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TAX INFORMATION Bulletin

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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents. Because we are keen to produce items that accurately and fairly reflect taxation legislation and are useful in practical situations, your input into the process, as a user of that legislation, is highly valued.

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.

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New legislation

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The new Act gives effect to the aspects of the Budget 2017 Family Incomes Package that require changes to primary legislation. The Family Incomes Package changes income tax thresholds and two of the tax credits available to lower income individuals and families.

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Foreign trusts that have a New Zealand resident trustee who do not prepare financial reports to a higher authoritative accounting standard are now required, under section 21B of the Tax Administration Act 1994, to prepare financial reports to a minimum standard. This was approved by the Tax Administration (Financial Statements—Foreign Trusts) Order 2017 on 21 August 2017. The Order applies to foreign trusts that are required by section 59D of the Tax Administration Act 1994 to file an annual return. In practice this means financial statements for years ended 31 March 2018 and later.

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The Privacy (Information Sharing Agreement between Inland Revenue and Ministry of Social Development) Order 2017 approves a new information sharing agreement between Inland Revenue and the Ministry of Social Development.

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The Income Tax (Employment-related Remedial Payments) Regulations 2017 came into force on 18 August 2017. The regulations declare a remedial payment made to correct the underpayment of entitlements under the Holidays Act 2003 and/or an employment agreement to be included in the definition of "extra pay" under the Income Tax Act 2007. Under the PAYE rules, employers are required to use a different method to calculate the amount of tax they must withhold from a payment that is an extra pay than for a payment of salary or wages.

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The deemed rate of return for taxing foreign investment fund interests has been set at 6.28% for the 2016–17 income year.

Interpretation statements

IS 17/07: Fringe benefit tax – motor vehicles 12

This interpretation statement aims to consolidate all the statements we have published on FBT and motor vehicles. A number of these statements related to earlier versions of legislation and use out-dated section references. This interpretation statement brings all the Inland Revenue statements together in one place in a user-friendly format. This should provide taxpayers with increased certainty in understanding their FBT obligations for motor vehicles and lead to better compliance.

Operational statements

OS 17/01: GST and costs associated with mortgagee sales 52

This statement outlines GST and costs associated with mortgagee sales. This statement is a review of OS 15/01 and contains a change in position with regard to input tax deductions for a mortgagee who is subject to the business to business financial services rules.

IN SUMMARY

Legislation and determinations

Special Determination S54: Application of financial arrangements rules to Investors in the Lifetime Income Fund 56

This special determination relates to the Lifetime Income Fund (the Fund), which is a managed investment scheme in which investors can invest their retirement savings in return for a stream of regular payments for the rest of their life. The determination prescribes the amount of consideration that is solely attributable to an investor's units in the Fund; and the amount of consideration that is solely attributable to the annuity that an investor receives from Lifetime Income Limited under the group life insurance policy that the manager of the Fund is required to take out for the benefit of investors.

General Determination DEP101: Tax Depreciation Rate for abrasive blasting booths (including media recovery/recycling, dust extraction and ventilation systems) 59

This determination inserts a new asset class for "Abrasive blasting booths" to the "Cleaning, Refuse, and Recycling" and "Engineering (including Automotive)" industry categories, that apply from the 2017 and subsequent income years.

Legal decisions - case notes

Taxation Review Authority determines allowable expenditure on rental properties and treatment of trust income and expenses 60

This case concerned the disputant's ability to claim interest expenditure on funds borrowed to purchase properties for commercial rental in the 2013 and 2014 income years ("years in dispute"). The disputant is a chartered accountant and operates a consultancy business from his residential address. The disputant's rental and consultancy income went into his various revolving credit accounts. Business and personal expenditure were paid by the disputant from personal credits cards and from funds in the revolving credit accounts.

The Commissioner of Inland Revenue ("the Commissioner") raised default assessments for the years in dispute, which were challenged by the disputant in the Taxation Review Authority ("the Authority"). As the disputant was unable to discharge his onus in showing how the Commissioner's assessments were wrong, the Authority, in finding for the Commissioner, made revised assessments disallowing certain losses.

Court of Appeal confirms that the *Edwards* decision applies to time bar and that once a company is restored to the register, actions taken during the period of its removal are retrospectively validated 62

This case was an appeal from the High Court decision of *Great North Motor Company Ltd (in rec) v Commissioner of Inland Revenue* [2016] NZHC 2708. In that case, Downs J found that the transaction underlying tax losses accumulated by Great North Motor Company Limited (in rec) ("Great North") was a tax avoidance scheme.

Great North did not appeal the finding of tax avoidance, rather it focussed on its position that six of the 12 assessments amended were time barred by s108(1) of the Tax Administration Act 1994. Downs J had found that even if the time bar had expired, the tax returns filed were fraudulent or wilfully misleading, and thus it did not apply. Alternatively, he found that the time bar did not apply because time did not accrue during the period Great North was struck off the register.

Taxation Review Authority declines company's application to hear late claim 64

A taxpayer's application to make a late claim in the Taxation Review Authority was dismissed as no exceptional circumstances applied to its situation.

High Court confirms a lease surrender payment is a revenue receipt in the hands of the landlord 66

The taxpayer is a commercial landlord and received a lump sum payment from one of its tenants for early termination of a lease. The Court held that where the taxpayer is in the business of leasing property the lease surrender payment was received by the taxpayer in the ordinary course of the taxpayer's business and was therefore a revenue receipt subject to tax. However, as the case was not clear cut, a shortfall penalty was not appropriate.

IN SUMMARY

Legal decisions - case notes (continued)

Court of Appeal remits Liquidation matter back to High Court 67

Chesterfields Preschools Ltd ("CPL") was placed into liquidation by the High Court following the issuing of a statutory demand by the Commissioner of Inland Revenue ("the Commissioner"). CPL appealed that decision on the basis that it was not insolvent and the debt was disputed. Following a one-day hearing in the Court of Appeal, the Court allowed the appeal on the basis that the amount of "core debt" was not quantified by the High Court (*Sisson v Commissioner of Inland Revenue* [2017] NZCA 326). The variability in the figures relied on by the Commissioner and the unchallenged value of CPL's assets meant that it was at least open to doubt that the Court could properly make a liquidation order.

NEW LEGISLATION

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

Taxation (Budget Measures: Family Incomes Package) Act 2017

Sections HC 24, LC 13, MD 3, MD 13, MF 7, RC 5, RC 10, RD 10, RD 17, RZ 1 to RZ 5D, YA 1, Schedules 1, 2, 6 and 31 of the Income Tax Act 2007; sections 24B, 33AA and 33C of the Tax Administration Act 1994; sections 2, 5 and 14B of the Taxation (Annual Rates and Budget Measures) Act 2011. The new Act also amended section 8 of the Customs and Excise (Tobacco Products—Budget Measures) Amendment Act 2016.

Background

The Taxation (Budget Measures: Family Incomes Package) Act 2017 was introduced and enacted on 25 May 2017. It received Royal assent on 29 May 2017.

The new Act gives effect to the aspects of the Budget 2017 Family Incomes Package that require changes to primary legislation. The Family Incomes Package changes income tax thresholds and two of the tax credits available to lower income individuals and families. Some of the Family Incomes Package relates to help with housing costs, which does not require changes to primary legislation.

The Taxation (Budget Measures: Family Incomes Package) Act 2017 amends the Income Tax Act 2007, Tax Administration Act 1994 and the Taxation (Annual Rates and Budget Measures) Act 2011. The new Act also amends section 8 of the Customs and Excise (Tobacco Products—Budget Measures) Amendment Act 2016.

Key features

The Act has three main components. First, it increases the bottom two tax thresholds for income tax rates, with the $14,000 threshold increasing to $22,000 and the $48,000 threshold increasing to $52,000. Second, it removes the independent earner tax credit. Third, it makes changes to the Working for Families Tax Credits, including increasing the family tax credit rates for children under 16 years old and changing the abatement rate and abatement threshold.

The Act also makes other amendments to tax legislation required to give effect to these three components such as consequential changes to related thresholds for resident withholding tax and fringe benefit tax. Individuals who pay provisional tax by the standard uplift method will also be affected by a temporary reduction of the uplift rate from 105% to 100%.

Application dates

Most changes commence on 1 April 2018 and apply for the 2018–19 and later tax or income years. The exception is section 24, which is treated as coming into force on 30 May 2016. Section 24 relates to the repeal of section 8 of the Customs and Excise (Tobacco Products—Budget Measures) Amendment Act 2016, which in turn affects section MF 7 of the Income Tax Act 2017 relating to Orders in Council for inflation adjustments to the family tax credit.

Detailed analysis

Income tax thresholds

The income tax thresholds will change for the bottom two thresholds, with no change to the rate of tax that applies. Schedule 1 Part A Table 1 of the Income Tax Act 2007, which sets out the basic tax rates for income tax, will be updated with the new thresholds. The change will apply for the 2018–19 and later income years. The changes are set out in the table below.

Current bracket ($)	New bracket ($)	Rate
1 - 14,000	1 - 22,000	10.5%
14,001 - 48,000	22,001 - 52,000	17.5%
48,001 - 70,000	52,001 - 70,000	30%
70,001+	unchanged	33%

Provisional tax changes

The standard method for calculating provisional tax liability is temporarily adjusted for individuals to reflect the change in income tax thresholds. The change only applies to a person whose basic rate of income tax is calculated under Schedule 1 Part A clause 1 of the Income Tax Act 2007, which is the individuals' income tax rates and does not apply to companies or trustees. The amendment will ensure that those individual taxpayers who use the standard uplift method benefit from the income tax threshold changes at the same time as PAYE earners, rather than at the end of the year.

Sections RC 5, 6 and 10 of the Income Tax Act 2007 set out the standard method of determining the provisional tax payable; a five percent uplift on the person's residual income tax for the preceding tax year or a ten percent uplift of the person's residual income tax for the tax year before the preceding tax year. To reflect the reduced tax payable from the change in income tax thresholds, the five percent uplift is reduced to zero percent for individuals for the 2018–19 income year and the ten percent uplift is reduced to five percent for individuals for the 2018–19 and 2019–20 income years.

There is no change to the estimation method or the GST ratio method. Redundant provisions RZ 1 to RZ 5D have also been removed or replaced. These sections set out the temporary rules for provisional tax for the specified years. The definition, in section YA 1, of a "new personal tax rate person" is consequently replaced with a definition of "new personal tax threshold person".

Other consequential changes

The change in income tax thresholds results in other consequential changes in the Income Tax Act 2007 to:

- choosing the rate for extra pay in sections RD 10, RD 17 and Schedule 2;
- the thresholds for basic rates for attributing fringe benefits in Schedule 1 Part C Table 1;
- the thresholds for basic rates for employer's superannuation contribution tax in Schedule 1 Part D Table 1;
- choosing the rate for resident withholding tax in Schedule 1 Part D Table 2; and
- choosing the prescribed investor rate for multi-rate portfolio investment entities (PIEs) and retirement scheme contributions in Schedule 6.

The change in income tax thresholds results in other consequential changes in the Tax Administration Act 1994 to the:

- secondary tax codes for PAYE income payments in section 24B; and
- exceptions to the requirement to file an income tax return in sections 33AA and 33C.

Independent earner tax credit

The Government considers that the independent earner tax credit (IETC) has become poorly targeted and administratively complex and has therefore removed it. The Act repeals section LC 13 of the Income Tax Act 2007, which sets out the IETC, for the 2018–19 and later tax years. This tax credit is a $520 a year entitlement for New Zealand tax resident individuals who earn between $24,000 and $48,000 (after expenses and losses) a year. An individual cannot claim the IETC if:

- they or their partner are entitled to Working for Families Tax Credits;
- they receive an income-tested benefit;
- they receive a Veteran's Pension or New Zealand superannuation; or
- they receive an overseas equivalent of any of the above.

If a person's income is between $24,000 and $44,000, the person can receive the full $520 a year. For incomes between $44,001 and $48,000 the entitlement is reduced by 13 cents for every dollar earned over $44,000.

With the repeal of the IETC for the 2018–19 and later tax years, cross references in HC 24, YA 1 and Schedule 2 of the Income Tax Act 2007 are also removed. There are also consequential changes to section 24B in the Tax Administration Act 1994 to repeal the associated "ME" and "ME SL" tax codes.

Family tax credit

Rates for younger children

Section MD 3 is amended to increase the rates of family tax credit for children under the age of 16 years to match the rates for children aged 16 to 18 years. This has the result of aligning the family tax credit rates across age bands and therefore removing age-related differences in payments. It also removes the requirement to calculate a weighted average rate when a child changes across age bands during a tax year. The current and new rates are in the table below.

Annual rate	Current	1 April 2018
Eldest child, 16-18	$5,303	$5,303
Eldest child, 0-15	$4,822	
Subsequent child, 16-18	$4,745	$4,745
Subsequent child, 13-15	$3,822	
Subsequent child, 0-12	$3,351	

The new rates of family tax credit will apply for the 2018–19 and later tax years.

Changes to abatement rate and abatement threshold

Currently the abatement rate is 22.5 percent, and there is provision for the abatement rate to progressively move to 25 percent over time in 1.25 percent increments whenever the family tax credit rates are increased by Order in Council. The Act removes the incremental approach and sets the abatement rate at 25 percent on 1 April 2018. Similarly, the abatement threshold is currently $36,350 and there is provision for it to progressively move to $35,000 over time in $450 increments whenever the family tax credit rates are increased by Order in Council. The Act removes the incremental approach and sets the abatement threshold at $35,000 on 1 April 2018. Both changes will apply for the 2018–19 and later tax years.

There are consequential changes to Schedule 31 of the Income Tax Act 2007, and to the Taxation (Annual Rates and Budget Measures) Act 2011 to remove the provisions that would have phased in the changes to the abatement rate and abatement threshold.

Changes to indexation provisions

Currently, the family tax credit rates increase (by Order in Council) when cumulative inflation reaches five percent since the last adjustment. As the Act increases the family tax credit rates on 1 April 2018, it also resets the time from which the cumulative inflation is measured. The next Order in Council will increase family tax credit rates when cumulative inflation from 1 April 2018 reaches five percent.

The Order in Council increases only apply to the family tax credit rates for children under 16, with the rates for children 16 to 18 years frozen until the other rates catch up. With the Act aligning the rates across age bands, a number of provisions are consequentially repealed from section MF 7 of the Income Tax Act 2007. From 1 April 2018, the Order in Council increases to family tax credit rates will apply to the "eldest child" and "subsequent child" rates.

The measure of inflation used is the "New Zealand Consumers Price Index all groups excluding cigarettes and other tobacco products". This measure was originally included as a temporary measure to coincide with the extra tobacco excise increases introduced in Budget 2010. A number of related provisions were inserted in legislation to apply for a set number of tax years ending 2013–14. At the end of the time planned for the tobacco excise increases, the provisions would expire and legislation revert back to its original drafting, which referred to the "New Zealand Consumers Price Index all groups" measure. However, these temporary provisions continue to be further extended, most recently out to the 2021–22 tax year in Budget 2016 when a further series of tobacco excise increases were approved.

The Act makes section MF 7 of the Income Tax Act 2007 easier to read and amend in future by removing the temporary provisions and specifying that the inflation measure for adjustments to the family tax credit is the "New Zealand Consumers Price Index excluding cigarettes and other tobacco products" measure, and it will apply for 2018–19 and later tax years. There are consequential changes to repeal section 8 of the Customs and Excise (Tobacco Products—Budget Measures) Amendment Act 2016.

ORDERS IN COUNCIL

Tax Administration (Financial Statements—Foreign Trusts) Order 2017

Foreign trusts that have a New Zealand resident trustee who do not prepare financial reports to a higher authoritative accounting standard are now required, under section 21B of the Tax Administration Act 1994, to prepare financial reports to a minimum standard. This was approved by the Tax Administration (Financial Statements—Foreign Trusts) Order 2017 on 21 August 2017. The Order applies to foreign trusts that are required by section 59D of the Tax Administration Act 1994 to file an annual return. In practice this means financial statements for years ended 31 March 2018 and later.

Background

In June 2016, the Government Inquiry into Foreign Trust Disclosure Rules recommended increased disclosure by foreign trusts. This included the requirement to file annual returns with Inland Revenue, together with financial statements.

Under the new provisions, "foreign trusts" are those required by new section 59D of the Tax Administration Act 1994 to file an annual return with Inland Revenue. The trusts affected are those with a foreign settlor and a New Zealand-resident trustee.

The changes introduced by the Order follow targeted consultation on proposed financial reporting requirements that are similar to the Tax Administration (Financial Statements) Order 2014, which applies to over 95 per cent of New Zealand companies.[1] The requirements are customised for trusts rather than companies, and certain extra detail is required regarding the transactions concerning settlors, beneficiaries and the corpus of the trust.

Overview of the Tax Administration (Financial Statements—Foreign Trusts) Order 2017

Application of the minimum requirements to foreign trusts

The trustees of all foreign trusts that are subject to section 56D of the Tax Administration Act 1994 (that is, they have a New Zealand resident trustee) are now required to prepare special purpose financial reports to a level specified by the Order. The only exception is where those trustees are already obliged by other legislation to prepare financial statements.

Definitions

For the most part, the definitions used by the Order are defined in the context of the Inland Revenue Acts. An exception applies to terms that are used to describe accounting principles – clause 3(2) refers – and includes:

- accrual accounting
- assets
- double-entry
- expenditure
- historical cost
- income
- liabilities
- net assets.

These terms are to be defined according to their accounting context.

[1] A small percentage of New Zealand companies have an obligation to prepare financial statements to IFRS level. Almost all other companies are still required to prepare financial statements, but to the minimum requirements specified in the 2014 Order.

Minimum requirements

Clause 4 of the Order prescribes the minimum requirements for preparing financial statements. The minimum requirements are directed at the preparation of special-purpose financial statements. The requirements are, for the most part, principles based, although some disclosures and valuation methods are specified. The Order sets out the following minimum requirements for preparing financial reports under the headings:

- *Form of the financial reports* – a balance sheet and a profit and loss statement are required.
- *Principles with which statements must comply* – financial reports need to be prepared using accrual accounting concepts.
- *Valuation* – values should generally be based on tax values (values that comply with the Inland Revenue Acts). In most instances this will correspond with or be based on historical cost. Where it is considered more appropriate, market values can be used. The valuation method(s) used should be included in the accounting policies disclosure.
- *Statement of accounting polices* – a description of the policies used by the trustees in preparing the financial reports and the effect, if material, of any changes in those policies.
- *Matters the statements must show* – comparatives are required if financial statements were prepared for the previous year.
- *Taxable income* – the financial statements must include (often this will be as a note) a schedule of the trust's New Zealand taxable income, if any.
- *Reconciliations* – the financial statements must include on a line by line basis a reconciliation of movements of all settlor and beneficiary accounts, including loans, and of movements in "net assets" – that is, corpus.
- *Currency* – the financial statements can be prepared in any appropriate currency.

Relationship with authoritative financial reporting standards and other frameworks

The Income Tax Act 2007 makes reference in a number of places to financial reporting standards (New Zealand International Accounting Standards) when determining values for income, expenditure or loss. Examples of this include research and development expenditure and the financial arrangement rules. Preparers of financial reports may choose to use higher quality reporting standards for their financial reports (or segments thereof) when appropriate so long as the minimum requirements are complied with.

Tax Administration (Financial Statements—Foreign Trusts) Order 2017 (LI 2017/258)

Privacy (Information Sharing Agreement between Inland Revenue and Ministry of Social Development) Order 2017

Information sharing agreement between Inland Revenue and the Ministry of Social Development

Section 81A of the Tax Administration Act 1994

The Privacy (Information Sharing Agreement between Inland Revenue and Ministry of Social Development) Order 2017 approves a new information sharing agreement (AISA) between Inland Revenue and the Ministry of Social Development. Under the new agreement, Inland Revenue will be able to share personal information to help determine a customer's entitlement to benefits and subsidies, and a more accurate assessment of tax obligations.

Two further Orders in Council repeal legislative provisions under which information was previously shared, and repeal an earlier information sharing agreement, which is now included in the new AISA. The new agreement will allow both agencies to share certain information to improve organisational efficiencies and provide better services to customers.

Background

Previously, a number of legislative provisions[2] under three Acts (the Tax Administration Act 1994, Student Loan Scheme Act 2011, and the Child Support Act 1991) provided for the sharing of information between Inland Revenue and the Ministry of Social Development. These provisions made it possible to share and use certain information for narrow purposes only, and provided limited flexibility to respond to Government expectations under its Better Public Services priorities.

[2] The *Tax Information Bulletin* item on the legislative provisions enabling the original information sharing agreements between IR and MSD can be found in Vol 29, No 5 (June 2017), p152, or at **www.ird.govt.nz**

To ensure there is no overlap between legislation and regulations, two further Orders in Council complement the AISA Order:

- the Taxation (Annual Rates for 2016–17, Closely Held Companies, and Remedial Matters) Act Commencement Order 2017, which sets the date for repealing previous legislative information sharing provisions between Inland Revenue and the Ministry of Social Development under three Acts: the Tax Administration Act 1994, Student Loan Scheme Act 2011, and the Child Support Act 1991; and
- the Tax Administration (Information Sharing with Ministry of Social Development) Order Revocation Order 2017, which repeals the Tax Administration (Information Sharing with Ministry of Social Development) Order 2012, which authorises one of the information sharing agreements amalgamated under the AISA.

Key features

The new agreement amalgamates six information sharing agreements under one Approved Information Sharing Agreement (AISA) under Part 9A of the Privacy Act 1993. Specifically, it allows for the:

- reuse of information currently shared, removing the need for multiple requests for the same information to be used for different purposes; and
- sharing information for assessing eligibility for social housing assistance or a student allowance.

The shared information will provide the means for the Ministry of Social Development to identify and extend assistance to those most in need, and ensure people receive more accurate entitlements and benefits across a wider range of services than previously.

Application date

These regulations came into force on 31 August 2017.

The AISA is available at **www.ird.govt.nz/aboutir/agreements/**

The Orders in Council are available at **www.legislation.govt.nz/**

Privacy (Information Sharing Agreement between Inland Revenue and Ministry of Social Development) Order 2017 (LI 2017/176)

Taxation (Annual Rates for 2016–17, Closely Held Companies, and Remedial Matters) Act Commencement Order 2017 (LI 2017/177)

Tax Administration (Information Sharing with Ministry of Social Development) Order Revocation Order 2017 (LI 2017/175)

Income Tax (Employment-related Remedial Payments) Regulations 2017

The Income Tax (Employment-related Remedial Payments) Regulations 2017 came into force on 18 August 2017. The regulations declare a remedial payment made to correct the underpayment of entitlements under the Holidays Act 2003 and/or an employment agreement to be included in the definition of "extra pay" under the Income Tax Act 2007. Under the PAYE rules, employers are required to use a different method to calculate the amount of tax they must withhold from a payment that is an extra pay than for a payment of salary or wages.

Background

Prior to the regulations coming into force, it was the Commissioner of Inland Revenue's view that the tax treatment of a back-dated payment of holiday pay follows that of the original payment, had it been paid correctly. Therefore, a lump sum back-dated remedial payment of holiday pay entitlements was treated as salary or wages, or an extra pay, or a combination of both, depending on whether the original payment of holiday pay was treated as salary or wages or an extra pay.

This tax treatment was inconsistent with common employer practice (of treating all such payments as an extra pay), and would have been difficult for employers to implement. Such a tax treatment would also be more likely to result in employees having tax over-withheld than if all back-dated remedial payments were treated as extra pays, meaning more individuals would need to contact Inland Revenue to obtain tax refunds.

As a back-dated remedial payment of holiday pay is a payment additional to the normal salary or wages payable to an employee for the pay period in which the remedial payment is made, it would be consistent with the policy intent of the PAYE rules to treat such a payment as an extra pay. An extra pay has tax withheld at a flat rate that reflects the employee's estimated marginal income tax rate. By contrast, a remedial payment treated as normal salary or wages, would be taxed on the assumption that the remedial payment represented a permanent increase in salary or wages, rather than an additional one-off payment and too much tax may be withheld.

Key features

The regulations declare an "employment-related remedial payment" to be included in the definition of "extra pay" under the Income Tax Act 2007.

Application date

The regulations apply from 18 August 2017.

Detailed analysis

Meaning of "employment-related remedial payment"

"Employment-related remedial payment" is defined in the regulations as a payment that:

- but for the regulations, would be a payment of salary or wages or an extra pay, or a combination of both; and
- is made to a person to satisfy all or part of a shortfall in one or more previous payments to the person in respect of the person's entitlements under the Holidays Act 2003 or an employment agreement, or both.

This means that an employment-related remedial payment covers more than just holiday pay. It covers a payment made to correct the underpayment of other types of entitlements under the Holidays Act 2003 (for example, sick leave) and entitlements under an employment agreement (for example, long service leave).

An important exclusion from the definition of employment-related remedial payments is the first of any payment made to address the failure to pay the person any salary or wages for a pay period. An example of this would be an initial payment made for payments not made on the regular paydate. Any subsequent payments to address this late payment would be extra pays.

Meaning of "employment agreement"

"Employment agreement" is defined in the regulations as having the meaning given by its definition in section 5 of the Employment Relations Act 2000, subject to two exceptions. That is, employment agreement means a contract of service, and includes an employee's terms and conditions of employment in:

- a collective agreement; or
- a collective agreement together with any additional terms and conditions of employment; or
- an individual employment agreement.

The two exceptions are that the definition of employment agreement in the regulations:

- excludes a contract for services between an employer and a homeworker; and
- includes an individual employment contract continued in force by section 242(1) of that Act.

Examples

Example 1

Jean was paid $1,500 by her employer ABC Co in annual holiday pay under the Holidays Act 2003 for pay period 1 and $1,500 in annual holiday pay for pay period 2 (a total of $3,000). ABC Co later discovers that the payments were incorrectly calculated and Jean should have been paid $1,600 for each pay period (a total of $3,200). ABC Co pays Jean $200 to satisfy the difference. The payment of $200 is an employment-related remedial payment. It is therefore an extra pay under the Income Tax Act 2007.

Example 2

James was paid $300 in sick leave under the Holidays Act 2003 and $1,700 in long service leave under his employment agreement (a total of $2,000). ABC Co later discovers that both payments were incorrectly calculated and James should have been paid $350 in sick leave and $2,000 in long service leave (a total of $2,350). The difference between the amounts paid to James and his actual entitlements is $350. ABC Co pays him $200 to satisfy part of the difference. The payment of $200 is an employment-related remedial payment. ABC Co later pays James $150 to satisfy the remainder of the difference. The payment of $150 is a separate employment-related remedial payment. Each employment-related remedial payment is an extra pay under the Income Tax Act 2007.

Example 3

Wendy was employed by D Company for 2 years. She was paid $6,000 in annual holiday pay under the Holidays Act 2003 and $2,000 in annual holiday pay upon termination of her employment (a total of $8,000). D Company later discovers that Wendy should have been paid $6,500 in annual holiday pay during her employment and $2,500 upon termination of employment (a total of $9,000). D Company pays Wendy $1,000 to satisfy the difference. The payment of $1,000 is an employment-related remedial payment. It is therefore an extra pay under the Income Tax Act 2007.

Example 4

Sam's employer, DomKop Co fails, on her regular payday, to pay her any of the $1,000 in wages owed for the relevant pay period. DomKop Co later makes a payment of $1,000 to Sam to address the failure to pay on the regular payday. The payment of $1,000 is not an employment-related remedial payment.

Example 5

DomKop Co fails, on the regular payday of another of its employees Alexandra, to pay any of the $1,000 in wages owed to her for the relevant pay period. DomKop Co later pays $800 (payment 1) to Alexandra to address the failure to pay Alexandra's wages on her regular payday, but a shortfall of $200 remains outstanding. Payment 1 is not an employment-related remedial payment.

Later still, DomKop Co makes a further payment to Alexandra of $200 (payment 2) to address the shortfall in payment 1. Payment 2 is an employment-related remedial payment. Payment 2 is therefore an extra pay under the Income Tax Act 2007.

Further guidance to employers on how a back-dated remedial payment of holiday pay is to be treated for tax purposes can be found in a Commissioner's Statement, CS *17/02 – Tax treatment of backdated remedial payment of holiday pay*.

The regulations were made by Order in Council on 14 August 2017.

Income Tax (Employment-related Remedial Payments) Regulations 2017 (LI 2017/241)

Income Tax (Deemed Rate of Return on Attributing Interests in Foreign Investment Funds, 2016–17 Income Year) Order 2017

Foreign investment fund deemed rate of return set for 2016–17

The deemed rate of return for taxing foreign investment fund interests is 6.28% for the 2016–17 income year, down from 6.77% for the previous income year.

The deemed rate of return is set annually and is one of the methods that can be used to calculate income from foreign investment fund interests. The rate is based on taking an average of the five-year Government bond rate at the end of each quarter, to which a 4% margin for risk is added.

The new rate was set by Order in Council on 31 July 2017.

Income Tax (Deemed Rate of Return on Attributing Interests in Foreign Investment Funds, 2016–17 Income Year) Order 2017 (LI 2017/178)

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 17/07: Fringe benefit tax – motor vehicles

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

Summary

1. This Interpretation Statement explains how fringe benefit tax (FBT) applies to motor vehicles.
2. A motor vehicle fringe benefit arises when an employer makes a motor vehicle available to an employee for their private use, in connection with the employment relationship.
3. Whether an employer has made a vehicle available for an employee's private use depends on the actions of the employer. An employer makes a vehicle available for an employee's private use by giving the employee access to the vehicle and permitting their private use of that vehicle. Once the employer has made the vehicle available for the employee's private use, it is irrelevant whether the employee actually uses the vehicle for private use. A motor vehicle fringe benefit arises when the vehicle is made available for private use, not when it is actually used for private purposes.
4. The two factors that determine the amount of FBT payable on a motor vehicle fringe benefit are:
   - the rate of FBT; and
   - the value of the motor vehicle fringe benefit (less any employee contributions).
5. The rate of FBT payable depends on the frequency with which an employer elects to file an FBT return and the payment option chosen. This is discussed in more detail at [170].
6. The value of a motor vehicle fringe benefit is calculated by multiplying the value of the vehicle by the number of actual days in the relevant period that an employer has made a motor vehicle available to an employee for their private use, less any exempt days. A motor vehicle's value is calculated using either the cost price of the vehicle or the tax value of the vehicle. If an employee makes a payment towards the cost of the benefit by paying for some of the vehicle's fuel for example, then the value of the benefit is reduced by this amount.
7. A motor vehicle fringe benefit does not arise on a particular day if the vehicle is:
   - a work-related vehicle at all times during the day;
   - used by an employee to make an emergency call; or
   - used by a qualifying employee for certain business travel exceeding 24 hours.
8. To be a work-related vehicle on any day, a vehicle must:
   - be a "motor vehicle" as defined in s YA 1;
   - display, prominently and permanently, on its exterior, the form of identification that the employer (or if the vehicle is hired, the owner of the vehicle) regularly uses in carrying on their undertaking or activity;
   - not be a "car" as defined in s YA 1; and
   - not be available for the employee's private use, except for private use that:
     – is travel to and from their home that is necessary in and a condition of their employment; or
     – other travel that arises incidentally to the business use.
9. A vehicle will not be a work-related vehicle if it is available for general private use on that day, regardless of whether the vehicle is actually used on that day. The work-related vehicle exemption is discussed in more detail from [66].

INTERPRETATION STATEMENTS

10. An emergency call is a visit made from an employee's home for the purpose of providing emergency or essential services. If the vehicle is used for an emergency call at any time on a day, then that whole day is exempt. The emergency call exemption is discussed in more detail from [116].
11. The business travel exemption applies when an employee is required, in the performance of their duties, to be absent from home with a vehicle for at least 24 hours. The exemption will only apply if the employee is required, in the performance of their duties, to use a vehicle and regularly be absent from home. The business travel exemption is discussed in more detail from [144].
12. The last step is to apply the FBT rate to the value of the motor vehicle fringe benefit. The result of this calculation is the amount of FBT payable for that motor vehicle fringe benefit. This is discussed from ([250]).
13. Close companies who provide motor vehicle fringe benefits to shareholder-employees may elect to apply the motor vehicle expenditure rules in subpart DE rather than the FBT rules. This is discussed in more detail from [278].

Introduction

14. This Interpretation Statement explains when a motor vehicle fringe benefit arises. It also outlines the three exemptions from FBT for motor vehicles and sets out how to calculate FBT on a motor vehicle fringe benefit.
15. The Interpretation Statement also seeks to address some common misconceptions about FBT and motor vehicles. For example, FBT applies to a motor vehicle when that vehicle is *made available* for an employee's private use not when the employee actually uses the vehicle privately. In addition, some taxpayers think that merely signwriting a vehicle means that any private use can be ignored. This is incorrect (see from [66]).
16. Examples are included throughout this Interpretation Statement to illustrate some of the concepts discussed. The examples are based on the same set of facts which are set out at [18].
17. One of the aims of this Interpretation Statement is to update and consolidate all previous Inland Revenue statements on FBT and motor vehicles. As a result, this Interpretation Statement replaces five items previously published by the Commissioner:
    - Four questions and answers from "Fringe benefit tax – questions and answers", *Public Information Bulletin* No 137 (July 1985): 4–5:
        - question and answer 8: emergency calls
        - question and answer 9: emergency calls
        - question and answer 12: private use of large trucks
        - question and answer 15: emergency calls.
    - "Fringe benefit tax – cars left at airports – 24 hour exemption", *Public Information Bulletin* No 144 (March 1986): 2.
    - "Station wagons and FBT", *Tax Information Bulletin* Vol 2, No 8 (April 1991): 2.
    - "Shareholder-employees and FBT on company vehicles", *Tax Information Bulletin* Vol 4, No 8 (April 1993): 3.
    - "What is an 'emergency call' for FBT purposes?", *Tax Information Bulletin* Vol 6, No 9 (February 1995): 21.
18. This Interpretation Statement uses the following case study to illustrate when the provision of a motor vehicle is subject to FBT.

Crossed Wires Ltd – the shareholders and the nature of the company

Chris Cross and his sister Veri Cross are equal shareholders and managing directors of Crossed Wires Ltd (CWL). They are also employees of CWL.

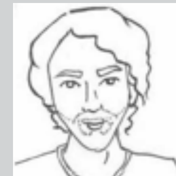
CWL offers computer solutions to medium-sized businesses. CWL specialises in customising, implementing and maintaining a range of third-party software. The company also sells and installs hardware.

Chris and Veri started CWL a few years ago. The company employs four staff. CWL has an office in a commercial area close to Wellington.

Chris and Veri travel frequently for work to meet with investors, clients and to attend conferences.

Crossed Wires Ltd – employees

Chris Cross and his wife own a private vehicle, which Chris's wife mainly uses. Therefore, Chris uses his company vehicle for private travel whenever he needs to.



Veri Cross and her partner own a private vehicle and a motorcycle. Veri also has a company vehicle but she is restricted from using it privately and does not use it privately. Veri's company vehicle is garaged at CWL's premises.

Teuila is the sales executive. She travels extensively in her role, visiting clients and prospective clients and attending conferences and meetings. She does some work from home. Teuila needs to use a vehicle to undertake many of her employment duties.

Garry is the installation specialist. He is responsible for all hardware installation and maintenance and assists with software issues. Most of his work is done on-site at clients' premises. He needs a vehicle to undertake most of his employment duties.

Spencer is a programmer. Spencer sometimes needs to visit clients' premises to resolve issues. He will usually travel with Garry, but occasionally he needs to use a work vehicle on his own.

Trevor is the office administrator and receptionist. Occasionally, Trevor needs to use a vehicle to get office supplies and run office errands.

Crossed Wires Ltd – motor vehicles

Two luxury vehicles for directors' business use

It is important to the directors that CWL is seen as successful. Therefore, CWL purchased two luxury vehicles for the directors' business use.

Chris and Veri held a board meeting before CWL purchased the vehicles. They agreed the reasons for the purchase and the intended use of the vehicles. They decided Veri's vehicle should be used only for business purposes while Chris could use his vehicle for business purposes and personal travel.

Chris and Veri recorded their decisions in the minutes of the meeting and drafted an agreement setting out how the shareholder-employees could use the company vehicles.

Two sedans for staff business use

CWL also had two sedans that were kept at the CWL premises for staff to use on business. The secure gated area behind the premises had room for only two vehicles (one sedan and Veri's company vehicle), so the other sedan was parked in front of the premises.

The sedan that was parked in front of CWL's premises was recently stolen, and CWL received an insurance pay-out. However, the insurance company has now advised that it will not insure any vehicle left overnight in a commercial area, unless the vehicle is behind a locked gate.

Both sedans had been in constant use. Teuila needed a vehicle to visit clients and Garry needed a vehicle for his installation work. From time to time, other staff also needed a vehicle, so would borrow Chris or Veri's vehicles. Since the theft of the sedan, this use has occurred more frequently. CWL is now investigating the purchase of a new vehicle.

Fringe benefit tax and motor vehicles

19. Sections CX 2 and CX 6 determine when a motor vehicle is subject to FBT. Section CX 2 defines "fringe benefit", and s CX 6 explains when a motor vehicle fringe benefit arises.

A fringe benefit is a benefit provided to an employee in connection with their employment

20. Section CX 2(1) defines "fringe benefit":

    CX 2 Meaning of fringe benefit

    Meaning

    (1) A **fringe benefit** is a benefit that—

    (a) is provided by an employer to an employee in connection with their employment; and

    (b) either—

    (i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or

    (ii) is an unclassified benefit; and

    (c) is not a benefit excluded from being a fringe benefit by any provision of this subpart.

21. For motor vehicles, there is a fringe benefit when:

- there is a **benefit**;
- the benefit is **provided** by an employer to an employee;
- the provision of the benefit is in **connection with employment**; and
- s CX 6 is satisfied (s CX 6, referred to in s CX 2(b)(i), is the only section relevant for motor vehicle fringe benefits).

Meanings of "benefit" and "provided"

22. The meanings of "benefit" and "provided" were considered in the Question We've Been Asked "QB 12/06: Fringe benefit tax – 'availability' benefits", *Tax Information Bulletin* Vol 24, No 4 (May 2012): 32 (QB 12/06). The Commissioner considers this analysis is still correct.

23. Based on dictionary definitions and the decision in *Case M9* (1990) 12 NZTC 2,069, QB 12/06 defines "benefit" to mean (at 33):

    a particular "advantage" must be sufficiently clear and definite that it can reasonably, practically and sensibly be understood as a tangible benefit.

24. And QB 12/06 defines "provided" to mean (at 34):

    supplied, furnished or made available for use by the employee.

25. Therefore, when an employer supplies, furnishes or makes a vehicle available to an employee for private use, the employer has "provided" a "benefit" to the employee.
26. In addition, if a person provides a benefit to an employee under an arrangement with the employer, then s CX 2(2) deems the benefit to have been provided "by the employer".

Meaning of "in connection with employment"

27. To be a fringe benefit, the benefit must be provided "in connection with" the employment relationship.
28. The meaning of "in connection with employment" was considered in the Question We've Been Asked "The meaning of 'benefit' for FBT purposes", *Tax Information Bulletin* Vol 18, No 2 (March 2006): 26. The Commissioner concluded that a benefit is provided "in connection with" the employment relationship if the employment relationship is the reason for, or at least a substantial reason for, the provision of the benefit (at 27):

> In *Smith v FCT* 87 ATC 4883 it was held that a benefit was "in respect of, or for or in relation to" the employment where there was a connection between the benefit received and the employment. It was considered that in determining whether there was a connection between the benefit and the employment relationship it was appropriate to consider the reason for the provision of the benefit. Where the employment is a substantial reason for the provision of the benefit, there would be a relationship between the benefit and the employment. The phrase "in connection with" also requires a relationship between two things: *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239; *Strachan v Marriott* [1995] 3 NZLR 272. The Commissioner considers that a benefit is provided "in connection with" the employment relationship if the employment relationship is the reason for, or at least a substantial reason for, the provision of the benefit.

29. In most situations, when an employer provides a vehicle to a non-shareholder-employee, the required employment connection will be present. When a company provides a vehicle to a shareholder-employee, it is deemed to be in connection with employment under s CX 17.

A fringe benefit arises where a vehicle is made available to an employee for their private use

30. Section CX 6(1) explains when a motor vehicle fringe benefit arises:

> **CX 6 Private use of motor vehicle**
>
> *When fringe benefit arises*
>
> (1) A fringe benefit arises when—
>
> (a) a motor vehicle is made available to an employee for their private use; and
>
> (b) the person who makes the vehicle available to the employee—
>
> (i) owns the vehicle:
>
> (ii) leases or rents the vehicle:
>
> (iii) has a right to use the vehicle under an agreement or arrangement with the employee or a person associated with the employee.

31. Section CX 6(1)(a) explains that for motor vehicles, the fringe benefit arises when the vehicle is "made available" to an employee for their "private use".
32. The person who makes the vehicle available to the employee does not have to be the employer. Under s CX 6(1)(b) the person can be someone who owns, leases, rents or has a right to use a vehicle (under an agreement or arrangement with the employee or a person associated with the employee). For ease of reference, we refer to the person who makes the vehicle available to the employee as the "proprietor" of a vehicle.

Meaning of "made available" to an employee

33. Before 2004, the definition of "fringe benefit" referred to the "availability" of a vehicle, rather than to a vehicle being "made available". While the courts have not considered the meaning of the words "made available" in s CX 6, the Commissioner considers that case law on the meaning of "availability" in the predecessor section to s CX 6 is relevant to the meaning of "made available" under s CX 6.
34. The High Court and the Taxation Review Authority (TRA) consider that "availability" means "capable of being turned to account, hence at one's disposal, within one's reach" (*CIR v Yes Accounting* (1999) 19 NZTC 15,296 (HC) and *Case L86* (1989) 11 NZTC 1,492).
35. Under s CX 6, a vehicle has to be "made available" to the employee by the proprietor. This implies that the proprietor has taken some action to place the vehicle at the employee's disposal. Therefore, whether a vehicle is "made available" must be determined according to the actions of the vehicle's proprietor.

36. This view is consistent with the relevant case law, which states that whether a vehicle is "made available" cannot be determined by whether an employee could potentially access the vehicle. The case law confirms that to make a vehicle available, the proprietor's actions must include:
    - granting permission for the employee to use the vehicle (*Yes Accounting*); and
    - ensuring the employee has practical and unconditional physical access to the vehicle (*Case L86*).
37. *Case L86* suggests that a vehicle is not "made available" until the proprietor has supplied practical and unconditional access to the vehicle. Even if an employer gives written permission to an employee to use a vehicle, the vehicle will not have been made available for use if the proprietor must take further steps before the employee can gain access to the vehicle.
38. Where an employee has practical and unconditional access to a motor vehicle, there is a presumption that the vehicle has been made available on a daily basis (see *Case R37* (1994) 16 NZTC 6,208 and *Case P26* (1992) 14 NZTC 4,196). However, in *Yes Accounting*, Anderson J confirmed that a vehicle cannot be available to an employee unless the employee has permission to use the vehicle (at 15,299):

    > I find compelling … that the word "so" in subcl (b) invests "availability" with connotations of permission by the proprietor of the motor vehicle. If this were not so an employer would be liable for fringe benefit tax because an employee could physically gain access to a vehicle and unlawfully convert it if the employee were so minded. Then fringe benefit tax would be payable by a motor vehicle renting company because the receptionist could physically gain access to a vehicle and take it for a joyride whenever such receptionist wished, notwithstanding an express prohibition against such conduct by the employer. That a person could be liable for fringe benefit tax because the circumstances would not prevent the tortious or criminal conversion of a motor vehicle by a dishonest employee is untenable.

39. In summary, whether a vehicle has been "made available" depends on the actions of the vehicle's proprietor. Relevant case law supports the view that a vehicle is "made available" for use, within the meaning of s CX 6, when its proprietor supplies an employee with access to the vehicle and permits the employee to use the vehicle.
40. The two-fold test for "made available" (access and permission) will be met when an employee has permission to use the vehicle and takes possession of it. If an employee has possession of the vehicle but does not have permission to use that vehicle, then the vehicle has not been "made available" to that employee until they obtain permission. If an employee has permission to use the vehicle but has not taken possession of it, then the vehicle is "made available" when the proprietor has taken all steps necessary to enable the employee to take possession.
41. A proprietor does not make a vehicle available to an employee when:
    - the vehicle is in use by another person;
    - the proprietor has not supplied the means of operating the vehicle (for example, the vehicle's keys);
    - the proprietor has not enabled physical access to the vehicle (for example, the vehicle is stored at a location inaccessible to the employee);
    - the employee is not permitted to operate the vehicle.

Has a vehicle been "made available" to the employee for their private use?

Chris has permission to use his company vehicle for private purposes whenever he needs to. CWL therefore provides a motor vehicle fringe benefit to Chris. As Chris is a shareholder-employee, s CX 17 treats the benefit as provided in connection with Chris's employment. CWL makes the vehicle available to Chris because he has physical access to the vehicle and is allowed to use the vehicle whenever he wants.

Last month, Spencer asked for the keys to the office so he could come in on weekends to finish off some work. Chris and Veri agreed. One Sunday, Veri visited the office and noticed that although Spencer's scooter was out front, he was nowhere to be seen and the office sedan was missing. When confronted, Spencer admitted he had been taking the key off the hook in reception and borrowing the vehicle in the weekends as it was difficult to do grocery shopping on his scooter.

CWL followed its formal disciplinary process and issued Spencer with a written warning for taking the sedan without permission. Chris and Veri also took the opportunity to remind all staff that their employment agreements prohibited unauthorised use of company vehicles. Chris also moved the spare key from a hook in reception to a locked drawer that is unlocked only when Trevor or the directors are in the office.

Question 1: Is Spencer's use of the vehicle relevant for FBT purposes?

Answer 1: No. CWL did not make the sedan available for Spencer's private use. CWL did not take any steps to provide him with the vehicle, nor did CWL permit Spencer to use the vehicle. The directors were unaware of his actions and when they discovered what had happened they took steps to ensure the use did not continue.

Question 2: What if Veri was the one borrowing the sedan on weekends, would her use of the vehicle be relevant for FBT purposes?

Answer 2: It would be difficult to argue that CWL did not make the vehicle available for Veri's use. Although Veri is a separate legal person to CWL, if she were to use the vehicle privately in the weekends, it could be inferred that she had permitted private use of a company vehicle in her capacity as director.

Question 3: Chris decides to take his family to Fiji for a holiday. Chris drives to the airport and leaves his company vehicle in the long-term stay parking area. Does CWL need to pay FBT on Chris's vehicle for the week he is in Fiji?

Answer 3: Yes. Whether a vehicle has been "made available" for private use depends on the actions of the vehicle's proprietor, not the actions of the employee. CWL has made the vehicle available to Chris for his private use. CWL has given Chris access to the vehicle and permission to use it. Chris's own actions have resulted in him being unable to access the vehicle while he is in Fiji. However, this does not change the fact that CWL has made the vehicle available to him for private use during this week.

Question 4: Would the position be different if Chris left the vehicle at his house and caught a taxi to the airport?

Answer 4: No. The same principles apply. CWL has made the vehicle available to Chris for his private use. Whether Chris leaves the vehicle at home or at the airport makes no difference.

Question 5: This year the annual IT Industry Conference is being held in Sydney. CWL decides to send Chris and Veri to the conference. Chris drives them both to the airport and parks his car there. They leave on Tuesday, the day before the conference. They attend the conference on Wednesday, Thursday and Friday, before departing late Friday night and returning to Wellington early Saturday morning. Does CWL need to account for FBT on Chris's vehicle while he is in Sydney?

Answer 5: CWL has required Chris to attend the business-related conference. This means that CWL has withdrawn Chris's access to the vehicle for the three full days that Chris and Veri are in Sydney. CWL will still need to account for FBT on Tuesday (the day of departure) and on Saturday (the day Chris and Veri arrive back in Wellington). This is because Chris still has access and permission to use the vehicle on Tuesday and Saturday (he is not subject to a private use restriction). Therefore, only the three intervening days (Wednesday, Thursday and Friday) are exempt from FBT.

Question 6: Chris's vehicle has been in an accident. CWL arranges for the vehicle to be repaired. The vehicle is in the garage for two weeks. Does CWL need to pay FBT for those two weeks?

Answer 6: No. While the vehicle is in the garage, the vehicle will be exempt from FBT. This is because CWL has not made the vehicle available to Chris for his private use. In this situation, CWL has removed Chris's access to the vehicle.

Meaning of "private use"

42. If a motor vehicle has been "made available" to an employee, the next step is to determine whether the vehicle was made available "for [the employee's] private use". This question is important in cases where restrictions are placed on the use of a vehicle. If a vehicle is made available on an unconditional basis, then it follows that the vehicle is available for any potential use, including "private use".

43. Section CX 36 defines "private use" for a motor vehicle:

> **CX 36 Meaning of private use**
>
> **Private use**, for a motor vehicle, includes—
>
> (a) the employee's use of the vehicle for travel between home and work; and
>
> (b) any other travel that confers a private benefit on the employee.

44. Therefore, "private use" of a motor vehicle includes:

- travel between home and work; and
- any other travel conferring a private benefit on the employee.

45. The test is whether the vehicle has been made available for private use, not whether the vehicle has actually been used privately.

Travel between home and work

46. The Commissioner's view of when travel between home and work is for "private use" is set out in the Interpretation Statement IS3448 "Travel by motor vehicle between home and work – deductibility of expenditure and FBT implications", *Tax Information Bulletin* Vol 16, No 10 (November 2004): 31 (IS3448). The following paragraphs summarise that analysis.

47. IS3448 considered the High Court decision in *CIR v Schick* (1998) 18 NZTC 13,738 (HC). *Schick* is the leading case on travel between home and work. In *Schick*, vehicles had been made available to employees of an earthmoving and transport business for travel between their homes and various job sites. The vehicles were stored at the employee's homes when not in use. Gallen J held that the travel in *Schick* was not private use of the vehicles.

48. The Commissioner had argued that there was a fringe benefit because the employees used the vehicles to travel to and from their homes. However, Gallen J held that the first part of the definition (now at s CX 36(a)) was qualified by the second part of the definition (now at s CX 36(b)). His Honour stated (at 13,743):

> …I agree with the Judge [Judge Willy in the TRA – *Case T5* (1997) 18 NZTC 8,024] that the word "travel" where used in the definition of private use or enjoyment, is to be regarded as qualified by that qualification which appears in the second part of the definition and means travel which confers a benefit of a private or domestic nature.

49. The court explained that travel between home and work is not "private use" of a vehicle merely because the travel starts or ends at the employee's home. "Private use" arises when travel between home and work confers a private benefit.

50. Gallen J then considered the meaning of "home". His Honour approved Judge Willy's view in the TRA (see *Case T5* (1997) 18 NZTC 8,024) that a place would not be a "home" for FBT purposes if the home were also a workplace. In upholding the TRA decision that there was no private use, Gallen J concluded (at 13,745):

> I consider therefore it was open to the Authority to conclude on the facts before him, that there was in fact no benefit to the employees in this case and that the definition of "private use or enjoyment" was not sufficient to categorise the activities as taxable, either because that definition itself required a degree of benefit as far as the employee was concerned, or because the term "home" where used in that particular definition was not apt to include a starting point or destination which was for the reasons discussed, reasonably to be categorised as a workplace even if it also had the characteristics of a home.

51. In summary, the main principles from *Schick* on the meaning of "private use" are:
    - "private use" imports a distinction between work-related use and private use of a vehicle;
    - the first limb of the definition of "private use" is qualified by the second and does not refer to all travel between home and work;
    - "private use" includes only travel between home and work that confers a private benefit on an employee;
    - where a home is also a workplace and an employee is required for sound business reasons to travel to perform employment duties partly at the home workplace and partly at another workplace, then the FBT rules do not recognise any private benefit conferred by that travel.

52. In most cases, travel between home and work will be "private use" of the vehicle. However, travel between home and work will not be "private use" if the travel does not confer a private benefit on the employee. There will be no private benefit (and therefore no private use) where:
    - sound business reasons arise from the nature of the work for the work to be performed partly at home (and therefore the need for the travel); and
    - the travel between home and work is "on work" (that is, there are work-related reasons for the travel and any private benefit received is incidental or minor).

53. The test in the first bullet point at [52] above will not be satisfied if the reason the employee is performing work partly at home is due to the personal preferences or choices of that employee. For example, if Teuila wanted to take some marketing work home in the evening to work on, her travel from work to home in a work vehicle would be private use of the vehicle. The need for the travel must arise from the nature of the work and not from the personal choice or circumstances of the employee.

Vehicle taken home for storage

54. IS3448 also explains that the fact a vehicle is taken to an employee's home for security reasons would not in itself make the journey work-related as a private benefit is still conferred. The Commissioner's position is summarised in the following paragraphs from IS3448 at (49):

> *Vehicle taken to home for security reasons*
>
> The Commissioner considers that the fact that a vehicle is taken to an employee's home for security reasons would not in itself make the journey work-related travel (although this factor may be taken into account in conjunction with other factors). While the employer would receive a benefit from a car being taken home by an employee for security reasons, the employee would also receive a benefit from the use of the vehicle for travel to and from the home which is more than incidental to the benefit to the employer. Such travel would not be undertaken in the course of performing employment duties. Rather the travel would be undertaken in order to travel from home to work or from work to home.
>
> In *Schick*, it was acknowledged that the storage of the vehicle at home should not be given too much weight given that the issue being considered was whether the travel between home and work was private travel. Although in *Case Q25* the TRA appeared to give some weight to the evidence that the vehicle was taken home because it was unsafe to leave it at the factory, other factors were present in the case which led to the conclusion that travel between home and work was work-related travel.

Other travel that confers a private benefit

55. Under s CX 36(b), "private use" of a vehicle includes other travel that confers a private benefit on an employee (other than travel between home and work). Travel that is not work-related will be private use, while travel that achieves a work-related objective will not be private use.

56. The distinction may not be as clear when travel achieves both a work-related objective and a private objective. Although, ultimately, a question of fact in each case, for travel to confer a private benefit, the travel must achieve some non-work objective that confers a tangible benefit on the employee. Any incidental or minor benefits conferred by work-related travel (or from minor deviations to work-related travel) are not caught by s CX 36(b).

57. In summary, if an employee receives a tangible benefit from travel, then the travel will be "private use" of a vehicle unless:
    - the benefit is incidental to the work-related travel; or
    - the benefit arises from a minor deviation from the route required by the work-related travel.

Travel that confers a private benefit

Chris takes a week's holiday, leaving Garry on call for the week. So he can respond quickly to any client calls, Garry is permitted to take the office sedan home. Garry's employment contract prohibits private use of work vehicles. Garry receives two after-hours calls and travels from home to the client sites using the work vehicle. Garry used the vehicle to travel between home and work, but that travel did not confer any private benefit on Garry. The vehicle is therefore not treated as being available for private use during this period.

Trevor needs to use the office sedan to pick up office supplies. Trevor knows he is not allowed to use the work vehicle for private use. However, he asks Veri if he can stop on the way and have lunch at his favourite café and pick up his dry-cleaning. Both the café and the dry-cleaners are in the same block of shops as the office supplies store. Veri emphasises to Trevor that the sedan is not available to him for private use. However, she notes that in this instance, Trevor's journey to the café and drycleaners arises incidentally to the work-related use. Trevor's travel confers a private benefit because he is able to get lunch and pick up his dry-cleaning. However, the benefit is an incidental one so the vehicle is not treated as available for private use under s CX 36(b).

Meaning of "motor vehicle"

58. "Motor vehicle" is defined in s YA 1, for the purposes of the FBT rules:

> **Motor vehicle,—**
>
> …
>
> (b) in the FBT rules, and in the definition of **car**,—
>
> (i) is defined in section 2(1) of the Land Transport Act 1998; and
>
> (ii) does not include a vehicle the gross laden weight of which is more than 3,500 kilograms.

59. Section 2(1) of the Land Transport Act 1998 defines motor vehicle:

    motor vehicle—

    (a) means a vehicle drawn or propelled by mechanical power; and

    (b) includes a trailer; but

    (c) does not include—

    (i) a vehicle running on rails; or

    (ii) *[Repealed]*

    (iii) a trailer (other than a trailer designed solely for the carriage of goods) that is designed and used exclusively as part of the armament of the New Zealand Defence Force; or

    (iv) a trailer running on 1 wheel and designed exclusively as a speed measuring device or for testing the wear of vehicle tyres; or

    (v) a vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles; or

    (vi) a pedestrian-controlled machine; or

    (vii) a vehicle that the Agency has declared under section 168A is not a motor vehicle; or

    (viii) a mobility device

60. Therefore, a "motor vehicle" is a vehicle drawn or propelled by mechanical power, including a trailer, and does not include vehicles with a gross laden weight of more than 3,500kg. Vehicles with a gross laden weight in excess of 3,500kg are likely to include larger trucks, buses and mobile homes.

61. While a vehicle with a gross laden weight in excess of 3,500kg does not qualify as a motor vehicle and will therefore not be subject to the rules for motor vehicle fringe benefits, in certain circumstances the provision of a heavy vehicle for private use could result in an unclassified benefit.

62. If the heavy vehicle is designed principally for the carriage of goods, then under s CX 19B no fringe benefit will arise where that vehicle is used to transport employees. An unclassified benefit could still arise if that vehicle is used for other purposes, such as the transportation of goods for private purposes (for example, if the employee uses the vehicle to transport some firewood for private use).

63. If the heavy vehicle is designed principally for the carriage of passengers, then by implication, any use of that vehicle would be subject to FBT as an unclassified benefit (s CX 37) (for example, if an employee is provided with a minibus so they can transport other employees to a remote work site or if the employee uses the minibus to transport firewood for private use).

Three exemptions from fringe benefit tax for motor vehicles

64. A fringe benefit arises when an employer makes a vehicle available to an employee for their private use (s CX 6(1)). Section CX 6(1) is subject to three exemptions (also known as exclusions) in s CX 6(2) to (4):

    Exclusion: work-related vehicles

    (2) Subsection (1) does not apply when the vehicle is a work-related vehicle.

    Exclusion: emergency calls

    (3) Subsection (1) does not apply when the vehicle is used for an emergency call.

    Exclusion: absences from home

    (4) Subsection (1) does not apply when the employee is absent from home, with the vehicle, for a period of at least 24 hours continuously, if the employee is required, in the performance of their duties, to use a vehicle and regularly to be absent from home.

65. The three exemptions are discussed in more detail in the next sections.

Work-related vehicle exemption

66. The work-related vehicle exemption is an exemption based on classification. If a vehicle is classified as a "work-related vehicle" for any day and provided to an employee, then an FBT liability will not arise on that day.

Work-related vehicles

Garry (the installation specialist) needs a vehicle to transport hardware, tools and spare parts to client sites. Since the theft of one of CWL's sedans, Chris and Veri have decided that CWL should purchase a vehicle for Garry to use. They are trying to decide whether to purchase a four-wheel drive vehicle, a station wagon or a double-cab ute.

While wandering through a car yard Chris and Veri get talking to the salesperson, Jan, who suggests they consider classifying their new vehicle as a work-related vehicle for FBT purposes. Jan explains that if the vehicle is a work-related vehicle, then some private use would be permitted without attracting FBT. Chris and Veri decide to find out more about work-related vehicles.

Meaning of "work-related vehicle"

67. Section CX 38 defines "work-related vehicle" for the purposes of the FBT rules:

CX 38 Meaning of work-related vehicle

Meaning

(1) Work-related vehicle, for an employer, means a motor vehicle that prominently and permanently displays on its exterior,—

(a) if the employer owns the vehicle, the form of identification that the employer regularly uses in carrying on their undertaking or activity; or

(b) if the employer rents the vehicle, the form of identification—

(i) that the employer regularly uses in carrying on their undertaking or activity; or

(ii) that the person from whom it is rented regularly uses in carrying on their undertaking or activity.

Exclusion: car

(2) Subsection (1) does not apply to a car.

Exclusion: private use

(3) A motor vehicle is not a work-related vehicle on any day on which the vehicle is available for the employee's private use, except for private use that is—

(a) travel to and from their home that is necessary in, and a condition of, their employment; or

(b) other travel in the course of their employment during which the travel arises incidentally to the business use.

68. Therefore, to be a work-related vehicle, the vehicle must:

- be a "motor vehicle", as defined in s YA 1;
- display, prominently and permanently, on its exterior, the form of identification that the employer (or if the vehicle is hired, the owner of the vehicle) regularly uses in carrying on their undertaking or activity;
- not be a "car", as defined in s YA 1; and
- not be available for the employee's private use, except for private use that:
  - is travel to and from their home that is necessary in and a condition of their employment; or
  - other travel that arises incidentally to the business use.

69. Each of these conditions is considered separately below.

A work-related vehicle must be a motor vehicle

70. A work-related vehicle must be a "motor vehicle". As previously discussed from [58], a "motor vehicle" is a vehicle drawn or propelled by mechanical power, including a trailer, which does not have a gross laden weight of more than 3,500kg.

Vehicle choices

Chris and Veri are considering purchasing a four-wheel drive vehicle, a station wagon or a double-cab ute. These vehicles meet the definition of "motor vehicle" so would satisfy the first work-related vehicle condition.

A work-related vehicle must display identification prominently and permanently

71. If the employer owns the vehicle, the vehicle must prominently and permanently display, on its exterior, the form of identification that the employer regularly uses in carrying on their undertaking or activity.

72. If the employer rents the vehicle, the vehicle must prominently and permanently display on its exterior the form of identification that the:
    - employer regularly uses in carrying on their undertaking or activity; or,
    - person from whom it is rented regularly uses in carrying on their undertaking or activity.

Form of identification

73. The definition of "work-related vehicle" in the Income Tax Act 1994 referred to "the name, logo, acronym or other similar identification of the employer" (or owner), regularly used by the employer or owner in carrying on the employer's activity or undertaking. The changes made to the "work-related vehicle" definition as part of the rewrite of the Act were not identified as intended policy changes in sch 22A of the Income Tax Act 2004. Therefore, it must be assumed that "form of identification" was intended to include a name, a logo, an acronym or other similar identification.
74. The form of identification must be the identification regularly used by the employer or owner in carrying on their business. It must identify the business or undertaking. It would not be sufficient to simply use the surname of a director or shareholder, if that surname were not the form of identification that the employer regularly uses in carrying on their business.

Prominently and permanently displayed on the exterior of the vehicle

75. The form of identification must be prominently and permanently displayed on the exterior of the vehicle. This will be a question of fact in each case.
76. The legislation does not provide a definition of "prominent", "permanent" or "display". However, the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011), defines those words as follows:

    display ▶ v. 1 place (something) prominently so that it may readily be seen.

    permanent ▶ adj. lasting or remaining unchanged indefinitely, or intended to be so; not temporary.

    prominent ▶ adj. 1 important or famous. **2** projecting; protuberant. **3** particularly noticeable.

77. The ordinary meaning of these words suggests that the form of identification must be readily seen and particularly noticeable. The identification must be attached to the exterior of the vehicle in a lasting and not temporary way.
78. The leading case on this requirement is *Case J50* (1987) 9 NZTC 1,281. In this case, the taxpayer operated a fleet of chauffeur-driven limousines. The limousines were available for public hire. The taxpayer displayed his business card on the inside of the windscreen of each vehicle. In addition, a Ministry of Transport vehicle authority sticker was permanently attached to the exterior of the windscreen, showing the name of the business. A loading authority (containing the business name) was stapled to the upholstery of the interior of all the limousines.
79. The taxpayer explained that the business cards were not permanently affixed to the car for reasons of discretion. Customers would hire the vehicles to impress their business associates and would want those associates to believe that the vehicle belonged to them and not the taxpayer.
80. Judge Barber held that the limousines were not work-related vehicles, nor were they cars. Instead, the limousines satisfied the definition of "taxicab". Judge Barber found that the notices, whether considered individually or collectively, had not been prominently or permanently displayed on the exterior of the vehicles. Judge Barber stated that the name of the business had been displayed with much discretion and in a low-key manner (at 1,282):

    I find the evidence to be quite clear that the objector's displays of identification on (or in) his said limousines are most certainly not "prominent". They are discreet.

81. Judge Barber accepted the taxpayer's submission that relevant identification did not need to be "emblazoned" over the motor vehicles in question. He concluded that a balance was needed between the requirements of the legislation and the discreet service required by the taxpayer's customers.
82. Judge Barber also concluded that only the vehicle authority (which was attached to the exterior of the windscreen of the motor vehicle) could be regarded as "permanently affixed" to the vehicle. However, the fact it was not prominently displayed meant the taxpayer's case still failed (at 1,285):

    …only the sticker on the windscreen could be regarded as "permanently affixed to the exterior …" (even though it used to "drop off") in terms of the definition of "work related vehicle". (As mentioned above, it has since been stuck to the inside of the windscreen.) The loading certificate is merely stapled to part of the upholstery of the interior of the limousine, and the business card merely rests against the inside of the front windscreen. Accordingly, I find it to be quite clear from the evidence that the limousines are not work-related vehicles.

Identification prominently and permanently displayed

Question 1: As a teenager, Chris was a professional motocross rider. His bikes and support vehicle were sign-written with his nickname – "ChrisX". Chris still has the stencils used to create that sign. He wants to know if he could use the stencils to sign-write Garry's vehicle to satisfy the "form of identification" requirement for work-related vehicles.

Answer 1: This would not satisfy the "form of identification" requirement. Although Chris is a shareholder and employee of CWL, "ChrisX" is not the form of identification that CWL uses in carrying on the company's business.

Question 2: Veri wants to know if they could use the personalised number plate "XWIRES" instead of sign-writing the vehicle. The plate comes with a surround (or frame) that could be printed with the phone number and web address for CWL. Veri notes that plates could be easily and cheaply removed when the vehicle is eventually sold, while removing sign-writing for re-sale could be expensive.

Answer 2: Personalised number plates do not satisfy the requirement for the "form of identification" to be prominently displayed. The details of the business would be visible only from the front and back of the vehicle and only from up close. The details would not be readily seen or particularly noticeable. The plates would also fail the "form of identification" requirement as "XWIRES" is not the form of identification regularly used by CWL in carrying on its business.

Question 3: Chris and Veri are considering whether to lease a vehicle for Garry rather than buying one. Leased vehicles can be work-related vehicles but they must still have either the employer or the owner's form of identification permanently and prominently displayed. The car lease company will not permit Chris and Veri to sign-write their vehicle. Chris suggests that CWL could get some custom-made magnetic signs for the lease vehicle. The signs would prominently display the "Crossed Wires Ltd" name and contact details, but could be easily removed when the lease ends without damaging the vehicle.

Answer 3: Magnetic door signs would not satisfy the requirement for the form of identification to be permanently displayed; neither would removable sign-written wheel covers or removable ute canopies.

A work-related vehicle must not be a "car"

83. A work-related vehicle must not be a "car", as defined in s YA 1:

> **Car,—**
>
> …
>
> (b) in the FBT rules, and in the definition of **work-related vehicle,—**
>
> (i) means a motor vehicle designed exclusively or mainly to carry people:
>
> (ii) includes such a motor vehicle that has rear doors or collapsible rear seats:
>
> (iii) does not include a minibus, moped, motorcycle, or small passenger vehicle

84. If a motor vehicle is designed exclusively or mainly to carry people, then it will not qualify as a work-related vehicle. This includes vehicles that have rear doors or collapsible rear seats.

85. The definition of "car" expressly excludes a minibus, moped, motorcycle or small passenger vehicle. These vehicles could qualify as work-related vehicles, even though they are designed exclusively or mainly to carry people.

Meaning of "designed exclusively or mainly to carry people"

86. Whether a motor vehicle is designed exclusively or mainly to carry people was considered in *Tisco Ltd v CIR* (1991) 13 NZTC 8,049 (HC). Barker J considered the meaning of the phrase "designed principally or exclusively for the carriage of passengers", which was how the test was worded in the Income Tax Act 1976.

87. The taxpayer in *Tisco* was in the business of installing and servicing electrical and technical appliances. The taxpayer operated a fleet of Toyota Corolla station wagons that its employees used to make service calls to customers' premises and to transport items from customers' premises to the taxpayer's workshops. Tool kits, service instruments and spare parts were carried in the vehicles to help with repairs.

88. The Commissioner considered that the vehicles were motorcars (being principally designed for the carriage of passengers), so subject to FBT. The taxpayer disagreed.

89. In the High Court, Barker J stated that whether a vehicle was designed principally for the carriage of people is ultimately a question that relates to the construction of the vehicle and not to its intended use (at 8,051):

    From cases based on similarly worded legislation, it is clear that the question whether a vehicle is designed principally for the carriage of persons is a question relating to the construction of the vehicle, not a question of the owner's use or intended use of the vehicle. However, any alterations or adaptations to the vehicle made by the owner must be taken into account when considering the question of design.

90. On the facts, Barker J was satisfied that the particular model of station wagon was not a motorcar because it was not designed principally or exclusively for the carriage of people. The vehicle could comfortably transport passengers, provided they were small enough to sit in the back seat. However, it was equally designed to carry goods (the model of station wagon had a particular type of suspension that made it suitable for carrying heavy loads of tools and equipment). Barker J concluded that if a vehicle is designed equally for two purposes then neither purpose can be called the "principal" purpose (at 8,052):

    From the manufacturer's point of view and hence the designer's point of view, the uses of this particular vehicle are both for passenger use and for goods use. It must be a matter of indifference to the manufacturers who buys the vehicle. One imagines that Toyota was trying to cater to as wide a market as possible. Nonetheless I think there is some force in the argument of counsel for the objector that **if a vehicle is designed equally for two purposes then neither purpose can be called the "principal" purpose.** [Emphasis added]

91. Barker J explained that his decision was based purely on the facts of this particular model of station wagon.

92. The three main principles from *Tisco* are:
    - The question of whether a vehicle is designed principally to carry people is a question relating to the construction of the vehicle. It is not a question of the owner's use or intended use of the vehicle.
    - Any alterations made to the vehicle since its manufacture must be taken into account when considering the question of design.
    - If a vehicle is designed equally for two purposes, then neither purpose can be called the principal purpose.

93. The Commissioner considers that station wagons will typically be "cars" as they are designed exclusively or mainly to carry people. This will be the case unless there is specific evidence to show that a station wagon has been designed equally to carry people and goods or if the necessary alterations have been made to the vehicle to convert it into a vehicle designed equally (or exclusively or mainly) to carry goods.

94. In *Case Q25* (1993) 15 NZTC 5,124, the taxpayer was a company that manufactured clothing. The shareholder-employees were a husband and wife and they regularly took items of clothing home to work on. The company provided the couple with hatchback vehicles to transport the clothing from the workshop to their home. When in use, the vehicles had the backseat folded down with a plywood floor covering the rear portion. The issue for the TRA was whether the hatchback vehicles were work-related vehicles. Judge Willy decided they were.

95. *Case Q25* was appealed to the High Court in *CIR v Rag Doll Fashions (NZ) Ltd* (1995) 17 NZTC 12,104 (HC). Morris J endorsed the principles from *Tisco*. He noted that when the vehicles were manufactured they could be regarded as designed "exclusively or principally for the carriage of persons". However, the design of the vehicles had been altered for the taxpayer's business (at 12,106):

    I am in no doubt when these vehicles came from the factory they could properly be regarded in no other way but vehicles designed principally or exclusively for the carriage of persons. But alterations were made to them. True, not major. The design of the vehicle was, without question, altered. There is a significant difference between a vehicle with the back seat up and available for passengers and one where a shaped and fitted plywood cover extends from the back of the front seat to the tailgate. With that cover in place the rear seat cannot be raised or used. This alteration enabled carriage of company products.

96. Therefore, Morris J was satisfied that there was sufficient evidence before the TRA to conclude that the vehicles were not designed "exclusively or principally for the carriage of persons" and could be categorised as "work-related vehicles".

97. The two main principles from *Rag Doll* are:
    - An alteration to the design of a vehicle, even if it is not "major", can change the vehicle from one that was principally designed to carry people to a work-related vehicle.
    - An alteration could involve the disabling of rear seats so that they cannot be raised or used to carry people.

98. The Commissioner's view is that any alterations to the design of a vehicle must be permanent in nature in order to satisfy this work-related vehicle requirement (see "FBT and work related vehicles – Court decision in *Rag Doll Fashions case*" in *Tax Information Bulletin* Vol 7, No 13, (May 1996): 19).

99. The definition of "motorcar" has changed since *Tisco* and *Rag Doll*. A "car" is now defined in s YA 1 as a motor vehicle "designed exclusively or mainly to carry people" rather than "designed principally or exclusively for the carriage of passengers". In the Commissioner's opinion, "mainly" has the same meaning as "principally" in this context, so the High Court's reasoning in *Tisco* and *Rag Doll* is still applicable.

"Includes such a motor vehicle that has rear doors or collapsible rear seats"

100. Paragraph (b)(ii) of the definition of "car" in s YA 1 states that a "car" "[i]ncludes such a motor vehicle that has rear doors or collapsible rear seats".

101. The Commissioner considers that para (b)(ii) must be read subject to para (b)(i). The focus under para (b)(i) is on whether the vehicle is designed exclusively or mainly to carry people. If this is not the case (as was the decision in *Tisco*), then the presence of rear doors or collapsible rear seats will not deem the vehicle to be a car. For example, a vehicle such as a double-cab ute, which is not designed exclusively or mainly to carry passengers, will not qualify as a car simply because it has rear doors and collapsible seats.

Exclusions from the definition of "car"

102. The s YA 1 definition of "car" expressly excludes minibuses, mopeds, motorcycles and small passenger vehicles. This means these vehicles may still qualify as work-related vehicles, even though they may be designed exclusively or mainly to carry people.

A work-related vehicle must not be a "car"

Chris and Veri have been investigating the purchase of a work-related vehicle for Garry. Garry needs to be able to transport hardware, tools and spare parts to client sites so he needs a vehicle that is suitable for this use. Jan, the salesperson from the car yard, suggests a few possibilities.

Vehicle 1 is a large four-wheel drive vehicle. This vehicle has two rows of rear seats and can accommodate up to seven people, including the driver. The seats can be folded forwards to make a large storage space, which would be suitable for storing and transporting equipment.

Assessment of vehicle 1: This vehicle is designed mainly for carrying people. The fact the seats can be folded down to make a large storage space does not change this fact. No alterations have been made to the vehicle since its manufacture that has changed this design. This vehicle is a car.

Vehicle 2 is a station wagon. This vehicle is a typical station wagon with four doors and rear seats. The rear seats can be folded forward to increase the boot space.

Assessment of vehicle 2: As with vehicle 1, this vehicle is designed mainly for carrying people. This vehicle is a car.

Vehicle 3 is a second-hand modified station-wagon. This vehicle has had the rear seats removed and replaced with plywood work benches.

Assessment of vehicle 3: This vehicle was originally designed mainly to carry people. However, post-manufacture, changes have been made to the vehicle to adapt it for a different use. The removal of the rear seats and the addition of plywood work benches have changed the design of the vehicle so that it is no longer designed mainly to carry people. This vehicle is not a car.

Vehicle 4 is a double-cab ute. This vehicle is a four-door ute with rear seats and a tray.

Assessment of vehicle 4: This vehicle is designed equally for carrying people and for carrying goods. The front half of the ute comprises the cab which has two rows of seats for carrying people. The back half of the vehicle is the tray, which is used for carrying goods. This vehicle is not a car.

Vehicle 5 is a lease vehicle and a station wagon. Jan has a station wagon that she could lease to CWL. However, the rear seats would need to be disabled to ensure the vehicle was not classified as a "car". Because this is a lease vehicle, CWL would not be able to remove the seats, but Jan says it might be possible to bolt the seats down so that they could not be used.

Assessment of vehicle 5: The station wagon has been designed exclusively or mainly for carrying people. However, if the seats were permanently bolted down so that they could not be used, then this would change the design of the vehicle so that it was no longer designed mainly to carry people. If this occurs the vehicle would not be a car.

A work-related vehicle is not available for private use, with exceptions

103. Section CX 38(3) states that a vehicle is not a work-related vehicle on any day on which it is available for private use, except for private use that is:
    - between home and work that is necessary in, and a condition of, the employee's employment (s CX 38(3)(a)); or
    - other travel in the course of the employee's employment, during which the travel arises incidentally to the business use (s CX 38(3)(b)).

104. A non-work-related vehicle will be subject to FBT on any day that the vehicle is available for the employee's private use. However, a work-related vehicle may be available for the types of private use specified in s CX 38(3) without triggering an FBT liability.

Meaning of "travel to and from their home that is necessary in, and a condition of, their employment"

105. A work-related vehicle is not subject to FBT where the vehicle is available for the employee's private use, where that private use is travel to and from the employee's home that is necessary in, and a condition of, their employment.

106. The *Concise Oxford Dictionary* defines "necessary" to mean:

> **necessary** ▸**adj. 1** required to be done, achieved, or present; needed. **2** inevitable: a necessary consequence.

107. The definition of "necessary" suggests there must be a direct or needed relationship between the employee's travel to and from home and their employment. This may not necessarily be "essential", but must certainly be "required or needed" in their employment (*Re Wreck Recovery & Salvage Co* (1880) 15 Ch 353, *Knight v Demolition and Construction Co* [1953] All ER 508, *Europa Oil (NZ) Ltd (No 2) v CIR* (1974) 1 NZTC 61,169 (CA) and *Fitzpatrick v IRC* [1994] SLT 836). If the travel is not necessary in the employee's employment, then the travel will be subject to FBT. For example, if a receptionist is given a vehicle to travel between home and work, the employer would not be entitled to the benefit of the private use exclusion in s CX 38(3)(a), because the travel to and from home is not necessary to the receptionist's role.

108. Section CX 38(3)(a) also states that the travel must be "a condition of" the employee's employment. The Commissioner considers that "a condition of" means that the travel to and from home must be a requirement of that employee's terms of employment.

109. In summary, the requirements for the application of s CX 38(3)(a) are that an employee cannot use a vehicle for private use except for travel to and from their home where that travel:
    - has a direct or needed relationship with the employee's employment; and
    - is a requirement of that employee's terms of employment.

Meaning of "other travel in the course of their employment during which the travel arises incidentally to the business use"

110. Section CX 38(3)(b) permits private use of a work-related vehicle where that use is "other travel in the course of [the employee's] employment during which the travel arises incidentally to the business use".

111. "Other travel" means travel other than travel to and from home. "Travel in the course of the [the employee's] employment" means other travel that has a nexus or proximity to their employment, where such travel arises incidentally to business use.

112. "Incidentally" is not defined in the Act or in relevant case law. The *Concise Oxford Dictionary* defines "incidental" and "incidentally" as:

> **incidental**▸adj. **1** occurring as a minor accompaniment. • occurring by chance in connection with something else. **2 (incidental to)** liable to happen as a consequence of.
>
> **incidentally**▸adv. **1** as an incidental comment; by the way. **2** in an incidental manner.

113. The dictionary definitions suggest two alternative interpretations. First, the travel could be "incidental" by reference to the distance or time of the travel, in comparison to the travel undertaken in the course of performing employment activities; the non-work travel being minor by comparison. Second, "incidental" travel could be a by-product or natural following-on of the travel undertaken in the course of performing employment activities. For example, an employee stops at a dairy for an ice-cream on the way to visit a client. Under this interpretation, the dairy stop is a natural following-on from the business use.

114. The Commissioner considers that the natural following-on interpretation is the most appropriate interpretation when considering whether the travel "arises incidentally to the business use". In this context, the more natural reading of "incidentally" is that the private use follows as a consequence of the business use.

Effect of the exemption and partial exemptions

115. There is no FBT liability on any day that a vehicle qualifies as a work-related vehicle. If an employer permits the vehicle to be available for some private use on certain days (such as weekends), then the vehicle will not be a work-related vehicle on those days and consequently, will be partially exempt. This means the employer will need to pay FBT for those days (whether the vehicle is used or not).

Work-related vehicle also available for private use

CWL purchases a double-cab ute for Garry to use. This vehicle qualifies as a work-related vehicle. The ute has been sign-written and CWL's name and contact details are prominently and permanently displayed on the exterior of the ute. The ute is a "motor vehicle" and is not a "car" as defined in s YA 1. The ute has been customised so there is safe and secure storage for transporting computer hardware, tools and spare parts.

Arrangement with Garry: CWL requires Garry to garage the ute at his home as there is no secure parking available at CWL's offices. This means using the ute to travel between home and work. Garry often travels directly to clients' premises from home and occasionally responds to after-hours call-outs, so this use is necessary in his employment.

Garry would like to be able to use his work-related vehicle for private use in the weekends. Garry is a radio-controlled sailboat enthusiast and would like to be able to transport his sailboats to regattas in the weekends. Some of his sailboats are up to two metres in length, so his work-related vehicle would be useful for this purpose. Garry asks CWL if he may do this.

As Garry is a valuable member of the CWL team, CWL decides to permit Garry to use the work-related vehicle for private use on Saturdays and Sundays. This means that on Saturdays and Sundays the vehicle does not qualify as a work-related vehicle, and CWL needs to pay FBT on the vehicle for those two days.

To ensure no further FBT liability arises, CWL makes it a condition of Garry's employment contract that he must securely garage the ute at his home. Additionally, CWL writes to Garry prohibiting him from using the vehicle for private use at any other time and advising that CWL will carry out quarterly checks to ensure no private use is occurring. In these circumstances, Garry may use the vehicle to travel between home and work without generating an FBT liability for CWL.

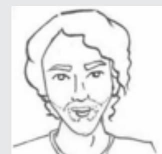
Garry also mentions that he might want to leave work early on some Friday afternoons to attend out-of-town regattas. CWL agree that Garry can do this as long as he seeks permission from the directors and notifies Trevor that the vehicle is being used for private purposes on that Friday. CWL will need to account for FBT for the extra day of private use.

Question: During March, Garry takes annual leave and decides to take a train trip to Hamilton. The work-related vehicle is left at home during this period. CWL wants to know if they still need to account for FBT on the weekends that Garry is in Hamilton, as the vehicle is not being used for private use on those weekends.

Answer: CWL must account for FBT on the weekends that Garry is on holiday in Hamilton. The work-related vehicle has been made available for Garry's private use. The fact Garry did not use the vehicle on those weekends does not change the fact the vehicle has been made available for his private use.

Emergency call exemption

Emergency calls



CWL is frequently required to make after-hours calls to client sites to perform essential services relating to the operation of CWL's clients' hardware and software.

Chris undertakes most of these calls with Garry's assistance when necessary. CWL wants to know whether Chris and Garry would qualify for the emergency call exemption.

116. Section CX 6(3) applies when a vehicle is "used for an emergency call". "Emergency call" is defined in s CX 34:

> **CX 34 Meaning of emergency call**
>
> **Emergency call** means a visit that an employee is required to make, to which all the following apply:
>
> (a) the employee makes the visit from their home in the course of their employment; and
>
> (b) the purpose of the visit is to provide—
>
> (i) essential services relating to the operation of the plant or machinery of the employer, or of their client or customer; or
>
> (ii) essential services relating to the maintenance of services provided by a local authority or a public authority; or
>
> (iii) essential services relating to the carrying on of a business for the supply of energy or fuel to the public; or
>
> (iv) emergency services relating to the health or safety of any person; and
>
> (c) the employer, their client or customer, or a member of the public requests the services; and
>
> (d) except when paragraph (b)(iv) applies, the services are required to be performed between the hours of 6.00 pm and 6.00 am on days other than a Saturday, Sunday, or statutory public holiday, and at any time on other days.

117. An emergency call is therefore a visit that meets certain conditions. The conditions relate to the purpose of the visit and the person who makes the visit (the employee). Simply being "on-call" would not be enough to satisfy this requirement.

118. The purpose of the visit must be to provide services requested by the employer, their client or customer, or a member of the public. The services must be "emergency services relating to the health and safety of any person" or "essential services".

119. If the purpose of the visit is to provide "essential services", then these services must be performed between 6pm and 6am on weekdays or on a Saturday, Sunday or public holiday. The essential services must relate to:

- the operation of the employer's plant or machinery or that of their client or customer; or
- the maintenance of services provided by a local or public authority; or
- the carrying on of a business for the supply of energy or fuel to the public.

120. Section CX 6(3) is satisfied when a vehicle is used for a visit that satisfies all the conditions at s CX 34. Section CX 6(5) then deems the vehicle to be unavailable for private use for the entire 24-hour period of the employer's FBT day (see [143]).

A "visit" means a short stay of a temporary nature

121. Section CX 34 defines an emergency call as a visit. The *Concise Oxford Dictionary* defines the noun "visit" (as relevant) to mean "an act of visiting" or "a temporary stay at a place". The verb "visit" is defined as "go to see for a purpose, such as to give professional advice".

122. The Commissioner considers that a "visit" may refer to short stays or it could include stays lasting hours or even days. However, the stay must be of a temporary nature.

123. It is not necessary for the employee to depart the workplace after the purpose of the visit has been fulfilled. If an employee is on an emergency call to their workplace within the acceptable period, the fact they then stay on and complete a full day's work does not prevent this exemption from applying.

An employee must be required to make the visit

124. For a visit to be an emergency call under s CX 34, the visit must be one that "an employee is required to make"; and the employee must make the visit from home in the course of their employment. Whether these requirements are met will be a question of fact.

125. The condition that the employee must be "required" to make the visit indicates some element of compulsion must exist, either because the employer has directed the employee to make a particular visit or because the employee must respond to certain requests under the terms of their employment.

126. The visit must be made from the employee's home. If the employee is away from home with the vehicle when they are obliged to make a visit, this requirement will not be met.

127. The visit must also be made in the course of the employee's employment. This means there must be some nexus or proximity between the travel and the employment. The requirement will generally be satisfied when there is a relationship between the visit and the employee's employment.

The visit must be to provide emergency services or essential services

128. A visit cannot be an emergency call unless the purpose of the visit is to provide "emergency services relating to the health and safety of any person" or "essential services". Where there is more than one purpose to the visit, the Commissioner considers that the reference to "the purpose" is a reference to the dominant purpose of the visit. (See *CIR v National Distributors Ltd* (1989) 11 NZTC 6,350 (CA), *CIR v Walker* [1963] NZLR 339 (CA), *CIR v Hunter* [1970] NZLR 116 (CA) and *Wellington Regional Stadium Trust v A-G* [2005] 1 NZLR 250 (HC).)

129. It will not be sufficient that the specified services happen to be performed during a visit. The provision of those services must be the purpose of undertaking the visit in the first place. The services must also be requested by the employer, their client or customer, or a member of the public.

Meaning of "emergency services"

130. One of theurposes of an emergency call must be to provide "emergency services relating to the health and safety of any person".

131. The *Concise Oxford English Dictionary* defines "emergency" to mean:

> **n. 1** a serious, unexpected, and potentially dangerous situation requiring immediate action • [as modifier] arising from or used in an emergency.

132. As "emergency" is used to qualify "services", the ordinary meaning of "emergency services" must be "services arising from a serious, unexpected and potentially dangerous situation requiring immediate action". Under s CX 34(b)(iv), the services must also relate to health and safety.

133. The Commissioner considers that the immediacy requirement will not necessarily be one of factual urgency. A reasonable perception of urgency would satisfy this test, as "emergency" requires only potential danger. For example, if a doctor attends to a person exhibiting symptoms of a medical emergency, the emergency call definition would be met, even if the patient's condition is found to be less serious than first thought.

Meaning of "essential services"

134. Another purpose of an emergency call is to provide "essential services". The *Concise Oxford Dictionary* defines "essential" (as relevant) to mean "absolutely necessary; extremely important". This definition does not appear to impose an element of urgency. The word "essential" can be used without reference to time. For example, the *Concise Oxford Dictionary* provides the usage example, "fibre is an essential ingredient of our diet". The Commissioner considers that the focus for essential services is on importance rather than urgency.

135. This view is supported by the United Kingdom Court of Appeal (Civil Division) in *Tapsell v Cemery* (1994) 27 HLR 114. The court considered whether work to be completed in improving a sea wall constituted "essential works" within the meaning of an agreement formed under the Mobile Homes Act 1993. The lower court had held that the sea wall improvements were "essential works". In confirming the lower court's decision, Butler-Sloss LJ explained that something can be essential without needing to be urgent (at 119):

> As my Lord said during argument, there is some confusion between "essential" and "urgent". It is clearly not urgent because it has not yet been done. That does not mean that it is not essential.

136. Section CX 34(b)(i)–(iii) requires that the services be "essential" in relation to any of three specified activities:
    - the **operation** of the plant or machinery of the employer, their client, or their customer;
    - the **maintenance** of services provided by a local or public authority;
    - the **carrying on** of a business for the supply of energy or fuel to the public.

137. Section CX 34(b) is not concerned with the importance of the activities in subparas (i)–(iii), which are defined broadly. Instead, it focuses on the importance of the services provided in relation to the specified activities. The services must be "essential" to one or more of the activities specified at s CX 34(b)(i)–(iii). The Commissioner considers that a nexus must exist between the performing of the services and the relevant activity.

138. The Commissioner also considers that the essential services must be sufficiently important to the carrying on of the activity, to the extent that it would be very difficult or impossible to carry on the activity if the services were not provided. Under this approach, routine maintenance and testing services would satisfy s CX 34(b)(i)–(iii), provided the services are indispensable to the activity. The services do not need to relate to an imminent or existing disruption to the activity.

139. The activity described in s CX 34(b)(i) is the operation of plant or machinery of the employer or their client or customer. For example, for an employer who carries on a business of servicing eftpos systems, the operation of an eftpos system by a client running a beauty salon would satisfy the activity described as s CX 34(b)(i). Whether eftpos servicing or beauty salons are "essential services" in ordinary usage is irrelevant. Whether the eftpos servicing qualifies as "essential" under s CX 34(b)(i) will require consideration of the importance of an eftpos technician's services in relation to the beauty salon's operation of their eftpos system.

140. The Commissioner considers that "plant and machinery" includes things like fire alarms. If an employee is required to visit their employer's site or a client's site after hours to service a malfunctioning fire alarm, then that visit would qualify as a visit to provide "essential services" relating to the operation of the employer's or client's plant and machinery.

"Essential services" must be performed outside normal working hours

141. Finally, s CX 34(d) requires that the essential services be performed between 6pm and 6am or on a Saturday, Sunday or statutory public holiday.

142. It is not enough that the services are merely performed within the s CX 34(d) timeframes. The services must be "required to be performed" during the timeframes. There must be something inherent in the facts of the situation that drives the decision to perform the services within the identified timeframes. An urgent mechanical breakdown or stoppage would likely meet this requirement. However, as discussed above; essential services do not require urgency. Similarly, the employer does not need to prove that it was impossible to perform the services outside the stated timeframes. Provided there is a sound reason for why the services could not be performed on a normal business day (between 6am and 6pm), aside from a reduction in FBT, the timeframe requirement at s CX 34(d) will be met.

143. A vehicle is used for an emergency call from the time an employee departs from home in the vehicle until they arrive at the site of the emergency call. When a vehicle is used for an emergency call the vehicle is deemed to be unavailable for private use for the entire 24-hour period (see s CX 6(5) and from [151] for a more detailed discussion on the meaning of "day"). When the employer is calculating their FBT liability, that day will not count as a day on which the vehicle was made available for private use. The effect of the emergency call exemption is considered in more detail from [151].

Emergency calls

Question 1: Jobs R US Ltd (a recruitment company and client of CWL) has decided to update its computer terminals. Chris has agreed to come in after hours and replace the terminals and run a software update. His visit is scheduled for 11pm on Tuesday evening when the recruitment staff have left for the day. The timing of the update is to ensure minimal disruption to the recruitment company's business. Chris travels from home to the offices of Jobs R US Ltd. Chris finishes up around 5am. He stays around afterwards to talk to the Jobs R US Ltd business development manager about selling the company some new accounting software. He leaves the Jobs R US Ltd offices at 9am. Does Chris's visit qualify for the emergency call exemption?

Answer 1: Yes. Chris's visit would qualify for the emergency call exemption because:

- Chris was required to make the visit because this was something that the client requested from CWL.
- The visit was made in the course of Chris's employment with CWL.
- Chris made the visit in his vehicle from his home to the client site.
- The principal purpose of the visit was to undertake essential information technology services in relation to the operation of the client's plant and machinery, namely the computers that the client uses to undertake its business. The client could not undertake its business without the computers.
- The work was scheduled and not of an urgent nature. However, urgency is not a requirement of the exemption.
- Finally, the essential services were carried out on a week day between 11pm and 5am. This satisfies the timeframe requirements in s CX 34(d). A valid reason existed for the services needing to be carried out during this time – to prevent disruption to the client's business.

It is irrelevant that Chris stayed on after he finished performing the essential services to discuss the sale of new accounting software with the business development manager. It is not necessary for the employee to depart the workplace after the purpose of the visit has been fulfilled. This does not prevent the exemption from applying.

Question 2: Garry's vehicle is a work-related vehicle only from midnight Sunday to midnight Friday. This is because he is allowed to use the vehicle privately on Saturdays and Sundays. One Saturday afternoon while Garry is getting his groceries, he gets a call on his work cell phone from one of CWL's clients, a boutique wool-dyeing business called Rainbow Merino. An employee has accidently knocked their wireless router into a vat of hot dye and they need it replaced immediately to keep the internet running so they can access new orders. After dropping his groceries home, Garry drives to Rainbow Merino's premises in his work vehicle at 2pm on Saturday. Does Garry's visit qualify for the emergency call exemption?

Answer 2: Yes. Garry's visit would qualify for the emergency call exemption because:

- The visit was made in the course of Garry's employment as an installation specialist with CWL.
- Garry made the visit in his work vehicle from his home to the client's site.
- The principal purpose of the visit was to undertake essential information technology services in relation to the operation of the client's plant and machinery (replacing and setting up the new router). The client could not undertake its business if Garry did not replace the router.
- The services were requested by the client and were required to be performed on a Saturday because that is when the accident happened.

While Garry's vehicle is not a work-related vehicle on weekends (so is subject to FBT on those days), the fact he was required to make an emergency call on the Saturday means the emergency call exemption applies and CWL is not liable for FBT on that Saturday. This is despite Garry using the vehicle privately to get his groceries.

Business travel exemption

Business travel

Chris travels frequently for work. CWL has clients in different towns and cities and sometimes these jobs take more than one day. Chris wants to know if the business travel exemption will apply.

144. Section CX 6(4) contains the business travel exemption:

> *Exclusion: absences from home*
>
> (4) Subsection (1) does not apply when the employee is absent from home, with the vehicle, for a period of at least 24 hours continuously, if the employee is required, in the performance of their duties, to use a vehicle and regularly to be absent from home.

Requirements of the exemption

145. The business travel exemption applies when:

- an employee is absent from home with the vehicle for at least 24 hours; and
- the employee is required to use a vehicle in the performance of their duties; and
- the employee is required to be regularly absent from home in the performance of their duties.

The employee is absent from home "with" the vehicle for at least 24 hours

146. The business travel exemption will apply only where an employee is absent from home "with" the vehicle. If the vehicle is parked at an airport while the employee travels by plane to another destination, then the vehicle is not "with" the employee and the exemption will not apply.

147. The requirement for the employee to be absent from home "with" the vehicle was introduced in 2004 and departs from the previous version of s CX 6(4), which did not contain this requirement. This change means the Commissioner's statement published in "Cars parked at airport carparks", *Public Information Bulletin* No 144 (March 1986) no longer correctly reflects the legislation. The *Public Information Bulletin* item concluded that the business travel exemption would apply when a person travelled by air for business and left the vehicle at the airport, provided the vehicle was not available for private use on those days. Due to changes in the legislation, this view is no longer correct. This Interpretation Statement therefore withdraws and updates that advice.

The employee is required to use a vehicle in the performance of their duties

148. This requirement is a question of fact and self-explanatory.

The employee is required to be regularly absent from home in the performance of their duties

149. The final requirement of the business travel exemption is that the employee must be required to be regularly absent from home in the performance of their duties. The *Concise Oxford Dictionary* relevantly defines "regular" as follows:

> recurring at short uniform intervals: *a regular monthly check*. • done or happening frequently. • doing the same thing often or at uniform intervals: *regular worshippers*…

150. The Commissioner considers that in the context of s CX 6(4) "regularly absent from home" should be interpreted as meaning travel that occurs with reasonable frequency or at short uniform intervals, such as monthly travel. Infrequent or occasional travel (for example, a yearly trip, even if the trip was for the same reasons, say attending an annual conference) would not satisfy this requirement.

Business travel

Question 1: Chris needs to visit some clients in Napier to help install new equipment and to investigate new business opportunities. He decides to make the four-hour journey in his company vehicle. He is in Napier for three days. Does Chris's visit qualify for the business travel exemption?

Answer 1: Yes. Chris is absent from home with the vehicle for more than 24 hours. In the performance of his employment duties, he is regularly required to use a vehicle and is regularly required to be absent from home.

Question 2: Instead of travelling by car to Napier, CWL has Chris fly so he can maximise his time in Napier and visit some additional clients. He parks his company vehicle at the airport and makes the journey by plane. Can CWL take advantage of the business travel exemption?

Answer 2: No. CWL cannot take advantage of the business travel exemption because Chris is not "with" the vehicle while he is absent from home.

Because the business travel exemption cannot apply, whether a vehicle is subject to FBT on a day that the vehicle is parked at an airport must be determined according to whether the employer has made the vehicle available to an employee for their private use on that day. In this example, CWL has effectively removed Chris's access to the vehicle by requiring him to fly to Napier on business. This means that CWL is no longer making the vehicle available to Chris for his private use. CWL still needs to account for FBT on the day of departure and the day of return, as Chris's vehicle is not subject to a private use restriction. This means the vehicle is still made available to Chris for his private use on the day of departure and the day of return. Only day two is therefore exempt from FBT.

Chris needs to document his travel and ensure this documentation is given to Trevor so he can accurately complete CWL's FBT return. This is a similar outcome to the outcome in the Australian IT Conference example at [41] above. However, it differs from the family holiday example at [41] because in that example it was Chris's own actions that removed his access to the vehicle, not the actions of CWL.

Effect of emergency call and business travel exemptions

151. Section CX 6(5) explains how the emergency call and business travel exemptions are implemented:

> *Use on part of day*
>
> (5) For the purposes of subsections (3) and (4), the whole of the day on which a motor vehicle is used as described in the applicable subsection is treated as a day on which the vehicle is not available for private use.

152. To understand how s CX 6(5) applies, it is necessary to consider its relationship with the emergency call and business travel exemptions – what is meant by "day"; and what is meant by a vehicle being "used as described". These issues are discussed next.

Vehicle deemed unavailable for private use for that day

153. Section CX 6(5) is a deeming provision. If a vehicle has been made available for private use but the vehicle is subsequently used for an emergency call or for business travel, then that vehicle is deemed to be unavailable for private use for the whole of that day of use.

154. Actual private use of a vehicle is not relevant in this context. A fringe benefit arises when a vehicle is made available for private use, and FBT is calculated according to the number of days the vehicle is made available for private use in a return period. Section CX 6(5) operates to exempt a day from the FBT calculations when a vehicle is used for an emergency call or for business travel. This means no FBT is payable for that vehicle for that day.

Meaning of "day"

155. Under s CX 6(5), the whole of the day on which a motor vehicle is used for an emergency call or business travel will be treated as being a day on which the vehicle is not available for private use.

156. "Day" is not defined for the purpose of s CX 6(5). Section RD 30 defines "day" for the purposes of the FBT calculation in s RD 29. Section RD 30(1)–(3) allows employers to choose the start or end of their "day" for FBT calculation purposes:

RD 30 Private use of motor vehicle: 24-hour period

When this section applies

(1) This section applies for the purposes of a calculation of the value of a benefit under section RD 29.

Meaning of day

(2) In section RD 29(5)(a) and (b), in relation to a motor vehicle and the item **days** in the formulas, a **day** is—

(a) a 24-hour period starting from a time in a day that a person who owns or leases the vehicle chooses; or

(b) a 24-hour period starting at midnight if paragraph (a) does not apply.

Choosing starting point and notifying Commissioner

(3) For the purposes of subsection (2)(a), the person must—

(a) choose a starting point for the day that is a whole number of an hour after midnight; and

(b) notify the Commissioner of their election when filing the next return relating to the vehicle.

Elections

(4) An election under subsection (2)(a) —

(a) is effective from the start of the quarter, income year, or tax year to which a return relates; and

(b) applies to all vehicles in relation to which the person files a return.

Hour applying for 2 income years

(5) If the person chooses under subsection (3)(a) a particular hour in the 24-hour period as the starting point of the day, that hour continues to apply to the use of the vehicle from the start of the relevant quarter, income year, or tax year, as applicable, for a minimum period of 2 income years.

When circumstances change

(6) An employer may apply to the Commissioner to amend the starting point of the 24-hour period, or to treat the election as revoked, if the employer's circumstances have changed in a way that—

(a) is more than minor; and

(b) makes the starting point no longer relevant to the employer's business.

157. The Commissioner considers the word "day" in s CX 6(5) must mean the day described at s RD 30(2) for any given employer (see from [212]). In other words, for an employer who has not made an election under s RD 30(2)(a), "day" in s CX 6(5) means any ordinary calendar day. For an employer who has made an election, a "day" is a 24-hour period starting on any calendar day at the time selected by the employer under s RD 30(2)(a).

158. As mentioned at [156], an employer may elect to change their FBT "day". The adoption of a non-standard FBT day might benefit an employer who occasionally allows an employee to take a vehicle home overnight. If the employer operates a standard FBT day (a 24-hour period from 12am to 12am), this would result in two days of private use. This means the employer would be liable for two days of FBT on that vehicle. However, by electing to start their FBT day at 5 pm, the employer would only be liable for one day of FBT when they permit the employee to take a vehicle home overnight.

159. However, if an employer makes an election under s RD 30, that election applies across all of the employer's vehicles. An election is made by notifying the Commissioner of this election when filing an FBT return. The election is effective for a period of two income years from the start of the quarter, income year or tax year to which the FBT return relates.

160. If an employer's circumstances change in a way that is more than minor and makes the starting point no longer relevant to their business, then the employer may apply to the Commissioner to amend or revoke that election (s RD 30(6)).

Emergency call exemption "day"

161. A vehicle is treated as unavailable for private use on a day if the vehicle is used to make an emergency call visit. If at any time during a day an employee uses a vehicle to make an emergency call visit, then s CX 6(5) treats the vehicle as unavailable for private use for that 24-hour period. The exemption applies when the vehicle is being used to make a visit, not when an employee is performing the services of an emergency call.

162. Generally, a vehicle is used to make a visit from an employee's home when an employee drives the vehicle from home to the location being visited. The period of time the vehicle is "used" to make the visit spans from departure (from home) to arrival (at the location of the emergency call).

163. The Commissioner considers that s CX 6(5) exempts the day of departure. However, in cases where an employee departs their home in a vehicle before the end of one FBT day (either midnight or an hour selected by the employer) and arrives at the emergency call site after that time (that is, on the next FBT day), both FBT days would be days on which the vehicle was used for an emergency call. Therefore, the employer's vehicle would be exempt from FBT for both days. The exemption is triggered by the use of the vehicle to make a visit from an employee's home, not the time of departure from the client site or the time of the emergency call.

Business travel exemption "day"

164. Unlike s CX 6(3) (the emergency call exemption), s CX 6(4) does not describe a vehicle being used in a particular way. Instead, it describes a particular situation: when an employee (who meets certain requirements) is absent from home with the vehicle for at least 24 hours.

165. However, the Commissioner considers that s CX 6(4) involves an implicit use of a vehicle. The circumstances described are when the employee is absent from home "with" the vehicle. The *Concise Oxford Dictionary* defines "with" to mean:

> **1** accompanied by. • in the same direction as. **2** possessing; having. **3** indicating the instrument used to perform an action or the material used for a purpose.

166. The Commissioner considers that if an employee has been absent from home "with" a vehicle, the employee must have used the vehicle during the absence. For an employee to be accompanied by a vehicle or have possession of it during an absence of at least 24 hours, the employee will generally have driven the vehicle to achieve the absence or in the course of the absence or both.

167. Use of the vehicle by a qualifying employee who is absent from home with the vehicle for at least 24 hours will attract the business travel exemption for that entire FBT day under s CX 6(5).

How to calculate fringe benefit tax on a motor vehicle fringe benefit

168. This part of the Interpretation Statement explains how to calculate FBT on a motor vehicle fringe benefit.

169. An employer who provides a motor vehicle fringe benefit to an employee is liable to pay FBT under ss RD 27 to RD 57 (s RD 26(1)). The two factors that determine the amount of FBT payable on a motor vehicle fringe benefit are the:
   - rate of FBT; and
   - value of the motor vehicle fringe benefit (less any payments made by an employee for receiving the benefit (see [243])).

Determining the rate of FBT

170. FBT returns can be filed on a quarterly, annual or income-year basis. Under s RD 26(2) an employer must choose one of the following four payment options:
   - single rate (quarterly);
   - alternate rate (quarterly);
   - close company (income-year); or
   - small business (annual).

171. Employers are required to file FBT returns quarterly, unless they are eligible to use an income-year or annual method and elect to file on that basis. The option chosen will determine the rate of FBT that is applied to the value of the motor vehicle fringe benefit.

172. Employers need to carefully consider which option best suits their particular circumstances. Inland Revenue's *Fringe Benefit Tax Guide (IR409)* explains that in deciding which rates to use, an employer should consider:
   - The additional time and possible set-up costs to complete the alternative rate calculations.
   - The impact of non-attributed benefits (if an employer provides a number of non-attributed benefits they should consider using the alternative rate calculation).
   - The amount the employees earn annually. The Guide suggests that an employer should consider using the single rate or the short form alternative rate for employees who earn over $70,000; or the full alternative rate calculation for employees who earn less than $70,000.

173. These factors will be explained in more detail in the following paragraphs.

Single rate option

174. Employers using the single rate option must pay FBT quarterly at the rate of 49.25% of the value of the fringe benefit (s RD 58(1)). This is the highest FBT rate.

175. The single rate option is the most administratively easy option, but it can result in overpayment if employees earn less than $70,000 a year. (The rate of 49.25% is a "gross-up" of the top personal marginal tax rate of 33%.)

176. Employers using this option may ask the Commissioner to replace their FBT liability for the final quarter with an amount calculated using the alternative rate option [see from [179]]. The employer then has two months to provide the Commissioner with the necessary information to support the new FBT calculations for that quarter (s 46E of the Tax Administration Act 1994 (TAA)).

177. An employer selects this option when they file a return (IR 420) using the relevant rate (s 46B of the TAA). The return due dates and payment due dates for quarterly options are 20 July, 20 October, 20 January and 31 May.

178. Employers using the single rate option cannot change options once the return has been filed (s RD 62(1)).

Alternative rate option

179. The alternative rate option is also a quarterly method. Employers who elect to use the alternative rate option must pay FBT for the first three quarters at either 43% or 49.25% of the value of the fringe benefit (s RD 59(2)).

180. For the final quarter of the tax year, FBT is calculated differently, depending on whether the fringe benefit is an attributed benefit or a non-attributed benefit. (For the meaning of "attributed benefit" and non-attributed benefit", see from [186].)

181. The calculations are in ss RD 50 (for attributed benefits) and RD 53 (for non-attributed benefits) and are undertaken for the tax year. The FBT payable for the previous three quarters is then deducted from this amount (s RD 59(4)).

182. Under the "short-form" alternative rate option, FBT is calculated at 49.25% on the value of the attributed benefits (s RD 50(5)). FBT for non-attributed benefits is calculated at a rate of 42.86%, or 49.25% for an employee who is also a major shareholder (s RD 53(4)). This is a good option if the relevant employees earn less than $70,000 or if there are a number of non-attributed benefits.

183. Under the "full" alternative rate method (which applies only for attributed benefits) FBT is calculated using rates based on the marginal tax rate of the relevant employee (see sch 1, part C) less tax on cash pay (ie, cash paid to an employee during the year, excluding fringe benefits) (s RD 50(3)(b)). FBT paid in the previous three quarters for that employee is then subtracted from that amount (s RD 59(4)). As with the "short-form" alternative rate option, this is a good option if the relevant employees earn less than $70,000. However, this option can get complicated as it requires a separate calculation to be undertaken for each employee. To assist with these calculations, an alternative rate calculator is provided on Inland Revenue website: **www.ird.govt.nz/calculators/tool-name/tools-f/calculator-fbt-multi-rate.html**

184. An employer selects this option when they file a return (IR 420) using the relevant rate (s 46B of the TAA). The return due dates and payment due dates are the same as for the single rate option (see [177]).

185. Employers using the alternative rate option cannot change options once the return has been filed (s RD 62(1)).

Meaning of attributed and non-attributed benefits

186. For the purposes of the alternative rate option, an employer must attribute the motor vehicle fringe benefit to the individual employee who receives the benefit (s RD 47(2)). This allows the employer to calculate FBT using rates based on the employee's marginal tax rate.

187. If the motor vehicle fringe benefit has been provided to more than one employee, then the employer must attribute the benefit to the employee who mainly used or received the motor vehicle fringe benefit in the relevant period. If the employer cannot determine which employee mainly received the benefit, then the benefit is a non-attributed benefit and must be pooled (ss RD 48 and RD 53). This means the employer must group the value of the benefits into two pools:

    - The first pool is for an employee who is a major shareholder or a person associated with an employee who is a major shareholder.
    - The second pool is for all other employees.

188. FBT is then calculated for the final quarter of the tax year at a rate of 49.25% for the first pool and 42.86% for the second pool (s RD 53(4)).

Close company option – for shareholder-employees

189. "Close company" is defined in s YA 1 to mean a company that has five or fewer natural persons who either hold voting interests or hold market value interests of more than 50% in the company. Under this definition, all associated natural persons are treated as one natural person.

190. Under the close company option, an employer that is a close company can elect to pay FBT on an income year basis (s RD 60).[1] An employer can use this option if it provided a fringe benefit to a shareholder-employee and for the previous year:
    - the employer's gross PAYE and employer's superannuation contribution tax did not exceed $1,000,000; or
    - the only fringe benefit provided was a motor vehicle fringe benefit and the benefit was only provided to shareholder-employees and was limited to one or two vehicles; or
    - the employer did not employ any employees.

191. "Shareholder-employee" is defined in s YA 1 for the purposes of the FBT rules to mean a person who receives or is entitled to receive salary, wages or other income to which s RD 3(2) to (4) (PAYE income payments) applies.

192. Under this option, the employer must pay FBT on the motor vehicle fringe benefit:
    - at the rate of 49.25% of the taxable value of the fringe benefit; or
    - by calculating the total pay of each employee under ss RD 50 and RD 53 (see from [181]).

193. The benefit of this option is that it permits an employer to defer payment of FBT until the end of the income year.

194. Unlike the first two options discussed, the close company option requires an employer to notify the Commissioner that it will be paying FBT under the close-company option no later than:
    - the last day of the first quarter of the relevant income year; or
    - the last day of the quarter in which the employer first started employing employees, if they had not employed employees in the previous year (s RD 60 of the Income Tax Act and s 46C of the TAA).

195. Notifications may be made online using the Inland Revenue's fringe benefit tax election service: **www.ird.govt.nz/online-services/service-name/services-f/online-fbt-election-ir414.html**

196. Section RD 62 permits employers using this option to change at any time to a quarterly option. If the employer no longer meets the requirements of the close company option it must revert back to either the single rate option or the alternative rate option (s RD 62(2)).

197. The employer's F*BT return (IR421)* and tax payable are due on the employer's terminal tax date (s 46C(3) of the TAA).

Small business option – for employees

198. Under the small business option, an employer may elect to pay their FBT liability on an annual basis (s RD 61(2)). An employer may use this option if it provided a fringe benefit to an employee, and, for the preceding tax year:
    - the employer's gross PAYE and employer's superannuation contribution tax did not exceed $1,000,000; or
    - the employer did not employ any employees.

199. The calculations are the same as for the close company option, but are undertaken on an annual basis.[2]

200. The benefit of this option is that it permits an employer to defer payment of FBT until the end of the tax year.

201. The small business option requires an employer to notify the Commissioner that they will be paying FBT under the small business option no later than 30 June in the relevant tax year or the last day of the quarter in which the employer first started employing employees if they had not employed employees in the previous year (s RD 61(2) of the Income Tax Act and s 46C of the TAA).

202. Notifications may be made online using the Inland Revenue's fringe benefit tax election service: **www.ird.govt.nz/online-services/service-name/services-f/online-fbt-election-ir414.html**

203. As with the close company option, employers using the small business option may change at any time to a quarterly option (see [196]). If the employer no longer meets the requirements of the small business option it must revert back to either the single rate option or the alternative rate option (s RD 62(2)).

[1] "Income year" is the year ending on a business's balance date. This return covers the same period as an end-of-year income tax return. For example, if a business has a 30 September balance date, it would file an FBT return for the year ending 30 September.

[2] An annual FBT return covers the tax year from 1 April to 31 March.

204. The employer's FBT return (IR 422) and tax payable are due on 31 May following the end of the relevant tax year (s 46C(4) of the TAA).

FBT filing options for CWL

Trevor files CWL's FBT returns quarterly. Trevor discovers that CWL could elect to use an annual or income-year option instead of paying FBT quarterly.

CWL is eligible to use both the close company option (for shareholder-employees) and the small business option (for employees). This is because CWL's gross amounts of PAYE and employer's super contributions last year were less than $1,000,000.

CWL decides that from 1 April 2017 it will elect to file and pay FBT annually using the close company option for Veri and Chris, and the small business option for CWL's other employees. This means CWL only needs to file two FBT returns a year rather than four. Trevor uses Inland Revenue's online fringe benefit tax election service to notify the Commissioner of CWL's election.

Calculating a motor vehicle fringe benefit

205. Once an employer has decided which option to use to account for FBT (and therefore which FBT rate to apply), the next step is to calculate the value of the motor vehicle fringe benefit provided.

206. Sections RD 28 to RD 32 explain how to calculate the value of a motor vehicle fringe benefit. Section RD 29 sets out the relevant formulas:

> **RD 29 Private use of motor vehicle: formulas**
>
> *What this section does*
>
> (1) This section sets out the formulas for calculating the value of the benefit that an employer provides to an employee by making a motor vehicle available for their private use.
>
> *Quarterly payment*
>
> (2) If FBT is paid quarterly, the value of the benefit is calculated using the formula—
>
> days × schedule 5 amount ÷ 90.
>
> *Annual payment*
>
> (3) If FBT is paid on an annual basis, the value of the benefit is the total of the amounts calculated under subsection (2) for the 4 quarters in the applicable tax year.
>
> *Payment by income year*
>
> (4) If FBT is paid on an income year basis, the value of the benefit is calculated using the formula—
>
> days × schedule 5 amount ÷ 365.
>
> *Definition of items in formulas*
>
> (5) In the formula,—
>
> (a) in subsection (2), **days** refers to the number of days in the quarter on which the vehicle is made available for private use, reduced by the number of days on which the vehicle was a work-related vehicle, or 90, whichever is less:
>
> (b) in subsection (4), **days** refers to the number of days in the income year on which the vehicle is made available for private use, reduced by the number of days on which the vehicle was a work-related vehicle:
>
> (c) in subsections (2) and (4), **schedule 5 amount** refers to the amount calculated under schedule 5 (Fringe benefit values for motor vehicles) as the value of the benefit that would have been received for unlimited private use of the vehicle in that quarter or income year, as applicable.
>
> *Test period*
>
> (6) To calculate the value of the benefit, an employer may choose to use a test period under section RD 31 to establish private use.

207. Put simply, the value of a motor vehicle fringe benefit is calculated by multiplying the value of the vehicle (the schedule 5 amount) by:

- the number of actual days in the quarter that an employer has made a motor vehicle available to an employee for their private use, less any exempt days or 90, whichever is less; or
- the number of actual days in the income year that an employer has made a motor vehicle available to an employee for their private use, less exempt days.

208. This amount is then divided by 90 (for quarterly and annual returns) or 365 (for income year returns) to give the value of the motor vehicle fringe benefit. If an employee makes a payment towards the cost of the benefit, then the value of the benefit is reduced by this amount (see [243]).

209. The formulas in s RD 29(1) and (4) have three components:

- 90 (for quarterly and annual returns) or 365 (for income year returns);
- the number of actual days in the quarter that the motor vehicle is made available to the employee for private use minus exempt days, or 90, whichever is less; or the number of actual days in the income year on which the motor vehicle is made available to the employee for private use, less exempt days; and
- the schedule 5 amount.

Number of days in the return period

210. If an employer pays FBT quarterly, then the number of days in the return period is 90 (s RD 29(2)). If an employer pays FBT annually, then the value of the benefit is calculated using the quarterly calculation for the four quarters of the tax year. If an employer pays FBT on an income year basis, then the number of days in the return period is 365 (s RD 29(4)).

211. These numbers do not change, even if the actual number of days in the return period exceeds the fixed number (for example, the number of days in a leap year are 366, however the number of days in an income year will still be 365).

Number of actual days the motor vehicle is made available to the employee for private use

212. For employers returning FBT quarterly or annually, "days" means the number of actual days in the quarter that the employer made the motor vehicle available to the employee for private use minus exempt days, or 90, whichever is less (s RD 29(5)(a)). Depending on the return period, the number of actual days in the FBT quarter might be 90, 91 or 92 days.

213. For employers filing on an income year basis, "days" means the number of actual days in the income year that the employer made the motor vehicle available to the employee for private use, less exempt days (s RD 29(5)(b)). Depending on whether it is a leap year or not, the actual number of days in the income year could be 365 or 366. The actual number of days may also vary depending on whether the employer has obtained approval from the Commissioner to change their balance date. This could potentially result in a longer or shorter income year.

214. The number of days does not include days where the vehicle was a work-related vehicle. In addition, the number of days does not include days where the vehicle was deemed to be unavailable for private use under the emergency call or business travel exemptions (s CX 6(5)).

215. Therefore, a day is an FBT day where:

- a vehicle is made available to an employee for private use on that day; and
- there is no exemption available for that day.

"Day" is a 24-hour period

216. An FBT day is a 24-hour period rather than a calendar day. An employer may choose the start and end of their "day" for the purposes of the calculation in s RD 29. If an employer does not choose a "day", then their "day" will be a 24-hour period starting at midnight (s RD 30).

217. If an employer decides to choose the start and end of their "day", they must choose a starting point for the day that is a whole number of an hour after midnight. For example, 5am rather than 5.30am. The employer also needs to notify the Commissioner of their choice when filing their next return (s RD 30(3)) by writing the start time elected on the return.

218. The "day" will apply from the start of the relevant quarter, income year or tax year for a minimum of two years (s RD 30(5)). The "day" must be applied across all of the employer's vehicles.

219. If the employer's circumstances change so that their "day" is no longer relevant to their business, the employer may ask the Commissioner to change their "day" (s RD 30(6)). There is no prescribed form for this – employers can simply request this using the normal channels described in s 14C of the Tax Administration Act 1994.

Use of a test period to determine the number of days a vehicle is available for private use

220. An employer may use a test period to establish the number of days a vehicle is made available for private use, rather than recording the actual days when the vehicle was available for private use (ss RD 29(6) and RD 31(1)).

221. If FBT is paid quarterly or annually, the test period is a quarter. If FBT is paid on an income-year basis, the test period is three consecutive months of an income year (s RD 31(3)). The employer must record when the vehicle was available for use during the relevant period. The results from the test period can then be used to calculate FBT on that vehicle for three years (s RD 31(6)).

222. The employer must choose a test period that fairly represents when the vehicle is likely to be available for use by the employee over the three-year period. The employer is also required to keep a record of the test period, including accurate details of the days in the period on which the vehicle is available for the employee's private use (s RD 31(4)).
223. The number of days a vehicle is available for an employee's private use in the test period is the number of days to be used in the calculation in s RD 29(2). It is also the number of days (multiplied by four) to be used in the calculation in s RD 29(4).
224. Provided the test period remains representative, the test period applies for three years (s RD 31(6)). The three-year period starts on the first day of:
    - the test period, if FBT is paid quarterly;
    - the tax year in which the test period occurs, if FBT is paid annually; or
    - the income year in which the test period occurs, if FBT is paid on an income year basis.
225. If the number of days the vehicle is available for private use increases by 20% or more from the test period, then the three-year period will be reduced. The term will end on the last day of the quarter, year or income year, depending on when FBT is paid (s RD 31(7)).
226. If a test period is no longer representative of days available for use, the Commissioner may notify an employer that the test period will end on a particular date (s RD 31(8)). Following notification, the employer must not use that test period result again. The employer could revert to using actual days or they could run another test period.

Schedule 5 amount

227. The "schedule 5 amount" in the formulas in s RD 29(2) and (4) (see [206]), is an amount calculated under schedule 5. Schedule 5 sets out the options for valuing the motor vehicle fringe benefit. An employer can choose one of two options:
    - the cost price of the vehicle; or
    - the tax value of the vehicle.
228. An employer chooses an option by filing a return using that option to calculate the value of the benefit (s RD 28(2)). An employer must use the chosen option from the end of the period of the first return until, the earliest of:
    - the date of disposal of the vehicle;
    - the date on which the vehicle ceases to be leased (if a series of leases was entered into, then switching between options can be done only when the last lease expires); or
    - five years after start of the period of the first return (s RD 28(4)).
229. Following the end of the period, an employer may change options. The two options are discussed in more detail from [230].

Cost price of the vehicle

230. Under the cost price option, the value of the motor vehicle fringe benefit is calculated by reference to the actual cost price of the vehicle to the employer. If the vehicle is leased, then the value of the benefit is calculated by reference to the cost price of the vehicle to its owner at the time the benefit is provided to the employee (sch 5, cl 1).
231. The cost price of a motor vehicle includes costs incurred to ensure the vehicle is in a state where it can be used by the employee. In "Public Ruling BR 09/08: 'Cost price of the vehicle' – meaning of the term for fringe benefit tax purposes", *Tax Information Bulletin* Vol 22, No 1 (September 2010): 3 (BR 09/08), the Commissioner confirmed that cost price includes:
    - the purchase price of the vehicle;
    - the cost of initial registration and licence plate fees;
    - the cost of accessories, components and equipment (other than "business accessories" – see [233]) fitted to the vehicle; and
    - the cost of transporting the motor vehicle to the place where it is first used, including freight, insurance costs and customs duty.
232. BR 09/08 also states (at 3) that the cost price of the vehicle will not include the cost of:
    - annual vehicle re-licensing fees;
    - road user charges;
    - sign-writing the vehicle in the employer's colours or style (in physical terms, the addition of paint or other graphics such as magnetic signs, decals or transfers);
    - "business accessories" fitted to the motor vehicle at the time of purchase or any time afterwards (see [233]); and
    - financing the purchase of the vehicle.

233. The terms "business accessories" and "fitted to the vehicle" are also defined in BR 09/08 (at 4):

- The term "business accessories" means accessories, components and equipment fitted to the vehicle, required for and relating solely to the business operations for which the vehicle is used, and that are in themselves "depreciable property" for the purposes of the Act. Where powered, they will usually require the vehicle's power source to operate them (for example, a two-way radio, roof-mounted flashing warning lights, and electronic testing or monitoring equipment).
- The term "fitted to the vehicle" means permanently affixed to the vehicle. Permanency would not be negated if the accessory were removed from the vehicle on a temporary basis, for repair or maintenance, or on the removal of the accessory at the time of sale or disposal of the vehicle or the accessory itself.

Cost price of a vehicle

CWL has purchased a double-cab ute for Garry to use.

When the vehicle is delivered, Chris notices that it has an in-built GPS system but no reversing camera. For safety reasons, CWL decides to get a reversing camera installed.

The cost price of the vehicle for FBT purposes will be the total of the purchase price (which includes the in-built GPS system), the cost of purchasing and fitting the reversing camera, and all on-road costs - such as the initial registration costs and licence plate fees. Including these costs brings the GST-inclusive cost of Garry's ute to $43,000.

234. BR 09/08 considers cost price on a GST-inclusive basis. However, cost price may also be calculated on a GST-exclusive basis (sch 5, cls 9 and 10). If a GST-exclusive cost price is used, an adjustment is required to ensure the cost price is equivalent to the GST-inclusive cost price (sch 5, cl 10). Similar provisions apply for the tax value option.

235. The cost price of the motor vehicle will be treated as being equal to the vehicle's market value (sch 5, cl 8(c)):

- where the vehicle is acquired for no cost;
- where the cost price is unable to be established to the satisfaction of the Commissioner by the person who acquires the vehicle; or
- if at the time the vehicle was acquired, the cost price to the person who acquired the vehicle is less than the market value because of an arrangement between that person and an associated person, and that arrangement has the purpose of defeating the intent and application of the FBT rules.

236. If a vehicle is owned by an employer (or if it is leased or rented), the cost price of the vehicle will be:

- for a quarter, 5% of the GST-inclusive cost price or 5.75% of the GST-exclusive cost price;
- for a tax year or income year, 20% of the GST-inclusive cost price or 23% of the GST-exclusive cost price.

Tax value of the vehicle

237. A motor vehicle's tax value is:

- the cost price of the vehicle, less the total accumulated depreciation of the vehicle at the start of the FBT period; or
- the cost of the vehicle if acquired after the beginning of the tax year.

238. Under the tax value option, the value of the motor vehicle fringe benefit is calculated by reference to the vehicle's depreciated value as determined under subpart EE, at the start of the tax or income year (sch 5, cl 3(a)). If a vehicle is acquired during the year, the value of the fringe benefit is calculated by reference to the vehicle's cost price (sch 5, cl 3(b)).

239. The motor vehicle fringe benefit is valued at a higher rate under the tax value option than under the cost price option. This is necessary to produce the same overall tax result, as the rate takes into consideration all the costs, including depreciation, over the average period the vehicle is held for (five years). This means that the overall FBT liability is higher in earlier years under the tax value option and lower in later years.

240. Under the tax value option, there is a minimum tax value of $8,333 (sch 5, cl 13). This means that when the tax value of a vehicle falls below $8,333, the taxable value of the vehicle must be calculated on $8,333. This amount reflects the ongoing benefits that an employee receives from the provision of the motor vehicle, even when that vehicle has depreciated significantly.

241. If a vehicle is owned by an employer (or if it is leased or rented), the tax value of the vehicle will be:

- for a quarter, 9% of the GST-inclusive tax value or 10.35% of the GST-exclusive tax value; and
- for a tax year or income year, 36% of the GST-inclusive tax value or 41.40% of the GST-exclusive tax value.

Cost price or tax value?

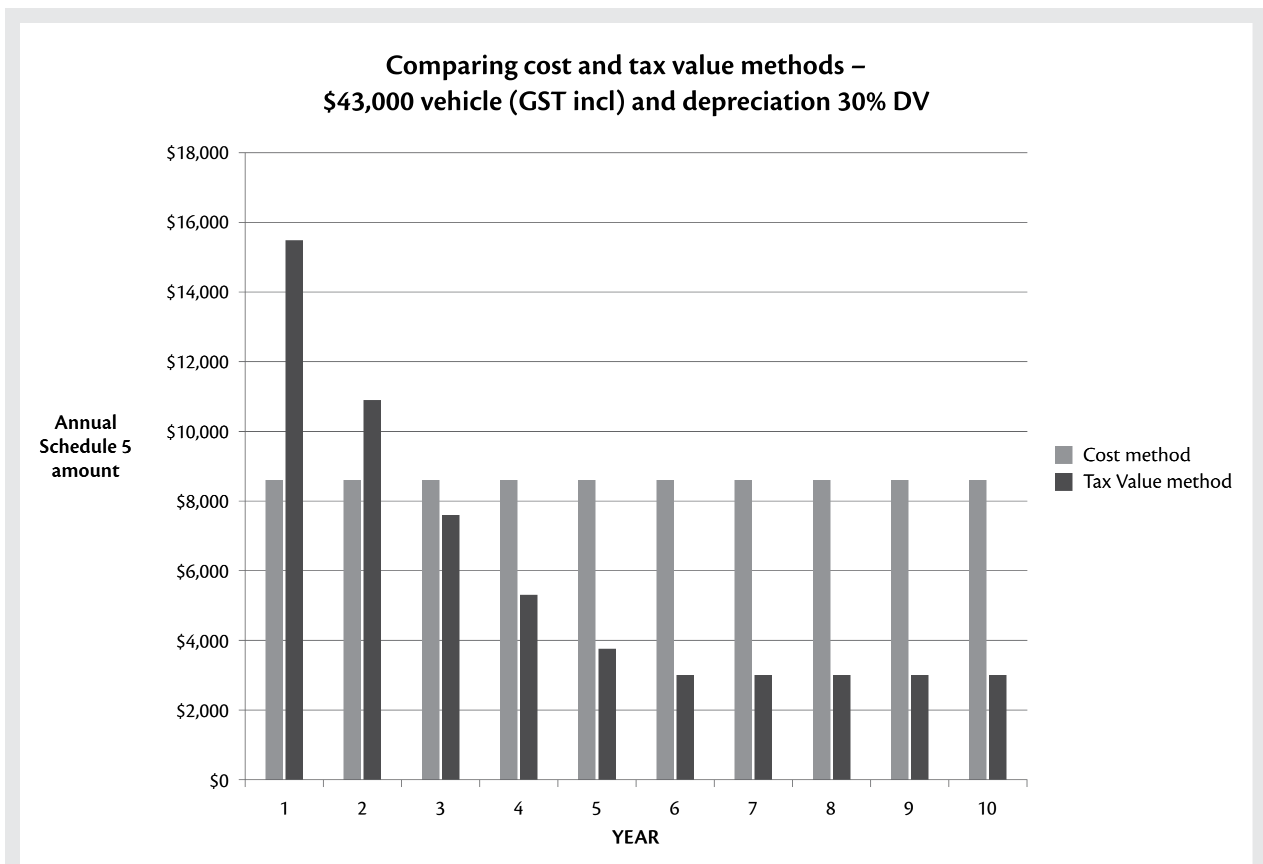
Trevor is trying to decide whether CWL should use the cost price or tax value method for Garry's new ute. Trevor knows that different methods can be used for different vehicles, but once he chooses a method for Garry's ute, CWL needs to use that method for the next 5 years or until CWL sells the vehicle if that happens sooner. Trevor undertakes both calculations in a spread sheet to see which method gives the best result.

Trevor produces the following table using: the GST inclusive cost of Garry's vehicle of $43,000; the depreciation rate of 30% for motor vehicles; the annual rate of 20% for the cost method; and the annual rate of 36% for the tax value method:

Year	Tax value of vehicle (GST incl)	Annual Schedule 5 amount			
		Cost method	Tax Value method	Cumulative Cost	Cumulative tax value
1	43,000	8,600.00	15,480.00	8,600.00	15,480.00
2	30,100	8,600.00	10,836.00	17,200.00	26,316.00
3	21,070	8,600.00	7,585.20	25,800.00	33,901.20
4	14,749	8,600.00	5,309.64	34,400.00	39,210.84
5	10,324	8,600.00	3,716.75	43,000.00	42,927.59
6	8,333	8,600.00	2,999.88	51,600.00	45,927.47
7	8,333	8,600.00	2,999.88	60,200.00	48,927.35
8	8,333	8,600.00	2,999.88	68,800.00	51,927.23
9	8,333	8,600.00	2,999.88	77,400.00	54,927.11
10	8,333	8,600.00	2,999.88	86,000.00	57,926.99

Trevor notes that under the cost method, the Schedule 5 amount remains the same over the period the vehicle is owned. The tax value method has higher values in the earlier years, but reduces down to become a lesser constant amount when the tax value of the ute goes below $8,333 (see [240]).

By looking at the total amounts paid under each of the methods, Trevor sees that by the end of year 5, CWL would pay the same amount of FBT regardless of which method is used. Trevor puts these figures into the following graph to show Chris and Veri.



Trevor explains to Chris and Veri that it makes sense for the first 5 years to use the cost method. If CWL retains Garry's ute for the whole 5 years, the Schedule 5 amount will be essentially the same as under the tax value method. If CWL decides to replace Garry's ute before the end of 5 years, the Schedule 5 amount will be less under the cost method. If CWL decides to hold onto Garry's ute for more than 5 years, it will make sense to switch to the tax value method to take advantage of the effect of depreciation.

Pooled vehicles

242. If an employer makes a pool of vehicles available to its employees for private use, then the "schedule 5 amount" is calculated as follows:

- If the employee mainly uses the same vehicle, then the "schedule 5 amount" will be the value of the vehicle (sch 5, cl 2(a)).
- If the employee:
  - does not mainly use the same vehicle; and
  - the employer's business is selling cars; and
  - the vehicles in the pool are trading stock;

  then the "schedule 5 amount" will be the average value of all the vehicles in the pool (sch 5, cl 2(b)).
- If the employee does not mainly use the same vehicle and the employer is not in the business of selling cars in the circumstances described above, the "schedule 5 amount" will be the highest value of any of the vehicles in the pool (sch 5 cl 2(c)).

Employee contributions

243. If an employee makes a payment for receiving the motor vehicle fringe benefit, then the value of that benefit is reduced by the lesser of the value of the benefit and the amount paid (s RD 54(2)).

Employee contributions

Garry decides to visit his friend in Rotorua. He drives there using his work vehicle. His petrol for this visit costs $120, which he pays for personally. The $120 may be deducted from the value of the motor vehicle fringe benefit.

Motor vehicle is part-owned by the employee or an associate

244. If an employee (or an associate of an employee) part owns a vehicle, then an adjustment must be made to the taxable value of the vehicle (s RD 55).

245. If the employer has valued the motor vehicle on a GST-inclusive basis, then the employer may deduct 2.5% of the employee's contribution to the cost price of the vehicle (if filing quarterly or annually) or 10% of the employee's contribution to the cost price of the vehicle (if filing on an income year basis) (s RD 56).

246. If the employer has valued the motor vehicle on a GST-exclusive basis, then:

- if FBT is paid quarterly or annually, 2.5 + (2.5 × schedule 5 rate); [2.875%]
- if FBT is paid on an income year basis, 10 + (10 × schedule 5 rate). [11.5%]

Sale and buy-back arrangements

247. Specific vehicle valuation rules exist when an employer (or an associate) purchases a vehicle, sells the vehicle and then re-purchases it within two years.

248. For example, Company A and Company B are associated. Company A buys a motor vehicle on 1 July 2015 for $25,000 and sells it to an unrelated party (Company Z) for $23,000 on 1 October 2015. On 1 April 2017 Company B buys the motor vehicle from Company Z for $15,000. The relevant period in this example is 1 April 2015 to 31 March 2017 (sch 5, cl 3(c) explains that the relevant period is the two years immediately before the employer (Company B) most recently acquired the vehicle). As the vehicle was owned by an associated person of Company B during this period, Company B will need to determine the value of the motor vehicle to the employee.

249. The Commissioner considered this arrangement in "QB 10/03: Fringe benefit tax – value of motor vehicle previously owned by the employer or by an associated person of the employer", *Tax Information Bulletin* Vol 22, No 5 (June 2010): 52 (QB 10/03). QB 10/03 concluded (at [4] and [5]) that in determining the value of a motor vehicle:

- If the cost price option is used, the starting point will be the highest cost price paid for the vehicle by the employer or the associated person on any acquisition. In the above example, this is $25,000, not the $15,000 the vehicle was subsequently purchased for (sch 5, cl 8(b)).
- If the tax value option is used, the appropriate starting point is determined by sch 5, cl 4.

Applying the FBT rate to the value of the motor vehicle fringe benefit

250. To summarise, the value of the motor vehicle fringe benefit is calculated using the formula in s RD 29:

Value of the benefit = days × Schedule 5 amount ÷ 90 or 365

251. The final step in calculating FBT on a motor vehicle fringe benefit is to apply the FBT rate to the value of the motor vehicle fringe benefit.

FBT liability = value of the benefit × FBT rate

Goods and services tax on fringe benefits

252. If an employer is registered for GST they will usually need to account for GST on the taxable value of the fringe benefit and/or any amount the employee has contributed.

253. To the extent an employee has paid an amount for the receipt or enjoyment of that benefit, that amount will be subject to GST (s 8 of the Goods and Services Tax Act 1985).

254. To the extent the employee has not paid an amount for the receipt or enjoyment of that benefit, the provision of a motor vehicle fringe benefit is deemed to be a supply of goods and services made by the employer in the course or furtherance of their taxable activity under s 21I(1) of the Goods and Services Tax Act 1985. The consideration for the supply is deemed to be the taxable value of the fringe benefit. The time of supply is deemed to be the time the fringe benefit is provided or granted (s 21I(3)).

Calculation of FBT on Crossed Wire Ltd's vehicles

255. Trevor needs to file CWL's quarterly FBT return for the quarter to 31 March 2017. The only fringe benefits CWL provides to its employees are the motor vehicles. Therefore, Trevor needs to determine the FBT payable on each of CWL's four vehicles:
    - Veri's luxury vehicle;
    - Chris's luxury vehicle;
    - the office sedan; and
    - Garry's double-cab ute.

Veri's luxury vehicle

Veri's vehicle is used wholly for business purposes and private use is prohibited. The vehicle is garaged at CWL's premises. Veri and her partner have their own vehicle and Veri also has a motorbike, so they do not need to use Veri's company car for private use. As Veri's company vehicle is not available for private use, no fringe benefit arises on this vehicle.

Chris's luxury vehicle

Chris has unrestricted use of his vehicle. It is always available for private use. The value of a motor vehicle fringe benefit is calculated as:

days × schedule 5 amount ÷ 90

Days

"Days" for the quarter ending 31 March 2017 is 90 (this is the actual number of days in the first quarter of 2017) less the number of days for which an exemption applies. The work-related vehicle exemption is not relevant for Chris's vehicle as it is a "car". However, the emergency call and business travel exemptions could both apply.

On checking the billing records, Trevor sees that Chris made five emergency calls during the quarter. These were all calls made at the request of CWL clients during the weekend. Additionally, Chris was out of town with his car for two days at a conference and a further three days helping CWL clients. Trevor determines that these 10 days qualify for the emergency call or business travel exemptions. In addition, Chris's vehicle was unavailable for private use for 14 days when it was in the garage being repaired and for three days when he was required to attend a conference in Australia.

"days" for Chris's vehicle = 90 – 27
= 63

Schedule 5 amount

The cost method is going to be best for Chris's luxury vehicle – particularly as Chris is likely to replace the vehicle within 5 years. Trevor notes that he can use the GST-inclusive price or the GST-exclusive price. Rather than try and find the original contract, Trevor uses the GST-exclusive amount of $60,000 shown in the fixed assets register.

As Trevor is using a GST-exclusive amount, the value of the benefit for the quarter is calculated by multiplying the cost of the vehicle by 5.75%:

Schedule 5 amount for Chris's vehicle = $60,000 × 5.75%
= $3,450

Value of the fringe benefit

This means the value of the benefit for Chris's vehicle is:

value of motor vehicle fringe benefit = days × schedule 5 amount ÷ 90
= 63 × $3,450 ÷ 90
= $2,415

Value of the fringe benefit deducted from Chris's current account

As Veri's vehicle is not available for private use she does not receive a motor vehicle fringe benefit. It is therefore agreed that Chris will pay CWL for the provision of the motor vehicle fringe benefit. This will ensure that they receive equal treatment.

Under s RD 54(2), if an employee pays an amount for receiving a fringe benefit, the value of the benefit is reduced by the lesser of the value of the benefit and the amount paid.

Chris pays for the motor vehicle fringe benefit by having CWL deduct the amount from his shareholder current account. This means that the value of the benefit for Chris's vehicle is $0.

From 1 April 2017, CWL has elected to file annually using the small business option (for employees) and the close company option (for shareholder employees). If CWL continues to deduct the value of the motor vehicle fringe benefit from Chris's current account and CWL pays no other fringe benefits to Chris and Veri, then CWL will need to file a nil close company FBT return. This will be an annual FBT return for the period ending 31 March 2018.

Office sedan

The office sedan is used wholly for business purposes and private use is prohibited. However, recently Teuila needed to have her car repaired and Veri permitted her to use the office sedan while her car is in the garage. Teuila had private use of the office sedan for 10 days. Therefore, FBT must be paid for those 10 days.

The value of a motor vehicle fringe benefit is calculated as:

days × schedule 5 amount ÷ 90

Days

"Days" for the quarter ending 31 March 2017 is 10.

Schedule 5 amount

Trevor uses the GST-exclusive amount recorded in the fixed asset register for the office sedan. The value of the benefit for the quarter is calculated by multiplying the cost of the vehicle by 5.75%:

Schedule 5 amount for the office sedan = $20,000 × 5.75%
= $1,150

Value of the fringe benefit

The value of the benefit for the office sedan is:

value of motor vehicle fringe benefit = days × schedule 5 amount ÷ 90
= 10 × $1,150 ÷ 90
= $127.78

Fringe benefit tax liability for this fringe benefit

Finally, the value of the benefit is multiplied by the FBT rate (in this case, 49.25%), to give the FBT liability for the office sedan:

FBT liability = Value of benefit × FBT rate
= $127.78 × 49.25%
= $62.93

Garry's double-cab ute

Garry's vehicle is classified as a work-related vehicle. This means FBT is not payable on any day that his vehicle is a work-related vehicle. Garry has permission from CWL Ltd to use the vehicle for private purposes in the weekend.

The value of the benefit is calculated as:

days × schedule 5 amount ÷ 90

Days

"Days" for the quarter ending 31 March 2017 is 90 (this is the actual number of days in the first quarter of 2017) less the number of days for which an exemption applies. Trevor has recorded that Garry's vehicle was a work-related vehicle for 52 days in the quarter. Trevor also notes that Garry has been on five emergency calls during weekends in the quarter. Garry also attended a two-day training course out of town. The course took place mid-week, but given the vehicle was already a work-related vehicle on those days, the business travel exemption does not also apply. For the quarter, this means:

"days" for Garry's vehicle = 90 – 52 – 5 = 33

Schedule 5 amount

Garry's vehicle has a cost price of $40,000 (GST inclusive). In addition to the cost price, Trevor understands he must add to this the cost of purchasing and fitting the reversing camera and the various on-road costs (see [233]). This gives a GST-inclusive cost price of $43,000.

Schedule 5 amount for Garry's vehicle = $43,000 × 5%
= $2,150

Value of the fringe benefit

The value of the benefit for Garry's vehicle is:

value of motor vehicle fringe benefit = days × schedule 5 amount ÷ 90
= 33 × $2,150 ÷ 90
= $788.33

Employee contributions

Any employee contributions must be subtracted from the value of the fringe benefit. As discussed at [243], Garry travelled to visit a friend and paid $120 in petrol. This means the $120 must be subtracted from the cost of the value of the fringe benefit ($788.33 – $120 = $668.33).

Fringe benefit tax liability for this fringe benefit

Finally, the value of the benefit is multiplied by the FBT rate (in this case, 49.25%), to give the FBT liability for Garry's vehicle:

FBT liability = Value of benefit × FBT rate
= $668.33 × 49.25%
= $329.15

Evidence required to support a fringe benefit tax return

256. The onus of proof for FBT self-assessments is with the employer. The employer must ensure they have sufficient evidence to support the position taken in their FBT return. The employer must be able to:
- identify the relevant motor vehicle (make, model, year of manufacture, registration number);
- support the tax value or cost price of each vehicle;
- have working papers showing how the days are calculated for each quarter, with supporting documentation for any exempt days (if there are no exempt days in a quarter the employer does not need to keep a record of days);
- maintain copies of any private use restrictions;
- include working papers showing how the total of any employees' contributions for each quarter was calculated, with supporting documentation.

257. Inland Revenue's *Fringe Benefit Tax Guide (IR409)* contains further details on the evidence required to support an FBT return.

258. There are additional evidential requirements where an employer seeks to rely on a private use restriction or an exemption. These are discussed next.

Evidence required to support a private use restriction

Employees

259. For motor vehicle fringe benefits, it is presumed the vehicle is made available for private use when an employee has been supplied with a motor vehicle, even if there is a clear business reason for the employee to use the vehicle.

260. In the absence of any conflicting evidence, a clause in an employee's employment contract prohibiting private use will usually be sufficient evidence of a private use restriction. The Commissioner will also usually accept a letter from the employer to the employee, if the letter clearly prohibits private use of the vehicle. In both situations, the restriction on private use needs to reflect what occurs in practice. If the Commissioner has evidence that the employer knows the employee is using the vehicle privately and takes no steps to enforce the restriction then this might indicate that the employer has given implied permission and the vehicle is available for private use. The onus of proof lies with the employer to demonstrate that any private use restriction is genuine. It is therefore important that employers have a system in place to monitor the private use restriction. If the employer fails to satisfy the Commissioner that the private use restriction is genuine, then FBT will be payable. Inland Revenue's *Fringe Benefit Tax Guide (IR409)* (p 11) contains further details about the checks that employers may want to undertake to ensure that they can satisfy the onus of proof.

Private use restriction

CWL ensures that the employment agreements with each staff member prohibit any unauthorised private use of its vehicles.

Following the incident with Spencer, Chris and Veri undertake quarterly spot checks to ensure the private use restriction is being followed. Chris and Veri also regularly remind staff by email that CWL's vehicles are not to be used privately.

Shareholder-employees

261. While the private use restriction is no different for shareholder-employees than for other employees, a shareholder-employee has a measure of control over their employer and in a typical New Zealand close company will also be a director. In many cases, when close companies own vehicles, it is necessary for the company to demonstrate that employees (in their capacity as directors of the company) prohibited themselves from using a vehicle in their capacity as shareholder-employees.

Case law

262. The TRA has considered the issue of whether a company has made a vehicle available to the company's shareholder-employees (*Case T38* (1997) 18 NZTC 8,255, *Case S26* (1994) 17 NZTC 7,182, *Case R37* (1994) 16 NZTC 6,208 and *Case P26* (1992) 14 NZTC 4,196). In these cases, the employee-shareholders were also the directors of the company.

263. In all four cases, vehicles were garaged overnight at the private residences of the shareholder-employee directors. The Commissioner sought to assess the companies for FBT on the basis that company vehicles were available for the private use of shareholder-employees on an unlimited basis. In each of the cases there was travel to and from the home that was considered travel "on work".

264. In *Case P26*, the taxpayer argued that the vehicle was available to the shareholder-employee and director of the company for private use on Saturdays and Sundays only. This was because the director worked long hours during the week, implying that the vehicle could not be available for private use when it was being used for business. The TRA found that despite the long hours worked by the director he was able to use the vehicle for private purposes on weekdays and did in fact do so (for example, he used the vehicle to do his weekly supermarket shopping). The director did not have a private vehicle.

265. In *Case R37*, a husband and wife were shareholder-employees and sole directors of a company. The couple wrote letters to each other prohibiting private use of two vehicles on any day except Saturday. The directors submitted that although private use of the vehicles did occur on other days of the week, on average each vehicle was used privately on just one day per week. The directors did not have a private vehicle. Judge Barber disregarded the letters and concluded that on the facts both vehicles were available for private use at all times.

266. In *Case S26*, the company was owned by husband and wife shareholder-employees. The company owned a vehicle that was garaged overnight at the home of the couple, because there was no secure garaging at the business premises. The couple also owned a private vehicle. It was agreed by the couple that the work vehicle was to be used for business purposes only and was to be unavailable for private use. The husband (in his capacity as director) wrote to his wife (in her capacity as an employee) prohibiting any private use of the vehicle. Judge Barber found that the taxpayers had demonstrated that the vehicle was not available for private use, stating (at 7,187):

> In my view, a vehicle cannot be available for private use if the employee is not only forbidden to use the vehicle, but does not use it and does not need to use it because of the availability at all times of the employee's own private vehicle.

267. In *Case T38*, the company owned two vehicles. One of the vehicles was available for the employee's private use. However, it was company policy that the second vehicle would not be available for the employee's private use, although the vehicle was to be stored at the shareholder-employee's home for security reasons. Judge Willy concluded that the company policy had been faithfully applied in this case, and the vehicle was never used for private purposes. This conclusion was supported by a letter written from the wife (in her capacity as director) to her husband (in his capacity as employee) that prohibited any private use of the vehicle.

268. In summary, the TRA considered the following to be evidence of whether a vehicle has been made available for the private use of a shareholder-employee:

- Evidence relating to the company's intentions as to what the vehicle would be available for (for example, letters from directors or evidence of the anticipated business use).
- Evidence concerning the actual use of the vehicle, including log books and taxpayer statements.
- Evidence that the shareholder-employees have access to an alternate vehicle for private use.

269. The Commissioner agrees with the evidence requirements set out by the TRA.

270. Although the FBT rules are not concerned with use in the absence of availability, evidence of use is considered evidence of availability when the individual using the vehicle is able to decide its availability in their capacity as a director. This is because the director is the person who determines access and permission.

Private use restriction - Veri

CWL ensures that Veri's luxury vehicle is not available for private use by having Chris, as Director of CWL, write a letter to Veri prohibiting her from using any of CWL's vehicles for private use. The letter also notes that Veri's luxury vehicle is required to be garaged on CWL's premises each night and cannot be taken home. The letter also observes that Veri lives in the city, has her own motorbike and private car and does not need another vehicle for private purposes. A copy of this letter is kept on file.

Evidence required to support an exemption claim

271. Employers need to ensure they retain sufficient evidence to support any exemptions claimed.

Evidence required to support a work-related vehicle claim

272. To support a work-related vehicle exemption claim, an employer should record or retain:
- a description of the vehicle to show that it qualifies for the exemption:
  - evidence to prove the vehicle is a motor vehicle and not a "car"; and
  - evidence to prove the vehicle prominently and permanently displays on its exterior the form of identification regularly used by the proprietor in carrying on their undertaking or activity;
- the vehicle's details such as make, model, year of manufacture and registration number;
- a copy of the private use restriction, which could be a clause in the employee's employment contract or a letter from the employer to the employee, explaining that as a condition of their employment, the only private use permitted is:
  - travel between home and work that is necessary in and a condition of the employee's employment; and
  - travel incidental to business use;
- records of quarterly checks (undertaken by the employer) to ensure the vehicle has not been used privately outside of the restrictions. The checks could involve, for example, a review of petrol purchases and logbooks;
- the employee's details.

273. For work-related vehicles that are partially exempt (that is, private use of the work-related vehicle is permitted on certain days), additional evidence is required:
- A copy of the written restriction permitting private use of the work-related vehicle on certain days (that is, in the employee's employment contract or in a letter from the employer to the employee).
- The actual days the vehicle is available for private use must be stated in the restriction (for example, Saturdays, Sundays or statutory holidays). It is not sufficient to simply state the vehicle is available for two days a week. This would mean that the vehicle could be available for private use on any day and FBT would then apply.

Evidence required to support an emergency call exemption claim

274. To support an emergency call exemption claim, an employer should record or retain:
- the purpose of the call;
- details of the services provided;
- when the services were performed – what time the employee left home, what time they returned home, the duration of the visit, and why the services had to be provided at that time;
- the client's or customer's details;
- the employee's details; and
- the vehicle's details such as make, model, year of manufacture and registration number.

275. If a vehicle satisfies the requirements of the emergency call exemption, then the vehicle is exempt from FBT for the whole of the day on which the vehicle satisfies the requirements. If the vehicle is also available for private use on that day, the availability for private use can be disregarded.

Evidence required to support a business travel exemption

276. To support a business travel exemption claim, an employer should record or retain:
    - the purpose of the travel;
    - timing details – what time the employee left home and when they returned (that is, proof the travel was for longer than 24 hours);
    - the number of days the travel satisfied the requirements of the exemption;
    - the employee's details; and
    - the vehicle's details such as make, model, year of manufacture and registration number.

277. If a vehicle satisfies the requirements of the business travel exemption, then the vehicle is exempt from FBT for the whole of the day on which the vehicle satisfies the requirements. If the vehicle is also available for private use on that day, the availability for private use is disregarded.

Evidence of exemptions

For Garry's ute, Trevor maintains the required details and the letter provided to Garry restricting his private use of the vehicle to weekends – Saturdays and Sundays only. Trevor will also need to retain evidence of any additional permissions that Chris or Veri have granted to Garry to allow him to use his vehicle for private use on a Friday to transport his radio-controlled sailboats to regattas.

For the emergency call exemptions, Trevor records the evidence of these from the client job sheets and the billing system. CWL charges its clients for after-hours call-outs and Trevor uses these records for FBT purposes as well.

For the business travel exemptions, Trevor maintains these records from the client job sheets and billing system for travel relating to out-of-town jobs. For travel relating to conferences and other training, details are recorded at the time of the course.

Motor vehicle expenditure rules

278. Close companies (see [189]) who provide motor vehicle fringe benefits to shareholder-employees may elect to apply the motor vehicle expenditure rules in subpart DE rather than the FBT rules (s CX 17(4B)). The amendments have been made to help reduce compliance costs for close companies. This means instead of registering for and paying FBT based on the availability of a vehicle for private use, close companies who provide motor vehicles to shareholder-employees for their private use can deduct motor vehicle expenditure according to actual business use.

279. An election can only be made for motor vehicles acquired after the beginning of the 2017-18 income year or when a motor vehicle is first used as part of the employer's business after the beginning of the 2017-18 income year. The election only applies to close companies where the only fringe benefit provided is the provision of one or two motor vehicles to shareholder-employees for their private use. Once an election is made, it will continue to apply until the close company stops using the motor vehicle for business use or until it disposes of the motor vehicle. Further details can be found in *Tax Information Bulletin* Vol 29, No 4 (May 2017): 70 **www.ird.govt.nz/resources/a/2/a27fab16-34e8-47b8-8c09-ba24a56f2712/tib-vol29-no4.pdf**

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OPERATIONAL STATEMENTS

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

OS 17/01: GST and costs associated with mortgagee sales

Introduction

Operational statement 15/01 has been reviewed with regard to a mortgagee who is subject to the business to business financial services rules. The revised statement now reflects at paragraphs 23 to 26 that the Commissioner's believes that such mortgagees can claim an input tax deduction for costs associated with mortgagee sales.

Transitional position

We are aware that we are changing our position with regard to input tax claims for taxpayers under the business to business financial services rules from that set out in Operational Statement OS 15/01. This means that going forward a mortgagee who has made a formal election under section 20F to be subject to the business to business zero-rating rules can claim input tax deductions for costs associated with a mortgagee sale.

A registered person who, while having made an election under section 20F, has not claimed input tax deductions for costs associated with a mortgagee sale, can:

- Request that the Commissioner amend the relevant assessment under section 113 of the Tax Administration Act 1994. The Commissioner will consider such requests on a case by case basis applying the approach outlined in the Standard Practice Statement on section 113 (SPS 16/01 – Requests to amend assessments); or
- Claim the input tax deduction in a subsequent period under the proviso to section 20(3) (provided the requirements of the proviso are met).

The Commissioner's general practice (as outlined in the SPS 16/01) is that where a registered person is able to make the required correction themselves in a later period, Inland Revenue will not expend resources considering whether to exercise the section 113 discretion to amend the original statement. However, a decision has been made that even though the taxpayer may be able to make the required amendment in a later return under section 20(3), in these cases this will not be a factor in determining whether to consider a request to amend the original assessment under section 113. This is a departure from the general practice outlined in SPS 16/01.

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

This Operational Statement sets out the Commissioner's position on GST input tax claims in relation to the costs of sale associated with mortgagee sales, namely:

(i) Whether the mortgagee's costs of sale can be deducted prior to the calculation of GST due; and

(ii) Whether a mortgagee can claim input tax on a mortgagee sale for the costs associated with the mortgagee sale; and

(iii) Whether a mortgagee can claim input tax on the costs associated with the mortgagee sale where the sale is subject to the business to business financial services rules; and

(iv) Whether a mortgagor can claim input tax on a mortgagee sale for the costs of sale incurred by the mortgagee.

Application

This Operational Statement applies from 6 September 2017 and sets out the Commissioner's position in relation to the Goods and Services Tax Act 1985. It replaces OS 15/01 *GST and the costs of sale associated with mortgagee sales* (October 2015).

Discussion

Whether the mortgagee's cost of sale can be deducted prior to the calculation of GST due

1. The term "costs of sale" in this statement refers to expenses that are occasioned by the mortgagee sale. Examples of such expenses are legal fees, valuation fees and real estate advertising and commission. The term "costs of sale" does not include money that is owed under the mortgage such as the interest or principal of the mortgage.
2. Section 5 deems a supply to take place in specific situations. In particular, section 5(2) deals with a sale in satisfaction of debt situation. It provides for there to be a supply by the defaulting person (the mortgagor) where the goods (the mortgaged property) are sold under a power exercisable by another person (the mortgagee) under the terms of the mortgage agreement. As there is a supply under a mortgagee sale, GST is to be charged pursuant to section 8 or section 11.
3. It should be noted that section 5(2)(a) and (b) provide for exceptions where a sale in satisfaction of debt would not be deemed a supply.
4. Section 5(2) alone does not aid in determining whether or not GST is to be calculated on the sale price inclusive of the costs of sale. It has to be read in conjunction with section 17.
5. Section 17 requires a person selling goods in a sale in satisfaction of a debt to perform certain duties.
6. Section 17(1)(a) states that the person selling the goods (whether or not GST registered) must furnish a return to the Commissioner in the prescribed form. The prescribed form is the *Goods and services tax return for goods sold in satisfaction of debt (IR373)*. This is referred to as the "special return" in this statement.
7. The special return must be furnished on or before the date set out in section 17(1B). Sales made in any month must be returned by the 28th of the following month except where the sale is made in either November or March, in which case they must be returned by the following 15th January and 7th May respectively.
8. The person selling the goods must at the same time, pay to the Commissioner the amount of tax that was charged on the supply and furnish to the person whose goods were sold, details of the information in the special return pursuant to sections 17(1)(c).
9. Section 17(2) deems the amount of tax charged on the supply to be tax payable and recoverable as a debt that is due to the Crown.

Section 185 Property Law Act 2007 and section 17 Goods and Services Tax Act 1985

10. Section 185(1)(a) of the Property Law Act 2007, by way of section 185(2), provides for the proceeds from the mortgagee sale to be applied to amounts reasonably paid or advanced by the mortgagee with a view to realisation of the security. This is the equivalent provision to the now repealed section 104 of the Land Transfer Act 1952. However, section 104 and its successor section 185 of the Property Law Act 2007 are not relevant to the question of who must pay the GST on mortgagee sales. The Privy Council's judgment in *Edgewater Motel Limited v Commissioner of Inland Revenue* (2004) 21 NZTC 18,664 dealt with this issue. Paragraph [10] of the Privy Council judgment was the response to Counsel for Edgewater's submission that GST was not an expense occasioned by the sale. It reads:

    > [10]. …There is no conflict between s 17 and s 104 of the 1952 Act because s 17 does not purport to interfere with the order of priorities laid down by s 104. It does not say that the mortgagee must pay the GST out of the proceeds of sale or of any particular fund. It simply says that he must pay the GST. As s 17(2) says, it creates a debt. The Crown has no concern with how the payment of this debt affects the distribution of the proceeds of sale. In claiming payment of the GST, the Crown is not seeking to assert a priority in the distribution of the assets of the mortgagor, any more than an estate agent instructed by the mortgagee and claiming commission on the sale. The claim lies directly against the mortgagee.

11. Paragraph [12] of the Privy Council judgment then goes on to say:

    > [12] Once the mortgagee has paid the GST, the question of the priority of his claim for reimbursement will arise. Their lordships consider that it is "plainly an expense occasioned by the sale" within the meaning of para (a). It is an obligation imposed upon the mortgagee by virtue of his having sold the property. He is therefore entitled to deduct it from the proceeds before payment of his own debt and is accountable to subsequent encumbrancers only for the balance.

12. The Privy Council is saying that the GST liability lies with the mortgagee, and is not dependent on any priority to the sale proceeds. Section 185 of the Property Law Act 2007 simply provides that the mortgagee is entitled to reimbursement of their costs from the proceeds of sale ahead of other claims on the proceeds including that of the mortgage itself.
13. There is no ability for the costs of sale related to a mortgagee sale to be deducted prior to the calculation of GST output tax due under section 17.

Whether a mortgagee can claim input tax in a mortgagee sale for the costs associated with the mortgagee sale

14. A mortgagee is not able to claim input tax incurred on costs associated with the mortgagee sale.
15. *Case Y2* 23 NZTC (2007) 13,017 is directly on point and confirms the Commissioner's view. Judge Barber of the Taxation Review Authority found at paragraph [72]:

    > The disputant is not entitled to input tax deductions with respect to its sale of the property as mortgagee. The express language of s 17 of the GST Act provides that, in a s 17 Special Return, the disputant must pay the full amount of output tax, without any deduction for input tax. There is nothing in the scheme and purpose of the Act which supports input tax deductions being available for the deemed supply.

16. This confirms the Commissioner's position. One argument to the contrary is that the mortgagee acts as the mortgagor's agent in a mortgagee sale and therefore the mortgagee is entitled to claim input tax on the sold property. However, it is Inland Revenue's view that the relationship between a mortgagee and a mortgagor is one of creditor and debtor. The mortgagee acts on their own behalf when exercising a power of sale.
17. Usually, the mortgagee sale occurs through a power exercised by the mortgagee as agreed in the mortgage agreement because of the mortgagor's default in the mortgage payments. Consequently, the mortgagee cannot purport to claim input tax on the costs of sale as agent for the mortgagor.
18. For the mortgagee to be permitted to claim input tax for costs associated with the mortgagee sale, the costs would have to be incurred in the course or furtherance of a taxable activity undertaken by the mortgagee. The mortgaged property would have to have been supplied in the course or furtherance of a taxable activity undertaken by the mortgagee. Putting aside the fact that section 5(2) deems the mortgaged property to be supplied in the course or furtherance of the mortgagor's taxable activity, in some cases the mortgagee may argue an indirect connection with some other activity that the mortgagee is GST registered for. This matter was also considered in *Case Y2*. It was felt that this indirect connection is incidental to a mortgagee's activity of providing financial services. And in that case, the provision of financial services was an exempt supply (section 14) and not part of a taxable activity (section 6).
19. "Financial services" is defined in section 3(1)(ka) for the relevant purpose of this statement to mean "the payment or collection of any amount of interest, principal, dividend, or other amount whatever in respect of any debt security, equity security, participatory security, credit contract, contract of life insurance superannuation scheme, or futures contract."
20. "Debt security", defined in section 3(2) means any interest in or right to be paid money that is, or is to be, owing by any person; but does not include a cheque. Therefore, the collection of any amount of interest, principal, dividend, or other amount whatever in respect of any debt security is the provision of a financial service which is an exempt supply.
21. A mortgage is simply security for the repayment of a debt. It satisfies the definition of "debt security" as the mortgagee has the right to be paid money owed by the mortgagor under the mortgage.
22. Therefore, a mortgagee whose activity is as a lender would be considered to be carrying on an exempt activity. As such, the mortgagee would be unable to claim input tax from the mortgagee sale. This is subject to section 11A(1)(q) of the GST Act, which is discussed next.

Whether a mortgagee making a mortgagee sale that is subject to the business-to-business financial services rules can claim input tax for the costs associated with that mortgagee sale

23. Sections 11A(1)(q) and 11A(1)(r) allow financial service providers that are registered for GST to zero-rate supplies of financial services to their customers (or in the case of a group of companies, the group's customers) that are registered for GST if the level of taxable supplies made by the customers, in a given 12-month period, is equal to or exceeds 75% of their total taxable supplies for the period. Section 20C and sections 20D to 20F support the financial services rules.
24. Input tax deductions may be made to the extent goods and services are used for making those supplies under the business to business financial services rules. However, the effect of section 5(2) is that the goods sold are deemed to be supplied in the course or furtherance of a taxable activity carried on by the mortgagor.
25. There is an argument that the expenses are not directly or indirectly related to a mortgagee's money lending activity. The Commissioner believes that even though the sale of the property is deemed to be supplied by the mortgagor, the steps undertaken to protect the securities and sell the properties is part of the mortgagees money lending taxable activity.
26. As such, an input tax deduction is available to a mortgagee for costs associated with a mortgagee sale made under the business to business financial services rules. The costs are directly related to the money lending taxable by the mortgagee.

Whether the mortgagor can claim the input tax credits on the sale costs directly incurred by the mortgagee

27. As the mortgagee is the recipient of the supply in these circumstances, the mortgagor cannot claim the input tax. Section 3A(1)(a) defines input tax as tax charged under section 8(1) on a supply of goods or services acquired by the registered person. The recipient of the supply of these services is the mortgagee and the purpose of the sale is for the mortgagee to receive the amount or part of the amount owing on the mortgage. The mortgagor may ultimately receive the net proceeds of the sale, if there are any, but it cannot be said that the mortgagor is the recipient of the costs.

Conclusions

28. A mortgagee in a mortgagee sale cannot deduct the costs of sale before calculating the GST due under section 17 of the Goods and Services Tax Act 1985.
29. A mortgagee cannot claim input tax for the costs associated with a mortgagee sale.
30. A mortgagee who is a registered person and makes a mortgagee sale that is subject to the business-to-business supply of financial services rules is able to claim input tax for the costs associated with that mortgagee sale.
31. A mortgagor cannot claim input tax for the costs, incurred by the mortgagee, associated with a mortgagee sale.

This Operational Statement is signed on 6 September 2017.

Rob Wells
LTS Manager – Technical Standards

LEGISLATION AND DETERMINATIONS

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

Special Determination S54: Application of financial arrangements rules to Investors in the Lifetime Income Fund

This Determination may be cited as Special Determination S54: Application of financial arrangements rules to Investors in the Lifetime Income Fund.

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

1.1 This determination relates to the Lifetime Income Fund (the Fund), which is a managed investment scheme in which investors (Investors) can invest their retirement savings in return for a stream of regular payments (the Lifetime Withdrawal Benefit) for the rest of their life.

1.2 Investors can elect to commence receiving their Lifetime Withdrawal Benefit at any time from age 60 until age 90. The Lifetime Withdrawal Benefit is calculated as a percentage of the Investor's Protected Income Base. An Investor's Protected Income Base is the Investor's original capital sum invested in the Fund net of any applicable fees and Unplanned Withdrawals, and includes any increase in value during the Deferral Period (the period up to the time the Investor begins receiving payments of the Lifetime Withdrawal Benefit). Each Investor's Lifetime Withdrawal Benefit is paid in two phases:

(a) Protected Income Phase: This period commences on the date the Investor elects for the commencement of Lifetime Withdrawal Benefits (the Initial Regular Payment Date), and ends when all Units held by the Investor in the Fund have been redeemed. During this period the Lifetime Withdrawal Benefit is paid out of the capital invested by an Investor in the Fund and the Investor's proportion of the Fund's post-tax earnings accumulated as a result of investing the Investor's original capital sum.

(b) Insured Income Phase: This period commences from the end of the Protected Income Phase and ends on the date of death of the Investor. During this period the Lifetime Withdrawal Benefit is funded from the proceeds of a group life insurance policy (the Policy) that the Manager of the Fund is required to take out in the name of the Supervisor of the Fund for the benefit of Investors. During this phase the life insurer pays the Lifetime Withdrawal Benefit in the form of an annuity to Investors under the Policy. However, under the Fund's trust deed, payments from the life insurer are made directly to the manager of the Fund. Those payments are then treated as a subscription on behalf of that Investor in the Fund's Cash Portfolio. Provided payments are received under the Policy in respect of an Investor, all payments of Lifetime Withdrawal Benefits to the Investor during their Insured Income Phase are then funded by redeeming the relevant Units in the Cash Portfolio until the date of death of the Investor.

1.3 The arrangement referred to above (the Arrangement) is the subject of product ruling BR Prd 17/04 issued on 18 August 2017 and private ruling BR Prv 17/35 issued on 18 August 2017, and is fully described in those rulings.

1.4 This determination prescribes:

(a) the amount of consideration that is solely attributable to an Investor's Units in the Fund; and

(b) the amount of consideration that is solely attributable to the annuity that an Investor receives from the life insurer under the Policy.

2. Reference

This determination is made under s 90AC(1)(h) of the Tax Administration Act 1994.

3. Scope of determination

3.1 This determination relates to the Arrangement under which Investors can invest their retirement savings in the Fund in return for regular fortnightly or monthly payments of a Lifetime Withdrawal Benefit for the rest of their life. The Fund is a managed investment scheme as defined in the Financial Markets Conduct Act 2013. The terms and conditions applicable to the Fund are set out in a trust deed dated 17 July 2017 (the Trust Deed).

3.2 Under the Trust Deed, the Manager of the Fund is required to effect with Lifetime Income Limited, in the name of the Supervisor and for the benefit of Investors, the Policy to provide regular payment benefits in respect of Investors during their Insured Income Phase.

3.3 Investors can elect to commence receiving their Lifetime Withdrawal Benefit at any time from age 60 until age 90. The Lifetime Withdrawal Benefit is calculated as a percentage of the Investor's Protected Income Base. An Investor's Protected Income Base is the Investor's original capital sum invested in the Fund net of any applicable fees and Unplanned Withdrawals, and includes any increase in value up to the time the Investor begins receiving payments of the Lifetime Withdrawal Benefit.

3.4 Each Investor's Lifetime Withdrawal Benefit is paid in two phases:

(a) Protected Income Phase: This period commences on the date the Investor elects for the commencement of Lifetime Withdrawal Benefits (the Initial Regular Payment Date) and ends when all Units held by the Investor in the Fund have been redeemed. During this period, the Lifetime Withdrawal Benefit is paid out of the capital invested by an Investor in the Fund and the Investor's proportion of the Fund's post-tax earnings accumulated as a result of investing the Investor's original capital sum.

(b) Insured Income Phase: This period commences from the end of the Protected Income Phase and ends on the date of death of the Investor. During this period, the Lifetime Withdrawal Benefit is funded from the proceeds of the Policy. During this phase, the life insurer pays the Lifetime Withdrawal Benefit in the form of an annuity to Investors under the Policy. However, under the Fund's trust deed, payments from the life insurer are made directly to the Manager of the Fund, and it is then treated as a subscription on behalf of that Investor in the Fund's Cash Portfolio. Provided that payments are received under the Policy in respect of an Investor, all payments of Lifetime Withdrawal Benefits to the Investor during their Insured Income Phase are then funded by redeeming the relevant Units in the Cash Portfolio until the date of death of the Investor.

3.5 This determination applies to Investors in the Fund in relation to all of the following aspects of the Arrangement:

(a) redemption of Investors' Units in the Fund to fund the payment of Lifetime Withdrawal Benefits during the Investors' Protected Income Phase;

(b) redemption of Investors' Units in the Fund if they make Unplanned Withdrawals from the Fund;

(c) annuities paid by the life insurer to Investors under the Policy during the Investors' Insured Income Phase; and

(d) redemption of Investors' Units in the Fund to fund the payment of Lifetime Withdrawal Benefits during the Investors' Insured Income Phase.

3.6 This determination is made subject to the following condition:

(a) The continued application of private ruling BR Prv 17/35 (the Ruling) issued on 18 August 2017 (including any ruling issued to replace the Ruling, provided that the change to the Ruling does not affect the application of this determination).

4. Principle

4.1 The following components of the Arrangement are excepted financial arrangements:

(a) Investors' Units in the Fund (the Units); and

(b) annuities paid by Lifetime Income Limited to Investors during their Insured Income Phase (the Annuities).

4.2 Any amount that is solely attributable to an excepted financial arrangement described in s EW 5(2) to (16) is not an amount that is taken into account under the financial arrangements rules (s EW 6(2)). This determination specifies the amounts that are solely attributable to the Units and the Annuities, and are therefore not taken into account under the financial arrangements rules.

5. Interpretation

5.1 All legislative references in this determination are to the Income Tax Act 2007, unless otherwise stated.

5.2 Capitalised terms and phrases in this determination should be taken to have the meaning attributed to that term or phrase in clause 1 of the Trust Deed or in the description of the Arrangement in product ruling BR Prd 17/04 issued on 18 August 2017. This determination has no specialised terms that need to be defined further.

6. Method

6.1 The amounts that are solely attributable to the Units are the:

(a) Lifetime Withdrawal Benefits received by Investors from the Fund during the Investors' Protected Income Phase;

(b) proceeds received by an Investor on redemption of their Units in the Fund when the Investor makes an Unplanned Withdrawal; and

(c) Lifetime Withdrawal Benefits received by Investors from the Fund during the Investors' Insured Income Phase.

6.2 The amounts that are solely attributable to the Annuities are the payments made by Lifetime Income Limited to Investors under the Policy during their Insured Income Phase. (These amounts are then treated as a subscription on behalf of that Investor in the Fund's Cash Portfolio to fund the ongoing payment of Lifetime Withdrawal Benefits during this phase.)

7. Examples

7.1 The following examples illustrate the application of the method set out in this determination.

Example A

7.2 An Investor invests $100,000 in the Fund at age 65 and in return acquires Units in the Fund. The investment grows in value after five years to $112,900 net of fees and taxes. During that period, the Fund pays premiums on behalf of the Investor to LIL under the Policy.

7.3 The Investor opts to receive their Lifetime Withdrawal Benefit from the Fund from age 70, which means the Lifetime Withdrawal Benefit is set at 5.5% per annum of their Protected Income Base of $112,900. This means the Investor receives $6,209.50 per annum in fortnightly instalments from the Fund.

7.4 At age 97, the Investor's capital in the Fund is exhausted, and the Investor continues to receive a minimum income of $6,209.50 per annum in fortnightly instalments under the annuity.

7.5 The payments of $6,209.50 per annum paid by the Fund are solely attributable to the Units in the Fund. The payments of $6,209.50 per annum made by LIL to an Investor under the Policy are solely attributable to the Annuity.

Example B

7.6 An Investor invests $150,000 in the Fund at age 67 and elects to start receiving a Lifetime Withdrawal Benefit immediately. The Lifetime Withdrawal Benefit is set at 5% per annum of the Investor's Protected Income Base. This means the Investor receives $7,500 per annum in fortnightly instalments from the Fund. At age 72 the Investor withdraws $20,000 as an Unplanned Withdrawal. This reduces the Lifetime Withdrawal Benefit payments to $6,500 per annum in fortnightly payments.

7.7 The payments of the Lifetime Withdrawal Benefit by the Fund to the Investor during their Protected Income Phase are solely attributable to the Units in the Fund.

This Determination is signed by me on the 18th day of August 2017.

Howard Davis
Director (Taxpayer Rulings)

General Determination DEP101: Tax Depreciation Rate for abrasive blasting booths (including media recovery/recycling, dust extraction and ventilation systems)

Note to Determination DEP101

The Commissioner has recently been asked to consider what depreciation rate should apply for abrasive blasting booths.

The asset consists of the abrasive blasting chamber, including the in-floor media recovery system and the media reclaimer/recycler. It does not include the blast pot, the air compressor systems and any separate dust extraction system. This is because these are considered stand-alone assets for which depreciation rates already exist.

Determination DEP101: Tax Depreciation Rates General Determination Number DEP101

This determination may be cited as "Determination DEP 101 Tax Depreciation Rates General Determination Number 101: Blasting booths (including media recovery/recycling, dust extraction and ventilation systems).

1. Application

This determination applies to taxpayers who own items of depreciable property of the kind listed in the tables below:

This determination applies for the 2016/17 and subsequent income years.

2. Determination

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

- Adding into the "Cleaning, Refuse and Recycling" and "Engineering (including Automotive) " industry categories, the new asset class, estimated useful life, and general diminishing value and straight-line depreciation rates listed below:

Asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Abrasive blasting booths (including media recovery/recycling, dust extraction and ventilation systems).	12.5	16	10.5

3. Interpretation

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

This determination is signed by me on the 6th day of September 2017.

Rob Wells
LTS Manager, Technical Standards

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.

Taxation Review Authority determines allowable expenditure on rental properties and treatment of trust income and expenses

Case	TRA Case 09/16, [2017] NZTRA 04
Decision date	26 July 2017
Act(s)	Tax Administration Act 1994 and Income Tax Act 2007
Keywords	Deductions; shortfall penalties

Summary

This case concerned the disputant's ability to claim interest expenditure on funds borrowed to purchase properties for commercial rental in the 2013 and 2014 income years ("years in dispute"). The disputant is a chartered accountant and operates a consultancy business from his residential address. The disputant's rental and consultancy income went into his various revolving credit accounts. Business and personal expenditure were paid by the disputant from personal credits cards and from funds in the revolving credit accounts.

The Commissioner of Inland Revenue ("the Commissioner") raised default assessments for the years in dispute, which were challenged by the disputant in the Taxation Review Authority ("the Authority"). As the disputant was unable to discharge his onus in showing how the Commissioner's assessments were wrong, the Authority, in finding for the Commissioner, made revised assessments disallowing certain losses.

Impact

This decision confirms, as per *Buckley v Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA) at 498, that the onus of proof rests on the taxpayer to show that the Commissioner's assessments are wrong and by how much they are wrong. The ability to accrue, carry forward and apply tax losses falls within the broad definition of a "tax shortfall" pursuant to s 3 of the Tax Administration Act 1994 ("TAA"), being a tax benefit, credit or advantage of any type or description whatever benefiting the taxpayer or another person. There is no provision enabling a trust to either pass on losses or for a beneficiary to claim any kind of deduction for expenses incurred by that trust.

Facts

Three rental properties purchased by the disputant were identified by the Commissioner and were the subject of her investigation. The first property was purchased by the disputant in 2002 ("the White Road property") in the name of the MF Trust of which the disputant and his brother are trustees and the disputant and his daughter are beneficiaries. In September 2003 the disputant and his then partner purchased a rental property ("the Green Road property"). In August 2004, the disputant and his partner purchased another rental property ("the Brown Avenue property"). The total cost of the properties was $2,082,000. Funding for the properties was largely obtained by loan and credit facilities from XY Bank.

The disputant claimed the interest on the borrowings for the Green Road property for only a small part of the 2013 income year. The disputant claimed interest in respect of the Brown Avenue and White Road property for both tax years in dispute.

Decision

The Authority found for the Commissioner on all points. Pursuant to s 138P of the TAA, the Authority made revised income tax assessments for the years in dispute (including shortfall penalties for gross carelessness). The Authority's findings on each of the listed issues above are addressed in summary below.

Issue 1: Interest deductions

The Authority found that based on the disputant's 2007 to 2011 tax returns he had an annual cash deficit of over $50,000 and was satisfied that some of the bank borrowings were used to fund personal living expenses. In the absence of sufficient evidence, the Authority found that the disputant had not discharged his onus of showing that the bank interest claimed as a deduction in each year was paid on capital utilised in earning assessable income in those periods.

Issue 2: White Road Property

The disputant contended that as he returned the rental income from this property as his own income, deductions in relation to the property should be allowed. In support of this proposition, the disputant gave evidence that the insurance invoices and rates assessments were in his and his brother's names, as trustees of the MF Trust, and paid by the disputant using his credit cards. However, the Authority noted that the balances on the credit cards were then paid from the MF Trust's bank account. The Authority was not satisfied that these accounts were paid by the disputant.

The Authority was also not satisfied for the purposes of s DA 1 of the Income Tax Act 2007 ("ITA") that the disputant derived the rental income other than as a beneficiary of the MF Trust (ss HC 5, HC 6 and HC 7of the ITA). Accordingly, the Authority found it appropriate to amend the default assessments removing the deductions allowed in the default assessments for bank interest, insurance and rates relating to this property.

Issue 3: Depreciation

The disputant claimed depreciation for furniture and fittings, motor vehicles, carpet, stove, waste master and computers for the years in dispute. The Authority noted that there was no separate schedule detailing the individual items and/or other documents evidencing that these items were purchased for the rental properties and not for the disputant's own residence. The Authority accepted the Commissioner's reduced allowances for depreciation for each of the years in dispute.

Issue 4: Shortfall Penalties

The disputant contended that no tax shortfall arose because once his accumulated losses were taken into account, he had no taxable income in either of the years in dispute. The question before the Authority was whether the tax position taken by the disputant, in not filing tax returns by the due date, "overstate[d] a *tax benefit, credit or advantage of any type or description whatever* by or benefitting…the disputant or another person. (Italics added)." (TRA Case 09/16 at [66])

On this point, the Authority concluded that the ability to accrue and carry forward tax losses thereby reducing the amount of tax payable on income earned in subsequent years is plainly a tax advantage to any taxpayer. The Authority was therefore satisfied that the disputant had taken a tax position that resulted in a tax shortfall in each of the years in dispute.

Taking into account the disputant's accountancy background, experience as a consultant advising business clients and his failure to file returns by the due date after repeated requests to do so, the Authority found that his conduct was a deliberate breach of his tax obligations. The Authority found that the Commissioner had properly imposed shortfall penalties for gross carelessness for the tax years in dispute reduced by 50% for previous behaviour.

Issue 5: Amended Assessments

The Authority concluded that the Commissioner did the best she could in assessing the disputant's taxable income when she prepared the default assessments based on the limited information she had at the time. However, the Authority held that as a consequence of the further information ascertained during the course of the proceeding as to the ownership of the White Road property, it was appropriate to adjust the assessments to remove deductions previously allowed in relation to that property. The Authority subsequently made revised assessments for the years in dispute pursuant to s 138P of the TAA.

This decision is subject to an appeal filed in the High Court.

Court of Appeal confirms that the *Edwards* decision applies to time bar and that once a company is restored to the register, actions taken during the period of its removal are retrospectively validated

Case	Great North Motor Company Limited (In Receivership) v Commissioner of Inland Revenue [2017] NZCA 328
Decision date	31 July 2017
Act(s)	Tax Administration Act 1994 s 108 (1) Companies Act 1993 s 330
Keywords	Time bar, fraudulent and wilfully misleading, removal from the register,

Summary

This case was an appeal from the High Court decision of *Great North Motor Company Ltd (in rec) v Commissioner of Inland Revenue* [2016] NZHC 2708. In that case, Downs J found that the transaction underlying tax losses accumulated by Great North Motor Company Limited (in rec) ("Great North") was a tax avoidance scheme.

Great North did not appeal the finding of tax avoidance, rather it focussed on its position that six of the 12 assessments amended were time barred by s108(1) of the Tax Administration Act 1994 ("TAA"). Downs J had found that even if the time bar had expired, the tax returns filed were fraudulent or wilfully misleading, and thus it did not apply. Alternatively, he found that the time bar did not apply because time did not accrue during the period Great North was struck off the register.

Impact

This decision confirms the time bar approach taken in *Legarth v Commissioner of Inland Revenue* [1967] NZLR 312 ("*Legarth*") and *Edwards v Commissioner of Inland Revenue* [2016] NZHC 1795, (2016) ("*Edwards*"). The Commissioner of Inland Revenue ("the Commissioner") is obliged to form an opinion on the face of a tax return that it is fraudulent or wilfully misleading. In a challenge proceeding, the hearing authority stands in the Commissioner's shoes in all respects when considering a challenge in relation to the opinion formed under s 108(2) of the TAA and forms its own opinion on whether the returns filed were fraudulent or wilfully misleading as if it is the Commissioner. However, the taxpayer bears the burden of proving that the returns were not fraudulent or wilfully misleading.

This decision also confirms the test for determining whether a return was 'wilfully misleading' as settled by Turner J in *Babington v Commissioner of Inland Revenue (no 2)* [1958] NZLR 152 at [156]-[157].

Finally, the Court found that once a company is restored to the register, s 330(2) of the Companies Act 1993 applies and neither the restored company nor third parties can challenge the validity of actions taken during the period of its removal. Accordingly, the Commissioner needs to monitor the register (or gazette) and notices of pending restoration of companies with a view to objecting to restorations where appropriate.

Facts

Great North filed income tax returns claiming deductions for losses of about $21.7 million suffered from business activities between 1996-2001 (inclusive). The Commissioner originally allowed the claim but later disallowed it and assessed Great North on the basis that the arrangement was a tax avoidance arrangement. The Commissioner also imposed shortfall penalties for taking an abusive tax position. Great North challenged the Commissioner's assessments.

The High Court found that the Commissioner was correct to conclude the arrangement was a tax avoidance arrangement and to impose an abusive tax position shortfall penalty. The High Court also held that the returns filed were misleading for the purposes of s 108(2) of the TAA on the basis that Mr Russell had actual knowledge that the arrangement constituted tax avoidance (or that it was highly likely tax avoidance (subjectively reckless)). Lastly, the High Court concluded that the s 108 time bar commenced only when Great North was restored to the register on 8 October 2010. Only then did the Commissioner have a "taxpayer" with whom to deal.

Great North sought to appeal certain aspects of the High Court decision but did not appeal the tax avoidance finding.

Decision

Standard of appellate review

In determining Great North's appeal, the Court of Appeal considered that it must resolve a threshold question about the appropriate standard of appellate review of the Commissioner's opinion.

Counsel for Great North submitted that the correct approach for the hearing authority, in this case the High Court, when determining a challenge to the Commissioner's assessments under s 138P of the TAA is to stand in the Commissioner's shoes and consider afresh whether the return in question is fraudulent or wilfully misleading. Accordingly, the hearing authority must substitute its own view for the Commissioner's view if she has erred. Counsel for Great North accepted that Great North carries the burden of proving it did not submit a wilfully misleading return. The Court of Appeal considered that this correctly stated the ratio of the Court of Appeal's decision in *Legarth*.

However, the Court's attention was drawn to a later decision of the Court of Appeal, namely *Wire Supplies Ltd v Commissioner of Inland Revenue* [2007] NZCA 244, [2007] 3 NZLR 458 ("*Wire Supplies*") which might stand as authority for a lower threshold of appellate scrutiny, limited to simply one of review of the evidential foundation or reasonableness of the Commissioner's opinion.

The Court noted that at first blush, *Wire Supplies* might seem contrary to *Legarth*, which was not apparently cited in argument. However, the Court of Appeal was satisfied that in *Wire Supplies* the Court of Appeal was answering a limited submission for the taxpayer, addressed solely to the evidential adequacy of the Commissioner's opinion. The Court of Appeal considered the apparent differences in the approaches adopted by the Court in those two cases are reconcilable when the circumstances of *Legarth* were examined more closely.

The Court of Appeal referred to the decision of *Edwards*, in which Williams J reviewed a number of High Court decisions addressing a same or similar issue. The Court of Appeal agreed with Williams J's conclusion following *Legarth*, that the hearing authority's reconsideration of the Commissioner's time-bar ruling is not restricted to whether her opinion under s 108(2) of the TAA was honestly held and reasonably available on the evidence. The hearing authority is obliged to review de novo.

The Court considered the approach adopted in *Legarth* to be consistent with the purpose of s 108(2) of the TAA. The Court considered that approach reflects the Commissioner's obligation to form an opinion on the face of a tax return that is fraudulent or wilfully misleading. She has neither the time nor the resources to conduct a full evidential enquiry. In the event that the taxpayer challenges an amendment made more than four years after the Commissioner's assessment, the hearing authority must be able to substitute its own view for the Commissioner's opinion of the correct liability to tax having considered the application of the relevant legislation and relevant evidence. The Court of Appeal confirmed that the taxpayer bears the burden of proving to the civil standard that its returns were not fraudulent or misleading which the Court considered is an exacting requirement where the Commissioner has made compelling findings that the underlying affairs were designed to avoid tax.

Test for "fraudulent or wilfully misleading"

The Court of Appeal confirmed that the correct test to be applied in determining whether a return was "wilfully misleading" is found in *Babington v Commissioner of Inland Revenue (No 2)*. Proof of mere negligence or breach of duty is not enough. There has to be knowledge that the return is materially inaccurate coupled with an intention to mislead. Subjective recklessness is sufficient where it is demonstrated that the person submitting the returns had no reasonable ground for believing that the returns were correct, where the only inference reasonably available is that he or she must have adverted to the probability or possibility that the returns were false, and was reckless in the sense of not caring whether they were correct or not.

The Court of Appeal considered that the Commissioner's claim that Great North's tax returns were fraudulent or wilfully misleading required proof of two sequential elements. Firstly, whether a particular return is misleading; would the returns on their face mislead the Commissioner?

Having approached the matter afresh, the Court was independently satisfied that all returns filed by Mr Russell for the relevant years were wilfully misleading within the meaning of s 108(2) of the TAA. The Court also came to the conclusion that Great North had fallen well short of discharging its onus that the returns were not wilfully misleading and to the contrary were satisfied that Mr Russell at the very least acted recklessly and with wilful disregard that the Commissioner would disallow the company's losses as being claimed under a tax avoidance scheme.

Accordingly, the Court concluded that the Commissioner's amendments were not time barred under s 108(1) of the TAA.

Section 330 of the Companies Act 1993

The Court of Appeal disagreed with the High Court's decision that retrospective validation of Great North's existence, deemed (under s 330(2) of the Companies Act 1993) by its 2010 restoration to the register, did not have the effect of validating the company's returns to the time of filing in 2005, 2006 and 2007.

The Court of Appeal stated s 330(2) is straightforward and fair: neither the restored company nor third parties can challenge the validity of actions taken during the period of its removal. The Court considered that ss 328(6) and 329(4) exist to protect creditors who understood they were dealing with a registered company during the period of removal and who would otherwise have no right to pursue the restored company on those transactions by enabling them to apply to the Court to wind back the clock.

The Court agreed with Counsel for Great North that the purpose of s 330 is strictly restorative and unequivocally deems that the company has "continued in existence as if it had not been removed from the register". Therefore, the legal effect is that the returns were filed on the day they were filed as if the company was then in existence.

The Court considered that the Commissioner would have arguably been entitled to apply for judicial review of the Registrar's decision to reinstate Great North from 10 October 2010 on the ground that Mr Russell's purported appointment as receiver on 26 May 2005 was invalid.

In response to the Commissioner's submission that she has neither the time nor the resource to restore companies to the register in order to comply with her statutory responsibilities, the Court stated that they would have assumed the Commissioner was monitoring closely the corporate machinations of Great North and its associates. In any event, the Court found that s 108(2) of the TAA is an effective safeguard for the Commissioner and the maintenance of the tax base. A company which was not carrying on business – neither when it was removed nor throughout the period it was struck off – had no lawful reason for filing tax returns other than to obtain a benefit to which it was not entitled.

The Court stated that had they not found that Great North's returns were fraudulent or knowingly misleading, the four-year time bar provided by s 108(1)(a) of the TAA would apply to six of the Commissioner's assessments.

Result

The appeal was dismissed and costs awarded to the Commissioner.

Taxation Review Authority declines company's application to hear late claim

Case	TRA 001/17 [2017] NZTRA 06
Decision date	16 August 2017
Act(s)	Section 138D Tax Administration Act 1994
Keywords	Exceptional circumstances, late filing of claim, late challenge

Summary

A taxpayer's application to make a late claim in the Taxation Review Authority ("the Authority") was dismissed as no exceptional circumstances applied to its situation.

Impact

This case follows the stages of identification, evaluation and discretion as set out by the Court of Appeal in *Commissioner of Inland Revenue v Fuji Xerox NZ Limited* (2002) 20 NZTC 17,470 ("*Fuji-Xerox*") when considering s 138D of the Tax Administration Act 1994 ("TAA"). The case is a reminder of the procedural steps required to file a challenge and the limited ability to extend the time for filing a challenge.

Facts

The disputant filed a notice of claim with the Authority, 10 working days after the last day of the two month response period. The Commissioner of Inland Revenue ("the Commissioner") did not file an opposition and agreed to abide the decision of the Authority.

The Authority issued a minute setting out s 138D of the TAA and directed the director of the disputant to file an affidavit addressing the event or circumstance beyond its control which provided a reasonable justification for not commencing its challenge within the requisite period.

The director filed an affidavit, however this dealt with events after the response period had ended.

The Authority was not satisfied and directed a further affidavit be filed and for the disputant to file any submissions if it wished. The Authority also extended an opportunity to the disputant for a hearing before her. Finally, the Authority recommended the disputant obtain legal advice (and noted that the case manager had done so twice previously).

The disputant filed a further affidavit but did not wish to file submissions or have a hearing. The application was therefore considered on the papers.

Decision

The Authority set out the three stages a hearing authority should consider as described by the Court of Appeal in *Fuji-Xerox*. The stages identified by the Court were identification, evaluation and discretion.

First, the hearing authority must identify the events or circumstances relied on by the disputant. Only circumstances beyond the control of the disputant can be relied on. Acts or omissions of agents are not exceptional circumstances unless it was caused by an event or circumstance beyond the control of the agent which could not have been anticipated and the effect of which could not have been avoided by compliance with accepted standards of business organisation and professional conduct.

Having identified the circumstances outside s 138D of the TAA, the hearing authority needs to evaluate whether they have provided reasonable justification for the disputant not having commenced the challenge within the response period.

The final step is the hearing authority deciding whether to exercise its residual discretion to grant leave to bring a late challenge.

The Authority then examined the circumstances relied upon by the taxpayer. In the first affidavit, the director alleged the disputant's notice of claim was unique in the sense that it involved a large number of documents which needed to be attached to the claim as "evidential data".

The second affidavit stated the disputant had received its invoices back from the Commissioner around the first week of April 2017. The returned documents were photocopies which were said to be illegible. He then embarked on the "insurmountable task of making extra copies of the tax invoices when the Commissioner already had most copies which were bar coded and encrypted." The disputant provided boxes containing copies of the invoices along with its claim.

The Authority noted that in the notice of claim, the disputant challenged the decision of the Commissioner not to allow input deductions across a number of GST periods. One of the issues arising from the adjudication report and mentioned in the notice of claim was the alleged failure of the disputant to provide valid tax invoices to the Commissioner.

The Authority commented that this is an unfortunate situation but it was unclear why the director felt it necessary to file copies of the invoices along with the notice of claim as this is not a requirement under the Regulations (Regulation 8, Taxation Review Authorities Regulations 1998).

The Authority observed that the Commissioner had provided written advice to the disputant as to the steps required to file a challenge and the disputant was clearly on notice as to the time period and filing requirements and this was admitted in the director's first affidavit.

The Authority, having found the events were clearly not beyond the disputant's control and did not amount to exceptional circumstances under s 138D of the TAA, declined the application. The taxpayer will therefore be unable to challenge the Commissioner's assessments before a hearing authority.

High Court confirms a lease surrender payment is a revenue receipt in the hands of the landlord

Case	Easy Park Limited v Commissioner of Inland Revenue [2017] NZHC 1893
Decision date	10 August 2017
Act(s)	Section CB(1) Income Tax Act 2007 Section 141B Tax Administration Act 1994
Keywords	Capital, revenue, lease surrender payment, unacceptable tax position

Summary

The taxpayer is a commercial landlord and received a lump sum payment from one of its tenants for early termination of a lease. The Court held that where the taxpayer is in the business of leasing property the lease surrender payment was received by the taxpayer in the ordinary course of the taxpayer's business and was therefore a revenue receipt subject to tax. However, as the case was not clear cut, a shortfall penalty was not appropriate.

Impact

The judgment provides assistance in distinguishing between capital and revenue receipts. However, in the case of lease surrender payments, the impact is limited as the Income Tax Act 2007 ("ITA") has been amended to make it clear that lease surrender payments are income in the hands of the recipient (see s CC 1C of the ITA effective from 1 April 2013).

Facts

Easy Park Limited ("the taxpayer") purchased the four storey Whitcoulls building at 312 Lambton Quay on 28 June 2003. At the time of purchase the building was subject to a 12 year lease by the anchor tenant Whitcoulls Group Limited of levels 1, 1A and 2 of the building. Levels 3 and 4 of the building were later leased to Lifestyle Gym.

When the building was purchased there were no identified earthquake concerns. However, a new earthquake building code was introduced in 2004. In 2007 the Wellington City Council advised the taxpayer that its initial evaluation had placed the building at 11% of the new building standards. The taxpayer commissioned a report which provided that the Whitcoulls building met 16% of the new building standard. Consequently, in 2010 the Wellington City Council issued a notice requiring the taxpayer to strengthen or demolish the Whitcoulls building by 2025.

Whitcoulls Group Limited went into voluntary administration in February 2011. The business was sold to Whitcoulls 2011 Limited ("W2011 Ltd") in May 2011 and the lease was assigned to the new owners. W2011 Ltd announced publicly that it intended to move to the nearby premises at 226 Lambton Quay.

In June 2011, W2011 Ltd and the taxpayer agreed to surrender the lease and a deed of surrender of lease was signed in February 2012. W2011 Ltd agreed to pay the taxpayer $1.1 million for the early termination of the lease (about a third of the rent remaining).

Bayleys' commercial leasing team advised the taxpayer that it would need to undertake the required strengthening work in order to attract a quality tenant. While the extent of the remedial work was assessed, the taxpayer agreed in principle to lease levels 1, 1A and 2 to Hallenstein Glassons Limited. An agreement to lease was signed on 5 December 2012 with an annual rent of $1.1 million. As part of the agreement the taxpayer was required to undertake the strengthening work to at least 85% of the new build standard, and was to use its best endeavours to obtain at least 95%.

In February 2013, a deed of surrender of lease was signed with Lifestyle Gym in order to obtain vacant possession and complete the strengthening work. Once the strengthening work was completed Glassons opened its new flagship store on levels 1, 1A and 2 of the building in October 2013. Level 4 was eventually leased to Harrison Grierson in 2014. Level 3 remained vacant.

When the taxpayer filed its tax return for the 2012 income year, it treated the lease surrender payment as a capital receipt (and therefore not subject to income tax) and provided a covering letter drawing the Commissioner of Inland Revenue's ("the Commissioner") attention to the treatment of the payment. The Commissioner assessed the payment as income and applied a shortfall penalty for taking an unacceptable tax position.

Decision

The Court canvassed the general principles relating to the distinction between capital and revenue payments and receipts. The Court noted that there is no New Zealand decision in which it has been held that a lease surrender payment received by a landlord is a capital receipt but did look at the relevant cases touching on lease surrender payments. However, the Court noted that these were primarily from the perspective of the payer/lessee rather than the recipient/landlord. Further, the Court considered it clear from the authorities that a payment made to induce a lessee to enter into a lease of premises from which to conduct their business will, in the hands of the lessee, be capital as the payments are made with a view to bringing into existence an asset for an enduring benefit.

The Court rejected the five key points advanced by the taxpayer supporting an argument that the principles relating to the lessee should also apply to the landlord. The Court also rejected the argument that the Court of Appeal decision of *Commissioner of Inland Revenue v McKenzies (NZ) Ltd* 2 NZLR 736 (CA), supported the proposition that the "identifiable asset" approach means leases must generally be regarded as fixed capital in the hands of both the lessee and lessor.

The Court held that it was not correct to say that the "identifiable asset" test will always be regarded for income tax purposes as capital, regardless of the nature of the taxpayer's business. What is required is an examination of what the relevant transaction and the receipt was calculated to effect from a practical and business point of view in the specific case at hand. That requires examination of the nature of the asset viewed in the context of the taxpayer's particular business.

In this case the Court accepted that the asset was the lease and that in the hands of W2011 Ltd, it was a capital asset. However, the Court was unable to accept that the lease was a capital asset in the hands of the taxpayer. The lease did not form part of the taxpayer's underlying business structure and it was not only indirectly connected with producing revenue. Rather, the lease was the very mechanism which generated profit for the taxpayer and was the taxpayer's core business.

The Court did not consider that the lease was so fundamental and permanent to the taxpayer's business that its surrender affected the structure of the taxpayer's business. The revenue producing asset was the leasehold which could be, and was, made the subject of another lease. Further, the nature of the lease surrender payment in the hands of the taxpayer was not affected by the need to undertake earthquake strengthening work, or the fact that the subsequent lease was on less favourable terms.

Shortfall penalty

The test for determining whether the tax position taken by the taxpayer is an unacceptable tax position for the purposes of s 141B of the Tax Administration Act 1994 is an objective one. The Court held that there was no authority which squarely determined the position against that taken by the taxpayer. Further, public rulings are not binding on taxpayers and in any event the fact that there was a public ruling on the matter arguably suggests that its subject matter may be difficult or controversial. The Court held that the capital/revenue divide is notoriously oblique and it is conceivable that circumstances could yet arise where a lease surrender payment might properly be regarded as capital in the hands of the lessor. Accordingly, on balance no shortfall penalty should be imposed.

Court of Appeal remits Liquidation matter back to High Court

Case	Sisson v Commissioner of Inland Revenue [2017] NZCA 326
Decision date	28 July 2017
Act(s)	Insolvency Act 2006
Keywords	Liquidation, insolvency, core debt, issue estoppel, res judicata, off-set, counterclaim

Summary

Chesterfields Preschools Ltd ("CPL") was placed into liquidation by the High Court following the issuing of a statutory demand by the Commissioner of Inland Revenue ("the Commissioner"). CPL appealed that decision on the basis that it was not insolvent and the debt was disputed. Following a one-day hearing in the Court of Appeal, the Court allowed the appeal on the basis that the amount of "core debt" was not quantified by the High Court (*Sisson v Commissioner of Inland Revenue* [2017] NZCA 326). The variability in the figures relied on by the Commissioner and the unchallenged value of CPL's assets meant that it was at least open to doubt that the Court could properly make a liquidation order.

Facts

CPL was placed into liquidation by Associate Judge Osborne in the High Court on 6 October 2015, having failed to comply with a statutory demand for $1,231,940.11 served by the Commissioner (*Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2015] NZHC 2440, (2015) 27 NZTC 22-029

Ms Sisson (a director of CPL) appealed that decision on behalf of CPL, and contended that CPL was not insolvent and that the Commissioner's claim for unpaid tax, interest and penalties is disputed. The Commissioner responded that CPL is precluded by the doctrine of res judicata from asserting that the claim is in dispute in view of an earlier judgment of the Court of Appeal (*Commissioner of Inland Revenue v Chesterfields Preschools Limited* [2010] NZCA 400, (2010) 24 NZTC 24,500).

Decision

After running through the lengthy background to the litigation, the Court held that at no point had the amounts of "undisputed core debt" or "core tax" been considered or identified by the High Court (at [54]). The Court found that the core tax not in dispute was $109,675.22. This was the difference between $1,136,138.36 (the amount identified by Mr Doubleday in his 2009 affidavit as being core tax plus shortfall penalties) and $1,026,463.14 (the amount paid by CPL according to the Commissioner's letter setting out the proposed 15% reduction in penalties and interest) (at [76(f)]).

The Court went on to find that the evidence suggested that CPL had total assets of $1,017,094.60, made up of term deposits at ANZ Bank, the property at 854 Colombo Street, and an as yet unpaid insurance pay-out of $138,064.77 (at [80] – [83]). The Court noted that this was slightly shy of Mr Doubleday's calculation of the total debt at July 2008 of $1,088,461.15, and exceeded by a wide margin Mr Brightly's calculation of the total debt at December 2006 of $827,304.62 (at [83]).

The Court held that the difference between the revised debt claim and CPL's asset position appeared to be comparatively narrow. Further, the variability in the figures relied on by the Commissioner and the unchallenged value of CPL's assets meant that it was at least open to doubt that the High Court could properly have made a liquidation order (at [86]).

The proper course was to allow the appeal, set aside the liquidation order, and remit the matter back for rehearing in the High Court where greater scrutiny can be given to the figures of both sides.

However, that order was conditional on Ms Sisson, on behalf of CPL, paying into the High Court at Christchurch the amount of $109,675.22 within 15 working days of this judgment (at [88]).

Aside from the liquidation issue, the Court also held that the doctrine of res judicata applied to any challenge to CPL's liability for 85% of the penalties. As such, the so-called Taxation Review Authority and Notice of Proposed Adjustment proceedings did not live on in isolation from the conclusions reached by the Court of Appeal in the judicial review proceedings. However, the precise amount of the reduction and the consequent level of CPL's indebtedness had not been determined, and so CPL could test the accuracy and methodology of the Commissioner's calculation in the High Court (at [102] – [103]).

The Court also held that CPL could not rely on potential damages claims associated with the alleged failure of the Commissioner to disclose information as an off-set or counterclaim against amounts owed in core tax and penalties (at [107]).

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