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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.

IN SUMMARY

Legal decisions – case notes

Legal decisions – case impact statements

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**

PRODUCT RULING - BR PRD 16/01: PMP DISTRIBUTION LIMITED

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by PMP Distribution Limited (PMP Distribution).

Taxation Laws

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

This Ruling applies in respect of:

- ss DA 2, RA 5, RD 5, RD 7, and RD 8; and
- s 6 of the Goods and Services Tax Act 1985 (GST Act).

The Arrangement to which this Ruling applies

The Arrangement is the engagement of deliverers by PMP Distribution pursuant to a Deliverers' Handbook and Contract (the Contract) for the delivery of unaddressed newspapers, leaflets, brochures, catalogues, advertising material, samples and other similar items to households and other premises throughout New Zealand.

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

1. PMP Distribution carries on the business of distributing newspapers, leaflets, brochures, catalogues, advertising material, samples and other similar items to households and other premises throughout New Zealand.
2. PMP Distribution only distributes unaddressed mail. PMP Distribution is not registered as a "postal operator" under the Postal Services Act 1998, as it is not involved in the carriage of "letters" (as defined in that Act) or addressed mail.
3. PMP Distribution engages the deliverers pursuant to the Contract, which includes a deliverers' handbook and conditions that the deliverers agree to abide by. The main terms of the Contract are summarised below.
4. Under the heading "Job Description", the Contract requires the deliverer to deliver product as provided by PMP Distribution on a pre-agreed schedule to private addresses, and the parties acknowledge that the deliverer is an independent contractor and not an agent or employee of PMP Distribution.
5. Under the heading "Payment", the Contract states that the deliverer is solely responsible for his/her own ACC levies, income tax liabilities and GST liabilities. The deliverer also acknowledges that the Contract is not a contract of employment governed by the Employment Relations Act 2000.
6. Under the heading "Delivery Payment Rates", the Contract stipulates standard minimum rates based on the number of items delivered, type of item and weight.
7. Under the heading "Reduction/Variation of Workload", the Contract states that due to the nature of PMP Distribution's business, the distribution of regular publications may cease without notice, and that the volume and timing of work may vary.
8. Under the heading "Performance of Services", the Contract states that:
   - the deliverer may sub-contract the services or otherwise engage or obtain assistance from others in the performance of the services;
   - the deliverer may provide and use (at the deliverer's cost, expense and risk) a car, trailer, trolley or other carrying equipment, and that scooters and motorcycles are also acceptable;
   - the deliverer is an independent contractor, and is therefore free to select their own means and methods of performing the services and the hours during which they will perform those services, subject to the delivery window requested by PMP Distribution; and
   - the deliverer is responsible/liable for all errors, omissions, loss or damage that are the deliverer's responsibility.

9. Under the heading "Termination", the Contract states that either party may terminate the agreement by giving 14 days' notice in writing, and that PMP Distribution may terminate immediately if there has been a serious breach.
10. The deliverers' handbook part of the Contract provides the following information to deliverers:
    - which houses to deliver to and how to deliver circulars;
    - when deliveries are to be done and what the regular delivery days are;
    - getting the correct number of circulars;
    - what to do in the event of absence;
    - reporting injuries and other problems with deliveries to supervisors;
    - dealing with dog issues and interference with delivered material;
    - completing an ACC form in the case of injury (the handbook reiterates that deliverers are self-employed, and states that PMP Distribution should not be entered as an employer on an ACC form);
    - disposing of excess circulars;
    - delivering during daylight and taking care crossing roads; and
    - health and safety procedures.
11. The Contract will remain materially the same as the version provided to Inland Revenue on 25 September 2015.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

a) For the purposes of the "PAYE rules", any payment PMP Distribution makes to a deliverer under the Contract will not be "salary or wages" or "extra pay" or a "schedular payment" within the meaning of those terms as defined in ss RD 5, RD 7 and RD 8 respectively.

b) PMP Distribution is not required to withhold tax from payments made to deliverers under the Contract under s RA 5(1)(a).

c) For the purposes of section DA 2(4), any payment PMP Distribution makes to a deliverer under the Contract will not be "income from employment".

d) For the purposes of the GST Act, the provision of services by any deliverer under the Contract will not be excluded from the definition of "taxable activity" in s 6(1), by s 6(3)(b).

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 July 2014 and ending on 30 June 2019.

This Ruling is signed by me on the 1st day of March 2016.

Howard Davis

Director (Taxpayer Rulings)

LEGISLATION AND DETERMINATIONS

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

DETERMINATION FDR 2016/02 - USE OF FAIR DIVIDEND RATE METHOD FOR A TYPE OF ATTRIBUTING INTEREST IN A FOREIGN INVESTMENT FUND

Reference

This determination is made under section 91AAO(1)(a) of the Tax Administration Act 1994 (the Act). This power has been delegated by the Commissioner of Inland Revenue to the position of Investigations Manager, Investigations and Advice, under section 7 of the Act.

Discussion (which does not form part of the determination)

Shares in the Astenbeck Offshore Commodity Fund II Limited (Astenbeck Feeder Fund), to which this determination applies, are attributing interests in a foreign investment fund ("FIF") for New Zealand resident investors.

The investments held indirectly by Astenbeck Feeder Fund are predominantly financial arrangements. In addition, some resident investors may hedge their attributing interests in Astenbeck Feeder Fund back to New Zealand dollars. Therefore, section EX 46(10)(cb) of the Income Tax Act 2007 (ITA) could apply to prevent the investors from using the fair dividend rate method in the absence of a determination under section 91AAO of the Act.

Despite Astenbeck Feeder Fund having assets predominantly comprising financial arrangements and the presence of the hedging arrangements, the overall arrangement contains sufficient risk so that it is not akin to a New Zealand dollar-denominated debt instrument. Accordingly, I consider it is appropriate for resident investors to use the fair dividend rate method to calculate FIF income from their attributing interest in Astenbeck Feeder Fund.

Scope of determination

This determination applies to investments in Astenbeck Feeder Fund held by New Zealand resident investors.

Astenbeck Feeder Fund:

- is a Cayman Islands exempted, umbrella open-ended investment company, with variable capital;
- invests all of its investible assets in Astenbeck Master Commodities Fund II Limited (Master Fund);
- issued/issues shares, denominated in US dollars;
- through its investment in the Master Fund, invests primarily in commodities (which may include commodity futures contracts, forward contracts, swaps and options on the foregoing, collectively referred to as 'commodities'), commodity-related securities, including exchange traded funds and currencies, with an investment objective of achieving superior absolute returns;

New Zealand resident investors may hedge their attributing interests in Astenbeck Feeder Fund back to New Zealand dollars.

The determination is subject to the following conditions:

1. The investment in Astenbeck Feeder Fund is not part of an overall arrangement that seeks to provide investors a return that is equivalent to an effective New Zealand dollar denominated interest exposure.
2. As the Master Fund is an actively managed fund, it may temporary close out its derivative investments. This may result in the Astenbeck Feeder Fund having a notional derivative position of less than 20% of its net assets value. Should this reduction in the value of derivative exposure occur, it is expected that the normal level of this type of investment would be restored within 45 days. Failure to restore the investment to its normal levels would result in this determination ceasing to apply from the first day of the following Quarter.
3. If the Master Fund ceases to trade continuously in derivative instruments or there is a reduction of investment holdings in favour of an investment that provides a New Zealand-resident investor with a return akin to a New Zealand dollar denominated debt investment, then this determination will cease to apply from the first day of the following Quarter unless corrective action is undertaken within a continuous period of 45 days.

Interpretation

In this determination unless the context otherwise requires:

"Fair dividend rate method" means fair dividend method under section YA 1 of the ITA;

"Foreign investment fund" means foreign investment fund under section YA 1 of the ITA;

"Financial arrangement" means financial arrangement under section EW 3 of the ITA;

"Astenbeck Feeder Fund" means the Astenbeck Offshore Commodity Fund II Limited, which is a Cayman Islands exempted company.

Determination

This determination applies to an attributing interest in a FIF, being a direct income interest in the Astenbeck Feeder Fund. This is a type of attributing interest for which the investor may use the fair dividend rate method to calculate FIF income from the interest.

Application Date

This determination applies for the 2017 and subsequent income years.

However, under section 91AAO(3B) of the Act, this determination also applies for an income year beginning before the date of this determination for a person who invests in the Astenbeck Feeder Fund and who chooses that the determination applies for that income year.

Dated at Hamilton this 21st day of March 2016.

Graham Poppelwell

Investigations Manager, Investigations and Advice

Inland Revenue

FOREIGN CURRENCY AMOUNTS - CONVERSION TO NEW ZEALAND DOLLARS (FOR THE 12 MONTHS ENDING 31 MARCH 2016)

This article provides the exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand dollars under the controlled foreign company ("CFC") and foreign investment fund ("FIF") rules for the 12 months ending 31 March 2016.

The Income Tax Act 2007 ("2007 Act") requires foreign currency amounts to be converted into New Zealand dollars applying one of the following methods:

- actual rate for the day for each transaction (including close of trading spot exchange rate on the day), or
- rolling 12-month average rate for a 12-month accounting period or income year (see the table **Currency rates 12 months ending 31 March 2016 – rolling 12-month average**), or
- mid-month actual rate as the basis of the rolling average for accounting periods or income years greater or lesser than 12 months (see the table **Currency rates 12 months ending 31 March 2016 – mid-month actual**).

Legislation enacted in September 2010 with effect from 1 April 2008 permits the Commissioner to set currency rates and approve methods of calculating exchange rates. The Commissioner can set rates for general use by taxpayers or for specific taxpayers. The Commissioner's ability to set rates and approve methods applies in circumstances where the 2007 Act does not contain a specific currency conversion rule (sections YF 1(5) and (6)), or in circumstances where the 2007 Act provides a rate or method for currency conversion (section YF 2).

Inland Revenue uses wholesale rates from Bloomberg for rolling 12-month average, mid-month actual and end of month. These rates are provided in three tables.

You must apply the chosen conversion method to all interests for which you use the FIF or CFC calculation method in that and each later income year.

To convert foreign currency amounts to New Zealand dollars for any country listed, divide the foreign currency amount by the exchange rate shown. Round the exchange rate calculations to four decimal places wherever possible.

If you need an exchange rate for a country or a day not listed in the tables, please contact one of New Zealand's major trading banks.

Note: All section references relate to the 2007 Act.

Actual rate for the day for each transaction

The actual rate for the day for a transaction can be used in the following circumstances:

- where the 2007 Act does not provide a specific currency conversion rule, then foreign currency amounts can be converted by applying the close of trading spot exchange rate on the date the transaction is required to be measured or calculated (section YF 1(2))
- where a person chooses to use the actual rate for the day of the transaction when calculating their FIF income or loss by applying the comparative value method, fair dividend rate method, deemed rate of return method or the cost method (section EX 57(2)(a))
- where a person chooses to use the close of trading spot exchange rate to convert foreign income tax paid by a CFC (section LK 3(a)) or by a FIF where the attributable FIF income method is used (sections EX 50(8)–(9) and LK 3(a)).

Unless the actual rate is the rate for the 15th or the last day of the month, these rates are not supplied by Inland Revenue.

The table **Currency rates 12 months ending 31 March 2016 – month end** provides exchange rates for the last day of the month. These are provided for convenience to assist taxpayers who may need exchange rates on those days.

Currency rates 12 months ending 31 March 2016 – rolling 12-month average table

This table is the average of the mid-month exchange rate for that month and the previous 11 months, ie, the 12-month average. This table should be used where the accounting period or income year encompasses 12 complete months.

This table can be used to convert foreign currency amounts to New Zealand dollars for:

- FIF income or loss calculated under the comparative value method, the fair dividend rate method, the deemed rate of return method or cost method (section EX 57(2)(b)) for accounting periods of 12 months
- FIF income or loss calculated under the attributable FIF income method (section EX 50(3)(a)) for accounting periods of 12 months
- attributed CFC income or loss calculated under the CFC rules (section EX 21(4)(b)) for accounting periods of 12 months
- calculating the New Zealand dollar amount of foreign income tax under the CFC rules (section LK 3(b)) or

under the FIF rules where the attributable FIF income method is used (sections EX 50(8)–(9) and LK 3(b)) for accounting periods of 12 months.

Currency rates 12 months ending 31 March 2016 – mid-month actual table

This table sets out the exchange rate on the 15th day of the month, or if no exchange rates were quoted on that day, on the preceding working day on which they were quoted. This table can be used as the basis of the rolling average where the accounting period or income year is less than or greater than 12 months (see Example 4). You can also use the rates from this table as the actual rate for any transactions arising on the 15th of the month.

This table can be used as the basis of the rolling average for calculating:

- FIF income or loss under the comparative value method, the fair dividend rate method, the deemed rate of return method or cost method (section EX 57(2)(b)) for accounting periods or income years of less than or greater than 12 months
- FIF income or loss calculated under the attributable FIF income method (section EX 50(3)(a)) for accounting periods of less than or greater than 12 months
- attributed CFC income or loss calculated under the CFC rules (section EX 21(4)(b)) for accounting periods of less than or greater than 12 months
- the New Zealand dollar amount of foreign income tax under the CFC rules (section LK 3(b)) or under the FIF rules where the attributable FIF income method is used (sections EX 50(8)–(9) and LK 3(b)) for accounting periods of less than or greater than 12 months.

Example 1

A taxpayer with a 30 September balance date purchases shares in a Philippine company (which is a FIF but does produce a guaranteed yield) on 6 September 2015. Its opening market value on 1 October 2015 or its closing market value on 30 September 2015 is PHP 350,000. Using the comparative value method and applying the actual rate for the day (section EX 57(2)(a)), the opening market value is converted as follows:

PHP 350,000 ÷ 29.8648 = $11,719.48

(In this example, the rate selected is the month-end rate for September 2015 for PHP. Refer to the table "Currency rates 12 months ending 31 March 2016 – month end".)

Example 2

A CFC resident in Hong Kong has an accounting period ending on 31 December 2015. Attributed CFC income for the period 1 January 2015 to 31 December 2015 is 200,000 Hong Kong dollars (HKD), which converts to:

HKD 200,000 ÷ 5.4484 = $36,708.02

(In this example, the rate selected is the rolling 12-month average rate for December 2015 for HKD. Refer to the table "Currency rates 12 months ending 31 March 2016 – rolling 12-month average".)

Example 3

A resident individual with a 31 October 2015 accounting period acquired a FIF interest in a Japanese company on 1 November 2014 for 10,500,000 yen. The interest is sold in October 2015 for 10,000,000 yen. Using the comparative value method and applying section EX 57(2)(b), these amounts are converted as:

JPY 10,500,000 ÷ 86.5413 = $121,329.35

JPY 10,000,000 ÷ 86.5413 = $115,551.76

(In this example, the rolling 12-month rate for October 2015 for JPY has been applied to both calculations. Refer to the table "Currency rates 12 months ending 31 March 2016 – rolling 12-month average".)

Example 4

A CFC resident in Singapore was formed on 19 April 2015 and has a balance date of 30 September 2015. During the period 1 May 2015 to 30 September 2015, attributed CFC income of 500,000 Singaporean dollars was derived. For the conversion to New Zealand dollars the taxpayer chooses the method set out in section EX 21(4)(b).

1. Calculating the average monthly exchange rate for the complete months May–September 2015:

   0.9871 + 0.9424 + 0.8998 + 0.9209 + 0.8912 = 4.6414

   4.6414 ÷ 5 = 0.92828

2. Round exchange rate to four decimal places: 0.9283
3. Conversion to New Zealand currency:

   SGD 500,000 ÷ 0.9283 = $538,618.98

(In this example, the rates are from the table "Currency rates 12 months ending 31 March 2016 – mid-month actual", from May to September 2015 inclusive for SGD.)

Currency rates 2015-2016 – Rolling 12 Month Average

Currency	Code	15/04/15	15/05/15	15/06/15	15/07/15	15/08/15	15/09/15	15/10/15	15/11/15	15/12/15	15/01/16	15/02/16	15/03/16
Australia Dollar	AUD	0.9343	0.9348	0.9331	0.9295	0.9273	0.9260	0.9285	0.9296	0.9294	0.9286	0.9262	0.9199
Bahrain Dinar	BHD	0.3035	0.2999	0.2946	0.2878	0.2817	0.2759	0.2724	0.2681	0.2650	0.2608	0.2582	0.2559
Britain Pound	GBH	0.5047	0.5014	0.4962	0.4887	0.4812	0.4737	0.4691	0.4628	0.4590	0.4539	0.4519	0.4493
Canada Dollar	CAD	0.9238	0.9202	0.9137	0.9060	0.9003	0.8952	0.8937	0.8919	0.8940	0.8943	0.8936	0.8888
China Yuan	CNY	4.9835	4.9213	4.8347	4.7221	4.6351	4.5539	4.5086	4.4520	4.4174	4.3685	4.3402	4.3154
Denmark Kroner	DKK	4.8409	4.8548	4.8423	4.8150	4.7881	4.7468	4.7349	4.7205	4.7194	4.6710	4.6358	4.5704
European Community Euro	EUR	0.6497	0.6516	0.6499	0.6462	0.6425	0.6369	0.6352	0.6332	0.6329	0.6261	0.6212	0.6125
Fiji Dollar	FJD	1.5563	1.5487	1.5364	1.5188	1.5048	1.4903	1.4830	1.4718	1.4644	1.4508	1.4419	1.4310
French Polynesia Franc	XPF	77.5617	77.7848	77.5816	77.1383	76.6937	76.0188	75.8064	75.5773	75.5442	74.7334	74.1588	73.1029
Hong Kong Dollar	HKD	6.2417	6.1661	6.0582	5.9176	5.7919	5.6742	5.6004	5.5117	5.4484	5.3625	5.3120	5.2640
India Rupee	INR	49.2100	48.8667	48.2880	47.4116	46.6606	46.0066	45.7054	45.2578	44.9834	44.5681	44.5007	44.3855
Indonesia Rupiah	IDR	9,816.9542	9,801.9825	9,724.2275	9,608.1408	9,533.1683	9,480.8217	9,448.9475	9,391.9083	9,366.7175	9,301.2892	9,251.1017	9,170.9242
Japan Yen	JPY	88.8791	88.9902	88.8208	88.1878	87.7283	86.8026	86.5413	85.5568	84.8144	83.5342	82.5049	81.3143
Korea Won	KOR	856.8775	850.2997	841.7076	829.6529	821.9033	813.6030	807.0959	798.3194	793.6836	788.9142	787.9365	784.0581
Kuwait Dinar	KWD	0.2330	0.2315	0.2287	0.2247	0.2211	0.2176	0.2157	0.2130	0.2113	0.2085	0.2067	0.2049
Malaysia Ringgit	MYR	2.7098	2.6979	2.6838	2.6622	2.6614	2.6694	2.6912	2.7099	2.7280	2.7330	2.7407	2.7439
Norway Krone	NOK	5.5111	5.5377	5.5572	5.5513	5.5677	5.5661	5.5934	5.6215	5.6285	5.6103	5.6163	5.5842
Pakistan Rupee	PKR	81.1210	80.3598	79.1897	77.5361	76.0295	74.5455	73.6673	72.6546	72.1048	71.2121	70.7265	70.2547
Philippines Peso	PHP	35.4970	35.1030	34.5648	33.8880	33.3139	32.7753	32.4629	32.0780	31.8775	31.5473	31.4383	31.3137
PNG Kina	PGK	2.0592	2.0295	2.0119	1.9848	1.9619	1.9435	1.9415	1.9328	1.9351	1.9293	1.9356	1.9428
Singapore Dollar	SGD	1.0423	1.0344	1.0226	1.0067	0.9954	0.9835	0.9775	0.9696	0.9641	0.9552	0.9485	0.9393
Solomon Islands Dollar*	SBD	0.1086	0.1068	0.1045	0.1016	0.0988	0.0964	0.0948	0.0927	0.0915	0.0893	0.0880	0.0870
South Africa Rand	ZAR	9.0318	9.0168	8.9687	8.8681	8.8174	8.7837	8.7915	8.8458	8.9288	9.0784	9.2246	9.3373
Sri Lanka Rupee	LKR	105.6146	104.5847	103.0830	100.9880	99.0386	97.6139	96.9461	95.9816	95.5688	94.6938	94.4558	94.2987
Sweden Krona	SEK	6.0148	6.0515	6.0475	6.0161	5.9949	5.9500	5.9440	5.9300	5.9164	5.8506	5.7970	5.7206
Swiss Franc	CHF	0.7453	0.7382	0.7274	0.7142	0.7037	0.6916	0.6833	0.6749	0.6685	0.6680	0.6648	0.6577
Taiwan Dollar	TAI	24.7093	24.4296	24.0653	23.5790	23.2129	22.8794	22.6829	22.4467	22.2690	22.0098	21.8979	21.7629
Thailand Baht	THB	26.1597	25.9024	25.5288	25.0580	24.7235	24.4277	24.2782	24.0735	23.9727	23.7937	23.7430	23.6612
Tonga Pa'anga*	TOP	1.5130	1.5036	1.4902	1.4719	1.4553	1.4405	1.4387	1.4323	1.4335	1.4291	1.4317	1.4333
United States Dollar	USD	0.8049	0.7951	0.7813	0.7631	0.7470	0.7318	0.7223	0.7109	0.7028	0.6914	0.6847	0.6786
Vanuatu Vatu	VUV	79.7259	79.5159	78.8478	77.7308	76.9628	76.1482	75.8001	75.3284	75.0413	74.4132	74.0303	73.6587
West Samoan Tala*	WST	1.8751	1.8638	1.8474	1.8092	1.7899	1.7720	1.7565	1.7395	1.7318	1.7139	1.7054	1.6946

Notes

1. *All currencies are expressed in NZD terms, i.e. 1NZD per unit(s) of foreign currency.*
2. *The currencies marked with an asterisk * are not published on Bloomberg in NZD terms. However these currencies are expressed in USD terms and therefore the equivalent NZD terms have been generated as a function of the foreign currency USD cross rate converted to NZD terms at the NZDUSD rate provided.*
3. *The rates provided represent the Bloomberg generic rate (BGN) based on the last price (Mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.*

Source: Bloomberg CMPN BGN

Currency rates 2015-2016 – Mid Month Rates

Currency	Code	15/04/15	15/05/15	15/06/15	15/07/15	15/08/15	15/09/15	15/10/15	15/11/15	15/12/15	15/01/16	15/02/16	15/03/16
Australia Dollar	AUD	0.9885	0.9297	0.9014	0.8932	0.8841	0.8900	0.9348	0.9169	0.9412	0.9422	0.9315	0.8850
Bahrain Dinar	BHD	0.2863	0.2818	0.2639	0.2485	0.2466	0.2398	0.2585	0.2467	0.2553	0.2436	0.2507	0.2489
Britain Pound	GBH	0.5117	0.4753	0.4486	0.4214	0.4177	0.4142	0.4429	0.4293	0.4501	0.4534	0.4606	0.4664
Canada Dollar	CAD	0.9333	0.8980	0.8627	0.8511	0.8557	0.8421	0.8814	0.8714	0.9294	0.9395	0.9197	0.8815
China Yuan	CNY	4.7124	4.6382	4.3457	4.0915	4.1786	4.0481	4.3485	4.1709	4.3775	4.2543	4.3206	4.2979
Denmark Kroner	DKK	5.3087	4.8732	4.6270	4.4913	4.3979	4.2086	4.4898	4.5300	4.6198	4.4188	4.4486	4.4315
European Community Euro	EUR	0.7112	0.6528	0.6203	0.6020	0.5887	0.5643	0.6016	0.6073	0.6192	0.5921	0.5959	0.5943
Fiji Dollar	FJD	1.5562	1.5008	1.4472	1.4002	1.4011	1.3751	1.4447	1.4156	1.4428	1.3858	1.4154	1.3875
French Polynesia Franc	XPF	84.8498	77.9088	74.0251	71.8011	70.2607	67.3010	71.8723	72.6003	73.9240	70.6436	71.1299	70.9184
Hong Kong Dollar	HKD	5.8873	5.7933	5.4267	5.1079	5.0674	4.9259	5.3099	5.0691	5.2453	5.0364	5.1758	5.1234
India Rupee	INR	46.8099	47.2459	44.7657	42.4277	42.6636	42.0557	44.5168	43.2211	45.4965	43.2523	45.3773	44.7929
Indonesia Rupiah	IDR	9,683.1300	9,747.4700	9,289.5200	8,927.5200	9,018.2200	9,113.1500	9,199.0500	8,912.2900	9,556.3900	8,928.8500	8,915.4700	8,760.0300
Japan Yen	JPY	90.4590	89.1270	86.3820	81.5570	81.3370	76.5320	81.4630	80.1430	82.3380	75.5330	76.1970	74.7030
Korea Won	KOR	829.7204	810.4685	781.6806	756.2151	770.7892	749.3905	769.4792	765.4617	794.6958	784.3733	807.4724	788.9510
Kuwait Dinar	KWD	0.2292	0.2249	0.2113	0.1995	0.1977	0.1920	0.2068	0.1987	0.2053	0.1964	0.1987	0.1987
Malaysia Ringgit	MYR	2.7808	2.6549	2.6206	2.5446	2.6693	2.7235	2.8302	2.8549	2.9281	2.8149	2.7534	2.7517
Norway Krone	NOK	5.9417	5.4624	5.4268	5.3741	5.4019	5.2080	5.5508	5.6760	5.8815	5.7121	5.7326	5.6421
Pakistan Rupee	PKR	77.5194	76.3359	71.4286	67.1141	66.6667	66.2252	71.4286	68.4932	70.9220	68.0272	69.9301	68.9655
Philippines Peso	PHP	33.4258	33.1325	31.4921	30.2562	30.2048	29.5524	31.4010	30.6939	32.2431	30.6161	31.6316	31.1144
PNG Kina	PGK	2.0314	2.0121	1.9102	1.8234	1.8141	1.7984	1.9835	1.9268	2.0201	1.9503	2.0216	2.0222
Singapore Dollar	SGD	1.0306	0.9871	0.9424	0.8998	0.9209	0.8912	0.9441	0.9315	0.9514	0.9300	0.9310	0.9120
Solomon Islands Dollar*	SBD	0.0987	0.0972	0.0910	0.0863	0.0841	0.0826	0.0891	0.0828	0.0865	0.0792	0.0833	0.0829
South Africa Rand	ZAR	9.1620	8.8137	8.6807	8.1825	8.3833	8.5600	8.9396	9.4131	10.1029	10.8452	10.4527	10.5119
Sri Lanka Rupee	LKR	101.0101	100.0000	94.3396	88.4956	87.7193	89.2857	96.1538	92.5926	97.0874	92.5926	96.1538	96.1538
Sweden Krona	SEK	6.6283	6.1222	5.7133	5.6058	5.5450	5.2794	5.6426	5.6737	5.7577	5.5503	5.6389	5.4895
Swiss Franc	CHF	0.7325	0.6840	0.6506	0.6273	0.6394	0.6190	0.6513	0.6577	0.6710	0.6513	0.6562	0.6516
Taiwan Dollar	TAI	23.7048	22.7446	21.6343	20.4946	21.0456	20.6535	21.9055	21.4656	22.1511	21.6479	22.0503	21.6568
Thailand Baht	THB	24.6337	25.0234	23.5670	22.5305	23.0472	22.8371	24.1040	23.4832	24.3330	23.4908	23.6974	23.1873
Tonga Pa'anga*	TOP	1.4829	1.4690	1.3955	1.3522	1.3501	1.3556	1.5036	1.4211	1.4919	1.4227	1.4907	1.4646
United States Dollar	USD	0.7592	0.7474	0.7000	0.6590	0.6547	0.6355	0.6852	0.6540	0.6767	0.6463	0.6648	0.6601
Vanuatu Vatu	VUV	80.6452	78.1250	74.6269	69.9301	71.4286	68.9655	75.1880	72.4638	74.0741	72.4638	73.5294	72.4638
West Samoan Tala*	WST	1.8051	1.7876	1.7199	1.6393	1.6450	1.6295	1.7260	1.6557	1.7342	1.6170	1.7161	1.6594

Notes

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2. *The currencies marked with an asterisk * are not published on Bloomberg in NZD terms. However these currencies are expressed in USD terms and therefore the equivalent NZD terms have been generated as a function of the foreign currency USD cross rate converted to NZD terms at the NZDUSD rate provided.*
3. *The rates provided represent the Bloomberg generic rate (BGN) based on the last price (Mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.*

Source: Bloomberg CMPN BGN

Currency rates 2015-2016 – End of Month Rates

Currency	Code	30/04/15	31/05/15	30/06/15	31/07/15	31/08/15	30/09/15	31/10/15	30/11/15	31/12/15	31/01/16	29/02/16	31/03/16
Australia Dollar	AUD	0.9635	0.9294	0.8779	0.9017	0.8913	0.9118	0.9494	0.9110	0.9370	0.9151	0.9228	0.9023
Bahrain Dinar	BHD	0.2871	0.2679	0.2551	0.2484	0.2393	0.2415	0.2557	0.2484	0.2574	0.2442	0.2484	0.2605
Britain Pound	GBH	0.4961	0.4646	0.4306	0.4219	0.4132	0.4229	0.4392	0.4373	0.4634	0.4551	0.4735	0.4811
Canada Dollar	CAD	0.9198	0.8852	0.8454	0.8629	0.8331	0.8519	0.8865	0.8797	0.9450	0.9066	0.8923	0.8985
China Yuan	CNY	4.7211	4.4069	4.2000	4.0906	4.0421	4.0672	4.2814	4.2112	4.4344	4.2622	4.3190	4.4562
Denmark Kroner	DKK	5.0658	4.8241	4.5310	4.4779	4.2212	4.2711	4.5914	4.6484	4.6937	4.4666	4.5212	4.5240
European Community Euro	EUR	0.6786	0.6471	0.6074	0.6002	0.5655	0.5725	0.6158	0.6232	0.6290	0.5991	0.6061	0.6070
Fiji Dollar	FJD	1.5401	1.4760	1.4168	1.4108	1.3746	1.3916	1.4288	1.4158	1.4669	1.3970	1.4071	1.4347
French Polynesia Franc	XPF	80.9338	77.2239	72.4045	71.6045	67.4161	68.3423	73.5420	74.3368	74.9811	71.4250	72.2945	72.4563
Hong Kong Dollar	HKD	5.9030	5.5110	5.2438	5.1101	4.9131	4.9588	5.2508	5.1044	5.2941	5.0466	5.1248	5.3592
India Rupee	INR	48.2597	45.4983	43.0223	41.9718	42.5920	41.8558	44.0630	43.6372	45.2995	44.0203	45.1737	45.9433
Indonesia Rupiah	IDR	9,869.86	9,411.36	9,032.86	8,867.28	9,030.70	9,345.54	9,254.47	9,076.74	9,456.63	8,968.66	8,844.32	9,170.81
Japan Yen	JPY	90.8960	88.2300	82.8610	81.6780	76.8560	76.7030	81.7420	81.0490	82.0990	78.5400	74.2620	77.7700
Korea Won	KOR	820.4457	791.5920	757.6760	768.9223	750.1522	758.3961	773.2305	763.7689	803.3536	783.0852	816.1027	791.0428
Kuwait Dinar	KWD	0.2297	0.2154	0.2046	0.1997	0.1916	0.1934	0.2055	0.2006	0.2072	0.1970	0.1982	0.2086
Malaysia Ringgit	MYR	2.7125	2.6104	2.5534	2.5089	2.6915	2.8070	2.9082	2.7918	2.9422	2.7005	2.7742	2.6990
Norway Krone	NOK	5.7368	5.5205	5.3161	5.3897	5.2501	5.4484	5.7496	5.7290	6.0405	5.6266	5.7295	5.7153
Pakistan Rupee	PKR	77.5194	72.4638	68.9655	67.1141	65.7895	66.6667	71.4286	69.4444	71.4286	68.0272	68.9655	72.4638
Philippines Peso	PHP	33.9462	31.7401	30.5262	29.9570	30.0331	29.8648	31.6841	30.9339	32.1551	31.0343	31.3745	31.8222
PNG Kina	PGK	2.0419	1.9133	1.8564	1.8282	1.7786	1.8364	1.9820	1.9509	2.0543	1.9678	2.0096	2.1428
Singapore Dollar	SGD	1.0081	0.9579	0.9114	0.9047	0.8950	0.9102	0.9490	0.9288	0.9688	0.9234	0.9270	0.9315
Solomon Islands Dollar*	SBD	5.7940	5.4061	5.1650	5.1206	4.9352	5.1054	5.3603	5.3197	5.5585	5.2719	5.3668	5.4750
South Africa Rand	ZAR	9.0728	8.6453	8.2322	8.3591	8.4185	8.8644	9.3746	9.5106	10.5722	10.3026	10.4626	10.2016
Sri Lanka Rupee	LKR	101.0101	95.2381	90.9091	88.4956	85.4701	90.0901	95.2381	94.3396	98.0392	93.4579	95.2381	101.0101
Sweden Krona	SEK	6.3460	6.0562	5.6075	5.6855	5.3713	5.3549	5.7853	5.7457	5.7698	5.5617	5.6481	5.6090
Swiss Franc	CHF	0.7102	0.6683	0.6331	0.6360	0.6132	0.6228	0.6695	0.6774	0.6815	0.6626	0.6579	0.6645
Taiwan Dollar	TAI	23.3152	21.9028	20.9010	20.8729	20.6006	21.0974	21.9795	21.4798	22.4213	21.7005	21.9113	22.2519
Thailand Baht	THB	25.1412	23.9549	22.8644	23.0792	22.7232	23.2652	24.1339	23.5718	24.6119	23.1415	23.4838	24.2489
Tonga Pa'anga*	TOP	1.4962	1.3969	1.3546	1.3566	1.3074	1.4021	1.4709	1.4574	1.5037	1.4573	1.4719	1.5136
United States Dollar	USD	0.7617	0.7107	0.6765	0.6592	0.6340	0.6399	0.6778	0.6584	0.6831	0.6484	0.6590	0.6909
Vanuatu Vatu	VUV	80.6452	74.0741	70.9220	71.4286	68.9655	71.9424	73.5294	72.4638	74.6269	72.4638	73.5294	74.6269
West Samoan Tala*	WST	1.9138	1.7208	1.6622	1.6480	1.6173	1.6535	1.7009	1.6873	1.7090	1.6613	1.6637	1.7364

Notes

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3. *The rates provided represent the Bloomberg generic rate (BGN) based on the last price (Mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.*

Source: Bloomberg CMPN BGN

STANDARD PRACTICE STATEMENTS

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

SPS 16/01: REQUESTS TO AMEND ASSESSMENTS

Introduction

Standard Practice Statements describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

This Standard Practice Statement ("SPS") sets out Inland Revenue's practice for exercising the Commissioner of Inland Revenue's ("the Commissioner") discretion under s 113 of the Tax Administration Act 1994 to amend assessments to ensure their correctness. It is intended both to provide direction to those Inland Revenue staff delegated to use the discretion in s 113 and to give guidance to taxpayers and their advisors in formulating requests for amendments.

Unless specified otherwise, all legislative references in this SPS are to the Tax Administration Act 1994 ("the TAA").

Application

This SPS applies from 1 April 2016. It replaces all previous policies and standard practices regarding the exercise of the discretion under s 113, including SPS 07/03 *Requests to Amend Assessments* (*Tax Information Bulletin* Vol 19, No 5 (June 2007): 8) but excluding QB 09/04 *The relationship between section 113 of the TAA and the proviso to section 20(3) of the GST Act when a registered person has not claimed an input tax deduction in an earlier taxable period* (*Tax Information Bulletin* Vol 21, No 6 (August 2009): 53).

Summary

Section 113 and the Commissioner's discretion

1. The Commissioner acknowledges that in a self-assessment regime taxpayers will occasionally take an incorrect tax position and that correcting these positions is an integral part of tax administration. Section 113 contains a broad discretion allowing the Commissioner to amend assessments to ensure their correctness.
2. The Commissioner's policy is generally to use the discretion to correct a tax position, subject to the criteria described in this Statement.
3. The criteria applied when determining whether to exercise the s 113 discretion are based on the care and management principles contained in ss 6 and 6A of the TAA.

Care and management of the taxes

4. Section 6(1) of the TAA requires that the Commissioner's best endeavours are used to protect the *integrity of the tax system*, including taxpayers' perceptions of that integrity. In carrying out this function, the Commissioner is bound not only to protect the rights of taxpayers to have their liability determined fairly, impartially and according to law, but also to have regard to the responsibilities of taxpayers to comply with the law. Section 15B of the TAA sets out taxpayers' responsibilities.
5. To discharge her s 6A(3) duties, the Commissioner must compare the available courses of action as to their likely effect on the amount of net revenue she collects over time. To do this, the Commissioner must consider the short- and long-term implications of each course of action and have regard to all three factors listed in s 6A(3): available resources, the promotion of compliance (especially voluntary compliance) by all taxpayers and the compliance costs incurred by taxpayers.
6. Inland Revenue has limited resources to undertake what sometimes can be a lengthy verification process to determine whether an assessment should be amended. Accordingly, it is consistent with the obligation of taxpayers under s 15B, and with ss 6(1) and 6A(3), for the Commissioner to limit the amount of time and other resources that will be spent investigating amendment requests. Not all requested amendments, therefore, will necessarily be made.

The process used to consider s 113 requests

7. In considering s 113 requests, the Commissioner must be assured that the amendment the taxpayer seeks will ensure the assessment is correct when amended, even if it was also correct beforehand. Where the Commissioner is not initially convinced that the amendment requested will result in a correct assessment, a decision must be made to commit Inland Revenue's limited resources to considering the request further.

8. Once the Commissioner, having decided to commit appropriate resources to the issue, is satisfied that making the requested amendment will result in a correct assessment being issued, the assessment will be amended. This is unless there is a residual reason, other than her limited resources, why she should not do so.
9. In undertaking this approach, the Commissioner breaks the inquiry down into four possible phases (see further at [34]):
   - Initial examination of the request to see if the matter can be disposed of simply.
   - If it cannot, consider whether the Commissioner should apply additional resources to consider the request further.
   - Determine whether a correct assessment will result from the requested amendment.
   - Finally, determine whether there is any residual reason (other than her limited resources) why the Commissioner should not make the requested amendment.

Considering simple amendment requests and voluntary disclosures

10. The Commissioner will follow the process set out in this SPS in determining whether the amendment requested will lead to the making of a correct assessment.
11. There may be very obvious errors that require little consideration. For instance, if a request is made to correct an arithmetic, transposition or keying error made by either the taxpayer or Commissioner, the correction will be made without further consideration.

Factors the Commissioner may consider in more complex cases

12. When exercising the s 113 discretion in more complex cases, the Commissioner will evaluate any amendment request using the care and management principles. To best inform this care and management decision, the Commissioner will objectively consider the relevant factors discussed in this SPS (as required on a case-by-case basis).

How does a taxpayer make a request to amend their assessment?

13. Requests to correct obvious errors, such as arithmetic, transposition and keying errors, may be made to Inland Revenue by telephone or in writing.
14. Requests to amend returns where the tax effect of the amendment requested is $10,000 or less may generally be made by telephone or in writing.
15. Requests to amend returns where the tax effect of the amendment requested is greater than $10,000 must be made in writing.
16. Taxpayers or their agents making amendment requests must supply the Commissioner with all relevant information to substantiate the merits of the amendment requested.

How does s 113 relate to s 113A and the proviso to s 20(3) of the Goods and Services Tax Act 1985?

17. Where the taxpayer is able to make the required correction for themselves in a later period, the Commissioner's practice is generally not to expend limited resources considering whether to exercise the discretion under s 113 in these circumstances. This is because both s 113A and the proviso to s 20(3) of the Goods and Services Tax Act 1985 ("the GST Act") provide a specific mechanism by which the taxpayer is able to self-correct the error. As such, the taxpayer does not need to request that the Commissioner amend an assessment under s 113 to make the correction. This outcome is more consistent with the scheme of the legislation, which requires that taxpayers take responsibility for correct assessments wherever possible.

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Detailed discussion

Section 113 and the Commissioner's discretion

18. The Commissioner acknowledges that both taxpayers and the Commissioner will occasionally make errors and that correcting these is an integral part of tax administration.

19. Section 113 contains a broad discretion allowing the Commissioner to amend assessments to ensure their correctness. This SPS outlines the general principles that will be followed.

20. The Commissioner will generally agree to amend assessments that are requested where the result can be clearly shown to be correct. This is subject to the criteria described below. It must also be borne in mind that, as a matter of law, the Commissioner cannot be compelled either to investigate amendment requests or subsequently to amend the assessments.[1]

21. In determining whether to exercise the s 113 discretion, the Commissioner will evaluate an amendment request using the care and management principles in ss 6 and 6A of the TAA, while balancing the obligations of taxpayers to make correct self-assessments.

22. The care and management principles are discussed below and more detailed guidance can be found in Interpretation Statement IS 10/07 *Care and Management of the taxes covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994.*[2]

Care and management of the taxes

Section 6: Integrity of the tax system

23. Section 6(1) of the TAA requires the Commissioner to use her best endeavours to protect the *integrity of the tax system*, including taxpayers' perceptions of that integrity. In carrying out this function, the Commissioner is bound not only to protect the rights of taxpayers to have their liability determined fairly, impartially and according to law, but also to have regard to the responsibilities of taxpayers to comply with the law. Section 15B of the TAA sets out taxpayers' responsibilities and, in particular, the obligations to:

    (aa) if required under a tax law, make an assessment:

    (a) unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:

    (b) deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:

24. Given this, the Commissioner may consider a taxpayer's compliance history when deciding whether to apply s 113 to an amendment request. Although not decisive, a particularly poor compliance history may support the Commissioner declining to make the requested amendment where, in her opinion, making such an amendment would not promote other taxpayers' perceptions of the integrity of the tax system or voluntary compliance (see further at [55] and [56] below).

Section 6A

25. Section 6A (together with s 6) was enacted to provide the framework within which the Commissioner administers the tax system. Section 6A(3) clarifies the Commissioner's overall objective in carrying out those functions.

26. To discharge her s 6A(3) duties, the Commissioner must compare the available courses of action as to their likely effect on the amount of net revenue collected over time. To do this, the Commissioner must consider the short- and long-term implications of each course of action and have regard to all three factors listed in s 6A(3). These factors are:

- the resources available to the Commissioner (s 6A(3)(a));
- the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts (s 6A(3)(b)); and
- the compliance costs incurred by taxpayers (s 6A(3)(c)).

27. The practical effect of the words is that the Commissioner can adopt courses of action that forgo the collection of the highest net revenue:

- in the short term, if it is considered that this will enable the collection of more net revenue in the longer term; and
- from particular taxpayers, if it is considered that this will enable more net revenue to be collected from all taxpayers.

28. The words *notwithstanding anything in the Inland Revenue Acts* in s 6A(3) mean that the Commissioner can carry out the course of action she considers will collect over time the highest net revenue that is practicable within the law, even if it results in less tax being collected than is imposed, or required to be collected, by another provision. However, the words *within the law* in s 6A(3) also mean that the Commissioner must act consistently with the rest of the Inland Revenue Acts.

[1] *CIR v Wilson* (1996) 17 NZTC 12,512 (CA); *Lawton v CIR* (2003) 21 NZTC 18,042 (CA).

[2] More information on this statement can be found here: **http://www.ird.govt.nz/technical-tax/interpretations/2010/**

Resources available to the Commissioner

29. Inland Revenue has limited resources to undertake what sometimes could be lengthy verification processes to determine whether the proposed amendment would result in a correct assessment. When meeting the obligation to collect over time the highest net revenue that is practicable within the law under s 6A(3), the Commissioner must consider the resources available, promoting compliance (especially voluntary compliance) by all taxpayers, and taxpayers' compliance costs.

30. Accordingly, it is consistent with the obligation under s 6A(3) for the Commissioner to limit the amount of time and other resources that will be spent investigating amendment requests. Not all requested amendments will necessarily be made. Ensuring a balance between time spent considering an amendment request and other activities is also consistent with the obligation to protect the integrity of the tax system under s 6(1).

31. The Commissioner will be reluctant to agree to investigate the correctness of an amendment request that would require the application of disproportionate amounts of Inland Revenue resources (that is, excessive resources when compared to the amount of tax at stake). This is not to say that the Commissioner will only use minimal resources to determine the correctness of amendment requests or never agree to complex amendment requests. The extent and relevance of a taxpayer's disclosure and the amount of tax at stake for the amendment request will indicate the amount of the Commissioner's resources needed to consider whether making the requested amendment will lead to a correct assessment being issued.

The process used to consider s 113 requests

32. As stated in *Westpac Securities NZ Ltd v Commissioner of Inland Revenue*[3] *("Westpac")* at [65], "...the focus of the inquiry as to whether the power was available would be centred on whether the amendment the taxpayer seeks to have made will ensure the assessment is correct when amended, even if it was also correct beforehand".

33. Once a taxpayer is able to show that making the requested amendment will result in a correct assessment being issued, the next step involves "the Commissioner's decision whether or not to exercise her discretion in a particular case".[4]

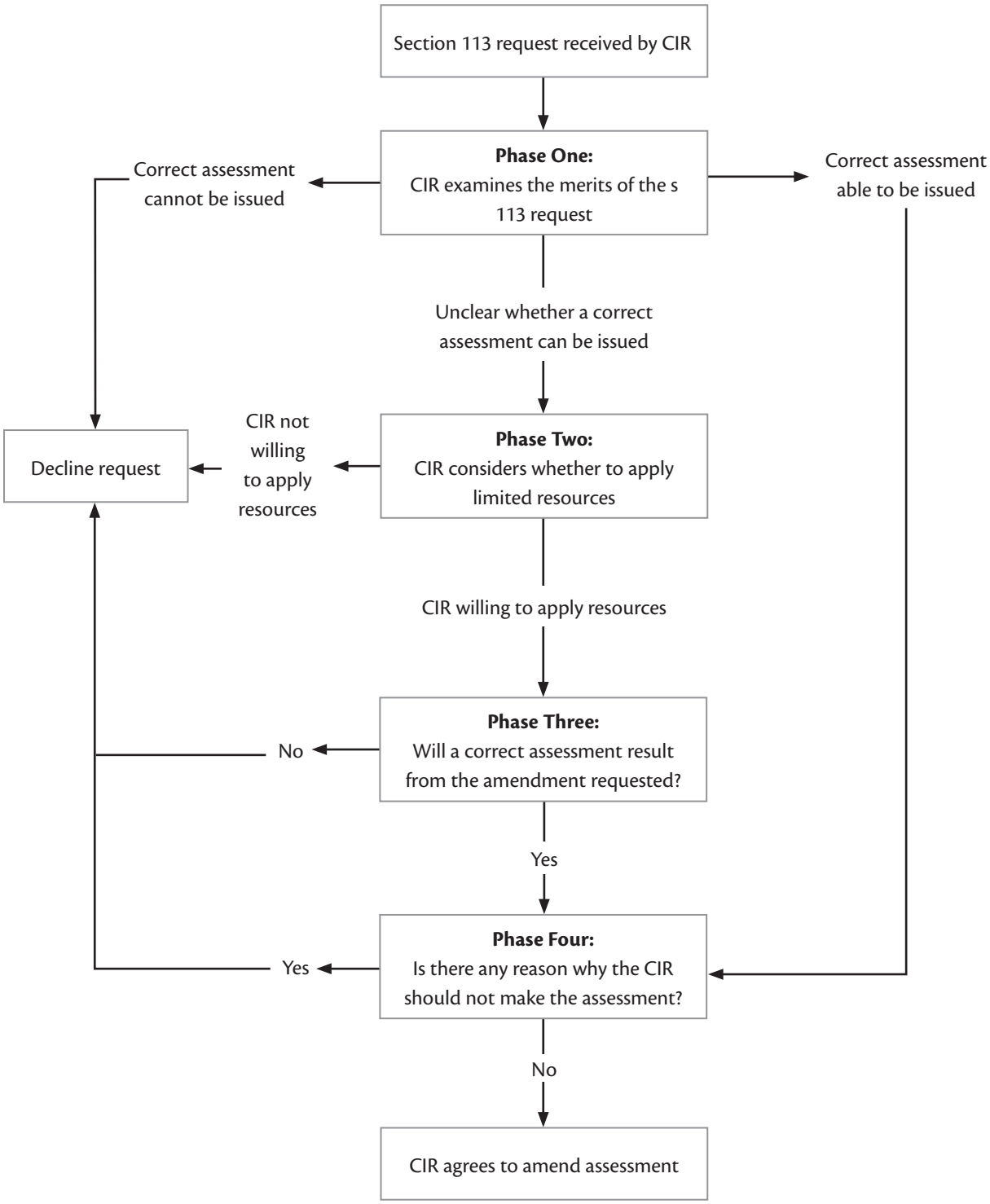
34. In undertaking this approach, the Commissioner breaks the exercise into phases:

- Phase one: An initial examination of the request. If it is clear and obvious that an error has occurred and that the error can be easily corrected, then the amendment will be made, subject to the application of phase four. The request will not have to progress through phases two and three. Conversely, if it is clear and obvious that agreeing to the request will not result in a correct assessment, the request will be declined at this phase.
- Phase two: If it is unclear whether agreeing to the request will result in a correct assessment being issued, the Commissioner will need to consider whether additional limited resources should be applied to consider the request further.
- Phase three: In cases where it is decided to apply further resources, the Commissioner will consider whether a correct assessment will result from the requested amendment.
- Phase four: Determine whether there is any residual reason (other than her limited resources) why the Commissioner should not make the requested amendment.

[3] [2014] NZHC 3377, (2014) 26 NZTC 21-118.

[4] *Westpac* at [66].

The following flowchart illustrates the progress of a s 113 request through the four phases:



Each of these phases is summarised on the following pages:

Phase One: Initial examination of request

35. The Commissioner receives many thousands of requests each year, pointing out errors that have been made by both taxpayers and the Commissioner, and requesting that the appropriate assessment be amended. **At this phase, the Commissioner considers the apparent merits of all s 113 requests. This consideration is based on the facts that are presented by the taxpayer in their request (and those that may already be known to the Commissioner).** In the vast majority of these cases the facts are clear and it is obvious that making the requested amendment will correct an error that has been made. Conversely, it may be equally clear that making the requested amendment will not result in a correct assessment being able to be made. **The aim of this phase is to act as a "filter" for these clearly correct/incorrect requests and, once the Commissioner has considered the merits of the request, to either decline the request or progress the request directly to phase four, and to do so with the minimum use of the Commissioner's resources.** There can be a number of factors that determine whether a request is able to be progressed to phase four (or declined) at this point, for instance:

- If the amendment is being requested to correct an arithmetic, transposition or keying error made by either the taxpayer or Commissioner, the correction will be made without further consideration. See [36] below.
- Has the taxpayer provided all the required information and has the request been made in the appropriate format? If not, the matter will not proceed unless the necessary information is provided. Note that this factor might also emerge at a later stage, when the Commissioner has begun to examine the question more closely, in which case the matter might not proceed further unless the necessary information can be easily provided by the taxpayer. See further at [37] and [64] to [67].
- Is the taxpayer under investigation by Inland Revenue or involved in a dispute with the Commissioner? If so, the request is unlikely to proceed, subject to the outcome of any dispute. See further at [44] and [75] to [78].
- Is the amendment able to be made by the taxpayer in a later period? See further at [86] to [93].
- Is the period that the taxpayer wishes to have amended subject to a statutory time bar? For example, where the Commissioner is unable to refund an amount of tax because the period subject to the amendment request is time barred, resources will not be applied to considering the request for that statute-barred period further. See further at [79] to [84].

Arithmetic, transposition and keying errors

36. As already stated above, if a request is made to correct an arithmetic, transposition or keying error made by either the taxpayer or Commissioner, the correction will be made without further consideration. The Commissioner has already made a decision, based on the care and management principles discussed above, to allocate resources to ensure previously incorrect assessments are corrected. This is on the basis that the amendment required is straightforward and the amount of resources required is minor.

Phase Two: Whether the Commissioner will apply resources to consider the request further

37. **Given what has already been stated at phase one (at [35] above), the majority of s 113 requests will not need to be considered at this phase. Those cases that do need to be considered will be cases where, following the phase one consideration of the merits of the request, it remains uncertain whether acceding to the request will result in a correct assessment. These cases will be more complex. At this second phase, the Commissioner must decide whether to devote her limited resources to resolving requests when their correctness remains uncertain after the initial examination.** In some cases, a balancing of the factors set out below will mean that the Commissioner can simply decide under s 113 to take the matter no further. This is because the courts have recognised that the allocation of resources is a matter for the Commissioner and she does not necessarily have to allocate resources to determine whether a proposed amendment is indeed correct. Resource consideration commences at this phase and continues throughout the s 113 process.

38. The more easily verifiable the correctness of the proposed amendment is, the more likely it will be that the Commissioner will allocate resources to making the requested amendment. Where the proposed adjustment is merely arguable or involves disputed facts or statutory interpretation, it is less likely that the Commissioner will devote resources to processing the request further (see further at [41] to [44]).

Factors the Commissioner may consider at Phase Two when determining whether to devote resources to considering the remaining requests

39. The cases that remain after phase one are those where it is not immediately certain that making the requested amendment will result in a correct assessment. Therefore, the Commissioner needs to determine if continuing to consider the request justifies the commitment of additional resources.

40. When determining whether to apply the s 113 discretion to these more complex cases, the Commissioner will evaluate any amendment request using the care and management principles discussed at [23] to [31] above. These care and management factors, as relevant on a case-by-case basis, will each be weighed up in reaching a decision. **This is a balancing exercise where it will be rare for one factor to be determinative.** Even if it is decided to proceed, it may later be necessary to re-evaluate the position if, for example, further information is needed and the issue becomes particularly difficult to resolve. The Commissioner may later determine that no further resources will be applied to the request.

Primacy of disputes resolution process

41. Requesting an amendment under s 113 cannot be used as an alternative means of considering the merits of the assessment by circumventing the statutory disputes procedure.[5] Further, the Commissioner does not consider it appropriate to use s 113 to amend assessments when the facts of a case or the interpretation of the law to those facts is at issue. Disputed facts and statutory interpretation, or instances where the facts or law is unclear, should properly be considered using the disputes resolution process.

42. If a taxpayer is aware that they had the disputes resolution procedure available to them and did not engage with that process within the available time period, but then attempts to use s 113 to challenge an assessment outside the disputes resolution timeframe, the Commissioner will take this into account in deciding whether to decline the amendment request.[6]

43. To accede to a taxpayer's amendment request in these circumstances would potentially mean treating that taxpayer more advantageously than others who, in line with the statutory scheme of the TAA, use the disputes resolution regime to seek amendment to assessments. Section 6(2)(c) of the TAA requires that the Commissioner protect the rights of taxpayers to have their tax affairs *treated with no greater or lesser favour than the tax affairs of other taxpayers*. As Wylie J observed in *Arai Korp* (at [68]), a taxpayer who has sat on their hands and done nothing is not entitled to expect preferential treatment.

44. As stated previously, the Commissioner will not amend assessments while any item of those assessments remains the subject of a current dispute under Part 4A. The Commissioner will make any required amendment at the conclusion of the disputes process. In practice this means that resources will not be applied to the case.

Whether the subject matter of the request could apply to other taxpayers

45. The focus of this factor is on whether the request could also have application for other taxpayers and, if so, the extent to which this would impact on the Commissioner's resources. Commonly, in such cases, it will make sense for the matter to be considered further for the Commissioner to clarify the position for all taxpayers potentially affected. The more important the precedent value, the more likely it is that resources will be applied.

How similar requests have been treated by the Commissioner

46. Similarly, if the Commissioner has allowed other requests with the same facts and legal analysis, then this would be a factor that would generally support exercising the discretion. However, if an assessment was previously amended under s 113 on what the Commissioner now considers to be an incorrect basis, then that would not provide authority for treating similar requests in the same manner.

Whether the request is a voluntary disclosure

47. The Commissioner will, as a matter of practice, always apply resources to considering a s 113 request that amounts to a voluntary disclosure (in that the request discloses a tax shortfall). This is on the basis that resources will be applied to considering whether the disclosure is full and complete and whether a shortfall penalty should be imposed in accordance with the process set out in SPS 09/02 *Voluntary disclosures*. Therefore, she is not applying any additional resources in considering the s 113 request. See further at [71] to [73].

Whether the taxpayer took their original position relying on advice from the Commissioner

48. As a matter of practice, the Commissioner will generally follow public statements. However, the Commissioner is not strictly bound by such statements

[5] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, (2011) 25 NZTC 20-103.

[6] *Arai Korp Limited v Commissioner of Inland Revenue* [2013] NZHC 958, (2013) 26 NZTC 21,014.

or other advice unless they are binding rulings that apply to the particular taxpayer and arrangement.[7]

49. From time to time, the Commissioner will take the view that advice that has previously been given is incorrect. This may occur, for example, where the court clarifies the law or the Commissioner takes a different view of the law.

50. Where the Commissioner has given incorrect advice (other than a binding ruling), this does not operate to change the tax legally payable on the basis of the correct application of the law (because the Commissioner cannot simply choose to alter the statutory basis of an assessment[8]). However, it may mean that an assessment previously made on the basis of that advice is now incorrect. Accordingly, that assessment may be corrected by the Commissioner following the application of the principles set out in this SPS, for example, provided it is possible to correctly establish the correct position without undue application of the Commissioner's resources.

51. The Commissioner's statement *Status of the Commissioner's advice*[9] more fully sets out the status of advice that is given by the Commissioner. It discusses the circumstances in which a change of view will be applied retrospectively and may therefore result in the approval of requests to amend existing assessments made in reliance on the former view of the Commissioner.

Whether there has been a delay in making the request

52. This factor relates to the length of time since the original position was first taken or the taxpayer became aware of the issue, or between the taxpayer becoming aware of the issue and the s 113 request.

53. When a substantial amount of time has passed between the events relevant to the proposed amendment and the request, it may be difficult for the Commissioner to ascertain and/or verify the relevant facts. The longer that time the more this factor supports a decision not to investigate the request further, after making a preliminary review of the adequacy of the material.

The size of the proposed amendment

54. If the size of the amendment is large in absolute terms or material for the taxpayer, this might be a factor that supports the Commissioner devoting resources to determine the correctness of the amendment. Conversely, very small amounts might not justify the allocation of resources when the care and management factors are viewed as a whole, unless it is a very straightforward case. This factor should never be decisive however.

Taxpayer's compliance history

55. The Commissioner may take a taxpayer's compliance history into consideration when deciding whether to apply resources to an amendment request. Although never decisive, a particularly poor compliance history may support the Commissioner's decision not to devote resources to consider the correctness of the requested amendment.[10] This may occur, for instance, when a taxpayer's compliance history means the Commissioner is unable to accept the evidence for the requested amendment at face value and considers that, as a result, further investigation is required.

56. Agreeing to the requested amendment in this circumstance, without further investigation, could be seen as undermining other taxpayers' perceptions of the integrity of the tax system and voluntary compliance. It is emphasised that declining a s 113 request in this circumstance will be a rare occurrence and will require the approval of a senior officer.

Any other considerations relevant to the particular case

57. The above list of factors is intended to be comprehensive, recognising the broad discretionary power contained in s 113, but not to be exhaustive. There may be other considerations arising out of a particular case that are relevant in determining what impact the proposed course of action for that particular case would have on voluntary compliance and on the integrity of the tax system, including taxpayer perception of that integrity.

Phase Three: Whether a correct assessment will result from the requested amendment

58. Where it is decided to apply additional resources to consider the requested amendment (which will most often be the case), the Commissioner will then consider the merits of the request and act accordingly. Sometimes this will require further information to be provided by the taxpayer and additional technical analysis to be undertaken. This step may take some time. The position requested must be consistent with the Commissioner's view of the law, on the facts presented. If, after examining the request, the

[7] *CIR v Ti Toki Cabarets* (1989) Ltd (2000) 19 NZTC 15,874 (CA); *Lemmington Holdings Ltd (No 2) v CIR* (1983) 6 NZTC 61,576 (HC); *Westpac Banking Corporation v CIR* (2008) 23 NZTC 21,694 (HC).

[8] *Vestey v IRC* (1979) 3 All ER 976 (HL); *R v IRC, ex p Wilkinson* [2006] 1 All ER 529 (HL)

[9] More information on this Statement may be found here: **http://www.ird.govt.nz/technical-tax/commissioners-statements/status-of-commissioners-advice.html**

[10] *Arai Korp; Charter Holdings Ltd v C of IR (No 2)* [2015] NZHC 2041, (2015) 27 NZTC 22-022

Commissioner concludes that a correct assessment can be issued, the request will be progressed to phase four. However, if the requested position is contrary to the Commissioner's view of the law, or the Commissioner remains uncertain that a correct assessment can be made, the request will be declined. In addition, if the commitment of resources proves to be much greater than anticipated in the context of the matters raised during this phase, the request will revert to phase two and the issue of the Commissioner's resources will be reconsidered.

Phase Four: Final Considerations: Whether the discretion will always be exercised

59. When the Commissioner is satisfied the amendment requested will lead to the making of a correct assessment, that assessment will be made unless a relatively rare circumstance exists that suggests that, on balance, the integrity of the tax system will be undermined.

    These circumstances can include, for example:

    (a) Where the request is, or is part of, a tax avoidance arrangement.

        This is because, while the requested adjustment may be a correct interpretation of the law when considered in isolation, the Commissioner would not be convinced that the resulting assessment would be correct given the presence of tax avoidance. The Commissioner's view of the law on tax avoidance is set out in Interpretation Statement *IS 13/01 – Tax avoidance and the interpretation of sections BG 1 and GA 1 of the Income Tax Act 2007*.[11]

    (b) Where a taxpayer requests the Commissioner to amend an assessment from one correct tax position to another position that is also correct.

        When a taxpayer requests the Commissioner to amend an assessment from one correct tax position to another tax position that is also correct, the fact the original position was correct is a factor the Commissioner may take into account in deciding whether to use her discretion to make the amendment requested. As stated by Clifford J in *Westpac* at [67]:

        > There could be any number of valid reasons why the Commissioner may decline to exercise her discretion in situations of regretted correct tax positions including where the taxpayer appears to be gaming the system. ... The fact that Westpac, a well resourced, sophisticated and well advised taxpayer says that it "erred" when the relevant offset elections were made may be a proposition that the Commissioner will need to consider carefully when deciding whether or not to exercise her discretion.

        Two matters flow from these judicial comments. Firstly, whether a taxpayer erred in taking their original tax position is a factor the Commissioner may take into account in deciding whether to make the requested adjustment. A taxpayer could be said to have "erred" where they did not take the tax position they intended, through mistake or oversight, or the tax position they took, though technically possible and therefore already correct, was not one they would have taken if they had been in possession of all the relevant facts at that time.

        If the request arises from such an oversight, it is more likely the amendment will be made than if the request is simply the result of the taxpayer changing their mind. This is because the TAA places an obligation on taxpayers to make self-assessments correctly and it is not contemplated that unlimited additional variations can be made at a cost to the Commissioner. Amendments should not be able to be made merely at will. On this basis, a request for multiple changes to tax positions will also be unlikely to be agreed to.

        The Commissioner may also take into account the fact a taxpayer is "well resourced, sophisticated and well advised" and therefore generally better equipped to be able to provide evidence that they erred in taking their original position.

60. To allow an amendment in these circumstances may have a negative impact on other taxpayers' perceptions of the integrity of the tax system, especially as they relate to the concepts of statutory timeframes[12], certainty and their own future voluntary compliance. In these instances, the decision not to apply the discretion will be made by a senior Inland Revenue officer, with advice from the Legal and Technical Services group.

How does a taxpayer make a request to amend their assessment?

Mode of request

61. A request to correct obvious errors, such as arithmetic, transposition and keying errors may be made by telephone or in writing.[13]

[11] More information on this Statement may be found here: **http://www.ird.govt.nz/technical-tax/interpretations/2013/**

[12] *Wilson; Charter Holdings Ltd*

[13] "in writing" includes by electronic means.

62. A request to make adjustments other than these obvious errors must be made as follows:
    - Requests to amend returns where the tax effect of the amendment requested is $10,000 or less may be made by telephone or in writing. However, where the request is made by telephone, Inland Revenue may ask that these requests be put in writing, especially where, for example, there are consequential adjustments that may need to be made to other returns or taxpayers.
    - Requests to amend returns where the tax effect of the amendment requested is greater than $10,000 must be made in writing.

63. To ensure there is a clear record of the amendment request made by a taxpayer, other than a request to adjust for an obvious error (as provided in [61] above), the ability to accept an amendment request by telephone is limited to calls that are received by Inland Revenue at a site that has call recording. For practical purposes, this means that a taxpayer will need to call using one of Inland Revenue's 0800 numbers. Where a call is received by a site that does not have call recording, the taxpayer may be asked to put their request in writing. An amendment request for an obvious error that is made by telephone should also be made by calling one of Inland Revenue's 0800 numbers. However, these requests will be dealt with irrespective of whether the site receiving the call has call recording.

Information required with request

64. The onus is on the taxpayer to provide all relevant information with their amendment request. This information will enable the Commissioner to consider the merits of the amendment request and verify that the amendment will lead to a correct assessment. Providing all relevant information at this early stage will help to have the request dealt with in the truncated phase one/phase four process (see further at [35] above).

65. If insufficient information is provided to enable the Commissioner to confirm that a correct assessment will result from the requested amendment, the request may be declined or the taxpayer will be asked to supply the missing information (if this is known). Where a request is declined because of insufficient information, the taxpayer is able to reapply once the missing information is obtained.

66. As stated previously in this SPS, whether the Commissioner will devote resources to determine the correctness of the amendment requested is something that will continue to be considered throughout this verification process, using care and management principles. The Commissioner must make appropriate resourcing decisions using these principles, regardless of the effort and resources committed by the taxpayer.

67. Taxpayers or their agents making amendment requests under s 113 must supply the Commissioner with all relevant information to substantiate the merits of the amendment requested. This should include the following (as relevant):
    - the tax types and periods containing the tax position that the taxpayer wishes to amend;
    - the decrease in tax liability[14] that will result from any amendment;
    - a description of the original tax position, including the background circumstances and the reasons the original tax position was taken;
    - the nature of the amendment, including any relevant tax laws;
    - how and why the need for the amendment was identified;
    - details of any incorrect advice given directly to the taxpayer by Inland Revenue and how the taxpayer relied on that advice;
    - the action required to ensure correctness;
    - all relevant documents and records or other information supporting the amendment request;
    - whether the taxpayer is aware of any relevant view published by the Commissioner and the extent to which the taxpayer's amended tax position is consistent with that published view.

Amending assessments

Advice to taxpayers

68. Where the decision is to decline to amend the assessment, the Commissioner will advise the taxpayer or their agent of the decision and the reasons the request was declined. Where the request has been made by telephone, the decision to decline and the reasons for declining the request may be given during the telephone call. If a final decision cannot be given at the time the telephone call is received, the final decision (to decline the request, together with the reasons for declining) may be given either by a telephone call to the taxpayer (or their agent) or in writing.

[14] An amendment request that results in an increase in the tax payable is a voluntary disclosure and will be dealt with by following the process set out in SPS 09/02 *Voluntary disclosures*. See [71] – [73] below.

Consequential adjustments

69. When amending an assessment, the Commissioner will ensure that all consequential adjustments to other tax types and/or periods (including other taxpayers' assessments) are made once they are confirmed by the affected taxpayers. That may mean that in some cases the Commissioner will require further information before making such consequential amendments.

Fresh or increased liability

70. Under s 113(2), if any amended assessment imposes a fresh or increased liability, the Commissioner will give written notice to the taxpayer.

Voluntary disclosures

71. For the purposes of this SPS, a "voluntary disclosure" is defined as any amendment request that, if accepted by the Commissioner, would result in an increase in the tax payable by a taxpayer or a decrease in the amount of any loss available to be utilised by the taxpayer.

72. Where a taxpayer makes an amendment request that is a voluntary disclosure, that disclosure must follow the process outlined in SPS 09/02 *Voluntary disclosures*[15] or any SPS issued in replacement. Further information on the voluntary disclosure process may also be found in Parts 3 and 4 of the guide IR280 *Putting your tax returns right*[16] or any guide issued in replacement.

73. Once a taxpayer's voluntary disclosure has been accepted as being valid by the Commissioner, s 113 provides the legislative authority for effecting the reassessment. Generally, a similar approach to that outlined in this SPS will apply, except that the Commissioner will always commit resources to the request (See [47] above).

Shortfall penalties

74. Where an amendment request that constitutes a voluntary disclosure imposes a fresh liability or increases an existing liability, the taxpayer may also be liable to a shortfall penalty. Whether a shortfall penalty will be imposed and whether the penalty will be reduced to take account of the voluntary disclosure are matters that will be considered as part of the voluntary disclosure process. This is discussed further in SPS 09/02 *Voluntary disclosures*.

Related matters

Investigations

75. Inland Revenue undertakes various types of investigation activities. For the purposes of this SPS, an investigation means any examination of a taxpayer's financial affairs to verify that they have paid the correct amount of tax and complied with their tax obligations.

76. Irrespective of whether there is a current dispute, if the period and tax type relating to an amendment request is already under investigation, the Commissioner will make any appropriate consequential amendments. That is, if the Commissioner is already devoting resources to verifying the correctness of an assessment, all reasonable consequential effects of the investigation (including the amendment request) will be considered as part of that process.

77. The Commissioner may make any consequential adjustments (that is, adjustments not requested by the taxpayer under investigation) to the taxpayer's other assessments or to other taxpayers affected by adjustments resulting from the investigation. The consequential adjustments could relate to the same or different tax types.

78. If the Commissioner agrees with the amendment request, then (subject to the limitations set out below) the amendments will be incorporated into the amended assessment arising from the investigation. The Commissioner cannot amend an assessment to reflect an amendment request before finalising the position for the other issues arising from the investigation. The amendments will be treated in the same way as any other agreed adjustments arising out of the investigation.

Time limits on increasing assessments

79. Generally the Commissioner cannot increase previously assessed amounts (or decrease the amount of net loss) after the expiration of four years from the end of the tax year in which the income tax returns were provided (ss 108, 108A).

80. As stated at [71], for the purposes of this SPS, a "voluntary disclosure" is defined as any amendment request that, if accepted by the Commissioner, would result in an increase in the tax payable by a taxpayer or a decrease in the amount of any loss available to be utilised by the taxpayer. Given this, whether the period subject to the voluntary disclosure is time barred is a matter that will be considered as part of that process.

Time limits on tax refunds

81. Before the Commissioner is able to refund an amount of overpaid tax, she must first exercise her s 113 discretion. As stated previously in this SPS, where the Commissioner is unable to refund an amount of

[15] More information on this Statement may be found here: **http://www.ird.govt.nz/technical-tax/standard-practice/shortfall/sps-09-02-voluntarydisclosures.html**

[16] More information on this guide may be found here: **http://www.ird.govt.nz/forms-guides/number/forms-200-299/ir280-guide-putting-your-tax-returns-right.html**

tax because the period subject to the amendment request is time barred, resources will not be applied to considering the request for that statute-barred period. Generally, the Commissioner is unable to refund an amount of overpaid tax where the four-year period in s 108 of the TAA has expired. For all taxes (other than GST), this rule, together with a number of exceptions to it, is set out in Subpart RM of the Income Tax Act 2007.

Time limits on GST refunds

82. As with the refund of other taxes, before the Commissioner makes a refund of overpaid GST she must first decide whether to exercise the s 113 discretion. Where it is decided to apply resources, the general rule is that the Commissioner cannot refund an amount of overpaid GST after the expiry of the four-year period in s 108A of the TAA. The exceptions to this general rule are set out in s 45 of the GST Act.

Amended assessments after expiry of the four-year time limit for increasing assessments

83. As noted above, in some instances there are exceptions to the general four-year time limit for the Commissioner either to increase an assessment or make a refund. When a taxpayer requests a refund after the four-year limitation period, in considering the refund request the Commissioner will also incorporate any debit adjustments that would have been made but for the application of the four-year time limit. This will ensure the correctness of the assessment.

84. Because, generally, the Commissioner cannot increase an assessment outside the four-year limitation period, if the amount of any required debit adjustment exceeds the refund requested by the taxpayer, the amendment will not be made.

Default assessments

85. If the Commissioner has raised assessments under s 106 of the TAA (commonly known as default assessments) and the taxpayer subsequently files tax returns for those default assessments outside the relevant response periods, the Commissioner will treat the tax returns as amendment requests. The Commissioner will generally amend the assessments under s 113 after confirming that the tax returns contain correct tax positions. In addition, if the taxpayer is within the relevant response periods, they should consider issuing notices of proposed adjustments under s 89D(1) along with their tax returns to preserve their disputes rights against the possibility that the Commissioner may decline the exercise of the s 113 discretion.

What is the relationship between s 113 and s 113A?

86. Under s 113, errors are generally required to be corrected in the return period in which they arose. However, s 113A allows taxpayers to correct minor errors made in income tax returns (including RWT and NRWT), FBT returns or GST returns in the next return that is due after the discovery of the error.

87. A minor error includes an error that was caused by a clear mistake, simple oversight or mistaken understanding on the taxpayer's part and that, for a single return, causes a discrepancy in the assessment of that return of $500 or less. When calculating the $500 discrepancy, income tax, FBT and GST returns are each treated separately.

88. While the Commissioner is not prevented from exercising the discretion under s 113 where the taxpayer is able to make the required correction themselves in a later period, the Commissioner's practice is generally not to expend resources in these circumstances. This is because s 113A provides a specific mechanism by which the taxpayer is able to correct the error themselves. As such, the taxpayer does not need to request that the Commissioner amend an assessment under s 113 to make the correction.

89. However, in certain circumstances the Commissioner will exercise the discretion under s 113, notwithstanding that the taxpayer is able to make the required correction using s 113A. Without limiting those circumstances, some examples include:

- Where the error has occurred in a taxpayer's final return for that revenue type and therefore there is no future return in which to make an adjustment under section 113A.
- Where not correcting the error in an earlier period using s 113 will negatively impact an entitlement of the taxpayer. For example, where making the amendment under s 113 will increase the taxpayer's Working for Families tax credit entitlement from that earlier date.

90. Taxpayers are not required to notify the Commissioner specifically of the corrections made under s 113A. However, Inland Revenue may review error adjustments as part of its investigation activity to ensure the adjustments were correct. Inland Revenue expects taxpayers to maintain sufficient records to substantiate any adjustments made and explain the reasons that the minor error arose in the first place.

91. For further information regarding the application of s 113A, please see the item *Correction of minor errors in*

subsequent returns included in *Tax Information Bulletin* Vol 22, No 1 (February 2010): 30.[17]

What is the relationship between s 113 and the proviso to s 20(3) of the GST Act?

92. When a registered person has not claimed a GST input tax deduction in an earlier taxable period then, under the proviso to s 20(3) of the GST Act, the person can claim that deduction in a later period. This contrasts with the treatment of the same error afforded by s 113, which would be to correct the earlier GST return to which the input tax deduction related.

93. While the Commissioner is not prevented from exercising the discretion under s 113, the presence of the specific provision in s 20(3) for this type of GST error means that the Commissioner's practice is generally not to exercise the discretion in these circumstances. Because s 20(3) provides taxpayers with a specific mechanism to correct their failure to claim the GST input tax deduction, the Commissioner's view is that a general provision such as s 113 should not be used. For further guidance see QB 09/04 *The relationship between section 113 of the TAA and the proviso to section 20(3) of the GST Act when a registered person has not claimed an input tax deduction in an earlier taxable period*.[18] This outcome is considered to be more consistent with the scheme of the legislation and in particular s 15B, which requires that taxpayers take responsibility for correct assessments wherever possible.

Challenge rights

94. A taxpayer cannot challenge the exercise of the Commissioner's discretion under s 113 by commencing proceedings in a hearing authority.[19] However, the exercise of this discretion (or the decision not to make the amendment requested) may be subject to judicial review.

Reconsideration and complaint rights

95. If a taxpayer is concerned that their circumstances have not been given proper consideration, they should raise their concern with the staff member that considered their request and ask for the decision to be reviewed by a more senior officer.

96. If a taxpayer is still not satisfied with the level of service they receive, they can obtain more information about the Inland Revenue Complaints Management Service at **http://www.ird.govt.nz/how-to/disputes/findout-disputes-cmplts-mgmnt-srvc.html** or phone 0800 274 138 (Monday to Friday between 8am and 5pm).

This Standard Practice Statement is signed on 01 April 2016

Graham Tubb

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Legal and Technical Services

APPENDIX – LEGISLATION

Of particular relevance to the Commissioner when considering requests to amend assessments are the following sections of the TAA:

Section 6 Responsibility on Ministers and officials to protect integrity of tax system

(1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.

(2) Without limiting its meaning, **the integrity of the tax system** includes-

(a) taxpayer perceptions of that integrity; and

(b) the rights of taxpayers to have their liability determined fairly, impartially, and according to law; and

(c) the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and

(d) the responsibilities of taxpayers to comply with the law; and

(e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and

(f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

Section 6A Commissioner of Inland Revenue

...

(2) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

[17] The item may be found here, at page 30: **http://www.ird.govt.nz/resources/2/1/214bb007-47bb-4174-9670-279abb3521cf/tib-vol22-no1.pdf**

[18] More information on this statement may be found here: **http://www.ird.govt.nz/technical-tax/questions/questions-gst/qwba-0904-relationship-between.html**

[19] Section 138E(1)(e)(iv)

(3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

(a) the resources available to the Commissioner; and

(b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(c) the compliance costs incurred by taxpayers.

Section 15B Taxpayer's tax obligations

A taxpayer must do the following:

(aa) if required under a tax law, make an assessment:

(a) unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:

(b) deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:

(c) pay tax on time:

(d) keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws:

(e) disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose:

(f) to the extent required by the Inland Revenue Acts, co-operate with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws:

(g) comply with all the other obligations imposed on the taxpayer by the tax laws:

(h) if a natural person to whom section 80C applies, inform the Commissioner that the person has not received an income statement for a tax year, if the income statement is not received by the date prescribed in section 80C(2) or (3):

(i) if the taxpayer is a natural person, correctly respond to any income statement issued to the taxpayer.

Section 113 Commissioner may at any time amend assessments

(1) Subject to sections 89N and 113D, the Commissioner may from time to time, and at any time, amend an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid.

(2) If any such amendment has the effect of imposing any fresh liability or increasing any existing liability, notice of it shall be given by the Commissioner to the taxpayer affected.

Other relevant legislative provisions are:

- Sections 78B, 89C, 89D, 89N, 106(1), 107A, 108, 108A, 113A, 113D, 138E, 141FB, and 141G of the TAA.
- Subpart RM 2 of the Income Tax Act 2007.
- Sections 19C(8), 20, 45 and 46 of the GST Act.
- Section 202 of the Student Loan Scheme Act 2011.

Published Statements

This SPS should be read in conjunction with the following statements published by the Commissioner and any issued in replacement:

- SPS 09/02 *Voluntary Disclosures* and SPS 06/03 *Reduction of shortfall penalties for previous behaviour*.
- IS 10/07 *Care and Management of the taxes covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994*.
- QB 09/04 *The relationship between section 113 of the TAA and the proviso to section 20(3) of the GST Act when a registered person has not claimed an input tax deduction in an earlier taxable period*.
- *Correction of minor errors in subsequent returns* (*Tax Information Bulletin* Vol 22, No 1 (February 2010): 30).
- *Status of the Commissioner's advice* (*Tax Information Bulletin* Vol 24, No 10 (December 2012): 86).

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 16/02: GST – WHAT IS THE CORRECT RATE OF GST TO CHARGE ON LEGAL SERVICES PROVIDED TO NEW ZEALAND RESIDENT OWNERS OF LAND BEING COMPULSORILY ACQUIRED?

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

This Question We've Been Asked is about ss 8 and 11.

Section 66 of Part 5 of the Public Works Act 1981 provides that the owner of land compulsorily taken can recover reasonable legal costs incurred. It has been drawn to the Commissioner's attention that there is some doubt about the correct rate of GST to be charged on legal services supplied to New Zealand resident owners of land that is being compulsorily acquired. The argument for zero-rating the legal services supplied is that the supply of the land is the only supply made by the land owner to which the compensation for the legal fees incurred can relate. As the supply of the land to the relevant body will be zero-rated under s 11(1)(mb), so should the supply of the legal services.

Question

1. At what rate should GST be charged on legal services provided by legal professionals to New Zealand resident land owners in the process of their land being compulsorily acquired?

Answer

2. When the legal services are supplied by a GST registered person, GST will be charged under s 8(1) at the standard rate of 15%.
3. The same conclusion will apply to the supply of other services obtained by the New Zealand resident owner of land being compulsorily acquired by the Crown or local authority, eg valuation or surveying services.
4. Section 66 of the Public Works Act 1981 provides that the owner can recover reasonable costs incurred when their land is compulsorily acquired by the Crown or local authority. This includes reasonable valuation and legal fees or costs incurred in respect of the land taken or acquired. Similarly, s 62 of the Canterbury Earthquake Recovery Act 2011 and cl 80 of the Greater Christchurch Regeneration Bill 2015 each provide that the owner can recover actual costs incurred when their land is compulsorily acquired. While the Crown or local authority may pay the invoices issued by the services providers, the services are supplied to the landowner.

Explanation

Background

5. This item applies to legal services provided to a New Zealand resident owner of land that is to be compulsorily acquired by the Crown or a local authority under the Public Works Act 1981. When land is compulsorily acquired, the land owner is entitled under the Public Works Act 1981 to full compensation from the relevant body for any loss or injury suffered. This will include compensation for any reasonable legal fees incurred by the land owner in the process of the land being acquired by the relevant body.

Analysis

6. Section 8(1) requires a registered person to charge GST on the (non-exempt) supply of goods and services made in New Zealand in the course or furtherance of a taxable activity carried on by the registered person. The rate of GST charged is 15% unless ss 11–11B require the GST to be charged at a rate of 0%. The provision being relied on to zero-rate the supply of legal services to land owners is s 11(1)(mb), which reads as follows:

> **11 Zero-rating of goods**
>
> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> …
>
> (mb) the supply wholly or partly consists of land, being a supply—
>
> (i) made by a registered person to another registered person who acquires the goods with the intention of using them for making taxable supplies; and

(ii) that is not a supply of land intended to be used as a principal place of residence of the recipient of the supply or a person associated with them under section 2A(1)(c); or

7. It is well established that GST is a tax on transactions (*CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA) at 13,193). The statutory provisions are directed at the contractual arrangements between the supplier and the recipient of the supply (*Wilson & Horton Ltd v CIR* (1995) 17 NZTC 12,325 (CA) at 12,328). As Durie J stated in *CIR v Capital Enterprises Limited* (2002) 20 NZTC 17,511 (HC) at [50]:

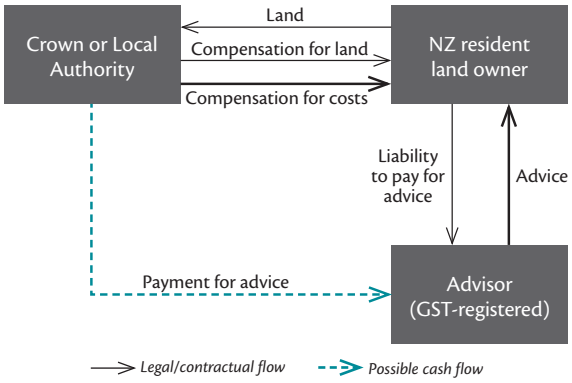
> The position seems rather to be that the Act taxes transactions at a given point in the transaction but the question of who are the parties is determined by reference to the general principles of the relevant contract law. Certainly **I can see no basis for divorcing the supply and receipt of goods and services for the purposes of the Act from contractual relationships.** A contract may be formed by the simple act of supplying and receiving. Equally, the Act [sic] of supplying and receiving may arise as part of a larger contractual arrangement. Ms Norris is undoubtedly correct in submitting that **the core provisions of the Act, ss 6–10, are directed to contractual arrangements between the suppliers and the recipients of the supply** (and see *Wilson & Horton Ltd v C of IR* (1995) 17 NZTC 12,325 (CA) and in particular Richardson J at p 12,328, Penlington J at p 12,335 and McKay J at p 12,333; *Director-General of Social Welfare v De Morgan* (1996) 17 NZTC 12,636 at p 12,641). It follows, as Ms Norris submitted, that the tax attaches to the supply to the person who at contract can require its performance.
>
> [Emphasis added]

8. The focus on contractual relationships means that the nature of the supply for GST purposes will be determined with reference to the rights and obligations created between the parties to the contract (*New Zealand Refining* (CA) at 13,192; *Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23,979 (HC) at [50]). The application of the statutory provisions will not be determined with reference to anyone who is not party to the contract (*Wilson & Horton* (CA) at 12,333).

What are the contractual relationships between the parties?

9. The Commissioner considers that the contractual relationship is between the legal professional, as supplier of legal services, and the land owner, as recipient of that supply. The Crown or the local authority, as the case may be, is not a party to this contract. The supply of legal services is a separate supply from the supply of the land by the owner to the Crown or local authority. The Crown or local authority does not instruct the legal professional to provide legal services to the land owner. Consequently, the Crown or local authority cannot require performance of the transaction. This is so despite their statutory obligation under Part 5 of the Public Works Act 1981 to compensate the land owner for the reasonable or actual loss incurred in obtaining the legal advice.

10. The contractual and other relationships may be illustrated as follows:



What is the correct GST treatment?

11. Because the contractual relationship is between the legal professional and the land owner, the nature of the supply will be determined under that contract. The services supplied by the legal professional under the contract will be legal advice or other related services. While the advice or other services supplied will relate to the compulsory acquisition of the land by the Crown or local authority, the supply does not "wholly or partly [consist] of land" as required under s 11(1)(mb). This is because the supplier – the legal professional – is not supplying the land. Rather, the supply made by the legal professional wholly consists of legal advice or other related services. In this light, s 11(1)(mb) is not relevant.

12. Therefore, s 11(1)(mb) does not apply to zero-rate the supply of legal services to the owner of the land that is being compulsorily acquired by the Crown or local authority. This means that the rate of GST to be charged by the legal professional to the New Zealand resident land owner is the standard rate under s 8(1) of 15%.

What if the Crown or local authority pays the fees directly to the legal professional?

13. That the Crown or local authority may pay the legal fees directly to the legal professional does not alter the conclusion that GST is charged at the standard rate of 15% on the supply of the legal services to the owner of the land being acquired (*Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032 (CA) at 10,036). The Crown or local authority's obligation is to compensate the land owner for the reasonable or actual costs incurred in obtaining the legal services.

References

Related rulings/statements
QB 13/03: Goods and Services Tax – whether a compulsory acquisition of land is a "supply by way of sale"
Subject references
GST, imposition of tax, zero-rating, compulsory acquisition of land
Legislative references
Canterbury Earthquake Recovery Act 2011 s 64 Goods and Services Tax Act 1985: ss 8 and 11(1)(mb) Greater Christchurch Regeneration Bill 2015: cl 82 Public Works Act 1981, s 66
Case references
CIR v Capital Enterprises Limited (2002) 20 NZTC 17,511 (HC)
CIR v New Zealand Refining Co Ltd (1997) 18 NZTC 13,187 (CA)
Rotorua Regional Airport Ltd v CIR (2010) 24 NZTC 23,979 (HC)
Turakina Maori Girls College Board of Trustees v CIR (1993) 15 NZTC 10,032 (CA)
Wilson & Horton Ltd v CIR (1995) 17 NZTC 12,325 (CA)

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

Use-of-money interest rates change

The use-of-money interest rates on underpayments and overpayments of taxes and duties have changed, in line with market interest rates. The new rates are:

- underpayment rate: 8.27% (previously 9.21%)
- overpayment rate: 1.62% (previously 2.63%)

The new rates came into force on 8 May 2016.

Rates are reviewed regularly to ensure they are in line with market interest rates. The new rates are consistent with the Reserve Bank floating first mortgage new customer housing rate and the 90-day bank bill rate.

The rates were changed by Order in Council on 4 April 2016.

Taxation (Use of Money Interest Rates) Amendment Regulations 2016 (LI 2016/75)

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, 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.

THE AUTHORITY FINDS NO TAXABLE ACTIVITY AND UPHOLDS THE COMMISSIONER'S REASSESSMENTS

Case	TRA 018/12 [2016] NZTRA 03
Decision date	26 February 2016
Act(s)	Goods and Services Tax Act 1985, Tax Administration Act 1994
Keywords	Taxable activity, input tax credits

Summary

Decision of the Taxation Review Authority ("the Authority") dismissing the disputant's claim and confirming the Commissioner of Inland Revenue's ("the Commissioner") assessments. The Authority found that the disputant was not carrying on a taxable activity. The Authority also found that even if the disputant was carrying on a taxable activity, he was not entitled to input tax credits as he had failed to produce the required documentary evidence.

Impact

This case upholds the current position of the law. In order to claim input tax deductions, a taxpayer must be carrying on a taxable activity.

Facts

The disputant challenged reassessments made by the Commissioner denying input tax deductions claimed by him for goods and services tax ("GST") purposes.

The Commissioner deregistered the disputant and denied the deductions on the basis that the disputant was not conducting a taxable activity in the GST periods in dispute.

The Commissioner contended that even if the disputant was found to be carrying on a taxable activity, the disputant had not provided sufficient evidence to show he acquired goods and services for the principal purpose of making taxable supplies.

The Commissioner also imposed shortfall penalties for gross carelessness for each of the periods in dispute.

Decision

The Authority dismissed the disputant's claim and confirmed the Commissioner's assessment.

Issue 1: Taxable Activity

The disputant gave evidence that he was engaged in a number of taxable activities (set out below).

The Authority was not satisfied on the evidence provided that any of the alleged activities fell within the definition of "taxable activity" for the below reasons.

(1) Acting as a tax agent

The Authority found that while the disputant asserted he acted for many clients, he only produced six invoices for two clients. He did not provide any bank statements showing payment of any of these invoices nor did he provide any other supporting documentation of the work being performed.

Furthermore, the Authority found that even if it were to accept the disputant acted as a tax agent, it was performed on a spasmodic basis at best. Judge Sinclair was not satisfied on the evidence that the disputant was "continuously" or "regularly" engaged in providing accounting services to other persons for consideration in any of the GST periods in dispute.

(2) Holding patent rights as patentee

The disputant gave evidence that he held patents and that there was an accrual of profits of $290,364.42 for the period up to 31 March 1986. The disputant explained that authority to enforce equities in a patent is conferred by the Patents Act, and that the profits are "equities" he wished to enforce. The disputant saw his taxable activity as being his continual attempt to enforce the equities in the patents.

The Authority found the disputant did not detail what activities he was engaged in during the periods in dispute

to enforce the "equities" nor did he produce any supporting documentation. Furthermore, the Authority could not see how any activity to enforce the alleged activities involved, or intended to involve, the supply of services to another person for consideration.

(3) Devising inventions and patenting them

The disputant told the Authority that devising inventions was a "continuous process" and that he was working on various inventions during the periods in dispute. However, he did not produce evidence of his design work and time spent on his inventions during any of this time. Accordingly, the Authority was not satisfied that the disputant was engaged in a taxable activity devising inventions and patenting them in any of the GST periods in dispute.

(4) Supplying services to trusts

The disputant produced two documents which he told the Authority were invoices issued by him to a trust for work enforcing rights which he asserts are held by the trust. He gave further evidence that he had not been paid.

The Authority, after careful consideration of the disputant's evidence, was not satisfied that the disputant was engaged in activity in the relevant GST periods that involved, or was intended to involve, the supply of services to the trust.

Issue 2: Entitlement to Input Tax Deductions

In the event that the Authority was wrong in its view that the disputant was not engaged in a taxable activity in any of the disputed periods, the Authority considered whether the disputant was entitled to the input tax deductions he had claimed.

No deduction of input tax is allowed unless a tax invoice is held by the registered person. Registered persons are also required to keep all invoices relating to goods and services supplied by them or to them for a period of at least seven years after the end of the taxable period to which they relate.

The Authority found that the disputant had every opportunity since 2011 to produce the invoices and evidence of payment to enable him to prove his claims to a refund in the GST periods in dispute. He simply failed to do so. On the evidence before it, the Authority was unable to be satisfied that the disputant was entitled to any or all of the input tax deductions claimed by him. His claim failed accordingly.

Issue 3: Shortfall penalties

A taxpayer can be liable for a shortfall penalty for gross carelessness where the taxpayer has taken an unacceptable tax position. A taxpayer takes an unacceptable tax position if, viewed objectively, his tax position fails to meet the standard of being "about as likely as not to be correct".

The Authority found that while the disputant strongly believed that his actions were taxable for the purposes of the Goods and Services Tax Act 1985, the test is objective, and a belief by the disputant that the position which he took was correct is irrelevant.

The Authority considered that the disputant showed a high level of disregard for the consequences when he filed his GST returns and that his conduct was a flagrant breach of the GST regime. The Authority noted that the disputant was an accountant by profession and held himself out as a tax agent. Furthermore, he had extensive dealings with the Commissioner over many years and he considered himself to have knowledge of GST and other tax matters.

The Authority was satisfied that the disputant's conduct created a high risk of a tax shortfall and that risk would have been recognised by any reasonable person in the circumstances. Accordingly, the Authority found the disputant liable for shortfall penalties for gross carelessness in each of the GST periods in dispute.

FINAL PAYMENT TRIGGERS A BASE PRICE ADJUSTMENT

Case	TRA 025/14 [2016] NZTRA 02
Decision date	16 February 2016
Act(s)	Tax Administration Act 1994, Income Tax Act 1994, Income Tax Act 2007
Keywords	Base price adjustment, financial arrangement rules, final payment

Summary

The assignment of a debt was a financial arrangement and on crediting of the debt amount to the disputant's current account, the financial arrangement matured and a base price adjustment ("BPA") was required.

Impact

This decision confirms that when a distribution is made available to a shareholder(s) for draw down, that constitutes a final payment (and maturity of a financial arrangement) and a BPA is triggered in accordance with the financial arrangement rules.

Facts

The disputant is the sole shareholder and director of Properties Ltd ("Properties").

In 1986, Properties entered into a large construction contract for which ABC Bank ("ABC") provided loan facilities.

The disputant personally guaranteed the lending in respect of Properties' debts and Properties gave ABC a debenture over its assets to secure the lending.

Properties then ran into financial difficulty and ABC appointed receivers to Properties' assets.

Litigation commenced between ABC and the disputant. By way of settlement of this dispute, agreement was reached between the parties and a Deed of Admission of Liability and Settlement ("Deed") was executed.

The Deed included: an acknowledgement of $2,659,442.06 in debt to ABC; an admission by the disputant of liability for the debt under the guarantee; agreement that, if $90,000 ("the Settlement Sum") and interest thereon was paid by the disputant, ABC would assign to the disputant the liability of Properties Ltd; agreement that until the Settlement Sum and interest was paid in full to ABC, Properties and the disputant would remain fully liable to ABC for the total debt; and agreement that after payment of two of the instalments making up the Settlement Sum, the receivers would retire from Properties.

The receivers did retire in 1993 and after the last portion of the monies due was paid in February 1996, ABC assigned the debt to the disputant.

Properties did not trade again until 2004 when it commenced a property development project.

Properties recorded an opening balance in the disputant's current account of $2,659,442 in the 2005 year (being the amount of the debt assigned under the Deed). Losses carried forward from previous years had the effect that there was no income tax payable in the 2005 income year.

Financial statements for Properties for the 2005 to 2007 income years showed net drawings over this three year period of $2,238,592 but the assigned debt was not recorded in the financial statements as a term liability.

The disputant ultimately returned no taxable income for the 2001 to 2010 income years.

The disputant had no bank account, did not draw a salary from Properties and he drew money from his current account to fund family living expenses. In the 2005 to 2007 income years, the disputant and his partner also claimed approximately $35,000 in Working for Families Tax Credits.

The Commissioner of Inland Revenue ("the Commissioner") contended that the assignment of the debt was a financial arrangement and on the crediting of the $2,659,441 to the disputant's current account the financial arrangement matured and a BPA was required.

The disputant argued that no event occurred in 2005 which triggered a BPA. Even if something had happened materially in that year, the disputant contended that it would not amount to a payment which required a BPA.

Decision

The disputant's claim was dismissed.

The Taxation Review Authority ("the Authority") was satisfied that a payment of the assigned debt of $2,659,442 was made to the disputant in 2005 by the crediting of this sum to his current account and available for the disputant to draw down. This was not a simple entry to reflect the change in party to whom the debt was owed nor was it a term loan owed to the disputant. Accordingly, the financial arrangement matured and a BPA was required in the 2005 year.

Accordingly, the Authority held that it was not necessary to address the Commissioner's alternative arguments and consequently whether this alternative argument could be raised by the Commissioner under s 138G of the Tax Administration Act 1994.

As for whether the disputant could rely on documents not previously discovered in support of an additional issue, the Authority was of the view that the disputant could have located the documents and discerned the issue at the time of delivery of his statement of position. The disputant was therefore unable to pursue this issue. Furthermore, the Authority did not consider that the raising of the additional issue was necessary to avoid any manifest injustice to the disputant.

In any event, as to the admissibility of the undiscovered documents, the Authority considered that the disputant was clearly well aware of his discovery obligations and because of her view on the merits of the disputant's proposed argument, the documents did not have any particular significance to the disputant. There was therefore no real risk of prejudice to the disputant if the documents were not produced. Accordingly, the disputant's application to admit the documents was declined.

COURT OF APPEAL HOLDS DOCTRINE OF ESTOPPEL PER REM JUDICATUM APPLIES AND DISMISSES APPEAL

Case	The Webster Group of Appellants v The Commissioner of Inland Revenue [2016] NZCA 31
Decision date	29 February 2016
Act(s)	Taxation Review Authorities Act 1994, Taxation Review Authority Regulations 1998, Tax Administration Act 1994
Keywords	Exceptional circumstances, reg 4(3), reg 8, estoppel per rem judicatum

Summary

The Court of Appeal dismissed the appellant's appeal on the basis that the question for determination on appeal, namely, whether the Taxation Review Authority ("TRA") erred in granting the Commissioner of Inland Revenue ("the Commissioner") an extension of time to file cases stated had been previously determined by the Court of Appeal.

Facts

In 2000, the TRA granted leave to the Commissioner to file cases stated against 28 taxpayers in the TRA out of time on the basis of there being exceptional circumstances.

In 2002, the Court of Appeal upheld the TRA's decision, dismissing the objectors' application for judicial review and a subsequent application for conditional leave to appeal to the Privy Council.

The TRA then heard and dismissed the objections to the Commissioner's assessments. Numerous challenges to the TRA's decision by way of applications for judicial review and appeal were unsuccessful. The appellants asked the TRA to state a case for the High Court's determination under s 26 of the Taxation Review Authorities Act 1994. The TRA posed 13 discrete questions to the High Court. On 13 November 2013, Ellis J decided all questions in the Commissioner's favour.

The appellant appealed Ellis J's finding on the first question, namely whether the objections of the Webster Group should be allowed because the Commissioner should not have been granted an extension of time to file the cases in the TRA. In relation to this question, Ellis J found that the Commissioner did not did not need an extension of time because the date on which Webster was bound to serve its points of objection notice was never formally triggered and so the time limit for the Commissioner to state cases in the TRA never started to run. The objections should not therefore have been allowed on that ground.

In the Court of Appeal, the appellants sought to challenge the TRA's original decision granting an extension of time to the Commissioner to file a case stated on a recently new ground of challenge that the Commissioner had failed to follow the correct procedural requirements. The appellants invoked this new argument based upon the Taxation Review Authority Regulations 1994 ("TRAR") reg 4(3), that the Commissioner was out of time in filing a case stated in the TRA from 12 August 1996, being three months after the appellants served its points of objection.

The appellant's proposition was that the whole hearing process was a nullity because the Commissioner filed his originating pleading in one forum, the High Court, instead of in the TRA.

Decision

The Court of Appeal considered that the TRA should not have stated in 2013 the same question which had been finally determined in 2002 in the *Wetherill (M & J Wetherill Co Ltd v Taxation Review Authority* [2003] 1 NZLR 577 (CA)) judicial review, namely whether the TRA erred in granting the Commissioner an extension of time to file cases stated. The High Court should have declined to answer the same question on the basis that the doctrine of estoppel per rem judicatum applies.

In any event, the Court of Appeal considered that even if the Commissioner was out of time in stating cases, exceptional circumstances exist which would justify granting an extension under TRAR reg 8.

The appeal was dismissed.

LEGAL DECISIONS –CASE IMPACT STATEMENTS

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Supreme Court. These recent tax decisions are considered, in the Commissioner's view, to be significant and the notes include her view on the impact of the decision.

We've given full reference 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. The case impact statement outlines the Commissioner's view of the implications arising from the decision and any subsequent work being undertaken as a result.

These case impact statements do not set out Inland Revenue Policy, nor do they represent our attitude to the decision. They are intended to provide readers with some guidance on the Commissioner's initial views on the impact of a decision.

RESIDENCY: INTERPRETATION OF PERMANENT PLACE OF ABODE

Case	Commissioner of Inland Revenue v Diamond [2015] NZCA 613
Decision date	18 December 2015
Act(s)	Income Tax Act 1994/Income Tax Act 2004
Keywords	Section OE 1(1), residency, permanent place of abode

Summary

The Court agreed with the High Court's conclusion on the facts and found that Mr Diamond was not a resident for the relevant years. The Court noted that the relevant property had never been Mr Diamond's home (and was never intended to be): it was never lived in by Mr Diamond and was only ever used as an investment property. The Court did not accept that a place in which Mr Diamond had never lived could constitute a dwelling with which he had enduring and permanent ties.

Case impact statement

The Court disagreed with the Commissioner's approach to the issue of how to interpret the phrase "permanent place of abode". The Court considered that a permanent place of abode means something more than mere availability of a place to stay and implies actual usage of the property by the taxpayer for residential purposes. The Court went on to conclude that what is required is an overall assessment of the facts and that this assessment cannot be separated into discrete questions. Rather, the approach calls for an integrated factual assessment directed to determining the nature and quality of the use the taxpayer habitually makes of a particular place of abode.

The Commissioner is currently reviewing her *Interpretation Statement (IS 14/01) Tax Residence* in light of this judgment and will consult on any proposed changes.

INTERPRETATION OF SECTION 2A(1)(a): ASSOCIATED PERSONS FOR THE PURPOSES OF THE GOODS AND SERVICES TAX ACT 1985

Case	Staithes Drive Development Limited v Commissioner of Inland Revenue
Decision date	21 October 2015
Act(s)	Tax Administration Act 1994; Goods and Services Tax Act 1985
Keywords	Sections 2A(1)(a)(i) and (iii), associated persons, voting interests, factual control, legal ownership.

Summary

The High Court held that the "voting interests" test in s2A(1)(a)(i) refers to the legal ownership of shares and does not extend to the beneficial ownership of the shares. Further, the Court held that "control by any other means" in s2A(1)(a)(iii) did not extend to the factual control argued by the Commissioner.

Case impact statement

This judgment is consistent with *Concepts 124 Ltd v Commissioner of Inland Revenue*, which established that the voting interests test in s 2A(1)(a)(i) related to legal ownership of the shares only and that the policy considerations underlying the continuity provisions do not apply where the voting interest provisions are used to determine control of the company. Accordingly, this judgment confirms that it is not necessary to look

beyond the legal ownership of shares for the purposes of determining who holds the voting interests in a company.

This judgment also indicates that the distinction between legal and factual control does not determine whether an incidence of control is "control by any other means" for s 2A(1)(a)(iii). The Court concluded that it is reasonably arguable that "control" in (iii) refers to ownership interests in a company rather than other forms of control, such as that exercised by directors. Further, that the "means" by which that control is achieved arguably must relate or refer back to the ownership/voting interests in a company as the ultimate source of power, and therefore, control.

The Court held however that the powers in s 76 operate to void structures which appear to fall outside the associated persons definition when entered into between parties which are, in reality, between the same or associated persons.

The Commissioner regards this decision as suggesting that an incidence of factual control could constitute "control by any other means" in (iii), where it relates to the ownership/voting interests in a company. However, both this judgment and *Concepts 124 Ltd* indicate such a finding would be rare, particularly where s 76 of the GST Act was available.

The Commissioner's Policy and Strategy unit is considering the impact of this decision on the issue of corporate trustees with multiple trusts.

REGULAR CONTRIBUTORS TO THE TIB

Office of the Chief Tax Counsel

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

Legal and Technical Services

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

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

Policy and Strategy

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

Litigation Management

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

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