

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
ED0172	Draft SPS: Remission of penalties and use-of-money interest	This draft standard practice statement (SPS) sets out the Commissioner's practice when granting remission of penalties and use-of-money interest.	25 September 2015
ED0173	Draft SPS: Instalment arrangements for payment of tax	This draft statement sets out the Commissioner's practice when considering applications for financial relief by an instalment arrangement.	25 September 2015
ED0174	Draft SPS: Writing off outstanding tax	This draft statement sets out the Commissioner's practice for granting financial relief by permanently writing off outstanding tax.	25 September 2015
ED0175	Draft SPS: Child support debt – Requesting an instalment arrangement	This draft statement sets out the Commissioner's practice for providing relief when the immediate payment of an overdue child support obligation is not possible.	25 September 2015
ED0176	Draft SPS: Student loans – relief from repayment obligations	This draft statement sets out the Commissioner's practice for providing relief under the Student Loan Scheme Act 2011.	25 September 2015

IN SUMMARY

Legislation and determinations

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The Commissioner has set a general depreciation rate for a new asset class “Rail passenger service electric multiple units” (EMUs), under the “Transportation” asset category.

Special Determination S39: Valuation of Shares issued by Bank following a Non-Viability Trigger Event 5

This determination relates to a funding transaction involving the issue of Notes by Bank to Parent. The Notes will contain a conversion mechanism, to allow them to be recognised as Tier 2 capital for the purposes of the Reserve Bank of New Zealand framework relating to the capital adequacy of banks. This determination applies in the situation that shares are issued by Bank to Parent following a Non-Viability Trigger Event, to determine the value of the shares for the purposes of the financial arrangement rules.

Operational statements

2015 review of the Commissioner’s mileage rate for expenditure incurred for the business use of a motor vehicle 7

Inland Revenue has reviewed the motor vehicle mileage rate to reflect the average cost of running a motor vehicle, including the average fuel prices. The mileage rate for the 2015 income year has changed to 74 cents per kilometre for both petrol and diesel fuel vehicles.

New legislation

Order in Council

Income Tax (Fringe Benefit Tax, Interest on Loans) Amendment Regulations 2015 8

The prescribed rate of interest used to calculate fringe benefit tax on low-interest, employment-related loans is 6.22% and applies from 1 July 2015.

Questions we’ve been asked

QB 15/07: Tax Administration Act 1994 – Meaning of “due and payable” under section 91E(4)(d)(i) 9

This QWBA considers when a tax, duty or levy will be “due and payable” under s 91E(4)(d)(i) of the Tax Administration Act 1994. The Commissioner may not make a private ruling if the matter on which a private ruling is sought concerns a tax, levy or duty that is “due and payable”. This will occur on the due date for payment of that tax type and tax period (regardless of whether an amount of tax is actually payable).

Legal decisions – case notes

Costs on a joint and severable basis

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The High Court declined the respondents' application to depart from r 14.14 of the High Court Rules ("HCR") and to apportion costs severally between each respondent. The High Court held that given the background to the application, and the unified opposition efficiently presented by all the respondents, there is no arguable basis for departing from the default principle under the rule.

Starting principle open justice

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The High Court dismissed Mr Musuku's application for an order that a judgment (where he was the applicant) not be published, or that his name, other identifying information and sensitive information in the judgment not be published. Woodhouse J held that the starting point is open justice and that more is required than to point to adverse consequences of publicity.

High Court upholds determinations of Taxation Review Authority in appeal by way of case stated

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The High Court granted the appellant's interlocutory application but went on to find for the Commissioner of Inland Revenue on the 13 questions included in the appeal by way of case stated.

High Court grants Commissioner's application for transfer

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The High Court granted the Commissioner of Inland Revenue's application, made pursuant to s 138N of the Tax Administration Act 1994, to transfer the challenge proceeding filed by Great North Motor Company Limited (In rec) in the Taxation Review Authority to the High Court.

Strike-out

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The Commissioner of Inland Revenue ("the Commissioner") applied to strike out the disputants' challenge as being solely for the purposes of delay and as frivolous and vexatious. The Taxation Review Authority found for the Commissioner, but gave the disputant one "last-chance" to retain counsel, and file briefs of evidence and submissions within one month of the date of judgment. Failing this, the challenge will be struck out.

Cost of obtaining resource consents held to be capital

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The Court of Appeal held that expenditure incurred in obtaining resource consents was capital expenditure and was, therefore, not deductible under s DA 1 of the Income Tax Act 2004 ("ITA"). As a result, s EE 7(j) of the ITA did not prevent the resource consents of fixed duration from being "depreciable property" under s EE 6 of the ITA.

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.

GENERAL DEPRECIATION DETERMINATION DEP94: CARPORTS

Note to Determination DEP94

The Commissioner has set a general depreciation rate for a new asset class “Carports (freestanding or lean-to)”, under the “Buildings and structures” asset category, within the Commissioner’s Table of Depreciation Rates.

A carport is a simple lean-to structure that is attached to an external wall of a building for support or may be freestanding supported by columns. Most carports may be distinguished from buildings because (whilst they obviously have a roof) they do not have four walls, or if they have walls, they are usually not completely enclosed and/or are not weather-tight.

Lean-to carports, although attached to a wall of a building for support, can be easily removed from a building without damage to the building. In addition, a reasonable person could easily distinguish a carport as a separate structure from a building. A lean-to carport would not be viewed as part of the fabric of a building, therefore is viewed as a separate structure.

Carports designed as an open-sided extension of a building roof structure, would not be easily removed without damage to the common roof structure. A reasonable person would not easily distinguish a carport as a separate structure from a building, which is more likely to be viewed as being an extension of the building and form part of the fabric of a building. Carports that are an extension of a building roof structure are not viewed as a separate asset and form part of a building.

If the structure used to shelter cars comprises a roof and four complete, weather-tight walls, then the structure is a building. If the structure to provide shelter for vehicles has a roof, three weather-tight walls and an open front (presence or absence of a door in the opening is irrelevant) it is therefore a building.

DETERMINATION DEP94: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 94

1. Application

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

This determination applies from the 2015 and subsequent income years.

2. Determination

Pursuant to section 91AAG of the Tax Administration Act 1994 the general determination will apply to the kind of items of depreciable property listed in the table below by:

- adding into the “Buildings and structures” asset category, a new asset class, estimated useful life, and diminishing value and straight line depreciation rates as listed below:

Asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Carports (freestanding or lean-to)	33.3	6	4

3. Interpretation

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

This determination is signed on the 4th day of August 2015.

Rob Wells

LTS Manager, Technical Standards

GENERAL DEPRECIATION DETERMINATION DEP95: RAIL PASSENGER SERVICE ELECTRIC MULTIPLE UNITS

Note to Determination DEP95

The Commissioner has set a general depreciation rate for a new asset class “Rail passenger service electric multiple units” (EMUs), under the “Transportation” asset category, within the Commissioner’s Table of Depreciation Rates.

An EMU consists of a self-propelled passenger carriage semi-permanently linked to a passenger trailer carriage (not motorised). There is no separate locomotive as the electric traction motors and drive wheels are incorporated into one or more of the carriages. EMUs are used to provide rail commuter passenger services and are usually formed from two or more semi-permanently coupled carriages, with a drive cab and motor at each end.

3. Interpretation

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

This determination is signed on the 4th day of August 2015.

Rob Wells

LTS Manager, Technical Standards

DETERMINATION DEP95: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 95

1. Application

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

This determination applies from the 2015 and subsequent income years.

2. Determination

Pursuant to section 91AAG of the Tax Administration Act 1994 the general determination will apply to the kind of items of depreciable property listed in the table below by:

- adding into the “Transportation” asset category, a new asset class, estimated useful life, and diminishing value and straight line depreciation rates as listed below:

Asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Rail passenger service electric multiple units	25	8	6

SPECIAL DETERMINATION S39: VALUATION OF SHARES ISSUED BY BANK FOLLOWING A NON-VIABILITY TRIGGER EVENT

This determination may be cited as Special Determination S39: Valuation of shares issued by Bank following a Non-Viability Trigger Event.

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

1. This determination relates to a funding transaction involving the issue of Notes by Bank to Parent. The Notes will contain a conversion mechanism, in order to allow them to be recognised as Tier 2 capital for the purposes of the Reserve Bank of New Zealand framework relating to the capital adequacy of banks.
2. Bank will enter into a Deed Poll, which will set out the steps that will occur in the event that a Non-Viability Trigger Event occurs, requiring conversion of the Notes.
3. If a Non-Viability Trigger Event occurs, the relevant number of Notes must be immediately and irrevocably converted into ordinary shares in Bank.
4. The Arrangement is the subject of private ruling BR Prv 15/25 issued on 27 July 2015, and is fully described in that ruling.
5. The share subscriptions provided for in the Deed Poll are each a financial arrangement (as defined in s EW 3) and an “agreement for the sale and purchase of property or services” (as defined in s YA 1). The Notes and the share subscriptions are, together, a wider financial arrangement.

2. Reference

This determination is made under s 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 Bank to Parent. Bank will enter into a Deed Poll, which will set out the steps that will occur in the event that a Non-Viability Trigger Event occurs, requiring conversion of the Notes into shares in Bank.
2. If a Non-Viability Trigger Event occurs, the relevant number of Notes must be immediately and irrevocably converted into shares in the Bank. In summary, the steps for the conversion of the Notes will be as follows:
 - a) Each Note (subject to conversion) will become immediately due and payable and Bank will be required to repay the NZ\$ equivalent of the A\$ face value of the Note. All accrued but unpaid interest on the Notes will be cancelled.

- b) Under the terms of the Deed Poll, Parent will be required to pay a sum to Bank equal to the NZ\$ equivalent of the A\$ face value of each Note converted, to subscribe for ordinary shares in Bank.
- c) The number of ordinary shares in Bank to be subscribed for will be calculated in accordance with a formula set out in the Deed Poll.

3. This determination applies in the situation that shares are issued by Bank to Parent following a Non-Viability Trigger Event, to determine the value of the shares for the purposes of the financial arrangement rules.

4. Principle

1. The share subscriptions and the Notes are, together, a financial arrangement (as defined in s EW 3). The subscription for shares in Bank by Parent contained in the Deed Poll 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 subscriptions are not a “short-term agreement for sale and purchase” (as defined in s YA 1), as settlement is not required to occur within 93 days of the Deed Poll being entered into. As such, they are not excepted financial arrangements 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 Bank must be established under s EW 32. None of subs (2B) to (5) of s EW 32 apply to the share subscriptions.
4. Under s EW 32(6), the Commissioner is required to determine the value of the property. Bank is required to use this amount.

5. Interpretation

In this determination, unless the context otherwise requires:

- “Bank” means the bank issuing the Notes.
- “Parent” means the ultimate parent company of Bank.
- “Non-Viability Trigger Event” has the meaning set out in the Deed Poll, as described in private ruling BR Prv 15/25, issued on 27 July 2015.
- “Notes” means the notes issued to Parent as described in private ruling BR Prv 15/25, issued on 27 July 2015.

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 consideration.
2. For the purposes of s EW 32(6), the value of the shares issued by Bank is equal to the amount paid for those shares by Parent.

7. Example

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

Example

Following a Non-Viability Trigger Event, Notes with a face value of A\$1,000 are to be converted to ordinary shares in Bank. Bank immediately repays the NZ\$ equivalent of the A\$ face value of the Notes to Parent.

Parent pays an amount equal to the NZ\$ equivalent of the A\$ face value of the Notes to Bank to subscribe for ordinary shares in Bank. Bank issues the number of shares to Parent calculated in accordance with the formula set out in the Deed Poll. The value of the shares, for the purposes of s EW 32, is the NZ\$ equivalent of A\$1,000.

This Determination is signed by me on the 27th day of July 2015.

Fiona Heiford

Manager (Taxpayer Rulings)

OPERATIONAL STATEMENTS

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

2015 REVIEW OF THE COMMISSIONER'S MILEAGE RATE FOR EXPENDITURE INCURRED FOR THE BUSINESS USE OF A MOTOR VEHICLE

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

A recent review of the Commissioner's mileage rate results in a reduction to the rate to 74 cents per kilometre for both petrol and diesel fuel vehicles for the 2015 income year. The weighted average rate of 73.9710839 cents per kilometre is calculated for the 2015 income year, compared to a weighted average of 76.45478 for the 2014 income year. The reduction is largely due to lower average fuel costs during the 2015 income year (petrol \$2.07 and diesel \$1.38) compared to the 2014 income year (petrol \$2.16 and diesel \$1.51) and to some extent more efficient motor vehicles. The 2015 income year for business taxpayers with a standard 31 March balance date, runs from 1 April 2014 to 31 March 2015.

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

The Commissioner does not propose to amend the returns for taxpayers who have already filed their 2015 returns using the 2014 mileage rate.

The Commissioner accepts that employers may use the 2015 vehicle mileage rate as a reasonable estimate of costs when they reimburse employees for the use of their private vehicle for business-related travel for a current income year (post 1 April 2015).

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

The mileage rate does not apply in respect of motor cycles, hybrid and/or electric motor vehicles as these modes of transport are not commonly used for business purposes. Any self-employed persons who use these forms of transport for business purposes will need to calculate their actual expenditure or in the situation of an employer reimbursement, they may make a reasonable estimate of the employee's costs.

NEW LEGISLATION

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

ORDER IN COUNCIL

INCOME TAX (FRINGE BENEFIT TAX, INTEREST ON LOANS) AMENDMENT REGULATIONS 2015

The prescribed rate of interest used to calculate fringe benefit tax on low-interest, employment-related loans is 6.22%, down from the previous rate of 6.70% which applied from the quarter beginning 1 October 2014.

The new rate applies for the quarter beginning 1 July 2015. The rate is reviewed regularly to align it with the results of the Reserve Bank's survey of variable first-mortgage housing rates.

The new rate was set by Order in Council on 24 August 2015.

*Income Tax (Fringe Benefit Tax, Interest on Loans)
Amendment Regulations 2015 (SR 2015/200)*

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out the answers to some day-to-day questions people have asked. They are published here as they may be of general interest to readers.

QB 15/07: TAX ADMINISTRATION ACT 1994 – MEANING OF “DUE AND PAYABLE” UNDER SECTION 91E(4)(d)(i)

Legislative references are to the Tax Administration Act 1994.

This Question We've Been Asked is about s 91E(4)(d)(i).

Question

1. We have been asked when a tax, duty or levy will be considered to be “due and payable” under s 91E(4)(d)(i).

Answer

2. A tax, duty or levy (tax type) becomes due and payable on the due date for payment of the relevant tax type and tax period.
3. Therefore, under s 91E(4)(d)(i) the Commissioner may not make a private ruling on a matter, unless the application is received before the due date for payment of the relevant tax type for the tax period to which the matter relates. For income tax generally, this is the due date for terminal tax payments for an income year (and does not include any provisional tax). For other types of tax (such as GST, PAYE, RWT and NRWT) this is the due date for payment of tax for the relevant period in respect of which the Commissioner has been asked to rule.

Explanation

4. The Commissioner's ability to make private rulings is provided in s 91E. Section 91E(4) sets out when the Commissioner may not make a private ruling. Relevantly, s 91E(4)(d)(i) provides:
 - (4) The Commissioner may not make a private ruling if—
 - ...
 - (d) the matter on which the ruling is sought—
 - (i) concerns a tax (excluding provisional tax), duty, or levy that is due and payable, unless the application is received before the tax (excluding provisional tax), duty, or levy is due and payable; or
 - ...
5. Relevantly, the Commissioner may not make a private ruling if the matter on which the ruling is sought

concerns a tax type that is due and payable (unless the application is received before the relevant tax type becomes due and payable).

6. The taxation laws in respect of which binding rulings may be made are contained in s 91C. For the purposes of s 91E(4)(d)(i), the matter on which a private ruling is sought must concern a tax type imposed by a taxation law included in s 91C. The ability to rule under s 91E(4)(d)(i) must be considered in respect of the relevant tax type and for the relevant tax period on which the Commissioner has been asked to rule. The question that arises is what “due and payable” means, as this term is not defined in the tax legislation.
7. The Commissioner notes that s 91E(4)(d)(i) specifically excludes provisional tax. Any due dates for payment of any provisional tax are not taken into account when determining whether any income tax is due and payable.
8. The term “tax payable” is defined in s 120C, for the purposes of Part 7 – Interest, as meaning:

At any time, means the amount of tax payable in respect of a tax liability by that time, determined in accordance with the tax laws; and includes an amount of tax that must be withheld or deducted under a tax law and paid to the Commissioner.
9. However, the conjunction between “due” and “payable” in s 91E(4)(d)(i) indicates that not only must the particular tax type be payable, it must also be due to be paid. Generally, there is a period of time between when a tax becomes payable and when it must be paid. This allows taxpayers time to calculate the amount and prepare the relevant tax return.
10. The term “due date” is defined in s 3(1). Unless the context otherwise requires, “due date” means:

due date means the last day on which a taxpayer is able—

 - (a) to pay tax; or
 - (b) to provide a tax return; or
 - (c) to provide a tax form; or
 - (d) to do any other thing under a tax law,—

before being liable to pay a penalty or (in the case of paragraph (a)) interest under Part 7:

11. The “due date” is the last day on which a taxpayer is able to pay tax, provide a tax return or tax form, or do any other thing under a tax law before being liable for a penalty or interest under Part 7.
12. For the purposes of s 91E(4)(d)(i), a matter will concern a tax type that is “due and payable” on the due date for payment of that tax type for the relevant period in respect of which the Commissioner has been asked to rule.
13. However, there is no requirement that an actual amount of tax is payable or quantified before s 91E(4)(d)(i) will apply. The Commissioner considers it sufficient that the relevant due date for payment of a particular tax type (for a tax period) has passed, regardless of whether an amount of tax is actually payable. The relevant question is whether, if any tax was payable in respect of a particular tax type and period on which the Commissioner has been asked to rule, the relevant due date for payment of that tax type for that tax period has passed. What this means is that, where there is the *potential* that a tax liability could exist in respect of the matter on which a ruling is sought, the Commissioner is not required to first determine whether there is, in fact, a tax liability or how much it would be. The question of whether the Commissioner is precluded from ruling under s 91E(4)(d)(i) must be resolved at the beginning of the rulings process before considering the relevant tax issues.
14. In addition, s 91E(4)(f) precludes the Commissioner from making a private ruling if an assessment has already been made. The Commissioner considers that s 91E(4)(d)(i) operates to extend this rule to include situations where a taxpayer has not filed a tax return and/or an assessment has not been made by the relevant due date for payment of the tax type concerned. Therefore, whether or not an assessment has been made, as long as the relevant due date for payment of the particular tax type for the relevant period has passed, the Commissioner may not issue a private ruling.
15. The Commissioner’s inability to make a private ruling in such a situation is aligned with the purpose of the binding rulings regime. Section 91A states:

Binding Rulings

91A Purpose of this Part

The purpose of this Part is to—

- (a) provide taxpayers with certainty about the way the Commissioner will apply taxation laws; and
- (b) help them to meet their obligations under those laws,—

by enabling the Commissioner to issue rulings that will bind the Commissioner on the application of those laws. The Part also recognises the importance of collecting the taxes imposed by Parliament and the need for full and accurate disclosure by taxpayers who seek to obtain binding rulings.

16. The binding rulings regime enables taxpayers to obtain certainty about how the Commissioner will apply tax laws and helps taxpayers comply with their tax obligations. However, by the relevant due date, a taxpayer will already have been required to file their tax return and make an assessment on that tax type for that period.
17. Once a self-assessment has been made regarding a tax type and for a relevant period, the disputes resolution process is available to the taxpayer should there be any disagreement with that assessment. There is a clear legislative policy that the binding rulings regime should not overlap with the disputes resolution process. The answer to this question we’ve been asked is consistent with the purpose of the binding rulings regime and the disputes resolution process.

Conclusion

18. Section 91E(4)(d)(i) applies where the tax type that the matter concerns is due and payable for the relevant period. A tax will be due and payable on the due date for payment of that tax type and tax period (excluding, in the case of income tax, any provisional tax payments). Consequently, unless the application is received before that due date (whether or not a tax liability actually exists), the Commissioner may not issue a private ruling on that matter.

Examples

19. The following examples are included to assist in explaining the application of the law.

Example 1: Income tax

20. Company A has a standard 31 March balance date and is linked to a tax agent. Company A’s terminal tax date is 7 April. Company A is required to pay provisional tax.
21. On 31 October Company A applies for a private ruling on the deductibility of an amount of expenditure incurred in the previous tax year. Company A’s tax return is not due until the following 31 March (so s 91E(4)(f) does not apply). Further, the relevant due date for payment of Company A’s terminal tax is 7 April of that following year. Because the ruling application is received by the Commissioner before Company

A's terminal tax date for income tax, s 91E(4)(d)(i) will not apply. Any provisional tax liabilities are not relevant for these purposes (as they are excluded by s 91E(4)(d)(i)).

Example 2: Income tax

22. Individual X decides to apply for a private ruling on whether an amount received two years ago from the sale of a property was of a capital or revenue nature. Individual X did not have a tax agent at that time and did not file a tax return (so the exclusion in s 91E(4)(f) does not apply). Individual X submits that the amount is a capital receipt, and so considers that no amount is due and payable. However, the Commissioner will not make a ruling in this situation because there is the potential for a tax liability to exist that was due and payable before the application was received.

Example 3: Goods and services tax

23. Company B is registered for GST and applies for a private ruling on whether a supply that occurred in the taxable period ending 30 September was zero rated. The due date for payment is 28 October.
24. The Commissioner receives the application on 15 October, at which point Company B has not yet filed its GST return and made its assessment. As the application is received before the due date for payment (and before an assessment has been made), the Commissioner is able to make a private ruling.

Example 4: Resident withholding tax

25. Company C withholds less than \$500 per month of RWT on interest paid and so is eligible to pay the RWT withheld to the Commissioner in two instalments for the tax year. The instalments are due by 20 October and 20 April the following year.
26. Company C applies for a private ruling on various matters, including the RWT withheld from interest during the first instalment period of 1 April to 30 September. The Commissioner receives the application on 12 October. As this is before the due date of 20 October, the Commissioner is able to make a private ruling on the RWT withheld.
27. If the application was received on 21 October, the Commissioner would not be able to make a private ruling in respect of the RWT for the first instalment period, but could make a private ruling in respect of the second instalment period.

References

Legislative references

Tax Administration Act 1994 – ss 3(1), 91A, 91E(4)(d)(i) and 120C

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.

COSTS ON A JOINT AND SEVERABLE BASIS

Case	Commissioner of Inland Revenue v Muir & Anors
Decision date	7 July 2015
Act(s)	High Court Rules
Keywords	Joint, severable, liability, costs

Summary

The High Court declined the respondents' application to depart from r 14.14 of the High Court Rules ("HCR") and to apportion costs severally between each respondent. The High Court held that given the background to the application, and the unified opposition efficiently presented by all the respondents, there is no arguable basis for departing from the default principle under the rule.

Impact

An application to the High Court to transfer and consolidate multiple tax challenges filed by different taxpayers in the Taxation Review Authority ("TRA") may be by a single application. Separate applications for each taxpayer or each tax challenge are not required.

Liability to pay court costs is joint and several unless the Court directs otherwise.

Facts

The respondents in this matter were investors in the Trinity tax avoidance scheme. In October 2013, the Commissioner of Inland Revenue ("the Commissioner") was granted leave to bring an application for transfer and consolidation of proceedings by way of an originating application under Part 19 of the HCR. This is a costs judgment addressing a submission that the Court should make a costs order, which departs from the usual rule that liability of each of two or more parties ordered to pay costs is joint and several (as per r 14.14 of the HCR).

The Commissioner filed a costs memorandum in November 2013 seeking an order for costs in a sum that had been agreed. Counsel for the Commissioner noted that the respondents had been unable to agree that the liability for costs should be on a joint and several basis.

In a memorandum dated 4 December 2013, counsel for some of the respondents argued that the costs burden should be divided equally amongst the 13 responding parties.

The Commissioner argued that there is no reason for the Court not to apply the default position in r 14.14 of the HCR, of joint and several liability for costs.

GJ Judd QC (on behalf of a number of the respondents) argued that although the Commissioner sought consolidation of proceedings in the application considered by the Court, the Commissioner was not entitled to file a single application without leave of the Court. Furthermore, a separate application should have been made for each challenge to the assessments.

Decision

Justice Toogood dismissed the argument that costs should be apportioned equally between the respondents. The Court relied on the fact that the proceeding was commenced as a single application against the respondents. The Court further noted that the respondents' claim was a highly technical afterthought and it was in any event far too late to raise it.

The Court stated that the single application was administratively efficient for the Court, and also provided a convenient and cost-saving approach for the parties.

Rule 14.14 of the HCR provides that liability for each of two or more parties ordered to pay costs is joint and several, unless the Court otherwise directs.

The Court further noted that the respondents must have realised this when proceedings were transferred from the TRA to the High Court. The effect of r 14.4 would mean

that any liability of the respondents to pay costs would be joint and several unless the Court considered it unjust.

The Court relied on the observations of Lord Neuberger, President of the UK Supreme Court who stated in *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209 at [89]:

... by becoming party to legal proceedings in this jurisdiction, a person is brought within a system governed by the rules of the court, which carry with them the potential for being rendered legally liable for costs, subject to the discretion of the court.

Given the background of the application, there was no arguable basis for departing from the default principle under r 14.14 and this was consistent with the approach to costs taken by other Courts in related Trinity matters.

Justice Toogood ordered the respondents to pay the Commissioner costs, jointly and severally, on a category 2B basis.

STARTING PRINCIPLE OPEN JUSTICE

Case	Jawahar Bhaskar Musuku v Commissioner of Inland Revenue [2015] NZHC 1584
Decision date	7 July 2015
Act(s)	Judicature Amendment Act 1972, High Court Rules, Tax Administration Act 1994
Keywords	Name suppression, confidentiality, open justice, publication

Summary

The High Court dismissed Mr Musuku's application for an order that a judgment (where he was the applicant) not be published, or that his name, other identifying information and sensitive information in the judgment not be published. Woodhouse J held that the starting point is open justice and that more is required than to point to adverse consequences of publicity.

Facts

Mr Musuku unsuccessfully brought judicial review proceedings against the Commissioner of Inland Revenue ("the Commissioner") (*Musuku v Commissioner of Inland Revenue* [2015] NZHC 678).

Having lost, Mr Musuku sought an order either that the judgment not be published or that his name and other identifying and sensitive information in the judgment not be published.

Decision

Woodhouse J, in an oral judgment, first assessed the authorities and, citing the leading authority on name suppression in tax cases *Muir v Commissioner of Inland Revenue* ((2004) 21 NZTC 18,894 (CA)) ("*Muir*"), emphasised that the starting point is the principle of open justice and the Court does not start on the basis that there is a right to privacy which stands equally with that principle.

His Honour referred to two Court of Appeal decisions which appeared to differ on name suppression in civil cases:

- *Clark v Attorney-General* ([Name suppression] 17 PRNZ 554 (CA)) ("*Clark*") where it was held that exceptional circumstances are required for name suppression in a civil case, and
- *Jay v Jay* ([2014] NZCA 445, [2015] NZAR 861) ("*Jay*") where it was held that "extraordinary circumstances" are not required.

The Court of Appeal in *Jay* did not conclude that *Clark* should not be followed and Woodhouse J did not need to determine which decision should be followed to the extent there is a material difference. His Honour held that that the starting point is open justice, as was made clear in *Muir*, and that more is required than to point to adverse consequences of publicity.

One of Mr Musuku's concerns was the reference to the Commissioner's opinion under s 108(2) of the Tax Administration Act 1994 that his tax returns were fraudulent or wilfully misleading for the purposes of the time-bar not applying. Woodhouse J recognised that the allegation of fraud in civil proceedings is a serious matter and this was Mr Musuku's strongest point in terms of adverse consequences.

However, His Honour noted that Mr Musuku had chosen to bring the application for judicial review in the High Court where the general rule is no anonymity.

Additionally, there was no up-to-date evidence pointing to any particular adverse consequences of publicising Mr Musuku's identity, other than the broad inferences one might draw in respect of family members.

Counsel for Mr Musuku argued that publication of Mr Musuku's name was unnecessary and not something that the open justice principle requires. This argument was rejected on the basis that, as set out by the Court of Appeal in *Clark*, the Court should not engage in an evaluation of public interest factors and a grading of which matters should, or should not, be reported.

The application was dismissed.

HIGH COURT UPHOLDS DETERMINATIONS OF TAXATION REVIEW AUTHORITY IN APPEAL BY WAY OF CASE STATED

Case	Webster Group of Objectors, Foster Group of Objectors, Consultant Application Group of Objectors v Commissioner of Inland Revenue
Decision date	3 July 2015
Act(s)	Tax Administration Act 1994, Taxation Review Authorities Act 1994, Income Tax Act 1976
Keywords	Extension of time, s 99, s 165(2), case stated

Summary

The High Court granted the appellant's interlocutory application but went on to find for the Commissioner of Inland Revenue ("the Commissioner") on the 13 questions included in the appeal by way of case stated.

Facts

The appellant taxpayers were participants in the "Russell template" tax avoidance scheme.

This appeal follows a series of determinations by the Taxation Review Authority ("TRA") disallowing the appellants' objections to the Commissioner's reassessment of their tax liabilities.

The appellants asked the TRA to state a case for the High Court under s 26 of the Taxation Review Authorities Act 1994.

The TRA posed 13 discrete questions to the High Court.

Decision

A preliminary issue, which the Court needed to address, was whether to allow Mr Russell to make submissions and to speak on questions that Mr Judd (the appellants' barrister) had advised he would not be submitting on.

The Court noted that a company may only be represented in Court by a lay person in exceptional circumstances (*Re GJ Mannix Ltd* [1984] 1 NZLR 309, (1984) 2 NZCLC 99,095 (CA)). The Court held firstly it was inappropriate, in a case-stated appeal, to see the questions raised that Mr Judd did not wish to address as abandoned. Secondly, due to Mr Russell's "considerable experience as an advocate" and familiarity with the history, facts and evidence of the decided cases, Mr Russell was allowed a circumscribed right of audience, even if in reality he would be speaking for all appellants, both natural persons and companies.

The 13 questions posed to the High Court by the TRA were as follows.

(1) Should the objections of the Webster group of objectors be allowed because the Commissioner should not have been granted an extension of time to file the cases in the Taxation Review Authority?

No. The Commissioner did not need an extension of time in *Case U35* ((2000) 19 NZTC 9,330 (TRA)) and the objections should not therefore have been allowed on that ground.

(2) Were any of the interlocutory rulings made by the TRA wrong and, if so, what were the consequences of those incorrect rulings?

The appellants argued that the conduct of the hearing of the case denied them a complete and fair hearing because the TRA was biased and they were prevented from adducing relevant documentary and oral evidence.

The Court held that the interlocutory rulings are irrelevant unless it can be shown that they would have affected in some way the substantive outcome of the objections.

The Court held that given the history of the Russell litigation there was no conceivable basis upon which further evidence or discovery might be able to demonstrate that the template was not a tax avoidance arrangement.

Further, the Court stated that all process errors advanced by Mr Russell in his submissions had already been comprehensively dealt with and determined against him in other cases.

(3) Should the affidavit of J G Russell sworn 23 July 1999 have been admitted as evidence and taken into account in determining the issues in these proceedings?

No. The Court found there was nothing in *Dandelion Investments Ltd v CIR* ([2003] 1 NZLR 600, (2003) 21 NZTC 18,010 (CA)) to suggest that the TRA is required to accept whatever material a taxpayer wishes to proffer to it.

(4) Were the requirements of s 25(2) of the ITA76 met in respect of each objector to allow the Commissioner to lift the time bar for each objector?

Yes. The Court found that appellants were unable to show why the opinion that the trading company profits were omitted from the shareholders' returns and that omission entitled the Commissioner to reopen otherwise statute-barred returns was not reasonably held.

(5) Is the effect of the decision of the Privy Council in Peterson v Commissioner of Inland Revenue that there is an onus of proof on the Commissioner in these cases and, if so, what is the extent of the onus and has the Commissioner discharged the onus?

No. The Court noted that the Court of Appeal in *Wire Supplies Ltd v Commissioner of Inland Revenue* ([2006] 2 NZLR 384, (2005) 22 NZTC 19,357 (HC), at [83]), had held that *Peterson* does not have the effect of imposing this onus on the Commissioner.

(6) Have different taxpayers been assessed with the same income contrary to the prohibition in s 99(4) and, if so, how does s 99(4) affect the s 99(3) assessments made against the objectors in this case?

No. Ellis J, agreeing with the TRA, held “that a taxpayer can be assessed under s 99(3) and that another taxpayer can be assessed under s 99(3) with the same income, provided that no objection or challenge proceedings have been filed for the first taxpayer in relation to the earlier assessment. In the event that an objection or challenge proceeding has been commenced prior to the issuing of an amended assessment, the latter assessment of the same income is open to objection or challenge on the grounds that s 99(4) deems the income to be the income of the first taxpayer.”

(7) In forming his opinion under s 99(2) in respect of each objector, did the Commissioner meet his statutory obligations to consider all of the relevant facts and particular circumstances in relation to each objector?

The appellants contended that the Commissioner did not follow his own Policy Statement on s 99. The Court cited the finding in *Miller* that the Commissioner’s Policy Statement on s 99 was not binding and did not lay down rules and conditions (*Miller v Commissioner of Inland Revenue* [2001] UKPC 17, [2001] 3 NZLR 316 at [29]). Nothing Mr Russell might have been able to elicit from witnesses would have changed that the Commissioner and his officers thought carefully about whether s 99 applied.

Thus, as the Commissioner’s reassessments have been confirmed to be correct, any defects in the assessment process that might exist have been cured by the TRA decision and (7) do not matter.

(8) Should a portion of the administration fee be treated as a deductible funding charge and so be allowed as a deduction against the income assessed to the objectors?

The Court, citing with approval Lord Hoffman in *Miller*, held “the Commissioner is not, on reconstruction, required to rewrite history so as to give a tax avoiding objector the benefit of something that never happened and which would, in all likelihood, not have happened had the tax avoidance arrangement not been entered into”.

Citing *Ben Nevis Forestry Ventures v Commissioner of Inland Revenue* in support, the Court affirmed that the onus is on a taxpayer “to prove on the balance of probabilities that the amount of the assessment is excessive by a specific amount” and it is “trite that [the] burden is both strict and critical”.

The Court held that there was insufficient evidence of a funding charge.

(9) How and to what extent does s 165(2) of the ITA76 apply to the income assessed to each objector?

The appellants contended that the portion of the consulting fee that is not deductible under s 104 is deductible under s 165(2) in relation to the work done by Mr Russell in determining their taxable positions.

The Commissioner submitted, and the TRA accepted, that there was no jurisdiction to determine this issue because it was never a ground for objection.

Ellis J found that s 165(2) has no application in the present cases, either because it was not a ground for objection or there was no evidence to discharge the taxpayers’ onus.

(10) Have conflicting and inconsistent assessments been made in respect of Fuel Haulers objectors and, if so, how should these assessments be reconciled?

Mr Judd submitted that because a Track A case has been stated in relation to the company and technically remains pending in the TRA, the Track B assessments issued to the manager and to Fuel Haulers (1990) Ltd cannot stand.

However, the Court was not satisfied that a case had ever been stated in relation to the Track A assessments and there is no difficulty in confirming the Track B assessments.

Additionally Ellis J stated, given that two of the companies remain struck off the Companies Register and there is no prospect of the Commissioner seeking to enforce the Track A assessments against those two companies, there is no vitiating inconsistency.

(11) Have the Consultant Applications Ltd objectors been mistakenly assessed?

The Court held that there was insufficient evidence to determine this and the burden is on the taxpayer.

(12) Are additional taxes chargeable in respect of any of the objections?

Ellis J noted this was a non-issue and the answer is “only if the Commissioner has nominated a due date”.

(13) Should the Authority have considered and determined the objections of those company objectors that were struck off the Companies Register?

No. The Court cited the “ample authority” for the proposition that a company struck off the register cannot bring or continue a legal proceeding.

HIGH COURT GRANTS COMMISSIONER'S APPLICATION FOR TRANSFER

Case	Commissioner of Inland Revenue v Great North Motor Company Limited (In Receivership) [2015] NZHC 1645
Decision date	14 July 2015
Act(s)	Tax Administration Act 1994
Keywords	Section 138N(2), transfer, s 330, complexity, likelihood of appeal, s 108, vendetta, <i>Kensington Developments Ltd (in rec) v Commissioner of Inland Revenue</i>

Summary

The High Court granted the Commissioner of Inland Revenue's ("the Commissioner") application, made pursuant to s 138N of the Tax Administration Act 1994 ("TAA"), to transfer the challenge proceeding filed by Great North Motor Company Limited (In rec) ("Great North") in the Taxation Review Authority ("TRA") to the High Court.

Facts

The Commissioner applied to transfer the substantive proceedings, currently before the TRA, to the High Court and also applied to bring this application by way of originating application. The respondent, Great North, opposed the Commissioner's transfer application but did not oppose the Commissioner's application being brought by way of originating application.

John George Russell is the sole director and receiver of Great North. Great North's shareholdings are held by two separate companies, Glen Eden Holdings Ltd ("Glen Eden") and Downsview Nominees Ltd ("Downsview").

On 20 August 1993, Great North issued a debenture to Glen Eden ("the Debenture"). Glen Eden held the Debenture as nominee for Downsview. The terms of the Debenture provided that the principal sum would be repaid on demand and with interest. Great North has made no actual interest or principal payments on the Debenture but has claimed annual income tax deductions for the interest payable.

On 25 May 2005, Glen Eden assigned the Debenture to Kensington Developments Ltd. The Commissioner now calculates the amount owing on the Debenture to be nearly \$22 million. It appears that no steps have been made to recover the amount owing.

The Commissioner reassessed the returns filed by Mr Russell on behalf of Great North. The primary issue in the substantive proceeding is whether Great North has entered into an arrangement that has the purpose or effect of tax avoidance.

Decision

The Court was satisfied that this was an appropriate case for transfer to the High Court.

Leave to commence proceeding by way of originating application

The High Court noted there are numerous High Court cases that have confirmed that an originating application under Part 19 of the High Court Rules is the appropriate way to commence proceedings under s 138N(2) of the TAA. The Court also noted that Great North did not oppose the application.

Accordingly, the Court granted leave for the Commissioner to commence this proceeding by way of originating application.

Transfer of proceeding to the High Court under s 138N(2) of the TAA

The High Court noted that the courts have been left to establish a number of principles relevant to considering when a transfer application should be granted. These principles were recently affirmed by the Court of Appeal in *Kensington Developments Ltd (in rec) v Commissioner of Inland Revenue* [2015] NZCA 60 ("*Kensington*").

The Commissioner gave submissions on the following factors in support of her application for transfer:

1. complexity of the arrangement;
2. importance of the proceeding from the Commissioner's perspective;
3. likelihood of appeal;
4. amount of money at stake;
5. vendetta allegations;
6. any advantages to Great North from the proceeding remaining in the TRA.

Complexity of the arrangement

The High Court found that for some of the factors raised by the Commissioner, the substantive proceeding will involve some complexity.

The Court noted the Court of Appeal's finding in *Kensington* that "the moderate complexity weighed in favour of transfer to the High Court but could not on its own be decisive" [29]. Accordingly, the High Court considered the other factors identified by the Commissioner.

Importance of the proceeding from the Commissioner's perspective

The Commissioner treated the tax returns for the 1996–2005 period as a nullity because during that period Great North had been taken off the company register and did not exist. Great North argues that pursuant to s 330(2) of the Companies Act 1993, the returns are not nullities and that the Commissioner cannot make assessments to re-assess the losses that were claimed because she is out of time under s 108 of the TAA.

Counsel for Great North relied upon the Supreme Court's decision in *Clark v Libra Developments Ltd* ([2007] NZSC 16, [2007] 2 NZLR 709) ("*Clark*"), submitting that s 330(2) of the Companies Act plainly validates the returns. The High Court noted that it was not clear that *Clark* was decisive of the interplay between s 108 of the TAA and s 330(2) of the Companies Act. The Court noted that a decision that *Clark* has the effect argued by Great North in this case would have far-reaching implications for the way in which the Commissioner deals with companies that have been struck off the register. Accordingly, the Court found that this factor favours transfer of the proceeding to the High Court.

Likelihood of appeal

The High Court noted that given the importance of the case to the Commissioner and Mr Russell's litigation history, it is almost certain that the decision will be appealed by the unsuccessful party. The Court found that this factor favours transfer.

Amount of money at stake

The High Court agreed that the \$21,717,813.79 at stake in the proceeding goes to the significance that the parties attach to the proceeding and the likelihood of appeal. Accordingly, the Court found that this factor favours transfer.

Vendetta allegations

The Court considered that the nature of the allegations on behalf of the taxpayer weighs strongly in favour of transfer to the High Court.

Advantages to Great North of the proceeding remaining in the TRA

Great North submitted that the confidentiality of the TRA combined with its ability to receive evidence not admissible in a court of law and costs savings were factors that must be given more weight than the factors outlined by the Commissioner in support of her transfer application. The Court found Great North's considerations unpersuasive and supported the Commissioner's submissions on these points.

STRIKE-OUT

Case	TRA 002/12 [2015] NZTRA 11
Decision date	27 July 2015
Act(s)	Goods and Services Tax Act 1985
Keywords	Strike-out, Unless order

Summary

The Commissioner of Inland Revenue ("the Commissioner") applied to strike out the disputants' challenge as being solely for the purposes of delay and as frivolous and vexatious. The Taxation Review Authority ("TRA") found for the Commissioner, but gave the disputant one "last-chance" to retain counsel, and file briefs of evidence and submissions within one month of the date of judgment. Failing this, the challenge will be struck out.

Facts

The Commissioner applied to strike out the disputants' challenge as being solely for the purposes of delay and as frivolous and vexatious. In response, the disputants applied to adjourn a hearing date of 24 August 2015 to subpoena two former Inland Revenue employees.

Throughout the proceedings, the disputants were represented by a registered accountant who was also the sole director of the two disputants and of several other corporations within the same group who were involved in the supply transactions underlying the GST dispute.

The decision sets out the very lengthy procedural history in great detail. The Commissioner contended that other than filing a Notice of Claim in January 2012, the disputants had taken no productive steps towards the hearing. Rather, the disputants, through their tax agent, engaged in a pattern of frivolous applications (including seeking to stay and strike out their own proceedings) and adjournment requests, while failing to comply with unless orders. In the course of the proceedings, the tax agent also made accusations of bias and other misconduct against Crown Counsel and judges involved in the procedural aspects of the case.

Decision

The TRA agreed with the submissions of the Commissioner, finding that the tax agent was pursuing proceedings for the purpose of delay and that there had been an ongoing abuse of process by the tax agent. The TRA considered the process followed by the disputants to be vexatious and that it could also be described as frivolous. The TRA also found that the tax agent was effectively refusing to comply with the TRA's orders.

Nevertheless, the TRA believed that the conduct of the tax agent may deprive the disputants of a proper resolution to the underlying GST challenge.

Accordingly, the TRA allowed the disputants one further month from the date of the judgment to appoint a suitable counsel and file evidence briefs and opening submissions, in which case the TRA would set a new fixture date. Failing completion of those steps, the challenge would be struck out. The disputants' request for an adjournment of the 24 August 2015 hearing was otherwise dismissed.

COST OF OBTAINING RESOURCE CONSENTS HELD TO BE CAPITAL

Case	Commissioner of Inland Revenue v Trustpower Limited
Decision date	19 June 2015
Act(s)	Income Tax Act 2004
Keywords	Resource consents, capital

Summary

The Court of Appeal held that expenditure incurred in obtaining resource consents was capital expenditure and was, therefore, not deductible under s DA 1 of the Income Tax Act 2004 ("ITA"). As a result, s EE 7(j) of the ITA did not prevent the resource consents of fixed duration from being "depreciable property" under s EE 6 of the ITA.

Facts

This case is an appeal by the Commissioner from the High Court judgment of Andrews J in *Trustpower Ltd v Commissioner of Inland Revenue* ([2014] 2 NZLR 502 (HC)).

It concerns whether expenditure incurred by TrustPower Limited ("Trustpower") in applying for and obtaining resource consents in the 2006, 2007 and 2008 income years is deductible. The resource consents were acquired in respect of four possible future new generation projects in the South Island.

Trustpower argued that the expenditure was part of its feasibility costs and was, therefore, deductible as a revenue expense. The Commissioner argued that the expenditure was of a capital nature and was not deductible.

Decision

The Court of Appeal allowed the Commissioner's appeal on the grounds that the expenditure was capital in nature, so the capital limitation in s DA 2(1) of the ITA applied to disallow a deduction.

Application of subpart EE

The Commissioner argued that resource consents (except land use consents of unlimited duration) were "depreciable intangible property" under subpart EE of the ITA so that the expenditure incurred for those consents was on capital account.

The Court noted that "property" in sub-part EE includes certain consents granted under the Resource Management Act 1991. It also noted that such consents were listed in Schedule 17 of the ITA and, as such, were "depreciable intangible property". However, the issue was whether, as an item of "depreciable intangible property", the resource consents were "depreciable property" under s EE 6 of the ITA.

The Court rejected Trustpower's argument that the resource consents did not fall under s EE 6 because they were not "used or available for use" in deriving income until Trustpower decided to proceed with the particular project. The Court stated that "available" simply meant "capable of being used".

However, because s EE 7(j) of the ITA provided that if a person is allowed a deduction outside of the depreciation regime then the depreciation regime will not apply, the Court decided that it was necessary to first consider whether a deduction was allowed under the general permission.

This approach was consistent with the scheme and purpose of the legislation and with the Commissioner's acknowledgement that there may be some circumstances in which resource consents would be stock in trade and, therefore, the expenditure incurred in acquiring them would be deductible.

The income/capital distinction

The Court noted that the correct approach to the distinction between income and capital was well established. It cited several cases by the appellate authority recounting the general factors to be taken into account in deciding whether an item of expenditure was capital or revenue, including *Hallstroms Pty Ltd v Federal Commissioner of Taxation* ((1946) 72 CLR 634 (HCA)) ("*Hallstroms*"), which the Court said was the starting point, *Commissioner of Taxes v Nchanga Consolidated Copper Mines* ([1964] AC 948 (PC)) ("*Nchanga*") and *BP Australia Ltd v Commissioner of Taxation for the Commonwealth of Australia* ([1966] AC 224 (PC)) ("*BP Australia*").

The Court emphasised that no rigid test could be applied. Instead, the Court was required to reach a common-sense appreciation of all the guiding features that provide the ultimate answer. It stated the following:

1. The general principles stated in *Hallstroms* and *Nchanga* remained the best guide for distinguishing between income and capital and may well be sufficient for that purpose without resort to the BP Australia factors.
2. The *BP Australia* indicia were just that, and were not determinative.
3. The answer will depend on a close examination of the facts of the particular case and the character of the particular payment to ascertain the nature and purpose or effect of the relevant expenditure.
4. There needs to be a sufficient relationship or connection between the expenditure or loss and the income or capital as the case may be. It is the object or effect of any given payment that will be determinative.
3. The High Court finding that the resource consents were not stand-alone assets separate to the projects to which they relate is irrelevant.
4. The disputed expenditure was not incurred in carrying on Trustpower's business or in earning the income of the existing business or in performing the income-earning operations of the existing business. Trustpower's profit-making enterprise was the generation and retailing of electricity, not the development of its pipeline of possible new projects.
5. The disputed expenditure was incurred in respect of possible future capital projects, including the resource consents needed to proceed with them.

The Court further noted that the general principles apply equally to the characterisation of expenditure on intangible property. It cited cases in which expenditure incurred in investigating a new source of income was held to be of capital nature (*Re Griffin Coal Mining Co Ltd v Commissioner of Taxation* [1990] FCA 343 and *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1992] FCA 851). It also stated that the High Court had been wrong to rely on *The Commissioner of Taxation v Ampol Exploration Ltd* ((1986) 13 FCR 545), which could be distinguished on its facts. The Court then went on to cite several cases in which expenditure incurred in obtaining resource consents and permissions was held to be capital (*ECC Quarries Ltd v Watkis (Inspector of Quarries)* [1977] 1 WLR 1386 (Ch), *Waste Management New Zealand Ltd v Commissioner of Inland Revenue* (1995) 17 NZTC 12,147 (CA), *Case T53* (1998) 18 NZTC 8-404 (TRA) and *Milburn New Zealand Ltd v Commissioner of Inland Revenue* (2001) 20 NZTC 17-017 (HC)).

The Court stated that determining which side of the line the expenditure fell involved an objective analysis of the factual background relating to the nature and purpose or effect of the expenditure, and not a subjective approach based on the views of the witnesses for Trustpower.

On this basis the Court concluded that the disputed expenditure was capital. Its reasons were as follows:

1. The expenditure was incurred for the purpose of enabling Trustpower to extend or expand its electricity generation business.
2. The resource consents gave Trustpower valuable rights, which were essential to Trustpower's long-term programme of future capital works, and valuable options.

The Court stated that by obtaining the resource consents, Trustpower invested unequivocally in capacity, whether or not it was committed at that time to proceed with the build. The expenditure on the projects was incurred for the purpose of enabling Trustpower to extend or expand its electricity generation business. That investment was inherently capital in nature and, on balance, there was not a sufficient nexus between the expenditure and the deriving of income.

It followed that Trustpower would be entitled to make deductions for the depreciation value of its assets under subpart EE of the ITA, but not under the general permission in s DA 1.

Even though it was not necessary for the determination of the case, for the sake of completeness, the Court went on to assess the *BP Australia* factors and concluded that it would assess the expenditure as capital in nature having regard also to the principles in that case.

Accordingly, the Court of Appeal confirmed the Commissioner's re-assessments disallowing the respondent's deductions and quashed the order for costs awarded to Trustpower in the High Court. Orders for costs in the High Court and Court of Appeal were also awarded in favour of the Commissioner.

An issue about the classification of expenditure incurred by Trustpower after the dates it was committed to acquiring the resource consents was remitted back to the High Court for determination.

Trustpower has sought leave to appeal the decision to the Supreme Court. Until the appeal process is completed, the Commissioner will continue to apply Interpretation Statement IS 08/02.

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