable period.
- When an amount is refunded to a PRP under clause 4.2 of the relevant Agreement, s 25(1)(b) will apply and either:
  - AASL will be required to provide the PRP with a credit note, or
  - (if s 25(3A) is satisfied) the PRP will be required to provide AASL with a buyer created credit note.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 November 2011 and ending on 31 December 2014.

This Ruling is signed by me on the 31st day of May 2012.

Howard Davis
Director (Taxpayer Rulings)

PRODUCT RULING BR PRD 12/03: NEWMONT MINING AMENITY EFFECT PROGRAMME

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by Newmont Mining NZ Companies (Consolidated Group) ("Newmont").

Taxation Laws

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

This Ruling applies in respect of sections CA 1(2), CB 1, CC 1(1), CD 1 and CE 1.

The Arrangement to which this Ruling applies

The Arrangement is the payment to persons pursuant to the Amenity Effect Programme ("AEP").

Newmont is required to comply with the Resource Management Act 1991 ("the RMA"), which includes the obligation to minimise any adverse effect of its operations on the environment and its neighbours. Consequently, Newmont endeavours to use industry-leading methods to manage, monitor and record the effect of its operations on the environment and on others living in the vicinity of its operations. However, based on the results of monitoring and modelling, Newmont has identified properties within the area of the Martha and Favona mines whose amenity may be measurably affected by mining activity specifically by noise, dust and blast-induced vibration effects ("the affected area").

In response to this, Newmont has developed the AEP, the full details of which have been provided to Inland Revenue in a letter dated 9 December 2011. The details are not repeated here, save to note that the AEP is not compensation for non-compliance with any of the conditions imposed under the RMA.

Occupiers of residential property within the affected area are offered an opportunity to participate in the AEP. However, any Waihi resident may request to be included in the AEP. Their inclusion or exclusion will be based on the results of monitoring and modelling at their property over the six-month payment period or a period sufficient to confirm potential effects on amenity.

Inclusion in the AEP is voluntary and an application to participate in the AEP can be made at any time.

Residents who apply to participate and are accepted into the AEP ("enrolled residents") will receive an initial one-off "enrolment payment". The enrolment payment is currently $500.

Enrolled residents are eligible for six-monthly, retrospective, effect-based payments for the greater of either noise or vibration effect based on its routine environmental monitoring results.

The quantum of the effect-based payments will vary with the actual loss of amenity experienced. If there is no effect, or the effect is to a greater or lesser extent, the payment will be varied.

Payments are carefully targeted to compensate for adverse amenity effects that residents have suffered.

Assumptions made by the Commissioner

This Ruling is not subject to any assumptions.

Conditions stipulated by the Commissioner

There are no conditions stipulated by the Commissioner.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The payments received by persons under the AEP are not income under sections CA 1(2), CB 1(1), CC 1(1), CD 1 and CE 1 of the Income Tax Act 2007.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 April 2012 to 31 March 2013.

This Ruling is signed by me on 5 June 2012.

Graham Poppelwell
Investigations Manager, Assurance

LEGISLATION AND DETERMINATIONS

This section of the *TIB* covers items such as recent tax legislation and depreciation determinations, livestock values and changes in FBT and GST interest rates.

DETERMINATION CFC 2012/01: NON-ATTRIBUTING ACTIVE INSURANCE CFC STATUS (TOWER INSURANCE LIMITED)

Reference

This determination is made under section 91AAQ of the Tax Administration Act 1994.

This power has been delegated by the Commissioner of Inland Revenue to the position of Investigations Manager under section 7 of the Tax Administration Act 1994.

Explanation (which does not form part of the determination)

Under sections CQ 2(1)(h) and DN 2(1)(h) of the Income Tax Act 2007, subject to sections CQ 2(2B) and DN 2(2), no attributed CFC income or loss arises from a CFC that is a non-attributing active CFC under section EX 21B of the Income Tax Act 2007.

Section EX 21B(3) of the Income Tax Act 2007 provides that a CFC that is an insurer meeting the requirements of a determination made by the Commissioner under section 91AAQ of the Tax Administration Act 1994 is a non-attributing active CFC. In the absence of such a determination, a CFC carrying on an insurance business is unlikely to be a non-attributing active CFC, because insurance income is otherwise treated as passive income and an attributable CFC amount by section EX 20B(3) of the Income Tax Act 2007.

Section 91AAQ(1)(b) of the Tax Administration Act 1994 allows a person to apply to the Commissioner for such a determination in respect of the members of a group of CFCs, if the members satisfy subsection (3). TOWER Insurance Limited has made application in respect of the members of the group of CFCs set out below.

It has been determined, having regard to the matters set out in subsections (4) and (5) of section 91AAQ of the Tax Administration Act 1994, that the members of the group of CFCs satisfy the requirements set out in section 91AAQ(3) of the Tax Administration Act 1994 and are accordingly non-attributing active CFCs for the purposes of section EX 21B of the Income Tax Act 2007.

Scope of determination

The CFCs to which this determination applies are:

Name	Jurisdiction
National Insurance Company (Holdings) Limited	Fiji
TOWER Insurance (Fiji) Limited	Fiji
Southern Pacific Insurance Company (Fiji) Limited	Fiji

Interpretation

In this document, unless the context otherwise requires:

"Attributed CFC income or loss" means attributed CFC income under section CQ 2 or attributed CFC loss under section DN 2 of the Income Tax Act 2007.

"CFC" means a CFC as defined in section YA 1 of the Income Tax Act 2007.

"Non-attributing active CFC" means a non-attributing active CFC under section EX 21B of the Income Tax Act 2007.

Determination

Pursuant to section 91AAQ of the Tax Administration Act 1994 I hereby determine that the above CFCs are non-attributing active CFCs for the purposes of section EX 21B of the Income Tax Act 2007.

Application date

This determination applies for the 2011–12 and 2012–13 income years.

This determination is signed by me this 13th day of August 2012.

John Trezise
Investigations Manager

DETERMINATION CFC 2012/02: NON-ATTRIBUTING ACTIVE INSURANCE CFC STATUS (TOWER INSURANCE LIMITED)

Reference

This determination is made under section 91AAQ of the Tax Administration Act 1994.

This power has been delegated by the Commissioner of Inland Revenue to the position of Investigations Manager under section 7 of the Tax Administration Act 1994.

Explanation (which does not form part of the determination)

Under sections CQ 2(1)(h) and DN 2(1)(h) of the Income Tax Act 2007, subject to sections CQ 2(2B) and DN 2(2), no attributed CFC income or loss arises from a CFC that is a non-attributing active CFC under section EX 21B of the Income Tax Act 2007.

Section EX 21B(3) of the Income Tax Act 2007 provides that a CFC that is an insurer meeting the requirements of a determination made by the Commissioner under section 91AAQ of the Tax Administration Act 1994 is a non-attributing active CFC. In the absence of such a determination, a CFC carrying on an insurance business is unlikely to be a non-attributing active CFC, because insurance income is otherwise treated as passive income and an attributable CFC amount by section EX 20B(3) of the Income Tax Act 2007.

Section 91AAQ(1)(b) of the Tax Administration Act 1994 allows a person to apply to the Commissioner for such a determination in respect of the members of a group of CFCs, if the members satisfy subsection (3). TOWER Insurance Limited has made application in respect of the members of the group of CFCs set out below.

It has been determined, having regard to the matters set out in subsections (4) and (5) of section 91AAQ of the Tax Administration Act 1994, that the members of the group of CFCs satisfy the requirements set out in section 91AAQ(3) of the Tax Administration Act 1994 and are accordingly non-attributing active CFCs for the purposes of section EX 21B of the Income Tax Act 2007.

Scope of determination

The CFCs to which this determination applies are:

Name	Jurisdiction
Southern Cross Marine Limited	Papua New Guinea
TOWER Insurance (PNG) Limited	Papua New Guinea

Interpretation

In this document, unless the context otherwise requires:

"Attributed CFC income or loss" means attributed CFC income under section CQ 2 or attributed CFC loss under section DN 2 of the Income Tax Act 2007.

"CFC" means a CFC as defined in section YA 1 of the Income Tax Act 2007.

"Non-attributing active CFC" means a non-attributing active CFC under section EX 21B of the Income Tax Act 2007.

Determination

Pursuant to section 91AAQ of the Tax Administration Act 1994 I hereby determine that the above CFCs are non-attributing active CFCs for the purposes of section EX 21B of the Income Tax Act 2007.

Application date

This determination applies for the 2011–12 and 2012–13 income years.

This determination is signed by me this 13th day of August 2012.

John Trezise
Investigations Manager

OPERATIONAL STATEMENTS

Operational statements set out the Commissioner's view of the law in respect of the matter discussed. They are intended to be a preliminary view in the absence of a public binding ruling or an interpretation statement on the subject.

2012 REVIEW OF THE COMMISSIONER'S MILEAGE RATE FOR EXPENDITURE INCURRED FOR THE BUSINESS USE OF A MOTOR VEHICLE

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

Inland Revenue has reviewed the motor vehicle mileage rate to reflect the average cost of running a motor vehicle, including the average fuel prices, and has changed the mileage rate for the 2012 income year to 77 cents per kilometre for both petrol and diesel fuel vehicles.

The Commissioner is required by statute to set a mileage rate for persons whose business travel is 5,000 or less in an income year. The mileage rate is set retrospectively for persons required to file a return for business income, so that the rate reflects the average motor vehicle operating costs for an income year. Those persons who meet the criteria have a choice of using the Commissioner's mileage rate or use actual costs if they consider that the Commissioner's mileage rate does not reflect their true costs. Taxpayers that choose to use actual costs are required to keep records to support any expenditure claimed.

The Commissioner accepts that employers may use the 2012 vehicle mileage rate as a reasonable estimate of costs when they reimburse employees for the use of their private vehicle for business related travel. As employers are required to make a reasonable estimate of expenditure incurred by employees on their behalf, at the time of making reimbursements, it is not envisaged that the vehicle mileage rate will apply retrospectively to settled employee reimbursements.

Also, employers may use an alternative estimate other than the Commissioner's vehicle mileage rate when reimbursing employees for use of their private vehicle for employment-related use. It is accepted that employers may use the motor vehicle running cost data published by other reputable sources, for example the New Zealand Automobile Association Incorporated, as an alternative reasonable estimate for reimbursement of employees.

The mileage rate does not apply in respect of motor cycles.

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.

RENTAL PROPERTY PARTNERSHIP A BUSINESS

Case	[2012] NZTRA 02
Decision date	9 July 2012
Act(s)	Income Tax Act 2004
Keywords	Working for Families Tax Credits, rental properties, principal caregiver, losses, business, pecuniary profit

Summary

The disputant owned several rental properties in a partnership, which was operating at a net loss. The losses were offset against other income, which increased her entitlement to Working for Families Tax Credits (WfFTC). Despite the losses, the rental properties were found to be a business because they were an undertaking for making a pecuniary profit. The losses could not therefore be offset against other income for WfFTC purposes.

Impact of decision

The decision follows the Court of Appeal decision in *Grieve v CIR* [1984] 1 NZLR 101 (CA) that pecuniary profit is more than a revenue (taxable) profit. It is the character and circumstances of the individual venture which are crucial in establishing whether or not there is an intention to make a pecuniary profit.

Facts

The dispute relates to amendments made by the Commissioner to the disputant's amended WfFTC assessments and consequential income tax assessments for the periods ended 31 March 2006 to 31 March 2008 inclusive.

The disputant is married with five children and is the principal caregiver for WfFTC purposes. During the period concerned, the disputant and her husband owned a number of rental properties in partnership together. The rental properties were incurring losses. The disputant and her husband offset the losses against their income. Because of the resulting decrease in income, the disputant claimed extra WfFTC.

The Commissioner re-assessed the disputant on the basis that the rental properties were a "business" for WfFTC purposes and accordingly the disputant could not deduct the rental losses from her income.

Decision

Judge Barber stated that where there is a "business" and the business incurs net losses, the business is deemed not to have been carried out (and therefore no loss incurred) when calculating "net income" for WfFTC purposes. "Business" is defined in section OB1 of the ITA 2004 as: "(f) includes any profession, trade, manufacture, or undertaking carried on for pecuniary profit".

Judge Barber referred to *Grieve v CIR* [1984] 1 NZLR 101 (CA) as the leading authority on the concept of "business". He held that there must be a two-fold enquiry as to: the nature of the activities; and the intention of the taxpayer in engaging in those activities. At [42], Judge Barber stated:

> In the end, the character and circumstances of the particular venture are crucial. The objective evidence shows that the disputant commenced and now carries on a commercial undertaking in an organised and sustained way, and in my view the overall effect of that is to obtain, now and in the future, pecuniary profit.

Judge Barber considered the following factors (from *Grieve*) at [43]–[53]:

- the nature of the activity;
- the period over which it is engaged in;
- the scale of operations and volumes of transactions;
- the commitment of time, money and effort;
- the pattern of activity; and
- the financial results.

Judge Barber agreed with the Commissioner that after taking into account all of these factors, the disputant was operating

a business. At [55], he held that: "to seek money's worth by capital gain in property value is to seek 'pecuniary profit'".

Judge Barber also held that the definition of "pecuniary profit" is not limited to revenue (taxable) profit. He agreed that the disputant's activity fell squarely within the concept of an "intention to make a pecuniary profit".

Judge Barber found that the disputant was undertaking a property owning and letting business at all material times. Accordingly, the disputant's rental losses for the relevant tax years were business losses and must be excluded from the WfFTC entitlement calculation.

ONUS ON TAXPAYER

Case	[2012] NZTRA 01
Decision date	2 July 2012
Act(s)	Goods and Services Tax Act 1985, Income Tax Act 1994, Tax Administration Act 1994
Keywords	Income tax liability, GST assessments, unexplained deposits, lost records, tax evasion, alleged costs, personal guarantor, re-banking, property development, tax invoice, carrying on business, propensity evidence, general credibility

Summary

The disputant conducted a property development business, operated companies, sold cars and had boarders. He failed to register for goods and services tax (GST) or to return the relevant income. Assessments were made by the Commissioner after a review of his bank accounts was undertaken. The disputant later attempted to claim GST for expenditure incurred but he had no invoices. He also claimed some of the money in the bank accounts was from re-banking. It was found that the re-assessment by the Commissioner using the information available was the most reliable. Some extra expenditure was allowed but generally the disputant had failed to prove the extra expenditure, to show that money paid into the bank was not income or to provide evidence or tax invoices which would allow him to claim GST input tax credits.

Impact of decision

This decision confirms that a taxpayer has the onus of proof and must have sufficient evidence to be entitled to deductions for income tax. Further, a GST invoice is necessary before input tax credits can be claimed and if not, a waiver of the need for an invoice should be sought before the filing of the GST return.

Facts

This case concerns the disputant's income tax liability for the years ended 31 March 1995 to 31 March 2000 (inclusive); and GST assessments for the periods between 1 April 1994 and 31 March 2001 (ie, 42 two-monthly periods). The disputant operated as a property developer with other sources of income including motor vehicle dealing and residential boarders. The disputant did not keep useful or complete records nor did he file income tax or GST returns. This led to default assessments based on unexplained deposits in the bank accounts of the disputant and his companies. He was convicted of income tax evasion for the 1997–2001 income years and GST evasion for GST periods between June 1997 and March 2001.

The disputant claimed that, while in the process of briefing his accountant during an Inland Revenue investigation, he lost records from his motor vehicle. During the initial three years of the investigation (1998–2001), he approached no less than three accountants, but none were successful in producing accounts for him as he failed to provide sufficient records. A fourth accountant (the accountant) did produce some accounts using some original documentation and bank statements. This put into question the disputant's claims regarding the loss of substantial records. The Commissioner's analysis was based on the accounts prepared by the accountant.

The disputant based his claims on the reconstruction on what his property development work might have cost and what cash flows and transactions might have occurred at that time. In terms of his building projects, he cast aside the accounts prepared by his accountant. The disputant used his own estimates and memory to challenge the assessments and claim additional expenditure. He attempted to claim GST on all his alleged costs despite not having the necessary invoices to support the claims. He further attempted to claim a payment he made personally as a guarantor for one of his companies (which were not registered for tax purposes). The disputant also claimed costs for property purchases in the wrong years. He said that many of the deposits in his bank accounts were from: re-banking, loans, re-payments of advances to his companies and boarders.

Decision

Claims for additional expenditure for development projects

The disputant claimed significant additional expenditure for each of his development projects. Each of these projects and the expenditure claimed was considered separately by Judge Barber (refer [23] to [127]).

Judge Barber disallowed most of the additional expenditure claimed by the taxpayer, essentially due to the lack of evidence of the payments being made (ie, the taxpayer had not satisfied the onus of proof).

GST on expenditure

The disputant claimed GST on all expenditure included in the accounts prepared by the accountant. He also claimed GST on the additional expenditure that he estimated he had incurred over and above the amounts included in the accounts. The disputant submitted the following:

1. The Commissioner forced his registration and claimed output tax, therefore he ought to be allowed to claim input tax credits for the expenditure that he allegedly incurred.
2. When a deduction is allowed for income tax purposes, the Commissioner must have accepted that goods and/or services were provided.
3. The two-pronged test for dispensing with the requirement to hold GST invoices pursuant to section 24(6) of the Goods and Services Tax Act 1985 ("GST Act") is met.

Judge Barber held that the disputant ignored the requirements of section 20(2) of the GST Act that no input tax credits are available unless a tax invoice in relation to the supply has been provided. His Honour held that bank statements and cheque butts do not give sufficient particulars of a supply in terms of section 24(3) of the GST Act. He referred to *Case Z12* (2010) 24 NZTC 14,371 where it was confirmed that a tax invoice is an evidential requirement "to ensure real supplies of goods and services are being made which are within the GST base".

When discussing the ability of the Commissioner to waive the need for a GST invoice under section 24(6) of the GST Act, Judge Barber referred to *Case Y6* (2006) 23 NZTC 13,056 and confirmed that the waiver should be applied for prior to filing the GST return claiming the tax. His Honour noted that section 24(6) of the GST Act does not apply to a situation where a tax invoice has been issued and then lost by its recipient.

Unexplained deposits

The disputant argued that he deposited all money from car sales into the bank (including cash). He also stated that he deposited cash into bank accounts to withdraw it again on the same day.

The Commissioner argued that the taxpayer operated wherever possible in cash, offered cash to lure sellers and the taxpayer's arguments seemed highly unlikely and lacked credibility. This was accepted by Judge Barber.

Judge Barber held that where there were deposits in the bank accounts that cannot be shown to be capital, these sums should be treated as "net" assessable income without discounting for assumed expenditure.

Expenditure for development carried out by the disputant's companies

In the final week of the hearing, the disputant presented new tax invoices, letters and notes which related to developments carried out by him personally and companies he controlled. The Commissioner undertook an analysis of the invoices and argued that most of the invoices had already been claimed or belonged to the companies not the disputant (see [187]).

Judge Barber held that if the recipient of an invoice who has made payment of it wants to claim deductibility against their own income, they need to show that it was incurred by them in deriving their gross income or necessarily incurred in carrying on their business for the purpose of deriving gross income. He held that in the current situation, the expenditure was primarily incurred for carrying out the companies' business. The expenditure could have been "necessarily incurred in carrying on a business" but it was questionable that the disputant was carrying on his own development business at the time. Judge Barber held that the disputant had not demonstrated a sufficient relationship between the expenditure and his on-going income earning process as a developer in his own right, nor had the disputant demonstrated that the income-earning process was intricately tied up with his reputation as a professional.

The disputant claimed GST input tax credits for services provided to him (ie, the contract was with the disputant) but the goods and services were acquired for the principal purpose of making his companies' taxable supplies.

Judge Barber held that to claim an input tax credit personally, the disputant must show that the goods and services were supplied to him for the principal purpose of making his taxable supplies.

Judge Barber held that if a contract to provide services was made with the disputant personally (and not as agent for the companies) but the services were acquired for the principal purpose of making his companies' taxable supplies, the disputant may find himself in a situation where neither he nor the company can claim GST input tax credits. He held that the Commissioner was correct to only allow the disputant to claim input tax credits for supplies that relate to the disputant's personal development activities.

Credibility

The Taxation Review Authority is entitled to take into account propensity evidence and contextual evidence in the course of a civil proceeding. No leave is required for a defendant to raise propensity evidence in a civil proceeding, the only barrier is relevance. Judge Barber outlined a number of matters that arose in the course of the hearing and held that he had no reason to doubt the general credibility of any witness in this case except for the disputant.

Conclusion

Judge Barber held that the revised schedules prepared by the Commissioner were seen as the most reliable reconstruction allowed by tax law subject to various further allowances he allowed and otherwise dismissed the disputant's challenge.

STATEMENT OF POSITION RESPONSE PERIOD

Case	[2012] NZTRA 03
Decision date	10 July 2012
Act(s)	Tax Administration Act 1994
Keywords	Statement of Position, response period, deemed acceptance, electronic notice, Part 4A Tax Administration Act 1994, High Court Rules

Summary

The disputant issued his Statement of Position ("SOP") on 20 November 2009. The Commissioner issued his SOP via fax on the last date of the response period, 19 January 2010, at 11.07 pm and also posted it at 11.25 pm. The disputant contended the High Court Rules applied to the dispute and that the Commissioner's SOP being issued after 5 pm was out of time.

Impact of decision

The Commissioner may issue a SOP to a taxpayer after 5 pm, but prior to midnight on the day the SOP is due. Submitting the SOP electronically will meet the requirements of the Tax Administration Act 1994 ("TAA"). The SOP response period is governed by the TAA and not the High Court Rules.

Facts

This was an application by the disputant concerning the Commissioner of Inland Revenue issuing a SOP to the disputant after 5 pm on the last day of the response period.

The Commissioner issued a Disclosure Notice pursuant to section 89M(1) of the TAA, which required the disputant to issue a SOP to the Commissioner within two months. This required the disputant to issue the SOP by 20 November 2009.

The disputant's SOP was issued on 20 November 2009.

On 19 January 2010, the Commissioner responded to the disputant's SOP by faxing his SOP to the disputant's tax agent that evening at 11:07 pm and also posted the SOP to the disputant's tax agent on the same evening at 11:25 pm, being the last day of the response period.

Decision

The Taxation Review Authority found that section 89AB(5) of the TAA deals specifically with the response period required in the current circumstances. This section provides:

> 89AB(5) [Disclosure Notice] When the initiating notice is a disclosure notice, a notice issued by the Commissioner rejecting an adjustment proposed by a disputant, or a disputant's statement of position, the response period is a 2-month period starting on the date of issue of the initiating notice.

Judge Barber agreed that issuing the SOP by way of facsimile on the evening of 19 January 2010 met the requirements of the TAA and was within the statutory period. Section 14(7) of the TAA specifically allows for giving notice to an addressee by electronic means of communication.

Judge Barber stated that in terms of Section 14(7) of the TAA, the Commissioner does not require the consent of the disputant to provide his SOP electronically. The only requirement is that there are reasonable grounds to suppose the notice will be received by the addressee.

Judge Barber agreed with the Commissioner that the disputes resolution process in Part 4A of the TAA is not a proceeding as defined in the High Court Rules.

Judge Barber agreed with the Commissioner that the TAA applies to this situation, dismissed the disputant's application and directed a directions hearing be convened for timetabling of the substantive dispute.

ACCRUAL RULES – APPLIED TO REINSURANCE TREATIES

Case	Sovereign Assurance Company Limited & Others v Commissioner of Inland Revenue
Decision date	19 July 2012
Act(s)	Tax Administration Act 1994, Income Tax Act 1994
Keywords	Accrual rules, reinsurance treaties, unbundled, commission arrangements, excepted financial arrangement, assessable income, deductible expenses

Summary

The plaintiffs challenged the Commissioner's assessments made following completion of the disputes process. The plaintiffs had treated the cash flows in their tax returns on the basis that refundable commissions were assessable income and commission repayments were deductible expenditure. The High Court confirmed the Commissioner's position that the commission arrangements were to be considered separately from other components of the money flows under the applicable treaties. As such, the commission arrangements constituted a financial arrangement for the purposes of the accrual rules. The accrual rules required the commission repayments to be spread over the relevant period with refundable commissions being netted off against the commission repayments, and only the sums attributable to the interest debited to the bonus account remained and could be deductible by the plaintiffs.

Impact of decision

This judgment confirms that the financing of working capital under reinsurance treaties is to be dealt with under the accrual rules.

Facts

This proceeding is concerned with the income tax implications for the 2000 to 2006 income years of certain agreements entered into between Sovereign Assurance Company Ltd (Sovereign) and three German reinsurance companies: Gerling, Cologne Re and Hanover.

As a new life company, Sovereign faced a number of risks. One risk was mortality risk (ie, an insurance policy either lapses or the policyholder dies within a short period of time from when the policy was taken out). Another risk was "new business strain"; as a new company Sovereign's up-front costs in issuing a policy exceeded the amount it initially made from that policy (due to Sovereign paying commissions to brokers and agents who sell policies to policyholders). To mitigate these risks, Sovereign entered into reinsurance agreements with the German reinsurers ("the treaties").

The treaties provided for two sets of money flows between Sovereign and the reinsurers (the two sets of money flows were interchangeably referred to in the judgment as "commission arrangements"; see [101]). First, Sovereign paid premiums to the reinsurers in return for the reinsurers accepting liability to meet the costs of policies ending early (ie, due to mortality). There is no dispute over the manner in which Sovereign accounted for the money flows in both directions on the reinsurance of those mortality risks.

The second money flow component of the treaties involved the reinsurers agreeing to pay Sovereign "refundable commissions" and Sovereign was obliged to repay the refundable commissions in stipulated portions out of subsequent years' premiums. The refundable commissions were used to cover the initial costs of establishing life insurance policies. It is this part of the treaties that was in dispute as to the correct tax treatment of the refundable commission payments and repayments.

Decision

Dobson J held that the refundable commissions are to be considered separately from the other components of the money flows under the treaties and that those commission arrangements constitute a financial arrangement for the purposes of the accrual rules. By doing this, Dobson J distinguished this case from *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (CA) as the accrual rules clearly contemplate that the money flows can be separately identifiable.

The refundable commissions' component of the treaties is not a contract of insurance so as to qualify as an excepted financial arrangement.

Once the accrual rules are applied to the additional component (representing the consideration for deferral of Sovereign's repayment of the amounts received as commissions), the base component of those money flows becomes irrelevant for income tax purposes. Accordingly, Sovereign's alternative contention that the commissions received and subsequent repayments should be added respectively to its assessable income and deductible expenses was also incorrect.

Dobson J also said that if he were wrong, then he finds for the Commissioner's alternative argument that the money flows were capital in nature.

STRIKE OUT DECLINED

Case	Chesterfield Preschools Limited & Others v the Commissioner of Inland Revenue & Others
Decision date	19 July 2012
Act(s)	Tax Administration Act 1994, Goods and Services Tax Act 1985, Judicature Act 1908, High Court Rules
Keywords	Review proceedings, reconsider action, memorandum of decisions, NOPA, abuse of process, no reasonable cause of action, functus officio, res judicata

Summary

The plaintiffs claimed that the Commissioner had failed to act on a Notice of Proposed Adjustment ("NOPA") they issued in response to a memorandum of decision issued to them by the Commissioner. The alleged NOPA was issued at a time when several other proceedings involving the same issues were being reviewed by the Courts. The Commissioner applied for strike out on the grounds of abuse of process and no reasonable cause of action. The strike-out application was dismissed.

Impact of decision

The decision confirms that the grounds for strike out are limited.

Facts

These proceedings relate to orders sought by the plaintiffs regarding decisions made by the Commissioner about an alleged NOPA filed by the plaintiffs. The Commissioner sought to have the claim struck out on the grounds that the claim was an abuse of process and that it disclosed no reasonable cause of action.

The plaintiffs alleged in an initial judicial review and related appeals that the Commissioner:

- did not honour arrangements made with them about their tax liabilities;
- had failed to act with reasonable diligence and celerity in progressing audits and processing GST returns;
- had behaved unreasonably over the re-registration for GST of one of the plaintiffs' companies; and
- acted unreasonably with regard to remission of penalties and by his attempts to recover tax debts from the plaintiffs.

The first judicial review judgment (*Chesterfields Preschools Ltd v Commissioner of Inland Revenue* HC Christchurch CIV-2004-409-001596, 15 December 2006) found generally in favour of the plaintiffs. Fogarty J set aside a June 2004 decision by the Commissioner declining the remission of additional tax. He required the remission issue to be reconsidered and gave certain directions as to that reconsideration.

A second judicial review (*Chesterfields Preschools Ltd v Commissioner of Inland Revenue* HC Christchurch CIV-2008-409-0722, 25 November 2008) relating to the first judicial review was also undertaken and the Commissioner was again directed to reconsider his actions with respect to the remission. The second judicial review was later appealed by the Commissioner (*Chesterfield Preschools Limited v Commissioner of Inland Revenue* [2010] NZCA 400; (2010) 24 NZTC 24,500). The second judicial review related to how the Commissioner had acted on the directions from the court in the first judicial review.

In June 2007 in response to the first judicial review, the Commissioner filed a memorandum of decisions which related to the plaintiffs' tax positions. The plaintiffs alleged they issued a NOPA to the Commissioner in response to the memorandum of the Commissioner. The Commissioner argues that no valid NOPA was served on him.

In October 2008, the plaintiffs commenced these "tax challenge" proceedings which the Commissioner applied to strike out.

The grounds of the strike-out application relied on by the Commissioner are summarised in the judgment at [9]:

a) The present proceeding is in essence an invitation to the High Court to reopen either or both of the two judicial review proceedings, in relation to which the High Court is *functus officio*.

b) The plaintiffs are precluded from pursuing the present proceeding either because of issue estoppel or the doctrine of *res judicata*.

c) The present proceeding is an attempt to circumvent the disputes and challenge proceedings in the Tax Administration Act 1994.

d) The present proceeding involves "gaming and diversionary behaviour" in terms of the Court of Appeal's description in *Westpac Banking Corporation v CIR* [2009] 2 NZLR 99.

At [16] Associate Judge Osborne noted that the principles for strike-out set out in *Attorney General v Prince* [1998] (*Attorney General v Prince* [1998] 1 NZLR 262), which were applicable in this case, included the following:

a) The Court is to assume that the facts as pleaded are true (unless they are entirely speculative and without foundation).

b) The cause of action must be clearly untenable in the sense that the Court can be certain that it cannot succeed.

c) The jurisdiction is to be exercised sparingly and only in clear cases.

d) The jurisdiction is not excluded by the need to decide difficult questions of law, even if requiring extensive argument.

e) The court should be slow to rule on novel categories of duty of care at the strike-out stage.

In [23], Associate Judge Osborne observed that the plaintiffs had pleaded that the plaintiffs' "... proposed adjustments in the NOPA were consistent with the findings and determination of the December 2006 judgment ..." and "[T]he NOPA set out at paragraphs 33 to 37, the distinction between the disputable decisions that were addressed in the NOPA, and the discretionary decisions that were to be reviewed in judicial review proceedings ...".

Associate Judge Osborne noted that the Commissioner continued to deny that the plaintiffs had met the statutory requirements for issuing a NOPA but that the main focus of the strike out proceedings was on *res judicata*/issue estoppel. The Court then discussed the issue of further litigation between the parties which had reference to the NOPA.

In a decision relating to the plaintiffs' property (*Chesterfield Preschools Ltd v Commissioner of Inland Revenue* HC Christchurch CIV-2004-409-001597, 31 October 2007), Fogarty J recognised that alternatives existed to challenge the June 2007 decision, one of which was "to take the matter up internally by way of NOPA" [27].

In a decision relating to the first judicial review (*Chesterfields Preschools Limited v Commissioner of Inland Revenue* HC Christchurch CIV-2004-409-001596, 30 September 2009) Fogarty J:

> observed there was a serious argument as to whether pursuing the NOPA would be an abuse of process but observed that, depending on the outcome of the Court of Appeal hearing, there may yet be some life in bringing the NOPA issue for hearing [32].

A further judgment of Fogarty J (*Chesterfield Preschools Limited v Commissioner of Inland Revenue* HC Christchurch CIV 2004-409-001596, 21 October 2009) recorded that counsel for the Commissioner had:

> ... re-assured me by stating the obvious that if and when the validity of the NOPA become relevant, and if it is found to be relevant, and he thinks that would probably be by way of a Court decision, then appropriate orders can be made as to the process thereafter [33].

In the Court of Appeal judgment (*Chesterfield Preschools Limited v Commissioner of Inland Revenue* [2010] NZCA 400; (2010) 24NZTC 24,500) in relation to the second judicial review, the Commissioner submitted that some issues dealt with by Fogarty J should have been dealt with by way of statutory challenge procedures. The Court of Appeal discussed this and noted "We are not to be taken as making any comment on whether the purported challenge is valid or not ..." [36].

Decision

The Court found that it had been a recurring feature of the various branches of litigation between the parties that both have recognised the appropriateness of the statutory challenge procedures in relation to at least some of the issues. This was not a case where the parties had ignored, deliberately or inadvertently, the distinction between those matters properly to be determined through the statutory challenge procedures and the very limited category of matters that might be susceptible to judicial review. Both parties were aware of the distinction and incorporated it into various submissions on various applications.

Both the *sub judice* and issue estoppel pleadings fell away subsequent to the Court of Appeal issuing its judgment on 31 August 2010. The Court of Appeal was not asked to rule on the validity or outcome of the NOPA and expressly recognised the possibility that the purported challenge of 2007 might yet be upheld.

The Court recognised that there was substantial room for the Commissioner to argue that at least some of the matters in the NOPA were not the proper subject matter of a NOPA but submissions to that effect are to be properly determined when the validity of the NOPA is before the Court in a substantive hearing. The appropriate course is for all of the issues relating to the NOPA to be before the Court at a substantive hearing.

This is not as clear a case as the authorities envisage for the exercise of the strike-out jurisdiction and given the history of these proceedings and repeated references to the appropriateness of statutory procedures, this was not a case where issue estoppel clearly arises.

The Commissioner's application for orders striking out the statement of claim was dismissed.

Associate Judge Osborne noted that if the plaintiffs (other than Mr Hampton) are to pursue this litigation further, they will be required to either enter appearances through a solicitor or will require leave to be represented by Mr Hampton and the granting of such leave is unlikely.

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