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TAX INFORMATION Bulletin

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Inland Revenue
Te Tari Taake

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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.

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at **www.ird.govt.nz/public-consultation**

Email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

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

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Correction – *Tax Information Bulletin* Vol 29 No 10 November 2017

QB 17/08: Are proceeds from the sale of gold bullion income? published in *Tax Information Bulletin* Vol 29 No 10, contained an error on page 14 concerning *Case Q109* (Board of Review (Australia)).

Under **CIR's view of whether s CB 4 would apply** the text reads "The amount derived on the sale would similarly be income under s CB 4". This line should read "The amount derived on the sale would not be income under s CB 4."

IN SUMMARY

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The High Court found that the appellant did have a permanent place of abode in New Zealand in the relevant years, applying the *Diamond* test (*Commissioner of Inland Revenue v Diamond* [2015] NZCA 613). The Court also concluded that time bar could be opened under s 108(2) of the Tax Administration Act 1994 and that a shortfall penalty for taking an unacceptable tax position was appropriately imposed.

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This case is an appeal of the Court of Appeal decision in *Roose v Duthie* [2016] NZCA 600. It concerned a transfer of a property which attracted adverse tax consequences. The collective respondents sought damages from the collective appellants on the basis they were given negligent advice. The Court had to consider whether a cause of action accrued (because a tax liability arose) once the sale and purchase agreement became unconditional, or later, when it was settled. The Court held that, the loss (and therefore the cause of action) arose when the income from the transaction was derived. This occurred, in accordance with general principles of derivation, when the transfer was effected (at settlement date) on 2 May 2008. The Attorney-General was invited as intervener in these proceedings.

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 17/02: Six-monthly GST return filing

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 certain practices that the Commissioner will exercise in applying the discretion to allow registered persons to remain or become six-monthly return filers for goods and services tax (GST) purposes.

Application

This statement replaces GNL 420 Six-monthly GST return threshold, *Tax Information Bulletin* Vol 13, No 12 (December 2001), and applies from 04 October 2017.

Standard Practice

Summary

1. The Government recognises that filing GST returns on a one or two-monthly basis may involve significant compliance costs. A GST-registered person may apply to the Commissioner for a six-monthly filing frequency if their taxable supplies in any 12-month period do not or are not likely to exceed $500,000. This figure is calculated on a GST exclusive basis.
2. In addition, a person may also apply for a six-monthly filing frequency regardless of their level of taxable supplies where they make seasonal supplies. That is, where 80% or more of their taxable supplies are made within a six-month period that ends at any day within the last month of the person's income year.
3. Where a person who has been allocated a six-month filing frequency ceases to meet the criteria for that approval, they will be required to change their filing frequency following the end of the return period that aligns with the end of the 12-month period in which they ceased to meet those requirements.
4. However, a person is not required to cease using a six-monthly filing frequency if the breach of the taxable supplies threshold is one-off. A person may remain a six-month filer if they expect their taxable supplies to still be within the threshold for the following 12-month period.

Changes to six-month filing frequency

5. The recently enacted Taxation (Annual Rates for 2016-17, Closely Held Companies, and Remedial Matters) Act 2017 addressed technical issues with the eligibility to file six-monthly GST returns and introduced an exception that allows a person to file six monthly even if they have a one-off breach of the threshold.
6. Section 15(1) of the Goods and Services Tax Act 1985 provides that a GST-registered person must have a one, two or six-monthly return filing frequency. Section 15(2) sets out the criteria for using a six-monthly filing frequency. Section 15C(1) provides that a person may apply, either in writing or in electronic format, to change from a one or two-monthly filing frequency to a six-monthly basis.
7. A six-monthly filing frequency has the obvious compliance cost advantage of requiring only two returns to be filed each year. It will also delay the liability to pay GST output tax on some transactions. However, these advantages must be weighed against the effect of delaying the ability to claim GST input tax.

Criteria for six-month filing frequency

8. A six-month filing frequency is available to any person whose taxable supplies have not or are not likely to be more than $500,000 in any 12-month period.

9. The amount of a person's taxable supplies is calculated on a GST exclusive basis and exclude amounts that arise out of:
   - donations and exempt supplies
   - the ending, including a premature ending, of a taxable activity carried on by the person:
   - a substantial and permanent reduction in the size or scale of a taxable activity carried on by that person:
   - the replacement of plant or a capital asset used in a taxable activity carried on by the person.

10. A person may also apply for a six-monthly filing frequency even though their taxable supplies exceed the $500,000 threshold if 80% or more of their taxable supplies in an income year are made:
    - within a six-month period that ends at any day within the last month of the person's income year, and
    - the person has not had a six-monthly filing frequency under this criterion in the 24-month period before the application.

11. This criterion is designed for people who have seasonal taxable activities. It is intended to apply for those taxpayers whose taxable supplies fall near the end of their income year.

Example 1 – Seasonal business

Dwight operates a ski hire shop with an annual turnover of $600,000. The shop is open only during winter. During the rest of the year, Dwight leaves New Zealand. If Dwight filed two monthly GST returns, he would need to file nil returns while he was outside New Zealand.

Dwight has approval to file income tax returns to coincide with his annual balance date of 31 October each year. Dwight can apply to file GST returns on a six-monthly basis because all of his taxable supplies are made between May and October, being within the last six months of the end of Dwight's income year. This means Dwight will need to file only two GST returns each year. The return filing frequency will be aligned with Dwight's income year. Dwight will file one return for the period November to April and the other for the period May to October each year.

Example 2 – Seasonal income

Aroha operates an apple orchard with an annual turnover of $700,000. 85% of her income is received from her harvest in April and May each year.

Aroha has approval to file income tax returns which coincides with her annual balance date of 30 June each year. Even though Aroha's orchard operates all year round, she can apply to file GST returns on a six-monthly basis because almost all of her taxable supplies are made within the last six months of the end of her income year. This means that Aroha will need to file only two GST returns each year. The return filing frequency will be aligned with her income year. Aroha will file one return for the period July to December and the other for the period January to June each year.

12. A six-month filing frequency would provide administrative savings. A person who files six-monthly GST returns would include most or all of their taxable supplies in one return that aligns with their annual balance date.

13. Note that a person who has changed from a six-monthly filing frequency under the seasonal criteria within the past 24 months, may not re-apply for six-monthly filing.

Breach of criteria

14. A person who has approval to file six-monthly GST returns and becomes ineligible to do so because they have breached the $500,00 threshold, and do not make seasonal supplies, must notify the Commissioner within 21 days of that breach.

15. In practice, it is likely that taxpayers will monitor their turnover when they calculate and file their GST returns. If, at that time, their taxable supplies made in that return indicate they have exceeded the turnover threshold (that is, taxable supplies made for that six-month period and the previous six-month period together exceed $500,000), they will need to determine whether they are likely to continue to maintain that level of turnover. If so, they must notify the Commissioner, and they will be changed to a one-monthly or two-monthly filing frequency.

16. However, where the person's taxable supplies exceed the threshold for six-monthly filing, but they determine they are not likely to exceed the threshold in the following 12 months, they are not required to change from six-monthly filing.

Example 3 – One-off breach in excess of the threshold

Sharyn operates a motel with an annual turnover of $450,000 and has an annual balance date of 31 March each year. She is approved to file six-monthly GST returns for the periods April to September and October to March each year. February is usually a quiet month for occupancy in the motel. However, in February 2017, the city held a month-long international event that meant Sharyn's turnover for the 12 months ending 29 February 2017 reached $550,000. The international event will be held in a different city in 2018. Therefore, Sharyn does not expect her annual turnover to be more than $450,000 for the 12-month period ended 28 February 2018.

Sharyn is not required to change her return filing frequency from 1 April 2017, because, although her turnover breached the $500,000 threshold, she does not expect her turnover to be over that threshold in the 12-month period following that breach.

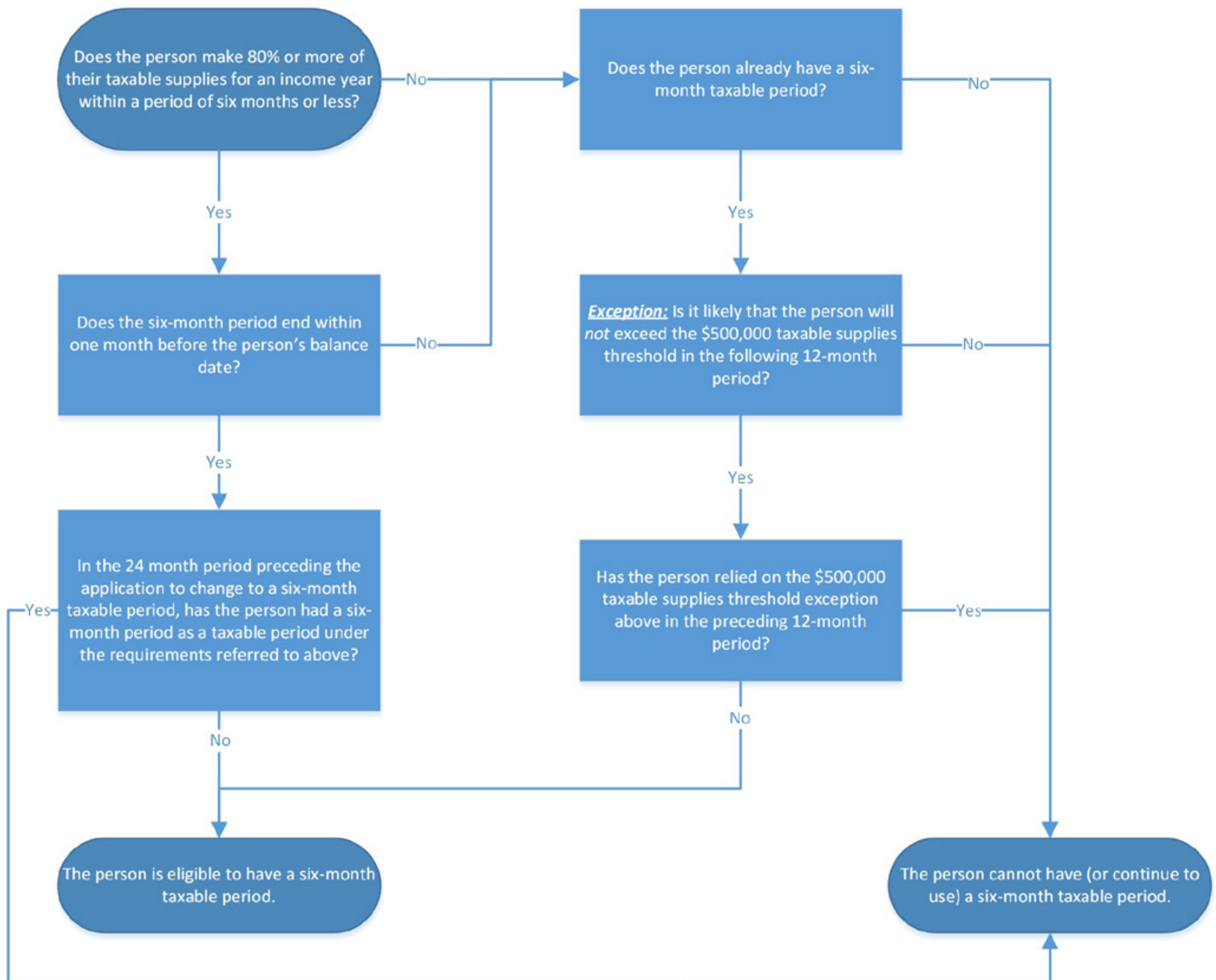
17. For any return filing frequency approved by the Commissioner, whether by initial application or by request to change, it is the Commissioner's practice to notify the person in writing. The letter will set out the approved filing frequency and the date from which the filing frequency will apply.
18. The flow chart in the Appendix below sets out the circumstances in which a registered person who makes (or expects to make) total taxable supplies for a 12-month period valued above $500,000 (but not more than $24 million) is eligible to be a six-month filer.

This Standard Practice Statement is signed on 04 October 2017.

Rob Wells
Manager, LTS Technical Standards

Appendix

Flowchart: Process where a person's taxable supplies exceed the $500,000 threshold figure



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.

Special Determination S56: Treatment of prepayments for services using IFRS

This Determination may be cited as Special Determination S56: Treatment of prepayments for services using IFRS.

1 Explanation (which does not form part of the Determination)

1.1 This Determination applies in respect of prepayments received by LP from customers under customer contracts, and of prepayments made by LP to Subsidiaries under supporting contracts on back-to-back terms.

1.2 Specifically, this Determination relates to the value of the consideration for one of the customer contracts and its supporting contract, and the spreading of any interest income or expenditure for two of the customer contracts and their supporting contracts under the financial arrangements rules.

1.3 This Determination must be applied in conjunction with BR Prv 17/48.

2 Reference

This Determination is made under ss 90AC(1)(d), 90AC(1)(i) and 90AC(1)(bb) of the Tax Administration Act 1994, in accordance with ss EW 20, EW 32(5) and EW 15I(2)(c) of the Income Tax Act 2007 (respectively).

3 Scope of Determination

3.1 This Determination applies to LP and its limited partners in respect of payments made and received under Agreements for the Sale and Purchase of services.

3.2 LP has entered into Customer Contracts and will enter into back-to-back Supporting Contracts with Subsidiaries on materially the same terms.

3.3 Under each of the Customer Contracts, LP receives upfront pre-payments from the Customers in return for the provision of services over the term of the contracts. Under the back-to-back Supporting Contracts, LP makes upfront payments to Subsidiaries and receives the services (in order to provide those services on to the customers).

3.4 This Determination is made subject to the following conditions:

- LP and its limited partners will derive income from the prepayments under the Customer Contracts and will deduct expenditure incurred under the Supporting Contracts under the relevant provisions of the Income Tax Act 2007 (outside of the financial arrangements rules) in accordance with BR Prv 17/48.
- This Determination applies to:
  - LP, its limited partner, and the ultimate limited partners who are New Zealand tax residents or have a fixed establishment in New Zealand, who use IFRS to prepare financial statements and to report for financial arrangements and who will apply IFRS in respect of the Customer Contracts and Supporting Contracts; and
  - Where relevant, the ultimate limited partners who are New Zealand tax residents or have a fixed establishment in New Zealand, and who do not use IFRS.
- The application of this Determination is subject to the continued application of private ruling BR Prv 17/48 (the Ruling) issued on 9 October 2017 (including any ruling issued to replace the Ruling, provided that the change to the Ruling does not affect the application of this determination).
- The Supporting Contracts are entered into on the same material terms as the corresponding Customer Contracts. The Customer Contracts will not be materially different from the documentation provided to Inland Revenue, to the extent that it impacts on the scope of the Determination, or the application of the financial arrangements rules to LP and its limited partners.

4 Principle

4.1 On and before the Service Date, LP will receive consideration from the Customers (in the form of the prepayments) in return for LP providing consideration to the Customers in the form of the provision of services from the Service Date and over the term of the Customer Contracts.

4.2 The Customer Contracts are each a "financial arrangement" under s EW 3 and are each an "agreement for the sale and purchase of property or services" under s YA 1.

4.3 The Customer Contracts are also each a wider or composite "financial arrangement".

4.4 LP will also make payments to the Subsidiaries under the Supporting Contracts in return for the Subsidiaries providing consideration to LP in the form of the provision of the services from the Service Date and over the term of the Supporting Contracts.

4.5 The Supporting Contracts are each a "financial arrangement" under s EW 3 and an "agreement for the sale and purchase of property or services" under s YA 1.

4.6 Valuing the services provided under the Customer Contracts and the Supporting Contracts may result in interest expenditure and interest income to LP and its limited partners.

4.7 The interest component (if any) will be spread over the term of the contracts.

4.8 All of the Customer Contracts and the Supporting Contracts will have the same principles under IFRS accounting applied to them in the financial statements of LP and the IFRS limited partners. The non-IFRS ultimate limited partners will be allocated income and expenditure in proportion to their partnership interests and will apply consistent accounting treatment.

5 Interpretation

In this Determination, unless the context otherwise requires:

- All legislative references in this Determination are to the Income Tax Act 2007, unless otherwise stated.
- Capitalised terms have the meaning as set out in Br Prv 17/48.
- **IFRS** means International Financial Reporting Standards as defined in s YA 1.
- **IFRS limited partners** means LP's limited partners (including ultimate limited partners) who use IFRS to prepare financial statements and to report for financial arrangements.

6 Method

Category 1 Contract

6.1 The consideration that is services provided by LP under the Category 1 Contract (and services received by LP under the relevant Supporting Contract) is valued under IFRS using the principles of s EW 32(2B).

6.2 The amount of LP's and the IFRS limited partners' interest expenditure that is to be allocated to each income year under the Category 1 Contract (if any) is determined by using the method in s EW 15D IFRS financial reporting method.

6.3 The amount of LP's and the IFRS limited partners' interest income that is to be allocated to each income year under the relevant Supporting Contract (if any) is determined by using the method in s EW 15D IFRS financial reporting method.

6.4 The non-IFRS limited partners will recognise interest income and expenditure under the Category 1 Contract and the relevant Supporting Contract (if any) as allocated to them from LP, in accordance with the method in s EW 15D.

Category 2 Contract

6.5 The amount of LP's and the IFRS limited partners' interest expenditure that is to be allocated to each income year under the Category 2 Contract (if any) is determined by using the method in s EW 15D IFRS financial reporting method.

6.6 The amount of LP's and the IFRS limited partners' interest income that is to be allocated to each income year under the relevant Supporting Contract (if any) is determined by using the method in s EW 15D IFRS financial reporting method.

6.7 The non-IFRS limited partners will recognise interest income and expenditure under the Category 2 Contract and the relevant Supporting Contract (if any) as allocated to them from LP, in accordance with the method in s EW 15D.

Category 3 Contract

6.8 The non-IFRS limited partners will recognise interest income and expenditure under the Category 3 Contract and the relevant Supporting Contract (if any) as allocated to them from LP, in accordance with the method in s EW 15D.

7 Example

This example is very stylised and is for illustrative purposes only. The example is based on the anticipated IFRS treatment. However, it is possible that the IFRS treatment may differ from the example, in which case, the IFRS treatment will prevail.

Category 1 Contract

7.1 The consideration that is services is valued by LP in its financial statements using IFRS, in accordance with the principles of s EW 32(2B) to be $Z.

7.2 The amount paid by Customer 1 to LP is $X.

7.3 The amount of LP's and its limited partners' interest expenditure (if any) for the Category 1 Contract is $Y (which is $Z–$X).

7.4 $Y will be deductible to LP's limited partners over the period of the Category 1 Contract. The proportion of $Y that is to be allocated to each income year under the Category 1 Contract will be calculated in accordance with the IFRS financial reporting method in s EW 15D.

7.5 For the avoidance of doubt, the method for determining the proportion of $Z which is income that is to be allocated to each income year under Category 1 Contract is set out in BR PRV 17/48.

This Determination is signed by me on the 9th day of October 2017.

Howard Davis
Director (Taxpayer Rulings)

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.

Court of Appeal confirms who can file a GST return

Case	Rhys Michael Cullen v The Commissioner of Inland Revenue [2017] NZCA 448
Decision date	12 October 2017
Act(s)	Tax Administration Act 1994 s 6; Goods and Services Tax Act 1985 ss 16, 51; Companies Act 1993 ss 248, 260; Incorporated Societies Act 1908 s 26.
Keywords	GST, standing, strike-out, liquidation, incorporated society

Summary

Mr Cullen filed GST returns in the name of Tamaki Rugby League Incorporated ("the Society"). However, the Society did not exist during the periods of the GST return. Later the Society was eventually restored to the register, but as it was in liquidation, the Official Assignee was liquidator. Therefore, Mr Cullen did not have the standing to act for the Society and file proceedings. In the High Court, Fitzgerald J found in favour of Mr Cullen. The Commissioner of Inland Revenue ("the Commissioner") therefore appealed to the Court of Appeal and was successful in striking out the High Court proceedings.

Impact

The impact of the decision:

1. Only the taxpayer, not another party, can use the taxpayer's registered details to file returns and claim refunds.
2. The Commissioner cannot be estopped by her previous errors (of law) from performing her statutory obligations to apply the revenue statutes correctly.
3. Only the liquidator of an incorporated society in liquidation, or somebody acting with the liquidator's consent, has standing or authority to issue proceedings on behalf of the society.

Facts

On 10 June 2016, Mr Rhys Cullen filed a goods and services tax ("GST") return with Inland Revenue in the name of the Society. The return claimed a GST refund of $14,951.24 for taxable activities carried out during the period from 1 April 2016 to May 2016. However, the Society did not exist either on the date the return was completed or, more particularly, during the preceding two-month period.

The Society was struck off the register in November 2012 and remained off the register until 17 June 2016, when Associate Judge Bell made an order for its restoration to the register. As a result, given that the Society was now back in existence, the Official Assignee resumed office as liquidator.

In August 2016 the Commissioner issued a notice of assessment to the Society reducing the GST refund due from $14,951.24 to $101.24. Mr Cullen responded by issuing a notice of proposed adjustment in the Society's name. The Commissioner did not issue a notice of response.

Mr Cullen filed proceedings with the High Court in September 2016. He acted for the Society and sought declarations that the GST return he filed was valid and the Commissioner's assessment was invalid.

Later that month, the Commissioner applied to strike out the originating application on the grounds that:

1. Mr Cullen had no standing to bring the proceeding;
2. the proceeding did not disclose a reasonably arguable cause of action because the Society did not exist during the period of alleged taxable activity;
3. the Commissioner's assessment was correct in all respects; and
4. the originating application was an abuse of process.

Fitzgerald J in the High Court found against the Commissioner, and the Commissioner appealed.

Decision

Their Honours found that Fitzgerald J in the High Court asked the wrong question. Fitzgerald J asked: "to whom [does] the [GST] Return … relate?" and "who is 'the taxpayer' for the purposes of the Return…?" Instead, their Honours agreed with the Commissioner that the inquiry should have been confined to whether the Society was the taxpayer for the purposes of the return; and if Fitzgerald J had asked this question, only one answer was available – that no other entity could file a GST return in the Society's name. Further, the Society was the only legal entity entitled to file a return and claim a refund for a taxable activity using that relevant number. Another party whether separately constituted by law or not, cannot use the registered person's details to claim a refund. To allow such uncertainty in taxpayer identity would undermine the Commissioner's statutory obligation to use her best endeavours to protect the integrity of the tax system.

Although the Commissioner accepted that she acted incorrectly in accepting GST returns filed by Mr Cullen in the Society's name, the Court of Appeal also held that the Commissioner cannot be estopped by her previous errors of law from performing her statutory obligations to apply the revenue statutes correctly.

Their Honours also found that Mr Cullen had no standing or authority to issue the proceeding on behalf of the Society. The Official Assignee had control and custody of the Society's assets (including a chose in action in bringing proceedings) from commencement of the liquidation on 17 June 2016. The Official Assignee never consented to Mr Cullen issuing this proceeding on the Society's behalf.

The Court of Appeal allowed the Commissioner's appeal and struck out the High Court proceedings.

Permanent place of abode and time bar

Case	Van Uden v Commissioner of Inland Revenue [2017] NZHC 2554
Decision date	19 October 2017
Act(s)	Income Tax Act 1994 ss CG15; OE 1 and Tax Administration Act 1994 ss 108; 141 B
Keywords	Residency, Diamond, time bar

Summary

The High Court found that the appellant did have a permanent place of abode in New Zealand in the relevant years, applying the *Diamond* test (*Commissioner of Inland Revenue v Diamond* [2015] NZCA 613). The Court also concluded that time bar could be opened under s 108(2) of the Tax Administration Act 1994 ("TAA") and that a shortfall penalty for taking an unacceptable tax position was appropriately imposed.

Impact

The decision confirms the application of the *Diamond* test for determining permanent place of abode. The decision also confirms that the wording of any time bar opinion is not important, but rather that an opinion has been formed. The Court also confirmed, consistent with the decision in *Great North Motor Co Ltd (in rec) v Commissioner of Inland Revenue* [2017] NZCA 328, that the Taxation Review Authority ("the Authority") is required to consider the time bar decision *de novo* and not merely whether it was honestly held and reasonably available.

Facts

The appellant, Mr van Uden, is a master mariner who on average, is at sea for approximately eight months of each year. The Commissioner of Inland Revenue ("the Commissioner") assessed the appellant for income tax in the 2005 to 2009 income years on the basis he had a permanent place of abode.

The appellant was born in New Zealand in 1957 after his parents emigrated from the Netherlands. During the 1980's, the appellant married his first wife and adopted her two daughters. In 1987, the appellant purchased a home in Mangere Bridge, Auckland for his family. In 1993, the appellant purchased a rental property in Auckland, which was the first of four rental properties that the appellant acquired.

By 1994, he and his wife had separated. In 1996, the appellant bought an apartment which he stayed in while in New Zealand. The appellant returned to New Zealand regularly to visit his son.

In 1998, the appellant met his current wife, Judith van Uden. Mrs van Uden had received a property at 27 Evelyn Road as part of an earlier divorce settlement from her previous marriage which she transferred to the Pink Dog Family Trust ("the Trust"). From 21 November 1998, the appellant stayed at 27 Evelyn Road with Mrs van Uden. The appellant and Mrs van Uden were married on 14 December 1998. In 1999 the appellant was also appointed a trustee of the Trust and included as a discretionary beneficiary. Between 1998 and early 2000, when the appellant was not at sea, he would return to New Zealand and stay at 27 Evelyn Road with Mrs van Uden. From early 2000, Mrs van Uden began sailing fulltime with the appellant. In March 2004 the property at 27 Evelyn Road was tenanted for $70 per month.

During early 2005 the appellant carried out deferred maintenance at 27 Evelyn Road. In August 2006, the appellant, Mrs van Uden, and her solicitor, as the trustees of the Trust, purchased 29 Evelyn Road. In June 2009, the appellant and Mrs van Uden commenced a new build project at 29 Evelyn Road, which was completed by early 2011. The property at 27 Evelyn Road was let in 2010. The appellant and Mrs van Uden moved into the property at 29 Evelyn Road and eventually sold the property at 27 Evelyn Road in October 2014.

The Commissioner assessed the appellant for income tax on his overseas income for the years ended 31 March 2005 to 31 March 2009 (inclusive) on the basis he was a resident in New Zealand. The appellant unsuccessfully challenged the assessment before the Authority and appealed that decision to the High Court.

Decision

Residency

The Court agreed with the Authority that the appellant had a permanent place of abode at 27 Evelyn Road. The Court applied the decision in *Diamond* and took into consideration the following factors:

1. *The continuity or otherwise of the taxpayer's presence in New Zealand and in the dwelling* – While the appellant spent an average of at least eight months a year at sea, when he was not on the ship, holidaying or travelling, he returned to New Zealand and spent time here. When he did return, the appellant lived and based himself at 27 Evelyn Road. Apart from relatively short periods in the Netherlands as a child and during a period in the 1980's, the appellant had a continuous presence in New Zealand.
2. *The duration of that presence* – the property at 27 Evelyn Road had been used as the appellant's home for almost 10 years until June 2010.
3. *The durability of the taxpayer's association with the particular place* – The appellant has maintained significant ties with 27 Evelyn Road, exhibited in both practical and financial ways. Firstly, the appellant returned to 27 Evelyn Road when not at sea. Secondly, the appellant and Mrs van Uden further committed to that address when they purchased the neighbouring property and undertook significant renovations. Thirdly, credit card statements in the relevant periods showed regular household expenditure at that location and a Sky television account maintained for several years suggested to the Court that 27 Evelyn Road was used for their residential purposes. Additionally, 27 Evelyn Road was the registered address for three motor vehicles that Mrs van Uden and the Trust owned from time to time, the appellant's pay slips, and their electoral address. Lastly, the appellant regularly gave the 27 Evelyn Road address for bills, bank statements, insurance policies and investments.
4. *The closeness or otherwise of the taxpayer's connection with the dwelling* – 27 Evelyn Road remained the property that the appellant and Mrs van Uden left from and returned to. It was their base in New Zealand. It was Mrs van Uden's home, who the appellant was in a committed relationship with. While the appellant argued that he did not own 27 Evelyn Road,

the Court noted that the parties committed to each other at an early stage in their relationship and that the appellant transferred his rental properties first to them both as a partnership and then from the partnership to the Trust.

5. *The requirement for permanency to distinguish merely transient or temporary places of abode* – 27 Evelyn Road was indefinitely available to the appellant when he and Mrs van Uden returned to New Zealand. Even when it was tenanted in 2004 that was at a concessionary rate and only for 10 months. Any use by the house sitter, friends or family was also dependent on the appellant and Mrs van Uden needing to live there.

FIF Income

The Court held that the *de minimis* exception in s CG 15(2)(d) did not apply namely because the employer's contributions were incurred "by or on behalf of" the appellant. Accordingly, the Court found that the appellant was liable to pay tax on his interest in his employer's superannuation fund. The appellant's unit trust investments were also aggregated to the income from the superannuation fund.

Time Bar

The Court found that the Commissioner validly formed an opinion when an adjudication report issued by a Manager of the Dispute Review Unit, confirmed that the exception to open the time bar in s 108(2)(b) of the TAA applied. The opinion was the most recent opinion on the issue, was reasonably held and the assessments that followed were consistent with that opinion.

The Court confirmed that there is no significance in the form of wording used, just that an opinion needs to be formed. In any event, the Court confirmed that the hearing before the Authority was a de novo hearing so that the Authority was obliged to review the Commissioner's time bar decision.

Shortfall Penalties

The Court held that the appellant's claim that he did not have a permanent place of abode in New Zealand during the tax years in dispute did not have the prospect of being close to a 50 per cent chance of success. He therefore failed to meet the standard of being about as likely as not to be correct.

Negligent advice regarding a transfer of land attracting tax liabilities

Case	Craig Duthie and Kirsten Taylor-Ruiterman v Denise Michelle Roose [2017] NZSC 152
Decision date	6 October 2017
Act(s)	Income Tax Act 2007, s BD 3, CB 14, GC 1; High Court Rules, r 10.15
Keywords	"Derivation of income"

Summary

This case is an appeal of the Court of Appeal decision in *Roose v Duthie* [2016] NZCA 600. It concerned a transfer of a property which attracted adverse tax consequences. The collective respondents sought damages from the collective appellants on the basis they were given negligent advice. The Court had to consider whether a cause of action accrued (because a tax liability arose) once the sale and purchase agreement became unconditional, or later, when it was settled. The Court held that, the loss (and therefore the cause of action) arose when the income from the transaction was derived. This occurred, in accordance with general principles of derivation, when the transfer was effected (at settlement date) on 2 May 2008. The Attorney-General was invited as intervener in these proceedings.

Impact

The Supreme Court is willing to involve the Attorney-General on matters of public relevance/importance when they are not a party to proceedings.

The Court confirmed the Commissioner of Inland Revenue's ("the Commissioner") current position on the derivation of income in land transactions.

Facts

The property in issue was acquired by Denise Developments Limited ("DDL") in 2006. DDL subdivided the property into seven sections.

In early 2008, Ms Roose sought advice from Mr Duthie regarding the proposed transfer of the property from DDL to a trust. She claimed that Mr Duthie negligently advised her that such a transfer would not attract income tax and the sale would be zero rated for goods and services tax ("GST") purposes.

A new trust was formed and DMR Development Limited ("DMR") was incorporated to act as its trustee. On 14 April 2008 DDL and DMR entered into an agreement under which DDL was to sell, and DMR to purchase the property, for $1,950,000. The agreement provided that on settlement DMR would provide a deed of acknowledgment of debt for the purchase price under which demand for payment could not be made for five years. Settlement was to take place on 21 April 2008, but was later varied by agreement. Settlement was effected electronically on 2 May 2008.

As a result of an audit, the Commissioner determined that DDL's taxable activity was property development, reassessed DDL's income tax for the 2009 year and imposed a shortfall penalty.

The respondents contended that had Ms Roose been properly advised by Mr Duthie, DDL would not have transferred the land, and subsequently not incur an unnecessary tax liability as a result of the sale.

Decision

Toogood J, in the High Court had concluded that when DDL entered into the agreement on 14 April 2008 there was a commitment to a loss at that point (being either a tax liability or the costs associated to prevent that loss). Accordingly, the limitation period began to run from the moment.

Applying the decision in *Thom v Davys Burton* [2008] NZSC 65, [2009] 1 NZLR 437 ("*Thom*") his Honour confirmed that the loss did not arise on transfer (2 May 2008) but when the parties entered into binding legal obligations.

The Court of Appeal allowed the appeal, distinguishing this case from *Thom* on the basis that this was a "no transaction" case. Briefly, the respondents would not have entered into the transaction but for the negligent advice. The Court concluded that DDL's tax liability arose on 2 May 2008 when the transfer from DDL to DMR was registered. The Court identified that the cause of action accrued when the tax liability arose; damage could be anticipated, but had not been incurred until that point. The Court, referring to *Mills v Commissioner of Inland Revenue* (1985) 7 NZTC 5,025 (HC) ("*Mills*"), *Gasparin v Commissioner of Taxation* (1994) 50 FCR 73 ("*Gasparin*") and *Ruddenklau v Charlesworth* [1925] NZLR 161 (HC) ("*Ruddenklau*") considered the tax liability arose on transfer and dismissed the argument that the tax implications became inevitable once the agreement was entered into by the parties.

The Supreme Court observed that for the purposes of this case they were prepared to accept that disposal of the relevant land occurred when the Sale and Purchase Agreement went unconditional on 14 April 2008 (consistent with *Mills*).

Considering the principles of income derivation, the Supreme Court confirmed that under an unconditional contract for the sale of land, the vendor is entitled to seek specific performance. However, referring to *Ruddenklau*, the Court noted that a right to seek specific performance is not the same as the right to sue for the purchase price as a debt. The Supreme Court, relying on *Gasparin*, confirmed that income is derived at settlement when a debt accrues to the vendor (and not when the vendor is entitled to specific performance).

The appellants argued that the property was sold for less than market value and therefore s GC 1 applied. Consequently, s GC 1 deemed the vendor to have derived the market value (income) when disposal occurred. The Court considered that s GC 1(2) identifies the time at which market value is determined (at disposal) but not the timing of derivation of resulting income, which is determined by reference to the general principles of derivation.

Consequently, the Court found that a tax liability, and thus the cause of action, did not accrue until the date of settlement on 2 May 2008.

The Court also dismissed the argument that unwinding the agreement would have resulted in tax evasion, with severe penalties attached, on the basis that if the respondents had decided not to proceed to settlement, no income would have been derived and therefore no accrual of a liability to tax.

The Court made obiter comments on the nature of "wasted costs" but dismissed any advancement of the argument. The Court agreed with the approach of the Court of Appeal in regards to the "unwind costs" in that had a realisation of the true position occurred before 2 May 2008, there would have been no settlement and the liability would not have arisen.

Result

The appeal was dismissed. The appellants were ordered to pay the respondents costs of $25,000 and reasonable disbursements.

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