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TAX INFORMATION Bulletin

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YOUR OPPORTUNITY TO COMMENT

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

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

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

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

Below is a selection of items we are working on as at the time of publication. If you would like a copy of an item please contact us as soon as possible to ensure your views are taken into account. You can get a copy of the draft from **www.ird.govt.nz/public-consultation/** or call the Senior Technical & Liaison Advisor, Office of the Chief Tax Counsel on 04 890 6143.

Ref	Draft type/title	Description/background information	Comment deadline
ED0169	Draft general depreciation determination: Gas detectors – hand-held and fixed	The Commissioner proposes to set general depreciation rates for gas detectors that are battery operated hand-held types or wired/fixed to plant and machinery.	13 March 2015
ED0166	Draft provisional determination: Depreciation rate for hydroelectric powerhouses	The Commissioner proposes to set a general depreciation rate for hydroelectric powerhouses by adding a new asset class to the "Power generation and electrical reticulation" industry category.	20 March 2015
ED0164	Draft operational statement: GST and the costs of sale associated with mortgagee sales	This item will replace Operational Statement 005 issued in April 2004.	27 March 2015

IN SUMMARY

Binding rulings

Public rulings BR Pub 15/01 and BR Pub 15/02: Secondhand goods input tax deductions – fishing quota, coastal permits and certificates of compliance 3

These rulings consider whether a registered person is entitled to claim secondhand goods input tax deductions when they purchase fishing quota, coastal permits or certificates of compliance from an unregistered person. The rulings conclude that fishing quota, coastal permits and certificates of compliance are not "goods" as defined in the Goods and Services Tax Act 1985. Therefore, they will not give rise to secondhand goods input tax deductions.

Legislation and determinations

Livestock values – 2015 national standard costs for specified livestock 11

This determination sets the national standard costs for specified livestock for the 2014–2015 income year.

Special Determination S32: Spreading Method to Be Used by Bank in Respect of the Notes and the Value of Shares Issued by Bank On Conversion 13

This determination relates to a funding transaction involving the issue of Notes by the Bank to its New Zealand branch of its Australian parent company. The Notes will contain a conversion mechanism, in order to allow them to be recognised as Additional Tier 1 capital for the purposes of the Reserve Bank of New Zealand frameworks relating to the capital adequacy of banks. The Notes are also mandatorily convertible on a specified date.
This determination applies in the situation that shares are issued by the Bank on a conversion of the Notes, to determine the value of the shares for the purposes of the financial arrangement rules. The determination also allows the Bank and its parent to use the IFRS financial reporting method to allocate income and expenditure over the term of the Notes under the financial arrangement rules.

General determination DEP90: Depreciation rate for drones and integrated accessories including remote controllers and software, used for photography, surveillance and video/movie production 16

The Commissioner has recently been asked to consider what depreciation rate should apply for drones when used for photography, surveillance and video/movie production.

Legal decisions – case notes

Supreme Court found that PAYE trust ceases upon liquidation 17

The Supreme Court held that any s 167(1) trust ceases upon liquidation of a company if the employer has failed to deal with PAYE deducted in the manner required by s 167(1) of the Tax Administration Act 1994 or in accordance with the PAYE rules.

Indemnity costs awarded to the Commissioner 18

The Commissioner of Inland Revenue was awarded indemnity costs on the basis that the taxpayers' claim was commenced for an ulterior purpose and fell within the "hopeless case" category.

Unsuccessful application by Trinity investors to the Supreme Court for leave to appeal three previous decisions 20

All the applications for leave involved proceedings which, in one way or another, were sequels to the judgment of the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289. The Supreme Court dismissed all three leave applications finding no points of public and general importance in the proposed appeals and no appearance of any miscarriage of justice.

Legal decisions – case notes (continued)

Leave to bring evidence not granted to disputant

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The disputant was denied leave to bring evidence alleging bad faith on the part of the Commissioner of Inland Revenue. The Taxation Review Authority ("TRA") took into account s 89A of the Tax Administration Act 1994 and the disputant's conduct in these proceedings and found that it was not necessary to admit the disputant's evidence to avoid manifest injustice to the disputant. Further, the TRA was not prepared to exercise its discretion under s 17(1) of the Taxation Review Authorities Act 1994.

Increased costs and disbursements awarded against Commissioner

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The Commissioner of Inland Revenue ("the Commissioner") was ordered to pay increased costs on the basis that the nature of the proceeding was such that the time required substantially exceeded the standard time allocations, and because the Commissioner's conduct was considered to have contributed unnecessarily to the time or expense of the proceeding. The Commissioner was also ordered to pay disbursements for witness expenses, litigation support services, and various travel and accommodation expenses.

High Court backdates charity's registration and confirms that the transitional definition of "tax charity" does not apply once a charity is registered

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The High Court backdated the National Council of Women of New Zealand Incorporated's ("NCW") registration as a charity so that its registration was continuous. The NCW was, therefore, not liable for income tax during the period it was deregistered.

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 *Binding rulings: How to get certainty on the tax position of your transaction (IR 715)*. You can download this publication free from our website at **www.ird.govt.nz**

PUBLIC RULINGS BR PUB 15/01 AND BR PUB 15/02: SECONDHAND GOODS INPUT TAX DEDUCTIONS – FISHING QUOTA, COASTAL PERMITS AND CERTIFICATES OF COMPLIANCE

These rulings consider whether a registered person is entitled to claim secondhand goods input tax deductions when they purchase fishing quota, coastal permits or certificates of compliance from an unregistered person. The rulings conclude that fishing quota, coastal permits and certificates of compliance are not "goods" as defined in the Goods and Services Tax Act 1985. Therefore, they will not give rise to secondhand goods input tax deductions.

These Rulings are a reissue of BR Pub 09/04 and BR Pub 09/05. For more information about earlier publications of these Public Rulings see the Commentary to these Rulings.

PUBLIC RULING BR PUB 15/01: GOODS AND SERVICES TAX – FISHING QUOTA – SECONDHAND GOODS INPUT TAX DEDUCTIONS

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

Taxation Laws

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

This Ruling applies in respect of s 20(3), the definitions of "goods" and "secondhand goods" in s 2, and the definition of "input tax" in s 3A.

Definitions

In this Ruling, "fishing quota" means:

a) individual transferable quota granted under the Fisheries Act 1983; or

b) individual transferable quota granted under the Fisheries Act 1996; or

c) annual catch entitlements generated by individual transferable quota under s 66 of the Fisheries Act 1996.

The Arrangement to which this Ruling applies

The Arrangement to which this Ruling applies is the supply, by way of sale, of fishing quota situated in New Zealand, where the supply is not a taxable supply, and the supply is made to a GST-registered purchaser who uses the fishing quota, or has it available for use, in making taxable supplies.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Fishing quota is not a good in accordance with the definition of "goods" in s 2. As a result, fishing quota will not be "secondhand goods" for the purposes of the Act.
- The purchaser of such fishing quota will not be entitled under s 20(3) to deduct from the amount of output tax payable in a taxable period any amount of input tax in respect of the supply of the fishing quota.

The period or tax year for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 July 2014.

This Ruling is signed by me on 10 February 2015.

Susan Price

Director, Public Rulings

PUBLIC RULING BR PUB 15/02: GOODS AND SERVICES TAX – COASTAL PERMITS AND CERTIFICATES OF COMPLIANCE – SECONDHAND GOODS INPUT TAX DEDUCTIONS

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

Taxation Laws

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

This Ruling applies in respect of s 20(3), the definitions of "goods" and "secondhand goods" in s 2, and the definition of "input tax" in s 3A.

Definitions

In this Ruling:

- "coastal permit" means a resource consent in the form of a coastal permit granted under the Resource Management Act 1991; and
- "certificate of compliance" means a certificate of compliance granted under the Resource Management Act 1991.

The Arrangement to which this Ruling applies

The Arrangement to which this Ruling applies is the supply, by way of sale, of coastal permits or certificates of compliance situated in New Zealand, where the supply is not a taxable supply, and the supply is made to a GST-registered purchaser who uses the coastal permits or certificates of compliance, or has them available for use, in making taxable supplies.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- A coastal permit or certificate of compliance is not a good in accordance with the definition of "goods" in s 2. Therefore, a coastal permit or certificate of compliance will not be "secondhand goods" for the purposes of the Act.
- The purchaser of a coastal permit or certificate of compliance will not be entitled under s 20(3) to deduct from the amount of output tax payable in a taxable period any amount of input tax in respect of the supply of the coastal permit or certificate of compliance.

The period or tax year for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 July 2014.

This Ruling is signed by me on 10 February 2015.

Susan Price

Director, Public Rulings

COMMENTARY ON PUBLIC RULINGS BR PUB 15/01 AND 15/02

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Rulings BR Pub 15/01 and BR Pub 15/02 (the Rulings).

Legislative references are to the Goods and Services Tax Act 1985 (GSTA) unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this commentary.

Summary

1. The Rulings consider whether GST input tax deductions are available to registered persons who acquire fishing quota, coastal permits or certificates of compliance from unregistered persons. For a registered person to claim an input tax deduction, fishing quota, coastal permits and certificates of compliance must be "secondhand goods". The term "goods" is defined as including all kinds of real and personal property, but excludes choses in action.
2. Fishing quota is property. However, fishing quota is also a chose in action. Therefore, fishing quota is excluded from the definition of "goods" and cannot be "secondhand goods" for the purposes of the GSTA.
3. The Resource Management Act 1991 (RMA) makes it clear that coastal permits and certificates of compliance are not personal or real property. Therefore, coastal permits and certificates of compliance are not "goods" and cannot be "secondhand goods" for the purposes of the GSTA.
4. Given fishing quota, coastal permits and certificates of compliance are not "secondhand goods", a registered person cannot claim a secondhand goods input tax deduction for them.

Background

5. BR Pub 15/01 and BR Pub 15/02 are reissues of BR Pub 09/04 and BR Pub 09/05, which expired on 30 June 2014. These Rulings are essentially the same as BR Pub 09/04 and BR Pub 09/05. However, they have been amended to reflect the new "use, or available for use" test in the GSTA. The Commissioner considers that this change does not affect the outcome of the Rulings.
6. While most fishing quota, coastal permits and certificates of compliance are held by large organisations that are registered for GST, unregistered persons still hold some of these rights. Some of these unregistered persons may not make supplies in excess of $60,000 in a 12-month period, so are not required to register for GST under s 51. However, one of these unregistered persons may sell their fishing quota, coastal permits or certificates of compliance to a person who is registered for GST. The Rulings consider whether the registered person may claim a secondhand goods input tax deduction.

Application of the GST legislation

7. The starting place to determine whether a GST input tax deduction is available to a registered person who acquires fishing quota, coastal permits or certificates of compliance from an unregistered person is s 20(3).

8. Section 20(3) provides that a person, in calculating the amount of output tax payable, may deduct input tax paid in relation to the supply of secondhand goods to the extent that a payment in respect of that supply has been made during the taxable period. The GSTA provides similar tests for claiming an input tax deduction for supplies of secondhand goods irrespective of the basis of registration (ie, invoice, payments or hybrid basis).

9. "Input tax" is defined in s 3A. For secondhand goods, the relevant provision is s 3A(1)(c), which refers to subss (2) and (3) of s 3A. Five relevant requirements need to be satisfied under subs (2) before the amount of the input tax deduction for a secondhand good can be calculated under subs (3). These requirements are that:
   - there is a supply by way of sale;
   - the supply is not a taxable supply;
   - the supply is made to a GST-registered person;
   - the supply is of secondhand goods; and
   - the secondhand goods are situated in New Zealand at the time of supply.

10. In addition, under s 20(3C) a person's input tax deduction is limited by "the extent to which the goods or services are used for, or are available for use in, making taxable supplies".

11. All but one of these requirements are specified in the Arrangement considered by the Rulings to ensure they will be satisfied in every instance in which the Ruling applies. The exception is the requirement that the supply be of secondhand goods. The issue considered by these Rulings, therefore, is whether fishing quota, coastal permits and certificates of compliance can be "secondhand goods".

"Secondhand goods"

12. The definition of "secondhand goods" in s 2 does not define the term, but prescribes a list of things that are not included in the meaning of "secondhand goods". Fishing quota, coastal permits and certificates of compliance are not excluded under the definition. Because the definition gives little indication as to the meaning of the term "secondhand goods", it is necessary to look at the ordinary meaning.

13. "Secondhand goods" is a composite term. It relates to items that are first of all "goods" and then the subset of those goods that can be described as "secondhand".

"Goods"

14. "Goods" is defined widely in s 2 as including all kinds of real and personal property, but excluding choses in action, money and electronic products.

15. The meaning of "property" is discussed in *Garrow and Fenton's Law of Personal Property* (7th ed, vol 1, Lexis Nexis, Wellington, 2010) at 2:

> The term "property" has varying usages within the law of Commonwealth countries including New Zealand. One common usage has a narrow meaning – that, in a legal sense, title has passed. … A related but more general usage signifies a thing owned, that over which title is exercised. For example, when it is said that a person's property includes cars, books, royalty rights, and other property it is frequently the second sense of the word "property" that is intended. In the first sense a person has property in a particular item; in the second sense, it is said that a person owns certain items of property. The context generally indicates which form is used.

16. From this, it can be seen that the term "property" is used to describe a wide variety of things, both tangible and intangible. Its fundamental characteristics are that it is capable of being owned and that the rights of ownership are capable of being transferred. "Property" also needs to be defined and identified, and have a degree of permanence or stability (*National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 (HL) at 494).

17. All "property" can be categorised as real property (ie interests in land) or personal property (see *Garrow and Fenton's Law of Personal Property* (7th ed, vol 1, Lexis Nexis, Wellington, 2010) at 10). As there are only two categories of "property", a determination that an item is "property", will mean that it will satisfy the first part of the definition of "goods" in the GSTA without the need to determine whether it is real or personal property.

18. Once it is determined that an item is "property" it is necessary to determine whether it is excluded from the definition of "goods" in s 2 by virtue of being a "chose in action" (the other exclusions do not apply to fishing quota, coastal permits or certificates of compliance).

19. The term "chose in action" was described in *Torkington v Magee* [1900-3] All ER 991 (KB) at 994:

> Chose in action is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.

20. This definition was also stated by the Court of Appeal in *Re Marshall (deceased), CIR v Public Trustee* [1965] NZLR 851 (CA) at 861.

21. The fundamental characteristics of a chose in action, therefore, are that a person cannot take the right into physical possession, and that court action is necessary to enforce the advantages of ownership.

"Secondhand"

22. There have been few cases on the meaning of the term "secondhand goods" in the GST context. In *Case N16* (1991) 13 NZTC 3,142 Judge Barber had to consider whether deer velvet purchased direct from producers by means of commission agents was a secondhand good when it was subsequently acquired by a distributor and exporter of deer velvet.

23. Judge Barber concluded that the deer velvet was not a secondhand good. Judge Barber accepted that the two key concepts underlying whether something is secondhand are previous ownership and previous use. He stated at 3,148:

> I agree with counsel that the concept of secondhand relates to pre-ownership or pre-use. I agree … that the emphasis is on pre-use. I consider that there is quite some commonsense flexibility in ascertaining whether a good is still new or has become secondhand. I do not regard second ownership as necessarily rendering an item secondhand. Many goods pass from manufacturer to wholesaler or retailer to customer or consumer (with other levels of distributors sometimes also involved), and yet are not regarded as secondhand at the consumer purchaser level, even though the item has been used as stock-in-trade at the various distribution levels. The good is not usually regarded as secondhand until it has been used for its intrinsic purpose.

24. Judge Barber considered that previous ownership of goods is not in itself necessarily sufficient to meet the test of secondhand in the GSTA. Usually, a previous owner must have also used the goods for their intrinsic purpose.

25. Subsequently, the Court of Appeal considered the meaning of secondhand goods in *LR McLean & Co Ltd v CIR* (1994) 16 NZTC 11,211. McKay J at 11,219 expressly referred to and agreed with Judge Barber's comments in *Case N16* as to the ordinary meaning of the term "secondhand". Richardson J stated at 11,213:

> The short point of the appeal is whether wool purchased by registered persons from unregistered persons is secondhand goods for the purposes of the 1985 Act. If the expression secondhand goods is given its ordinary and natural meaning it is common ground that it is not within that description. In ordinary usage the expression refers to goods which have been used, although depending on the context it may apply to goods which are no longer new or even in some contexts goods which have simply been previously owned. Mr Harley for the appellants did not seek to draw any distinction based on "use" of the wool by the sellers. The argument for the appellants is that to accord with the scheme and purpose of the legislation the expression has to be given the meaning of any goods which have been purchased by a registered person.

26. The judgments of the Court of Appeal state that the term "secondhand" should be given its ordinary or normal meaning. While "secondhand" can mean pre-owned or pre-used, the Court concluded that it is not sufficient that the goods were previously owned. If an item were "secondhand" simply through being previously owned, the term "secondhand" would be deprived of any practical meaning according to Richardson J. Therefore, the Court of Appeal concluded that the more relevant factor is whether the goods have been previously used.

27. The effect of this is that the courts have not extended the meaning of the term "secondhand goods" to goods that have been previously owned but not previously used for their intrinsic purpose.

Conclusion

28. For a secondhand goods input tax deduction to be available to a registered person who acquires fishing quota, coastal permits or certificates of compliance from an unregistered person, the fishing quota, coastal permits or certificates of compliance must:
    - be real or personal property;
    - not be choses in action; and
    - be secondhand.

29. The following analysis considers the nature of fishing quota, coastal permits and certificates of compliance to determine whether they satisfy these criteria.

Nature of fishing quota

30. The fishing quota considered by this commentary are individual transferable quota and annual catch entitlements as defined in s 2 of the Fisheries Act 1996 (FA 1996).

31. Individual transferable quota were established and allocated in 1986 under the Fisheries (Quota Management Areas, Total Allowable Catches, and Catch Histories) Notice 1986, which was issued under the Fisheries Act 1983 (FA 1983). They appear to have been allocated based on a person's commercial fishing history. No charge was made for the quota initially allocated. However, individual transferable quota do not provide "free" rights because an annual levy must be paid. These levies are typically significant.

32. Under the FA 1983, the fundamental rights acquired by the holder of individual transferable quota (as determined from the legislation) were that the quota holder had the right to catch and take away for their own purposes:
    - a specified quantity,
    - of a particular fish species,
    - from a particular area (the quota management area),
    - in a specific period (in a year, although a quota is issued in perpetuity).
33. These rights could be dealt with in ordinary commercial dealings; they could be bought and sold, used as security and have interests registered against them.
34. The FA 1996 introduced the concept of an "annual catch entitlement". Instead of the individual transferable quota providing a right to catch a specified amount of fish, the individual transferable quota now "generates" an annual catch entitlement on the first day of the fishing year under s 66 of the FA 1996. Section 74 of the FA 1996 provides that the annual catch entitlement confers the immediate right to catch fish in a given year. Sections 132 and 133 of the FA 1996 provide that the individual transferable quota and annual catch entitlement may be transferred. For holders of an individual transferable quota, the annual catch entitlement is separately tradable, so that for a particular year a quota owner may sell their annual catch entitlement while retaining the individual transferable quota that will generate another annual catch entitlement the following year.
35. Individual transferable quota and annual catch entitlements are not the same, but they are both unique rights that may be bought, be sold and, in the case of individual transferable quota, have interests registered against them.

Is fishing quota "property"?

36. There is no definitive statement in any of the fisheries legislation as to the nature of fishing quota. The expression "individual transferable quota" was not defined in the FA 1983. Although the term is defined in the FA 1996, the definition appears to have been added to ensure all quota allocated under the different Acts are regarded as fishing quota for the purposes of the FA 1996.
37. Tipping J commented on the nature of fishing quota issued under the FA 1983 in *NZ Fishing Industry Association (Inc) v Minister of Fisheries* (CA 82/97, 22 July 1997) at 16:

> While **quota are undoubtedly a species of property** and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them. That legislation contains the capacity for quota to be reduced. If such reduction is otherwise lawfully made, the fact that quota are a "property right", to use the appellants' expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned.
>
> [Emphasis added]

38. The Court of Appeal also stated that fishing quota issued under the FA 1996 is a "property right" in *Sanford Ltd v NZ Recreational Fishing Council Inc* [2008] NZCA 160 (CA).
39. The courts have confirmed, therefore, that both individual transferable quota and annual catch entitlements are property. They are definable and identifiable through being granted under a statutory regime. Both are capable of being owned and specific legislative provisions in the FA 1996 deal with the ability of individual transferable quota and annual catch entitlements to be transferred. On this basis, the Commissioner accepts that fishing quota are "property".

Are fishing quota "choses in action"?

40. Case law indicates that the fundamental characteristic of a chose in action is that a person cannot take the right into physical possession.
41. Both individual transferable quota and annual catch entitlements appear to possess this characteristic. The right to catch fish directly or indirectly cannot be taken into possession. While an argument could be made that a person could simply catch the fish under the quota, this seems to confuse the fish (which could be taken into possession) with the right to catch those fish (which cannot be taken into possession).
42. This conclusion is supported by *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (HC) where Baragwanath J stated at [5] that individual transferable quota are statutory choses in action:

> The root of title is the issue under the quota management system ... **of individual transferable quota (ITQ) which is a statutory chose in action** comprising a fraction of the total of exclusive rights to fish commercially a particular species of fish within one of the ten quota management areas into which the exclusive economic zone is divided. Rights to ITQ are codified by the relevant legislation, especially the Fisheries Amendment Act 1986 and the Fisheries Act 1996.
>
> [Emphasis added]

BINDING RULINGS

43. Therefore, both individual transferable quota and annual catch entitlements are choses in action.

Conclusion

44. Given that individual transferable quota and annual catch entitlements are choses in action, they are excluded from being "goods". Because they are not "goods", they cannot be "secondhand goods". Therefore, a registered person who acquires fishing quota from an unregistered person is not entitled to a GST input tax deduction.

Nature of coastal permits and certificates of compliance

45. Section 87 of the RMA defines a "resource consent" to include a consent to do something in a coastal marine area that otherwise would contravene certain provisions of the RMA and calls this kind of consent a "coastal permit".

46. Section 88 of the RMA provides that resource consents are to be obtained from the local or regional council by application. Section 139 of the RMA provides that where an activity may be lawfully carried out without a resource consent, a certificate of compliance must be applied for instead. Section 139(10) of the RMA deems a certificate of compliance to be a resource consent with the result that the provisions of the RMA are to apply accordingly.

47. Section 122(1) of the RMA states that "a resource consent is neither real nor personal property". As noted above, all property is either real or personal property. By making this statement, therefore, Parliament has created a legal fiction. It appears Parliament did not want all of the common law and other rights that would automatically attach to property of this nature to attach to resource consents.

48. The definition in s 122(1) of the RMA is not a standard definition. It is not contained in s 2 of the RMA with the other definitions that apply "for the purposes of this Act". Therefore, it appears Parliament intended s 122(1) of the RMA to have an application wider than simply the RMA.

49. Section 122 of the RMA goes on to deal with the characteristics of resource consents for the purposes of other legislation. After making the initial statement that a resource consent is not real or personal property, the section provides specific exceptions where resource consents are to be regarded as having the characteristics of personal property for the purposes of several specific Acts (including for example the Personal Property and Securities Act 1999) and circumstances. The GSTA is not included as one of the exceptions in s 122 of the RMA. Therefore, the Commissioner considers that s 122(1) of the RMA would apply for the purposes of the GSTA.

Conclusion

50. Under s 122 of the RMA coastal permits and certificates of compliance are deemed not to be "personal or real property". The Commissioner considers this definition is intended to apply for the purposes of other enactments, including the GSTA.

51. Therefore, coastal permits and certificates of compliance are not "goods" for the purposes of the GSTA. Because they are not "goods", they cannot be "secondhand goods". Therefore, a registered person who acquires coastal permits or certificates of compliance from an unregistered person is not entitled to a GST input tax deduction.

References

Expired Rulings
BR Pub 03/07 "Fishing quota and secondhand goods input tax credits" in *Tax Information Bulletin* Vol 15, No 12 (December 2003)
BR Pub 03/10 "Coastal permits, certificates of compliance, marine farming permits, and secondhand goods input tax credits" in *Tax Information Bulletin* Vol 15, No 12 (December 2003)
BR Pub 09/04 "Fishing quota – secondhand goods input tax credits" in *Tax Information Bulletin* Vol 21, No 6 (August 2009)
BR Pub 09/05 "Coastal permits and certificates of compliance – secondhand goods input tax credits" in *Tax Information Bulletin* Vol 21, No 6 (August 2009)
Subject references
Annual catch entitlements; Certificates of compliance; Chose in action; Coastal permits; Fishing quota; Goods; GST; Individual transferable quota; Property; Secondhand; Secondhand goods
Legislative references
Fisheries Act 1983
Fisheries Act 1996 – ss 2, 66, 67, 74, 132 and 133
Fisheries (Quota Management Areas, Total Allowable Catches, and Catch Histories) Notice 1986
Goods and Services Tax Act 1985 – ss 3A, 20(3) and (3C), 51, and the definitions of "goods" and "secondhand goods" in s 2
Personal Property Securities Act 1999 – s 23
Resource Management Act 1991 – ss 2, 87, 88, 122 and 139
Case references
Antons Trawling Co Ltd v Smith [2003] 2 NZLR 23 (HC)
Case N16 (1991) 13 NZTC 3,142

LR McLean & Co Ltd v CIR (1994) 16 NZTC 11,211 (CA)
Marshall (deceased), Re, CIR v Public Trustee [1965] NZLR 851 (CA)
National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472 (HL)
NZ Fishing Industry Association (Inc) v Minister of Fisheries (22 July 1997, CA 82/97) (CA)
Sanford Ltd v NZ Recreational Fishing Council Inc [2008] NZCA 160
Torkington v Magee [1900-3] All ER 991 (KB)
Other references
Garrow and Fenton's Law of Personal Property (7th ed, vol 1, LexisNexis, Wellington, 2010)

APPENDIX – LEGISLATION

1. The definitions of "goods" and "secondhand goods" in s 2 of the GSTA provide:

   goods means all kinds of personal or real property; but does not include choses in action, money or a product that is transmitted by a non-resident to a resident by means of a wire, cable, radio, optical or other electromagnetic system or by means of a similar technical system:

   secondhand goods, does not include—

   (a) Secondhand goods consisting of any fine metal; or

   (b) Secondhand goods which are, or to the extent to which they are, manufactured or made from gold, silver, platinum, or any other substance which, if it were of the required fineness, would be fine metal; or

   (c) Livestock:

2. Section 3A(1)–(3) of the GSTA provides:

   (1) **input tax**, in relation to a registered person, means—

   (a) tax charged under section 8(1) on a supply of goods or services acquired by the person:

   (b) tax levied under section 12(1) on goods entered for home consumption under the Customs and Excise Act 1996 by the person:

   (c) an amount determined under subsection (3) after applying subsection (2).

   (2) In the case of a supply by way of sale to a registered person of secondhand goods situated in New Zealand, the amount of input tax is determined under subsection (3) if—

   (a) the supply is not a taxable supply; and

   (b) the supply is not—

   (i) a supply of goods previously supplied to a registered person who has entered them for home consumption under the Customs and Excise Act 1996, whether the person is registered at the time they enter the goods for home consumption or later; and

   (ii) a supply of goods made by a non-resident, whether or not they made the earlier supply referred to in subparagraph (i); and

   (c) the goods acquired by the person for making taxable supplies are either—

   (i) not charged with tax at the rate of 0% under section 11A(1)(q) or (r); or

   (ii) charged with tax at the rate of 0% under section 11A(1)(q) or (r) and, before the acquisition, have never been owned or used by the person or an associated person.

   (3) The amount of input tax is—

   (a) if the supplier and the recipient are associated persons, the lesser of—

   (i) the tax included in the original cost of the goods to the supplier; and

   (ii) the tax fraction of the purchase price; and

   (iii) the tax fraction of the open market value of the supply; or

   (b) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(7A), the lesser of—

   (i) the tax fraction of the open market value of the deemed supply under section 5(3); and

   (ii) the tax fraction of the purchase price; and

   (iii) the tax fraction of the open market value of the supply; or

   (c) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(8), the lesser of—

   (i) the tax fraction of the valuation under section 10(8) of the deemed supply under section 5(3); and

   (ii) the tax fraction of the purchase price; and

   (iii) the tax fraction of the open market value of the supply; or

   (d) if the supplier and the recipient are not associated persons and the supply is not the only matter to which the consideration relates, the lesser of—

BINDING RULINGS

(i) the tax fraction of the purchase price; and

(ii) the tax fraction of the open market value of the supply; or

(e) in all other cases, the tax fraction of the consideration in money for the supply.

3. Section 20(3)(a) and (b) and (3C)(a) and (b) of the GSTA provides:

(3) Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period—

(a) In the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19 of this Act, the amount of the following:

(i) input tax in relation to the supply of goods and services (not being a supply of secondhand goods to which section 3A(1)(c) of the "input tax" definition applies), made to that registered person during that taxable period:

(ia) input tax in relation to the supply of secondhand goods to which section 3A(1)(c) of the "input tax" definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:

(ii) input tax invoiced or paid, whichever is the earlier, pursuant to section 12 of this Act during that taxable period:

(iii) any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b); and

(b) In the case of a registered person who is required to account for tax payable on a payments basis or a hybrid basis pursuant to section 19 of this Act, the amount of the following:

(i) input tax in relation to the supply of goods and services made to that registered person, being a supply of goods and services which is deemed to take place pursuant to section 9(1) or section 9(3)(a) or section 9(3)(aa) or section 9(6) of this Act, to the extent that a payment in respect of that supply has been made during the taxable period:

(ii) input tax paid pursuant to section 12 of this Act during that taxable period:

(iii) input tax in relation to the supply of goods and services made during that taxable period to that registered person, not being a supply of goods and services to which subparagraph (i) of this paragraph applies:

(iv) any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b), to the extent that a payment has been made in respect of that amount; and

…

(3C) For the purposes of subsection (3), and if subsections (3D) or (3L) do not apply,—

(a) input tax as defined in section 3A(1)(a) or (c) may be deducted to the extent to which the goods or services are used for, or are available for use in, making taxable supplies:

(b) input tax as defined in section 3A(1)(b) may be deducted to the extent to which the goods are used for, or are available for use in, making taxable supplies other than—

(i) the delivery of the goods to a person in New Zealand:

(ii) arranging or making easier the delivery of the goods to a person in New Zealand.

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.

LIVESTOCK VALUES – 2015 NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK

The Commissioner of Inland Revenue has released a determination, reproduced below, setting the national standard costs for specified livestock for the 2014–2015 income year.

These costs are used by livestock owners as part of the calculation of the value of livestock on hand at the end of the income year, where they have adopted the national standard cost ("NSC") scheme to value any class of specified livestock.

Farmers using the scheme apply the one-year NSC to stock bred on the farm each year, and add the rising two-year NSC to the value of the opening young stock available to come through into the mature inventory group at year-end. Livestock purchases are also factored into the valuation of the immature and mature groupings at year-end, so as to arrive at a valuation reflecting the enterprise's own balance of farm bred and externally purchased animals.

NSCs are developed from the national average costs of production for each type of livestock farming based on independent survey data. Only direct costs of breeding and rearing rising one-year and two-year livestock are taken into account. These exclude all costs of owning (leasing) and operating the farm business, overheads, costs of operating non-livestock enterprises (such as cropping) and costs associated with producing and harvesting dual products (wool, fibre, milk and velvet).

For bobby calves, information from spring 2014 is used while other dairy NSCs are based on the 2013–2014 income and expenditure from a DairyBase sample of owner-operated dairy farms. For sheep, beef cattle, deer and goats, NSCs are based on survey data from the 2012–2013 sheep and beef farm survey conducted by the Beef & Lamb New Zealand Economic Service. This is the most recent information available for those livestock types at the time the NSCs are calculated in December 2014.

For the 2014–2015 income year there has been a decrease in the NSCs for most livestock types (except bobby calves, rising two-year dairy cattle, dairy goats and 10 to 17 week pigs). For sheep and beef cattle this reflects the decrease, in real expenditure, of costs incurred per livestock unit and for rising one-year sheep, an increase in lambing percentage with costs allocated over more lambs than the previous year.

The increased NSCs for rising two-year and decreased NSCs for rising one-year dairy cattle have come about largely because of a change in the calculation methodology. Direct feed/grazing costs are now allocated directly to rising one-year and rising two-year stock, in order to more accurately reflect the actual cost of production. The effect of the resultant change in cost allocation is being phased in over three years and commenced with the NSC determination for the 2013–2014 year. The small increase in NSC for bobby calves largely results from an increase in the underlying cost of foodstuffs, partially offset by a decrease in other costs, notably the underlying cost of labour.

The NSCs for deer, dairy goats, and fibre and meat-producing goats, and pigs reflect changes in real expenditure, per livestock unit.

The NSCs calculated each year only apply to that year's immature and maturing livestock. Mature livestock valued under this scheme effectively retain their historic NSCs until they are sold or otherwise disposed of, albeit through a FIFO or inventory averaging system as opposed to individual livestock tracing. It should be noted that the NSCs reflect the average costs of breeding and raising immature livestock and will not necessarily bear any relationship to the market values (at balance date) of these livestock classes. In particular, some livestock types, such as dairy cattle, may not obtain a market value in excess of the NSC until they reach the mature age grouping.

One-off movements in expenditure items are effectively smoothed within the mature inventory grouping, by the averaging of that year's intake value with the carried forward values of the surviving livestock in that grouping. For the farm-bred component of the immature inventory group, the NSC values will appropriately reflect changes in the costs of those livestock in that particular year.

The NSC scheme is only one option under the current livestock valuation regime. The other options are market value, the herd scheme and the self-assessed cost scheme

("SAC") option. SAC is calculated on the same basis as NSC but uses a farmer's own costs rather than the national average costs. There are restrictions in changing from one scheme to another and before considering such a change, livestock owners may wish to discuss the issue with their accountant or other adviser.

NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK DETERMINATION 2015

This determination may be cited as "The National Standard Costs for Specified Livestock Determination 2015".

This determination is made in terms of section EC 23 of the Income Tax Act 2007. It shall apply to any specified livestock on hand at the end of the 2014–2015 income year, where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EC 23 of the Income Tax Act 2007 the national standard costs for specified livestock for the 2014–2015 income year are as set out in the following table.

National standard costs for 2014–2015 income year

Kind of livestock	Category of livestock	National standard cost $
Sheep	Rising 1 year	30.80
	Rising 2 year	21.80
Dairy cattle	Purchased bobby calves	173.30
	Rising 1 year	486.10
	Rising 2 year	273.90
Beef cattle	Rising 1 year	329.10
	Rising 2 year	183.40
	Rising 3 year male non-breeding cattle (all breeds)	183.40
Deer	Rising 1 year	103.70
	Rising 2 year	52.20
Goats (meat and fibre)	Rising 1 year	25.60
	Rising 2 year	17.50
Goats (dairy)	Rising 1 year	176.80
	Rising 2 year	31.30
Pigs	Weaners to 10 weeks of age	110.90
	Growing pigs 10 to 17 weeks of age	93.10

This determination is signed by me on the 23rd day of January 2015.

Rob Wells

LTS Manager, Technical Standards

SPECIAL DETERMINATION S32: SPREADING METHOD TO BE USED BY BANK IN RESPECT OF THE NOTES AND THE VALUE OF SHARES ISSUED BY BANK ON CONVERSION

This determination may be cited as Special Determination S32: "Spreading Method to Be Used by the Bank in Respect of the Notes and the Value of Shares Issued by the Bank On Conversion".

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

1. This determination relates to a funding transaction involving the issue of Notes by the Bank to the New Zealand branch of its Australian parent company. The Notes will contain an exchange mechanism, in order to allow them to be recognised as Additional Tier 1 capital for the purposes of the Reserve Bank of New Zealand framework relating to the capital adequacy of banks.
2. The Note Terms set out the steps that will occur in the event that a Conversion Event occurs, requiring exchange of the Notes. A "Conversion Event" may be a mandatory conversion event (requiring conversion on a specified date or on the occurrence of certain events, including events concerning the Bank's viability or capital adequacy), or an optional conversion event (allowing conversion at the election of the Bank on a specified date or on the occurrence of certain events, including events concerning the tax or regulatory treatment of the Notes).
3. If a Conversion Event occurs, the relevant number of Notes must be immediately and irrevocably exchanged for ordinary shares in the Bank. This is achieved by the Bank repaying the full face value of the Notes to the Parent, and the Parent using those funds to subscribe for shares in the Bank.
4. The Arrangement is the subject of private ruling BR Prv 15/03 issued on 22 January 2015, and is fully described in that ruling.
5. The share subscription provided for in the Note Terms is a financial arrangement (as defined in s EW 3) and an "agreement for the sale and purchase or property or services" (as defined in s YA 1). The various transactions under the Note Terms are, together, a wider financial arrangement.

2. Reference

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

3. Scope of determination

1. This determination applies to a funding transaction involving the issue of Notes by the Bank to the New Zealand branch of its Australian parent. The Note terms set out the steps that will occur in the event that a Conversion Event occurs, requiring exchange of the Notes.
2. If a Conversion Event occurs, the relevant number of Notes must be immediately and irrevocably exchanged. In summary, the steps for the exchange of the Notes will be as follows:
   a) The Parent's rights in relation to each Note to be converted will be immediately and irrevocably terminated and repaid by the Bank for an amount equal to the face value of the Notes and the Bank will apply that amount by way of payment for subscription for its shares to be issued under step (b) below.
   b) The Bank will allot and issue the specified "Conversion Number" of its ordinary shares to the Parent in consideration for payment by the Parent of the subscription amount referred to in paragraph (a) above.
   c) The "Conversion Number" of ordinary shares for each Note will be calculated in accordance with the following formula:

      $$\text{Conversion Number for each Note} = \frac{\text{Face Value}}{\text{Ordinary Share Value}}$$

      Where:

      Face Value means $100 per Note.

      Ordinary Share Value (expressed in dollars and cents) means, as at the conversion, the value of each ordinary share of the Bank on issue immediately prior to conversion occurring, as determined by the Bank by reference to its net assets in its most recently published disclosure statement under section 81 of the RBNZ Act and to such other information as the Bank (acting reasonably) considers appropriate and that will not delay or impede the conversion.
   d) If, for whatever reason (including if the Ordinary Share Value is zero), any of the Notes are not able to be converted on a Trigger Event in accordance with the process described above within five business days after the Trigger Event

Conversion Date, the Parent's rights (including as to interest payments) in relation to such Notes will be immediately and irrevocably terminated and written off with no payment to the Parent in respect of such Notes. If, for whatever reason (including if the Ordinary Share Value is zero), any of the Notes are not able to be converted in any other circumstances, conversion will be postponed until the first interest payment date on which conversion is possible.

3. This determination applies in the situation that shares are issued by the Bank to the Parent following a Conversion Event, to determine the value of the shares for the purposes of the financial arrangements rules.
4. This determination also applies to determine the spreading method to be used by the Bank and the Parent in respect of the Notes. It is made subject to the conditions that:
   - None of the restrictions for application of the IFRS financial reporting method in s EW 15D(2B) apply to the Notes; and
   - The Bank and the Parent both adopt the following accounting approach under IFRS:
     - The Notes are classified entirely as debt instruments; and
     - Interest payments under the Notes are recognised as an interest expense in the income statement of the Bank and as interest income in the income statement of the Parent.

4. Principle

1. Each note is a financial arrangement (as defined in s EW 3). The subscription for shares in the Bank by the Parent under the Note Terms is an "agreement for the sale and purchase of property and services" (as defined in s YA 1), as it is a conditional agreement to acquire property.
2. The share subscription is not a "short-term agreement for sale and purchase" (as defined in s YA 1), as settlement will not occur within 93 days of the Notes being entered into. As such, it will not be an excepted financial arrangement under s EW 5.
3. For the purposes of determining the consideration paid or payable under the financial arrangements rules, the value of the shares issued by the Bank must be established under s EW 32. None of subs (3) to (5) apply to the share subscriptions.
4. Under s EW 32(6), the Commissioner is required to determine the value of the property. Both parties are required to use this amount.
5. A person who uses IFRS to prepare financial statements and to report for financial arrangements can use the IFRS financial reporting method in s EW 15D.
6. Under s EW 15I, because the financial arrangement includes in part an excepted financial arrangement, s EW 15C(1) does not apply and the Bank must use one of the methods in s EW 15I(2) to allocate an amount of income or expenditure to an income year.
7. One of the methods available under s EW 15I(2) is a determination made by the Commissioner.

5. Interpretation

In this determination, unless the context otherwise requires:

- "the Bank" means the bank issuing the Notes.
- "the Parent" means the parent company of the Bank, acting through its New Zealand branch.
- "Conversion Event" means an event or date on or following which the exchange of Notes must occur, or in respect of which the Bank elects for an exchange of Notes to occur, as described in private ruling BR Prv 15/03, issued on 22 January 2015.
- "Notes" means the fully paid, convertible, subordinated securities issued by the Bank to the Parent shortly after the date certain notes are issued by the Parent to the public.
- "Note Terms" means the terms on which the Notes are issued.
- "IFRS" means a New Zealand Equivalent International Financial Reporting Standard, approved or issued under the Financial Reporting Act 1993, and as amended from time to time or an equivalent standard issued in its place.
- "Trigger Event" and "Trigger Event Conversion Date" have the meanings given to them in the Note Terms.
- All legislative references in this determination are to the Income Tax Act 2007, unless otherwise stated.

6. Method

1. The Arrangement does not involve the advancement or deferral of income or expenditure.
2. The IFRS financial reporting method in s EW 15D (as modified by s EW 15D(2)) must be used by the Bank and the Parent to allocate income and expenditure over the term of the Notes.
3. For the purposes of s EW 32(6), the value of the shares issued by the Bank on conversion of a Note is equal to the aggregate face value of that Note.

7. Example

This example illustrates the application of the method set out in this determination.

> The Bank issues Notes having a face value of $100 to the Parent. Prior to a Conversion, the Bank will use the IFRS financial reporting method to allocate income and expenditure over the term of the Notes.
>
> Following a Conversion Event, the Bank repays the face value of the Notes, by applying the amount on the Parent's behalf to subscribe for ordinary shares in the Bank. The Bank issues the number of shares to the Parent calculated in accordance with the formula in paragraph 2(c) of the Scope of the Determination above. The value of the shares, for the purposes of s EW 32, is equal to the aggregate face value of the Notes repaid by the Bank on the Conversion Event.

This Determination is signed by me on the 22nd day of January 2015.

Fiona Heiford

Manager (Taxpayer Rulings)

GENERAL DETERMINATION DEP90: DEPRECIATION RATE FOR DRONES AND INTEGRATED ACCESSORIES INCLUDING REMOTE CONTROLLERS AND SOFTWARE, USED FOR PHOTOGRAPHY, SURVEILLANCE AND VIDEO/MOVIE PRODUCTION

Note to Determination DEP90

The Commissioner has recently been asked to consider what depreciation rate should apply for drones when used for photography, surveillance and video/movie production.

The Commissioner considers that the asset includes the remote controller, software and carrying case, and where the asset also includes a camera which is built into and fully integrated into the drone, the camera will be part of the asset.

On the other hand, where the drone merely provides an aerial platform onto which a camera may be mounted, the drone and the camera will be regarded as separate assets which should be depreciated separately.

Similarly, the asset does not include items such as computers or laptops where these are used in conjunction with the drone.

GENERAL DETERMINATION DEP90: DEPRECIATION RATE FOR DRONES AND INTEGRATED ACCESSORIES INCLUDING REMOTE CONTROLLERS AND SOFTWARE, USED FOR PHOTOGRAPHY, SURVEILLANCE AND VIDEO/MOVIE PRODUCTION

This determination may be cited as "Determination DEP90: Drones and integrated accessories including remote controllers and software, used for photography, surveillance and video/movie production".

1. Application

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

This determination applies for the 2013–14 and subsequent income years.

2. Determination

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

- adding into the "Audio and Video Recording Studios and Professional Photography" asset category, the new asset class, estimated useful life, and general diminishing value and straight-line depreciation rates listed below:

Asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Drones and integrated accessories including remote controllers and software, used for photography, surveillance and video/movie production	4	50	40

- adding into the "Leisure" industry category, the new asset class, estimated useful life, and general diminishing value and straight-line depreciation rates listed below:

Asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Drones and integrated accessories including remote controllers and software, used for photography, surveillance and video/movie production	4	50	40

3. Interpretation

In this determination, unless the context otherwise requires, words and terms have the same meaning as in the Income Tax Act 2007 and the Tax Administration Act 1994.

This determination is signed by me on the 10th day of February 2015.

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.

SUPREME COURT FOUND THAT PAYE TRUST CEASES UPON LIQUIDATION

Case	Jennings Roadfreight Ltd (in liquidation) & Anors v Commissioner of Inland Revenue
Decision date	7 November 2014
Act(s)	Tax Administration Act 1994, Companies Act 1993
Keywords	PAYE deductions, s 167, statutory trust, liquidation, schedule 7 of the Companies Act

Summary

The Supreme Court held that any s 167(1) trust ceases upon liquidation of a company if the employer has failed to deal with PAYE deducted in the manner required by s 167(1) of the Tax Administration Act 1994 ("TAA") or in accordance with the PAYE rules.

Facts

Jennings Roadfreight Ltd ("Jennings") was placed into liquidation on 24 March 2011. At the time, it owed approximately $50,000 in PAYE for the month ended 28 February 2011.

The Commissioner of Inland Revenue ("the Commissioner") issued a notice pursuant to s 157 of the TAA requiring the Bank of New Zealand to deduct funds from Jennings' bank account. Jennings was placed into liquidation and the appeal concerns $14,076.38 held in the Jennings' bank account when Jennings was placed into liquidation but placed into a suspense account.

The High Court held that the $14,076.38 was refundable by the Commissioner to the liquidator. The Court of Appeal, by majority decision, held that the $14,076.38 was held in trust for the Commissioner, did not form part of Jennings' estate in liquidation and did not need to be refunded.

The liquidators were granted leave to appeal to the Supreme Court.

Decision

The Court first considered the relationship between ss 167(1) and 167(2) of the TAA.

Jennings submitted that any s 167(1) trust is extinguished if the PAYE rules have not been complied with and, in any event, upon liquidation by virtue of s 167(2) of TAA. The Commissioner submitted that s 167(1) creates a statutory trust to protect the amount of any PAYE deduction (or deemed deduction) and if at liquidation, there is any credit balance in a company's bank accounts, then the Commissioner is entitled to it because of the statutory trust.

The Court considered the wording of ss 167(1) and (2) and found that s 167(2) must be read as a specific qualification on s 167(1) where s 167(2) applies. This means that where it applies, s 167(2) prevails over s 167(1).

Section 167(2) of the TAA applies on the liquidation of a company to unpaid PAYE in two situations:

1. where an amount of PAYE has been deducted and the employer has failed to deal with the amount deducted in the manner required by s 167(1); or
2. the employer has failed to deal with the amount deducted as required by the PAYE rules.

The Court saw no reason to depart from the long-established reading of s 167(1) of the TAA to construe it as requiring funds to be segregated. It is unlikely that many businesses would in practice segregate the funds. It may be that s 167(2) does not apply to PAYE that has been deducted where, despite there being no obligation to do so, it has been held separately from other funds. Although the Supreme Court left this question open as the funds in this case were not held in a separate account.

The Court saw the second situation in s 167(2) of the TAA as straightforward. The PAYE rules require amounts deducted to be paid to the Commissioner on a due date. In this case, payments were not made to the Commissioner on

the due dates and the amounts remained outstanding as at the date of liquidation. Accordingly, the employer failed to deal with the amounts as required by the PAYE rules and the priorities in s 167(2) apply to Jennings' overdue but unpaid PAYE deductions.

The Court went on to consider the case law and the scheme of the statutory provisions, finding that both supported that s 167(2) of the TAA is a qualification on the general nature of s 167(1). The Court noted that if the Commissioner's interpretation was correct, then the Commissioner would have first access to the credit balance in bank accounts for PAYE deductions by virtue of it being trust property and this would reverse the order of priorities in schedule 7 of the Companies Act 1993 (which ranks items deducted from an employee such as child support obligations and student loan repayment obligations above PAYE).

The Court set out the legislative history of PAYE and, in drawing together the various threads, found that s 167(2) applies on liquidation where one of two conditions are met: the employer has failed to deal with the amount deducted as required by s 167(1); or failed to deal with the amount in accordance with the PAYE rules. This means that in the event of liquidation, s 167(2) and the priorities set out in that subsection apply to all amounts of PAYE deducted that fell due before liquidation but not paid before liquidation to the Commissioner. Section 167(1) does not apply to such amounts, unless (possibly) unpaid PAYE has been segregated by the employer in a separate account.

As the PAYE in this case had been deducted but not paid to the Commissioner on its due date, remained unpaid at the time of liquidation and was not held in a separate account, all of the PAYE unpaid at the date of liquidation (including the $14,076.38) was to be dealt with under s 167(2) of the TAA and thus distributed in accordance with the priorities set out in schedule 7 of the Companies Act 1993.

The Court went on to consider the nature of the trust under s 167(1) of the TAA. Jennings submitted the trust only applied to funds set aside in a separate account at the time of deduction. The Commissioner submitted it was a statutory notional trust in the nature of a floating charge.

The Court noted that as a matter of construction between ss 167(1) and (2), it had already rejected the Commissioner's interpretation of s 167(1) continuing to apply to any credit balance held in a company's accounts at liquidation. It was therefore not strictly necessary to come to a definitive view of the nature of the s 167(1) trust but the Court made five general observations:

1. Jennings' submission that s 167(1) only applies to funds set aside in a separate account is consistent with the interpretation of similar provisions in Canada.
2. In the context of deemed or notional deductions of PAYE, the notional statutory trust in s 167(1) is not limited to funds held in bank accounts.
3. The Court did not accept that the Commissioner's interpretation in part protects employees from being pursued for unpaid PAYE in the event of liquidation. An employee is not liable for PAYE on liquidation unless the employee has received the gross amount of his/her salary or wages or has received from the employer a benefit in cash or equal kind to the PAYE that should have been deducted.
4. The s 167(1) trust is not brought to an end where there is a failure to pay PAYE on the due date. On liquidation, any trust is bought to an end not by any action of the company but by virtue of the legislation under s 167(2).
5. A notional trust protects the Commissioner from claw-back amounts actually paid (whether late or not) to the Commissioner before liquidation.

The Court upheld Jennings' appeal, the unpaid and overdue PAYE fell subject to schedule 7 of the Companies Act 1993 by virtue of s 167(2)(b) of the TAA and the Commissioner must repay the $14,076.38.

INDEMNITY COSTS AWARDED TO THE COMMISSIONER

Case	Peebles & Bradbury & Anors v Attorney-General and Commissioner of Inland Revenue [2014] NZHC 3040
Decision date	2 December 2014
Act(s)	High Court Rules
Keywords	Indemnity costs, hopeless case, ulterior purpose, Trinity

Summary

The Commissioner of Inland Revenue ("the Commissioner") was awarded indemnity costs on the basis that the taxpayers' claim was commenced for an ulterior purpose and fell within the "hopeless case" category.

Impact of decision

The Court will award indemnity costs where a hopeless case is commenced by a plaintiff for the purpose of delaying collection of debt confirmed by a Supreme Court decision. This may have some application where taxpayers commence proceedings merely to delay the collection of tax.

Facts

This judgment is a costs judgment which relates to the previous Peters J decision dismissing the plaintiffs' application for review of a decision by the Commissioner, *Peebles v Attorney-General* [2014] NZHC 2635, (2014) 26 NZTC 21-107 (October judgment).

The judicial review was premised on the argument that, notwithstanding the Supreme Court's determination of their tax challenge, the Commissioner should have recalculated the tax due under a different provision of the Income Tax Act 1994. The plaintiffs argued that the Commissioner has a duty to not seek to recover more tax than is properly payable and that the Commissioner failed to have regard to that duty and therefore made an error of law when she decided to commence/continue with collection proceedings against the plaintiffs. This argument was rejected by Peters J.

The Commissioner sought an award of indemnity costs, relying on High Court Rules, r 14.6(4)(a) of which states the court may order a party to pay indemnity costs if:

> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding.

The Commissioner's submission was that the plaintiffs' conduct was within r 14.6(4)(a) because they commenced this proceeding for an ulterior motive (namely to delay the collection process), misconducted themselves and the case was hopeless from inception.

The plaintiffs opposed the award of indemnity costs.

Decision

Peters J awarded indemnity costs. She found for the Commissioner on the grounds that:

- the plaintiffs commenced the judicial review for an ulterior purpose, was to delay the Commissioner in recovering the sum due from the plaintiffs; and
- the proceeding was hopeless from the outset.

Consequently, her Honour did not consider the Commissioner's third alternative ground that the plaintiffs' conduct amounted to misconduct, which wasted the time of the Court and of the Commissioner.

Her findings were that the plaintiffs' case was knowingly hopeless from inception and from this she inferred the proceeding was therefore brought for the ulterior purpose of delaying the Commissioner in recovering the sum due from the plaintiffs.

Peters J's basis for the decision was that the Supreme Court judgment *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 ("2008 Supreme Court Judgment") had the effect of fixing Mr Peebles' and Mr Bradbury's liabilities, being an obligation to each to pay the sum assessed, and this effect would have been known to the plaintiffs at the time of the commencement of the judicial review.

Peters J pointed out that this same point had been made as recently as September 2013 by Associate Judge Faire (as he was then) in declining an application to set aside a statutory demand the Commissioner had served. One of the issues that arose on that application was whether a debt was owed to the Commissioner in respect of sums assessed for the 1998 tax year. Associate Judge Faire confirmed that indebtedness by reference to the 2008 Supreme Court judgment (*Bristol Forestry Venture Ltd v Commissioner of Inland Revenue* [2013] NZHC 2384, (2013) 26 NZTC 21-031) and provisions of the Tax Administration Act 1994 ("TAA").

It was further noted that the plaintiffs would also have been familiar with the TAA at the time they commenced this proceeding, given the extensive litigation between the plaintiffs and/or other participants in the Trinity scheme on the one hand and the Commissioner on the other.

Peters J concluded by finding at [15]:

> The Commissioner has been required to commence the recovery proceedings only because Messrs Peebles and Bradbury have defaulted on their obligation to pay what was confirmed as owing in 2008. I consider it hopeless for a taxpayer in those circumstances to contend that, prior to taking steps to collect the tax assessed, the Commissioner has a duty to consider whether the amount assessed is due.

The Court was satisfied that the plaintiffs have acted vexatiously, frivolously, improperly or unnecessarily in commencing this proceeding and awarded indemnity costs.

UNSUCCESSFUL APPLICATION BY TRINITY INVESTORS TO THE SUPREME COURT FOR LEAVE TO APPEAL THREE PREVIOUS DECISIONS

Case	Clive Richard Bradbury and Gregory Alan Peebles and Anors v Commissioner of Inland Revenue [2014] NZSC 174
Decision date	2 December 2014
Act(s)	Supreme Court Act 2003, Tax Administration Act 1994
Keywords	Supreme Court, leave application, presumptive bias, Trinity, tax avoidance

Summary

All the applications for leave involved proceedings which, in one way or another, were sequels to the judgment of the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289. The Supreme Court dismissed all three leave applications finding no points of public and general importance in the proposed appeals and no appearance of any miscarriage of justice.

Impact of decision

The Supreme Court reiterated that for leave to be granted, a matter of public and general importance or an appearance of a miscarriage of justice must be found in any proposed appeals.

These Supreme Court decisions should signal the end of the bias and subpart EH arguments that have been advanced by Trinity investors in multiple proceedings over a number of years.

Facts

This judgment addressed three related applications for leave to appeal to the Supreme Court:

1. *Bradbury v Commissioner of Inland Revenue* (SC 87/2014);
2. *Accent Management Ltd v Attorney-General* (SC 90/2014); and
3. *Bradbury v Judicial Conduct Commissioner* (SC 103/2014).

All the applications for leave involved proceedings which, in one way or another, are sequels to the judgment of the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 ("*Ben Nevis SC*"), which addressed the Trinity tax avoidance scheme.

In SC 87/2014, the applicants in the High Court sought an order setting aside the *Ben Nevis* High Court judgment in the Trinity litigation on the basis that the first instance Judge was biased (*Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2013] NZHC 2361, (2013) 26 NZTC 21-032). A protest to jurisdiction by the Commissioner was upheld by Katz J and the applicants' appeal to the Court of Appeal was dismissed (*Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 350, (2014) NZTC 21-086). Both courts concluded the High Court does not have jurisdiction to set aside for bias an earlier High Court judgment that has been upheld on appeal.

In SC 90/2014, the applicant asserted that when the High Court heard the original Trinity case, it wrongly analysed the Trinity scheme under subpart EG of the Income Tax Act 1994 rather than (the purported mandatory) subpart EH. The applicant's contention is that implementation of the judgment would therefore involve the collection of tax otherwise than as authorised by Parliament and that the judgment should be set aside as unlawful.

In SC 103/2014, the applicants sought leave to appeal decisions of the High Court and Court of Appeal (*Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495) dismissing an application to judicially review the Judicial Conduct Commissioner's findings that the first instance Judge was not biased.

Decision

The Supreme Court dismissed all three leave applications finding no points of public and general importance in the proposed appeals and no appearance of any miscarriage of justice and found:

1. In SC 87/2014, that the position of the applicants being if the High Court judgment is set aside, the judgments of the Court of Appeal and Supreme Court would fall away as nullities had no supporting authority aside from the special case of judgments obtained by fraud. However, fraud was not one of the grounds in this leave application.
2. In SC 90/2014, that the argument raised by the applicants was either the same as, or at best only inconsequentially different from, that already addressed in the Supreme Court's previous *Redcliffe* judgment (*Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804).
3. In SC 103/2014, that although the subject matter of the proposed appeal was undoubtedly of public importance—as it involves complaints against a Judge—the case primarily involved the application of the Judicial Conduct Commissioner and Judicial

> Conduct Panel Act 2004 to the very particular facts of the present case. The underlying arguments as to the merits of this did not raise any issue of public or general importance and no appearance of a miscarriage of justice.

Further, the Supreme Court found the various applications for leave to appeal the various awards of indemnity costs held no arguments that would warrant the granting of leave.

LEAVE TO BRING EVIDENCE NOT GRANTED TO DISPUTANT

Case	TRA 021/11; [2014] NZTRA 16
Decision date	2 December 2014
Act(s)	Taxation Review Authorities Act 1994, Evidence Act 2006, Tax Administration Act 1994
Keywords	Admissibility of evidence, bad faith, lis in proceeding

Summary

The disputant was denied leave to bring evidence alleging bad faith on the part of the Commissioner of Inland Revenue ("the Commissioner"). The Taxation Review Authority ("TRA") took into account s 89A of the Tax Administration Act 1994 ("TAA") and the disputant's conduct in these proceedings and found that it was not necessary to admit the disputant's evidence to avoid manifest injustice to the disputant. Further, the TRA was not prepared to exercise its discretion under s 17(1) of the Taxation Review Authorities Act 1994 ("TRAA").

Impact of decision

The TRA, in determining the admissibility of evidence under s 17 of the TRAA, will consider whether proposed evidence will assist to deal effectively with the matters in the proceeding.

Facts

The disputant filed submissions alleging that the Commissioner acted in bad faith in making the assessment and sought leave to lead evidence of the alleged actions. The assessment that underlies the dispute was made in August 2009 when the disputant was assessed under s 61 of the Goods and Services Tax Act 1985 as an agent of certain companies for their GST liability.

Decision

The TRA declined to grant leave to the disputant to bring the proposed evidence alleging bad faith on the part of the Commissioner.

Evidence excluded

Judge Sinclair noted the relevant statutory provisions of s 17(2A) and s 17(2B) of the TRAA and pointed out that the disputant's statement of position dated 17 July 2010 did not raise any facts, evidence, issues or propositions of law that related in any way to an allegation of bad faith. The TRA further noted that there has been no application under s 17(2B) of the TRAA or any reasons given as to why the disputant could not at the time of his statement of position "with due diligence" have discovered those matters he now wishes to raise in evidence.

Judge Sinclair moved on to consider two allegations submitted by the disputant which the Commissioner stated could relate to the assessment. Those were that:

1. the proceeding can have no financial benefit to the Commissioner, therefore the proceeding is predicated on ill will; and
2. no explanation was provided to the disputant as to why the assessment against him was maintained while the assessment against a co-director was cancelled.

In regard to the first allegation, Judge Sinclair agreed with the Commissioner's submission that the fact that it has subsequently become apparent that there are no assets in the estate to satisfy the debt, does not support an allegation that the assessment was made in bad faith.

With regard to the second allegation, Judge Sinclair found this matter irrelevant as to whether or not the disputant had been correctly assessed. Judge Sinclair stated that under s 81 and s 6(2) of the TAA the disputant is not entitled to an explanation from the Commissioner in respect of the tax affairs of another taxpayer.

Judge Sinclair found the evidence the disputant wished to raise to be unrelated to the assessment and not relevant to the issues for her determination. Allowing the disputant to bring fresh evidence (the disputant intended to call 12 witnesses) would cause further delay in finalising the matter.

Having taken into account s 89A of the TAA and the disputant's conduct in these proceedings, Judge Sinclair found that it is not necessary to admit the disputant's evidence in order to avoid manifest injustice to the disputant.

Admissibility of evidence under s 17(1) of the TRAA

Judge Sinclair stated that even if she is wrong in her analysis under s 17(2B), she is not prepared to admit this evidence exercising her discretion under s 17(1) of the TRAA.

Judge Sinclair considered ss 17(1) and 17(3) of the TRAA and s 7 of the Evidence Act 2006 and found that the disputant's proposed evidence did not have any probative

value in these proceedings. The events which were alleged to have occurred since the making of the assessment were not evidence of any particular pattern of behaviour by the Commissioner.

Judge Sinclair, having referred to *Dandelion Investments Limited v Commissioner of Inland Revenue* [1997] 2 NZLR 96 approved by the Court of Appeal in *Dandelion Investments Limited v Commissioner of Inland Revenue* [2003] 1 NZLR 600 ("*Dandelion*") did not consider that the proposed evidence "may" be of assistance to her in dealing with the matters for determination in this proceeding.

Commissioner has no "lis" in this proceeding.

The disputant also sought leave to refer to s 177C(2) of the TAA which requires the Commissioner to write off the tax claimed in the proceeding as it is accepted by the Commissioner that there will be no recovery from the disputant's bankruptcy.

The disputant claimed that once the tax is written off then the Commissioner will have no *lis* (described as when an "active dispute exists between specific contesting parties" in *Re 110 Martin Street, Upper Hutt* [1973] 2 NZLR 15) in these proceedings.

Judge Sinclair stated that the Commissioner is not bound by s 177C(2) of the TAA until there has been a final distribution of a dividend from the Official Assignee or notification from the Official Assignee that no dividend is available to pay to the Commissioner for the outstanding tax liability assessed. Judge Sinclair found that that position has not been reached in this case, and stated that even if that position was reached the assessment would remain on foot, as writing off the tax forms part of the enforcement and collection process and does not affect the dispute between the parties.

INCREASED COSTS AND DISBURSEMENTS AWARDED AGAINST COMMISSIONER

Case	Trustpower Limited v Commissioner of Inland Revenue
Decision date	4 December 2014
Act(s)	High Court Rules
Keywords	Increased costs, disbursements, witness expenses

Summary

The Commissioner of Inland Revenue ("the Commissioner") was ordered to pay increased costs on the basis that the nature of the proceeding was such that the time required substantially exceeded the standard time allocations, and because the Commissioner's conduct was considered to have contributed unnecessarily to the time or expense of the proceeding. The Commissioner was also ordered to pay disbursements for witness expenses, litigation support services, and various travel and accommodation expenses..

Impact of decision

Rule 14.12 of the High Court Rules ("HCR") does not restrict claims for witnesses' expenses to that of expert witnesses only.

Facts

On 12 November 2013, Andrews J found for Trustpower Limited ("the disputant") in the substantive proceeding. Accordingly, the disputant was entitled to claim costs against the Commissioner (*Trustpower Limited v Commissioner of Inland Revenue* [2013] NZHC 2970, [2014] 2 NZLR 502 (HC)). The disputant claims a total of $1,448,213 (comprising $1,021,631 in costs and $426,582 in disbursements). The Commissioner has accepted liability for, and has paid, a total of $639,967, comprising costs of $477,290 and disbursements of $162,677.

Decision

Increased costs pursuant to r 14.6(3)(a) of the HCR

The Commissioner accepted that increased costs are appropriate under r 14.6(3)(a) of the HCR due to the fact that the nature of the proceeding, and the steps in the proceeding, are such that the time required substantially exceeds the time allocated under band C of Schedule 3 of the HCR. However, the Commissioner contended that a smaller increase than that sought by the disputant should be allowed.

Discovery and Agreed Statements of Facts

Andrews J accepted the disputant's submission that discovery in this proceeding required a very substantial amount of work, far in excess of the seven days provided for under the scale, and accordingly considered that discovery was clearly a huge and complex task.

Andrews J considered that a realistic and pragmatic approach was required, as an award of costs without uplift would not "reflect the complexity and significance of the proceeding" (r 14.2(b)). Her Honour accordingly concluded that the reasonable time for completing discovery in this proceeding was 70 days, which results in an award of $205,800.

Counsel for the disputant submitted that preparation of the agreed statements of facts was a very involved and extensive process.

Andrews J accepted that the agreed statements of facts were prepared with the Commissioner's knowledge and involvement, that they were of value to the parties and the Court and that preparation thereof is a "step in the proceeding", which is not specifically mentioned in schedule 3 of the HCR and therefore should be allocated a time for that work.

Andrews J concluded that a reasonable time allocation for preparing agreed statements of facts is 40 days, which results in an award of $117,600.

Preparation for briefs of evidence

The disputant sought a time allocation of 39.85 days, being half of the time actually spent, minus the five days allowed under band C of Schedule 3 of the HCR.

Counsel for the Commissioner submitted that no time allocation should be given to the briefs of evidence of Dr Harker and Mr Kedian due to the fact that draft witness statements for each of them had been provided to the Adjudication Unit of Inland Revenue, essentially submitting that the briefs of evidence were duplication.

Concerning the evidence of Dr Harker and Mr Kedian, counsel for the disputant submitted that while the briefs of evidence were consistent with earlier draft statements, substantial further work was required to brief and prepare evidence to respond to the Commissioner's change in position from asserting at the adjudication stage that the disputant was committed to each of the four projects to asserting at trial that the resource consents applied for by the disputant during the feasibility process were stand-alone capital assets.

Andrews J held that there was no duplication of work and that the briefs of evidence of Dr Harker and Mr Kedian required a substantial amount of work, as well as those of Mr Campbell and Mr Palmer, which were necessary for the disputant to meet its burden of proof.

Andrews J accordingly made the following time allocations: Dr Harker, 7 days; Mr Kedian, 7 days; Mr Campbell, 7 days; Mr Palmer, 5 days; and Mr Hagen, 3 days. This is a total of 29 days, which amounts to $85,260.

Preparation for trial

The disputant sought an order for costs for 53.1 days, being half the time actually spent, less the five days allocated under the scale.

Counsel for the disputant submitted that significant work was required in terms of preparing for trial. She further submitted that the number of documents included in the common bundle, as well as the need to deal with issues raised by the Commissioner's expert witnesses in their briefs of evidence, impacted on the time spent preparing for trial. Counsel for the Commissioner submitted that 20 days was a reasonable allocation for trial preparation.

Andrews J considered that the determinations required in this proceeding were fact-specific and accordingly found, without concluding that the reasonable time allocation for preparation for trial should be arrived at as if there were four trials, that preparation in this case was extensive.

Andrews J held that the nature of the proceeding was such that the time required by the disputant substantially exceeded the time allocated under band C and accordingly awarded 30 days, which amounts to $88,200.

Increased costs pursuant to r 14.6(3)(b) of the HCR

In addition to an order pursuant to r 14.6(3)(a) of the HCR, the disputant also sought an order for increased costs on the grounds that the Commissioner contributed unnecessarily to the time and expense of the proceeding by:

- taking an overly expansive and undiscriminating approach to the factual matters she chose to put in dispute and failing to accept incontrovertible facts;
- intending to call evidence as to the resource management consenting processes when the disputant, observing that the issue is fact-specific, informed the Commissioner that an expert witness was unlikely to add any value; and
- raising novel and un-foreshadowed arguments in the evidence of Mr Hucklesby, which made it necessary for the disputant to call evidence from Mr Freeman, the senior audit partner at PricewaterhouseCoopers ("PwC").

Even though counsel for the Commissioner rejected all of counsel for the disputant's criticisms, Andrews J accepted that the Commissioner's approach warranted an additional uplift. Andrews J held that determination of the central issue as to whether the expenditure on the resource consents was capital or revenue, did not require the Commissioner to put the disputant to proof on the majority of the allegations in the disputant's Statement of Claim. Andrews J further considered that the breadth and extent of discovery was considerably greater than necessary (so too was the common bundle) and accordingly awarded an uplift of 10 per cent on discovery, preparing the agreed statements of facts and briefs of evidence, as well as preparing for trial.

Disbursements pursuant to r 14.12 of the HCR

Witness expenses

Mr Freeman gave expert evidence as an auditor and accountant. Counsel for the Commissioner submitted that the claim for reimbursement of his fees should be disallowed because:

1. Mr Freeman was not required to prepare a brief of evidence; and
2. Mr Freeman's evidence was unnecessary due to the fact that Mr Hagen was also called by the disputant to give expert accounting evidence.

Andrews J held that Mr Freeman's evidence was reasonably necessary as it was her view that Mr Freeman's evidence focused on establishing the independence of two opinions provided to the disputant concerning issues raised by the Commissioner. This put in issue whether the disputant's accounting treatment of obtaining resource consents was correct. Andrews J allowed the expenses of $48,690.

Mr Kedian, formerly General Manager, Generation, of the disputant, gave extensive factual evidence as to the disputant's business, the feasibility analysis process and the four projects.

Counsel for the Commissioner submitted because r 14.12 of the HCR only allows for expert witnesses' fees to be claimed as a disbursement, Mr Kedian's fees could not be allowed because he was a witness of fact.

Andrews J, referring to *Harper v Beamish* HC Napier CIV-2009-441-636, 27 March 2012 and *Body Corporate 396711 v Sentinel Management Ltd* [2012] NZHC 2556, held that there was nothing express or implicit in r 14.12 which allows recovery of expert witnesses' fees only. Her Honour also rejected counsel for the Commissioner's submission that Mr Kedian "could readily have been subpoenaed". His evidence was extensive and the Court, as well as the parties, was substantially assisted by it.

Litigation Support services

The disputant has claimed recovery of $112,268, which counsel for the Commissioner submitted could not be claimed as a disbursement because:

- if the work had been done internally, a disbursement could not have been claimed; and
- charges relating to extracting documents for listing (which cannot be claimed as a disbursement) are different from the process of listing them.

Andrews J concluded that the engagement of PwC was in relation to work that was distinct from that undertaken by the disputant. Her Honour was accordingly satisfied that the disbursement was for the purposes of the proceeding, specific to and reasonably necessary for the conduct of the proceeding, and reasonable in amount. Bearing in mind the award that had already been made, Andrews J concluded that the Commissioner should pay $56,134 of PwC's litigation support.

Counsel's travel and accommodation expenses

Andrews J held that Mr Harley's travel and accommodation expenses were incurred for the purposes of the proceeding, and were specific to, and reasonably necessary for, the conduct of the proceeding. The expenses were also reasonable in amount and her Honour accordingly allowed the disbursement of $35,307.

HIGH COURT BACKDATES CHARITY'S REGISTRATION AND CONFIRMS THAT THE TRANSITIONAL DEFINITION OF "TAX CHARITY" DOES NOT APPLY ONCE A CHARITY IS REGISTERED

Case	In re The National Council of Women of New Zealand Incorporated; The National Council of Women of New Zealand Incorporated v Commissioner of Inland Revenue [2014] NZHC 3200
Decision date	12 December 2014
Act(s)	Charities Act 2005, Income Tax Act 2007
Keywords	Tax charity

Summary

The High Court backdated the National Council of Women of New Zealand Incorporated's ("NCW") registration as a charity so that its registration was continuous. The NCW was, therefore, not liable for income tax during the period it was deregistered.

Impact of decision

The Commissioner of Inland Revenue ("the Commissioner") is required to refund the tax paid by the NCW.

The transitional definition of "tax charity" in s CW 41(5)(b) of the Income Tax Act 2007 ("ITA") has limited application so there are no considerable wider implications for this case.

Facts

This case involved two proceedings. The first proceeding was an appeal by the NCW against the decision of the Charities Registration Board ("CRB") not to backdate the NCW's registration beyond the date of its application to be registered as a charity ("the appeal").

The second proceeding was a challenge by the NCW against the tax assessed against it by the Commissioner during the period that it was not registered as a charity ("the tax challenge").

The NCW is a charitable organisation established in 1896. On 4 June 2009, following the enactment of the Charities Act 2005 ("CA"), the NCW was registered as a charity by the Charities Commission ("CC"). The effective date of registration was 30 June 2008.

On 22 July 2010, the CC revoked the registration decision with effect from 19 August 2010 ("the date of deregistration").

On 10 September 2012, the NCW applied to the CRB, the successor to the CC, for reregistration as a charitable entity. The NCW requested that it be registered from the date of deregistration so as to avoid any potential exposure to income tax during the period of its deregistration.

On 15 April 2013, the CRB granted the NCW's reregistration application but with effect from 10 September 2012, not 19 August 2010. That meant that during the period from 19 August 2010 to 10 September 2012 ("the deregistration period"), the NCW was not registered as a charity.

The Commissioner assessed the NCW for income tax for the deregistration period on the basis that it was not exempt from income tax.

Decision

The appeal

Counsel for the NCW argued that s 20(2)(b) of the CA is to be interpreted literally. She contended that as the NCW had lodged a properly completed application on 28 May 2008, the CRB's backdating power could have applied to any date after 28 May 2008.

Dobson J disagreed. His Honour found that the power to backdate registrations was "of a more confined scope", and that the CRB did not have the discretion to backdate under s 20 of the CA where there had been a deregistration decision (following an initial application and acceptance as a charitable entity) and a second application to the CRB (at [38] and [40]).

However, his Honour went on to consider whether the Court itself had a wider power to backdate under s 61 of the CA. Section 61(4) of the CA states that the High Court "may make any other order that it thinks fit".

Dobson J found that s 61 afforded wider powers to the Court on appeal than those granted by the CA to the original decision-maker (at [52]). Given the overall purpose of the CA is to encourage and promote the effective use of charitable resources, he concluded that an order backdating the NCW's registration to the date of deregistration was justified. Accordingly, his Honour ordered that the NCW is to be registered as a charity from 19 August 2010 (at [55]).

The tax challenge

The order backdating the NCW's registration was sufficient to resolve the tax challenge (at [56]). As previously acknowledged by the Commissioner, backdating the NCW's registration removed the basis for the assessments and, in those circumstances, the tax paid is to be refunded.

However, in case he is found to have been wrong in making that order, Dobson J went on to consider the competing positions raised by the parties.

In respect of the NCW's argument that it was a "tax charity" under the transitional definition in s CW 41(5)(b) of the ITA because it had started to take reasonable steps in the process of preparing an application for registration before 1 July 2008 and intended to complete the process of applying for registration, Dobson J stated that there was "an artificiality" in the NCW's contentions (at [70]). He stated:

> … NCW cannot accurately be described as having taken reasonable steps in the process of preparing an application before 1 July 2008 when it had in fact completed and lodged the application prior to that date. Furthermore, it is artificial to treat NCW as having an intention to complete the process of preparing an application from 1 July 2008, when the product of that work was already lodged with the Commission.

Dobson J stated that the NCW was "inarguably outside the scope of the transitional provision in paragraph (b) because it was registered" and that "there are no circumstances in which it could reasonably be contemplated that the transitional provision in paragraph (b) of the definition would be resurrected" (at [71] and [72]). Accordingly, his Honour rejected the NCW's interpretation of the definition of "tax charity" in s CW 41(5) and upheld the Commissioner's contention that the transitional provision in s CW 41(5)(b) ceased to apply when the NCW lodged its application for registration with the then CC (see [66]).

In respect of the NCW's argument that the Commissioner had a discretion to recognise it as a tax charity throughout the period of its deregistration, Dobson J accepted the Commissioner's position that there was no such discretion in s CW 41(5) to allow a care and management solution. He found that the Commissioner does not have discretion to disregard the law.

Accordingly, Dobson J stated that if he was wrong in backdating the NCW's registration, then he would dismiss the NCW's tax challenge.

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