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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

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 (IR715)*. You can download this publication free from our website at **www.ird.govt.nz**

PRODUCT RULING – BR PRD 16/03

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 Bank of New Zealand.

Taxation Laws

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

This Ruling applies in respect of ss BG 1, CA 1(2), CB 4, CC 3, CE 1 and CP 1.

This Ruling does not apply if there is an employment relationship between the Fly Buys member who redeems their Fly Buys points for a contribution and the BNZ KiwiSaver member who receives the contribution.

This Ruling does not apply if there is a contract for services (i.e. independent contractor relationship) between the Fly Buys member who redeems their Fly Buys points for a contribution and the BNZ KiwiSaver member who receives the contribution.

This Ruling does not apply to a Fly Buys member who is a participant in the Fly Buys for Business programme.

The Arrangement to which this Ruling applies

The Arrangement is the redemption of Fly Buys points for a contribution to a KiwiSaver account in a KiwiSaver scheme that Bank of New Zealand (the Bank) has established (the BNZ KiwiSaver Scheme). Under an agreement between the Bank and Loyalty New Zealand Limited (Loyalty NZ), persons who are members of the Fly Buys loyalty programme will be able to request the redemption of their Fly Buys points for a contribution to their own, or another person's, member's account in the BNZ KiwiSaver Scheme. To request the redemption of Fly Buys points a person does not have to be a customer of the Bank. As a separate and independent obligation under an agreement between the Bank and Loyalty NZ, the Bank will make a payment to Loyalty NZ for each contribution Loyalty NZ makes to a member's account in the BNZ KiwiSaver Scheme.

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

KiwiSaver Act 2006

1. The KiwiSaver regime, which started on 1 July 2007, is a voluntary work-based saving scheme established to facilitate individuals' savings habits, principally through the workplace. Savings are primarily for retirement and are "locked in" until the age of eligibility for New Zealand superannuation (which is currently 65 years old), although exceptions can be made in certain cases, such as financial hardship.
2. As stated in s 3 of the KiwiSaver Act 2006, the purpose of KiwiSaver is to:
    - encourage long-term savings habits and asset accumulation by individuals who may not otherwise enjoy standards of living in retirement similar to those enjoyed before retirement; and
    - increase individuals' well-being and financial independence, particularly in retirement, and provide retirement benefits.
3. Inland Revenue administers Parts 1 to 3 and Schedule 3 of the KiwiSaver Act 2006. The Commissioner of Inland Revenue oversees the provisions of the KiwiSaver Act 2006 that Inland Revenue administers. Among other administrative functions, Inland Revenue collects contributions from employers, as part of the PAYE rules, and pays contributions to providers of KiwiSaver schemes.

The Bank's KiwiSaver Scheme

4. The Bank operates its own KiwiSaver scheme.
5. The BNZ KiwiSaver Scheme was established by trust deed dated 8 January 2013 (the Trust Deed), and set up as a portfolio investment entity (PIE). The manager/issuer of the BNZ KiwiSaver Scheme is BNZ Investment Services Limited (which is a wholly owned subsidiary of the Bank), with the Bank and its directors being promoters of the BNZ KiwiSaver Scheme. As at the

date of this Ruling, the registrar, trustee, investment adviser and accountant of the BNZ KiwiSaver Scheme are Trustees Executors Limited, The New Zealand Guardian Trust Company Limited, Russell Investment Group Limited and MMC Limited respectively. The BNZ KiwiSaver Scheme is registered with the Financial Markets Authority, and is open to customers who are natural persons that join the Scheme by completing the relevant application form. Customers can elect to make their employee and employer contributions to any one of the six funds within the BNZ KiwiSaver Scheme, being:

- the Cash Fund (comprising 100% growth assets);
- the First Home Buyer Fund (comprising 85% income assets and 15% growth assets);
- the Conservative Fund (comprising 80% income assets and 20% growth assets);
- the Balanced Fund (comprising 50% income assets and 50% growth assets);
- the Moderate Fund (comprising 65% income assets and 35% growth assets); and
- the Growth Fund (comprising 30% income assets and 70% growth assets).

6. It is possible that additional funds could be established within the BNZ KiwiSaver Scheme from time to time, pursuant to and in accordance with the terms of the Trust Deed.
7. It is anticipated that changes will shortly be made to the Trust Deed in order to ensure compliance with the Financial Markets Conduct Act 2013. Among the changes will be the removal of the role of "Promoter" and changes in terminology so that the Trustee is referred to as the "Supervisor" and the Trust Deed becomes known as the "Governing Document". None of these changes will affect the BNZ KiwiSaver Scheme or the Arrangement.

Fly Buys

8. The Fly Buys points programme is New Zealand's largest loyalty programme. Fly Buys is administered by Loyalty NZ, which is owned in equal shares by the Bank, Foodstuffs Ventures (NZ) Limited, IAG New Zealand Limited, and Z Energy Limited.
9. Any person can become a Fly Buys member by completing an appropriate application form. Membership is free. Under the terms and conditions established by Loyalty NZ, Fly Buys points are agreed to have no value and cannot be sold, transferred, or assigned for cash or other consideration. Additionally, Fly Buys points cannot be redeemed for or refunded in cash. Any Fly Buys points that are awarded but unused expire after 36 months. The terms and conditions of the Fly Buys loyalty programme do not prohibit the points being redeemed for any particular reward or class of rewards. Once redeemed, a reward could (as a subsequent and separate transaction) be sold, transferred or assigned for cash or other consideration.
10. Once a person is a Fly Buys member, they collect Fly Buys points (by way of a credit to an account maintained by Loyalty NZ) as a consequence of purchasing goods or services from participating reward partners (Partners). There are currently over 40 Partners. Loyalty NZ and Partners agree on the level of Fly Buys points that may be awarded to Fly Buys members by Loyalty NZ. For example, 1 point may be awarded to a Fly Buys member for every $25 (or some other amount) spent with the Partner. From time to time Loyalty NZ provides Fly Buys members with a points summary statement, which details the opening points balance, credits and debits of points, and the closing points balance.
11. Once sufficient Fly Buys points have been collected the Fly Buys member may redeem the Fly Buys points for specified rewards, being goods and services provided by Partners or other third parties that have entered into an agreement with Loyalty NZ to provide such rewards. The Fly Buys member contacts Loyalty NZ to request a redemption of their Fly Buys points, and Loyalty NZ contacts the relevant Partner or other reward provider to arrange for the reward to be provided to the Fly Buys member. At Loyalty NZ's option, rewards are posted or delivered to the address of the Fly Buys member, or made available for collection at a location notified to the Fly Buys member.

Fly Buys and contributions to the BNZ KiwiSaver Scheme

12. The Bank has integrated a Fly Buys feature into the BNZ KiwiSaver Scheme.
13. Under an agreement between the Bank and Loyalty NZ, members in the Fly Buys programme (Fly Buys member) will be able to redeem their Fly Buys points for a contribution to their own, or another person's, member's account in the BNZ KiwiSaver Scheme (BNZ KiwiSaver member). In the case where Fly Buys members redeem their Fly Buys points for a contribution to another person's BNZ KiwiSaver account, the contribution will be a gift from the Fly Buys members to the other persons.
14. In the case of a redemption request for a contribution to a member's account in the BNZ KiwiSaver Scheme, the Fly Buys member contacts Loyalty NZ and requests

the redemption of a specified number of Fly Buys points for a contribution of a specified amount to a nominated BNZ KiwiSaver account.

15. Loyalty NZ then provides details of the BNZ KiwiSaver member that is receiving the contribution reward and the dollar amount of the reward to the Bank. Loyalty NZ pays the money into the BNZ KiwiSaver Scheme subscriptions account (held in the name of the Trustee). In turn, the Trustee applies the contribution to the member's BNZ KiwiSaver account and to the fund they have selected.
16. As a separate and independent obligation, the Bank will make a payment to Loyalty NZ for each contribution made by Loyalty NZ to a member's account with the BNZ KiwiSaver Scheme. The contributions to the BNZ KiwiSaver member's account arising from the redemption of Fly Buys points are treated no differently to any other employee or employer KiwiSaver contributions.
17. A Bank customer's membership in the Fly Buys programme is contractually separate to their agreement (if any) relating to their investment in the relevant KiwiSaver fund, and each arrangement exists independently of the other.

Bank's objectives

18. The Bank's goals and objectives in integrating the Fly Buys feature into the BNZ KiwiSaver Scheme are to:
    - increase customer benefits, satisfaction and customer retention;
    - encourage retirement savings by providing an innovative savings solution to its customers; and
    - improve the Bank's brand awareness among the public, so the Bank is seen as a market leader.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

a) No income arises under s CA 1(2) for a BNZ KiwiSaver member in relation to the Arrangement.

b) No income arises under s CB 4 for a Fly Buys member or for a BNZ KiwiSaver member in relation to the Arrangement.

c) No income arises under s CC 3 for a BNZ KiwiSaver member in relation to the Arrangement.

d) No income arises under s CE 1 for a BNZ employee in relation to the Arrangement.

e) No income arises under s CP 1 for a BNZ KiwiSaver member in relation to the Arrangement.

f) Section BG 1 does not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 April 2016 and ending on 31 March 2021.

This Ruling is signed by me on the 17th day of May 2016.

Howard Davis
Director (Taxpayer Rulings)

PRODUCT RULING – BR PRD 16/05

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 Sovereign Services Limited.

Taxation Laws

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

This Ruling applies in respect of ss CA 1, CE 1, and EW 3.

The Arrangement to which this Ruling applies

The Arrangement is the offering of retail discounts and a points based reward scheme to the three categories of members of a scheme offered by Sovereign Services Limited (Sovereign). The number of reward points determines the amount of each member's "cash back reward" and "gym cash back voucher". Cash back rewards are between $50 - $100 and gym cash back vouchers are between $25 - $50. The retail discounts are offered to all members irrespective of the number of reward points earned by the member.

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

Summary of the Reward Scheme

1. The points based reward scheme is called "Healthy by Sovereign". It encourages members to become healthier by awarding points for exercising, receiving regular medical check-ups and consuming nutritious food. A member will be ranked as bronze, silver, gold or platinum depending on the number of points that they have accumulated.
2. If the member earns a certain number of points within a twelve month period, they will be rewarded with a cash back reward payment. Members are also eligible for other benefits including special discounts, gym cash back vouchers and exclusive offers. However, only silver, gold and platinum members will receive gym cash back vouchers to obtain additional discounts at a Gym Partner.
3. Membership will be open to customers (who have a health insurance policy for which they are the life assured), advisers (third party advisers with a current agency agreement), and permanent employees of Sovereign.

Membership

4. Entry into the Healthy by Sovereign scheme is voluntary and is free of charge.
5. There are three categories of membership:
   - Customer Membership: An individual who is at least 16 years of age and is life assured under a retail health insurance policy or eligible group scheme with Sovereign (includes employees and advisers who have an eligible insurance policy with Sovereign).
   - Adviser Membership: Third party advisers who have a current agency agreement with Sovereign and are accredited to sell Sovereign health products. For the purposes of this ruling the phrase "Adviser" refers to those Adviser Members who are treated by Sovereign as employees for tax purposes.
   - Sovereign Employee Membership: A permanent employee of Sovereign.
6. If a person is eligible for more than one membership, they will automatically be added to only one membership category based on the following order of priority: (1) Customer, (2) Adviser, and (3) Sovereign Employee.
7. Membership is only available to individuals. Membership cannot be shared. There is no family, company, trust or joint membership.

Partnership Agreements

8. Sovereign has entered into a number of Partnering Agreements with Gym Partners who will provide all Healthy by Sovereign members with an upfront fee discount. Sovereign will not subsidise this discount and it will be fully funded by the Gym Partner. If, however, a member reaches silver, gold or platinum status, Sovereign will issue the member with a gym cash back voucher to redeem at a Gym Partner. In this instance the Gym Partner will invoice Sovereign for reimbursement of the discount provided to the member.
9. Sovereign has entered into agreements with Retail Partners who will provide all members of Healthy by Sovereign with discounted goods and/or services regardless of their level of membership.
10. Sovereign will not reimburse Retail Partners and Gym Partners for the cost of discounts provided to the three categories of members.

Reward points and cash back rewards

11. Only Customer Members and Adviser Members are eligible for the cash back reward. Sovereign Employee Members are only eligible for gym cash back vouchers, Gym Partner discounts and Retail Partner discounts.

12. Whenever a member completes a specified healthy activity they will earn reward points. Activities that earn reward points include purchasing fresh meat, fruit and vegetables, completing a gym workout, reaching a certain number of daily steps, and going for annual doctor and dentist check-ups.
13. The number of points earned by a member will determine which of the four membership levels they will be accredited with. The cash back rewards are calculated on the basis of the level that has been achieved as at their membership anniversary date. The cash back reward payment will only be paid to members who reach Silver ($50), Gold ($75) or Platinum ($100) status. The maximum annual cash back reward is capped at $100.
14. The terms and conditions provide that reward points are not transferrable and cannot be redeemed for cash. Gym cash back vouchers and other rewards are non-transferable, not exchangeable for cash, cannot be replaced if expired, can only be redeemed once, and can only be used if the person is a member of Healthy by Sovereign.
15. At each member's anniversary date, the member's points will be reset to zero, and the member will be automatically reclassified into the Bronze category. A member's points cannot be carried over to a subsequent year.
16. The anniversary dates for each membership category are outlined below:
    - Customer Membership – six weeks before their Sovereign health insurance policy renews.
    - Adviser Membership – the date that the adviser registered for Healthy by Sovereign.
    - Employee Membership – the date the employee registered for Healthy by Sovereign.
17. A member can lose the points they have been allocated if they are involved in any dishonest or fraudulent activity with regard to the programme.

Termination of Membership or the Scheme

18. A member may terminate their membership at any time. All accumulated points will automatically expire.
19. If Sovereign cancels the program, members will be allowed to access their benefits for a period of 30 days from the date of the notification of termination.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following four conditions:

a) There are no differences in the terms and conditions of the employment of "Employee Members" and any employees who have not elected to join the Healthy by Sovereign scheme.

b) There are no differences in the terms and conditions of the employment of "Adviser Members" and any "Adviser Members" who have not elected to join the Healthy by Sovereign scheme.

c) There are no differences in the terms and conditions of the reward scheme offered under the Arrangement at any time to "Employee Membership" and "Customer Membership", other than the exclusion of "Employee Members" from the cash back reward payment.

d) There are no differences in the terms and conditions of the reward scheme offered under the Arrangement at any time to "Adviser Membership" and "Customer Membership".

How the Taxation Laws apply to the Applicant and the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

a) No income arises to a Healthy by Sovereign member under s CA 1(2) when the member receives a cash back reward payment.

b) No income arises under s CE 1 for an "Adviser Member" who does not operate as a company.

c) No income arises under the "financial arrangement rules" as defined in s YA 1 as the Healthy by Sovereign scheme is not a "financial arrangement" as defined by s EW 3.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 April 2016 and ending on 31 May 2019.

This Ruling is signed by me on the 5th day of July 2016.

Howard Davis
Director (Taxpayer Rulings)

NEW LEGISLATION

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

TAXATION (TRANSFORMATION: FIRST PHASE SIMPLIFICATION AND OTHER MEASURES) ACT 2016

The Taxation (Transformation: First Phase Simplification and Other Measures) Bill was introduced into Parliament on 30 June 2015. It received its first reading on 13 October 2015, completed its second reading on 12 April 2016 and the third reading on 31 May 2016 followed by Royal assent on 2 June 2016. The bill was amended by Supplementary Order Paper No 171 during the Committee of the Whole House.

The new legislation introduces a new framework for communications between Inland Revenue and taxpayers, provides for PAYE to be deducted from employee share scheme benefits and makes several other amendments to tax administration and information-sharing provisions. At the Committee of the Whole stage of the bill, Supplementary Order Paper No 171 introduced changes for the continued application of the now repealed Canterbury Earthquake Recovery Act 2011 for tax purposes in certain situations.

The new Act amends the Income Tax Act 2007, Tax Administration Act 1994, KiwiSaver Act 2006, Goods and Services Tax Act 1985, Child Support Act 1991, Student Loan Scheme Act 2011, the Gaming Duties Act 1971 and the Accident Compensation Act 2001.

EMPLOYEE SHARE SCHEMES

SIMPLIFYING THE COLLECTION OF TAX ON EMPLOYEE SHARE SCHEMES

Sections CE 2, RD 6, RD 7, RD 7B, of the Income Tax Act 2007; section 46(6B) of the Tax Administration Act 1994; section 4 of the KiwiSaver Act 2006; sections 11 and 15 of the Accident Compensation Act 2001

The Income Tax Act 2007 and Tax Administration Act 1994 have been amended by integrating employment income in the form of employee share benefits into the PAYE (pay as you earn) system. The changes were introduced in the Taxation (Transformation: First Phase Simplification and Other Measures) Bill enacted on 2 June 2016.

Employers are now responsible for reporting share benefits under an employee share scheme.

Employers have a choice about whether tax is withheld on such benefits.

The changes are designed to remove problems facing some employees with meeting their tax obligations in relation to these benefits, and improve the integrity of the tax system by reporting income information at its source.

Key features

The general PAYE collection rules in the Income Tax Act and disclosure rules in the Tax Administration Act have been changed to:

- allow employers to choose to use the PAYE system and withhold tax on any employment income an employee receives under a share purchase agreement using the PAYE system; and
- require employers to report the value of any benefits an employee receives under a share purchase agreement via the employer monthly schedule (EMS).

Consequential changes have also been made to the Accident Compensation Act 2001 and the KiwiSaver Act 2006 to ensure that share benefits are not counted as employment income under these Acts.

Background

Benefits an employee receives under a share purchase agreement are treated as employment income under the Income Tax Act 2007.

Under the old rules, unlike most employment income or benefits (such as salary and wages or the use of a company car), such share benefits were not subject to tax at source under either the PAYE or FBT rules. This meant employee recipients of a benefit under a share purchase agreement had to file an individual tax return including the benefit as income and pay the tax on those benefits themselves.

For employees unused to filing returns and paying tax directly to Inland Revenue, these obligations were not always well understood and imposed compliance costs.

These compliance costs could affect voluntary compliance and perceptions about the integrity of the tax system.

From Inland Revenue's perspective, the rules imposed a number of administrative costs. If an individual employee did not return the income from an employee share scheme, the Commissioner had to expend resources to collect a potentially small amount of tax from an individual.

In April 2015, officials released an issues paper, *Simplifying the collection of tax on employee share schemes*, which discussed the problems with the collection of tax on benefits received under an employee share scheme. The issues paper discussed changing the collection of tax on employment income received under a share purchase agreement using the PAYE system, the FBT rules or a separate withholding tax.

Inland Revenue considered a number of ways information about employee share benefits could be collected under the PAYE system and concluded that the employer monthly schedule (EMS) was the best option as the necessary information is captured in a timely and administratively efficient manner.

Application date

The new rules apply to income years beginning on or after 1 April 2017. Validation rules apply if employers have withheld and paid tax in a return of income in earlier income years.

Benefits treated as income under section CE 2 and received on or before 31 March 2017 should be returned by the employee.

Detailed analysis

The basic rule: what employee share benefits are covered by the new rules?

Under the Income Tax Act, employment income from an employee share scheme arises in the specific circumstances set out in section CE 2.

The obligation to report the value of a share benefit and the election to withhold PAYE is intended to be limited to situations when income arises under section CE 2(2) and CE 2(4) – situations when there is a transfer of shares to the employee or an associate of the employee.

Notwithstanding the new reporting obligation on employers, employees may continue to have their own filing obligations under the tax Acts.

Table 1 illustrates the likely range of responsibilities under the tax Acts for employers and employers to report and pay tax on income from an employee share scheme from 1 April 2017.

Table 1: When income arises from an employee share scheme and compliance obligations on the employer and employee

When income arises	Pre 1 April 2017	Post 1 April 2017
When the employee acquires shares – section CE 2(2)	Employee must report income and pay tax.	(i) Employer reports income for current employees. (ii) Employer may choose to withhold tax. (iii) Employee must pay tax if (ii) does not apply. (iv) Former employees must report and pay tax unless (ii) applies.
When employee disposes of rights to acquire shares to non-associates – section CE 2(3)	Employee must report income and pay tax.	Employee must report income and pay tax.
When an associate of the employee acquires shares – section CE 2(4)	Employee must report income and pay tax.	(i) Employer reports income for current employees. (ii) Employer may choose to withhold tax. (iii) Employee must pay tax if (ii) does not apply. (iv) Former employees must report and pay tax unless (ii) applies.
When an associate disposes of rights to acquire shares to non-associates – section CE 2(5)	Employee must report income and pay tax.	Employee must report income and pay tax.

Employers are reminded that section CE 7, definition of "share purchase agreement", means the employer may be responsible for reporting the value of the benefit received under a scheme offered by an associate of the employer if the benefit is in connection with the employee's employment or service.

Exceptions to the basic rule

The new reporting and payment rules have two important exclusions from the basic rule.

- ***Former employees:*** When an employer's PAYE obligations for an employee have ended or reasonably expected to have ended, any benefits accruing to the employee do not need to be reported by the employer. An employee is considered to be a person who receives or is entitled to receive a payment that would be a PAYE income payment (definition of "employee" in section 46(7) of the Tax Administration Act). Consider the examples below:
  - (i) Employee ceases employment from 1 October 2017. A cash bonus is paid to the former employee in March 2018. The employee has their incentive shares vested in November 2017. In this situation,

NEW LEGISLATION

the employer has an obligation to report the value of benefits received by the former employee.

(ii) Employee ceases employment from 1 October 2017. A cash bonus is paid to the former employee in March 2018. The employee has their incentive shares vested in April 2018. In this situation, the employer has no obligation to report the value of benefits received by the former employee. The employer can still choose to report and withhold tax on any benefit, however.

- ***Commissioner-approved schemes:*** Benefits received from an employee share scheme to which sections DC 12 and DC 13 of the Income Tax Act apply, known as "Commissioner-approved schemes", are not required to be reported. Under section CE 2(7) of the Income Tax Act, these benefits are treated as having a nil value.

Disclosing share benefits in the employer monthly schedule

Section CE 2 specifies the income year in which an employee derives a share benefit from an employee share scheme. For most employers, they will be responsible for reporting the value of the share benefit in the relevant employer monthly schedule (EMS) for which the share benefit accrues to the employee. For example, a share benefit that accrues to an employee in August 2017 would be included in the employer's EMS for the period ending 31 August, and due on 20 September 2017.

Special income recognition rule for "large" employers

For employers that have annual withholding obligations under the PAYE system of $500,000 or more (including employer superannuation contribution tax – ESCT), the disclosure of income from a share benefit has been modified. Under section RD 22(2), employers with this level of withholding are considered to be "large" employers, and new section CE 2(11) shifts the recognition of employment income to the next PAYE payment period. This rule applies whether or not the employer has withheld tax on the share benefit.

Under this new rule, income from the share benefit is shifted to the next PAYE payment period.

The implications for employers of this new rule are as follows:

- Recognition of share benefits that vest to the employee in the first half of the month is shifted to the second half of the same month and reported by the employer in the employer monthly schedule for that month.
- Recognition of share benefits that vest to the employee in the second half of the month is shifted to the first half of the following month and would be reported in the employer monthly schedule for that following month.

This rule does not affect the date that the share benefit should be valued. It does, however, affect when share benefits are reported to Inland Revenue. In some cases, such as when a benefit arises between the 16th and the last day of March, the rule shifts employee income into the next tax year. Inland Revenue may investigate instances where employees seek to exploit for personal advantage the deferred recognition of income for share benefits provided between 16 and 31 March if those share benefits are provided out of pattern with previous years or the decision to acquire shares is out of step with market conditions.

Affected employers should raise the effect of this new timing rule with their employees as it may affect their tax obligations for the income year and any associated social policy obligations and entitlements.

Withholding tax on employee share benefits under the PAYE system

If the employer elects to withhold under new section RD 7B, share benefits received from a share purchase agreement are treated as an "extra pay" for the purposes of section RD 7 of the PAYE rules. Such benefits are treated as a "PAYE income payment" under section RD 3. This ensures that the obligation to pay tax is transferred from the employee to the employer under the PAYE rules. The applicable rate of tax on the benefit will be determined by:

- section RD 10, if the employee has made an election with their employer to fix the rate of tax on extra pays; or
- section RD 17.

Selling shares to meet PAYE withholding

Employers who sell shares to meet an employee's tax liability will be acting on the employee's behalf. The tax treatment of the sale of shares to meet employees' tax obligations under the PAYE rules should not create a different outcome from the situation if the employee were to sell the shares themselves to meet a tax obligation. If the shares vested in the employee were held on capital account then, in principle, any share disposal to meet tax obligations (independent of whether tax is withheld under PAYE) should not result in those shares being "tainted" and treated as held on revenue account.

Compliance obligations on employees

The overarching purpose of the changes is to reduce the need for employees to complete an IR3 return or request a personal tax summary (PTS). For employees whose employers have elected to withhold PAYE, there should be no further tax to pay on that share benefit income. Employees may still have filing obligations if they have other income.

Employees whose employer has reported only the value of any share benefit will have tax owing and should arrange payment.

Employees who receive employment income from a share benefit by way of selling share rights to another party, or an associate disposes of the share rights, will continue to have obligations to report that income to Inland Revenue.

Former employees will need to be aware that their tax obligations may be affected by their employer's disclosure obligations and whether tax has been withheld on any share benefit that vests in the former employee.

Examples

Table 2 sets out the compliance implications for large and "small" employers in connection with the new rules for current employees.

Table 2: Examples

Facts	When employer reports benefit/pays tax	When treated as derived by employee	Tax outcome
Large employer • Share benefit vests in employee on 25 March 2018. • Employer elects to withhold tax under section RD 7B of the Income Tax Act.	• Employer records the benefit in the EMS for April, which is returned on 5 May. • Tax on the benefit is paid in the PAYE payment period due 20 April.	• Employee treats the income as derived in April 2018, the next tax year after the year in which the benefit is vested.	• Share benefit is treated as an extra pay under section RD 7. • Tax is withheld, assuming for the purposes of section RD 6, that the benefit was paid on 1 April on the basis of the value of the share benefit as at 25 March. • Employee has no obligation to separately report the income or pay tax as these have been done by the employer.
Large employer • Share benefit vests in employee on 25 March 2018. • Employer chooses not to withhold tax on the benefit.	• Employer records the benefit in the EMS for April, which is due on 5 May.	• Employee treats the income as derived in April 2018, the next tax year after the year in which the benefit is vested.	• Employee has no obligation to report the income separately but will need to pay tax on the value of share benefit.
"Small" employer • Share benefit vests in employee on 25 March 2018. • Employer elects to withhold tax under section RD 7B of the Income Tax Act.	• Employer records the benefit in the EMS for March, which is returned on 20 April. • Tax on the benefit is paid in the PAYE payment period due 20 April.	• Employee treats the income as derived in March 2018.	• Share benefit is treated as an extra pay under section RD 7. • Tax is withheld for the purposes of section RD 6 when the benefit was paid on 25 March using the value of the share benefit as at 25 March. • Employee has no obligation to separately report the income or pay tax as these have been done by the employer.
"Small" employer • Share benefit vests in employee on 25 March 2018. • Employer chooses not to withhold tax on the benefit.	• Employer records the benefit in the EMS for March, which is due on 20 April.	• Employee treats the income as derived in March 2018.	• Employee has no obligation to separately report the income but will need to pay tax on the value of the share benefit.

ELECTRONIC COMMUNICATIONS

CHANGES TO THE COMMUNICATIONS FRAMEWORK

Sections CB 8, CB 28, CD 34, CZ 25, DQ 4, EC 7, EC 46, EC 48, EG 1, EH 12 to EH 13, EH 44 to EH 46, EH 70 to EH 72, EI 1, EI 3, EI 8, EK 11 to EK 16, EW 15E, EW 26, EW 33B, EY 11, EY 49, EZ 23B, EZ 23BB, EZ 35, EZ 52B, FE 18, FM 4, GC 11, HB 13, LF 8, RC 8, RC 17 to RC 19, RD 30, RD 60, RD 61, RD 68, RM 12, RM 21, RP 17B, RP 19, RP 19B, RP 20, RP 21, YA 1, YA 4 and YZ 4 of the Income Tax Act 2007

Sections 14 to 14G, 15P, 17, 17A, 20, 20C, 20D, 21, 22, 25 to 32, 32A, 32B, 32D, 32E, 32I, 32M, 33AA, 33A, 34B, 38, 40, 41B, 43A, 44D, 46A, 58, 63, 80F, 80G, 82A, 83, 85C, 85E, 89F, 89H, 89I, 89M to 89 O, 91AAG, 91AAL, 91AAN, 91AAQ, 91E, 91EC, 99EE, 91EG, 91EI, 91FE, 91FG, 91GB, 91GD, 91GE, 91GG, 106, 108B, 120KE, 124A, 126, 130, 136, 137, 138B, 138R, 139BA, 141JA, 141L, 150D, 159, 177, 177A, 183CA, 183H, 184 and 226B of the Tax Administration Act 1994

Sections 2, 5, 8, 11, 14, 19, 19A, 25, 43, 51, 51B, 52, 53, 55 to 58, 60, 60B, 75, 75B, 78A, 78BA, 78E, 78F and 86 of the Goods and Services Tax Act 1985

Section 217 of the KiwiSaver Act 2006

Section 214 of the Student Loan Scheme Act 2011

The amendments remove references throughout the Income Tax Act 2007, the Goods and Services Tax Act 1985 and the Tax Administration Act 1994 that restrict interaction between taxpayers and Inland Revenue to paper-based transactions. In addition, where legislation requires the Commissioner, a taxpayer or a third party to *ask, request, inform, apply or notify*, these verbs have been defined to allow a freer interpretation of how those actions are to be undertaken when communicating on tax matters.

The amendments govern how all information must generally be communicated. They also provide general rules applicable to various methods of communication delivery. The delivery rules consolidate current practices and legal requirements and extend these to electronic communications putting emails, for example, on the same footing as paper letters delivered by post.

The intent is to remove any legislative barriers to receiving and sending electronic communications, as the necessary first step towards accommodating better use of digital services. This is achieved by both removing the outdated references and specifically providing for electronic communications within the new framework.

This framework will facilitate greater use of electronic and other new communication channels in step with the planned transformation of Inland Revenue's systems and business processes over the coming years. Inland Revenue's simplification programme aims to provide greater use of digital channels for increased convenience and reduction in compliance costs. The amendments provide the legislative framework for that change and preclude the need to amend the tax legislation to specifically cover the new channels, thus future-proofing the legislation.

Background

The Electronic Transactions Act 2002 (ETA) overrides other legislation and allows for the use of electronic forms of communication when written communication is otherwise required by legislation, if the recipient of the communication consents.

However communication under the tax legislation is primarily reliant on paper-based communications. Partly this reliance stems from uncertainty over the validity of electronic communications. This uncertainty arises from the fact that communications between taxpayers and the Commissioner are primarily governed by tax legislation which predates the widespread use of digital services.

As a result, many of the provisions refer to now outdated modes of communication and methods of communication delivery, including for example, requirements for communication to be provided "in writing" or delivered "by post".

The amendments seek to clarify any uncertainty arising from the interaction between the application of the ETA and the outdated requirements of the tax legislation.

Key features

New sections 14 to 14G of the Tax Administration Act 1994 establish the new communications framework for facilitating information flows between the Commissioner and a person, and between two persons where the tax legislation governs that interaction.

It establishes the general rules and standards for communications on tax matters in the Income Tax Act 2007, the Goods and Services Tax Act 1985 and the Tax Administration Act 1994. This includes a range of communications, such as a taxpayer making a phone call or submitting a GST registration application, or Inland Revenue issuing a notice or income statement to the taxpayer. It can also cover communications between third parties on tax matters such as the requirement for a bank to provide an investor with an RWT certificate, for example.

Because the framework is intended to apply broadly, so that the amendments do not unnecessarily disturb established practices or specific legislative requirements, new section 14E allows for some general overrides.

The framework provides for varying levels of communication formality, ranging from telephone conversations to formal notification requiring personal delivery. This allows for a variety of options for communications, which may range from low risk or importance to more restricted formal procedures for significant communications.

The amendments allow the Commissioner to permit new modes of communication, as systems are upgraded or new technologies emerge, without the need to extensively amend the legislation each time.

Broadly, new section 14F preserves the various elements of the previous sections 14 to 14C in relation to paper-based communications, and extends them to electronic modes of communication.

For electronic notices, the previous rules under section 14 to 14C have been maintained and extended to all electronic communications. This includes the consent override for electronic notices. Therefore, under these amendments the same rule would apply in circumstances when the Commissioner seeks to electronically "inform" a person, for example.

The majority of the remaining amendments simply replace existing terminology that refers to specific modes of communication – for example, the requirement for certain communications to be "in writing", with terminology corresponding to an appropriate tier in the communications framework.

There are also a number of amendments where a more significant redraft was required, to fit the requirements of the provision into the new framework. There is no broad intended change in the meaning of the provisions, other than changes to the form or format of the communication or its delivery consistent with the new framework.

Application date

The changes came into force on 2 June 2016, being the date of enactment.

Detailed analysis

Scope

The new communications framework intentionally applies broadly. It covers all communications between the Commissioner or Inland Revenue officers and other persons as well as communications between two or more other persons not involving the Commissioner when those interactions are governed by provisions of the tax legislation. An example may be the requirement for a company to provide a dividend statement to its shareholders.

The new rules preserve the precedence of prescribed forms and formats, and any specific requirements covered within particular sections. For example, it is not intended that the general nature of the framework would allow a taxpayer to file tax a tax return by sending the required information in an email, when no email return forms have been prescribed by the Commissioner.

In practical terms, this means that if paper forms have been prescribed but no electronic equivalents have been made available, taxpayers will be required to continue to file paper returns on prescribed forms until electronic equivalents are made available.

Similarly, with employer monthly schedules, for example, the specific requirements for these to be completed electronically are not intended to be relaxed as a result of the broad framework amendments in the new legislation.

New section 14E also preserves the overriding effect of double tax agreements and other inter-governmental treaties, by applying the new communication rules only to the extent to which they are not inconsistent with the application of the particular agreement.

Tiers of communication

New sections 14B to 14D create three distinct tiers to accommodate various modes of communication. These range from the informal (including oral communication) to electronic (whether by electronic filing through Inland Revenue's website, email or other electronic means) to more formal methods requiring paper or original documents. The tiers are signalled by the use of the following verbs – ask, request, or inform, apply or notify, and formally notify.

Each tier sets out the options available for a person providing information or communicating something in response to one of the aforementioned verbs. For example, a section requiring a person to inform the Commissioner of something can be satisfied by a telephone call, whereas a requirement to notify the Commissioner of something would require a document, either electronic or printed.

Each tier also allows for the Commissioner to permit new modes of communication. This allows for the framework to be expanded over time. Once a new channel becomes available for use, it would be sufficient to publish a notice that this new option is available to those who wish to use it, without the need for a separate legislative amendment.

New sections 14F and 14G establish delivery rules which ensure that communications, in particular electronic communications, are delivered only to appropriate contact addresses. This is important to protect Inland Revenue and taxpayers from the risk of misdirected communications, and to guard against an inadvertent breach of the tax secrecy provisions.

For example, this amendment ensures that if the Commissioner sends a notice to a corporate taxpayer via email that it is sent to a person who is acting for the corporate taxpayer in relation to that matter. This ensures that the notice is not treated as "delivered" if it is simply sent to a generic email box at that corporation.

In addition, the previous rules allow for the Commissioner to post a notice to the recipient's current or last known address. The new rules extend this to allow the Commissioner to send a notice via email to the recipient's current or last known email address.

The amendments preserve the Commissioner's ability to send an electronic notice to the recipient without first obtaining the recipient's consent, as required by the ETA. For Inland Revenue, which processes large volumes of communication, this is important in order to ensure the electronic communication is workable as an alternative to paper-based communications.

Integrity and confidentiality

Inland Revenue will aim to always preserve integrity and confidentiality in its communications.

Where possible and practical Inland Revenue staff will seek, from each individual recipient, their consent for electronic communication. This may not always be feasible, particularly for large groups of recipients receiving a generic batch email notice, or in circumstances when the email address is the only contact address available for the recipient as they are overseas-based, for example.

In the interests of maintaining confidentiality and integrity, the amendment preserves the condition that the Commissioner may not send the electronic notice if there are reasonable grounds to suppose that the notice will not be received. This requirement is maintained and extended to all forms of electronic communications by the Commissioner.

The intended result of these amendments is to ensure that electronic communications are not unnecessarily restricted compared with paper equivalents sent by post.

Intent

Finally, as discussed above, these amendments are not intended to allow for filing tax returns by email, unless that service is made available by the Commissioner either by direct agreement with the taxpayer or generally consented to by a notice on the Inland Revenue website, for example.

This restriction on the receipt of electronic communication by Inland Revenue is necessary to protect taxpayers from misdirected communications falling outside the net – for example, tax returns being sent via email and never being picked up for processing.

However, if the Commissioner has made a specific Inland Revenue email contact address for a particular purpose available on the website, this amendment does not affect the ability to use this address to send emails to Inland Revenue for that specific purpose.

Section 17

Section 17 provides a broad obligation for every person to provide information or documents to the Commissioner when required by the Commissioner. The title of the section describes the section as "information to be furnished on request of Commissioner". However, section 17 does not set out a manner for how a request for information must be communicated.

Operational statement (OS 13/02) outlines the procedures Inland Revenue will follow when issuing section 17 notices. It clarifies that although Inland Revenue staff will usually request information and documents without expressly relying on section 17, as this fosters a spirit of reasonableness and mutual cooperation, when information is not provided voluntarily or in a timely manner the Commissioner is able to use section 17 to demand the information by issuing a notice. The OS clearly states that when information is demanded under section 17, a notice will be issued in writing.

Officials have undertaken to further consider whether an amendment to section 17, to formalise the Commissioner's stated practice, is nonetheless desirable.

Defined terms

Section YA 1 of the Income Tax Act 2007 has been amended to include definitions of apply, ask, inform, notify and request. The existing definition of "notify" has been updated.

ACCEPTING ELECTRONIC SIGNATURES

Sections 13, 13B and 40 of the Tax Administration Act 1994

Changes have been introduced to allow for documents to be "signed" with a digital or electronic signature. This includes all information provided to the Commissioner, including for example, electronically submitted tax returns or application forms.

Once operational, the amendment will eliminate the need for handwritten signatures when an acceptable and valid electronic signature is used instead. This has a number of positive impacts for the use of digital services, including improving customer interactions and lower compliance costs.

The amendment does not mandate the use of electronic signatures, and valid handwritten signatures will continue to be acceptable.

Background

The Tax Administration Act 1994 requires handwritten signatures on paper forms. From a legal viewpoint, a person's signature is the visual representation of an intention to be legally bound by the information contained in the signed document. So, for example, a taxpayer's signature on a tax return both identifies them as the person signing the return and also evidences that taxpayer's certification that the contents of the return are true and correct.

From a technological perspective, an electronic signature can inextricably link a particular version of a document to the sender or a point in time, and can be used to indicate any subsequent alterations to the document or give information about the identity of the sender.

As part of Inland Revenue's focus on simplifying processes by improving digital services, this amendment will allow tax agents and taxpayers to submit electronically signed documents to Inland Revenue. The amendment will also reduce compliance costs associated with current processes. For example, tax agents filing their client's returns electronically will no longer have to first mail out a paper copy of the return for the client to hand sign. Instead, the entire process could become paperless.

Key features

The Electronic Transactions Act 2002 allows for an electronic signature to satisfy a legal requirement for a document to be signed, where the recipient of the document consents to the use of the electronic signature.

The amendment to section 13 of the Tax Administration Act 1994 provides the necessary consent for the use of valid electronic signatures on information provided to the Commissioner. It also brings the Tax Administration Act 1994 into line with the Electronic Transactions Act 2002.

Because of the legal significance of a signature, it is important that the use of electronic signatures is both secure and reliable for both taxpayers and Inland Revenue.

Section 13B allows for the Commissioner to set criteria and technical requirements for the use of electronic signatures.

A draft of these criteria and technical requirements was released for feedback in June 2016 and is expected to be finalised and published by the end of the year.

Section 13B also allows for the Commissioner to place reasonable reliance on the user of the electronic signature. This means that when a person provides an electronically signed document, unless there are reasonable grounds to suppose otherwise, the document will be treated as signed by that person.

Type of electronic signatures accepted

The amendment is intended to be flexible to allow for the Commissioner to respond to new technologies. For this reason the new section does not list all of the acceptable technologies or ways in which the technologies can be used; this detail will be covered in the guidelines.

The term "electronic signature" is defined in the Electronic Transactions Act as a method used to identify a person and to indicate that person's approval of that information. This definition is very broad and therefore electronic signatures can arguably range from a name typed into a document, a pin number, the ticking of an internet check box or even a scanned image of a hand-written signature. The combination of the broad definition of "electronic signature" and the requirement for guidelines, will allow the Commissioner to approve the use of new technologies and to accept the use of new forms of electronic consent, by adding to the guidelines without the need for further legislative change.

Application date

The changes came into force on 2 June 2016, being the date of enactment.

INFORMATION SHARING

RELEASE OF GENERAL INFORMATION

Section 81(4)(j) of the Tax Administration Act 1994

Section 81(4)(j) of the Tax Administration Act 1994 has been amended to allow the Commissioner to release general information such as statistical data without needing to seek approval from the Minister of Finance. The tests required to safeguard the privacy of taxpayers when releasing general information remain but are transferred from the Minister of Finance to the Commissioner.

Background

Previously, under section 81(4)(j) of the Tax Administration Act 1994, the Commissioner could release general information if it did not identify a taxpayer and if the release was approved by the Minister of Finance.

The Minister had to be satisfied that the release was in the public interest and that the information was readily available and could be communicated easily.

The new legislation continues the three tests previously contained in section 81(4)(j) that transfers the power to release from the Minister to the Commissioner. The test for whether the information is readily available and can be communicated easily has been replaced with a reference to the five considerations already legislated in section 81(1B)(b)(i)-(v). These considerations look at the effects on integrity, compliance, the impact on individuals or businesses, the resources available and whether the information is already publicly available.

The reference to an "authorised person" has also been removed as this is no longer needed when the Commissioner is making the release.

Key features

New section 81(4)(j)(i) requires that the release must be in the public interest.

New section 81(4)(j)(ii) ensures that the information being released does not identify any taxpayer.

New section 81(4)(j)(iii) refers back to the five considerations listed in section 81(1B)(b)(i)-(v), which inform whether the release is "reasonable".

Application date

The changes came into force on 2 June 2016, being the date of enactment.

ENFORCEMENT OF EMPLOYMENT STANDARDS

Sections 81(4)(eb) and (8)(c) of the Tax Administration Act 1994

A consequential amendment has been made to section 81 of the Tax Administration Act 1994 to allow Inland Revenue to share information with the Ministry of Business, Innovation and Employment, and with WorkSafe. The amendment allows information to be shared for the enforcement of employment standards. This amendment is a consequence of recent changes to workplace legislation, contained in the Health and Safety at Work Act 2015, and in amendments to the Employment Relations Act 2000.

Background

Wage and time records are key tools which enable labour inspectors to investigate possible breaches of employment standards assisting with targeting non-compliance and investigating cases. Sometimes wage and time records are absent, inaccurate or falsified.

The amendment allows Inland Revenue records to support the goal of the Ministry of Business, Innovation and Employment, in the Employment Relations Act 2000, to facilitate the enforcement of employment standards. Inland Revenue records should enable labour inspectors to identify and proceed against a breach.

Where health and safety breaches are concerned, the aim is narrower. Inland Revenue records will assist WorkSafe in identifying relevant entities and employer/employee relationships to assist it with enforcement under the new Health and Safety at Work Act 2015.

Under section 81(1) of the Tax Administration Act 1994, Inland Revenue officers must maintain secrecy. There was no specific exception in section 81(4) under the previous rules to allow the sharing of entity information for the purposes of enforcing employment standards.

Key features

Inland Revenue will share information with the Ministry of Business, Innovation and Employment, and WorkSafe, to facilitate and place greater emphasis on the enforcement of employment standards. Inland Revenue records should enable inspectors to identify and proceed against a breach.

In relation to health and safety breaches, Inland Revenue records will assist WorkSafe in identifying relevant entities and employer/employee relationships to assist it with enforcement.

Application date

The amendment came into force on 2 June 2016, being the date enactment.

SHARING BIOMETRIC INFORMATION

Section 81(4)(nb) of the Tax Administration Act 1994

An amendment has been made to section 81 of the Tax Administration Act 1994 to allow Inland Revenue to share biometric information with other agencies. This allows research to be undertaken to determine whether Inland Revenue's biometric information can be used to identify and verify callers to the other agency.

Background

Approximately 1.3 million taxpayers have registered to use their voiceprint to validate their identity when they contact Inland Revenue. The technology is known as voice biometrics.

Under section 81(1), Inland Revenue officers must maintain secrecy. Under the previous rules, when a caller phoned another government agency, which also used voice biometrics, the voiceprint held by the other agency could not be compared and matched to the voiceprint held by Inland Revenue.

To undertake the match, an amendment to section 81 was necessary to enable Inland Revenue to share the voiceprint information.

Key features

An amendment has been made to section 81(4) to allow for the sharing of information with other agencies, to allow for the verification and identification of callers to the other agencies. The other agency is required to obtain consent from the customer before the verification.

Before sharing the information with an agency, Inland Revenue is required to notify the Minister of Revenue that biometric information will be shared with the agency specified.

Application date

The amendment came into force on 2 June 2016, being the date of enactment.

KIWISAVER MEMBERSHIP

KIWISAVER – INFORMATION SHARING

Section 220B of the KiwiSaver Act 2006

The amendments seek to simplify the administration of the KiwiSaver scheme rules under the KiwiSaver Act 2006 by allowing Inland Revenue and KiwiSaver fund providers to share certain information about KiwiSaver members for account maintenance purposes.

Background

Under section 220B of the KiwiSaver Act 2006, information sharing between Inland Revenue and KiwiSaver fund providers for KiwiSaver account maintenance purposes was previously limited to sharing email and address contact details with scheme providers for account maintenance purposes. An extension to those rules now allows Inland Revenue to also share a KiwiSaver member's telephone number with a fund provider, allowing the provider to communicate more effectively with its members.

In addition, Inland Revenue can now supply a scheme provider with certain information, including the names of scheme members who have transferred out of their scheme and the name of the member's new provider and vice versa. This was not previously possible under the rules.

Inland Revenue is in the unique position of knowing a member's contact details and transfer history and also has an on-going relationship with all scheme providers. Where there are differences in account information held by the parties, Inland Revenue can help facilitate reconciliation and resolution of administration issues.

Key features

Sharing information on KiwiSaver fund transfers

Section 220B of the KiwiSaver Act 2006 has been extended to allow Inland Revenue and fund providers to share certain information about members who have transferred out of one scheme and into another, including:

- the name of the member;
- their contact details;
- the name of the member's new provider; and
- the member's tax credit information.

The amendment is intended to help improve service to KiwiSaver members.

Sharing KiwiSaver member contact details

The amendment expands the current information-sharing provision under section 220B of the KiwiSaver Act 2006 to allow a broader range of contact details to be shared between Inland Revenue and KiwiSaver fund providers. The new definition encompasses not just the member's email and address, as the provision previously did, but also a telephone number and any future mode of communication related to the member that emerges as technologies develop.

Application date

The amendment came into force on 2 June 2016, being the date of enactment.

MINORS OPTING OUT OF KIWISAVER

Sections 10, 18, 59A, 59B, 59C, 59CB and 59D of the KiwiSaver Act 2006

A new provision allows minors who have been incorrectly enrolled into KiwiSaver via their employers to opt out before their 19th birthday. This provides some protection to minors who may not know that they have been enrolled and want to exit the scheme.

Members who opt out of KiwiSaver under this new provision would have the contributions they had made returned to them, their Government contributions returned to the Crown, and their compulsory employer contributions returned to their employers.

Background

KiwiSaver is a workplace savings scheme open to all New Zealand residents under the age of 65. People can join KiwiSaver by contracting directly with a KiwiSaver

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provider, electing to join through their employer, or through automatic enrolment when they start a new job.

Minors (children under the age of 18) can only join KiwiSaver if they have the consent of all of their legal guardians (if under 16) or co-sign with a guardian (if 16–17). These restrictions recognise that joining KiwiSaver, which locks in funds until the member is 65, is a serious undertaking and minors should be protected while they are vulnerable and still supported by their guardian.

For this reason, minors can only join KiwiSaver by directly contracting with a KiwiSaver provider. These providers are best equipped to receive and review the necessary parental consent. Minors are not able to elect to join KiwiSaver through their employer, and are not subject to the auto-enrolment rules.

Unlike a person over 65 or a non-resident, a minor is entitled to join KiwiSaver, but only by contracting directly with a provider. The previous provisions available to reverse an invalid enrolment were only applicable to members who never should have been enrolled at all, not members who were enrolled through the wrong mechanism.

Key features

- New section 50CB allows members who have incorrectly been enrolled in KiwiSaver when they were minors to opt out of KiwiSaver up until their 19th birthday if:
  - they are aged under 16 and they have the consent of one of their guardians; or
  - under their own authority if they are 17–19 years old.

  This opt-out is not available if the member has been correctly enrolled into KiwiSaver either as a minor or an 18 year old.
- New section 59D extends the rules that apply to invalid memberships for non-residents and over-65s to incorrectly enrolled minors.

Application date

The changes came into force on 2 June 2016, being the date of enactment.

REMEDIAL MATTERS

FIF EXEMPTION SIMPLIFICATION FOR ASX

Sections CX 55 and EX 31 of the Income Tax Act 2007

The new Act amends the exemption contained in section EX 31 of the Income Tax Act 2007, which operates to exclude certain share investments listed on the Australian Stock Exchange (ASX) from attribution under the foreign investment fund (FIF) rules.

Previously the ASX exemption broadly applied to shares in certain Australian-resident companies that were listed on an approved index under the ASX Operating Rules.

The requirement that the shares must be listed on an approved index created considerable uncertainty for investors and administrative costs for Inland Revenue as companies move on or off an approved index from period to period.

To relieve the uncertainty, as well as reduce the administration cost for Inland Revenue, the Act amends the exemption to apply to shares in companies listed on the ASX irrespective of whether they are also listed on an ASX-approved index.

Background

Investments that qualify for the ASX exemption are not taxed under the FIF rules but are treated in the same way as New Zealand investments (that is, they are taxable on dividends if the investment is held on capital account or on dividends and realised gains if held on revenue account).

Dividend-only taxation, rather than an attribution method under the FIF rules, is a reasonable approach for Australian-resident listed companies because the Australian tax system encourages dividend distributions, as does the New Zealand tax system.

The previous drafting of section EX 31(2)(c) restricted the application of the ASX exemption to shares included in an index that was an approved index under the ASX Operating Rules.

The broadest equity index on the ASX for ordinary and preferred equity stocks is the Standard & Poor's All Ordinaries index, which comprises the top 500 securities measured by market capitalisation. This index is re-balanced regularly so that it includes what is, at the re-balance date, the top 500 listed companies based on capitalisation (that is, share price multiplied by the number of shares). As a result, companies can drop off or appear on the index from time to time.

The periodic re-balancing of indexes, such as the All Ordinaries index, creates uncertainty for taxpayers as the tax treatment of the same investment changes with the re-balancing of the index from one period to the next.

The amended ASX exemption, which applies to shares in all companies listed on the ASX irrespective of whether they are also listed on an ASX approved index, relieves the uncertainty and reduces the administration cost for Inland Revenue.

It also better supports the policy that the ASX exemption is intended to capture the majority of New Zealanders' FIF investments in Australia.

This amendment makes it easier for taxpayers to self-assess their compliance with the ASX exemption, as it is much simpler to check whether share investments are listed on the ASX (this information is publicly available) rather than listed on an approved index (information generally only available from specialist market information providers such as Bloomberg).

The amendment also allows for more accurate and timely information access for taxpayers, as the ASX listings are updated more regularly than indexes that are typically balanced quarterly.

Improved certainty and information accuracy is likely to reduce compliance time and costs for affected taxpayers.

Key features

Section EX 31(2)(c) has been amended to remove the requirement that shares must be listed on an approved index under the ASX Operating Rules, and replaces this rule with a requirement that the shares are in a company listed on the ASX.

As a result, all shares in companies listed on the ASX that meet the remaining criteria contained in section EX 31 – including the requirement that the company is Australian tax-resident and maintains a franking account, for example – will qualify for the exemption whether or not these companies are also listed on an approved ASX index.

Section CX 55 has been amended to align with the new criteria in section EX 31 to ensure that taxpayers who are investing through a fund are not tax-disadvantaged compared with those investing directly.

Application date

The changes come into force from the beginning of the 2017–18 income year.

SUPPORTING CO-LOCATION

Sections 81 and 87 of the Tax Administration Act 1994

To increase efficiency in the delivery of government services and to achieve cost reductions across the public service, government agencies are increasingly co-locating their staff and services. In this situation, Inland Revenue employees are exposed to the risk of inadvertently disclosing taxpayer information to other government agencies at the co-located sites in the normal course of duties. Such disclosures could be a breach by the relevant employee of the secrecy provisions in the Tax Administration Act 1994, and they could face severe penalties. This acts as a barrier to co-locating with other government agencies. The amendment supports co-location by providing that an employee does not breach the secrecy provision when they unintentionally disclose tax secret information in a co-located environment, and they have taken reasonable care in the place and conditions to avoid the disclosure.

Background

The secrecy provisions in the Tax Administration Act 1994 do not allow Inland Revenue employees to pass taxpayer information on to other government agencies except in limited, defined circumstances. There are severe penalties for any Inland Revenue employee who knowingly breaches secrecy provisions.

In line with Government policies, Inland Revenue is co-locating with other government agencies in some offices and call centres across New Zealand. While some co-locations have been achieved while still maintaining physical separation between agencies (which minimises secrecy risks) such separation is not always possible – for example, in post-earthquake Christchurch, co-locations are "open-plan".

Inland Revenue employees are exposed to the risk of inadvertently disclosing taxpayer information to other government agencies at co-located sites. This can arise if the other agency's employees overhear conversations (between Inland Revenue staff discussing a case, and conversations with taxpayers themselves), or if they happen to see Inland Revenue correspondence, or as a result of shared office facilities and equipment.

Given that further co-location is planned (including in open-plan sites) this gives rise to the issue of proximity with other government employees and inadvertent disclosure of taxpayer information with those employees. It is considered that no amount of training, best practice guidelines or adopted behaviour is likely to adequately address the substantial risk of Inland Revenue employees inadvertently disclosing taxpayer information to other government employees in a co-located environment.

Key features

Under the amendment to section 81 of the Tax Administration Act 1994, an Inland Revenue employee does not breach the secrecy provision if the employee unintentionally discloses taxpayer secret information under the following circumstances:

- to another Inland Revenue employee or contractor or an employee of another government agency subject to the same secrecy standards;

- in a place in which the Commissioner of Inland Revenue expects Inland Revenue officers to perform their duties; and
- takes care that is reasonable in the place and conditions to prevent the receipt of the communication by the recipient.

The amendment only protects the employee when the disclosure is unintentional. Unless otherwise excused under section 81, an Inland Revenue employee will breach section 81 if they intentionally disclose information to another Inland Revenue employee or an employee of another government agency.

Further, the amendment only applies when the disclosure is to an Inland Revenue employee or contractor, or an employee of another government agency (who has signed a secrecy certificate under section 87 of the Tax Administration Act 1994). A person who has signed the secrecy certificate is subject to the same penalties for disclosing taxpayer-secret information as an Inland Revenue employee. As a result, the amendment to section 81 aligns the approach to co-located staff working in open-plan areas, with the approach to Inland Revenue staff working in open-plan areas. In other words, the amendment applies the same high-level of protection for tax-secret information to co-located areas as is imposed in open-plan Inland Revenue areas.

The amendment only applies to places where the Commissioner expects Inland Revenue officers to perform their duties. This provides the Commissioner of Inland Revenue with some flexibility over the types of co-locating arrangements that are entered into.

The Inland Revenue officer must take care "that is reasonable" in the place and conditions to prevent the receipt of the communication by the recipient. This means the conditions of the co-location work environment will need to be taken into account in determining what level of care is reasonable. The Commissioner of Inland Revenue is under an obligation to use her best endeavours to ensure the locations and conditions of secrecy at the co-located location protect the integrity of the tax system (including the right of taxpayers to have their affairs kept confidential).

The amendment also confirms that employees of a government agency, required by their employer to perform their duties in a co-located environment, can sign a secrecy certificate under section 87.

Application date

The amendments came into force on 2 June 2016, being the date of enactment.

SPECIAL TAX CODES

Sections 3 and 24 of the Tax Administration Act 1994

Legislative amendments have been made to enable the Commissioner to provide special tax code certificates directly to the Ministry of Social Development instead of providing the certificate to the recipient of New Zealand Superannuation or a veteran's pension and requiring them to send it on to the Ministry.

Background

Special tax codes are personalised PAYE deduction rates that taxpayers can provide to their employer to help the taxpayer avoid an under- or over-payment of tax at the end of the year.

When a person who receives New Zealand Superannuation or a veteran's pension applies to Inland Revenue for a special tax code, the legislation requires Inland Revenue to supply the tax code certificate to the recipient who then is required to provide it to the Ministry of Social Development. This imposes compliance costs on recipients and potentially delays the application of the correct tax code deduction rate.

Key features

A number of amendments have been made to sections 3, 24B, 24F, 24H, and 24I and a new section 24IB has been inserted in the Tax Administration Act 1994. These amendments:

- provide that when an employee asks for a special tax code, they must ask the Commissioner to apply the special tax code to either:
  - their New Zealand Superannuation or veteran's pension income; or
  - their other employment income from one or more employers.
- provide that when the Commissioner issues a special tax code for the employee, the Commissioner must, as soon as practicable, provide a special tax code notification to the responsible department;
- require that when the responsible department receives a special tax code notification in relation to an employee's New Zealand Superannuation income or veteran's pension income, the notification shall apply to payments made after the date of the notification;
- make it clear that a special tax code can apply to the employee's employment income from one or more employers;
- draw a distinction between a special tax code certificate, which the employee provides to their employer and

a special tax code notification, which Inland Revenue provides to the Ministry of Social Development;

- clarify that the "no notification" tax code is a code that the employer applies when the employee does not provide the employer with a tax code. Previously, the "no declaration" tax code was incorrectly included in a list of codes that the employee could advise the employer of; and
- amend the definition of "responsible department" in section 3 for the purposes of sections 24F to 24IB, to mean the department for the time being responsible for the administration of the Social Security Act 1964.

Application date

The amendments came into force on 2 June 2016, being the date of enactment.

ALLOWING DEDUCTIONS TO BE MADE FROM WAGES OR SALARY

Section 157 of the Tax Administration Act 1994, section 43 of the Goods and Services Tax Act 1985, section 156 of the Child Support Act 1991, section 50 of the Student Loan Scheme Act 2011 and section 12L of the Gaming Duties Act 1971

The amendments allow Inland Revenue to require an employer to make additional deductions from an employee's salary or wages when the employee has defaulted on tax, child support, gaming duty or student loan repayment obligations, even when Inland Revenue does not hold a valid address for the employee. These additional deductions have been prevented when the defaulter has failed to notify a change of address so that Inland Revenue has been unable to advise them of intended additional deductions. The changes correct that administrative problem so the proper intent of the rules – that people in default of their tax and social policy obligations should make restitution – are realised.

Background

Deductions from wages or salary are one of the most efficient means of debt collection available to Inland Revenue. If additional deductions are imposed soon after a default is detected they have the effect of limiting the growth of late payment interest or penalties, or use-of-money interest, as well as ensuring early recovery of the debt.

The law requires Inland Revenue to issue a notice to an employer when it requires deductions to be made from an employee's wages or salary. Under the previous rules it also required Inland Revenue to provide a copy of the notice to the employee at the same time.

This requirement for the copy posed a problem when people did not advise Inland Revenue promptly of a change in their address, as the returned correspondence creates an "invalid" address and prevents the issue of further correspondence to that address. This has meant that although Inland Revenue had confirmation of the person's employer, it could not issue a notice to make deductions from the person's wages or salary because it could not issue the copy to the employee.

Issuing a copy of the notice to a person's employer to be passed on was considered but that would not create any incentive for the person to update their address details and would have imposed compliance costs on employers.

Key features

When a defaulting taxpayer, liable parent, gaming machine operator or student loan borrower is already having PAYE, child support, gaming duty or student loan repayment deductions made from their salary or wages, Inland Revenue is now able to require their employer to make additional deductions from the person's wages or salary to recover outstanding taxes, child support, gaming duty or student loan repayments, without concurrently notifying the employee.

This has been achieved through amendments to similar provisions in each of the following:

- The Tax Administration Act 1994
- The Goods and Services Tax Act 1985
- The Child Support Act 1991
- The Gaming Duties Act 1971
- The Student Loan Scheme Act 2011.

A person's right to respond to or challenge the assessment that led to the notice will have been protected through earlier communications with the person.

The changes in detail are as follows:

Tax Administration Act 1994

Section 157 has been amended by replacing subsection (5) with a new subsection which maintains the general requirement for Inland Revenue to issue a copy of a deduction notice to the affected taxpayer. However, new subsection (5B) allows Inland Revenue to dispense with the requirement to send a copy to the taxpayer at the time the deduction notice is sent to the taxpayer's employer for deductions to be made from the taxpayer's wages or salary, if Inland Revenue has first made reasonable enquiries to find a valid address for the taxpayer.

Goods and Services Tax Act 1985

Section 43 has been amended by replacing subsection (5) with a new subsection which maintains the general requirement for Inland Revenue to issue a copy of a deduction notice to the affected taxpayer. However, new subsection (5B) allows Inland Revenue to dispense with the copy to the taxpayer at the same time the deduction notice is going to the taxpayer's employer for the deductions to be made from the taxpayer's wages or salary, if Inland Revenue has first made reasonable enquiries to find a valid address for the taxpayer.

Child Support Act 1991

Section 156 has been amended by inserting new subsection (3), which allows Inland Revenue to dispense with the copy of the deduction notice to the liable parent at the same time the deduction notice is going to the liable parent's employer for the deductions to be made from the liable parent's wages or salary. New subsection (3) requires Inland Revenue to first make reasonable enquiries to find a valid address for the liable parent.

Student Loan Scheme Act 2011

Section 50 has been amended by inserting new subsection (2B), which allows Inland Revenue to dispense with the copy of the deduction notice to the student loan borrower at the same time the deduction notice is going to the borrower's employer for the deductions to be made from the borrower's wages or salary. New subsection (2B) also requires Inland Revenue to first make reasonable enquiries to find a valid address for the borrower.

Example

John fell behind in student loan repayments when he changed employer. His new employer is deducting PAYE and, because John has provided the correct tax code, has started making standard student loan deductions. John was advised that he would need to make additional payments to cover the arrears. However, despite reminders, including an alert message to his email address, John has not made the additional payments. The final debt notice sent to John has been returned to Inland Revenue indicating he is no longer at the given address. Because Inland Revenue knows where John is working it is able to issue a notice to John's employer requiring additional deductions to be made until the arrears are fully recovered.

If John questions his employer about the additional deductions he will be advised to contact Inland Revenue. When he does so, Inland Revenue will be able to update John's contact details.

Gaming Duties Act 1971

Section 12L has been amended by inserting new subsection (4B), which allows Inland Revenue to dispense with the copy of the deduction notice to the gaming machine operator at the same time the deduction notice is going to the operator's employer for the deductions to be made from the operator's wages or salary. New subsection (4B) also requires Inland Revenue to first make reasonable enquiries to find a valid address for the operator.

Application date

The amendments came into force on 2 June 2016, being the date of enactment.

EXEMPTIONS FROM REQUIREMENT TO APPLY FOR CHILD SUPPORT

Sections 9 and 122 of the Child Support Act 1991

Section 9 of the Child Support Act 1991 has been amended to exempt some social security beneficiaries from the compulsory requirement to apply for child support. The grounds for exemption include: when there is insufficient evidence to establish paternity, there is risk of violence, or similar compelling circumstances to warrant an exemption.

These grounds reflect exemptions from penalties for failure to apply for child support in the Social Security Act 1964. The law change better aligns the two pieces of legislation and provides greater certainty for beneficiaries on their legal requirement to apply or not for child support.

Background

The Social Security Act 1964 was amended in 2005 to increase the penalty that applied to specified social security beneficiaries for failure to apply for child support and to introduce new exemptions from that penalty. At the time, the responsible Minister indicated that if sole parents could prove such things as violence against them or their children, or it is proper that they be exempted because they are refugees for example, they would not be required to establish paternity or apply for child support. However, the legislative changes in 2005 only exempted beneficiaries from the penalty for not applying for child support – it did not amend the compulsory requirement for beneficiaries to apply in the Child Support Act 1991.

Key features

Sole parent beneficiaries and recipients of the Unsupported Child's Benefit are required to apply for a formula assessment of child support unless they are already in the child support system, do not expect to be a receiving carer, or receive Jobseeker Student Hardship payments.

Further exemptions have been introduced. The grounds for the further exemptions reflect the grounds in section 70A of the Social Security Act 1964 that exempt beneficiaries from penalties for a failure to apply for child support.

Under subsection 9(5B) of the Child Support Act 1991 a social security beneficiary is not required to apply if the chief executive of the Ministry of Social Development is satisfied that one of the following applies:

- There is insufficient evidence to establish who is, in law, the other parent.
- The beneficiary or any of the beneficiary's immediate family (and the qualifying child's immediate family where applicable) would be at risk of violence if the beneficiary makes an application for formula assessment or takes steps to make an application for formula assessment.
- The potential liable parent died before an application for a social security benefit was made (that is, the other parent died and the carer was widowed).
- The qualifying child was conceived as a result of incest or sexual violation.
- There is another compelling circumstance for the beneficiary not to apply.

Application date

The amendments came into force on 2 June 2016, being the date of enactment.

Detailed analysis

Section 9: Application for child support

Section 9 of the Child Support Act 1991 requires all social security beneficiaries[1] who are sole parents, and all recipients of an Unsupported Child's Benefit, to apply for child support at the time they apply for a benefit. The current exemptions are:

- applicants do not expect to meet the definition of "receiving carer", that is they do not expect to provide at least 35 percent of the ongoing daily care of the child; or
- they are already a receiving carer in the child support system.

Under new subsection 9(5B) a social security beneficiary is also not required to apply for a formula assessment in relation to a parent of a child if the chief executive of the department that is responsible for the administration of the Social Security Act 1964 at that time is satisfied that one of the following conditions apply:

- There is insufficient evidence to establish who in law that parent is.
- The beneficiary or any of the beneficiary's immediate family (and the qualifying child's immediate family where applicable) would be at risk of violence if the beneficiary makes an application for formula assessment or takes steps to make an application for formula assessment.
- The parent died before an application for a social security benefit was made (that is, the other parent died and the carer was widowed and receives a sole parent benefit).
- The qualifying child was conceived as a result of incest or sexual violation.
- There is another compelling circumstance for the beneficiary not to apply.

If a person who does not meet these exemptions fails to apply, the Child Support Act 1991 says they will be subject to a penalty under section 70A of the Social Security Act 1964. The two agencies (the Ministry of Social Development and Inland Revenue) can share information to determine which beneficiaries have failed to apply and therefore are subject to the penalty.

Section 70A also indicates which beneficiaries are subject to the penalty and the grounds for which they may be exempt (if the chief executive is satisfied that specified criteria for exemptions apply). The criteria for exemption from the penalty are any of the following:

- There is insufficient evidence available to establish who is in law the other parent.
- The beneficiary is taking active steps to identify who is in law the other parent.
- The beneficiary or any of the beneficiary's children would be at risk of violence if the beneficiary carried out or took steps to carry out any of the required actions (including making an application for child support).
- There is a compelling circumstance for the failure or refusal to carry out the required actions and, even if the beneficiary did carry out the actions, there is no real likelihood of child support being collected in the foreseeable future from the other parent of the other parent's estate.
- The child was conceived as a result of incest or sexual violation.

Subsections 9(6), (6B), (7) and (8) and 122(2) of the Child Support Act 1991

Subsections 9(6), (6B), (7) and 122(2) of the Child Support Act 1991 have been updated to reflect the application of section 70A of the Social Security Act 1964. That is, that a penalty for failure to apply for child support only applies

[1] Section 2 of the Child Support Act 1991 defines who is a beneficiary for the purpose of child support. Recipients of Student Allowance and Jobseeker Support Student Hardship are not defined as beneficiaries.

when the beneficiary is receiving a sole parent payment (so does not apply to a recipient of an Unsupported Child's Benefit), and also does not apply if the parent is undertaking steps to establish paternity.

Subsection 9(8) of the Child Support Act 1991 provides definitions of "sole parent" and "violence" for the purpose of section 9. The definitions are the same as those used in section 70A of the Social Security Act 1964.

Rewrite of the Social Security Act 1964

Note: The Government has introduced a Social Security Legislation Rewrite Bill 2016. This bill proposes to repeal and replace the Social Security Act 1964 and is also proposing to rename the Unsupported Child's Benefit from July 2017. Readers should be aware names and section references in this *Tax Information Bulletin* item may become out of date if the bill is enacted.

CHANGES TO PERSONAL TAX SUMMARY REFUND THRESHOLDS

Section RM 5(1) of the Income Tax Act 2007 and sections 80H(3) and 80F(2) and (3) of the Tax Administration Act 1994

When a salary or wage earner (not a business taxpayer) needs an end-of-year assessment, they are issued (or can request) a personal tax summary (PTS). If the result is a refund, they can confirm the PTS and the refund will be issued. Under the previous legislation if the refund was less than $200 and they did not confirm their PTS, the refund would be released automatically after 30 days.

The new legislation reduces the time delay and increases the threshold so credits will be released 15 days after the PTS is issued if the refund is less than $600. Reducing the time delay to 15 days still gives the taxpayer sufficient time to receive, check and, if necessary, correct their PTS before any refund is released.

Key features

Section RM 5(1) of the Income Tax Act 2007 has been amended to raise the threshold at which a person must confirm their PTS before receiving their refund to $600.

Section 80H(3)(c) of the Tax Administration Act 1994 has been amended to provide that a PTS is considered an assessment on the 15th day after it is issued, if the refund showing on that PTS exceeds the threshold set in section RM 5(1) of the Income Tax Act 2007 (now $600).

The interaction of sections 80H(3) and 80F(2) remains unchanged. Section 80H(3) allows low-value refunds to be issued automatically without requiring an interaction between the taxpayer and Inland Revenue. Section 80F(2) requires any taxpayer receiving an incorrect personal tax summary to contact Inland Revenue and provide the necessary information before their terminal tax due date or the date two months after the personal tax summary was issued, whichever is later.

Application date

The changes came into force on 1 April 2016.

CHANGES TO RULINGS REGIME

Sections 90AC, 90AE, 91DD, 91E, 91EB, 91EH, 91FB, 91FH, 91GG of the Tax Administration Act 1994

The purpose of the binding rulings regime is to provide certainty on a tax position for a taxpayer. The amendments remove some unnecessary restrictions on Inland Revenue's ability to provide a binding ruling and some unnecessary compliance costs by:

- allowing the Commissioner of Inland Revenue to fix minor errors in financial arrangement determinations;
- allowing the Commissioner of Inland Revenue to rule on issues that are not the same as the issues that are the subject of a dispute;
- clarifying when a ruling ceases to apply when an assumption stated in the rulings proves to be incorrect; and
- allowing the Commissioner of Inland Revenue to notify the publication of a status ruling in a publication other than the *New Zealand Gazette*.

Background

A binding ruling is Inland Revenue's interpretation of how a tax law applies to a particular arrangement. If a binding ruling applies to a taxpayer and they follow it, Inland Revenue is bound by it (provided that the taxpayer has entered into the arrangement exactly as described in the ruling, and that they satisfy any stated assumptions or conditions). A taxpayer is not required to follow the approach in the ruling.

Binding rulings can provide certainty on the tax position for a wide range of transactions, from complex financing transactions to land subdivisions. Anyone can apply for a binding ruling on a transaction, but there are some restrictions on Inland Revenue's ability to provide a binding ruling, and some unnecessary compliance costs.

Key features

The amendments remedy four problems with the binding rulings regime.

First, the Commissioner has the ability to withdraw and reissue a ruling to correct a typographical or minor error in a ruling. However, previously there was no provision allowing Inland Revenue to correct minor errors in a signed financial arrangement determination. Instead, even if there was only a minor or typographical error in a financial arrangement determination, the Commissioner had to make a new determination to correct the original determination. The amendment allows the Commissioner to correct a typographical or minor error in a financial arrangement determination without having to withdraw and reissue it.

Secondly, the Commissioner was previously prevented from ruling on an arrangement when the same tax type was the subject of a notice of proposed adjustment (in other words, it was going through the disputes process). This unnecessarily restricted the Commissioner from ruling on issues that were not the same as the issues that were the subject of the dispute. The amendment allows the Commissioner to rule on an issue unless a notice of proposed adjustment has been issued that relates to:

- the person;
- the arrangement; and
- the same tax type or a separately identifiable issue.

Thirdly, there was a lack of clarity about when a ruling would cease to apply because an assumption listed in a ruling subsequently proved to be incorrect. The amendment clarifies that:

- an assumption must be material to be included in a ruling; and
- a breach of an assumption must be a material breach before the ruling ceases to apply.

Fourthly, the amendments allow a status ruling to be notified in a publication chosen by the Commissioner and a publication of the department (rather than in the *New Zealand Gazette* as previously). This aligns with publication requirements for product rulings. A similar amendment has also been made to allow the Commissioner to publish an extension of a public ruling in a publication chosen by the Commissioner and a publication of the department.

Application date

The amendment came into force on 2 June 2016, being the day of enactment.

REPEAL OF SPECIAL HOME OWNERSHIP ACCOUNT PROVISIONS

Sections BF 1, LZ 9 to LZ 12, RZ 7 to RZ 10 of the Income Tax Act 2007; sections 56, 95 and 157 of the Tax Administration Act 1994

The amendment repeals the obsolete special home ownership account provisions in the Income Tax Act 2007 and the Tax Administration Act 1994. This allows an account to be closed without paying the withdrawal tax that would otherwise have applied.

Background

Special home ownership savings accounts were introduced in 1974 to help people save to purchase a house. The amount of the annual increase in a person's account (up to a maximum of $3,000 per annum) received a tax credit of 45%. This occurred until the account:

- reached a maximum of $10,250;
- was closed to purchase a house; or
- was otherwise withdrawn.

When the account was closed and the money was withdrawn (and not used to purchase a house), a tax of 45% was imposed on the amount of the withdrawal.

No new home ownership accounts have been able to be opened since 1 August 1986, and no tax credits have been able to be generated since 1 August 1991. Although these accounts are now very old, under the previous law withdrawal tax of 45% still applied to any withdrawals that were not used to purchase a house.

Key features

The amendment repeals the special home ownership account provisions in the Income Tax Act 2007 and the Tax Administration Act 1994. Importantly, the amendment repeals section RZ 8 of the Income Tax Act 2007, which required a financial institution to withhold the withdrawal tax from an amount payable to a person when the money had not been withdrawn to purchase a house. The repeal of section RZ 8 allows an account to be closed without paying the withdrawal tax that would otherwise have applied.

Application date

The amendments came into force on 2 June 2016, being the date of enactment.

TAX SECRECY AND SOFTWARE PROVIDERS

Sections 3 and 81(4) of the Tax Administration Act 1994

The secrecy rule contained in section 81 of the Tax Administration Act 1994 has been amended to facilitate digital communication between Inland Revenue and taxpayers via a third party software package such as an accounting package.

Background

Inland Revenue is subject to a strict obligation of secrecy in relation to the information it collects and holds. The general secrecy rule, contained in section 81 of the Tax Administration Act 1994, requires all employees of Inland Revenue to keep secret all matters that come to their knowledge relating to the Acts administered by Inland Revenue. Tax-secret information cannot be disclosed to third parties unless it is for tax purposes, or some specific exception contained in the legislation applies.

Taxpayers increasingly use software, for example accounting or payroll software, to run their business or organisation. As part of its Business Transformation programme, Inland Revenue will increasingly enable taxpayers to manage most tax transactions, complete their tax affairs and file their tax information with Inland Revenue directly from their business software (for example, their accounting and payroll software). Inland Revenue in turn will be able to send information, confirmation and messages back directly through the same channel. However, by doing this Inland Revenue could be disclosing tax secret information relating to the customer to a third party (the software provider that is providing and maintaining the business software for their client). As the exceptions listed in the secrecy provision do not specifically apply to the transmission of information through software via software provider services, Inland Revenue could potentially breach tax secrecy.

The new exemption clarifies that the transmission of information directly between Inland Revenue and accepted software a taxpayer uses does not breach the secrecy provision.

Key features

Section 81(4) of the Tax Administration Act 1994 has been amended by inserting new paragraph (ld). The new paragraph allows the Commissioner to communicate and transfer information relating to the taxpayer directly to the accepted software package the taxpayer uses for business, accounting, tax, or other purposes.

The exception applies to software packages that are accepted by the Commissioner for use in communicating information to the Commissioner and receiving information from the Commissioner. A definition for "accepted software package" has been inserted into section 3 of the Tax Administration Act 1994. Software providers who wish to offer direct transmission functionality will be required to have their software package accepted by the Commissioner. In particular, software providers will be required to show that they comply with Inland Revenue's requirements regarding access and use of taxpayer information.

Application date

The amendments came into force on the date of enactment, being 2 June 2016.

CONSEQUENTIAL TAX AMENDMENTS RESULTING FROM THE GREATER CHRISTCHURCH REGENERATION ACT 2016

Sections CZ 25, CZ 26 and YZ 4 of the Income Tax Act 2007 and section 183CB of the Tax Administration Act 1994

The amendments provide for the continuing but limited application of the Canterbury Earthquake Recovery Act 2011 (which was repealed by the Greater Christchurch Regeneration Act 2016) for the purposes of a number of provisions in the Income Tax Act 2007 and the Tax Administration Act 1994.

In the aftermath of the Canterbury earthquakes of 2010 and 2011, a number of tax law changes were made to ensure that the tax rules did not impede the recovery and rebuilding of the Canterbury region. Those tax provisions will generally expire at the end of the 2018–19 income year.

The Greater Christchurch Regeneration Act 2016 came into force on 19 April 2016, replacing the Canterbury Earthquake Recovery Act 2011. Consequential tax amendments were subsequently made to ensure that a number of definitions in the Canterbury Earthquake Recovery Act 2011, especially "greater Christchurch" and "Canterbury earthquakes", continue to apply to affected taxpayers to ensure they are not adversely impacted by its replacement. A small number of other related consequential amendments were also made, such as cross-referencing changes.

Application date

The amendments came into force on 19 April 2016.

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 2016/04: A TYPE OF ATTRIBUTING INTEREST IN A FOREIGN INVESTMENT FUND FOR WHICH A PERSON MAY NOT USE THE FAIR DIVIDEND RATE METHOD (BLACKROCK GLOBAL FUNDS WORLD BOND FUND)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. 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 Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Shares in BlackRock Global Funds (BGF), a public limited company established under the laws of Luxembourg to which this determination applies, are an attributing interest in a foreign investment fund (FIF) for New Zealand resident investors. BGF is structured as an umbrella fund with segregated liability between sub-funds. Those sub-funds, whilst economically separate, do not have a separate legal personality.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in shares in BGF each year.

The BGF World Bond Fund (the Fund) is a sub-fund of BGF which invests in a portfolio of global fixed interest securities and other financial arrangements. The Fund has on issue a number of share classes including a class of shares denominated in New Zealand dollars (the NZD share class) that provides holders of that class of shares with an interest in the pool of investments held by the Fund. Foreign currency hedging arrangements are in place, which effectively provide investors with a New Zealand dollar denominated return on the financial arrangements held by the Fund.

Section EX 46(10)(c) of the Income Tax Act 2007 would not apply to prevent the use of the fair dividend rate (FDR) method, but would apply if the Fund represented a separate foreign company and the NZD share class was the only class of shares on issue.

The policy intention is that the FDR method of calculating FIF income should not be applied to investments that provide a New Zealand resident investor with a return similar to a New Zealand dollar denominated debt investment. It is appropriate for the Commissioner to take into account the whole of the arrangement, including any interposed entities or financial arrangements, in ascertaining whether an investment in a FIF provides the New Zealand-resident investor with a return akin to a New Zealand dollar denominated debt investment.

On this basis, where a New Zealand resident invests in NZD share class issued in the Fund, I consider that it is appropriate for the investor holding that investment to be excluded from using the FDR method for the 2016-17 and subsequent income years.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination and applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

1. The non-resident issuer:
    a. is incorporated in Luxembourg, established on 14 June 1962, and issues multiple classes of shares;
    b. is known at the date of this determination as BlackRock Global Funds; and
    c. is structured as an umbrella fund with segregated liability between sub-funds; and
2. The attributing interest consists of a New Zealand dollar denominated class of share issued in the BlackRock Global Funds World Bond Fund, a sub-fund of BlackRock Global Funds which provides exposure solely to a sub-fund that invests in a portfolio predominantly of fixed interest securities and other financial arrangements; and
3. The investment assets attributable to the New Zealand dollar denominated class of share are subject to

foreign currency hedging arrangements undertaken by the non-resident for the purpose of eliminating any exchange rate risk for New Zealand investors.

4. The hedging mandate for the NZD investments is to be in the range of 99.5 -100.5%.

Conditions stipulated

This determination is issued on the condition that the hedging mandate does not change to fall outside the 80% - 125% range, being the hedging range required by NZIAS 39 for a hedging instrument to be highly effective under section EX 46(10)(b).

Interpretation

In this determination unless the context otherwise requires:

"The Act" means the Income Tax Act 2007;

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

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Act.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the FDR method to calculate FIF income from the interest.

Application date

This determination applies for the 2016-2017 and subsequent income years. However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination also applies for an income year beginning before the date of this determination for a person who invests in the New Zealand denominated class of share issued in the BlackRock Global Funds World Bond Fund and who chooses that this determination applies for that income year.

Dated this 11th day of July 2016.

Graham Poppelwell
Investigations Manager

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 16/03: NOTIFICATION OF A PENDING AUDIT OR INVESTIGATION

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 statement sets out the Commissioner's practice for notifying taxpayers of a pending audit or investigation or advising them that one has begun. For many taxpayers, notification of an audit will be by letter without any prior contact by Inland Revenue on the matter.

For the purposes of this statement, the words "audit" and "investigation" have the same effect. Inland Revenue may undertake a variety of tasks to review a taxpayer's compliance with their tax obligations, but these will all be referred to here as "audits".

Not all contact by Inland Revenue officers with a taxpayer, or the taxpayer's agent, relates to an audit or will necessarily lead to one. An officer may contact a taxpayer (or their agent) for information where no decision has been made to audit them. General enquiries by Inland Revenue officers are not considered part of an audit unless the taxpayer has been clearly notified that an audit is pending or that one has begun. Taxpayers will be encouraged to voluntarily disclose any errors or omissions.

Section references are to the Tax Administration Act 1994 (the TAA) unless otherwise stated. The relevant provision is s 141G. It is reproduced in the appendix to this statement.

Application

This statement applies from 17 June 2016 and replaces SPS 07/02 *Notification of a pending audit or investigation*, which was issued in April 2007.

This statement should be read with SPS 09/02 Voluntary Disclosures (or any subsequent statement issued in replacement).

Standard practice

Summary

1. Inland Revenue makes a variety of enquiries of taxpayers that may or may not be related to a pending or existing audit.
2. Inland Revenue will clearly notify a taxpayer when they are about to be audited or advise them when an audit has begun. This notification will specifically use the word "audit" or "investigation".
3. Notification of pending or existing audits will meet the requirements of sections 14 to 14G of the TAA and will be in writing and communicated by post, by facsimile, by personal delivery, or by electronic means.

Detailed Discussion

4. A number of situations have arisen where it was disputed whether the taxpayer was entitled to a reduction of a shortfall penalty. These situations show a need for Inland Revenue to communicate clearly when notifying taxpayers of a pending audit or that one has begun.
5. This statement also clarifies when notification is expected to be given. It clarifies when enquiries made by Inland Revenue are likely to be for information gathering purposes only and when the enquiry is likely to be part of a pending or existing audit.
6. Modern tax administration practices recognise that taxpayers have the best information about their own activities. Taxpayers are generally better placed than the Commissioner to assess their tax liabilities by making the appropriate calculations and furnishing their returns.
7. The voluntary disclosure rules provide an incentive to taxpayers to determine their tax liability correctly. The incentives in those rules reflect the savings to Inland Revenue from auditing taxpayers where a voluntary disclosure has been made. They also acknowledge the co-operation of those taxpayers who have made a voluntary disclosure.
8. The voluntary disclosure rules are based around the timing of notification by the Commissioner that an audit is pending or that one has begun. Where a voluntary disclosure is made before that notice is given, a taxpayer qualifies for the greatest reduction in shortfall penalties for which they may be liable. The reductions can be 100% or 75% of the shortfall penalty, depending on the relevant type of penalty.

9. However, a person can still qualify for a lesser reduction of 40% where a voluntary disclosure is made after that notification but before the time specified in s 141G(5). That section provides that an audit starts at the earlier of (a) the end of the first interview, and (b) the time when an officer inspects information and the taxpayer is notified of the inspection. This is known as a post-notification disclosure. Note, in relation to s 141G(5)(b), that Inland Revenue will give written notice that the records are being inspected upon the commencement of that inspection. It is not necessary that the records being inspected have been collected subsequent to the initial notification of audit. Until the notification of inspection is given, or the first interview has ended, a taxpayer will still qualify for a post-notification disclosure reduction of shortfall penalties.

10. It is therefore important to clarify when it is expected that notices will be given and how to recognise them.

What is an audit or investigation?

11. The words "audit" and "investigation" are not specifically defined in the tax legislation. The Concise Oxford English Dictionary (11th ed, Oxford University Press, New York, 2004) defines "audit" as "an official inspection of an organisation's accounts, typically by an independent body", and "investigate" as to "carry out a systematic or formal inquiry into (an incident or allegation) so as to establish the truth."

12. In a tax context, Inland Revenue views an audit as an examination of a taxpayer's financial affairs to verify that they have paid the correct amount of tax and complied with their tax obligations as required by law.

13. For further information about audits, please see Inland Revenue's guide, IR297 I*nland Revenue audits - Information for taxpayers*. This is available on our website at **www.ird.govt.nz/forms-guides/number/forms-200-299/ir297-guide-ir-audits.html**

When will notification be given?

14. Not all contact that Inland Revenue has with taxpayers will relate to an audit.

15. Although the Commissioner is not required either to alert taxpayers when she is considering whether to audit them or to advise them that an audit has begun, the Commissioner's practice is that a taxpayer will generally be given notice, in writing, advising them that they have been selected for an audit, or that an audit is underway. The notice will set out which areas of their tax affairs are being audited. Taxpayers will also be informed of the direction and focus of an audit as it progresses. If the audit's scope widens during the audit and other tax types and/or periods are to be reviewed, the taxpayer will be promptly notified of this change.

16. Instances where no notice will be given will be limited but may include where:
    - the visit is intended to be unannounced, such as a spot check;
    - Inland Revenue holds anonymous information;
    - there are strong indications the taxpayer is involved in an aggressive tax practice;
    - it is impractical to send a letter due to time constraints.

17. Notwithstanding [8], where the Commissioner establishes a tax shortfall but no notice was given, a taxpayer will not qualify for a pre-notification or post-notification disclosure reduction in shortfall penalties. This is because a taxpayer cannot disclose a tax shortfall when Inland Revenue has already identified the shortfall and advised them of it.

Situations that are not audits

18. Inland Revenue often contacts taxpayers for information omitted or incorrectly entered on filed returns to enable the self-assessment process to be completed.

19. Inland Revenue officers often call taxpayers for background information on GST returns without having decided whether to carry out an audit. These situations are not considered part of an audit unless the taxpayer has been clearly notified that an audit is pending or that one has begun.

20. Inland Revenue officers routinely request information from various sources, including individual taxpayers, to research and prioritise tax compliance risk areas. This activity is often referred to as risk review. In these circumstances, the purpose of the Inland Revenue officer's enquiry is to collect information and their contact with taxpayers is neither an audit nor notification of a pending audit.

21. Information gathered through risk review activities allows Inland Revenue to consider the level of risk of a particular taxpayer, taking into account that taxpayer's approach to determining their tax position. Audit activity, on the other hand, involves examining the tax position itself, having already decided to audit that tax position.

22. As discussed earlier, a taxpayer will qualify for a pre-notification disclosure reduction of shortfall penalties up until the point that the taxpayer has been notified in writing that an audit is pending or is notified that one has begun.

Notice of Audit

23. Inland Revenue officers will clearly communicate the purpose of their contacts with taxpayers and their agents. When Inland Revenue contacts taxpayers or their agents to notify of a pending audit or to advise that one has begun, the communication will use the word "audit" or "investigation". That notification will only occur once a decision has been made to audit the taxpayer.

24. The communication will be in writing and is considered to be given when that written notification is received by the taxpayer. It will be communicated in terms of section 14C of the TAA by post, by facsimile, personal delivery, or by electronic means. Up until that time, a taxpayer can still qualify for a pre-notification disclosure reduction of shortfall penalties.

25. Audits sometimes involve considering compliance by other parties that are connected. For example, a partnership and the individual partners, a company and its shareholders. Notification of an audit will be made to each party subject to a pending audit.

This Standard Practice Statement is signed on 17 June 2016.

Rob Wells

APPENDIX

Tax Administration Act 1994

Section 141G – Reduction in penalty for voluntary disclosure of tax shortfall.

(1) A shortfall penalty payable by a taxpayer under any of sections 141A to 141EB may be reduced if, in the Commissioner's opinion, the taxpayer makes a full voluntary disclosure to the Commissioner of all the details of the tax shortfall, either—

(a) before the taxpayer is first notified of a pending tax audit or investigation (referred to in this section as **pre-notification disclosure**); or

(b) after the taxpayer is notified of a pending tax audit or investigation, but before the Commissioner starts the audit or investigation (referred to in this section as **post-notification disclosure**).

(2) The Commissioner may from time to time—

(a) specify the information required for a full voluntary disclosure; and

(b) the form in which it must be provided.

(3) The level by which the shortfall penalty is reduced—

(a) for pre-notification disclosure is—

(i) 100%, if the shortfall penalty is for not taking reasonable care, for taking an unacceptable tax position, or for an unacceptable interpretation; or

(ii) 75%, if subparagraph (i) does not apply:

(b) for post-notification disclosure is 40%.

(4) A taxpayer is deemed to have been notified of a pending tax audit or investigation, or that the tax audit or investigation has started, if—

(a) the taxpayer; or

(b) an officer of the taxpayer; or

(c) a shareholder of the taxpayer, if the taxpayer is a close company; or

(d) a tax adviser acting for the taxpayer; or

(e) a partner in partnership with the taxpayer; or

(f) a person acting for or on behalf of or as a fiduciary of the taxpayer,—

is notified of the pending tax audit or investigation, or that the tax audit or investigation has started.

(5) An audit or investigation starts at the earlier of—

(a) the end of the first interview an officer of the department has with the taxpayer or the taxpayer's representative after the taxpayer receives the notice referred to in subsection (4); and

(b) the time when—

(i) an officer of the department inspects information (including books or records) of the taxpayer after the taxpayer receives the notice referred to in subsection (4); and

(ii) the taxpayer is notified of the inspection.

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.

INCOME TAX – DONEE ORGANISATIONS AND GIFTS

The purpose of this QWBA is to provide guidance about when a donee organisation may issue a donation receipt for payments made to them by individual supporters. The QWBA includes some examples of common fundraising activities.

Donee organisations include organisations like charities, schools, religious, sporting and cultural organisations that are not carried on for private financial gain of any individual and that meet certain other requirements.

The Commissioner understands donee organisations and individuals/natural persons who support these organisations (referred to as "supporters" in this QWBA) need more certainty on when payments are gifts for income tax purposes. This is important for donee organisations when issuing donation receipts, and for their supporters when claiming donation tax credits.

While ultimately it is the Commissioner's decision whether a supporter receives a donation tax credit for a particular payment to a donee organisation, it is important to understand the circumstances in which donee organisations may issue donation receipts.

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

This Question We've Been Asked is about ss LD 1 to LD 3.

This item updates and replaces the previous statements made by the Commissioner in "Charitable Donations: Fund Raising Functions and Sponsorship" in *Public Information Bulletin* No 125 (March 1984): 2 and "Cost of Function Ticket: When Charitable Portion Can Qualify for Rebate" in *Tax Information Bulletin* Vol 6, No 2 (August 1994): 18.

Question

1. When may a donee organisation issue a donation receipt to a supporter so the supporter is able to claim a donation tax credit?

Answer

2. A donee organisation may issue a donation receipt for donation tax credit purposes when a supporter makes a "charitable or other public benefit gift" to the organisation of $5 or more.

3. The term "donee organisation" refers to an organisation not carried on for the private pecuniary profit (personal financial/monetary gain) of any individual and that meets one of the descriptions in s LD 3(2). "Donee organisation" is a broad term and may include, but is not limited to, charitable entities registered under the Charities Act 2005. It also includes organisations listed in sch 32 to the Act.

4. A "charitable or other public benefit gift" is a gift of money, or a subscription, of $5 or more paid to a donee organisation (as long as that subscription provides no rights arising from membership). It does not include testamentary gifts (ie, a gift made in a will).

5. A gift is a payment made voluntarily by a supporter to a donee organisation by way of benefaction in return for which the supporter receives no material benefit or advantage. If a supporter buys something from a donee organisation, such as a ticket to an event or goods the donee organisation is selling, the payment is not a gift.

Explanation

6. The purpose of this QWBA is to provide guidance to donee organisations on when they may issue donation receipts to individuals who support the organisation by making one-off or regular payments to the organisation. These individuals are referred to as "supporters" in this QWBA. Additionally, this QWBA aims to assist supporters to understand when they can successfully claim a donation tax credit if they have received a donation receipt.

What is a donation tax credit?

7. Part L of the Act contains the rules about tax credits and how they may be used for meeting tax obligations. Subpart LD sets out the rules for donation tax credits (ss LD 1 to LD 3).

8. A donation tax credit is available for a charitable or other public benefit gift made by a supporter to a donee organisation if the requirements in ss LD 1 to LD 3 are met. Donation tax credits are refundable credits.

9. Section 41A of the Tax Administration Act 1994 (TAA) sets out the requirements for claiming a donation tax credit. An individual taxpayer may complete an

IR526 - Tax credit claim form, detailing any charitable or other public benefit gifts made in a tax year. The Commissioner requires this claim to be supported by relevant receipts, each from a donee organisation and each with "donation" written on it. The Commissioner considers the application and then notifies the individual of the amount of tax credit that will be allowed.

10. The sum of charitable or other public benefit gifts made by an individual taxpayer in a tax year must not exceed their taxable income for that year. If the sum does exceed the taxpayer's taxable income, the Commissioner must reduce the total amount of charitable or other public benefit gifts so the taxable income is not exceeded (ss 41A(3) and (4) of the TAA).

Who may issue a donation receipt for donation tax credit purposes?

11. A "donee organisation" may issue a donation receipt for donation tax credit purposes. A donee organisation is defined in s YA 1 as an organisation that fits one of the descriptions in s LD 3(2) or is listed in sch 32 to the Act.

12. Donee organisations must not be carried on for the private pecuniary profit (personal financial/monetary gain) of any individual. Subject to that requirement, the types of organisations that may be able to issue donation receipts are:
    - a society, institution (including a public institution), association, organisation, or trust whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand;
    - a fund (including a public fund) established and maintained exclusively for the purpose of providing money to such donee organisations;
    - a community housing entity that meets the requirements of s CW 42B;
    - a Board of Trustees constituted under Part 9 of the Education Act 1989; and
    - a tertiary education institution.

13. In addition, some organisations may seek approval to be donee organisations, even though they do not meet the requirements of s LD 3(2). These organisations are listed in sch 32. Schedule 32 organisations are organisations Parliament has agreed to recognise as donee organisations.

14. As seen from the list in [12] above, donee organisations may include, but are not limited to, organisations registered as charitable entities under the Charities Act 2005. Donee organisations may also include organisations with benevolent, philanthropic, or cultural purposes within New Zealand, and which meet the requirements of s LD 3(2).

15. A searchable list of organisations whose donee organisation status has been confirmed by Inland Revenue for the purposes of s LD 1 is available at **www.ird.govt.nz/donee-organisations/**

Who may claim a donation tax credit?

16. Individual taxpayers may claim donation tax credits (s LD 2). Companies and Māori authorities cannot claim donation tax credits even if they hold a donation receipt from a donee organisation. This is because other provisions in the Act (ie, the deduction provisions) apply to gifts made by them (see ss DB 41 and DV 12). Other types of taxpayers (eg, absentees (as defined in s YA 1), unincorporated bodies, partnerships and trustees) are excluded from claiming donation tax credits.

What is a "charitable or other public benefit gift"?

17. The phrase "charitable or other public benefit gift" is defined in s LD 3(1). It means a monetary gift of $5 or more paid to a donee organisation. It also includes a subscription of $5 or more paid to a donee organisation, but only if the subscription provides no rights arising from membership in that donee organisation or any other society, institution, association, organisation, trust or fund (see s LD 3(1)(b)). It does not include testamentary gifts (ie, gifts made through a will).

18. To qualify as a monetary gift, the gift needs to be money of $5 or more paid to a donee organisation. For example, payment may be by cash, cheque, direct debit, credit card or debit card. However, a charitable or other public benefit gift does not include transfers of value, ie, money's worth. For example, a charitable or other public benefit gift does not include the making of a loan to a donee organisation, the forgiving of a loan made to the donee organisation or the transfer of other types of property (eg, art works) or money's worth (eg, free services) to a donee organisation.

What is a gift?

19. The term "gift" is not defined in the Act. In the absence of a definition, the Commissioner considers "gift" should be given its ordinary meaning. This is consistent with the Court of Appeal's decision in *Mills v Dowdall* [1983] NZLR 154.

20. However, New Zealand case law on the ordinary meaning of "gift" is limited. In contrast, the

Australian and Canadian courts have considered the ordinary meaning of the term "gift" on a number of occasions. In the absence of New Zealand case law, the Commissioner considers it appropriate to take guidance from the overseas case law.

21. The key principles on the meaning of "gift" taken from case law, are:
    - For a payment to be a "gift" it must be made voluntarily and no advantage of a material character may be received by the giver in return for the payment (*FCT v McPhail* (1968) 117 CLR 111 (HCA), *The Queen v Zandstra* [1974] 2 FC 254).
    - A payment is not generally regarded as being made voluntarily if it is made under a contractual or some other legal obligation. (Although there may be some limited circumstances where a contractual payment may still be described as voluntary.) (*Leary v FCT* (1980) 80 ATC 4,438 (FCA))
    - A payment is voluntary even if made under a sense of moral obligation (*Leary*).
    - Gifts do not need to be for benevolent reasons, but an essential element of a gift is that it is made by way of benefaction. Benefaction involves the concept that the recipient is advantaged to the extent of the payment. A gift ordinarily proceeds from a detached and disinterested generosity (*Leary*).
    - A gift will not be made by way of benefaction if the giver (or someone else) receives an advantage of a material character in return for making the payment (*Leary, Klopper v FCT* (1997) 97 ATC 4,179 (FCA)).
    - A payment that places the recipient under an obligation to do or provide something in return for the payment is not a gift (*Leary*).
    - A material benefit or advantage to the giver will prevent a payment from being a gift if it is provided in return for the payment, ie a sufficient nexus or connection exists between the payment made and the relevant benefit or advantage (*Leary, Coleman v The Queen* (2010) TCC 109, DTC 1,096).
    - Only material advantages gained in return for a payment should be relevant when deciding whether a gift has been made (*Leary*).
    - Fame or honour gained by a supporter from making gifts is not an advantage of a material character (*Leary*).
    - Moral benefit or favourable tax treatment (such as the ability to claim a donation tax credit in New Zealand) are not advantages of a material character (*The Queen v Friedberg* (1991) 92 DTC 6,031 (FCA Canada)).
    - A supporter being relieved of a liability as a result of making the payment is a material advantage (*Klopper*).

22. The Commissioner considers the New Zealand courts, as the Canadian courts have done, would likely adopt the approach taken by the Australian courts in *McPhail* and *Leary* (and subsequent decisions, such as *Klopper*) on the meaning of "gift" in the context of ss LD 1 to LD 3.

When will the Commissioner consider a payment to be a gift?

23. Based on the above case law, the Commissioner considers a "gift" in s LD 3(1) to be a payment of money of $5 or more:
    - made voluntarily,
    - by way of benefaction, and
    - in return for which the supporter receives no material benefit or advantage.

24. When deciding if a payment to a donee organisation is a gift, the true nature of the payment is to be determined by considering the overall arrangements and transactions giving rise to the payment.

25. Firstly, the payment must be made voluntarily. This means something more than that the payment was made freely by choice. A supporter's payment is not voluntary if it is made under an arrangement (contractual or otherwise) where the payment is made in return for a material benefit or advantage. This is the case even when the arrangement is entered into freely or for benevolent reasons.

26. Generally, payments under a contract are not voluntary, but the presence or absence of a contract does not always indicate whether a payment is "made voluntarily". The mere existence of a contract may not disqualify a payment from being a gift if there is no nexus or link between the contract and the payment. For example, there may still be a gift if A and B agree to make donations to a donee organisation, or if A agrees with B to match any gift made by B to a donee organisation.

27. On the other hand, the absence of a contract does not always mean a payment is made voluntarily. A payment is unlikely to be a gift in situations where there is some agreement or understanding in place between the donee organisation and the supporter where the supporter is to receive a material benefit or advantage. Similarly, a payment may not be a gift where there is some agreement or understanding that the donee organisation is to do or provide something in return for the payment. For example, a supporter

intends to make a gift of a car to a donee organisation but instead of gifting the car (which would not qualify for a tax credit) the person arranges to make a gift of money to the organisation. The donee organisation then uses the gifted money to purchase the car from the supporter. See Revenue Alert 11/01.

28. Secondly, the requirement that a gift is made voluntarily is connected with the concept of benefaction and the belief that gifts usually proceed from a detached and disinterested generosity. Benefaction is the idea that a gift is made to provide an advantage to, or to do good for, the recipient. Benefaction is an important element of a gift in its ordinary sense; when it is absent there can be no gift (*Leary*).

29. Conversely, the existence of benefaction does not, by itself, establish that a payment is a gift. For example, benefaction does not qualify a payment as a gift if the payment was not made voluntarily or there is a material benefit or advantage for the supporter in return for making the payment.

30. Thirdly, to be a "gift" the supporter must receive no material benefit or advantage in return for the payment. This is discussed below in more detail.

When will the Commissioner consider a payment is *not* a gift?

31. The Commissioner considers a payment will not be a "gift" where:
    - the supporter's payment is made in return for a material benefit or advantage, or
    - the donee organisation is placed under a material obligation to do or provide something in return for the supporter making the payment.

32. A material benefit or advantage does not need to come directly from the donee organisation and does not need to be received directly by the supporter who made the payment (eg, someone else may deliver or receive the benefit) so long as under the arrangement the material benefit or advantage to the supporter is in return for making the payment.

Material benefit or advantage

33. A benefit or advantage will be considered "material" if it is of substance and can be valued and/or owned. (Sometimes these benefits are referred to as pecuniary or proprietary benefits.) In this context, determining if a benefit or advantage is material is not a comparative materiality test (as is used in accounting practice). Rather, the question is whether the benefit has some value that is able to be objectively ascertained. An example of a material benefit would be a book sold by an organisation in their gift shop given to a supporter *in return* for making a payment to a donee organisation. Another example would be the offer of a 10% discount on a purchase from the organisation's gift shop *in return* for a payment. (In the case of a discount, it does not matter whether the supporter takes advantage of the offer; it is the availability/ provision of the discount *in return* for the supporter's payment that is the material benefit (unless the maximum value of the discount is in itself trivial (de minimis).)

34. A benefit or advantage will not be material if it is intangible and cannot be valued or owned. This includes benefits or advantages that might give a supporter a good feeling, bring them public recognition or make them happy. Non-material advantages include such things as public acknowledgement - for example, when an individual supporter's name is printed in a donee organisation's newsletter as a way of acknowledging their gift. This acknowledgment might make the supporter feel proud, but that benefit has no objectively ascertainable value. On the other hand, if a supporter is in business and is given public recognition by a donee organisation for commercial advertising purposes, that will be a material benefit. Sponsorship of donee organisations by businesses generally fall into this category. In such a case, although a donation tax credit will not be available, the supporter may be entitled to an income tax deduction for the cost of sponsoring a donee organisation.

35. Sometimes a benefit or advantage may have a value in the eyes of the donee organisation or the supporter, but that value is not of substance and cannot be objectively ascertained. In that case, the benefit will not be "material". For example, meeting the conductor after a concert might be a valuable and enjoyable experience for an enthusiastic orchestra supporter. However, if the experience is usually given for free, it is likely it will have no objectively ascertainable value and will not be a material benefit.

Sufficient link between payment and benefit or advantage

36. Not every material benefit or advantage will necessarily disqualify a payment from being a gift. A payment will not be a gift where there is a sufficient link between the supporter's payment and any material benefit or advantage gained in return. The strength of the link between the supporter's payment and the benefit determines whether the payment is a gift. This can usually be determined from the circumstances surrounding the gift. For example, a sufficient link to

disqualify a payment as a gift will exist where:

- the supporter knowingly seeks the benefit in return for making the payment, or
- the donee organisation offers the benefit as an inducement for the payment.

37. An example of a material benefit provided in return for a supporter's payment is the offer of a free ticket to a concert in return for a minimum donation amount. Another example is where a supporter makes a payment to a donee organisation in return for an invitation to a dinner with a guest celebrity speaker.

38. Sometimes a payment may be a gift even if the supporter obtains a material benefit. This happens when the connection between the payment and the benefit is too remote to prevent the payment from being a gift. An example of a material advantage not having a sufficient link to a payment is where an arthritis sufferer makes a $50 donation to a national arthritis drug research charity. While the arthritis sufferer may ultimately obtain a material benefit in the form of a new treatment, the connection between the benefit and the payment is too remote for the benefit to prevent the payment from being a gift (*Coleman*).

39. Depending on the circumstances, other factors might have a bearing on the strength of link between a supporter's payment and a benefit, including such things as the relationship between the supporter, the donee organisation or any ultimate recipient, any conditions attached to the payment, and the parties' expectations of how the payment will be used (*Coleman*). When deciding if a payment to a donee organisation is a gift, the true nature of the supporter's payment is to be determined by considering the overall arrangements and transactions that gave rise to the payment. In considering all the circumstances, it is important to remember that gifts ordinarily proceed from a detached and disinterested generosity (*Leary*).

Can a benefit obtained by the supporter ever be overlooked?

Stewardship

40. Sometimes organisations will thank and acknowledge their supporters' generosity by inviting them to a function or by giving them a token of appreciation. This is often referred to as "stewardship". In those situations, a benefit provided to a supporter by a donee organisation, even if material, may not disqualify a supporter's payment from being a gift.

41. Stewardship activities are not part of any agreement or arrangement between the donee organisation and the supporter, and will often be unplanned and based on opportunity. A supporter has no expectation of being invited to participate in stewardship activities when making a payment to a donee organisation. In these circumstances there is an insufficient link or connection between the supporter's payment to the donee organisation and the stewardship activity such that it cannot be said that the supporter's payment is made in return for any benefit. Accordingly, the provision of true stewardship benefits by a donee organisation will not usually prevent supporters' payments being gifts.

Minimal benefit or advantage

42. Occasionally, benefits or advantages obtained by a supporter in return for making a payment to a donee organisation will be so minimal or trivial they can be overlooked, in accordance with de minimis principles.

43. To be overlooked under de minimis principles, the benefits must be minimal or trivial both in their own right *and* when compared with the payment made. For example, a supporter makes a donation of $50 and is promised in return and receives a plastic key ring with the donee organisation's logo printed on it. Although the supporter obtained a "benefit" in return for the $50 payment, the plastic key ring is too trivial in its own right, and in comparison to the amount of the payment, to prevent the payment from being a gift in those circumstances.

Can a gift be for a specific purpose?

44. Sometimes gifts are paid by supporters to a donee organisation for a specific purpose or project, for example, to a church for a new church building or to a hospital for a new baby incubator. The fact that an organisation seeks donations for a specific project will not, in itself, prevent the payment being a gift. In the Commissioner's view, a gift made for a specific purpose will not cease to be a gift so long as it has the attributes of a gift and there is no material benefit or advantage provided in return for the supporter making the payment. Further, the fact that the supporter, or people close to the supporter, may be among those who ultimately benefit from a project (eg, the supporter's family attends the church receiving the payment or is within the area served by the hospital receiving the payment) may not disqualify the payment from being a gift. However, the stronger the connection between the supporter's payment and any material benefit or advantage obtained in return, the less likely it is that the payment will qualify as a gift.

Can part of a payment be a gift?

45. The Commissioner considers a supporter's payment cannot be split into a gift component and a non-gift component where a supporter receives a material benefit or advantage in return for making that payment.

46. The term "gift" describes a particular transaction. The legal arrangements entered into and carried out by the parties establish the nature of that transaction. If a supporter's payment is not a gift at common law, it is not open to the parties to then describe the payment as comprising two separate payments – one for consideration (eg, a sale) and one made voluntarily for no consideration (a gift). For example, if the price paid for an item at a charity auction to raise funds for a donee organisation exceeds the value of the item, the amount paid in excess of its value cannot be treated as a gift. No donation receipt may be issued in that situation.

47. However, a donation receipt may be able to be issued where a supporter makes two payments contemporaneously to a donee organisation. For example, if a supporter purchases tickets to an event being hosted by a donee organisation and at the same time voluntarily supports the donee organisation by making an additional payment, the additional voluntary payment may be a gift. For the additional payment to be a gift, the supporter must be able to attend the event regardless of whether any additional payment is made – ie, the ticket purchase must not be dependent on the supporter making an additional payment. In that situation, the donee organisation may choose to issue a single invoice to the supporter, so long as it clearly identifies the two separate payments (the ticket sale and the gift), and a donation receipt may be issued for the gift made by the supporter.

Examples

48. The following examples are provided to illustrate the Commissioner's view on when certain common fundraising activities may or may not involve gifts.

Example 1 – Charity dinner and dance

49. Sally purchases a ticket to a dinner and dance being put on as a fundraising event by her favourite dog refuge charity, which is a donee organisation. The ticket costs her $150 and entitles her to attend the event. The charity calculates it will raise approximately $90 from each ticket sold to help feed and re-house stray dogs. None of the ticket price paid by Sally is a gift. The charity has sold the ticket to Sally for $150. The charity should not issue a donation receipt to Sally for any portion of the ticket price.

50. In contrast, if the charity sold each ticket for $100 and at the same time asked ticket purchasers to consider making a donation to the charity of $20, $50, $100 or any other amount chosen by the supporter, and Sally opted to buy a ticket and make a $50 donation, the charity may issue a donation receipt to Sally for the $50.

51. While at the charity dinner, Sally is asked if she would like to contribute towards the cost of a new kennel block at the dog refuge. She agrees to make a donation of $500. The charity is very grateful and they advise Sally she will be acknowledged in their next newsletter. The charity may issue a donation receipt to Sally for $500. The public acknowledgement of her generosity is not a material benefit.

Example 2 – Charity auction

52. Simon has purchased tickets to attend a dinner and charity auction to raise funds for a local community group supporting children in need. The community group qualifies as a donee organisation.

53. Before the auction night, the community group asks local people to contribute "prizes" that it can auction off to raise funds. Clare, a local artist, donates a painting. The painting would ordinarily sell at one of Clare's exhibitions for $300. The painting sells at the auction for $500. Although Clare has donated the painting to the community group, she should not be given a donation receipt as she has not made a gift of money to a donee organisation.

54. On the night of the auction, after an enjoyable dinner, various donated items are sold by auction to the guests to raise funds for the charity. Simon bids on a signed rugby jersey. A similar jersey recently sold in an online auction for $200. Simon is keen to support the charity and so he bids $800 for the signed jersey and wins the auction. Although Simon may have purchased the jersey for well in excess of the recent online auction price, no amount of the purchase price he paid is a gift. The charity should not issue a donation receipt to Simon.

Example 3 – Supporter package for dramatic society

55. Bruce loves going to the theatre and he likes to support his local dramatic society, which is a donee organisation. To help with its funding, the society offers a variety of supporter packages for different levels of financial support. A supporter makes a specified cash "donation" and in return receives the package of benefits associated with that level of payment. This year Bruce selects a Silver

package for $150. The benefits of the Silver Package include two tickets, an opportunity for a private "behind the scenes" visit before a performance, and acknowledgement as a Silver supporter in the next season's programme.

56. No amount of Bruce's $150 payment is a gift. The dramatic society has sold Bruce a package that he has purchased for an agreed amount. While Bruce has voluntarily purchased the package, knowing it will help the society, he has not made a gift because he obtains material benefits in return for the payment (the tickets are a material benefit). The dramatic society should not issue a donation receipt to Bruce.

Example 4 – Supporter package for performing arts centre

57. The Pohutukawha Performing Arts Centre, a donee organisation, decides to offer its patrons a new range of supporter packages. Patrons who purchase performance tickets are given the option of making a donation at different levels – Crimson ($100), Silver ($250), Gold ($1,000) and Platinum (>$1,000). Sylvia chooses to become a Crimson supporter. Sylvia purchases two performance tickets and makes a donation of $100. In return for her donation Sylvia will be acknowledged as a Crimson supporter in the next season's programme and she will be invited to meet the cast of the current production.

58. In this case, there are two separately identifiable amounts paid to the donee organisation, the ticket price and the $100 donation by Sylvia to become a Crimson supporter. The $100 donation is a gift because Sylvia has voluntarily chosen to make the donation, and while she does receive benefits in return, they are not material benefits. The public recognition of an individual supporter by a donee organisation is not a material benefit. The invitation to meet the cast, while exciting for Sylvia, in this case has no objectively ascertainable value, as the cast do not usually meet the public and so do not ordinarily charge for the opportunity. The tickets were purchased separately and were not provided in return for the donation. The centre may issue Sylvia a donation receipt for $100.

Example 5 – Hospice afternoon tea

59. Matt makes regular donations to the hospice, which is a donee organisation. In recognition of his on-going support and generosity (and to keep him engaged with the organisation), the hospice invites Matt to a "Friends of the Hospice" afternoon tea where the hospice takes the opportunity to thank all its regular donors and explain its plans for the coming year.

60. The afternoon tea was not planned when Matt made his donations and was not part of any package offered to Matt by the hospice to encourage him to make donations. It is a stewardship activity. The invitation to the afternoon tea does not stop the payments Matt has made (and hopefully will continue to make) from being gifts. The benefit of the afternoon tea is not in return for the payments Matt makes to the hospice.

Example 6 – Christmas cards and donation

61. Felicity received a letter from a donee organisation, which is also a registered charity, offering her the opportunity to purchase a pack of 10 hand-painted Christmas cards for $20. On the order form, Felicity could also choose to add a donation. She chose to purchase one pack of cards and to make a donation of $30. She sent the card order away with her credit card details authorising a payment of $50.

62. The charity then sent her the ordered cards and a donation receipt for $30. This is correct. Felicity's $50 payment comprised two separately identifiable amounts paid to the charity - $20 to purchase the cards and the $30 donation. The donation portion was made voluntarily, and Felicity sought no material advantage in return for making the additional payment. The cards Felicity obtained were not conditional on her payment of the additional $30.

Example 7 – Friend of the surf lifesaving club

63. Hoani is an active member of his local surf lifesaving club, which is a donee organisation. As a way for members to contribute to the club's financial wellbeing, the club offers members the option of becoming Friends of the Surf Club by making a donation of $500 or more. By being a Friend of the Surf Club, Hoani is not entitled to any special benefits beyond being named on the Friends board in the clubrooms and receiving a Friend bumper sticker for his car. Hoani donates $500 to the surf lifesaving club. The club may issue Hoani with a donation receipt. This is because he receives no material benefit in return for his payment. Being named on the Friends board is not a material benefit and therefore will not prevent the payment from being a gift. The benefit of the bumper sticker is insignificant, both in its own right and in comparison to Hoani's payment, so it may be overlooked.

Example 8 – Payments to a local football club

64. Jill's two children are junior members of the local football club, which is a community-focused sports club that qualifies as a donee organisation. Jill pays membership fees to the club for her two children, with

membership giving her children the entitlement to train and play in their respective age-group football teams. The club has also recently been fundraising for five new sets of goals for the club's 30 junior teams, and Jill makes a $100 donation to the club as part of this fundraising.

65. The membership fees paid by Jill are not gifts, and they are not "subscriptions" that qualify as gifts because junior membership rights are provided in return for the fees. However, the club may issue Jill with a donation receipt for her $100 donation.

66. In this case, the fact that Jill's children, as junior members of the club, may benefit from the club's fundraising activities does not disqualify her payment from being a gift. This is because any benefit or advantage in this context is too remote and therefore is not in return for Jill's payment to the club.

References

Subject references
Charitable or other public benefit gift
Gift
Tax credits
Legislative references
Income Tax Act 2007, ss LD 1 to LD 3, YA 1 (definition of “charitable or other public benefit gift”)
Tax Administration Act 1994, s 41A
Case cited
Coleman v The Queen (2010) TCC 109, DTC 1,096
FCT v McPhail (1968) 117 CLR 111 (HCA)
Klopper v FCT (1997) 97 ATC 4,179 (FCA)
Leary v FCT (1980) 80 ATC 4,438 (FCA)
Mills v Dowdall [1983] NZLR 154 (CA)
The Queen v Friedberg (1991) 92 DTC 6,031 (FCA Canada)
The Queen v Zandstra [1974] 2 FC 254

ITEMS OF INTEREST

WITHDRAWAL OF SPS INV-225 CRIMINAL OFFENCE – EVASION OR SIMILAR OFFENCES

Standard Practice Statement ("SPS") INV-225 issued in March 1998 and published in *Tax Information Bulletin* Vol 10 No 3 has been withdrawn, effective immediately.

SPS INV-225 set out what was meant by the term "evasion or similar offences", as set out under section 143 of the Tax Administration Act 1994 and describes the purpose of the penalty.

A review of the contents of this SPS has found that it is both incomplete and, due to legislative changes since 1998, inaccurate. For these reasons it is necessary to withdraw the SPS. At this time it is not envisaged that the SPS will be replaced.

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.

COMMISSIONER NOT REQUIRED TO DISCLOSE DOCUMENTS EXCHANGED UNDER DOUBLE TAX AGREEMENT

Case	Chatfield & Co Limited v Commissioner of Inland Revenue [2016] NZHC 1234
Decision date	9 June 2016 (1 September 2015, [2015] NZHC 2099)
Act(s)	Sections 17 and 81 of the Tax Administration Act 1994, ss 69 and 70 of the Evidence Act 2006, s 10(2)(i) of the Judicature Amendment Act 1972
Keywords	Double Tax Agreement, disclosure, confidentiality

Summary

The High Court found that the disclosure of documents exchanged between tax authorities pursuant to a Double Tax Agreement is governed by s 81 of the Tax Administration Act 1994 ("TAA"). The High Court confirmed the Commissioner of Inland Revenue ("the Commissioner") was not required to disclose such documents to the applicant in relation to judicial review proceedings.

Impact

The High Court has found that the provisions of s 81 of the TAA govern the determination of whether copies of documents exchanged between Republic of Korea's National Tax Service ("NTS") and the Commissioner, including the original request received by the Commissioner from the NTS ("the Documents") are to be disclosed to the applicant. While the Commissioner had relied on the relevant sections of the Evidence Act 2006 in support of her opposition to the disclosure of the Documents, this decision reinforces the confidential nature of documents exchanged between tax authorities.

Facts

Chatfield & Co Ltd ("Chatfield") applied to judicially review a decision of the Commissioner to issue it with Notices to Furnish Information under s 17 of the TAA ("the Notices").

Chatfield acts as the tax agent for various companies ("the Companies") which are currently under investigation by the tax authorities of the Republic of Korea ("Korea"). The NTS asked the Commissioner to obtain and provide information relating to the Companies, pursuant to the Double Taxation Relief (Republic of Korea) Order 1983 ("the DTA").

In the context of this application for review, Chatfield has sought copies of the Documents. The Commissioner had refused to provide copies of the Documents on the grounds that they are irrelevant, and that they relate to "matters of state" and as such are protected by privilege/confidentiality.

Decision

The High Court's decision is set out in a judgment ([2016] NZHC 1234) dated 9 June 2016 which is to be read in conjunction with an earlier reserved judgment ([2015] NZHC 2099) dated 1 September 2015.

Reserved Judgment dated 1 September 2015

In its reserved judgment dated 1 September 2015, the High Court stated that it was prepared to proceed on the basis that, as the Documents caused the Notices to be issued, they will by definition be relevant to a claim seeking judicial review of the decision to issue the Notices.

The High Court identified two cases in which the New Zealand Courts have been required to grapple with applications for discovery in a Double Tax Agreement context; being *Commissioner of Inland Revenue v E R Squibb & Sons (New Zealand) Ltd* ((1992) 6 PRNZ 601 (CA)) ("*Squibb*") and *Avowal Administrative Attorneys Ltd v North Shore District Court* ([2008] 1 NZLR 675 (HC)) ("*Avowal*").

The High Court considered that the terms of the DTA coupled with s 81 of the TAA and the rules of court govern the position regarding disclosure. If consent to disclose the

Documents was specifically refused by the NTS, then ss 69 and 70 of the Evidence Act 2006 may come into play.

Furthermore, the High Court considered that the conclusions set out in its reserved judgment were not directly at odds with *Squibb* and *Avowal*, and that any such conflict is explicable on the basis of the different wording of the DTA; the clarification in more recent OECD commentaries; and the more nuanced approach that is now taken to secrecy under s 81 of the TAA.

The High Court considered that the following factors are relevant in interpreting Double Tax Agreements:

1) Each Double Tax Agreement is the product of a separate bilateral negotiation process and there are likely to be differences between the various agreements;
2) The most recent version of the relevant Commentaries to the Model Convention (OECD (2014), *Model Tax Convention on Income and on Capital: Condensed Version* 2014, OECD Publishing) is intended to reflect a common view as to what the meaning of a particular section is, and has always been; and,
3) The legal landscape in relation to taxpayer secrecy, and its recent evolutions.

The High Court also considered that *Westpac Banking Corporation Ltd v Commissioner of Inland Revenue* ([2008] NZSC 24, [2008] NZLR 709) ("*Westpac*") carried greater authority than *Squibb* in this context.

The High Court concluded that the matter could not be resolved at this point. It directed that the Commissioner make inquiries of the NTS as to its views on disclosure of specific documents and file a memorandum advising of the outcome of any inquiries made.

Judgment dated 9 June 2016

Subsequent to the release of the Reserved Judgment, the Commissioner filed a memorandum with the High Court detailing why, as a matter of Korean law, the NTS sought to maintain the confidentiality of the Documents.

In its judgment the High Court found that the requested disclosure was not a ss 69 or 70 (of the Evidence Act 2006) matter but that, following *Westpac*, s 81 of the TAA and the rules governing discovery apply.

The High Court found that the Commissioner faces competing s 81 interests in carrying into effect the Inland Revenue Acts, being:

1) Complying with her discovery obligations in the course of defending court proceedings against her; and
2) Maintaining a properly founded duty of confidence (whether owed to a taxpayer or to a foreign state).

The weighing of these two interests was considered to be different to the exercise required under ss 69 or 70 of the Evidence Act 2006.

Against disclosure, the High Court found that discovery principles require that documents sought must at least be relevant to some justiciable issue. Here the applicant wished to test whether the request from the NTS was:

1) necessary for carrying out the provisions of the Convention or of the domestic laws of Korea (as required by art 25(1)); and
2) for information which is obtainable under the laws or in the normal course of the administration of Korea (as required by art 25(2)).

As set out in its reserved decision of 1 September 2015, the High Court found that the prospect of the Court on review being willing to engage with those kinds of issues is far from high.

The High Court then considered the recent decision of the Singaporean Court of Appeal in *Abu v Comptroller of Income Tax* ([2015] SGCA 4, [2015] 2 SLR 420 (CA)) ("*Abu*"). It found that there were similarities between the contentions raised in *Abu* and those Chatfield advanced in the judicial review proceedings. In this regard the High Court agreed with the concerns articulated by the Singaporean Court of Appeal, that:

1. Domestic law requires that a request from a foreign tax authority must be clear, specific, relevant, legitimate and consistent with the Exchange of Information Standards.
2. Where considering challenges to the veracity of a request from a foreign tax authority, the protection of a taxpayer's rights needs to be balanced against the need to ensure the efficacy of the exchange of information machinery.
3. International comity would be compromised if the court were required to make pronouncements that could question the underlying *bona fides* of requests made by foreign tax authorities.
4. The Court, in applying the relevant provisions of the tax acts, must not step into the shoes of the executive, which is the branch of government charged with the responsibility for entering into and enforcing international agreements.

As a result, the High Court considered the balance fell firmly on the side of confidentiality, directing that the Documents are not required to be disclosed.

PARTIES MUST BE REPRESENTED BY A BARRISTER OR SOLICITOR OF THE HIGH COURT; OPEN JUSTICE PRINCIPLES PREVAIL

Case	Sovereign Books Limited and Creative Productions Ltd v Commissioner of Inland Revenue [2016] NZHC 1313
Decision date	16 June 2016
Act(s)	District Courts Act 1947, High Court Rules
Keywords	Challenge to strike-out, representation by a barrister or solicitor in the High Court, open justice of the High Court, exceptional circumstances

Summary

The High Court found that a company has to be represented by a barrister and solicitor of the High Court. The Court also confirmed that there is no specific provision in the High Court Rules relating to name suppression and that the principle of open justice works in New Zealand.

Impact

This decision upholds the *Mannix* principles regarding companies being represented in the High Court by a barrister or solicitor. The decision also upholds the threshold required for name suppression in New Zealand; that the circumstances displacing the principle of open justice must be exceptional or extraordinary in nature.

Facts

The applicants, Sovereign Books Ltd and Creative Productions Ltd, brought proceedings called "Leave to make application of a statutory review of the Taxation Review Authority and to join Crown Law as a third party and to make a statement of claim again IRD Crown Law in High Court", and also leave to appeal the decisions made by the Taxation Review Authority.

The parties essentially sought to challenge Judge P F Barber's decision in striking out the applicants challenge before the Tax Review Authority ("TRA").

In these proceedings, the applicants sought leave for their tax agent, Mr Young, to represent them in the substantive matters and for name suppression of the applicants and tax agent.

The Commissioner of Inland Revenue ("the Commissioner") opposed both applications and sought costs.

The Court considered that in order to effectively seek a challenge to the strike out and appeal applications it was necessary to determine the following preliminary issues:

1. As Mr Young is the director of the two applicants (Sovereign Books Ltd and Creative Productions Ltd), and not a barrister or solicitor of the High Court of New Zealand, whether he should be granted leave to represent both applicants in the High Court. **(Issue 1)**
2. Whether the companies and Mr Young should be granted name suppression. **(Issue 2)**

Mr Young's application for leave to appear

Mr Young submitted that he should be granted leave to appear in accordance with s 57(2) of the District Court Acts 1947, providing that a corporation may appear by an officer, attorney or agent of the corporation in court. There was no equivalent provision in the Judicature Act 1908 or High Court Rules.

The Court stated, per Cooke J's judgment in *Re G J Mannix Ltd* [1984] 1 NZLR 309 ("*Re G J Mannix Ltd*"), that a company has to be represented by a barrister or solicitor of the High Court. Exceptions to the rule were discussed, however these were only in situations of emergency when counsel is not available or where it would be 'unduly burdensome to insist on counsel' (*Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 314).

Mr Young stated that *Re G J Mannix* does not apply in the modern world, in particular to situations involving his companies where they "just want to have their day in court." Mr Young further stated that the Commissioner's reliance on *Re G J Mannix* was a strategy by the Commissioner to get rid of him as the party representing the applicants.

Asher J contended that the Court is bound by *Re G J Mannix* and the cases that have followed it. Asher J further stated that a company is not a natural person and there would be concerns if a director acts for a company in court and gives the 'directors perspective' and not that of the company.

Asher J noted that an individual officer representing a company in court does not hold the objectivity required to represent the company's best interests. He further noted the many meritless applications and failures of the applicants to comply with court orders furthering the need for counsel to appear on its behalf.

Asher J stated that he could not find any exceptional circumstances warranting departure from the rule that non-lawyer shareholders cannot appear for the company, and further that the proceeding was not urgent. Asher J noted, in referring to the TRA's strike out decision, that the 'procedural tangles' that occurred in the TRA were the fault of the applicants and Mr Young.

Suppression

The second issue examined by the Court related to the applicants application seeking name suppression.

Mr Young contended that it would be unfair for there to be publicity. His primary consideration appeared to be unfairness to himself. He claimed that he was an accountant and should not be subjected to the burden of publicity in challenging proceedings that he claimed had proceeded in a grossly unfair manner.

Asher J stated that there is no specific provision in the High Court Rules relating to suppression of name or anonymity of parties in proceedings. He further noted that the principle of open justice works for publication and that the public of New Zealand are entitled to know what matters are proceeding in their courts.

The Court noted, in referring to the decisions of *Clark v Attorney-General (No 1)* ([2005] NZAR 481 (CA) ("*Clark*"), and *Brown v Attorney-General* ([2006] NZAR 450 (CA)), that exceptional or extraordinary circumstances are required in order to displace the principle of open justice before suppression orders could be granted. It was stated in *Clark* that the basis for the exceptional circumstances test was that the principles of open justice and the related freedom of expression creates a presumption of disclosure in all aspects of court proceedings and:

> "the right to freedom of expression is better served by placing as few restrictions as possible on it …". (*Clark v Attorney General (No 1)* [2005] NZAR 481 (CA) at [43])

The Court stated that Mr Young did not point to any particular factors alluding to the adverse effects of publicity. Asher J also referred to the Court of Appeal decision in *McIntosh v Fisk* whereby the principles of 'open justice' was emphasised, and that a party seeking name suppression must show the interests of justice displace the presumption favouring publication (*McIntosh v Fisk* [2015] NZCA 247, [2015] NZAR 1189 at [1]).

Decision

The Court declined Mr Young's application for leave to appear for the applicants.

The Court declined the application for name suppression of the parties involved.

The Commissioner was awarded costs on a 2B basis.

HIGH COURT UPHOLDS TRA'S FINDING THAT NO MANAGEMENT SERVICES WERE PROVIDED BY HONK LAND LIMITED TO HONK LAND TRUST

Case	Honk Land Trustees Limited v Commissioner of Inland Revenue [2016] NZHC 1316
Decision date	17 June 2016
Act(s)	Income Tax Act 1994 ss BD 2(1)(b)(i) and (ii), Tax Administration Act 1994 141B and 141D
Keywords	Deductions, management fees, services

Summary

The High Court dismissed Honk Land Trustees Limited's appeal. Ellis J agreed with the Taxation Review Authority ("TRA") that no services were provided by Honk Land Limited ("HLL") to Honk Land Trust ("Trust").

Impact

This decision confirms the judgment of the TRA, and in particular the correctness of its factual finding that the management services were not actually provided by HLL to the Trust. There was no need for the High Court to consider whether or not the payment of the fee formed part of or constituted a void tax avoidance arrangement that was appropriately reconstructed by the Commissioner of Inland Revenue ("the Commissioner") but the High Court indicated (such indication is obiter) that it was.

Background

This case is an appeal by Honk Land Trustees Limited ("HLT") of the TRA's decision confirming an assessment made by the Commissioner disallowing a $1,116,000 income tax deduction HLT claimed in the 2005 income year. The deduction related to a management fee that, in its capacity as the corporate trustee of the Trust, HLT had paid to a related entity, HLL.

The TRA found that the management fee was not deductible because it did not relate to any relevant services actually provided by HLL and (alternatively) that it was a contrivance designed to enable the Trust to avoid the payment of tax. The TRA also upheld the imposition of a 50% shortfall penalty for taking an abusive tax position.

Facts

The Trust was established by deed dated 27 September 2002. The settlor was Mr David Andrew Tauber, who is also a discretionary beneficiary of the Trust. Mr Tauber is, or was in 2005, the controlling mind of a number of companies and other entities that were beneficially owned by the Trust (through HLT) and which collectively comprised a wider business enterprise. HLT directly owned Honk Group Limited which, in turn, directly and indirectly owned various other companies, including HLL.

In the 2005 tax year:

1) the Trust earned income from commercial rentals, dividends and interest income from associated entities;
2) two of the three Auckland commercial properties owned by the Trust were sold;
3) HLL owned two commercial buildings in Takapuna worth $20 million with a rent roll in excess of $2 million.

The financial statements of the Trust for the 2005 year recorded management fees totalling $1,152,824 as an expense to the Trust which comprised:

1) $1,116,000 charged by HLL; and
2) $36,824 charged by Basin Ridge Management Ltd, Mr Tauber's management company.

The effect of the $1,116,000 management fee expense was:

1) the Trust claimed a deduction resulting in it having no tax to pay on its income; and
2) HLL offset the payment it received against its existing losses with the result it paid no tax on the management fee income.

Decision

The High Court considered the fundamental question raised by the appeal was whether the management services were in fact provided by HLL to the Trust at all. If they were not, then all other grounds of appeal necessarily fail.

Management Fees

The High Court agreed with the TRA's finding that there was no record of services provided and the fee was not fixed by reference to the costs incurred but simply by reference to the Trust's total income. The High Court considered the TRA's analysis of Mr Tauber's evidence was correct, highlighting the undisputed absence of any written management agreement between the Trust and HLL or any other supporting documentation. Furthermore, various other undisputed factors collectively formed a more than adequate basis for the TRA to draw the conclusions it did.

The High Court considered that Mr Tauber's evidence was, in a number of important ways, implausible, contradictory, vague and equivocal. The High Court cited examples from the transcript of the TRA hearing, pointing out the various inconsistencies.

The High Court considered it was difficult not to agree with the Commissioner that, in reality, the management fee was a rather unsophisticated ex post facto contrivance designed solely to effect the transfer of the precise amount of taxable income upon which the Trust would otherwise have had to pay tax.

The High Court found that the TRA was correct to find that no management services were provided by HLL to the Trust. As a result, the High Court did not consider it necessary to consider the legal aspects of the appeal.

Shortfall penalties

On applying shortfall penalties, the High Court considered:

1) Whether, viewed objectively, claiming the deduction was about as likely as not to be correct and, if not;
2) Whether the deduction was claimed with a dominant purpose of avoiding tax.

The High Court agreed with the Commissioner's view that it is obvious that no deduction can be claimed by a taxpayer for the cost of services which have not been provided to it. Therefore, HLT's tax position was not about as likely as not to be correct.

The High Court discussed a dominant purpose of avoiding tax, referring to *Alesco New Zealand Limited v Commissioner of Inland Revenue* ([2013] NZCA 40, [2013] 2 NZLR 175), concluding, as the management services were not in fact provided to the Trust by HLL, the only purpose of the fee can have been to avoid tax by moving profits out of the Trust to HLL.

QUEENSTOWN AIRPORT'S EASTERN RUNWAY SAFETY AREA FOUND NOT TO BE DEPRECIABLE UNDER THE INCOME TAX ACT 2007

Case	Queenstown Airport Corporation Limited v Commissioner of Inland Revenue [2016] NZHC 1299
Decision date	15 June 2016
Act(s)	Income Tax Act 2007
Keywords	Depreciable, depreciation, schedule 13, airport runways, hardstanding, roads

Summary

The Court dismissed Queenstown Airport Corporation Limited's tax challenge and confirmed the Commissioner of Inland Revenue's ("the Commissioner") view that the eastern runway and safety area ("East RESA") was not depreciable.

Impact

The decision provides useful commentary on the parameters of the items listed in sch 13, specifically airport runways, hardstandings, and roads. It confirms that unless a runway and safety area ("RESA") can satisfy one of the existing criteria in sch 13, it will not be depreciable under sch 13. Permanent embankments will be considered land and so not depreciable.

Facts

In April 1998 the International Civil Aviation Organisation set as a new standard the creation of a minimum 90 metre RESA at the end of airport runways used for international flights. That standard was implemented in November 1999, and adopted into New Zealand law in October 2006.

In order to provide an East RESA of the Queenstown Airport runway, where there was a steep drop-off down to the Kawerau/Shotover River delta 45 metres below, the plaintiff constructed an engineered fill embankment out from the existing cliff at a cost in excess of $8.5 million.

The plaintiff filed its income tax returns for the 2012 and 2013 income years on a conservative basis, namely the plaintiff did not claim depreciation deductions for the East RESA. Instead, the plaintiff issued Notices of Proposed Adjustment ("NOPAs") proposing to amend its 2012 and 2013 returns to include amounts of depreciation deduction. The amounts claimed by the plaintiff were as follows:

On the basis that the East RESA is a runway (the published depreciation rate being 4% on a straight line value basis (SL)):

a) $417,078.34 for the 2012 income year; and

b) $419,062.66 for the 2013 income year.

Alternatively, on the basis that the East RESA is hardstanding or road (the published depreciation rate being 3% SL):

c) $312,808.75 for the 2012 income year; and

d) $314,062.66 for the 2013 income year.

The Commissioner notified the plaintiff that she rejected the plaintiff's NOPAs.

Decision

His Honour noted that by the end of the hearing it appeared that the plaintiff did not contest whether the embankment and the East RESA constituted land. His Honour found it nevertheless desirable to note the Commissioner's argument and his view on it.

His Honour held there was an air of unreality in characterising the very large amount of compacted engineered fill as either a chattel or a fixture. Instead, applying the principles in *Elitestone Ltd v Morris* [1997] 2 All ER 513 he was satisfied that the degree and purpose of the annexation of the embankment, comprised of compacted engineered fill, to the 45m bluff at the end of the runway strip plainly indicate that the embankment (and the East RESA atop it) became part and parcel of the plaintiff's land.

His Honour was unable to accept that, beyond the ambit of the individual listed items themselves, sch 13 has a penumbra of meaning such that a land improvement could qualify as depreciable property even though it did not in fact come within any one of the 18 listed items purposively construed. It is not sufficient for such a land improvement to be "similar to" or "consistent with" (say) reservoirs, dams, bridges and tunnels. If a land improvement does not actually come within one of those specified depreciable land improvements it is not open to a taxpayer to contend that, by analogy with some listed items, the land improvement falls within the general purview of sch 13, and it is not the function of the Court to recognise additional new items in sch 13.

Is the East RESA within the term "airport runways"?

His Honour inferred that in selecting the phrase "airport runway" for inclusion in sch 13, the legislature was intending to identify runways comprising paved areas constructed in such a manner as to safely cater for the landing and take-off of the kind of aircraft engaged in the delivery of passenger and cargo services. A RESA could only fall within the phrase "airport runway" as used in sch 13 if the RESA was constructed to the standard required for an airport runway. The East RESA is not so constructed, and so His Honour concluded that the East RESA does not come within the phrase "airport runways" in sch 13 and is not thereby excised from the ambit of "land" in s EE7(a).

Is the embankment within the term "airport runways"?

His Honour found that even if the East RESA itself, which lies atop the embankment, qualified as one of the specified depreciable land improvements in respect of airport runways (and likewise hardstanding and roads), the underlying embankment, which was constructed to enable the East RESA to be provided, is captured by the "land" exclusion and not encompassed by the specified depreciable land improvement.

Is the East RESA within the term "hardstanding"?

His Honour accepted the Commissioner's submission that hardstanding refers to an area that has been paved or surfaced with material that is both strong and hard. While the subgrade of the embankment was compacted, it is not hardstanding. The fact that RESAs are designed so that jet aircraft will sink into their surface is inconsistent with their being categorised as hardstanding. Further, if a RESA was to be used for parking aircraft or other vehicles, other than for emergency use, it might reasonably be expected to have a hard surface. However, parking is not permitted in the RESA.

Is the East RESA within the term "roads"?

His Honour found that the function of the East RESA was not as a road, save to the extent that it is used as a service access road. Depreciation could only be claimed to the extent of the formed access road.

Might the East RESA reasonably be expected to decline in value?

So far as the relevant "identifiable asset" was concerned, his Honour did not accept that the identifiable asset comprised the entirety of the plaintiff's runway system. In his Honour's view the identifiable asset is no more extensive than the embankment and the East RESA.

Any damage to the East RESA is most likely to occur only in the rare event of an aircraft undershooting or overrunning the runway. Even then it is to be expected that only a small portion of the top layer of the embankment would be damaged. The evidence was that such damage could be repaired by grading and resowing grass, which is minor work similar to regular maintenance. His Honour concluded that the plaintiff had not established that the East RESA and the embankment are property that, in normal circumstances, might reasonably be expected to decline in value while they are used or available for use.

His Honour dismissed the challenge and found the RESA was not a depreciable asset.

MICHAEL HILL'S INCONSISTENCY CHALLENGE STRUCK OUT ON APPEAL

Case	Commissioner of Inland Revenue v Michael Hill Finance (NZ) Limited [2016] NZCA 276
Decision date	21 June 2016
Act(s)	Income Tax Act 2007, Tax Administration Act 1994
Keywords	Inconsistency, duty of consistency, s 6, s 6A, correctness, fairness, impartiality

Summary

The Commissioner of Inland Revenue ("the Commissioner") successfully appealed the High Court's decision to refuse to strike out Michael Hill's inconsistency cause of action. The Court of Appeal was not satisfied that there existed a standalone duty of consistency under ss 6 and 6A of the Tax Administration Act 1994 ("TAA") or common law, and found that even if there was such a duty, it would be owed to the public at large not an individual taxpayer. The assessment of any transaction should reflect the correct tax position and complaints about process deficiencies should not relieve the taxpayer of that liability.

Impact

Michael Hill's Inconsistency Challenge has been struck out, however their cause of action challenging the correctness of the assessments continues.

The judgment is authority for the proposition that ss 6 and 6A of the TAA do not create a separate duty of consistency, which can be brought as a separate cause of action against the Commissioner distinct from an orthodox correctness challenge.

Facts

In December 2008, the Michael Hill group of companies entered into a transaction in which it transferred its intellectual property and franchising operations within the group from New Zealand to Australia. An Australian Limited Partnership ("ALP") was used as part of the finance structure. Michael Hill owns 99.5% of the ALP. The ALP was used to create asymmetric tax treatment in the relevant years. The effect of this was that in both New Zealand and Australia there were deductions, and that the Australian deduction was not assessable income in New Zealand.

Michael Hill applied for a binding ruling from the Commissioner on the application of the Income Tax Act 2007 ("ITA"), including s BG 1, to the transaction. A binding ruling was provided in relation to the "black letter" tax treatment of the structure, but the Commissioner formed the view that s BG 1 applied; that is, that the transfer of the intellectual property and/or financing of its acquisition was a tax avoidance arrangement.

Michael Hill amended its application for a binding ruling to exclude consideration of s BG 1, and then self-assessed the tax liability on the basis that s BG 1 did apply. Subsequently, Michael Hill proposed an adjustment to its self-assessment. The Commissioner rejected Michael Hill's proposed adjustment by issuing a notice of response ("NOR").

Michael Hill has filed a challenge in the High Court to the Commissioner's consequential assessments of its liability to tax (The judgment refers to "consequential assessments" by the Commissioner. The Commissioner has not, however, made any assessments; Michael Hill self-assessed and then issued a notice of proposed adjustment ("NOPA") to its self-assessment. The Commissioner issued a NOR and Michael Hill have challenged the decision to issue a NOR.). Michael Hill relies on the orthodox ground that the Commissioner's "ruling" is incorrect in law.

Michael Hill separately challenges the Commissioner's "ruling" on the ground of its inconsistency with her earlier assessment that materially similar transactions entered into by another taxpayer are not liable to tax. Michael Hill claims the Commissioner has breached a duty owed to it of consistency of taxation treatment of comparable transactions ("the Inconsistency Challenge"). The Commissioner applied to strike this cause of action out.

Decision

Legislative Scheme

The Court was not satisfied that ss 6 and 6A of the TAA arguably recognise a standalone duty of consistency owed by the Commissioner to a taxpayer when exercising her statutory powers in assessing its liability to tax by reference to her assessment of materially similar transactions undertaken by another taxpayer.

The Court found that it was telling that s 6(2) omits any reference to a fourth standalone duty of consistency and could not see any warrant for reading that requirement separately into the meaning of the "integrity of the tax system".

Michael Hill's submission that the pleaded duty must be imported into the statutory framework to ensure the Commissioner's conduct is subject to public scrutiny was also rejected. The Court held other channels are expressly designed to promote the Commissioner's accountability.

Moreover, the Commissioner's responsibility under s 6(1) to protect the integrity of the tax system is not of an absolute nature. The Commissioner is required instead to use her "best endeavours". The aspirational nature of this standard reflects Parliament's recognition of the limitations imposed upon the Commissioner by various factors, and those limitations may well result in a degree of inconsistency among taxpayers, viewed at any point in time.

Michael Hill sought support from the Supreme Court's decision in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 ("*Tannadyce*") for their argument that other provisions in the TAA suggest a consistency duty. Toogood J found that support for the existence of a consistency duty was available from the minority's judgment.

The Court of Appeal held that, contrary to Toogood J's conclusion, the majority expressly rejected the minority's statement in question, and that the minority's statement was in a limited context.

Michael Hill also submitted that the majority's acceptance in *Tannadyce*, that process or invalidity claims can be brought within the pt 8A statutory challenge procedure "on any ground whatsoever", arguably supports the existence of an underlying duty of consistency.

The Court of Appeal disagreed. Instead, the Court of Appeal considered that the majority's discussion in *Tannadyce* of "any ground whatsoever" for disputing an assessment was on the obvious premise that the ground crossed the threshold of arguability – it did not open the door to any ground, regardless of its tenability.

The Court noted that of more importance is the recognition in *Tannadyce* that challenges should be separated only in rare cases. That is because a challenge is in law an appeal by way of hearing de novo of the facts and law. The hearing authority is free to form its own views on the merits, which will of itself normally cure any process defects by the Commissioner. The Supreme Court said nothing to suggest that a failure to act consistently can amount to such a defect.

Administrative law principles

The Court then addressed Michael Hill's argument that the Commissioner as a decision-maker is subject to a standalone duty imposed by administrative law principles to act with both procedural and substantive consistency.

Michael Hill submitted that the Commissioner's duty is to treat similarly placed taxpayers alike relying on *Reckitt and Coleman (New Zealand) Ltd v Taxation Board of Review* [1966] 2 NZLR 1032 (CA) ("*Reckitt and Coleman*").

In the Court's judgment, Turner J in *Reckitt* and *Coleman* in a different factual and legal setting does not provide a tenable foundation for asserting the existence of a common law duty owed by the Commissioner to Michael Hill to assess its liability to tax on the transaction consistently with her assessment of a materially-similar transaction entered into by another taxpayer.

Alternatively, Michael Hill sought support for its case from three English authorities (*HTV Ltd v Price Commission* [1976] ICR 170 (CA) ("*HTV*"), *R v Inland Revenue Commissioners, ex part Preston* [1985] 1 AC 835 (HL), and *R v Inland Revenue Commissioners, ex part MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 (QB)). The Court found that there were vastly different issues raised by all three English decisions and Michael Hill's claim. In each English case the complaint was that the levying authority had gone back on its word upon which the taxpayer had earlier relied to its detriment.

The Court went on to add three further points. First, New Zealand courts have refused to countenance a public law doctrine of estoppel against the operation of a statute imposing a duty of a positive kind. Second, the ratios of the judgments of Scarman and Goff LJJ in *HTV* were firmly founded on an orthodox error of law. Third, an imposition of a duty of consistency of treatment as between taxpayers would raise problems of policy and principle.

Irrationality

The Court rejected Michael Hill's submission of irrationality for two reasons. First, the Commissioner's conscious knowledge of her earlier assessment of the other taxpayer's materially similar transactions does not disqualify her from assessing Michael Hill's transaction differently. Second, a duty of consistency of taxation treatment or interpretation, if it exists, is owed to the public at large. An individual taxpayer does not acquire a correlative right of action for breach.

Remedies

The Court held the extent to which Michael Hill's consistency claim runs contrary to the TAA is exposed by the remedies sought. Liability is imposed by statute, not the Commissioner and there is no discretion to be exercised when assessing the amount of liability. In performing her duty to collect revenue, the Commissioner must determine a taxpayer's liability fairly, impartially, and according to the law. The hearing authority must be bound to the same statutory obligation on appeal [challenge].

There was no suggestion that a hearing authority is exercising a supervisory power on a Part 8A appeal [challenge], where the inquiry is primarily into correctness, lawfulness or validity. A hearing authority may invoke its power to cancel an assessment in extreme examples where the assessment was not an assessment at all or the Commissioner acted outside of or abused her powers in making the assessment. Michael Hill does not assert that the Commissioner's assessment fell into that rare or extreme category.

Reconstruction

Michael Hill raised a complex reconstruction argument, namely that the Commissioner's opposition to the existence of a duty on the ground that she has no discretion when assessing a transaction to tax could not apply where the Commissioner exercises a statutory power importing a degree of discretion. The Court found this argument did not advance their claim. Michael Hill's new argument was no more than a variation on its existing theme. The defining inconsistency for Michael Hill's purposes is the Commissioner's failure to reinstate Michael Hill's tax advantages to the same extent as those enjoyed by the other taxpayer. But this presupposes an underlying duty of substantive consistency which the Court had rejected.

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