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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** (search keywords: public consultation).

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

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

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

Ref	Draft type	Title	Comment deadline
PUB00332	Interpretation statement	Goods and services tax – unconditional gifts	10 April 2020
PUB00334	Question we've been asked	Can owners of existing residential rental properties claim deductions for costs incurred to meet Healthy Homes standards?	10 April 2020
PUB00349	Question we've been asked	Income tax - natural love and affection exception to debt remission income for look-through company	10 April 2020
PUB00308	Interpretation statement	Goods and services tax – supplies of residences and other real property	17 April 2020
PUB00338	Public ruling	Investment in US limited liability companies	17 April 2020
PUB00310	Interpretation statements and determination	Overseas rental properties	21 April 2020

IN SUMMARY

NEW LEGISLATION

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

TAXATION (USE OF MONEY INTEREST RATES SETTING PROCESS) AMENDMENT REGULATIONS 2020

Taxation (Use of Money Interest Rates Setting Process) Regulation 1997

An Order in Council has been made to ensure that the Commissioner's use of money interest paying rate cannot be set at a negative rate.

The Taxation (Use of Money Interest Rates Setting Process) Regulation 1997 outlines the methodology to be used when setting the use of money interest rates. This has been amended to specify that when setting the Commissioner's paying rate, that it must be set at the higher of:

- The 90-day bank bill rate minus 100 basis points; or
- 0%

In effect, this prevents it being set at a negative rate.

Background

The use of money interest ("UOMI") rates are a cornerstone of the tax compliance system in New Zealand. UOMI interest is paid by the taxpayer where tax has been underpaid and by the Commissioner where tax has been overpaid. The rate of UOMI payable for overpaid tax is referred to as the Commissioner's paying rate. The legislated twin objectives of the UOMI provisions are to:

- fairly compensate the party (either the Crown or the taxpayer) that does not have the use of its money; and
- encourage taxpayers to pay the right amount of tax at the right time.

The method used for setting the overpayment rate is outlined in the Taxation (Use of Money Interest Rates Setting Process) Regulation 1997. This method uses the Reserve Bank of New Zealand ("RBNZ") 90-day bank bill rate minus 100 basis points (1%).

When the UOMI rates were last set, at the start of July this year, the UOMI for the Commissioner's paying rate was reduced to 0.81%, as the 90-day bank bill rate was 1.81%. However, since then, the RBNZ has decreased the Official Cash Rate ("OCR") further to 1.00. This has caused the 90-day bank bill rate to drop to 1.27% for the month of January 2019.

Key features

The measure prevents the Commissioner's use of money interest paying rate being set at a negative rate.

Application date(s)

The Order in Council came into force on 9 April 2020.

TAX ADMINISTRATION (DIRECT CREDIT OF REFUNDS OF EXCESS FINANCIAL SUPPORT AND STUDENT LOAN PAYMENTS) ORDER 2020

Sections 184A and 184B of the Tax Administration Act 1994

An Order in Council has been made to include refunds for excess payments of financial support and student loan deductions as tax types refundable by direct credit under section 184A of the Tax Administration Act 1994.

The provisions in sections 184A and 184B require tax refunds to be paid via direct credit to a bank account nominated by the taxpayer and were introduced to benefit taxpayers by eliminating time delays associated with the postal system and costs related to cheques.

Tax Administration (Direct Credit of Refunds of Excess Financial Support and Student Loan Payments) Order 2020 mandates the direct credit of refunds for excess payments of financial support and student loan deductions. Financial support means child support and domestic maintenance as defined in the Child Support Act 1991. Student loan deductions are salary or wage deductions as defined in section 4(1) of the Student Loan Scheme Act 2011. Section 184A still allows the Commissioner to provide an exemption when direct crediting would cause undue hardship or is impracticable.

Background

Compulsory direct crediting for income tax and gaming machine duty was implemented when their administration was moved to Inland Revenue's new technology platform (START), which modernises and improves information flows, and enables more online self-service and automated processes. The administration of financial support and student loan deductions are to be moved to START in the next phase of Inland Revenue's business transformation project, planned for April 2020.

Whilst the intent was that the Commissioner of Inland Revenue would eventually be required to direct credit all refunds of excess tax paid, the progressive implementation for various tax types through Orders in Council was legislated for to allow Inland Revenue the necessary flexibility to choose the optimal dates to implement direct crediting of refunds for each tax type.

Application date(s)

The Order in Council comes into effect on 9 April 2020.

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.

2020 International tax disclosure exemption ITR31

Introduction

Section 61 of the Tax Administration Act 1994 ("TAA") requires taxpayers to disclose interests in foreign entities.

Section 61(1) of the TAA states that a person who has a control or income interest in a foreign company or an attributing interest in a foreign investment fund ("FIF") at any time during the income year must disclose the interest held. In the case of partnerships, disclosure needs to be made by the individual partners in the partnership. The partnership itself is not required to disclose.

Section 61(2) of the TAA allows the Commissioner of Inland Revenue to exempt any person or class of persons from this requirement if disclosure is not necessary for the administration of the international tax rules (as defined in section YA 1) contained in the Income Tax Act 2007 ("ITA").

To balance the revenue forecasting and risk assessment needs of the Commissioner with the compliance costs of taxpayers providing the information, the Commissioner has issued an international tax disclosure exemption under section 61(2) of the TAA that applies for the income year corresponding to the tax year ended 31 March 2020. This exemption may be cited as "International Tax Disclosure Exemption ITR31 "("the 2020 disclosure exemption") and the full text appears at the end of this item.

Scope of exemption

The scope of the 2020 disclosure exemption is the same as the 2019 disclosure exemption.

Application date

This exemption applies for the income year corresponding to the tax year ended 31 March 2020.

Summary

In summary, the 2020 disclosure exemption **removes** the requirement of a resident to disclose:

- An interest of less than 10% in a foreign company if it is not an attributing interest in a FIF or if it falls within the $50,000 de minimis exemption (see section CQ 5(1)(d) and section DN 6(1)(d) of the ITA). The de minimis exemption does not apply to a person that has opted out of the de minimis threshold by including in the income tax return for the income year an amount of FIF income or loss.
- If the resident is not a widely-held entity, an attributing interest in a FIF that is an income interest of less than 10%, if the foreign entity is incorporated (in the case of a company) or otherwise tax resident in a treaty country or territory, and the fair dividend rate or comparative value method of calculation is used.
- If the resident is a widely-held entity, an attributing interest in a FIF that is an income interest of less than 10% if the fair dividend rate or comparative value method is used for the interest. The resident is instead required to disclose the end-of-year New Zealand dollar market value of all such investments split by the jurisdiction in which the attributing interest in a FIF is held or listed.

The 2020 disclosure exemption also removes the requirement for a non-resident or transitional resident to disclose interests held in foreign companies and FIFs.

Commentary

Generally, residents who hold an income interest or a control interest in a foreign company, or an attributing interest in a FIF are required to disclose these interests to the Commissioner. These interests are considered in further detail below.

Attributing interest in a FIF

A resident is required to disclose an attributing interest in a FIF if FIF income or a FIF loss arises through the use of one of the following calculation methods:

- attributable FIF income, deemed rate of return or cost methods; or
- fair dividend rate or comparative value methods, if the resident is a "widely-held entity" or
- fair dividend rate or comparative value methods, if the resident is not a widely-held entity and the attributing interest is incorporated or otherwise tax resident in a country or territory with which New Zealand does not have a double tax agreement in force as at 31 March 2020.

The 40 countries or territories with which New Zealand does have a double tax agreement in force as at 31 March 2020 are listed below.

Australia	France	Mexico	Spain
Austria	Germany	Netherlands	Sweden
Belgium	Hong Kong	Norway	Switzerland
Canada	India	Papua New Guinea	Taiwan
Chile	Indonesia	Philippines	Thailand
China	Ireland	Poland	Turkey
Czech Republic	Italy	Russian Federation	United Arab Emirates
Denmark	Japan	Samoa	United Kingdom
Fiji	Korea	Singapore	United States of America
Finland	Malaysia	South Africa	Viet Nam

For the avoidance of doubt, the term "double tax agreement" does not include tax information exchange agreements or collection agreements and is limited to the double tax agreements negotiated with the 40 countries or territories listed in this 2020 disclosure exemption.

No disclosure is required by non-widely-held taxpayers for attributing interests in FIFs that are income interests of less than 10% and are incorporated or otherwise tax resident in a tax treaty country or territory, if the fair dividend rate or comparative value methods of calculation are used.

A "widely-held entity" for the purposes of this disclosure is an entity which is a:

- portfolio investment entity (this includes a portfolio investment-linked life fund); or
- widely-held company; or
- widely-held superannuation fund; or
- widely-held group investment fund ("GIF").

Portfolio investment entity, widely-held company, widely-held superannuation fund and widely-held GIF are all defined in section YA 1 of the ITA.

The disclosure required, by widely-held entities, of attributing interests in FIFs which use the fair dividend rate or the comparative value method of calculation is that, for each calculation method, they disclose the end-of-year New Zealand dollar market value of investments split by the jurisdiction in which the attributing interest in a FIF is held, listed, organised or managed. In the event that tax residence is not easily determined, a further option of a split by currency in which the investment is held will also be accepted as long as it is a reasonable proxy - that is at least 90-95% accurate - for the underlying jurisdiction in which the FIF is held, listed, organised or managed. Investments denominated in euros will not be able to meet this test and so euro-based investments will need to be split into the underlying jurisdictions.

FIF interests

The types of interests that fall within the scope of section 61(1) of the TAA are:

- rights in a foreign company or anything deemed to be a company for the purposes of the ITA (eg, a unit trust)
- an entitlement to benefit from a foreign superannuation scheme, if a person acquired the interest before 1 April 2014 and treated the interest as a FIF interest in a return of income filed before 20 May 2013 and for all subsequent income years
- an entitlement to benefit from a foreign superannuation scheme, if a person's interest in the scheme was first acquired whilst the person was tax resident of New Zealand
- an entitlement to benefit from a foreign life insurance policy
- an interest in an entity specified in schedule 25, part A of the ITA.

However, the following interests are exempt (under sections EX 31 to EX 43 of the ITA) from being an attributing interest in a FIF and do not have to be disclosed:

- certain interests in Australian resident companies included on the official list of the Australian Stock Exchange and required to maintain a franking account (refer to Inland Revenue's website **www.ird.govt.nz** (keyword: other exemptions))
- certain interests in an Australian unit trust that has a New Zealand RWT proxy with either a high turnover or high distributions
- an interest held by a natural person in a foreign superannuation scheme that is an Australian approved deposit fund, Australian exempt public sector superannuation scheme, Australian regulated superannuation fund or Australian retirement savings account
- an income interest of 10% or more in a controlled foreign company ("CFC") (although separate disclosure is required of this as an interest in a foreign company)
- certain interests of 10% or more in a foreign company that is treated as resident, and subject to tax, in Australia (although separate disclosure is required of this as an interest in a foreign company)
- an interest in certain venture capital investments in New Zealand resident start-up companies that migrate to a grey-list country
- an interest in certain grey-list companies owning New Zealand venture capital companies
- an interest in certain grey-list companies resulting from shares acquired under a venture investment agreement
- an interest in certain grey-list companies resulting from the acquisition of shares under an employee share scheme
- certain interests held by a natural person in a foreign entity located in a country where exchange controls prevent the person deriving any profit or gain or disposing of the interest for New Zealand currency or consideration readily convertible to New Zealand currency.
- an interest held by a natural person who is a non-resident or transitional resident
- a beneficial interest in a foreign superannuation scheme which was first acquired whilst the person was not a tax resident of New Zealand and which has not been treated as an attributing interest in a FIF by the person
- certain foreign pensions or annuities (see Inland Revenue's guide *Overseas pensions and annuity schemes (IR257)* for more information).

De minimis

Interests in foreign entities held by a natural person not acting as a trustee also do not have to be disclosed if the total cost of the interests remains under $50,000 at all times during the income year. This disclosure exemption is made because no FIF income under section CQ 5 of the ITA or FIF loss under section DN 6 of the ITA arises in respect of these interests.

This de minimis exemption does not apply to a person who has opted out of the de minimis threshold by including in the income tax return for the year FIF income or loss. Please note that a person opting out of the de minimis threshold is generally required to continue to apply the FIF rules in each subsequent tax year. Where a person has previously opted out of the de minimis threshold, they will be required to apply the FIF rules unless they have less than $50,000 of attributing interests in FIFs for the current year, and for each of the four previous tax years:

- the person had no attributing interests in FIFs (for example, they had no foreign shares, or only had foreign shares which were exempt from the FIF rules); and/or
- the person had more than $50,000 in attributing interests in FIFs (note that for these years they would have been required to apply the FIF rules).

Format of disclosure

The forms for the disclosure of FIF interests are as follows:

- IR443 form for the deemed rate of return method
- IR447 form for the fair dividend rate method (for individuals or non-widely-held entities)
- IR448 form for the comparative value method (for individuals or non-widely-held entities)
- IR449 form for the cost method
- IR458 spreadsheet form (this spreadsheet form can be used to make electronic disclosures for all methods)
- myIR income tax return attachment form (this form can be used to make electronic disclosures for all methods)

The IR458 spreadsheet and myIR income tax return attachment forms, which reflect the disclosure options for fair dividend rate and comparative value for widely-held entities, must be filed online. As discussed above these disclosures are by country rather than by individual investment as is the general requirement of section 61 of the TAA. In order to be exempt from the general requirement, these disclosures must be made electronically.

As noted above, all other disclosures may be filed using the IR458 spreadsheet or myIR income tax return attachment form options.

If you choose the spreadsheet option you will be able to save the form as a working paper on your computer. When completed, submit the form by logging into your myIR account and uploading it as part of the electronic income tax return filing process, or by logging into your myIR account and attaching it to a web message with 'FIF disclosure' in the subject line.

Alternatively, you can complete the myIR income tax return attachment disclosure form online when preparing your income tax return electronically in myIR.

The IR443, IR447, IR448, IR449 and IR458 forms can be found at **www.ird.govt.nz/income-tax/income-tax-for-businesses-and-organisations/types-of-business-income/foreign-investment-funds-fifs/file-a-foreign-investment-fund-disclosure** Click 'Other ways to do this' on this web page to access the IR458 spreadsheet form.

Income interest of 10% or more in a foreign company

A resident is required to disclose an income interest of 10% or more in a foreign company. This obligation to disclose applies to all foreign companies regardless of the country of residence. For this purpose, the following interests need to be considered:

a. an income interest held directly in a foreign company

b. an income interest held indirectly through any interposed foreign company

c. an income interest held by an associated person (not being a CFC) as defined by subpart YB of the ITA.

To determine whether a resident has an income interest of 10% or more for CFCs, sections EX 14 to EX 17 of the ITA should be applied. To determine whether a resident has an income interest of 10% or more in any entity that is not a CFC, for the purposes of this exemption, sections EX 14 to EX 17 should be applied to the foreign company as if it were a CFC.

Format of disclosure

The forms for disclosure of all interests in a CFC are:

- IR458 spreadsheet form, or
- myIR income tax return attachment form

If you choose the spreadsheet option you will be able to save the form as a working paper on your computer. When completed, submit the form by logging into your myIR account and uploading it as part of the electronic income tax return filing process.

Alternatively, you can complete the myIR income tax return attachment disclosure form online when preparing your income tax return electronically in myIR.

The IR458 spreadsheet form must be accessed online at **www.ird.govt.nz** (keyword: ir458).

Please note that electronic filing is a mandatory requirement for CFC disclosure.

Overlap of interests

It is possible that a resident may be required to disclose an interest in a foreign company which also constitutes an attributing interest in a FIF. For example, a person with an income interest of 10% or greater in a foreign company that is not a CFC is strictly required to disclose both an interest held in a foreign company and an attributing interest in a FIF.

To meet disclosure requirements, only one form of disclosure is required for each interest. If the interest is an attributing interest in a FIF, then the appropriate disclosure for the calculation method, as discussed previously, must be made.

In all other cases, where the interest in a foreign company is not an attributing interest in a FIF, the IR458 spreadsheet form or myIR income tax return attachment form for CFCs must be filed.

Interests held by non-residents and transitional residents

Interests held by non-residents and transitional residents in foreign companies and FIFs do not need to be disclosed.

This would apply for example to an overseas company operating in New Zealand (through a branch) in respect of its interests in foreign companies and FIFs; or to a transitional resident with interests in a foreign company or an attributing interest in a FIF.

Under the international tax rules, non-residents and transitional residents are not required to calculate or attribute income under either the CFC or FIF rules. Therefore disclosure of non-residents' or transitional residents' holdings in foreign companies or FIFs is not necessary for the administration of the international tax rules and so an exemption is made for this group.

Persons not required to comply with section 61 of the Tax Administration Act 1994

This exemption may be cited as "International Tax Disclosure Exemption ITR31".

1. Reference

This exemption is made under section 61(2) of the Tax Administration Act 1994 ("TAA"). It details interests in foreign companies and attributing interests in foreign investment funds ("FIFs") in relation to which any person is not required to comply with the requirements in section 61 of the TAA to make disclosure of their interests, for the income year ended 31 March 2020.

2. Interpretation

For the purpose of this disclosure exemption:

- to determine an income interest of 10% or more, sections EX 14 to EX 17 of the Income Tax Act 2007 ("ITA") apply for interests in controlled foreign companies ("CFCs"). In the case of attributing interests in FIFs, those sections are to be applied as if the FIF were a CFC, and
- double tax agreement means a double tax agreement in force as at 31 March 2020 in one of the 40 countries or territories as set out in the commentary.

The relevant definition of "associated persons" is contained in subpart YB of the ITA.

Otherwise, unless the context requires, expressions used have the same meaning as in section YA 1 of the ITA.

3. Exemption

i. Any person who holds an income interest of less than 10% in a foreign company, including interests held by associated persons, that is not an attributing interest in a FIF, or that is an attributing interest in a FIF in respect of which no FIF income or loss arises due to the application of the de minimis exemption in section CQ 5(1)(d) or section DN 6(1)(d) of the ITA, is not required to comply with section 61(1) of the TAA for that interest and that income year.

ii. Any person who is a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct interest of 10% or more in a foreign company that is not a foreign PIE equivalent, and uses the fair dividend rate or comparative value calculation method for that interest, is not required to comply with section 61(1) of the TAA in respect of that interest and that income year, if the person discloses the end-of-year New Zealand dollar market value of investments, in an electronic format prescribed by the Commissioner, split by the jurisdiction in which the attributing interest in a FIF is held or listed.

iii. Any person who is not a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct income interest of 10% or more, and uses the fair dividend rate or comparative value calculation method is not required to comply with section 61(1) of the TAA in respect of that interest and that income year, to the extent that the FIF is incorporated or tax resident in a country or territory with which New Zealand has a double tax agreement in force at 31 March 2020.

LEGISLATION AND DETERMINATIONS

iv. Any non-resident person or transitional resident who has an income interest or a control interest in a foreign company or an attributing interest in a FIF in the income year corresponding to the tax year ending 31 March 2020, is not required to comply with section 61(1) of the TAA in respect of that interest and that income year if either or both of the following apply:

- no attributed CFC income or loss arises in respect of that interest in that foreign company under sections CQ 2(1)(d) or DN 2(1)(d) of the ITA; and/or
- no FIF income or loss arises in respect of that interest in that FIF under sections CQ 5(1)(f) or DN 6(1)(f) of the ITA.

This exemption is made by me acting under delegated authority from the Commissioner of Inland Revenue pursuant to section 7 of the TAA.

This exemption is signed on 6 March 2020

Haydn Clark
Technical Specialist

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 20/01: Income tax – treatment of the receipt of lump sum settlement payments

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

Summary

1. The focus of this statement is setting out how the Commissioner will treat a lump sum payment received under a settlement agreement for claims that (if successful) would have resulted in receipts of both a capital and revenue nature.
2. Whether a settlement payment is taxable depends on what it is paid for – in this case, what was given up in return for the payment – and its nature in the hands of the recipient. It is essential to first determine what a payment is for before determining whether apportionment is necessary.
3. It has been suggested that two High Court of Australia decisions: *McLaurin v FCT* (1961) 12 ATD 273 and *Allsop v FCT* (1965) 14 ATD 62 *McLaurin* and *Allsop* are authority for the proposition that, if an undissected settlement payment includes both capital and revenue amounts, the whole amount will be treated as capital. To the extent that *McLaurin* and *Allsop* stand for this proposition, the Commissioner's view is that they would not be followed in New Zealand. Rather, where possible, New Zealand courts would seek a reasonable basis for apportioning a lump sum.
4. Given this, where a single undissected sum is received, it should be apportioned between its capital and revenue elements where possible. Any apportionment must be made on an objective basis. The starting point for determining an appropriate apportionment will be the settlement agreement and any related documents (for example, the statement of claim (if there is one)). Where necessary, the circumstances surrounding the agreement and other relevant evidence (such as evidence of any negotiations between the parties) should be considered. The onus of proof is on the taxpayer to show the apportionment is appropriate.
5. In the rare circumstance where the payment <u>cannot</u> be appropriately apportioned, the whole amount should be treated the same. Where the lump sum includes an amount that is taxable under a provision in Part C, the taxpayer has the burden of proving what part of the amount is not taxable. If a taxpayer is unable to show what part of a lump sum payment is capital, the Commissioner's view is that generally the whole amount should be treated as income.

Introduction

6. We have been asked to clarify the Commissioner's position on how to treat lump sum payments made to settle claims partly capital and partly revenue in nature. There has been uncertainty as to how such payments should be treated. In particular, some people have taken the view that the lump sum should be treated as always wholly capital and, therefore, not subject to income tax. This is based on an interpretation of two High Court of Australia decisions: *McLaurin v FCT* (1961) 12 ATD 273 and *Allsop v FCT* (1965) 14 ATD 62. This item sets out the Commissioner's view on this issue.

Analysis

How to determine whether an amount is capital or revenue

7. To decide whether a payment is capital or revenue, it is necessary to determine what the payment is for (*Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA)). The character of a cause of action discharged by a payment will determine the nature of the payment (*Federal Coke Pty Ltd v FCT* 77 ATC 4255 (FCA)). Therefore, where a payment is received in return for settling claims, it is necessary to consider what the nature of any payment received would have been if those claims had been successful. A payment received to settle claims of a revenue nature would be revenue. A payment received to settle claims of a capital nature would be capital (*Case V8* (2001) 20 NZTC 10,092). This is regardless of the nature of the

legal rights to make the claims for payment – that is, whether made in contract or tort or under statute or in any other way in which a right to claim may arise (*London & Thames Haven Oil Wharves Ltd v Attwooll* [1967] 2 All ER 124 at 134 per Diplock LJ).

8. Sometimes a payment will be made to settle claims of both a capital and revenue nature. As discussed below, in the Commissioner's view, generally such payments should be apportioned. An exception to this is where one of the advantages sought is ancillary or incidental to the other. In such a case it may be proper to characterise the payment as wholly capital or wholly revenue (*Buckley & Young* (at 61,275):

> Difficulties of characterisation may arise where the director or employee agrees to resign and to give a restrictive covenant. **The proper conclusion may be that the payment secures one advantage and the other provision is merely ancillary or incidental, not affecting the character of the payment** (cf. *Anglo-Persian Oil Company Limited v Dale (H.M. Inspector of Taxes)* [1932] 1 K.B. 124, 139-140). In other cases distinct and separately identifiable advantages may be gained by the payment. There the payment is of a dual character. The statement of the problem highlights the importance of identifying the true character of the payment for which deduction is sought. [Emphasis added]

In that case, it would not be necessary to go on and consider apportionment.

9. For an amount to be taxable, it must be "income" under a provision in Part C (and not exempt or excluded income). In the context of settlement payments, common provisions that could apply include s CB 1 (amounts derived from business) and s CE 1 (amounts derived in connection with employment). Unless the context otherwise requires, references to "revenue" amounts in this statement assume that a provision in Part C would apply to treat the amount as assessable income.

10. At issue is the tax treatment of a lump sum paid to settle claims of both a capital and revenue nature.

Apportionment

New Zealand approach

11. The Commissioner considers the approach of the New Zealand courts is to seek to apportion a payment into its capital and revenue elements wherever possible. This is demonstrated in Richardson J's judgment in *Buckley & Young* – one of the leading New Zealand cases on apportionment. Although *Buckley & Young* considered the apportionment of expenditure rather than income, in the Commissioner's view the same principles are relevant to both. *Buckley & Young* shows the approach of the New Zealand courts is to apportion where possible, rather than applying an all-or-nothing approach. However, an all-or-nothing approach can arise where the taxpayer fails to provide a reasonable basis for apportionment.

12. *Buckley & Young* concerned a series of agreements aimed at removing an unsatisfactory employee. The payments made were for both capital (restrictive covenant) and revenue (payment made to remove employee) elements. The contract did not specify how the amounts paid were to be apportioned.

13. Richardson J noted that the purpose of apportionment is to determine how much of an amount the parties have attributed to a particular item. This is done by considering the terms of the contract and, where relevant, the context and background to the agreement. Richardson J took the view that a situation where apportionment was impossible was likely to be rare and the fact an apportionment might be difficult was not, of itself, a reason not to apportion.

14. He also noted that "absolute precision" was not required, nor was it necessary that the apportionment could be "calculated by some kind of scientific process". Apportionment cannot, however, be based on mere speculation and there must be sufficient evidence to justify the result. Ultimately, apportionment was not possible on the facts of that case as the taxpayer had not put forward any argument as to how apportionment should be made.

15. *Case V8* considered the characterisation of a lump sum settlement payment. In that case, the taxpayer (the operator of a kiwifruit packhouse and storage facility) had filed a statement of claim alleging breach of contract by the supplier and manufacturer of an allegedly defective fruit-processing machine, misrepresentation and negligence. The taxpayer claimed compensation of $1,050,561.25. Mediation resulted in an out of court settlement under which the taxpayer received $170,000 from the designer of the machine and $100,000 from the manufacturer. The agreement included a denial of liability by all parties. It was also entered into in "full and final settlement of all issues between the parties in or in connection with" the proceedings.

16. Judge Barber considered that in determining the character of the settlement payment it was necessary to consider the statement of claim, the mediation agreement, the settlement agreement and the circumstances surrounding the case. As the mediation agreement referred to the attached settlement agreement and the statement of claim, these documents were intended to be read together. Judge Barber considered that the settlement payment was made to compensate the taxpayer for the losses specified in the statement of claim.

17. The taxpayer argued that, because the payment was received as a lump sum, it could not be apportioned between the ingredients of the original claim made by the taxpayer. Judge Barber held that, as the payment was made to compensate the taxpayer for loss of profits and for repair costs as per the statement of claim, the settlement payment was income, being compensation for revenue losses. The judgment suggests that if it had been established that the settlement payment was compensation for losses of both a capital and revenue nature, apportionment would have been required. Unlike in *Allsop* (considered in more detail below), the fact that the agreement included a general clause settling all issues between the parties was not seen as relevant – even though there may have been capital claims that the taxpayer could have (but did not) bring. Foregoing the right to sue was an incident of settlement; it did not characterise the payment.
18. *Case S96* (1996) 17 NZTC 7,603 related to personal grievance proceedings against an employer. The settlement agreement had been lost so the Taxation Review Authority had to consider whether (and how) a lump sum settlement payment should be apportioned (between revenue amounts (for loss of income) and capital amounts (for humiliation, loss of dignity and hurt feelings)). The taxpayer argued that the entire settlement payment was compensation for injury to feelings.
19. Judge Barber considered all of the available evidence and circumstances and chose to apportion the payments on a pro rata basis of the amounts claimed in the original proceedings. In his view, this was a fair apportionment (at 7,608):

    I consider that the non taxable element of the settlements needs to be now fixed by this Authority because it has heard the available evidence, and **regardless of what limit may have been imposed by the Settlement Agreement. The issue must be what, in commercial and personal reality, was a fair apportionment of each settlement to compensation for feelings injury.** [Emphasis added]

20. *Sayer v CIR* (1999) 19 NZTC 15,249 involved an employment court award for wrongful dismissal. The Employment Court awarded Mr Sayer compensation including $62,142 as compensation for lost remuneration, $50,000 for humiliation, loss of dignity and injury to feelings and $5,000 for costs (a total of $117,142). Mr Sayer applied to wind up the company and also took action against the directors and shareholders of the company for any shortfall that he might suffer as a result of the company's liability to him, as well as interest and exemplary damages.
21. Mr Sayer entered into a deed of settlement and assignment with the directors and shareholders of the company. At that time, the company owed Mr Sayer $130,944.30. Under the deed of settlement, in consideration of the amount of $100,000, Mr Sayer agreed to assign to a second company all claims that he might have against the company and to release the directors and shareholders from any claims that he had against them. The deed provided that $99,999 of the settlement amount (together with interest less withholding tax) was attributable to the consideration for the assignment of Mr Sayer's claim against the company.
22. The Commissioner had assessed $50,000 as monetary remuneration and had attributed the other $50,000 to compensation for humiliation (capital). Mr Sayer argued that no part of the $100,000 was monetary remuneration as it was paid to bring about the discontinuance of his proceedings against the directors and shareholders (rather than to settle his dispute with the company). However, Doogue J considered that the deed of settlement made it clear that $99,999 of the settlement amount (together with interest less withholding tax) was attributable to the consideration paid for the assignment of the claim against the company and that it was not possible to go behind the deed.
23. The taxpayer also argued that the $100,000 could not be apportioned and must be considered as a whole. This was on the basis of *McLaurin* and *Allsop* (which are considered below). Doogue J rejected the taxpayer's argument on the basis that it was not supported by the facts and distinguished *McLaurin* and *Allsop* on the basis that the settlement agreement in Sayer involved settling a claim for liquidated damages (which was squarely within one of the exceptions noted in *McLaurin*).
24. In *Henwood v CIR* (1995) 17 NZTC 12,271 the majority of the Court of Appeal (Richardson J and Hardie Boys J) held that payments received under a contract for services were partly capital in character as the payments were received in return for both acting services (income) and for the restraint of trade (capital). The majority also held the payments could be apportioned.
25. In determining an appropriate apportionment, Richardson J was willing to take into account the TRA's finding as to what level of fee would have been commercial in the circumstances (ie attributing a value to that element of the contract). This, in conjunction with implications from the contract, provided the basis for Richardson J's conclusion that the TRA's apportionment was appropriate.
26. On the other hand, Hardie Boys J appears to have been trying to work out from the contract how much the parties intended to allocate to each element (which he found in clause 11 of their contract). In the absence of any indication to this effect, Hardie Boys J suggested that apportionment may have been impossible.

Conclusion on New Zealand approach

27. The New Zealand courts have tended to take a broad approach to apportionment. The default position is that the courts will apportion where there is a reasonable basis for doing so. In determining an appropriate apportionment, the courts have looked at the documentation between the parties, as well as the relevant context and background.

United Kingdom case law

28. Two United Kingdom cases directly on point are *Wales v Tilley* [1943] 1 All ER 280 (HL) and *Carter v Wadman* (1946) 28 TC 41 (UKCA). Both cases considered the apportionment of undissected lump sum settlement payments.

29. *Wales v Tilley* was a decision of the House of Lords (which was followed by the House of Lords more recently in *Mairs (Inspector of Taxes) v Haughey* [1993] 3 All ER 801). It concerned the managing director of a company. The company had agreed to pay Mr Tilley a salary of £6,000 a year and had also agreed to pay him a pension of £4,000 a year for 10 years after he ceased to be managing director. Mr Tilley agreed to release the company from the obligation to pay the pension and agreed to a reduced salary of £2,000 a year in consideration for a lump sum payment of £40,000 in two equal instalments.

30. The House of Lords held that, to the extent the payment was received for surrendering a right to a pension, it was capital and, to the extent the payment was made in consideration of a reduction of salary, it was income. There was nothing in the agreement that apportioned the amount between the two rights that had been surrendered. Nor was there any other evidence of agreement between the parties as to how the amount was calculated.

31. Viscount Simon noted that if the court considered tax was due under one head but not the other, the Attorney-General, on behalf of the Crown, had accepted the amount should be treated as apportionable. On the same point, Lord Thankerton commented that, on the issue of practicability, Mr Tilley's accountants had provided a basis for apportionment. Lord Porter considered that although there were difficulties in determining the amount attributable to each component (which depended, for example, on when Mr Tilley's employment ceased), it was not impossible to do so (at 285):

> It only remains, therefore, to see whether the sum attributable to the release of the pension can be separated from that payable for the reduction of salary. It was only faintly argued on behalf of the Crown that such a division was not possible; but it was said that there were no materials **upon which such a calculation could be made** inasmuch as the cessation of the salary and the commencement of the pension were dependent on many unascertainable matters, amongst others on the Appellant's choice of the time of his retirement. No doubt there are difficulties but the resultant figure **seems no more incalculable** than, say, the length of time during which an injured workman would have continued to earn wages had he not received his injury, a period difficult no doubt to ascertain, but one which has constantly **to be estimated** in dealing with cases of personal injury. [Emphasis added]

32. Therefore, in considering whether an apportionment was possible, Lord Porter considered whether it was possible to objectively calculate the respective values of the rights given up in return for the lump sum payment. The fact the respective amounts would have to be estimated (as they could not be calculated exactly) did not mean apportionment was not possible. The case was referred back to the Special Commissioners to determine the appropriate apportionment.

33. A similar issue was considered by the UK Court of Appeal in *Carter v Wadman*. In that case, the taxpayer (Mr Carter) was employed as the resident manager of a public house for a salary of £10 per week plus a quarter share of the net profits of the business. The term of the agreement began on 30 January 1942 and ended on 24 June 1949. In 1942 the employer (Mrs Pierce) wished to assign the lease and the licence for the premises and to sell the goodwill, chattels and stock relating to the premises. Mr Carter's consent to the assignment was required as it was a term of Mr Carter's agreement with Mrs Pierce that she could not, without his consent, sublet or part with possession of any part of the premises or the goodwill or assets of the business, except in the ordinary course of business.

34. Mr Carter and Mrs Pierce entered into an agreement under which Mrs Pierce agreed to pay Mr Carter £2,000 in consideration of his agreeing to the transfer of the licence to the purchaser and in full settlement of "all past, present and future claims" he might have against her under the management contract. At the time the agreement was made Mr Carter had been paid his salary up to the cancellation date (2 December 1942), but his share of the profits for the 1942 year had not been calculated. In view of the agreement, Mr Carter could no longer make any claim against Mrs Pierce for a share of the profits. Subsequently, it was determined that Mr Carter's share of the profits would have been £1,090.

35. The Court of Appeal had to determine whether any part of the £2,000 was employment income. It considered the payment was, in part, the price for the cancellation of the agreement and, in part, paid in settlement of past and present claims. One of the possible claims was for the taxpayer's share of the profits up to 2 December 1942 (this would be employment income). The court considered it was possible to determine the value of the unexpired term of the agreement, at 52-53:

> Mr. Mustoe sought to argue that, as the consideration was one lump sum of £2,000, it was impossible to point to any portion of the £2,000 and say that it was a profit arising from his employment: but the Crown might equally well have argued that, as it was impossible to fix any sum which represented a capital payment, the whole must be income. … **But we respectfully agree with their Lordships** [in *Wales v Tilley*] **that in principle there must be apportionment, and we think that on the facts of the present case, though the calculation of the value to the Appellant of the unexpired portion of the agreement must be a matter of estimate, there is no insuperable difficulty in estimating its value**. [Emphasis added]

36. It can be seen from this that the court was concerned with apportioning the lump sum based on the values of the respective elements. Consistent with *Wales v Tilley*, there was no consideration given to trying to determine any agreement between the parties as to how the amount was made up. This emphasis on valuation is consistent with the order the court gave regarding apportionment when referring the case back to the General Commissioners.

37. The court found apportionment should be made on the basis of the proportion the sum of £1,090 (the share of the profits to which the taxpayer would have been entitled) bore to the aggregate of £1,090 and the sum the taxpayer would have been entitled to recover from Mrs Pierce as damages for breach of the employment contract, if he had been paid his salary and a share of profits up to cancellation date and had then repudiated the contract.

Australian case law

38. The leading Australian cases on this issue are the High Court of Australia decisions in *McLaurin* and *Allsop*. The taxpayer in *McLaurin* had made claims for a total amount of £30,240 as compensation for damage to property as a result of a fire that had spread from a property owned by the Commissioner of Railways. Some of the claims were for amounts that were capital in nature and some for amounts that were revenue in nature. The Commissioner of Railways made a settlement offer of £12,350 and the taxpayer accepted it "in full settlement of all claims for damage arising out of" the fire.

39. The £12,350 lump sum offer was based on a valuation of the items of property for which the claims had been made, as carried out by a valuer employed by the Commissioner of Railways. There had been various discussions between the valuer and the taxpayer in the course of the valuer arriving at his valuation. However, the court found no information was given to the taxpayer as to how the amount was arrived at.

40. The Commissioner considered £11,000 of the compensation was income, being compensation for the revenue items claimed, determined on the basis of the valuation. The court accepted the valuation was based on a list of items supplied by the taxpayer and the taxpayer could make a confident guess as to the amount allowed by the valuer for each item claimed. However, the court considered the character of the payment in the hands of the recipient could not be determined by the payer's (the Commissioner of Railways) uncommunicated reasons for agreeing to pay the amount. The court considered the offer made and accepted was for a single undissected amount (not payments for each individual item claimed).

41. The court accepted that it may be appropriate to apportion a single payment of a mixed nature made in settlement of specific claims where at least some of the claims are for liquidated amounts or are amounts that are "otherwise ascertainable by calculation". In this context, the court referred to *Carter v Wadman* and *Wales v Tilley*. It gave *Carter v Wadman* as an example of a case that included liquidated claims and *Wales v Tilley* as an example of a case where some of the distinct claims were ascertainable by calculation.

42. However, the court considered apportionment was not appropriate where a payment is made only for claims for unliquidated damages under a compromise that treats the payment as a single undissected payment. In such circumstances, the amount must be considered as a whole. The court considered the damage caused by the fire (whether included in the taxpayer's claim or not) was compensated for by one entire sum. There was no factual basis for the Commissioner's argument that the settlement payment was income on the basis it had the same character as the profits the taxpayer would otherwise have derived. The court, therefore, held the entire sum was capital in nature.

43. The court was concerned with establishing what the parties had **agreed** the amount was paid for. It was not relevant what one party had originally claimed was payable. It was also not relevant what the other party was willing to pay for (ie the uncommunicated reasons of the payer for making the payment were not relevant). Further, there was no discussion of the possibility of valuing the respective claims given up and apportioning on that basis. This may be because the parties had not argued the case on this basis.

44. *Allsop* concerned a taxpayer who was in the transport business. The taxpayer had paid the Commissioner for Motor Transport permit fees totalling £54,868 and had been allowed deductions for the permit fees. Following a decision by the Privy Council that the fees were not legally payable, the taxpayer sought recovery of the fees paid on the basis that the amounts had been improperly demanded under the colour of office. A settlement was negotiated under which the taxpayer was paid £37,500.

45. The settlement deed was made without any admission of liability on the part of the Government and the Commissioner for Motor Transport. The deed provided that, in consideration of the payment, the taxpayer released the Government and the Commissioner for Motor Transport from all actions, suits, proceedings, causes of action, arbitrations, debts, dues, demands, costs, charges and expenses the taxpayer had in connection with or arising out of anything done or omitted to be done under the relevant legislation.

46. The High Court of Australia rejected the Commissioner's argument that, as the payment was a refund of expenditure for which a deduction had been allowed, the amount was income. The court considered there was no factual basis for the Commissioner's argument.

47. Barwick CJ and Taylor J considered the taxpayer would have had valid claims against the Commissioner for unlawful interference with the taxpayer's vehicles and his business (even though no such claims had been made by the taxpayer). As the settlement deed provided the amount was paid for the release of all potential claims, Barwick CJ and Taylor J considered the entire payment was made by way of compromise of all claims the taxpayer had. No part of the payment was attributable solely to the refund of the fees paid.

48. Windeyer J held the consideration for the payment was the release of a variety of claims the taxpayer had or might be thought to have had against the Government. No part of the payment was received as a refund of permit fees paid by the taxpayer. In particular, Windeyer J appears to have been seeking evidence as to how the parties had calculated the amount before he would have been willing to apportion (at 65):

> It does not appear from the material before us that the sum of £37,000, or any definite part of it, was computed, paid and received as a refund of particular amounts that had been paid by the appellant for road charges and which had been allowed as deductions in the assessment of his taxable income.

49. The court did not consider attempting to value the respective claims given up. Rather the court seems to have been looking for evidence as to how the parties calculated the amount (ie what they agreed the amount was paid for). As the agreement contained (and, in that case, was limited to) a general release clause covering all potential claims, it was not possible to determine that any specific amount was paid for any specific claim. The court, therefore, found the whole amount should be treated as capital.

50. *McLaurin* and *Allsop* have also been followed in later Australian decisions. In determining whether apportionment is possible, the courts have sought evidence of agreement between the parties as to how the amount was calculated. See, for example, *FCT v Spedley Securities Ltd* 88 ATC 4126 (FCA) at 4128:

> After negotiation, an entire sum of $200,000 was accepted. Its payment was the subject of agreement, **but there was no agreement as to the way in which it was made up**. The evidence as to the way the settlement was seen, from one side or another is scant. [Emphasis added]

51. The Court held that the entire amount was capital as the payment was received as a lump sum, the ingredients of which were not identified, so there was no basis for apportionment.

Conclusion on apportionment

52. In the Commissioner's view, the Australian and UK courts have taken different approaches to apportioning lump sum settlement payments. The courts in *Wales v Tilley* and *Carter v Wadman* were willing to accept apportionments based on objectively estimated values for different elements of the agreements. On the other hand, the High Court of Australia in *McLaurin* and *Allsop* seemed concerned with trying to find evidence of agreement between the parties as to how the lump sum was made up. In the absence of this, the courts found that no apportionment was possible.

53. Although *McLaurin* distinguished *Wales v Tilley* and *Carter v Wadman*, this, arguably, does not fully explain the different approaches to apportionment. The fact the agreement in *Carter v Wadman* included a liquidated amount did not appear to assist the court with determining any agreement between the parties. It was not a case where the court concluded an amount equal to the amount of the liquidated damages (in that case £1,090) was allocated to that head. In such a situation, it would be easier to argue that the parties had implicitly agreed on the amount to be allocated. However, the court found the £2,000 was paid as a lump sum to cover all of the rights given up. It found that £2,000 had to be apportioned according to the respective values of the different claims. In this regard, the fact there was an amount of liquidated damages was of no more assistance to the court than any other right that could be valued.

54. Similarly, the amounts making up the lump sum in *Wales v Tilley* do not seem to be any more easily "ascertainable by calculation" than the amounts in *McLaurin* or *Allsop*.

55. Neither *McLaurin* and *Allsop* nor *Wales v Tilley* and *Carter v Wadman* have been applied in New Zealand. The court in Sayer did suggest that, if the facts had been different, the taxpayer would have been able to argue that *McLaurin* and *Allsop* applied – however, this does not mean that such an argument would necessarily have been accepted. Rather, in the Commissioner's view, the broad approach taken in New Zealand apportionment cases is more consistent with the UK approach than the Australian one. It has been suggested that *McLaurin* and *Allsop* are authority for the proposition that, if an undissected settlement payment includes both capital and revenue amounts, the whole amount will be treated as capital. To the extent that *McLaurin* and *Allsop* stand for this proposition, the Commissioner's view is that they would not be followed in New Zealand. Rather, where possible, New Zealand courts would seek a reasonable basis for apportioning a lump sum.

56. It is noted that *McLaurin* and *Allsop* have also been judicially criticised by the High Court of Australia (see *FCT v CSR Ltd* No S278 of 2000, 23 November 2001). In that case, the Commissioner was seeking leave to appeal to the High Court. He argued that *McLaurin* and *Allsop* should be overturned despite their longevity. Ultimately, although critical of *McLaurin* and *Allsop*, the High Court denied the application for leave to appeal. This was because the cases had stood for (at that time) 40 years and Parliament had not chosen to overturn them by legislation. This was despite a recommendation by the Asprey Committee in 1975 that specific legislation be introduced to apportion on a valuation basis. As *McLaurin* and *Allsop* have never been applied in New Zealand, the High Court's reasons for not considering overturning *McLaurin* and *Allsop* are not relevant. However, their criticisms are equally valid in New Zealand as in Australia.

How should an appropriate apportionment be determined?

57. Any apportionment must be undertaken on an objective basis. The ultimate aim of apportionment is to determine what the amount was paid for and to split it into its capital and revenue parts. As well as considering any settlement agreement, it is likely to be necessary to look at the surrounding circumstances and other, related documentation.

58. Where it can be established that the parties to the settlement have agreed how the payment is made up, this will generally be an appropriate basis for determining the apportionment between capital and revenue amounts. However, the Commissioner may not accept such an apportionment where taking into account the relevant circumstances, the amount allocated to the capital element is excessive, the agreement is a sham, or the agreement is part of a tax avoidance arrangement (see *Case S96* at 7,606).

59. Often there will be no agreement between the parties as to how the lump sum was made up. The nature of settlement agreements is that they represent a compromise between parties with competing interests. For example, an employee may want a higher payment for hurt and humiliation, but their employer may prefer a higher payment for lost wages. Other times, the parties may care only about the total amount of the payment and may not have given any thought as to how it is made up.

60. Where there is no (or insufficient) evidence of how the parties intended the amount to be apportioned, it may be appropriate to calculate (or estimate) the value of the respective claims given up in return for the payment.

61. The terms of any statement of claim should be considered. How helpful a statement of claim is will depend on the particular circumstances. For example, a statement of claim is likely to be highly relevant where there is an express link to it in the settlement agreement (as in *Case V8*). At the other end of the spectrum, if the dispute was settled on a different basis to the statement of claim, it may be of little or no relevance in determining an appropriate apportionment (see *du Cros v Ryall* (1935) 19 TC 444 (KBD)). In situations in between, it is likely to be of some assistance along with evidence of later negotiations between the parties.

62. Evidence of negotiations between the parties prior to settlement and other background facts may also be relevant if they help determine what the payment was made for.

63. The relevance of a general clause releasing a party from all liability will be similarly fact dependent. In some circumstances, it will be included as an incidental element of a settlement agreement (as in *Case V8* and Sayer). In other cases, it may be intended to cover one or more claims (as in *Carter v Wadman*). This will generally be a question of characterisation, rather than apportionment. As discussed above, it is essential to work out what the payment is for before considering apportionment. In *Allsop* the agreement consisted entirely of a general release clause. In the Commissioner's view, no apportionment would be required on the facts of *Allsop* as the full payment was made to settle a claim by the taxpayer of a revenue nature.

64. All relevant factors need to be considered when determining a reasonable basis for apportionment.

Amounts that cannot be apportioned

65. In the Commissioner's view, it will be possible to find an appropriate basis for apportionment in most situations. The taxpayer has the burden of proving that any apportionment is reasonable. Where a taxpayer does not make an apportionment, the Commissioner may, depending on the relevant facts and the information available, make an apportionment that the Commissioner considers is fair and reasonable.

66. There may be rare situations where no apportionment is possible. In these cases, the whole amount received should be treated the same. As noted above, for an amount to be taxable, it must be "income" under a provision in Part C. Where no part of the amount comes within a provision in Part C, none of the amount will be taxable.

67. However, where the lump sum includes an amount that is taxable under a provision in Part C, the taxpayer has the burden of proving what part of the amount is not taxable. If a taxpayer is unable to show what part of a lump sum payment is capital, the Commissioner's view is that generally the whole amount should be treated as income. This is consistent with *Buckley & Young* (at 61,283):

> If there is insufficient evidence to arrive at a conclusion, any answer must be mere speculation and the taxpayer will have failed to discharge the onus of proof upon him …

68. This is also consistent with the Commissioner's position as set out in the Commentary to BR Pub 05/12 *Taxability of payments under the Human Rights Act 1993 for humiliation, loss of dignity and injury to feelings*:

> Where the Commissioner has some doubt about the amount attributed to humiliation, loss of dignity, or injury to feelings, he may ask the parties to an agreement what steps they took to evaluate objectively what would be a reasonable amount to attribute to humiliation, loss of dignity, or injury to feelings. This would be so regardless of whether the payment was made as a result of an out of court settlement and whether or not the agreement is settled by the Human Rights Commissioner under the Human Rights Act. **The onus of proof regarding the taxability of any such payment would be on the taxpayer**. [Emphasis added]

References

Related rulings/statements

"BR Pub 05/12: Taxability of payments under the Human Rights Act 1993 for humiliation, loss of dignity, and injury to feelings" *Tax Information Bulletin* Vol 17, No 6 (August 2005): 4

"IS 16/04: Income tax – treatment of the receipt of lump sum settlement payments" *Tax Information Bulletin* Vol 28, No 12 (December 2016): 33

Subject references

Income Tax
Lump sum
Settlement payment

Case references

Allsop v FCT (1965) 14 ATD 62 (HCA)
Buckley & Young Ltd v CIR (1978) 3 NZTC 61,271 (CA)
Carter v Wadman (1946) 28 TC 41 (UKCA)
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FCT v Spedley Securities Ltd 88 ATC 4126 (FCA)
Wales v Tilley [1943] 1 All ER 280 (HL)

STANDARD PRACTICE STATEMENTS

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

SPS 20/02: Loss offset elections between group companies

Introduction

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

This Statement sets out certain practices that the Commissioner will accept for offsetting losses by election between group companies. It also sets out the consequences of specific events that can impact on a loss offset and how these should be addressed.

The Statement does not consider all questions relating to loss offsets within a group of companies and accordingly is not a fully comprehensive guide to Subpart IC of the Income Tax Act 2007.

All legislative references in this Statement refer to the Income Tax Act 2007, unless otherwise specified.

Application

This Statement applies from 12 February 2020 and replaces SPS 17/03 *Loss offset elections between group companies* published in *Tax Information Bulletin* Vol 30, No 1 (February 2018).

Standard practice

Summary

1. The purpose of the loss offset provisions is to allow those companies that incur losses to utilise those losses even where different entities are involved. This means that there is similarity in the tax treatment of a group of companies, each carrying on separate enterprises, as compared with a single company that carries on the same enterprises in separate divisions.
2. This Statement sets out the application of certain pre-requisites and other aspects of loss offset provisions in Subpart IC which allow loss offset elections to be made. It discusses the requirements for giving notice, the Commissioner's practice with respect to part-year losses and explains what should happen when the loss company's loss or the profit company's net income is increased or reduced. It also sets out the requirements for there to be a valid election and/or subvention payment.
3. A loss company must be resident in New Zealand in terms of s IC 7. The loss company must have maintained a 49% continuity of ownership from the time of the loss to the time of the offset. The profit company(ies) and the loss company must have at least 66% common ownership. The amount of loss offset(s) will be limited to the amount of profit(s) in the profit company(ies). The amount must be fixed by the election in a manner that binds the electing company but need not be quantified in the election. Refer to [13] to [15] for more detail in this area.
4. The loss company must notify the Commissioner of an election for the loss offset and where applicable of a subvention payment within the timeframe under s IC 9. The election may be notified in a tax return or separately from the tax return. The Commissioner may agree to an extension of time for filing the election so long as the request for an extension of time is made and approved before an offset is made.

Detailed discussion

5. Subpart IC provides for the sharing of losses between companies that are in the same group of companies. A company may make its tax loss available for subtraction from the net income of another group company.
6. There are two methods of sharing losses which may be used together. The first is for the loss company to notify an election in its tax return for the loss to be made available to the profit company. Any such election is irrevocable. That election must be notified to the Commissioner no later than the 31 March that follows the end of the loss company's year of offset, or within such further time as the Commissioner may allow: s IC 9(2).

7. Another method of sharing a loss is for the profit company to make a "subvention payment" to the loss company. A subvention payment made to the loss company is offset against the profit company's net income and reduces the loss company's available net losses. The payment to the loss company and notice to the Commissioner by the loss company of that payment must be made no later than the 31 March that follows the end of the loss company's year of offset, or within such further time as the Commissioner may allow: ss IC 9(1) and (2).
8. Previously the Commissioner took the view that a subvention payment required actual payment to be made. However, from December 2010 it is accepted that in the absence of any statutory definition of "payment" in the context of subvention payments, the following principles will apply:
   a) The ordinary meaning requires a discharge of obligations between parties.
   b) There are several ways in which an obligation may be discharged including payment in cash or its equivalent or by certain accounting entries.
   c) Payment may be made by accounting entries where they cause a genuine crediting in the payee's account or set off a pre-existing obligation. Making a journal entry will not be generally sufficient to cause a "payment" unless there is a clear agreement between the parties that this will satisfy the obligation.

   Consequently, in the subvention payment context, "payment" will be satisfied when the obligation under the subvention payment agreement has been discharged. The obligation can be discharged by an actual cash payment, cheque or bank transfer. Other methods of discharging an obligation can also amount to "payment". An obligation will generally be discharged where the payee can no longer sue the payer for the payment. It should be noted that an accounting entry that merely records an intention to pay a subvention payment will not in itself amount to a "payment". Also, simply resolving to pay a subvention payment does not amount to creating an enforceable obligation.

Example 1

A loss company has an obligation to pay a debt to a profit company for past purchases from the profit company. The profit company resolves to make a subvention payment to the loss company. The profit company and the loss company decide to allow the subvention payment to be applied in satisfaction of the loss company's past debt. An accounting entry is made to record this. The accounting entry is treated as the payment of the subvention payment.

9. As stated above, this Statement sets out the application of certain aspects of loss offset provisions in Subpart IC which allow loss offset elections to be made. It discusses the requirements for giving notice, the Commissioner's practice with respect to part year losses, and explains what should happen when the loss company's loss or the profit company's net income is increased or reduced. It also sets out the requirements for there to be a valid election. Where this statement discusses elections, it is equally referring to notices of subvention payments made.
10. The election may be included in the loss company's income tax return or made separately from the tax return. An election must be made by the latest time to file a loss company's income tax return. The Commissioner has discretion to accept a late election to offset losses beyond an agreed extension of time to file the return.
11. The Commissioner must approve the application to apply the discretion and agree to make the loss offset. The mere processing of the return and issuing the taxpayer's notice of assessment do not amount to an exercise of the discretion by the Commissioner to accept a late loss offset election.

Prerequisites

12. Before a loss offset can proceed the following factors must be present.

    Loss company

13. There must be a company with a tax loss for an income year or a loss balance carried forward. The loss company must have 49% continuity of ownership from the time the loss is incurred until the loss is offset: ss IA 5(2), (3) and (6).
14. The loss company for the commonality period under s IC 6(1) must be incorporated in New Zealand or be carrying on a business in New Zealand through a fixed establishment in New Zealand.
15. The loss company for the commonality period under s IC 6(1) must not be a dual resident company, that is, though resident in New Zealand it must not be:
    - treated under a double tax agreement as not being resident in New Zealand for the purposes of the double tax agreement, or
    - liable to income tax in another country by reason of domicile, residence or place of incorporation: s IC 7.

16. A qualifying company may only receive a loss offset from another qualifying company: s HA 22.

Profit company

17. There must be one or more profit companies in the same group of companies as the loss company and all companies must be in the same group of companies for the whole continuity period as defined in s IA 5(6). A group of companies must have at least 66% common ownership. Whether or not two companies form a group of companies is outside the scope of this Statement. More detailed guidance on common ownership can be found in the Interpretation Statement: *IS 13/02 Income tax – whether certain rights conferred by the Companies Act 1993 could give rise to a "shareholder decision-making right".*[1]

Amount of loss

18. The amount of loss to be offset must not exceed the net income of the elected profit company for the tax year, or the total net income of all the elected profit companies. Nor can the amount of subvention payment that the profit company agrees to pay the loss company exceed the loss company's tax loss: s IC 8.

A specific amount

19. An election should refer to an amount that is capable of identification as a specific dollar amount. The amount must be fixed by the election in a manner that binds the loss company but need not be quantified in the notice of election. That is, a formula may be used where the result of applying that formula could be known at the time of the election. For instance, the election might provide that the tax loss to be offset is to be such an amount that would reduce the profit company's net income to nil.

Example 2

In a group consisting of two companies, it is found, once its accounts have been prepared, that Company A has a tax loss of $10,000. It is anticipated that Company B will be in profit and that the amount of the net income will be about $2,000, ie less than the amount of Company A's tax loss. However, Company B's accounts have still to be prepared as the accountants are waiting on further information from their clients. That information will be arriving in a few days. There is still time to file an election and the question is whether Company A can now elect to offset some of its loss up to the amount of the profit company's net income by using a formula.

This is permissible because:

- the Commissioner will be notified in time;
- the amount will be subsequently identified as a specific dollar amount;
- it does not matter that (even if the accounting firm could commit staff to the finalisation of the accounts) the net income cannot be ascertained with finality at the time of making the election;
- the amount to be offset is already fixed in that it is controlled by the formula.

The election

20. An election to offset the tax loss must be notified by the loss company. The loss company can give notice of election by:
    - completing the appropriate boxes in the loss company's income tax return, or
    - completing the appropriate boxes in the loss company's e-filed income tax return, or
    - sending a separate notice to the Commissioner. These notices need to set out the names and IRD numbers of the relevant companies as well as the respective amounts (or formula for calculation of the amounts) of net loss to be offset.

Late elections and extensions of time for filing them

21. An election must generally be made by 31 March in the year following the year of loss offset (that is, in the year to March 31 when the offset is elected). However, the Commissioner can agree to a later date for the election: s IC 9(2). The notification of the election may be made in the return, or by separate notice. Note that in the case of a subvention payment, the payment must also be made within the same time for notifying the Commissioner of the election: s IC 9(1).
22. In considering an application to apply this discretion, the Commissioner will be mindful of the purpose of the loss offset regime which is to allow those companies that incur losses to utilise those losses even where different entities are involved. There should be similarity in the tax treatment of a group of companies, each carrying on separate enterprises, as compared with a single company that carries on the same enterprises in separate divisions. A case need not be exceptional for the discretion to be exercised favourably. The Commissioner will generally extend the timeframe required to make loss offset

[1] This statement can be found at **www.ird.govt.nz** (search keyword: "IS 13/02").

elections where a loss offset would be allowed. However, where the loss company has already taken a tax position that does not provide for a loss offset of a (current year) net loss, an amendment to that tax position will be required to apply any subsequent loss offset election. It is logical that the same rationale that relates to an amendment under s 113 of the Tax Administration Act 1994 (TAA) - where this involves a change to a (current year) net loss - should be applied to the discretion to extend the date for making an election. This means that where an amendment to an assessment under s 113 (TAA) would be denied, the Commissioner would not extend the timeframe for notifying a late loss offset election.

23. To summarise this aspect, the decision to exercise the discretion to notify the late loss offset election will be based on whether the loss offset will be allowed. If the loss offset will be allowed, then the discretion will be exercised. Where the loss company is seeking to amend a position already taken with regard to the loss offset, the discretion will only be exercised where the approval under s 113 (TAA) would be applied.

24. Where the late election relates to the loss company's available tax losses other than a current year net loss (losses brought forward), then the same rationale that applies to amendments under section 113 (TAA) will equally apply to deciding whether the late election will be allowed. This rationale is set out in *SPS 16/01 Requests to amend assessments*[2].

Example 2

A request to extend the date for making a loss offset election is filed on 10 April after 31 March of the year following the year of loss offset. The reason given for requesting the extension is that although the loss company's income tax return had been prepared and filed sometime previously there were numerous profit companies in the group and the preparation of those returns had taken time. Consequently, the income tax returns for the profit companies had been filed late. At the time of filing its return, the loss company was unaware of the group company's profit outcome. The loss company made no loss offset election within the time for the loss company to file their income tax return. Section 113 (TAA) would be applied to allow a loss offset. The reason is that the loss company was not aware of the full facts and erred when it took its tax position (refer para [59] of *SPS 16/01 – Requests to amend assessments*).

Further elections

25. Once a loss company has made an election, it cannot withdraw that election or change any part of that election. It is final and irrevocable: s IC 5(4). However, further elections can be made in some cases, for instance a loss company is not limited to a single election in respect of only one profit company. As already noted, it must be remembered that any further elections would be treated as a request to amend an assessment under s 113 (TAA).

Part-year losses

26. It is possible to offset a part-year loss (s IP 4) provided the following requirements as set out in s IP 4(2) are met:

- the tax loss component arises in the common span (as defined in s IP 2(1)), and
- the amount of the tax loss component is no more than the net income that the profit company derives in the common span, and
- continuity of ownership in the loss company under s IC 2(1) applies from the beginning to the end of the common span, and
- the loss company and the profit company provide the Commissioner with adequate financial statements under s IP 6. These accounts should contain sufficient information to indicate the calculation of the amount of the company's net income for the relevant part of the corresponding income year. The Commissioner's view is that the financial statements are required to be prepared in accordance with the generally accepted accounting practice, adjusted for the purposes of income tax legislation, at the level required under the Financial Reporting Act 2013 and the Tax Administration (Financial Statements) Order 2014. This does not require the preparation of notes to the accounts and disclosure statements. The part-year accounts will of necessity be different from full year accounts due to different ratios, denominators etc, and
- a valid loss offset election (s IP 7) within the timeframes required for elections under s IC 9.
  - As stated above, loss offsets are limited to the profit company's profit for the year (s IC 8 refers).

27. Where a company has a break in shareholder continuity part way through a month and its accounting system balances and reports at the end of the month, subject to the taxpayer backing out significant transactions pre or post the change in continuity, the Commissioner will accept the use of the end-of-month balance sheet figures for determining provision balances. She will also accept pro-rata allocation of the month's income and expenditure to determine the pre and post continuity change in net income or loss.

[2] This statement can be found at **www.ird.govt.nz** (search keyword: SPS 16/01).

28. In some cases it may be difficult to prepare part-year accounts to the level of detail set out above, particularly where there has been a significant lapse of time since the loss of shareholder continuity for the part-year. In such circumstances, taxpayers may discuss their individual positions with the Commissioner and depending on the facts a different approach may be agreed upon.

Amended assessments

29. In some cases, the Commissioner may amend an assessment for a profit or loss company resulting in increased or reduced net income or losses respectively. As a consequence there may be a need for further elections for additional loss offsets. There are four situations that may be brought about by amended assessments. These are:
    - the available loss is reduced below the amount originally elected to be offset;
    - the available loss is increased;
    - the profit company has additional net income that could be the subject of an offset: and
    - the profit company has reduced net income below the level of the amount of the loss offset.

Reduced loss

30. Where the loss company's assessment is amended (having its loss reduced below the level in the loss offset election) and consequently is not entitled to offset the amount elected then the following action will be taken:
    (i) where there is only one profit company then the Commissioner will, usually after consultation with the company or its agent, simply amend the assessment for the profit company in accordance with section 113 (TAA). No further election is necessary as the assessment of the profit company will reflect the reduced loss available to be offset, and
    (ii) where there is more than one profit company the loss company will need to notify the Commissioner as to how that reduced loss is to be allocated to the profit companies pursuant to IC 11(3). If the loss company does not make this subsequent election within 6 months of the loss company being notified that its tax loss is reduced or within such further time as the Commissioner may allow, the reduced loss is allocated proportionately to the original amount of the loss offset allocated to each profit company: s IC 11(4).
31. In the case where the reduction results in a subvention payment being treated as a dividend in the hands of the loss company, the dividend may be reduced to the extent this portion of the subvention payment is repaid to the profit company within the same timeframe discussed in the preceding paragraph: s IC 11(5).

Increased loss

32. Where the loss company's assessment is amended and therefore has additional losses to offset, a further election can be made for those additional losses. The first election remains valid and cannot be revoked. The further election must meet all the criteria set out above for an election, for example it must be on time, state the additional amount to be offset, and name the profit company or companies. As discussed already, any amendment will be subject to the SPS 16/01.

Increased profit

33. Where a profit company's assessment is amended and consequently has additional net income that could be the subject of an offset, a further election can be made by the loss company in respect of the additional net income within the statutory time period (set out in s IC 9(2)). This election must meet all the criteria for loss offsets. The emphasis will be on the notification of a loss offset by the loss company. It will not focus on the profit company's change in net income.

Reduced profit

34. Where a profit company's assessment is amended and therefore has reduced net income (below the level of the loss offset), the deduction for the profit company remains valid up to the reduced amount of the net income. The "unused" tax loss will be added back to the loss balance carried forward by the loss company. A further election can be made for the additional losses to other profit companies within the group. Any further election must meet all the relevant criteria for loss off-sets.

Requests to amend assessments

35. Changes to the assessments of the loss company or profit company may impact on the loss offset election already made and the availability of further loss offset elections. Examples are discussed in the immediately preceding paragraphs.

36. Requests will be looked at from the amending loss company's point of view. This means, for example, that the Commissioner will be considering why a loss company made an error with their initial loss offset. In that case, it may not be relevant why the profit companies' net income was amended.

37. Where there are any consequential impacts on the loss offset election and a further election needs to be made or the election needs to be revised, the taxpayer companies may need to consider whether s 113 (TAA) allows those changes to be implemented. SPS 16/01 sets out the circumstances when the Commissioner may amend assessments to ensure correctness, is relevant in considering whether the election should be accepted.

38. It should be noted that taking tax positions that both include or exclude a loss offset are each correct tax positions. The Commissioner will not amend one correct tax position to another correct tax position unless the initial tax position was made in error. The onus will be on the taxpayer to show that this was the case.

39. It is the Commissioner's practice that having approved a further election so that the loss company's loss or the profit company's net income is increased or reduced, those amendments will be made. Generally, the Commissioner will not agree to amend an assessment where the taxpayer has previously had the opportunity to offset known losses, and has failed, for whatever reason, to do so.

This Standard Practice Statement is signed on 12 February 2020.

Rob Falk
National Advisor, Technical Standards -Legal Services

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, Court of Appeal, and the Supreme Court.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

Court of Appeal decides forgiveness of debt can be a charitable gift qualifying a taxpayer for donation tax credit

Case	*Commissioner of Inland Revenue v Nancy Lois Roberts* [2019] NZCA 654
Decision date	17 December 2019
Act(s)	Income Tax Act 2007, ss LD 1 and LD 3 Interpretation Act 1999, s 5
Keywords	appeal; charitable trust; forgiveness of debt; donation tax credits; charitable or public benefit gift; monetary gift; statutory interpretation

Summary

This was an appeal of the High Court's decision that Nancy Lois Roberts' forgiveness of debt was a "charitable or other public benefit gift" within s LD 3(1)(a) of the Income Tax Act 2007 (the ITA) qualifying her for a donation tax credit (*Nancy Lois Roberts v Commissioner of Inland Revenue* [2018] NZHC 2153).

The Court of Appeal upheld the High Court's decision and found that:

For the purposes of s LD 3(1)(a), the term "monetary" means "of or pertaining to money";

- In this context, "monetary" is not limited to include only cash, credit cards, cheques and bank transfers as the Commissioner submitted;
- In this context, "monetary" also includes a right to receive cash, such as sums standing to the credit of a bank account, or invested in securities; and
- Mrs Roberts' forgiveness of debt was a monetary gift that was paid

Impact

As a result of this judgment, taxpayers who have made gifts of forgiveness of debt can qualify for donation tax credits.

However, on 17 December 2019, the Minister of Revenue issued a media statement proposing an urgent remedial amendment to clarify that debt forgiveness does not qualify for donation tax credits. The proposed amendment would apply retrospectively to 1 April 2008, being the commencement date of the ITA. A savings provision would apply to taxpayers who have already taken a position in reliance on the current legislation and have filed a return or donation tax credit claim before the date of the announcement.

The amendment is contained in the Taxation (KiwiSaver, Student Loans, and Remedial Matters) Bill. The Bill has passed the Second Reading Stage on 4 March 2020.

Inland Revenue will continue to monitor the situation in light of the judgment and the proposed amendment.

Facts

Mrs Roberts and her late husband jointly established the Oasis Charitable Trust (the Trust) in 2007 and registered it with the Charities Commission.

In October 2008, Mr and Mrs Roberts lent $1,708,080.90 to the Trust (the Loan).

In each income year ending 2011 to 2015, Mrs Roberts executed Deeds of Gift which released the Trust from liability to repay specified amounts of the Loan. She then claimed a donation tax credit for each of those five years on the basis that the forgiveness of debt was a charitable gift. The donation tax credits totalled $91,577.24, which corresponded with the $274,732 worth of debt that was forgiven.

The Commissioner of Inland Revenue (the Commissioner) issued a notice on 4 May 2016 requiring repayment of the portion of donation tax credits paid to Mrs Roberts relating to the forgiveness of debt.

Decision

1. The Court of Appeal dismissed the Commissioner's appeal, holding that a forgiveness of debt was capable of being a "monetary gift" under s LD 3(1)(a) of the ITA and that Ms Roberts was entitled to the donation tax credits she received.
2. The Court applied s 5(1) of the Interpretation Act 1999, which provides that the text of the statutory provision and its purpose will determine the correct interpretation, noting that even if the meaning of the text appears plain in isolation of purpose, it must be cross-checked against the purpose to satisfy the dual requirements of the Interpretation Act.

The words used in the legislation

3. The Court noted the definition of "charitable or other public benefit gift" in s LD 3(1)(a) used the words "a gift of $5 or more that is paid" (for the 2011 to 2013 years), and "a monetary gift of $5 of more that is paid" (for the 2014 to 2015 years).
4. In interpreting the word "monetary", the Court relied on dictionary definitions and concluded that for the purposes of s LD 3(1)(a), "monetary" is intended to mean "of or pertaining to money". The Court accepted that the term "monetary" excludes a gift of land, chattel or services.
5. In interpreting the word "money", the Court also relied on dictionary definitions and in particular, the Laws of New Zealand that defines "money" as follows (*Laws of New Zealand Money* (online ed) at [3] (footnotes omitted). The letters were added by the Court of Appeal for ease of reference):
   - [A] The term "money" generally includes banknotes as well as coins. However, the amount of money that can be paid in the various small denomination bank notes and in coins is limited. [B] The term money is sometimes used to include not only actual cash but also a right to receive cash, such as sums standing to the credit of a bank account, or invested in securities. [C] The term may also be used in a popular sense to include all personal or even, exceptionally, all real and personal property. If the term "money" is used in relation to paying money into Court it is to be construed in its ordinary and natural meaning, as including money in foreign currency.
6. The Court was attracted to the wider definition set out in [B] in this context as the definition at [A] was too narrow and inapt for the general statutory context. The Court (in *Commissioner of Inland Revenue v Nancy Lois Roberts* [2019] NZCA 654 (*the Commissioner v Roberts*) at [38]) held that:
   - Parliament clearly intended that payment could be achieved by debiting and crediting accounts, thus excluding a meaning of just bank notes or coins. It was common ground that the provision was not confined to money in this narrow sense.
7. Furthermore, the definition at [C] was too wide as it would include gifts of services, personal property, goods, chattels and land and it was clear that Parliament did not intend to include such gifts within s LD 3(1)(a).
8. Accordingly, the Court rejected the Commissioner's assertion that the words "monetary" and "money" were limited only to cash payments and the like, and held that the text of s LD 3(1)(a) is not limited to include only cash, credit cards, cheques and bank transfers.

The legislative history and extrinsic aids

9. The Court considered the extensive legislative history of the charitable donations provisions and, in doing so, found it provided no support for the interpretation of "monetary" or "money" contended by the Commissioner.
10. The Court found that there has been, for a number of years, somewhat of a disconnect between the actual wording of the legislation and the commentary or discussion generated by officials (*the Commissioner v Roberts*) at [58].
11. References in discussion papers and officials' reports that differed from the statutory language (such as commentary references to "cash donations" differing from the statutory language "money") were considered by the Court as "imprecise paraphrase[ing]" that did not provide any real assistance in interpreting statutory language, at [58] – [62]. It noted that comments by officials, unless they form part of the Parliamentary record, are not an especially reliable, or orthodox, form of legislative history.

Policy arguments

12. The Court found that none of the policy arguments the Commissioner advanced to support her interpretation of the statutory language (avoiding significant compliance and administrative costs and the difficulty of valuing non-cash donations which could result in tax avoidance) were compelling or persuasive.
13. The Court agreed with Mrs Roberts that the concerns advanced under the grounds that excluding forgiveness of debt avoids significant compliance and administrative costs were exaggerated. It considered that if Parliament was concerned about this, these concerns could be addressed by more detailed and specific drafting of the statutory provisions.
14. The Court was also unpersuaded by suggestions that greater administration costs will arise with the inclusion of forgiveness of debts. While significant investigation and checking may be required for tax rebate claims in relation to gifts of cash, depending on the circumstances of the giving, the Court found that concerns about tax avoidance were overstated by the Commissioner. It noted that there are now robust statutory mechanisms in place to deal with any instances of tax avoidance in this context, at [64] – [66].

About this document

Case summaries are brief notes of decisions made by the Taxation Review Authority, the High Court, Court of Appeal, Privy Council, and the Supreme Court. These summaries do not set out Inland Revenue policy, nor do they represent our attitude to the decision.

GENERAL ARTICLE

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