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TAX INFORMATION Bulletin

CONTENTS

1 In summary

2 Binding rulings
BR Prd 17/03: Westpac NZ Limited

7 Interpretation statements
IS 17/06: Application of schedular payment rules to directors' fees

22 Standard practice statements
SPS 17/01: Income equalisation deposits and refunds

33 Legal decisions - case notes
Application for strike out granted
High Court costs – accountancy fees were not properly claimable as a disbursement
Court of Appeal indicates that the statutory notice requirements regarding the payment of GST in property transactions cannot be waived

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:

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

You can also subscribe at **www.ird.govt.nz/public-consultation** to receive regular email updates when we publish new draft items for comment.

Ref	Draft type	Title	Comment deadline
PUB00305	Interpretation statement	Review of Interpretation Statement on Tax Avoidance	15 September 2017

Correction – *Tax Information Bulletin* Vol 29 No 5 June 2017

The discussion of the Taxation (Annual Rates for 2016–17, Closely Held Companies, and Remedial Matters) Act 2017 contains errors in figures in examples 2 and 4 under the section relating to Capital loss amount rules in section CD 44(9) of the Income Tax Act 2007.

Example 2

The figures given for "consideration on disposal", should both be $980,000 instead of $960,000 and $96,000 respectively.

Example 4

The figure for "consideration on disposal" in the column entitled "Before amendment to section CD 44(9)" should be $700,000 (and not $550,000). The capital loss amount under that column should be $300,000 (and not $450,000).

IN SUMMARY

Binding rulings

BR Prd 17/03: Westpac NZ Limited 2

This ruling relates to a mortgage offset arrangement where customers can elect to use the balance of eligible accounts to offset against home loan accounts, to reduce interest payable on those home loan accounts.

Interpretation statements

IS 17/06: Application of schedular payment rules to directors' fees 7

This interpretation statement discusses how the schedular payment rules apply to payments of directors' fees. In particular, it covers the situations in which tax must be withheld from directors' fee payments, and when and how much tax must be withheld and paid to the Commissioner, if withholding is required. It does not discuss the withholding treatment of directors' fees paid to non-residents.

Standard practice statements

SPS 17/01: Income equalisation deposits and refunds 22

This standard practice statement (SPS) sets out the Commissioner's practice in regard to the statutory powers to accept income equalisation deposits for a tax year outside the specified period, and accept refund applications for a tax year outside the specified period.

Legal decisions - case notes

Application for strike out granted 33

On 30 June 2017 the High Court ("Court") gave judgment for the Respondent and granted the Commissioner of Inland Revenue's ("the Commissioner") strike out application under s138H of the Tax Administration Act 1994 ("TAA").

The plaintiff disputed her liability for income tax in the years ended 31 March 2004, 2005 and 2006. In this proceeding she seeks that her "alleged debt" be cleared and that the exceptional circumstance provision under s89K of the TAA be invoked. The Commissioner disagreed and sought to strike out her claim.

The Court struck-out the plaintiff's claim, and awarded costs on a category 2B basis.

High Court costs – accountancy fees were not properly claimable as a disbursement 34

On 12 May 2017 the High Court ("Court") gave judgment for the plaintiff and found that the Commissioner of Inland Revenue's ("the Commissioner") assessments and default assessments in respect of the plaintiff's income tax were incorrect. This judgment is currently under appeal.

The plaintiff subsequently sought costs on a category 3 basis in accordance with the High Court Rules 2016. The Commissioner disagreed with the calculation and allocation of costs.

The Court awarded the plaintiff costs on a category 3B basis, save that band C would be applied to the preparation of briefs and preparation for hearing. The Court also allowed the plaintiff's disbursements as claimed save for the plaintiff's accountancy fees which the Court said were not properly claimable as a disbursement.

Court of Appeal indicates that the statutory notice requirements regarding the payment of GST in property transactions cannot be waived 36

This is a dispute between a vendor and purchaser involving the payment of goods and services tax ("GST") in a property transaction. The dispute concerned whether there had been a waiver of the statutory notice requirement regarding the payment of GST under s 14C of the Tax Administration Act 1994 and s 78F of the Goods and Services Tax Act 1985. The Attorney-General was joined to the appeal as intervener.

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 17/03: Westpac New Zealand

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by Westpac New Zealand Limited (Westpac).

Taxation Laws

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

This Ruling applies in respect of:

(a) ss BG 1, CC 4, CC 7, EW 15, EW 31, GB 21, RE 1 to RE 6, RE 10, RF 2 to RF 4, RF 12, RF 12I and YA 1;

(b) part VIB of the Stamp and Cheque Duties Act 1971.

The Arrangement to which this Ruling applies

The Arrangement is a mortgage offset arrangement pursuant to which Westpac customers can elect to use the balance of eligible Westpac transaction and savings accounts to offset against home loan accounts in order to reduce interest payable on those home loan accounts (Choices Offset Arrangement).

The Choices Offset Arrangement allows a customer to link several deposit accounts (known as Linked Deposit Accounts) to one of a variety of home loan accounts (known as a Choices Offset Loan), notionally offsetting the balances of the deposit accounts against the loan account balance. Interest is calculated on the loan account balance after the notional offset. Interest is not paid or payable on any Linked Deposit Accounts for as long as the account is linked to a Choices Offset Loan.

This Ruling does not consider the tax consequences of any arrangement under which a Linked Deposit Account holder agrees to offset their deposit account credit balance against another person's Choices Offset Loan account debit balance in return for valuable consideration (whether in monetary or non-monetary form).

Further details of the Arrangement are set out below.

Background

1. The Choices Offset Arrangement is a "mortgage offset" arrangement. The customers who may participate are classified as either Restricted Entities or Non-restricted Entities. Special rules apply to each of the two participant entities as discussed below.
2. The Choices Offset Arrangement allows Westpac customers to "link" up to 10 Linked Deposit Accounts to a single loan account such that the balances of the home loan and deposit account(s) will be notionally aggregated (thereby notionally reducing the debit balance of the loan) for the purposes of calculating the amount of interest that accrues on the loan. Westpac will pay no credit interest on the Linked Deposit Accounts during the period they are so linked, even where the deposit balances exceed the loan balance.
3. The Choices Offset Arrangement is not a separate loan product; it is an arrangement that can be used with an existing home loan product and deposit accounts. Further details of the Choices Offset Arrangement, particularly in relation to the eligible home loans and deposit accounts, interest calculations, interest rates, eligibility requirements of participants and relevant documentation are set out in the following paragraphs.

Eligible home loans that can be offset

4. Westpac offers its retail and business customers several loan products, including Choices Home Loans, which may have a fixed, floating or capped interest rate.
5. Westpac will determine from time to time which loan products may be included in a Choices Offset Arrangement (Qualifying Loans). Currently, only floating-rate Choices Home Loans may be included in the Choices Offset Arrangement. Other Choices Home Loan types (excluding the Choices Everyday Loan) may be added in due course.
6. Qualifying Loans will have a variety of repayment options, including table, non-table and interest only. A Qualifying Loan included in a Choices Offset Arrangement is referred to as a Choices Offset Loan.
7. The effect of offsetting is that interest will be payable on the lower notional principal balance of the Choice Offset Loan. In the case of:
   a. a table loan, the term of the loan will be reduced;
   b. a non-table loan, the interest payments will be reduced. Any interest savings will result in either a reduction of interest payments or (if any minimum periodical payments are maintained) a reduction in the term of the loan;
   c. an interest-only loan, interest payments will be reduced.

Eligible deposit accounts that can be offset

8. Westpac also offers its customers a variety of deposit accounts, including transaction accounts and savings accounts. Westpac determines, from time to time, which of these accounts may be included in a Choices Offset Arrangement.
9. Deposit accounts are not required to be new deposit accounts opened for the purpose of the Arrangement. Further, no new deposit account types have been (or will be) created as part of the Choices Offset Arrangement.
10. To participate in the Choices Offset Arrangement, the deposit account (or accounts) must be linked to a Choices Offset Loan. As noted above, a deposit account that has been linked to a Choices Offset Loan pursuant to the Choices Offset Arrangement is referred to as a Linked Deposit Account.
11. Only one Qualifying Loan and up to 10 Linked Deposit Accounts may be included in a Choices Offset Arrangement.

Offsetting features

12. The key feature of the Choices Offset Arrangement is the "offsetting" of the aggregate credit balance of the Linked Deposit Account(s) against the debit balance of a Choices Offset Loan. This offsetting occurs before interest is calculated.
13. A net notional balance will be calculated for the Choices Offset Loan. Interest then accrues on that net notional balance only. This is the case as a matter of both contract (as set out in the terms and conditions applying to the Choices Offset Arrangement, which are discussed in more detail below) and as a matter of practice (in terms of Westpac's internal systems and accounting).
14. There are no actual transfers of funds, no set-offs or netting of funds, and no transfer of any interest in, or entitlement to, funds between the Choices Offset Loan account and Linked Deposit Account (or Accounts).
15. The effect of offsetting is that interest will be payable on the lower notional principal balance of the Choices Offset Loan.
16. Financially, the consequences for a customer of linking one or more deposit accounts and a Choices Offset Loan in a Choices Offset Arrangement are similar in terms of reduced interest costs that may arise from the use of Westpac's revolving home loan product (Choices Everyday Loan). Under the revolving home loan product, the balance on which interest is calculated is reduced, resulting in a reduced term of the loan for table mortgages and reduced periodic payments for non-table mortgages.

Interest calculations under a Choices Offset Loan

17. The balance on which interest accrues on any day under a Choices Offset Loan will be calculated by notionally reducing the debit balance of the Choices Offset Loan at the end of that day by an amount equal to the aggregate of the credit balances of each Linked Deposit Account at the end of that day.
18. If the aggregate of the credit balances of all Linked Deposit Accounts equals or exceeds the debit balance of the relevant Choices Offset Loan, no interest will accrue on the Choices Offset Loan.
19. No interest will accrue or be paid on the credit balance of a Linked Deposit Account for so long as it is linked to a Choices Offset Loan. This is the case irrespective of whether, on any given day, the aggregate of the credit balances of all Linked Deposit Accounts at the end of that day exceeds the debit balance of the Choices Offset Loan to which they are linked.

20. Interest will accrue on any Linked Deposit Account for any period that it is not linked to a Qualifying Loan. Clause 3 of the Offset Arrangement Agreement and Clause 2 of the Offset Arrangement Contributor Agreement make it clear that interest is suspended on Linked Deposit Accounts only for so long as they are linked to a Choices Offset Loan under those agreements.
21. Default interest will not be subject to the offsetting arrangement. It will continue to accrue in accordance with the standard terms and conditions that apply to any Choices Offset Loan.

Interest rate

22. The rate of interest applicable to a Choices Offset Loan will be a market rate that Westpac determines.

Eligible persons and entities

23. Under a Choices Offset Arrangement, deposit accounts held by the following persons may be linked to a Choices Offset Loan:
    a. the Borrower, that is, the person (or persons acting jointly) who has (have) taken out the Qualifying Loan to be included in the Choices Offset Arrangement;
    b. in limited circumstances (as discussed below), persons other than the Borrower (known as a Contributor).
24. The Offset Arrangement Agreement draws a distinction between "Restricted Entities" and "Non-Restricted Entities" for the purposes of determining what deposit accounts can be linked to a Choices Offset Loan. These terms, and the consequences arising, are discussed below.

Restricted Entities

25. Where the Borrower is a Restricted Entity only the following deposit accounts may be linked to a Choices Offset Loan:
    a. A deposit account in respect of which the Borrower is the Account Holder; and
    b. if the Borrower is party to this Agreement in its capacity as the trustee(s) of a trust or executor(s) of an estate, deposit accounts that are held by the Account Holder in its capacity as the trustee(s) of the same trust or executor(s) of the same estate.
26. A Restricted Entity is
    a. any body corporate or other person, including a body of persons acting jointly, other than a natural person or two natural person(s) jointly who are Partners; and
    b. any person(s), including any natural person(s), who is/are acting in its/their capacity as the trustee(s) of a trust or executor(s) of an estate.
27. The effect of being a Restricted Entity is that only deposit accounts in respect of which the Borrower is the sole account holder can be linked to the Borrower's Choices Offset Loan.
28. In the case of a Borrower acting in its/their capacity as the trustee(s) of a trust or the executor(s) of an estate, deposit accounts held only by the Borrower in its/their capacity(ies) as the trustee(s) of the same trust or executor(s) of the same estate can be linked to its Choices Offset Loan.
29. By way of example, if ABC Limited has established a Choices Offset Arrangement in connection with its Qualifying Loan, deposit accounts held only by ABC Limited may be linked to that loan. Further, if ABC Limited is a party to the Choices Offset Loan as trustee of a trust, deposit accounts held only by ABC Limited in its capacity as trustee of the same trust may be linked to that loan.

Non-Restricted Entities

30. Where the Borrower is not a Restricted Entity, deposit accounts held either individually or jointly by the Borrower, their partner (spouse, civil union or de facto partner), any of their children (or a child together with his or her partner), or any of their parents (or a parent together with his or her partner) can be linked to the Borrower's Choices Offset Loan (on the condition that such persons are not themselves Restricted Entities). This can be done by:
    a. the Borrower where he or she (or they) can do so within the parameters of any linking rules determined by Westpac from time to time (which will require, among other things, that the Borrower has sufficient authority to operate the relevant deposit account);
    b. the Borrower acting with the consent of the relevant Contributor, in circumstances where the linking rules determined by Westpac from time to time require the relevant Contributor's consent (which will be the case where the Borrower does not have sufficient authority to operate the relevant deposit account);

c. a Contributor, where the relevant deposit account is held by a Contributor and that Contributor has already provided consent in relation to another deposit account (and, therefore, has already signed up to the relevant terms and conditions under which the Borrower and the relevant Contributor agree that the Contributor may do so).

31. By way of example only, if Mr and Mrs Brown jointly establish a Choices Offset Loan:
    a. deposit accounts held by Mr and Mrs Brown jointly may be linked to that Choices Offset Loan;
    b. subject to any further criteria set by Westpac from time to time, deposit accounts held by Mr Brown in his individual capacity may be linked to that Choices Offset Loan (most likely by Mr Brown himself);
    c. subject to any further criteria set by Westpac from time to time, deposit accounts held by Mrs Brown's father may be linked to that Choices Offset Loan by:
        i. Mr and Mrs Brown, as the Borrower, with the consent of Mrs Brown's father; or
        ii. Mrs Brown's father, if Mrs Brown's father has already consented to another deposit account being linked to Mr and Mrs Brown's Choices Offset Loan;
    d. deposit accounts held by Mr Brown's father or by Mr Brown's father and his de facto partner jointly may be linked to that Choices Offset Loan (in accordance with relevant linking criteria above); and
    e. deposit accounts held by ABC Limited, or by Mr Brown in his capacity as a trustee, or any other Restricted Entity, cannot be linked to that Choices Offset Loan.

Offset Arrangement documentation

32. The terms and conditions of the Choices Offset Arrangement are set out in the following documents provided to Inland Revenue on 29 March 2017:
    a. Choices Home Loan Summary (which forms part of the agreement pursuant to which Westpac advances home lending to a particular customer).
    b. Choices Home Loan Terms & Conditions (which is a standard form master document that contains generic provisions applying to all Westpac loans of a particular type).
    c. Offset Arrangement Agreement (being the principal agreement between the Choices Offset Loan customer and Westpac in relation to the Offset Arrangement).
    d. Offset Arrangement Contributor Agreement (being the document that a Contributor signs in addition to Westpac and the Borrower to join an Offset Arrangement).

33. The Choices Offset Arrangement documentation will override certain of the terms and conditions that would otherwise apply to the relevant Qualifying Loan and Linked Deposit Accounts that are included in an Offset Arrangement.

34. In particular, the Choices Offset Arrangement Agreement sets out the interest calculation method to be used for the Choices Offset Loan, provides for no interest to accrue on Linked Deposit Accounts for as long as the account(s) are linked to a Choices Offset Loan, and sets out the eligibility criteria (in relation to loans, accounts and account holders).

35. Therefore, Westpac customers who wish to include a Qualifying Loan in a Choices Offset Arrangement would enter into the standard loan documentation applicable to the Qualifying Loan as well as the Choices Offset Arrangement documentation. A customer may not have a Choices Offset Arrangement without a Qualifying Loan.

Condition[s] stipulated by the Commissioner

This Ruling is made subject to the following condition:

a. All interest rates offered by Westpac in relation to an Offset Arrangement are at arm's length market rates.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any conditions stated above, the Taxation Laws apply to the Offset Arrangement as follows.

Financial arrangements rules

When, under the Choices Offset Arrangement, a credit balance of a Linked Deposit Account and a debit balance of a Choices Offset Loan account are offset, no amount of consideration is paid or payable by virtue of that offset for the purposes of calculating income or expenditure under ss EW 15 and EW 31 of the financial arrangements rules (as defined in s EW 1(2)). Therefore, offsetting does not, of itself, give rise to any income or expenditure under the financial arrangements rules. For the avoidance of doubt, fees payable by a Borrower to Westpac for the Choices Offset Arrangement constitute consideration for the purposes of the financial arrangements rules.

Withholding tax

- There is no payment of, or entitlement to, interest (as defined in s YA 1) in relation to the credit balance(s) of Linked Deposit Account(s) in the Choices Offset Arrangement. Therefore, no holder of a Linked Deposit Account derives any interest income on such accounts for the purposes of s CC 4, and Westpac does not pay any interest and has no obligation to deduct resident withholding tax or non-resident withholding tax under the Act or pay approved issuer levy under part VIB of the Stamp and Cheque Duties Act 1971.
- The Choices Offset Arrangement is not an indirect associated funding arrangement as that term is defined in section RF 12I.

Section CC7

- No income arises under s CC 7 for Westpac or its customers in relation to the Choices Offset Arrangement.

Tax avoidance

- Sections BG 1 and GB 21 do not apply to the Choices Offset Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 April 2017 and ending on 31 March 2022.

This Ruling is signed by me on the 9th day of June 2017.

Graham Poppelwell
Investigations Manager, Investigation and Advice

INTERPRETATION STATEMENTS

This section of the *TIB* contains interpretation statements issued by the Commissioner of Inland Revenue.

These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

IS 17/06: Income tax – application of schedular payment rules to directors' fees

All legislative references are to the Income Tax Act 2007 (the Act) unless otherwise stated. Relevant legislative provisions are reproduced in the appendix to this Interpretation Statement.

Summary

1. This Interpretation Statement discusses:
   - the situations when you must withhold tax from the payment of directors' fees; and
   - when and how much you must withhold, if you are required to do so.
2. Generally, if you pay a director's fee you are making a "schedular payment" and you are required to withhold tax from that payment and pay the tax you withhold to Inland Revenue. However, not all payments of directors' fees are schedular payments. Whether a payment of a director's fee is a schedular payment largely depends on who has contracted to provide the directorship services you are paying the director's fee for. If a director's fee is not a schedular payment then there is no requirement to withhold tax from the payment.
3. If you are paying a director's fee that is a schedular payment, the rate of tax at which you must withhold will depend on who you are paying, and the information they give you.
4. The flow chart at Appendix 1 will help you determine whether you are required to withhold tax from a payment of a director's fee, and if so, at what rate you must withhold.
5. This Interpretation Statement does not discuss the withholding treatment for directors' fees paid to non-resident taxpayers. Non-resident tax issues turn on the facts of the particular case, and the outcomes may vary depending on whether a Double Tax Agreement applies to the particular non-resident taxpayer.
6. This Interpretation Statement updates and replaces *Interpretation Statement – Tax deductions from directors' fees paid to GST registered person* – Tax Information Bulletin (TIB) Vol 8, No 4 (September 1996).

Paying a director's fee – what do you need to know?

7. Generally, a director's fee is a "schedular payment". When you make a schedular payment you are required to withhold tax from that payment and pay the tax you withhold to Inland Revenue. However, there are exceptions to this general rule. Whether any of these exceptions will apply largely depends on who has contracted to provide the directorship services you are paying the director's fee for. If a director's fee is not a schedular payment then there is no requirement to withhold tax from the payment.
8. While the Companies Act 1993 requires the person holding the office of director to be a natural person, this does not mean contracts for directorship services must be with an individual director. Other entities can contract to provide the services of an individual as a director, for example, an employee of a company or a partner in a law firm. As such, an individual holding the office of director will not necessarily be the person (or entity) that has contracted with you to provide the directorship services.

Who have you contracted with to provide directorship services?

9. Directorship services will either be provided by an individual, or a non-individual entity, such as a company, partnership, or authority.

10. The following paragraphs discuss:
    - what to do when you pay an individual a fee for being a director;
    - what to do when you pay a non-individual entity a fee for providing directorship services; and
    - your administrative obligations regarding withholding tax from payments of directors' fees.
11. This statement is intended to complement *Public Ruling BR Pub 15/10: Goods and services tax – Directors' fees* TIB Vol 27, No 7 (August 2015) by using some of the same fact scenarios and examples.

Payments of directors' fees to individuals

12. Individuals providing directorship services commonly do so as independent contractors. In most cases, when you pay directors' fees to an individual who is providing directorship services to you as an independent contractor, these directors' fees will be schedular payments from which you must withhold tax, and pay the tax withheld to Inland Revenue.

Example 1: Directors' fees paid to contractor

(See Example 1 in BR Pub 15/10.)

Ophelia is a human resources consultant in business on her own. Reynaldo Ltd approaches Ophelia to be a director. Ophelia contracts (as an independent contractor) to provide her services as a director of Reynaldo Ltd and in return she receives directors' fees.

When Reynaldo Ltd pays directors' fees to Ophelia, it must withhold tax from those payments (as schedular payments) and pay that tax to Inland Revenue.

13. It is possible, although less common, that an individual will provide directorship services as an employee. An individual will provide directorship services as an employee if directorship duties are included in the terms of their employment, usually recorded in the employee's employment agreement. These duties may be in addition to other non-directorship duties. For example, a person employed as a managing director may have both management duties and directorship duties.
14. If you employ someone as a director, amounts you pay them for performing their directorship duties will be either "salary or wages" (regular payments), or an "extra pay" (a lump sum payment), not schedular payments. You will need to deduct PAYE from these payments, as you would for any other payments of "salary or wages" or "extra pay" made to an employee.

Example 2: Directors' fees paid to an employee

Voltimand is the managing director of Royal Norway Ltd. His employment agreement with Royal Norway Ltd states that his duties include managing the day-to-day operations of the company, as well as acting as a director.

Any payment Voltimand receives for performing the duties set out in his employment agreement will be "salary or wages" or an "extra pay" because it is paid to him in connection with his employment. "Salary or wages" or an "extra pay" cannot, by definition, be a schedular payment. Royal Norway Ltd will therefore need to deduct PAYE from Voltimand's "salary or wages" or "extra pay" as it would for any other employee.

15. In some cases, you may have both employees and independent contractors acting for you as directors. If so, you will need to treat the payments differently depending on whether you are paying an employee or an independent contractor.

Example 3: Directors' fees paid to employees and independent contractors

In addition to employing Voltimand as the managing director of Royal Norway Ltd, the company also contracts Francisco to be a director. Francisco is an independent contractor and has directorships with a number of other companies.

As discussed above, when Royal Norway Ltd pays Voltimand for acting as a director these payments are "salary or wages". Royal Norway Ltd must therefore deduct PAYE as it would for any other employee.

However, because Francisco is an independent contractor, the payments he receives from Royal Norway Ltd for acting as a director are schedular payments, not "salary or wages". Therefore, when Royal Norway Ltd pays Francisco his directors' fees', Royal Norway Ltd must withhold tax from those payments and pay the tax to Inland Revenue.

GST registration does not affect the requirement to withhold

16. In the past, some taxpayers believed they were not required to withhold any tax from directors' fees they paid to a GST-registered director. This is not the case. Whether a person is registered for GST is irrelevant when determining if you are required to withhold tax from directors' fees you are paying to that person.

The "shareholder-employee" exception

17. If you are paying directors' fees to a shareholder-employee, you may not be required to withhold tax from those payments. There is a shareholder-employee exception that will apply if you are not a look-through company and:
    - you are a close company; or
    - you are a company with 25 or fewer shareholders; and
    - the directors' fees are paid to the shareholder-employee in the circumstances set out in s RD 3B.
18. The circumstances set out in s RD 3B include the situation where the shareholder-employee is not paid regular salary or wages, or they are not paid for regular periods. In that situation, all amounts paid by the company to the shareholder-employee in their capacity as an employee, can be treated as other than a PAYE income payment. If you pay directors' fees to a shareholder-employee in these circumstances, you are not required to withhold tax from those payments.

Payments of directors' fees to non-individuals

19. The most common non-individuals you are likely to contract with for the provision of directorship services include:
    - companies;
    - partnerships; or
    - public, local, or Māori authorities.

Companies

20. As a general rule, if you are paying directors' fees for directorship services provided by a company, these payments will not be schedular payments and you are not required to withhold tax from them. However, there are exceptions in the Act to this general rule. If you are paying directors' fees for directorship services provided by an agricultural, horticultural, viticultural company, or a company that is a non-resident contractor or non-resident entertainer, these directors' fees will be schedular payments. If you are a labour-hire business, and you make payments to a company, which you have contracted with to provide directorship services to one of your clients under a labour-hire arrangement , those payments will also be schedular payments. These exceptions are discussed below at [24]-[28].
21. Companies are the most common non-individual provider of directorship services. In many cases, these companies are "personal services companies" owned and operated by a professional director. The professional director is employed by their personal services company and you contract with the company to provide the directorship services, not the director personally.
22. The definition of "company" under the Act is broad and includes entities you may not ordinarily think of as companies. For example, the definition of "company" includes:
    - listed limited partnerships;
    - incorporated societies; and
    - other body corporates.
23. If you make payment of directors' fees for directorship services provided by such entities, these payments will not be schedular payments and you are not required to withhold tax from them.

Example 4: Directors' fees paid for services provided by a company

(See Example 3 in BR Pub 15/10.)

Polonius Ltd, a financial management company, contracts to provide directorship services to Osric Ltd. It is agreed that Marcellus, one of Polonius Ltd's specialist employees, will act as a director for Osric Ltd. Osric Ltd pays directors' fees to Polonius Ltd for the directorship services it has provided.

Because the directors' fees Osric Ltd pays are for services provided by a company, those fees are not schedular payments and Osric Ltd is not required to withhold tax from them.

Exceptions

24. As noted at [20], under the Act, you may need to withhold tax from directors' fees paid for directorship services provided by:
    - an agricultural, horticultural, or viticultural company;
    - a company that is a non-resident contractor; or
    - a company that is a non-resident entertainer.
25. For the reasons noted at [5], the treatment of directors' fees paid to non-residents is not covered in this statement.
26. A payment of a director's fee for directorship services provided by an "agricultural, horticultural, or viticultural company" is a schedular payment and you will need to withhold tax from it and pay that tax to Inland Revenue.
27. The term "agricultural, horticultural, or viticultural company" is defined in the Act. Essentially, it means a company that supplies labour for the cultivation of fruit crops, vegetables, orchards, or vineyards. This exception to the general rule only applies to companies that **supply labour** to one of those industries. It does not apply to other companies in those industries.
28. As also noted at [20], if you are a labour-hire business, and you make payments to a company, which you have contracted with to provide directorship services to one of your clients under a labour-hire arrangement, those payments will be schedular payments. You must therefore withhold tax from those payments and pay the tax withheld to Inland Revenue. It may appear unusual that the labour-hire exception potentially applies to the provision of directorship services. However, a labour-hire arrangement is framed broadly under the Act, and involves the performance of both "work or services". It therefore follows that should a labour-hire arrangement involve the performance of directorship services this exception will apply.

Partnerships

29. If you pay directors' fees for directorship services provided by a partnership, these will generally be schedular payments. Unless the partnership has an exemption certificate, you will need to withhold tax from those payments.
30. It is not uncommon for companies to appoint a professional director from a legal, accounting or other professional firm. These professional firms are usually set up as partnerships. Because of the arrangements partners have with their professional partnerships, you might contract with the partnership to provide the directorship services rather than with the individual partner you wish to appoint. Commonly, these types of professional partnerships hold exemption certificates, in which case, you will not need to withhold tax from the directors' fees you pay to them. Exemption certificates are discussed further below at [48]-[51].

Example 5: Directors' fees paid for services provided by a partnership with an exemption certificate

(See Example 6 in BR Pub 15/10.)

Dane & Co, a legal partnership, provides legal advice to Rosencrantz Ltd. A partner in the partnership, Gertrude, is approached by Rosencrantz Ltd to be a director on their board.

Gertrude discusses the opportunity with her fellow partners and they all agree it is a good idea. Dane & Co draws up a one-year contract between the partnership and Rosencrantz Ltd for the provision of directorship services. After signing the contract, Dane & Co provides Rosencrantz Ltd with a copy of an exemption certificate issued by the Commissioner. When Rosencrantz Ltd pays directors' fees to Dane & Co, it will not be required to withhold from those payments.

If Dane & Co did not have an exemption certificate, Rosencrantz Ltd would have been required to withhold tax from the directors' fees.

Public, local, and Māori authorities

31. If you pay directors' fees for directorship services provided by a public, local, or Māori authority, these payments will not be schedular payments and you will not need to withhold tax from them.
32. The terms "public authority", "local authority", and "Māori authority" are defined in s YA 1 of the Act.
33. Public authorities include government departments, the Public Trust and the Māori Trustee. Local authorities include regional councils, airport authorities, Auckland Transport and various museum trust boards. Māori authorities are defined as those entities that have elected to be Māori authorities.
34. Situations in which an authority might provide directorship services include where a regional council holds shares in a company and those shares carry a right to appoint a director to the board of that company. The regional council may decide to appoint one of its own employees as a director of the company. The regional council is likely to contract with

the company so that it is the entity providing the directorship services (by supplying the employee) to the company. Any directors' fees paid to the regional council would be for directorship services provided by a local authority. Therefore, the company paying directors' fees would not be required to withhold.

Example 6: Directors' fees paid for services provided by an authority

A regional council has a 50% shareholding in a tourism promotion company. The tourism promotion company produces marketing material on the region's natural tourist attractions. Under the company's constitution, the regional council has the right to appoint a director to the tourism promotion company's board.

The regional council decides to appoint Daniel, a tourism expert employed in the council's tourism team. Because Daniel is an employee and will perform his director duties on the council's time, the regional council contracts to provide Daniel as a director of the tourism promotion company. The tourism promotion company will pay directors' fees to the regional council. Because those directors' fees are for directorship services provided by the regional council (a local authority) the tourism promotion company is not required to withhold tax from the directors' fees.

Voluntary schedular payments

35. If you are going to be paying directors' fees that are not schedular payments, the person or entity you are paying may nonetheless want you to withhold tax from those payments. If you agree to this, those directors' fees may be treated as "voluntary schedular payments". An agreement to treat non-schedular payments as voluntary schedular payments must be recorded in writing. If you have agreed in writing to treat certain payments of directors' fees as voluntary schedular payments, you must withhold tax from those payments and pay the tax withheld to Inland Revenue, as you would for any other schedular payments.

Your obligations when you are required to withhold from directors' fees

Withhold at the time of payment

36. If the directors' fees you are paying are schedular payments, and you are required to withhold tax from them, you must withhold at the time you make the payment. You are then required to pay the tax withheld to Inland Revenue. You will also need to record details of the person or entity you are paying, the payment, and the tax withheld in your employer monthly schedule.

What rate should you withhold at?

37. Depending on who you are paying, and the information they give you, the withholding rate you should use may vary. It is therefore important you determine the appropriate rate for each person or entity you pay.

38. Before you pay a schedular payment to someone, they should give you a *Tax Rate Notification for Contractors (IR330C)* form. The IR330C will record both the person's name and tax number. If the person you are paying wants to elect their own withholding rate, they also need to record this in the IR330C. Elected rates are discussed below. If a person has been given a prescribed rate/additional deduction rate by the Commissioner, they are required to notify you of this in their IR330C form. Prescribed rates/additional deduction rates are also discussed below.

39. If you are making schedular payments to a person, and before 1 April 2017, that person provided you with a *Tax Code Declaration (IR330)* form recording their name and tax number, they do not need to provide you with an IR330C as well. However, if that person wants to elect their own withholding rate for schedular payments you make to them on or after 1 April 2017, they will need to notify you of their elected rate using an IR330C.

"No notification" rate

40. If the person you are about to pay has not provided you with an IR330C (or, prior to 1 April 2017, an IR330) recording both their name and tax number, you should withhold at a rate of 45%. This is called the "no notification" rate.

Standard rate

41. If the person you are about to pay provides you with an IR330C recording their name and tax number with no elected rate, and they are not subject to a prescribed rate/additional deduction rate, you should withhold tax at a rate of 33%. This is the standard withholding rate for directors' fees.

Elected rates

42. A person entitled to receive a schedular payment is allowed to elect their own withholding rate. However, this elected rate cannot be less than 10% (or 15% for non-residents and temporary visa holders). For the purposes of this statement, we will only be referring to the 10% minimum rate, which will apply to most New Zealand residents.

43. A person who wants to elect their own withholding rate must do so in their IR330C. As long as the elected rate is not less than 10%, you should withhold at that rate.

44. A person can subsequently change their elected rate. However, if that person has already elected to change the withholding rate twice in the last 12-month period, you are not required to withhold at the newly elected rate unless you agree to.

What if the person you are paying has a certificate from the Commissioner?

45. You may be obliged to withhold tax at a different rate if the person you are paying holds a certificate from the Commissioner. Taxpayers can apply to the Commissioner for a special tax rate certificate or for an exemption certificate.

Special Tax Rate Certificates

46. A person can only elect a withholding rate below the minimum rate of 10% if the Commissioner has issued them with a special tax rate certificate for that rate. If the person you are paying directors' fees to has elected a rate less than 10%, you should only deduct at that rate if they have provided you with a corresponding special tax rate certificate.

47. Where a person has a 0% special tax rate certificate, the directors' fees you pay to them will still be schedular payments even though you will not need to withhold any tax. Because they are schedular payments, you must still record the payments and details of the person you are paying in your employer monthly schedule.

Exemption certificates

48. Generally, if the person you are paying a schedular payment to holds an exemption certificate, you will not need to withhold tax from that payment. However, exemption certificates have no effect on payments made under labour-hire arrangements. Therefore, if you are a labour-hire business making payments to a person under a labour-hire arrangement, you are still required to withhold tax even if they hold an exemption certificate.

49. There is an exception to this. If you are a labour-hire business making payments to a person under a labour-hire arrangement, and that person holds an unexpired exemption certificate issued before 1 April 2017, you will not need to withhold tax from such payments you make to them between 31 March 2017, and the earlier of:
    - 1 April 2018; or
    - the expiry date of the exemption certificate.

50. This is because, in those particular circumstances, an unexpired exemption certificate issued before 1 April 2017 is treated as a 0% special tax rate certificate.

51. As noted at [47], if the person you are paying holds a 0% special rate certificate you do not need to withhold tax from the payments you make to them. However, you will still need to record the details of those payments in your employer monthly schedule, together with the details of the certificate holder. If the person you are paying holds an exemption certificate, you do not need to withhold any tax, or enter details about the payments you make to them in your employer monthly schedule.

Prescribed rates/additional deduction rates

52. Occasionally, the person you are paying will have outstanding tax liabilities with Inland Revenue. In this situation, the Commissioner may have prescribed a specific withholding rate for that person, and may have also prescribed an additional deduction rate for you to withhold and pay to Inland Revenue. Inland Revenue applies the additional deduction rate amounts to reduce a person's outstanding tax liabilities.

53. You will be notified of this type of prescribed rate/additional deduction rate either by the person you are paying or Inland Revenue directly. If you are notified of a prescribed rate/additional deduction rate, you must withhold at those rates even if the person you are paying has elected a different rate.

Once you have decided the rate, what amount do you apply it to?

54. Once you have determined the appropriate withholding rate for a payment, you must then apply that rate to the total amount of the schedular payment, exclusive of any GST charged.

55. If you reimburse a director for an amount they have incurred as a necessary part of performing their role as director, for example, the cost of flights to attend a board meeting, that payment is not considered to be a director's fee. Accordingly, the reimbursement payment will not be a schedular payment and you will not need to withhold tax from it.

Example 7: Directors' fees paid to an individual together with a reimbursement of expenses

(See Example 2 in BR Pub 15/10.)

Ophelia who contracted to act as a director of Reynaldo Ltd is also GST registered.

Withholding rate

Reynaldo Ltd provides Ophelia with a "Tax Rate Notification for Contractors" form to complete. Ophelia fills out the form, providing her name, tax number and elects to use a 20% withholding rate.

Calculating the amount to withhold

Ophelia issues the following tax invoice to Reynaldo Ltd for her first month's attendances as a director of Reynaldo Ltd:

TAX INVOICE	[5 March 20XX]
From: Ophelia Smith	GST number: XXX-XXX-XXX
[Ophelia's address]	
To: Reynaldo Ltd	
[Reynaldo's address]	
Fee for Feb 20XX attendances as director of Reynaldo Ltd	$1,000.00
GST on Feb 20XX director's fee	$150.00
Reimbursement for cost of taxi fares to and from board meeting	$83.60
Total amount due	**$1,233.60**

Reynaldo Ltd needs to withhold tax from the payment it makes for Ophelia's director's fee. Reynaldo Ltd applies Ophelia's elected withholding rate of 20% to $1,000, being the gross amount of Ophelia's director's fee (excluding GST). Accordingly, Reynaldo Ltd needs to deduct $200 of withholding tax and pay this to Inland Revenue. However, Reynaldo Ltd does not need to withhold tax from the payment it makes reimbursing Ophelia for the cost of her taxi fares to attend the board meeting. Reynaldo Ltd will therefore pay Ophelia $1,033.60 (being $1,000 – $200 tax + $150 GST + $83.60 reimbursement).

References

Related rulings/statements

Interpretation Statement – Tax deductions from directors' fees paid to GST registered person TIB Vol 8, No 4 (September 1996)

Public Ruling BR Pub 15/10: Goods and services tax – Directors' fees TIB Vol 27, No 7 (August 2015)

Subject references

Directors' fees

Schedular payments

Legislative references

Companies Act 1993 – s 151(3)

Income Tax Act 2007 – ss BE 1, RA 5, RD 3, RD 4, RD 8, RD 10, RD 10B, YA 1 (definitions of "agricultural, horticultural, or viticultural company", "company", "cultivation contract work", "local authority", "Māori authority", and "public authority"), and Parts B, C, J and W of schedule 4

Tax Administration Act 1994 – ss 24L, 24LB, 24LC, 24M, 24N

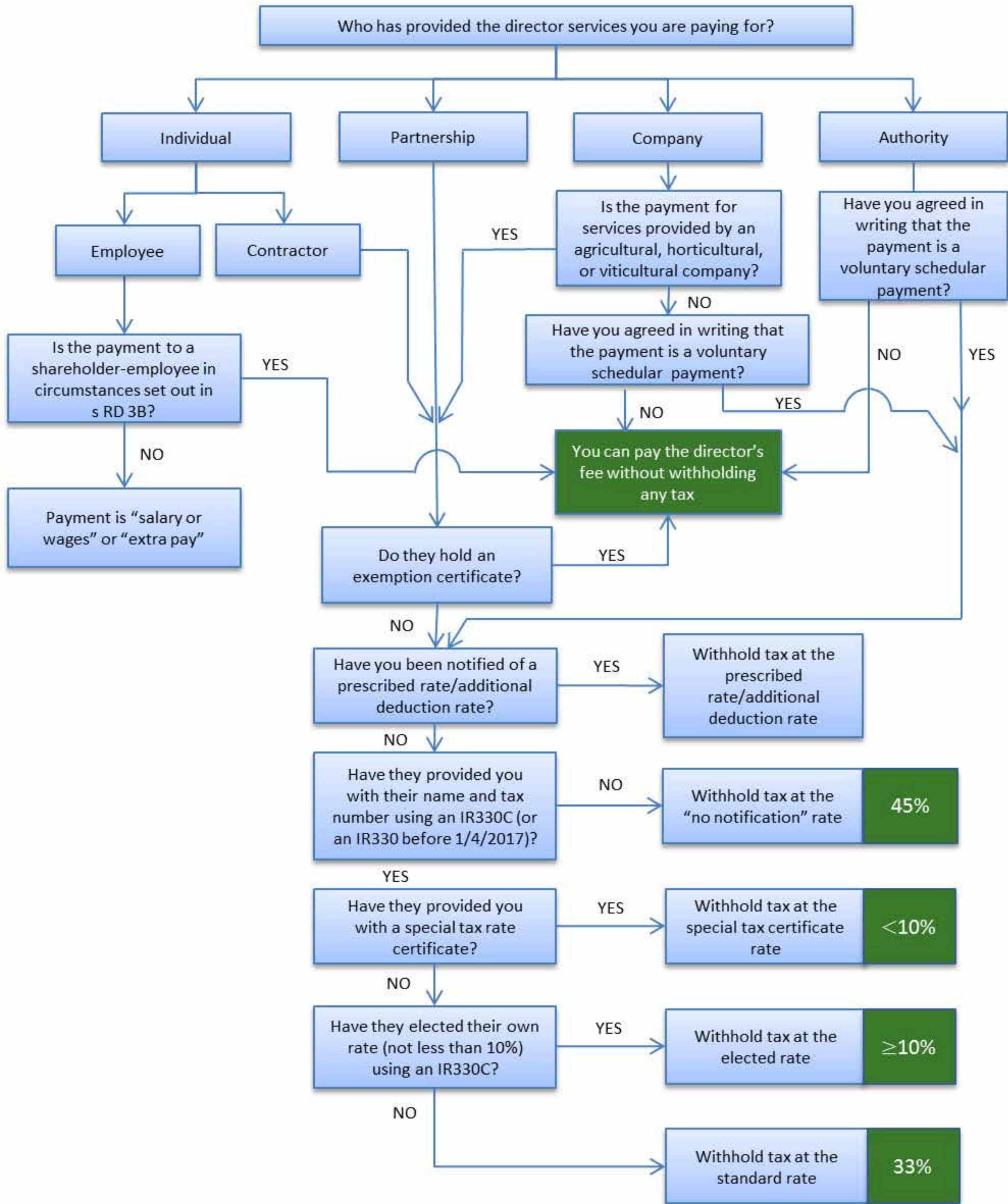
Case references

Buckley & Young Ltd v C of IR (1978) 3 NZTC 61,271

Case K10 (1988) 10 NZTC 163

Case S53 (1996) 17 NZTC 7,347)

Appendix 1: Flow chart*



* If you are a labour-hire business making a payment under a labour-hire arrangement then this flow chart does not apply. In such cases, the standard withholding rate is 20%.

Appendix 2: Legislation

Income Tax Act 2007

1. Section BE 1 provides:

BE 1 Withholding liabilities

PAYE income payments

(1) A person who makes a PAYE income payment must withhold an amount from the payment under the PAYE rules.

2. Section RA 5 provides:

RA 5 Tax obligations for employment-related taxes

Withholding and payment obligations

(1) A person who makes a payment or provides a benefit of 1 of the following kinds must either withhold and pay, or pay, the amount of tax for the payment or benefit to the Commissioner under subpart RD (Employment-related taxes) by the due dates:

(a) a PAYE income payment:

(b) a fringe benefit:

(c) an employer's superannuation cash contribution.

Timing for PAYE income payments

(2) An amount of tax withheld from a PAYE income payment must be withheld at the time the person makes the payment.

3. Section RD 3 provides:

RD 3 PAYE income payments

Meaning generally

(1) The PAYE rules apply to a PAYE income payment which—

(a) means—

(i) a payment of salary or wages, see section RD 5; or

(ii) extra pay, see section RD 7; or

(iii) a schedular payment, see section RD 8:

(b) does not include—

(i) an amount attributed under section GB 29 (Attribution rule: calculation):

(ii) an amount paid to a shareholder-employee in the circumstances set out in section RD 3B or RD 3C:

(iii) an amount paid or benefit provided, by a person (the claimant), who receives a personal service rehabilitation payment from which an amount of tax has been withheld at a rate specified in section RD 10B.

If questions arise

(5) If a question arises whether the PAYE rules apply to all or part of a PAYE income payment, other than an amount referred to in section RD 3B or RD 3C, the Commissioner must determine the matter.

4. Section RD 3B provides:

RD 3B Shareholders who are employees, for some companies: income other than PAYE

When this section applies

(1) This section applies for an income year for a person who is a shareholder and an employee of a company that is not a look-through company and is a close company or has 25 or fewer shareholders if—

(a) the person does not derive as an employee payments of salary or wages—

(i) of a regular amount for regular pay periods of 1 month or less throughout the income year; or

(ii) that total 66% or more of the annual gross income of the person in the corresponding tax year as an employee; or

(b) an amount is paid as income that may later be allocated to the person as an employee for the income year.

When this section does not apply

(2) This section does not apply for an income year if it or section RD 3C did previously apply but then, for 1 of the last 3 income years, ceased to apply for the person.

Income other than PAYE

(3) All amounts paid to the person in the income year and in later income years in their capacity as employee of the company are treated as income other than from a PAYE income payment.

5. Section RD 4 provides:

RD 4 Payment of amounts of tax to Commissioner

Payments monthly or fortnightly

(1) An employer or PAYE intermediary who withholds an amount of tax for a PAYE income payment must pay the amount to the Commissioner as follows

(a) on a monthly basis, if they are an employer to whom section RD 22(3) or (4) applies:

(b) for 2 payment periods in a month, if paragraph (a) does not apply.

Liability when amount not withheld

(2) If some or all of the amount of tax for a PAYE income payment is not withheld under subsection (1), the employee in relation to whom the payment is made must—

(a) pay an amount equal to the amount of tax to the Commissioner by the 20th day of the month following that in which the PAYE income payment was made; and

(b) provide an employer monthly schedule to the Commissioner by the date described in paragraph (a).

6. Section RD 8 provides:

RD 8 Schedular payments

Meaning

(1) A schedular payment—

(a) means—

(i) a payment of a class set out in schedule 4 (Standard rates of tax for schedular payments); and

…

(b) does not include—

(i) salary or wages; or

(ii) an extra pay; or

(iii) a payment for services provided by a public authority, a local authority, a Māori authority, or a company, other than a non-resident contractor, a non-resident entertainer, a company in relation to a payment described in schedule 4, part J or part W, or an agricultural, horticultural, or viticultural company; or

(iv) a payment covered by an exemption certificate provided under section 24M of the Tax Administration Act 1994; or

(v) a payment for services provided by a non-resident contractor who has full relief from tax under a double tax agreement, and is present in New Zealand for 92 or fewer days in a 12-month period; or

(vi) a contract payment for a contract activity or service of a non-resident contractor when the total amount paid for those activities to the contractor or another person on their behalf is $15,000 or less in a 12-month period.

7. Section RD 10 provides:

RD 10 Amounts of tax for PAYE income payments

…

Schedular payments

(3) The amount of tax for a schedular payment is determined—

(a) under section RD 10B; and

(b) on the basis of the gross amount of the payment, other than GST, whether—

(i) some or all of the payment is income; and

(ii) the full income tax liability lies with the person receiving the payment, or lies partly with an employee or subcontractor of the person.

8. Section RD 10B provides:

RD 10B Amounts of tax for schedular payments

When this section applies

(1) This section applies to determine the amount of tax for a schedular payment for the purposes of section RD 10(3)(a).

Rate when no notification

(2) The person making the schedular payment must withhold, as tax,—

(a) 45% of the schedular payment, if the person has not been notified of the payee's name and tax file number under section 24L of the Tax Administration Act 1994 and paragraph (b) does not apply:

(b) 20% of the schedular payment, if the person has not been notified of the payee's name and tax file number under section 24L of the Tax Administration Act 1994 and the payee is a company that is a non-resident contractor.

Basic rates

(3) If the person making the schedular payment has been notified of the payee's name and tax file number under section 24L of the Tax Administration Act 1994, the tax rate that applies to a schedular payment is—

(a) the payee's elected rate under section 24LB of the Tax Administration Act 1994, if the payee chooses an elected rate under that section and paragraph (c) of this subsection does not apply:

(b) the relevant rate set out in schedule 4 (Standard rates of tax for schedular payments), if the payee does not choose an elected rate under section 24LB of the Tax Administration Act 1994 and paragraph (c) of this subsection does not apply:

(c) if the Commissioner has provided the payee with a special tax rate certificate under section 24N of the Tax Administration Act 1994, the tax rate set out in the certificate.

Commissioner prescribed tax rate and deduction amount

(4) Despite subsection (3), if the person making the schedular payment has been notified of an applicable tax rate prescribed by the Commissioner under section 24LC(1) of the Tax Administration Act 1994, the person must use that prescribed and notified tax rate for the payment. The person must also deduct or extract from schedular payments payable to the payee, the amount prescribed under section 24LC(3) of that Act and pay it to the Commissioner.

Non-resident entertainer rate

(5) Despite subsections (2), (3), and (4), the tax rate, if the payee is a non-resident entertainer, is 0.20.

9. Section YA 1 provides the following definitions:

Agricultural, horticultural, or viticultural company means a company that carries on a business that comprises or includes performing any work or rendering a service set out in schedule 4, part C, clause 1(b) (Rates of tax for schedular payments)

…

company—

(a) means a body corporate or other entity that has a legal existence separate from that of its members, whether it is incorporated or created in New Zealand or elsewhere:

(ab) does not include a partnership:

(abb) does not include a look-through company, except in the PAYE rules, the FBT rules, the NRWT rules, the RWT rules, the ESCT rules, the RSCT rules, and for the purposes of subpart FO (Amalgamation of companies):

(ac) includes a listed limited partnership:

(ad) includes a foreign corporate limited partnership:

(b) includes a unit trust:

(c) includes a group investment fund that is not a designated group investment fund, but only to the extent to which the fund results from investments made into it that are—

(i) not from a designated source, as defined in section HR 3(5) (Definitions for section HR 2: group investment funds); and

(ii) not made before 23 June 1983, including an amount treated as invested at that date under the definition of pre-1983 investment in section HR 3(8):

(d) includes an airport operator:

(e) includes a statutory producer board:

(f) includes a society registered under the Incorporated Societies Act 1908:

(g) includes a society registered under the Industrial and Provident Societies Act 1908:

(h) includes a friendly society:

(i) includes a building society:

(j) is further defined in section EX 30(7) (Direct income interests in FIFs) for the purposes of that section

…

cultivation contract work—

(a) means work or services provided under a contract or arrangement—

(i) for the supply of labour, or substantially for the supply of labour; and

(ii) on or in connection with land that is used or intended to be used for the cultivation of fruit crops, vegetables, orchards, or vineyards:

(b) excludes work or services provided by—

(i) a post-harvest facility:

(ii) a management entity under a formal management agreement under which the entity is responsible for payment for the work or services provided

…

local authority—

(a) means a local authority as defined in the Local Government Act 2002:

(b) includes—

(i) the administering body, as defined in the Reserves Act 1977, of any reserve classified under the Act as a recreation reserve or a scenic reserve:

(ii) an airport authority, other than an airport company, as defined in the Airport Authorities Act 1966:

(iii) the Aotea Centre Board of Management established by the Auckland Aotea Centre Empowering Act 1985:

(iv) the council of the Auckland Institute and Museum constituted under the Charitable Trusts Act 1957:

(v) the Canterbury Museum Trust Board continued in existence by section 5(1) of the Canterbury Museum Trust Board Act 1993:

(vi) the Otago Museum Trust Board continued in existence by section 5(1) of the Otago Museum Trust Board Act 1996:

(vii) Auckland Transport (as established by section 38 of the Local Government (Auckland Council) Act 2009):

(viii) other than for the purposes of section CW 39(4) (Local authorities), Auckland Regional Holdings as established by section 18 of the Local Government (Auckland) Amendment Act 2004:

(ix) the New Zealand Local Government Funding Agency Limited while it is a council-controlled organisation within the meaning of section 6(1) of the Local Government Act 2002:

(x) the Auckland Council Independent Māori Statutory Board established by section 81 of the Local Government (Auckland Council) Act 2009

…

Māori authority means a person who has made an election under section HF 11 (Choosing to become Māori authority)

…

public authority—

(a) means every department or instrument of the Executive Government of New Zealand; and

(b) includes the Public Trust and the Māori Trustee; and

(c) includes the Christmas Island Phosphate Commission, incorporated in Australia by the Christmas Island Agreement Act 1949 of the Parliament of Australia and continued under the Christmas Island Agreement Act 1958; and

(d) is further defined in section CW 38(6) (Public authorities) for the purposes of that section; and

(e) does not include a mixed-ownership enterprise

10. Schedule 4 of the Income Tax Act 2007 provides:

Part B

Payments of company directors' fees, examiners' fees, honoraria, and other payments

1 A payment of a company director's fee, or an examiner's fee, or an honorarium, has a standard rate of tax of 0.33 for each dollar of the payment.

…

Part C

Payments for work or services relating to primary production

1 A payment for work or services referred to in the following paragraphs has a 0.15 rate of tax for each dollar of the payment:

(a) farming contract work:

(b) cultivation contract work:

(c) shearing:

(d) droving:

(e) [Repealed]

(f) forestry or bush work (including bush felling, road and tramway work, removal of timber, undergrowth cutting, burning, or clearing):

(g) planting or cutting flax:

(h) work described in section DO 1 or DO 2 that is related to land that is used or intended to be used for farming or agriculture.

2 In this part,—

cultivation contract work—

(a) means work or services provided under a contract or arrangement—

(i) for the supply of labour, or substantially for the supply of labour; and

(ii) on or in connection with land that is used or intended to be used for the cultivation of fruit crops, vegetables, orchards, or vineyards:

(b) excludes work or services provided by—

(i) a post-harvest facility:

(ii) a management entity under a formal management agreement under which the entity is responsible for payment for the work or services provided

…

Part J

Payments under labour-hire arrangements

1 A payment by a person (the **payer**) to another person (the **payee**) has a standard rate of tax of 0.20 for each dollar of the payment if—

(a) 1 of the payer's main activities is the business of arranging for a person or persons to perform work or services directly for clients of the payer; and

(b) the payment is made under an arrangement the performance of which, in whole or in part, involves the performance of work or services by the payee directly for a client of the payer, or directly for a client of another person; and

(c) in the case of the payer and the payee being associated persons described in section YB 2 or YB 3, the payer has chosen to apply this part to the payment.

…

Part W

Voluntary schedular payments

1 A payment to a person is treated as a schedular payment (a **voluntary schedular payment**) and has a standard rate of tax of 0.20 for each dollar of the payment if—

(a) there is no obligation to withhold an amount from the payment under this Act or under the Tax Administration Act 1994; and

(b) the payer and the payee have agreed that the payment is a voluntary schedular payment, and have recorded their agreement in a document.

Tax Administration Act 1994

11. Section 24L provides:

24L Schedular notification

(1) This section applies to a person who is entitled to receive a schedular payment described in section RD 8 of the Income Tax Act 2007.

(2) Before the person (the **payee**) receives the schedular payment, the payee must give the person making the payment a notice that states—

(a) if the payee has elected a tax rate to be applied to the schedular payment, as provided by section 24LB, that elected tax rate:

(b) if the Commissioner has notified the payee that a different tax rate applies to the schedular payment, as provided by section 24LC, that different tax rate:

(c) the payee's name and tax file number.

(3) The notification referred to in subsection (2) must be in a form authorised by the Commissioner.

12. Section 24LB provides:

24LB Schedular tax rate elected by payee

(1) A person who is entitled to receive a schedular payment (the **payee**) may choose the tax rate, to 1 decimal place, to be applied to the payment for the purposes of section RD 10B(3)(a) of the Income Tax Act 2007 (the **elected rate**).

(2) The elected rate must be a minimum of—

(a) 15% if the payee is—

(i) a non-resident:

(ii) a holder of a temporary entry class visa as defined in section 4 of the Immigration Act 2009; or

(b) 10% for all other payees.

(3) Despite subsection (1), if the payee has notified a person making a schedular payment (the **payer**) of 2 different elected rates within 12 months of each other, then the last notified rate is the elected rate, and the payee may not choose another elected rate in relation to the payer within a 12 month period of the first notified rate.

(4) Despite subsection (3), the payee may choose another elected rate under subsection (1) in relation to the payer in the 12 month period and notify it to the payer, if the payer and the payee agree that the payee may choose and notify that other rate.

13. Section 24LC provides:

24LC Schedular tax rate prescribed by Commissioner

(1) Where a person who is entitled to receive a schedular payment (a **payee**) has not met a liability under the Inland Revenue Acts, the Commissioner may prescribe the tax rate to be applied to the payee's schedular payments by notifying the rate to—

(a) the payee; or

(b) the payee and a person (a **payer**) making a schedular payment to the payee.

(2) Upon the request of the payee, the Commissioner must rescind a rate prescribed and notified under subsection (1), by notifying the relevant persons described in subsection (1), if the Commissioner is satisfied that all liabilities under the Inland Revenue Acts have been met, and is reasonably satisfied that all liabilities under the Inland Revenue Acts will be met in the future.

(3) The Commissioner may also prescribe and notify, at the same time as prescribing and notifying a tax rate under subsection (1), a percentage of the payee's schedular payments that payers must—

(a) deduct or extract from schedular payments payable to the payee; and

(b) pay to the Commissioner.

(4) Upon the request of the payee, the Commissioner must rescind a percentage prescribed and notified under subsection (3), by notifying the payer, if the Commissioner is satisfied that the payee has paid all tax due and payable.

(5) The tax rate prescribed under subsection (1) and the percentage prescribed under subsection (3) must not total more than 50%.

(6) An amount received by the Commissioner under subsection (3) is to the credit of the payee's liabilities under the Inland Revenue Acts and is not a tax credit under part L of the Income Tax Act 2007.

(7) The Commissioner may revoke or prescribe and notify a new tax rate under subsection (1) and percentage under subsection (3) from time to time.

(8) The Commissioner does not have to notify the payee under subsection (1)(b), if, after making reasonable inquiries, the Commissioner does not have a valid address for the payee.

14. Section 24M provides:

24M Exemption certificates for schedular payments

(1) The Commissioner may provide a person who is entitled to receive a schedular payment with an exemption certificate setting out the payments for a period for which no amount of tax is to be withheld.

(2) Subsection (1) does not apply to a payment—

(a) to a non-resident entertainer:

(b) that is a payment, described in schedule 4, part J of the Income Tax Act 2007, to a New Zealand resident.

…

(7) A person who is provided with an exemption certificate before 1 April 2017 for a period ending on or after 1 April 2017 is treated as having a special rate certificate under section 24N with a 0% rate for schedular payments the person is entitled to receive, to the extent to which—

(a) the schedular payments—

(i) are received between 31 March 2017 and 1 April 2018; or

(ii) if the period set out in the certificate of exemption ends before 31 March 2018, are received before the end of that period; and

(b) the certificate of exemption is not in force on or after 1 April 2017 because of amendments made to this Act by the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017.

15. Section 24N provides:

24N Special tax rate certificates for schedular payments

(1) The Commissioner may provide a person who is entitled to receive a schedular payment with a special tax rate certificate setting out the amount of tax for the payment, or the rate applying to the payment or a part of each payment as if it were the whole payment.

…

Companies Act 1993

16. Section 151(3) provides:

151 Qualifications of directors

…

(3) A person that is not a natural person cannot be a director of a company.

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 17/01: Income equalisation deposits and refunds

Introduction

Standard practice statements describe how the Commissioner of Inland Revenue (the Commissioner) will exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

This standard practice statement ("SPS") sets out the Commissioner's practice in regard to the statutory powers to accept income equalisation deposits for a tax year outside the specified period, and to accept refund applications for a tax year outside the specified period.

Unless specified otherwise, all legislative references in this SPS refer to the Income Tax Act 2007 ("ITA").

Application

This SPS applies from 7 August 2017 and replaces SPS 05/09 *Income equalisation deposits and refunds* issued in September 2005.

The SPS applies to income equalisation deposits and refunds made under:

- the main income equalisation scheme (under sections EH 3 to EH 37), and
- the thinning operations income equalisation scheme (under sections EH 65 to EH 81).

However, it does not apply to:

- the adverse event income equalisation scheme (under section EH 38 to EH 64)
- refunds from the main income equalisation account to:
  - persons who retire, die or are adjudicated bankrupt (under section EH 17 to EH 24), or
  - companies that are put into liquidation (under section EH 25 and EH 26)
- refunds from the thinning operations income equalisation account to companies that carry on a forestry business in New Zealand and are put into liquidation (under section EH 77 and EH 78).

Standard Practice

Summary

Deposits

1. Eligible taxpayers may make a deposit into the applicable income equalisation scheme.
2. To be deductible in an accounting year, the deposit must be received by the Commissioner:
   - within the accounting year
   - within the specified period after the end of the accounting year, or
   - within a time after the end of the specified period for an accounting year that the Commissioner allows in a case or class of cases (a "late deposit").
3. If the deposit is made within or after the specified period for an accounting year the taxpayer must, at the time the deposit is made, notify the Commissioner that the deposit is for that accounting year.
4. The Commissioner will accept a late deposit, where the deposit is provided by the earlier of:
   - one month from the date the taxpayer's income tax return was filed for an accounting year
   - one month from the taxpayer's income tax return due date for an accounting year.

5. In exceptional circumstances, the Commissioner will extend her discretion beyond the timeframe set out in paragraph 8. This is discussed in more detail at paragraphs 91 to 102.
6. The Commissioner must consider every request to allow a late deposit on a case-by-case basis and will decide whether to accept a deposit for the nominated accounting year after careful consideration of the taxpayer's particular circumstances.
7. Where the Commissioner declines to allow a late deposit for the accounting year nominated by the taxpayer, the deposit may still be applied to the accounting year the deposit was made in. In this situation, the Commissioner will first contact the taxpayer to give them the option of continuing with the deposit or having it returned to them.
8. The taxpayer is allowed a deduction for a deposit made into the applicable income equalisation scheme for the accounting year that was set out in the taxpayer's notice, provided it is accepted by the Commissioner for the relevant accounting year. If the taxpayer's income tax return was filed before the deposit was made, the Commissioner will reassess the return to include the deduction.

Refunds

9. An eligible taxpayer may apply for a refund from the applicable income equalisation scheme.
10. A deposit cannot generally be refunded until it has been in the scheme for one year unless specific circumstances apply. However, the Commissioner may allow an early refund where she is satisfied that the early refund is required for a purpose a refund should be given for.
11. A refund within the one-year period can only be allowed when certain legislative criteria are met. The criteria discussed in this statement are:
    - To enable the taxpayer to undertake planned development work
    - To enable the taxpayer to buy livestock or replacement livestock
    - To avoid them suffering serious hardship
    - To do anything else that that the Commissioner determines in a case or class of case is a purpose for which a refund should be given.
12. In every case the taxpayer is required to provide evidence to support the reason for the early refund.
13. A refund from the scheme is income in the income year in which the Commissioner receives the application except where the taxpayer chooses the income to be allocated to an accounting year.
14. To be allocated as income in an accounting year, the application must be received by the Commissioner:
    - within the accounting year, or
    - within the specified period after the end of an accounting year, or
    - within a time after the end of the specified period for an accounting year that the Commissioner allows in a case or class of cases (a "late application").
15. If the application for a refund is made within or after the specified period for an accounting year, the taxpayer must, at the time of applying for the refund, notify the Commissioner that they elect the refund be allocated as income to that accounting year.
16. The Commissioner will accept a late application, where the application is received by the earlier of:
    - one month from the date the taxpayer's income tax return was filed for an accounting year
    - one month from the taxpayer's income tax return due date for an accounting year.
17. In exceptional circumstances, the Commissioner will extend her discretion to accept a late application beyond the timeframe set out in paragraph 16. This is discussed in more detail at paragraphs 91 to 102.
18. The Commissioner must consider every request to allow a late application on a case-by-case basis and decide whether to allow the refund for the requested accounting year after careful consideration of the taxpayer's particular circumstances.
19. Where the Commissioner declines a late application for the accounting year elected by the taxpayer, the refund may still be applied to the accounting year the application was made in. In this situation, the Commissioner will first contact the taxpayer to give them the option of continuing with or withdrawing the application for a refund.
20. The taxpayer must return the income equalisation refund as income in the accounting year nominated in the taxpayer's notice, provided it is accepted by the Commissioner for the relevant accounting year. If the taxpayer's income tax return was filed before the application was made, the Commissioner will reassess the return to include the income equalisation refund as income.

21. The Commissioner must issue a refund of a deposit that is in a person's income equalisation account at the end of five years after the end of the accounting year the deposit was made for.

Background

22. The income equalisation scheme was introduced in 1965. At the time of introduction of the scheme, it was stated that it would:
    - enable farmers to iron out rates of tax due to rises and falls in income
    - encourage farmers to put aside part of their income in good years and to use this money for farm development in years when farm income falls
    - help to remove a cause of inflation and therefore help to maintain a steadier rate of economic growth.
23. The scheme enables eligible taxpayers to:
    - make income equalisation deposits with the Commissioner, and
    - claim a deduction against their income in the accounting year:
        - the deposit is made in, or
        - requested by the taxpayer in their notice to the Commissioner when they make a deposit, provided the request is accepted by the Commissioner.
24. When a refund is made from the scheme, the amount is included as part of the taxpayer's income in the accounting year:
    - in which the application for the refund is received by the Commissioner, or
    - elected by the taxpayer.
25. Since the implementation of the scheme, use-of-money interest has been introduced. Farmers are not usually in a position to know their final financial position until after liability for use-of-money interest applies. Also, many farmers do not receive the bulk of their income until near the end of their tax year, so they have not had the use of that money throughout the year. The income equalisation scheme provides an avenue for farmers to limit their exposure to use-of-money interest.

Detailed discussion

Meanings

The following meanings describe terms used in this statement.

Accounting year

26. "Accounting year" is defined under s YA 1 of the Act and means a tax year or another 12-month period that ends with the taxpayer's balance date.
27. The definition of "accounting year" for a company also includes:
    - a period, shorter than twelve months, that is the period accounts are prepared for, including under the international tax rules, because of the formation of the company or the termination of the company's existence
    - a period, shorter or longer than twelve months, that is the period accounts are prepared for, including under the international tax rules, because of the company or a person adopting a new accounting balance date under ss EX 25 or EX 69 of the Act.

Eligible taxpayers

28. "Eligible taxpayers" may reduce their net income for a tax year by making an income equalisation deposit into the applicable income equalisation scheme with the Commissioner pursuant to s EH 1(1) of the Act.
29. Section EH 3(1) of the Act provides that eligible taxpayers in respect of the main income equalisation scheme are:
    - persons who carry on a farming or agricultural business on land in New Zealand
    - persons who carry on a fishing business
    - persons who derive income from forestry, but not a company, public authority, Māori authority, or an unincorporated body.
30. Section EH 63(1) of the Act provides that eligible taxpayers for the thinning operations income equalisation scheme are companies that carry on a forestry business on land in New Zealand and derive income from carrying out thinning operations on the land.
31. The thinning operations income equalisation scheme does not apply to natural persons.

Serious hardship

32. The term "serious hardship" is not defined in the legislation. Although the ordinary meaning of the words "serious" and hardship" would require that there is a degree of suffering or privation that is relatively significant in the circumstances, the historical background to the scheme suggests that "serious hardship" should not be an unduly high standard to satisfy.
33. However, a taxpayer must still show evidence that an early refund would be used to avoid them suffering serious hardship.
34. This would include a situation where, if the refund were not made, the future farming operation may be seriously jeopardised. Examples of this could include the need to dispose of breeding stock, or being unable to undertake essential farm maintenance. Note that the Commissioner considers that deferring the application of fertiliser for one year would not seriously jeopardise future farming operations.
35. Factors likely to count against an early refund to avoid serious hardship are:
    - There are alternative and more traditional sources of credit available.
    - The early refund, or the saving as a result of an early refund, will effectively be spent on things other than maintaining the farming operations or keeping debt lower (buy a new vehicle or spending more to upgrade machinery than is reasonable, for instance).

Specified period

36. "Specified period" is defined for the purposes of the applicable income equalisation schemes under ss EH 36, EH 79 and YA 1 of the Act and means the shorter of:
    - the period of six months after the end of the accounting year that corresponds to the tax year
    - the period from the end of the accounting year that corresponds to the tax year to the date one month after the date the person must, under s 37 of the Tax Administration Act 1994, file their return of income for the accounting year that corresponds to the tax year.

Examples

Calculating the specified period with an extension of time arrangement

In the case of a taxpayer with a balance date of 30 June 2016 and an extension of time arrangement to file their income tax return by 31 March 2017, the specified period is the shorter of:

- the period of six months after the end of the accounting year that corresponds to the tax year—1 July 2016 to 31 December 2016
- the period from the end of the accounting year to one month after the tax return is due—1 July 2016 to 30 April 2017.

The specified period ends on 31 December 2016.

Calculating the specified period without an extension of time arrangement

In the case of a taxpayer with a balance date of 30 June 2016 without an extension of time arrangement, the specified period is the shorter of:

- the period of six months after the end of the accounting year that corresponds to the tax year—1 July 2016 to 31 December 2016
- the period from the end of the accounting year to one month after the tax return is due—1 July 2016 to 7 November 2016.

The specified period ends on 7 November 2016.

Main income equalisation scheme

Section EH 4 – Deposit

37. The minimum deposit is $200. Deposit amounts cannot exceed a taxpayer's net income derived from carrying out their farming or agricultural, fishing or forestry activity in the accounting year the deposit is accepted. Any interest received from lending or investment activities will not form part of the deposit.
38. Where the net profit has been paid as a salary to trust beneficiaries or company shareholders, the Commissioner is not likely to reassess the taxpayer's income tax return and amend the salary paid to an income equalisation deposit. She will apply her discretion in the manner set out in *SPS 05/05: Retrospective adjustments to salaries paid to shareholder-employees* and *SPS 16/01: Requests to amend assessments*.

39. An eligible taxpayer may make a deposit into the main income equalisation scheme for an accounting year at any time during the accounting year or within the specified period for the accounting year.
40. The Commissioner has neither the ability nor the discretion under the Act to accept an early deposit into the main income equalisation scheme.
41. Section EH 4(4)(c) of the Act gives the Commissioner the discretion to accept a late deposit, ie, a deposit made within a time after the end of the specified period for an accounting year in a case or class of cases allowed by the Commissioner. Refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion.
42. If the deposit is made within or after the specified period for an accounting year the taxpayer must, at the time of making the deposit, notify the Commissioner that the deposit is for that accounting year.
43. Where the Commissioner does not accept a late deposit, it may, subject to consultation with the taxpayer, be applied to the accounting year in which the deposit was made.
44. Sections DQ 1 and EH 7 of the Act provide that the taxpayer can claim a deduction for the amount of the deposit in the applicable accounting year.
45. No deduction is allowed until the deposit is physically received and accepted by the Commissioner. If this occurs after the taxpayer's income tax return has been filed, the Commissioner will reassess the return to allow the deduction.

Section EH 13 – Refund on request

46. A taxpayer may apply, in writing, for a refund from the main income equalisation scheme under s EH 13 of the Act. If the taxpayer wants a refund from the main income equalisation scheme and none of the other relevant refund provisions apply, the Commissioner must refund the amount applied for. This is to the extent to which the refund can be made up of one or more deposits that have been in the main income equalisation scheme for at least one year.
47. Section EH 14 of the Act provides that a refund under s EH 13 of the Act is allocated as income to the accounting year the Commissioner receives the application for the refund, unless either of these two situations apply:
    - The application is received within the specified period for an accounting year and the taxpayer chooses that the refund is to be treated as income in the accounting year the specified period relates to. In this case the refund is allocated as income to the accounting year the specified period relates to.
    - A late application is received, ie:
        - the application is received within a longer period after the end of the specified period for an accounting year that is allowed by the Commissioner in a case or class of cases, and
        - the taxpayer chooses that the refund be treated as income in the accounting year the longer period relates to. In this case the refund is allocated as income to the accounting year nominated by the taxpayer. Refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion.
48. Where the Commissioner does not accept a late application, the refund may, subject to consultation with the taxpayer, be allocated to the accounting year the application was made in.
49. Sections CB 27 and EH 14 of the Act provide that the taxpayer must return the refund as income in the applicable accounting year.
50. The refund may not be allocated as income to an accounting year until the application for a refund is physically received and accepted by the Commissioner. If this occurs after the taxpayer's income tax return has been filed, the Commissioner will reassess the return to allocate the refund as income.

Section EH 15 – Refund for development or recovery

51. A taxpayer may apply, in writing, for an early refund from the main income equalisation scheme in specific circumstances under s EH 15 of the Act.
52. The Commissioner must refund an amount that has been in the main income equalisation scheme for more than six months to an eligible taxpayer to enable them to:
    - undertake planned development or maintenance work, or
    - buy, immediately after the refund is given, livestock for use in their farming business (other than to replace livestock disposed of or lost as a result of a self-assessed adverse event).

53. The Commissioner must refund an amount regardless of the length of time it has been in the main income equalisation scheme to an eligible taxpayer to enable them to:
    - buy, immediately after the refund is given, livestock for use in their farming business to replace livestock replaced or lost as a result of a self-assessed adverse event
    - avoid suffering serious hardship
    - do anything else the Commissioner determines, in a case or class of cases, is a purpose for which a refund should be given.
54. The Commissioner has the discretion to allow a refund from the main income equalisation scheme, regardless of the length of time the deposits have been in the account, for the taxpayer to do anything the Commissioner determines in a case or class of cases is a purpose for which a refund should be given. Refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion.
55. If refund requests are made on the grounds that they will be used to avoid serious hardship, the taxpayer will need to be able to explain to the Commissioner how the refund will be applied to avoid serious hardship.
56. A forecast reduction in income as part of the normal fluctuations in prices which primary producers would expect to experience from time-to-time would not be enough, on its own, to meet the criteria. Although some degree of "hardship" may be on the horizon, the taxpayer will need to be able to show how that event will, or is likely to, lead to them experiencing "serious hardship".
57. It may be hard to show where money is deposited into the scheme and then asked to be withdrawn at the same time or shortly after. In that situation, the financial impact of an early withdrawal will only be the tax deferral and cash-flow benefits.
58. Section EH 16 of the Act provides that a refund under s EH 15 of the Act is allocated to the accounting year the Commissioner receives the application for the refund in, unless either of these two situations apply:
    - The application is received within the specified period for an accounting year and the taxpayer chooses that the refund is to be treated as income in the accounting year the specified period relates to. In this case the refund is allocated as income to the accounting year the specified period relates to.
    - A late application is received, ie:
        - the application is received within a longer period after the end of the specified period for an accounting year that is allowed by the Commissioner in a case or class of cases, and
        - the taxpayer chooses that the refund be treated as income in the accounting year the longer period relates to. In this case the refund is allocated as income to the accounting year nominated by the taxpayer. Refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion.
59. Where the Commissioner does not accept the late application, the refund may, subject to consultation with the taxpayer, be allocated to the accounting year the application was made in.
60. Sections CB 27 and EH 16 of the Act provide that the taxpayer must return the refund as income in the applicable accounting year.
61. The refund may not be allocated as income to an accounting year until the application for a refund is physically received and accepted by the Commissioner. If this occurs after the taxpayer's income tax return has been filed, the Commissioner will reassess the return to allocate the refund as income.

Thinning operations income equalisation scheme

Section EH 64 – Deposit

62. The minimum deposit is $200. Deposit amounts cannot exceed a taxpayer's net income derived from carrying out thinning operations in the accounting year the deposit is accepted. Any interest received from lending or investment activities will not form part of the deposit.
63. Where the net profit has been paid as a salary to company shareholders, the Commissioner is not likely to reassess the company's income tax return and amend the salary paid to an income equalisation deposit. She will apply her discretion in the manner set out in *SPS 05/05: Retrospective adjustments to salaries paid to shareholder-employees* and *SPS 16/01: Requests to amend assessments*.
64. An eligible taxpayer may make a deposit into the thinning operations income equalisation scheme for an accounting year at any time during the accounting year or within the specified period for the accounting year.

65. Section EH 64(4)(c) of the Act allows the Commissioner to accept a late deposit, ie, a deposit made within a time after the end of the specified period for an accounting year in a case or class of cases allowed by the Commissioner. Refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion.
66. If the taxpayer makes the deposit within or after the specified period the taxpayer must, at the time of making the deposit, notify the Commissioner that the deposit is for that accounting year.
67. Where the Commissioner does not accept a late deposit, it may, subject to consultation with the taxpayer, be applied to the accounting year the deposit was made in.
68. Sections DQ 3 and EH 67 of the Act provide that the taxpayer can claim a deduction for the amount of the deposit in the accounting year.
69. No deduction is allowed until the deposit is physically received and accepted by the Commissioner. If this occurs after the taxpayer's income tax return has been filed, the Commissioner will reassess the return to allow the deduction.

Section EH 71 – Refund on request

70. A taxpayer may apply, in writing, for a refund from the thinning operations income equalisation scheme under s EH 71 of the Act. If the taxpayer wants a refund of some or all of the amount in the scheme and none of the other relevant refund provisions in the Act apply, the Commissioner must refund the amount applied for. This is to the extent the refund can be made up of one or more deposits that have been in the scheme for at least one year.
71. Section EH 72 of the Act provides that a refund under s EH 71 of the Act is allocated to the accounting year the Commissioner receives the application for the refund in, unless either of these two situations apply:
    - The application is received within the specified period for an accounting year and the taxpayer chooses that the refund is to be treated as income in the accounting year the specified period relates to. In this case the refund is allocated as income to the accounting year the specified period relates to.
    - A late application is received, ie,
        - the application is received within a longer period after the end of the specified period for an accounting year that is allowed by the Commissioner in a case or class of cases, and
        - the taxpayer chooses that the refund be treated as income in the accounting year to which the longer period relates, in which case the refund is allocated as income to the accounting year nominated by the taxpayer (refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion).
72. Where the Commissioner does not accept a late application, the refund may, subject to consultation with the taxpayer, be allocated to the accounting year in which the application was made.
73. Sections CB 27 and EH 72 of the Act provide that the taxpayer must return the refund as income in the applicable accounting year.
74. The refund may not be allocated as income to an accounting year until the application for a refund is physically received and accepted by the Commissioner. If this occurs after the taxpayer's income tax return has been filed, the Commissioner will reassess the return to allocate the refund as income.

Section EH 73 – Refund for development or recovery

75. A taxpayer may apply, in writing, for an early refund from the thinning operations income equalisation scheme in specific circumstances under s EH 73 of the Act:
    - The Commissioner must refund an amount that has been in the scheme for more than six months to an eligible taxpayer to enable them to undertake planned development or maintenance work for their forestry business.
    - The Commissioner must refund an amount regardless of the length of time it has been in the scheme to an eligible taxpayer to enable them to:
        - avoid suffering serious hardship
        - do anything else the Commissioner determines, in a case or class of cases, is a purpose a refund should be given for.
76. If requests for refunds made on the grounds that they will be used to avoid serious hardship, the taxpayer will need to be able to explain to the Commissioner how the refund will be applied to avoid serious hardship.
77. That may be hard to show where money is deposited and a refund request is made at the same time or shortly after. In that situation, the financial impact will only be the tax deferral and cash-flow benefits.

78. The Commissioner has the discretion to allow a refund from the thinning operations income equalisation scheme, regardless of the length of time the deposits have been in the account, for the taxpayer to do anything the Commissioner determines in a case or class of cases is a purpose for which a refund should be given. Refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion.

79. Section EH 74 of the Act provides that a refund under s EH 73 of the Act is allocated to the accounting year in which the Commissioner receives the application for the refund, unless either of these two situations apply:

- The application is received within the specified period for an accounting year and the taxpayer chooses that the refund is to be treated as income in the accounting year the specified period relates to. In this case the refund is allocated as income to the accounting year the specified period relates to.
- A late application is received, ie:
  - the application is received within a longer period after the end of the specified period for an accounting year that is allowed by the Commissioner in a case or class of cases, and
  - the taxpayer chooses that the refund be treated as income in the accounting year the longer period relates to. In this case the refund is allocated as income to the accounting year nominated by the taxpayer. Refer to paragraphs 91–102 of this statement for discussion on how the Commissioner will apply this discretion.

80. Where the Commissioner does not accept a late application, the refund may, subject to consultation with the taxpayer, be applied to the accounting year in which the application was made.

81. Sections CB 27 and EH 74 of the Act provide that the taxpayer must return the refund as income in the applicable accounting year.

82. The refund may not be allocated as income to an accounting year until the application for a refund is physically received and accepted by the Commissioner. If this occurs after the taxpayer's income tax return has been filed, the Commissioner will reassess the return to allocate the refund as income.

Commissioner's discretion – "a case or class of cases"

83. As stated above, the Commissioner has the discretion to accept a deposit into or an application for a refund from the applicable income equalisation scheme after the specified period for an accounting year.

Relevant case law

84. The Courts have established some principles around the exercise of a statutory discretion that require the Commissioner to act reasonably in applying her discretion and consider the merits of the taxpayer's particular circumstances and explanation.

85. The Commissioner must exercise her discretion reasonably, as stated by Lord Wrenbury in *Roberts v Hopwood* [1925] AC 578, as follows:

> A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.

86. When exercising her discretion, the Commissioner must consider each case on its own merits. This is supported by the Court of Appeal's decision in *Lawton v Commissioner of Inland Revenue* [2003] 2 NZLR 48 in which the Court held that the Commissioner had not properly exercised his discretion in respect of s 30(2) of the Income Tax Act 1976, which provided that the Commissioner may accept a late objection, on the basis that there had been a failure to consider and properly weigh the merits of the taxpayer's late objection.

87. Justice Glazebrook, delivering the unanimous judgment of the Court, quoted the Court of Appeal's previous decision in *CIR v Wilson* (1976) 17 NZTC 12,512:

> … the merits of a proposed objection must be considered unless the explanation for the lateness of the objection is so inadequate that this is unnecessary.

88. The Court also found that the taxpayer had given a full and credible explanation for the lateness of the objection. Justice Glazebrook stated:

> … In such a case, unless this explanation was palpably untrue or quite unjustified, it would be rare for the explanation to be deemed so inadequate that the merits need not be examined.

STANDARD PRACTICE STATEMENTS

89. Another principle established by the Court is that the Commissioner may make policies, but the policies cannot be overly rigid. This is highlighted in *Gisborne Mills Ltd v CIR* (1989) 11 NZTC 6,194. Justice Robertson found that the Commissioner is required to weigh the particular circumstances which exist in each individual case, rather than adhere to policy:

> The test is whether, by the rigid and inflexible application of policy, there has been a reasoned exercise of the discretion …
>
> In my view, however the discretion required him to weigh the particular circumstances which existed … In as much as none of these exceptional matters appear to have been addressed because of the preoccupation with the policy issue, I am forced to the conclusion that there has been a failure by the Commissioner to exercise the discretion which Parliament has given him. …
>
> I find therefore, that the respondent has abused his powers by refusing to consider the specific circumstances of this case.

What is reasonable?

90. What needs to be considered is how the Commissioner should exercise her discretion, with reference to the principles established by the Courts.

Late deposits and applications for a refund

91. In most instances, the taxpayer's financial position for an accounting year will not be known until the taxpayer's set of accounts and tax return have been completed. At this point, the decision on whether to make a deposit to the applicable income equalisation scheme, and of how much, may be made.

92. So an eligible taxpayer could reasonably be expected to make a deposit into or request a refund from the applicable income equalisation scheme for a particular accounting year at the time of filing their tax return, provided the tax return is filed by the due date.

93. However, it may not be possible or practicable for the deposit or application to be sent to the Commissioner with the tax return. It may also take a tax agent a period of time to arrange for the deposit or application for a refund to be sent to Inland Revenue. So eligible taxpayers should be allowed a reasonable period of time after either:
    - the taxpayer's income tax return due date, or
    - the date the taxpayer's income tax return was filed on

    to forward the deposit or application to Inland Revenue.

94. The Commissioner considers it is reasonable to apply her discretion and accept late deposits and late applications for a refund in relation to the applicable income equalisation scheme by the earlier of:
    - one month from the date of filing the tax return for that accounting year, and
    - one month from the date the tax return for that accounting year is due to be filed.

95. If the specified period for an accounting year is longer than the extended timeframe set out in paragraph 94, the taxpayer may still make the deposit or application for a refund within the specified period. The Commissioner is not likely to further extend this to provide a late deposit or late application for a refund unless exceptional circumstances apply. Refer to paragraphs 91–102 of this statement for discussion of exceptional circumstances.

96. Taxpayers without a tax agent who require an extension of time to file their income tax return should refer to *SPS 09/03: Extension of time applications from taxpayers without tax agents*.

Examples

Making a late deposit with an extension of time arrangement

A taxpayer has a tax agent. The taxpayer has a balance date of 31 March. The taxpayer's income tax return due date for the 2016 accounting year is 31 March 2017, incorporating an extension of time arrangement. The taxpayer's income tax return was filed on 31 October 2016.

The specified period for making deposits into the applicable income equalisation scheme ends on 30 September 2016, which is the shorter of:

- the period of six months after the end of the accounting year that corresponds to the tax year—1 April 2016 to 30 September 2016
- the period from the end of the accounting year to one month after the tax return is due—1 April 2016 to 30 April 2017.

For a deposit to be accepted for the 2016 accounting year, the taxpayer must make the deposit within the discretionary extended timeframe, ie, by 30 November 2016, which is the earlier of:

- one month from the date of filing the tax return for that accounting year—30 November 2016
- one month from the date that the tax return for that accounting year is due to be filed—30 April 2017.

In the same scenario, if the taxpayer's income tax return was filed on 1 May 2017, a deposit would need to be paid by 30 April 2017, which is the earlier of:

- one month from the date of filing the tax return for that accounting year—1 June 2017
- one month from the date that the tax return for that accounting year is due to be filed—30 April 2017.

In the above scenarios, if there are valid reasons why the taxpayer cannot make the deposit within the specified period or discretionary extended timeframe for an accounting year, the Commissioner will consider the merits of the taxpayer's situation on a case-by-case basis and may still accept the late deposit.

Making a late deposit without an extension of time arrangement

A taxpayer with a 30 June 2016 balance date, with no extension of time arrangement, must file their income tax return by 7 October 2016. The taxpayer filed their income tax return on 30 September 2016.

The specified period for making deposits into the applicable income equalisation scheme ends on 7 November 2016, which is the shorter of:

- the period of six months after the end of the accounting year that corresponds to the tax year—1 July 2016 to 31 December 2016, and
- the period from the end of the accounting year to one month after the tax return is due—1 July 2016 to 7 November 2016.

The taxpayer should make the deposit by the end of the specified period, ie, 7 November 2016. This is a later date than would be allowed by applying the discretionary extended timeframe, ie 31 October 2016, which is the earlier of:

- one month from the date of filing the tax return for that accounting year—30 October 2016
- one month from the date that the tax return for that accounting year is due to be filed—7 November 2016.

However, if there are valid reasons why the taxpayer cannot make the deposit by 7 November 2016, the Commissioner will consider the merits of the taxpayer's situation on a case-by-case basis and may still accept the late deposit.

Early applications for a refund

97. The Commissioner will allow applications for an early refund for unforeseen development, ie, development work not anticipated when the deposit was made, which arose through an adverse event (for example, a flood, drought, fire, livestock disease). Unforeseen development is not confined to deductible development expenditure and may also include any capital expenditure that will result in increased production.

Adverse events

98. If an event is classified as an adverse event, the Commissioner may extend the timeframe for eligible taxpayers to make a deposit or request an early refund from the main income equalisation scheme under ss EH 4 and EH 15(3)(c) of the Act. Note that a taxpayer must still explain how the adverse event has affected them before these provisions to can apply.

99. Where the Commissioner extends her discretion due to an adverse event being declared, this is published on Inland Revenue's website: **http://www.ird.govt.nz/business-income-tax/income-equalisation/special-provisions/**

Exceptional circumstances

100. Where an eligible taxpayer makes a late deposit, or an application for an early refund or a late application for a refund outside of the circumstances detailed above, it may still be accepted by the Commissioner. Each request will be considered on a case-by-case basis, taking into account the merits of the taxpayer's particular situation.

101. Reasons to accept a late deposit, an application for an early refund, or a late application for a refund could include, but are not limited to:

- a taxpayer receiving incorrect advice from their tax agent, or
- a taxpayer experiencing a sudden or unexpected change in circumstances.

102. However, these examples are not indicative of situations when a late deposit, an application for an early refund, or a late application for a refund will automatically be accepted. All factors must be considered before the Commissioner accepts the deposit as being made in the requested tax year.

This Standard Practice Statement is signed on 7 August 2017

Graham Tubb
Group Tax Counsel, Service Delivery

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.

Application for strike out granted

Case	Donna Vitasovich v Commissioner of Inland Revenue [2017] NZHC 1501
Decision date	30 June 2017
Act(s)	Tax Administration Act 1994 ss 3, 14, 89H, 89I, 89K, 89M, 138D, 138H, 141A, 141G Income Tax Act 2004 s HK 11
Keywords	Strike out, voluntary compliance, exceptional circumstances

Summary

On 30 June 2017 the High Court ("Court") gave judgment for the Respondent and granted the Commissioner of Inland Revenue's ("the Commissioner") strike out application under s138H of the Tax Administration Act 1994 ("TAA").

The plaintiff disputed her liability for income tax in the years ended 31 March 2004, 2005 and 2006. In this proceeding she seeks that her "alleged debt" be cleared and that the exceptional circumstance provision under s89K of the TAA be invoked. The Commissioner disagreed and sought to strike out her claim.

The Court struck-out the plaintiff's claim, and awarded costs on a category 2B basis.

Impact

Disputants must engage in the statutory disputes process. As the plaintiff did not file a Statement of Position ("SOP") (failing to comply with s89M of the TAA) the Commissioner had established grounds to strike out the proceeding under s 138H of the TAA.

Facts

The Commissioner assessed the disputant for income tax and shortfall penalties. The Commissioner issued a Notice of Proposed Adjustment and the disputant issued a Notice of Response. The Commissioner issued a SOP and the disputant was deemed to accept the Commissioner's proposed adjustment given the disputant had not issued a SOP. The disputant filed a statement of claim in the High Court in which she claimed that exceptional circumstances had prevented her from filing her SOP within the statutory timeframe.

The Commissioner applied to strike out the claim on the basis that the disputant had not complied with the disputes process and there were no exceptional circumstances which applied in her case.

Decision

First cause of action

Ms Vitasovich denied liability for amounts the Commissioner had assessed on the basis that she was only liable for the market value of the shareholding in the company under s HK 11 of the Income Tax Act 2004. The Court held that s HK 11 did not apply as the proceedings were in relation to the disputant's personal tax liability not that of the company.

Second cause of action

The disputant asserted that refusing to exercise her discretion not to assess a shortfall penalty was in ignorance of the law and procedures. The Commissioner had failed to acknowledge the disputant's voluntary disclosure and had made disclosures of her details to others which were an alleged maladministration.

Clark J was satisfied that this cause of action was untenable as her Honour was not convinced that any disclosure made satisfied the requirements for full disclosure.

Third cause of action

Ms Vitasovich alleged that exceptional circumstances prevented her from issuing a SOP. Under s 89K of the TAA, an exceptional circumstance is an event or circumstance beyond the control of a disputant that provides the disputant with a reasonable justification for not issuing (in this case) a SOP within the response period.

Ms Vitasovich claimed that her exceptional circumstances were:

1. Wrong advice given to her by the Department;
2. The Department's failure to acknowledge her voluntary disclosure;
3. The Department refusing to confer with her;
4. The fact the Department chose to use a "snail mail" address despite having an email address; and
5. Handing out her details without permission to undesirable people and foreigners.

Ms Vitasovich went overseas in 2007 and requested that mail be sent to her Auckland address. Her Honour found that the evidence showed that while overseas Ms Vitasovich communicated by email and received correspondence sent to her Auckland address. Ms Vitasovich also confirmed that correspondence was to be by 'snail mail'. The Court found that notice of the Commissioner's SOP was validly given by posting it to the Auckland address.

Clark J also held that the evidence did not establish that an exceptional circumstance beyond the disputant's control prevented the disputant from filing her SOP as soon as reasonably practicable after becoming aware of the failure to issue the SOP and in fact had not ever filed a SOP therefore, s 89K was inapplicable.

Section 138

As the disputant failed to comply with s 89M of the TAA, the Commissioner had established the grounds for striking out the proceeding under s 138H.

Prejudice or delay – amended pleading

The Commissioner had alleged that the statement of claim was unintelligible and as such would likely cause prejudice or delay. As an alternative to striking out, Clark J considered whether the claim could be amended but found that the defects in the pleadings were such that it was not capable of cure.

High Court costs – accountancy fees were not properly claimable as a disbursement

Case	Patty Tzu Chou Lin v Commissioner of Inland Revenue [2017] NZHC 1548
Decision date	6 July 2017
Act(s)	Rule 14.2, 14.3, 14.5, 14.12 High Court Rules 2016
Keywords	Costs, change of costs' classification, disbursements and accountancy fees

Summary

On 12 May 2017 the High Court ("Court") gave judgment for the plaintiff and found that the Commissioner of Inland Revenue's ("the Commissioner") assessments and default assessments in respect of the plaintiff's income tax were incorrect. This judgment is currently under appeal.

The plaintiff subsequently sought costs on a category 3 basis in accordance with the High Court Rules 2016. The Commissioner disagreed with the calculation and allocation of costs.

The Court awarded the plaintiff costs on a category 3B basis, save that band C would be applied to the preparation of briefs and preparation for hearing. The Court also allowed the plaintiff's disbursements as claimed save for the plaintiff's accountancy fees which the Court said were not properly claimable as a disbursement.

Impact

Accountancy fees cannot be claimed as a disbursement by a successful party in a proceeding unless it can be shown that they are specific to the conduct of the proceeding, reasonably necessary for the conduct of the proceedings and reasonable in amount.

Facts

The plaintiff sought category 3 costs against the Commissioner of $92,070 plus disbursements of $24,374.30.

The Court determined the issue of costs on the papers.

Decision

Category 2 or category 3?

On 29 February 2016 the parties filed a joint memorandum in advance of the first case management conference advising that the proceeding should be classified as a category 2 proceeding for costs purposes.

On 3 March 2016 the Court, satisfied with the contents of the joint memorandum, issued a Minute but did not record an allocation of the costs' category. On this basis, the plaintiff said that no costs category had ever been assigned.

The plaintiff submitted that the Court could appropriately categorise the proceeding as a category 3 (the current daily rate for Category 3 proceedings is $3,300 and $2,230 for Category 2 proceedings) as the view of the parties in the joint memorandum was irrelevant.

The plaintiff said that the proceeding should be classified as category 3 because of the complexities involved.

Furthermore, even if the parties' previous view in classifying the proceeding as category 3 was relevant, the plaintiff said that the parties understated the appropriate costs category and that the Court was free to allocate the proceeding an appropriate category at this stage.

The Commissioner responded that any change to the classification of a proceeding should be made at the point when it is apparent that the existing classification is not appropriate. In this case the change was raised for the first time in the plaintiff's costs submissions (post judgment). The Court agreed that the plaintiff was effectively requesting a change of costs' classification.

The main issue was whether "special reasons" existed to justify post hearing re-categorisation of costs from category 2 to category 3.

The Commissioner did not disagree with the plaintiff's assessment of the factors for why category 3 would be appropriate but contended that was nothing to justify a change which would amount to a "special reason" (Rule 14.3 High Court Rules 2016 and *Body Corporate No 189855 v North Shore City Council (Costs)* HC Auckland CIV-2005-404-5561, 2 October 2008 and *J L Tindall & Ors v Far North District Council* (unreported HC AK CIV 2003-488-000135 25 May 2005)).

The Court said that one of the fundamental principles applying to determination of costs is that the award should reflect the complexity and significance of the proceeding.

In the usual course, and particularly in light of policy considerations, the Court said that it is unlikely that special reasons would be found where there is only a change of opinion regarding the adequacy of the initial categorisation.

However, in the circumstances of this case, the Court held that the way in which the proceeding developed does amount to special reasons and therefore category 3 would be appropriate.

Increased time bands

The plaintiff sought an increased time band from B to C in respect of preparation of briefs, preparation for hearing and supplementary submissions.

The Commissioner opposed the increase, noting there was no factual evidence at the hearing and, given the only evidence was expert evidence, the Commissioner did not accept that the plaintiff's counsel was required to undertake significant attendances in preparing the brief. Rather, the Commissioner submitted that minimal input would have been required having also pointed out that the plaintiff's principal counsel was an experienced tax barrister.

The main issue was whether "a comparatively large amount of time for the particular steps is considered reasonable" in which case band C should be allocated, or whether a "normal amount of time is considered reasonable", in which case band B should be allocated (Rule 14.5(2) High Court Rules 2016).

The Court was satisfied that a comparatively large amount of time would have been required for preparation of the expert brief and for the hearing. However, the Court was not satisfied that a large amount of time would have been required for the supplementary submissions.

The Court allocated band C for the preparation of briefs and preparation for hearing only and band B for all other matters.

Disbursements: accountancy fees

The Commissioner objected to the plaintiff's claim for the accountancy fees charged by her accountant.

The plaintiff claimed these fees as a disbursement, being a necessary and reasonable expense paid by her specifically for the purposes of the proceeding (Rule 14.12 High Court Rules 2016).

The Court held that these fees do not fall under HCR 14.12 and therefore need to be approved by the Court.

The Court agreed with the Commissioner's approach that, given the plaintiff engaged counsel with specialist skill in tax law, and was represented by two counsel at the hearing, with a highly qualified expert, there was no need to have the assistance of a chartered accountant.

On that basis the Court held that these fees were not properly claimable as a disbursement.

Result

The plaintiff was awarded costs on a category 3B basis, save that band C was to be applied to the preparation of briefs and the hearing.

The plaintiff was awarded disbursements as claimed with the exception of the accountancy fees which were disallowed.

Court of Appeal indicates that the statutory notice requirements regarding the payment of GST in property transactions cannot be waived

Case	Y&P NZ Limited v Yang Wang and Chen Zhang [2017] NZCA 280
Decision date	3 July 2017
Act(s)	Goods and Services Tax Act 1985, ss 11 and 78F Tax Administration Act 1994, s 14C
Keywords	"zero-rated", "waiver"

Summary

This is a dispute between a vendor and purchaser involving the payment of goods and services tax ("GST") in a property transaction. The dispute concerned whether there had been a waiver of the statutory notice requirement regarding the payment of GST under s 14C of the Tax Administration Act 1994 ("TAA") and s 78F of the Goods and Services Tax Act 1985 ("GSTA"). The Attorney-General was joined to the appeal as intervener.

Impact

This decision indicates that courts will be inclined to find that the statutory notice requirement under s 78F of the GSTA cannot be waived.

Facts

The appellant entered into agreements to sell various properties to the respondents ("the agreements"). The purchase price was $2,430,000 "[p]lus GST (if any)". Schedule 2 to the agreements recorded that the respondents were not, and at settlement would not be, registered for GST and that they did not intend at settlement to use the properties for making taxable supplies. This meant that GST at 15 per cent was payable on the purchase price.

At settlement, a dispute arose. The appellant insisted there had not been proper notice of a change to the respondent's GST position under s 78F(2) of the GSTA and s 14C of the TAA, which meant that GST on the purchase would be zero-rated. The respondents issued summary judgment proceedings seeking an order that the appellant settle on the zero-rated basis. They also sought an order that caveats they had lodged against the properties not lapse. The High Court held that summary judgment was

not appropriate, but did, however, make an order sustaining the caveats, as in the Court's opinion, it was reasonably arguable that in issuing zero-rated settlement statements, the appellant had waived its right to timely written notice of the relevant GST information. The current proceeding is an appeal of this decision.

The High Court Decision

The High Court considered that, if the respondent purchasers failed to provide written notification of the matters under s 78F(2) of the GSTA, the appellant vendor was entitled to proceed on the basis that GST at 15 per cent applied. The High Court also considered that the requirement under 14C of the TAA for written notice could be waived, because the notice requirement was for the convenience of the vendor. The High Court also had the same view of the contractual obligation to provide written notice of any change to the purchasers' GST status.

The High Court considered that it was not appropriate to grant summary judgment. First, because the respondents had not included in their pleading evidence that they informed the appellant that they did not intend to use the land as a principal place of residence, and second, as they had not pleaded that they were ready, willing and able to settle.

The High Court found that an order sustaining the caveats was appropriate because it was reasonably arguable that in issuing zero-rated settlement statements, the appellant had waived its right to timely written notice of the relevant GST information. If so, the appellant was not entitled to insist on settlement on the basis of GST at 15 per cent, its settlement notices issued on that basis would be invalid, and the agreements would remain on foot.

The Appeal

The arguments

The appellant submitted that the High Court was wrong to find there was a reasonably arguable basis for sustaining the caveats. It submitted that the statutory requirement for written notice of the s 78F(2) matters cannot be waived by a vendor and that there was no waiver of the contractual requirement for notice at least two working days before settlement.

The Attorney-General supported the appellant's submission that the requirement for notice of the s 78F(2) matters cannot be waived. He submitted that s 78F of the TAA exists primarily for the benefit of the tax base and to enable the efficient functioning of the GST system. As such, its requirements cannot be waived by a vendor. He also submitted that s 11(1)(mb) of the GSTA has a mandatory effect. Regardless of what the vendor knows at settlement, GST is zero-rated if the criteria in s 11(1)(mb) are met. Where the wrong rate of GST is applied at settlement, there are provisions to correct the position.

The decision

The Court stated that, in order to sustain the caveat, the respondents must establish a reasonably arguable case that they have a relevant interest in the properties.

The Court considered that it was arguable that the provision of amended settlement statements with zero-rated GST, together with a request for GST numbers which were provided, was a waiver of the contractual requirement for written notice. The Court also considered that it was arguable there was no effective withdrawal of the waiver. The respondents had proceeded on the basis that settlement would be on a zero-rated GST basis. The appellant then sought to insist on the contractual provisions on the day of settlement as though there had never been any waiver.

The Court stated that the issue of statutory waiver did not arise, because the statute requires the notice to be given by or on settlement. The respondents could have complied with the statute by giving notice on the day of settlement. The Court expressed reservations about the High Court's view that the statutory position could be waived. Although it was not necessary for the Court of Appeal to decide this point, the Court considered that there was force in the Attorney-General's submission that the provision is for the benefit of the tax base and not for the sole benefit of the vendor.

The Court concluded that the respondents arguably had a caveatable interest in the properties.

Result

The appeal was dismissed. The appellant was to pay the respondents costs for a standard appeal on a Band A basis and usual disbursements.

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Office of the Chief Tax Counsel

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

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