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TAX INFORMATION Bulletin

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Inland Revenue
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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.taxtechnical.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.taxtechnical.ird.govt.nz/subscribe** to receive regular email updates when we publish new draft items for comment.

Ref	Draft type	Title	Comment deadline
PUB00348	Question we've been asked	Income tax - monthly retirement payments from the United Nations Joint Staff Pension Fund	9 July 2020

IN SUMMARY

IN SUMMARY (continued)

Interpretation statement (continued)

IS 20/04: GST treatment of short-stay accommodation

This interpretation statement is the final item in a series of guidance on the income tax and GST consequences of providing short-stay accommodation through peer-to-peer websites such as Airbnb, Bookabach and Holiday Houses. The statement explains the GST treatment of supplying short-stay accommodation and confirms these supplies are not exempt supplies. The statement also discusses the requirements for registration, the main consequences of registration, change of use adjustments and what happens when the property is sold or the short-stay accommodation activity ceases. These latter topics will be useful in providing guidance to taxpayers of the options available where their short-stay accommodation activity has been affected by COVID-19.

Commissioner's statement

CS 20/02: Trophy hunting and the GST treatment of the "trophy fee"

This Commissioner's statement clarifies the GST treatment of the "trophy fee" charged by outfitters and guides. It was published at the same time as interpretation statement *IS 20/02: Goods and services tax - supplies by New Zealand hunting outfitters and taxidermists to overseas hunters.*

Legal decisions - case summaries – Recent Case Summaries

Court of Appeal decides that payments made in support of overseas mission services qualify for tax credits

The Court of Appeal found that the High Court Judge was correct when she concluded that payments made by a missionary's sibling and other more distant relatives, as well as unrelated members of the Church of Jesus Christ of Latter-Day Saints were gifts for the purposes of s LD 1(1) of the Income Tax Act 2007.

The Court of Appeal found that the High Court Judge erred in concluding payments made by a missionary, their parents, guardians or grandparents were not gift. The Court of Appeal determined these payments were also gifts, making the payors eligible for donation tax credits.

Taxpayer ordered by Court of Appeal to pay increased security for costs

In the underlying substantive matter, the appellant, Mr John Alfred Dowden ("Mr Dowden"), appealed the High Court decision that he is liable for unpaid PAYE, GST and income tax for the period from April 2003 to November 2011 in respect of two businesses conducted by him.

Mr Dowden applied for an order dispensing with security for costs for the appeal (which the Court of Appeal (Civil) Rules set at $7,060). The Commissioner of Inland Revenue ("the Commissioner") cross-applied for an order increasing security for costs by $2,500 to $9,560.

The Deputy Registrar declined Mr Dowden's application and granted the Commissioner's application. Mr Dowden then applied for review of the Deputy Registrar's decision, which the Court of Appeal upheld.

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.

About this publication

To help customers manage the impacts of COVID-19, the Commissioner now has a discretion to vary a requirement under an Inland Revenue Act (including for these purposes, the Unclaimed Money Act 1971). This discretion is found in ss 6H and 6I of the Tax Administration Act 1994 and applies from 17 March 2020 to 30 September 2021. This variation is an exercise of that power.

COV 20/01: Variation to section HB 13(3)(b) of the Income Tax Act 2007

Variation

The Commissioner of Inland Revenue has, under the discretion provided under section 6I of the Tax Administration Act 1994, made the following statutory variation:

For an election to be an LTC (look-through company) for the 2019 income year for a company to which s HB 13(3)(b) of the Income Tax Act 2007 applies, the deadline by which that election must be received by the Commissioner is extended to include an election received by the Commissioner on or before 30 June 2020.

Application date

This variation applies from 1 April 2020 to 30 June 2020.

Dated at Wellington on 13 May 2020.

Martin Smith
Chief Tax Counsel
Inland Revenue

Background (material under this heading does not form part of the variation)

Summary of effect

1. Section HB 13(3)(b) of the Income Tax Act 2007 provides that in the case of a company that has not previously been required to file a return of income prior to the year from which they wish to be treated as an LTC (look-through company), the election must be provided before the last day for filing that return. The due date for filing that election has been extended to 30 June 2020 using s 6I of the TAA.

Provisions affected

2. Section HB 13(3)(b) of the Income Tax Act 2007.

Application of variation

3. This variation applies to all companies who wished to elect to be an LTC and had not previously been required to file a return of income. It recognises that the impact of COVID-19 will have adversely affected some companies' ability to file their election on time, and this will mean they are unable to be treated as an LTC for the year in question. For this reason, the due date for providing this election has been extended.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I
Income Tax Act 2007: s HB 13(3)(b)

COV 20/02: Variation to section EI 1 of the Income Tax Act 2007

Variation

The Commissioner of Inland Revenue has, under the discretion provided under section 6I of the Tax Administration Act 1994, made the following statutory variation:

Under s EI 1 of the Income Tax Act 2007, for a person to allocate timber income derived in an income year ending on a date between 25 March 2019 and 31 May 2019 to any one or more of the person's previous three income years, the date the application in writing must be received by the Commissioner is extended to 31 July 2020.

Application date

This variation applies from 1 April 2020 to 30 June 2020.

Dated at Wellington on 13 May 2020.

Martin Smith
Chief Tax Counsel
Inland Revenue

Background (material under this heading does not form part of the variation)

Summary of effect

1. Section EI 1 of the Income Tax Act 2007 allows a person to allocate income from the disposal of timber or right to take timber, or the disposal of land with standing timber, to previous income years. The income may be allocated between the income year in which it is derived and any 1 or more of the previous 3 income years. A person must apply in writing to the Commissioner no later than 1 year after the end of the income year in which they derive the income. The time for making that application, for income derived in an income year ending between 25 March 2019 and 31 May 2019, has been extended to 31 July 2020 using s 6I of the TAA.

Provisions affected

2. Section EI 1 of the Income Tax Act 2007.

Application of variation

3. This variation applies to a person who wishes to allocate to any 1 or more of the previous 3 income years timber income derived in an income year ending on a date between 25 March 2019 and 31 May 2019. Applications to allocate that income were due no later than one year after the end of the income year. The variation recognises that the impact of COVID-19 has adversely affected some taxpayers' ability to make an application on time and would otherwise mean they are unable to spread the income to previous income years. For this reason, the due date for making the application has been extended.

References

Legislative references
Tax Administration Act 1994: ss 6H and 6I
Income Tax Act 2007: s EI 1

COV 20/03: Variation of the application of s 15D(2) Goods and Services Tax Act 1985 to extend time to make an application to change GST taxable period

Variation

The Commissioner of Inland Revenue has, under the discretion provided under section 6I of the Tax Administration Act 1994, made the following statutory variation, to enable a change from 6-month to 1-month taxable periods to take effect earlier:

Regarding the 6-month GST taxable period ending on 31 March 2020, this period is extended to 30 June 2020 by s 6I(1)(a)(iii) of the TAA but only for making the election to change a person's taxable period to 1 month. This means that an election made before 30 June 2020 to change from a 6-month taxable period to a 1-month taxable period will take effect, under s 15D(2) of the Goods and Services Tax Act 1985, from 1 April 2020.

This variation is subject to the following conditions:

- The person notifies the Commissioner before 30 June 2020 that they wish their election to have this effect; and
- The person does not subsequently elect to change from a 1-month taxable period before 30 September 2020.

Application date

This variation applies from 6 June 2020 to 30 June 2020.

Dated at Wellington on 06 June 2020.

Martin Smith
Chief Tax Counsel
Inland Revenue

Background (material under this heading does not form part of the variation)

Summary of effect

1. Section 15(3) of the Goods and Services Tax Act 1985 allows a person to apply to the Commissioner to have a one-month taxable period for GST. Under s 15D(2) of the GST Act, the change in taxable period takes effect at the end of the taxable period in which the person applies. For a person who had a six-month taxable period ending 31 March 2020 but who did not apply to change to a one-month taxable period before 31 March 2020, the time for making that application has been extended to 30 June 2020 using s 6I of the TAA.

Provisions affected

2. Section 15D(2) of the Goods and Services Tax Act 1985.

Application of variation

3. This variation applies to a person who wishes to change from a six-month taxable period to a one-month taxable period for GST. A person is permitted to do so under s 15(3) of the GST Act, but the change will take effect from the end of the taxable period in which they apply. For a person who did not apply before 31 March 2020, the change will not take effect until 1 October 2020. The variation recognises that the impact of COVID-19 means that some taxpayers may now wish to file on a one-monthly basis to provide earlier access to any GST refunds, but will not have been able to consider whether to apply, or make the application, before 31 March 2020. It allows the change of taxable period to take effect much sooner than would otherwise be the case.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I
Goods and Services Tax Act 1985: s 15D

COV 20/04: Variation in relation to s DB 31 Income Tax Act 2007 to extend time for writing off bad debts

Variation

The Commissioner of Inland Revenue has, under the discretion provided under section 6I of the Tax Administration Act 1994, made the following statutory variation:

For the 2020 income year, the timeframe by which a debt must be written off as bad in order for a deduction to be available in that income year is extended to 30 June 2020.

This is subject to the conditions that:

- The taxpayer did not write off their debt as bad by the end of the 2020 income year as a result of the impacts of Covid-19.
- The taxpayer takes into account only information that was relevant as at the end of their 2020 income year.

Application date

This variation applies from 1 April 2020 to 30 June 2020.

Dated at Wellington on 11 June 2020.

Martin Smith
Chief Tax Counsel
Inland Revenue

Background (material under this heading does not form part of the variation)

Summary of effect

1. In order to claim a deduction in an income year for a bad debt, section DB 31 of the Income Tax Act 2007 requires that the debt has been written off as bad in the income year. For the 2020 income year, the time within which the debt must be written off as bad has been extended to 30 June 2020 using s 6I of the TAA.

Provisions affected

2. Section DB 31 of the Income Tax Act 2007.

Application of variation

3. This variation applies to a person who wishes to claim a deduction in the 2020 income year for a bad debt. The variation recognises that the impact of COVID-19 means that some taxpayers may not have been able to write off debts as bad during their 2020 income year, and it extends the time for writing off debts as bad to 30 June 2020. The variation is subject to the two conditions that the person did not write off the debt by the end of the 2020 income year as a result of the impacts of Covid-19, and that the person takes into account only information that was relevant as at the end of their 2020 income year.

References

Legislative references
Tax Administration Act 1994: ss 6H and 6I
Income Tax Act 2007: s DB 31

COV 20/05: Variation in relation to s RP 17B(4) of the Income Tax Act 2007 to extend time for tax pooling transfers

Variation

The Commissioner of Inland Revenue has, under the discretion provided under section 6I of the Tax Administration Act 1994, made the following statutory variation:

Section RP 17B(4)(a) and (b) of the Income Tax Act 2007 are varied to allow a taxpayer to ask a tax pooling intermediary to arrange the transfer of an amount to satisfy an obligation for provisional tax (other than under the aim method), terminal tax or use of money interest on the provisional tax or terminal tax for the 2019 income year, on or before the date that is 365 days after a person's terminal tax date for the 2019 tax year.

This is subject to the conditions that:

- The transfer relates to a contract the taxpayer has with the tax pooling intermediary that is in place on or before 21 July 2020 to purchase tax pooling funds.
- In the period between January 2020 and July 2020 the taxpayer's business must have experienced (or for June and July 2020 be expected to experience) a significant decline in actual (or predicted) revenue which means that in respect of the 2019 tax year the taxpayer was either (a) unable to satisfy their existing commercial contract with a tax pooling intermediary or (b) was, prior to this variation, not able to enter into a commercial contract with a tax pooling intermediary; and that decline in actual or predicted revenue is related to COVID-19.

Application date

This variation applies from 11 June 2020 to 7 April 2021.

Dated at Wellington on 11 June 2020.

Martin Smith
Chief Tax Counsel
Inland Revenue

Background (material under this heading does not form part of the variation)

Summary of effect

1. In order to use funds in a tax pooling account to satisfy a tax obligation for the 2019 income year, section RP 17B(4) of the Income Tax Act 2007 requires a transfer request to be made on or before either 75 or 76 days of terminal tax date. For the 2019 income year, the time within which a request must be made has been extended to 365 days after terminal tax date using s 6I of the TAA.

Provisions affected

2. Section RP 17B of the Income Tax Act 2007.

Application of variation

3. This variation applies to a person who wishes to use funds in a tax pooling account to satisfy an obligation for provisional tax or terminal tax for the 2019 tax year. The variation recognises that the impact of COVID-19 means that some taxpayers who would otherwise have made use of tax pooling have been unable to do so due to cashflow difficulties. The variation is subject to the two conditions requiring a contract with a tax pooling intermediary to be in place on or before 21 July 2020, and that the person's business must have experienced, or will be expected to experience a significant decline in revenue as a result of COVID-19.

References

Legislative references
Tax Administration Act 1994: ss 6H and 6I
Income Tax Act 2007: s RP 17B

National Average Market Values of Specified Livestock Determination 2020

Note to this determination

This note does not form part of the national average market values of specified livestock determination 2020 (the determination) but are produced to aid Inland Revenue staff, taxpayers and their agents in their understanding of how the values contained in this determination are arrived at and how they should be used.

Section EC 15 of the Income Tax Act 2007 (the Act) requires the Commissioner of Inland Revenue (the Commissioner) to make a determination declaring the national average market values (NAMV) for an income year for each class of specified livestock set out in Schedule 17 of the Act. This determination is published in May each year.

These NAMVs are used by taxpayers that are in the business of livestock farming to value their livestock on hand where the taxpayer has elected to use the herd scheme to value livestock in an income year.

As the name of this determination suggests, NAMVs provide the national average market value of specified livestock classes. As such they may not always reflect the market value of the livestock of a particular taxpayer, or even of a particular region. This being so, the values are not intended to be used for any other purpose than that for which they are produced; valuing livestock of taxpayers who have elected to value their livestock under the herd scheme in the income year for which the determination relates.

In order to ascertain the market value of the various classes of livestock the Commissioner contracts with a number of experienced livestock valuers situated throughout the country[1]. Each valuer is asked to provide the market value of the various specified livestock classes located in their region. There is generally more than one valuer contracted for each region. The market valuations required are for "good quality on-farm animals (capital stock)" as at 30 April. From these values the CIR then calculates the national average market value for each livestock class. In the case of sheep, beef, dairy cattle and deer (red, wapiti and elk) classes a weighted average is used (based on total livestock numbers for a type of livestock in that region compared to the national herd numbers for that type of livestock[2]). Because of their comparatively low numbers, a straight average is used for the remaining livestock types.

[1] 38 valuations were obtained for the 2020 determination.

[2] Numbers are based on data collated by Statistics New Zealand.

National Average Market Values of Specified Livestock Determination 2020

This determination may be cited as "The National Average Market Values of Specified Livestock Determination, 2020".

This determination is made in terms of section EC 15 of the Income Tax Act 2007 and shall apply to specified livestock on hand at the end of the 2019-2020 income year.

For the purposes of section EC 15 of the Income Tax Act 2007 the national average market values of specified livestock, for the 2019-2020 income year, are as set out in the following table.

NATIONAL AVERAGE MARKET VALUES OF SPECIFIED LIVESTOCK

Type of livestock	Class of livestock	Average Market Value per Head $
Sheep		
	Ewe hoggets	108.00
	Ram and wether hoggets	105.00
	Two-tooth ewes	177.00
	Mixed-age ewes (rising three-year and four-year old ewes)	156.00
	Rising five-year and older ewes	128.00
	Mixed-age wethers	105.00
	Breeding rams	340.00
Beef Cattle	***Beef breeds and beef crosses:***	
	Rising one-year heifers	526.00
	Rising two-year heifers	888.00
	Mixed-age cows	1090.00
	Rising one-year steers and bulls	678.00
	Rising two-year steers and bulls	1035.00
	Rising three-year and older steers and bulls	1315.00
	Breeding bulls	2950.00
Dairy Cattle	***Friesian and related breeds, Jersey and other dairy breeds:***	
	Rising one-year heifers	737.00
	Rising two-year heifers	1222.00
	Mixed-age cows	1525.00
	Rising one-year steers and bulls	471.00
	Rising two-year steers and bulls	818.00
	Rising three-year and older steers and bulls	1186.00
	Breeding bulls	1711.00
Deer	***Red deer, wapiti, elk, and related crossbreeds:***	
	Rising one-year hinds	236.00
	Rising two-year hinds	405.00
	Mixed-age hinds	430.00
	Rising one-year stags	283.00
	Rising two-year and older stags (non-breeding)	455.00
	Breeding stags	1990.00

Type of livestock	Class of livestock	Average Market Value per Head $
Deer (continued)	***Other breeds:***	
	Rising one-year hinds	157.00
	Rising two-year hinds	230.00
	Mixed-age hinds	265.00
	Rising one-year stags	169.00
	Rising two-year and older stags (non-breeding)	261.00
	Breeding stags	655.00
Goats	***Angora and angora crosses (mohair producing):***	
	Rising one-year does	92.00
	Mixed-age does	117.00
	Rising one-year bucks (non-breeding)/wethers	52.00
	Bucks (non-breeding)/wethers over one year	66.00
	Breeding bucks	448.00
	Other fibre and meat producing goats (Cashmere or Cashgora producing):	
	Rising one-year does	74.00
	Mixed-age does	104.00
	Rising one-year bucks (non-breeding)/wethers	51.00
	Bucks (non-breeding)/wethers over one year	68.00
	Breeding bucks	374.00
	Milking (dairy) goats:	
	Rising one-year does	321.00
	Does over one year	430.00
	Breeding bucks	588.00
	Other dairy goats (culls)	84.00
Pigs		
	Breeding sows less than one year of age	204.00
	Breeding sows over one year	306.00
	Breeding boars	442.00
	Weaners less than 10 weeks of age (excluding sucklings)	87.00
	Growing pigs 10 to 17 weeks of age (porkers and baconers)	144.00
	Growing pigs over 17 weeks of age (baconers)	205.00

This determination is signed by me on the 26th day of May 2020.

Rob Falk
National Advisor
Technical Standards, Legal Services

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 20/03: Requests to amend assessments

Introduction

This Statement sets out Inland Revenue's practice for exercising the Commissioner of Inland Revenue's (the Commissioner) discretion under s 113 of the Tax Administration Act 1994 (the TAA) to amend assessments to ensure their correctness. It is intended both to provide direction to those Inland Revenue staff delegated to use the discretion in s 113 and to give guidance to taxpayers and their advisors in formulating requests for amendment.

All legislative references in this Statement refer to the TAA unless stated otherwise.

Application

This Statement applies from 2 June 2020 and replaces SPS 16/01 Requests to amend assessments published in *Tax Information Bulletins* Vol 28, No 4 (May 2016): 12 and Vol 29, No 3 (April 2017): 43.

Standard practice

Summary

Section 113 and the Commissioner's discretion

1. The Commissioner acknowledges that in a self-assessment regime, taxpayers will occasionally take an incorrect tax position and that correcting these positions is an integral part of tax administration. Section 113 contains a broad discretion allowing the Commissioner to amend assessments to ensure their correctness.
2. The Commissioner's practice is generally to use the discretion to correct a tax position, subject to the criteria described in this Statement.
3. The criteria applied when determining whether to exercise the s 113 discretion are based on the care and management principles contained in ss 6 and 6A.

Care and management of the taxes

4. Section 6 requires that the Commissioner's best endeavours are used to protect "the integrity of the tax system", including public perception of that integrity. In carrying out this function, the Commissioner is bound not only to protect the rights of taxpayers to have their liability determined fairly, impartially and according to law, but also to have regard to the responsibilities of taxpayers to comply with the law. Section 15B sets out taxpayers' responsibilities.
5. To discharge her s 6A(2) duties, the Commissioner must compare the available courses of action with the likely effect on the amount of net revenue collected over time. To do this, the Commissioner must consider the short- and long-term implications of each course of action and have regard to all three factors listed in s 6A(2): available resources, the promotion of compliance (especially voluntary compliance) by all taxpayers and the compliance costs that they incur.
6. Inland Revenue has limited resources to undertake what can sometimes be a lengthy verification process to determine whether an assessment should be amended. Accordingly, it is consistent with the taxpayer obligation under s 15B and the Commissioner's duty under ss 6 and 6A(2) to limit the amount of time and other resources that will be spent investigating amendment requests. Because of this, not all requested amendments will necessarily be made.

The process for considering s 113 requests

7. In considering s 113 requests, the Commissioner must be assured that the amendment the taxpayer seeks will ensure the assessment is correct when amended, even if it was also correct beforehand. Where the Commissioner is not initially persuaded that the amendment requested will result in a correct assessment, a decision must be made whether to commit Inland Revenue's limited resources to considering the request further.
8. Where the Commissioner does decide to commit appropriate resources to the issue and is satisfied that making the requested amendment will result in a correct assessment being made, the assessment will be amended. This is unless there is a residual reason, other than her limited resources, why the discretion should not be exercised.
9. The Commissioner's process for considering requests under s 113 is carried out under four possible phases (see further at [36]):
   - An initial examination of the request to see if the matter can be disposed of simply (either by making the amendment or not).
   - If it cannot, consideration of whether the Commissioner should apply additional resources to consider the request further.
   - Determine whether a correct assessment will result from the requested amendment.
   - Finally, determine whether there is any residual reason (other than limited resources) why the Commissioner should not make the requested amendment.

Considering simple amendment requests and voluntary disclosures

10. The Commissioner will follow the process set out in this Statement in determining whether the amendment requested will lead to the making of a correct assessment.
11. There may be very clear errors that require little consideration. For instance, if a request is made to correct an arithmetic, transposition or keying error made by either the taxpayer or the Commissioner, the correction will be made without further consideration.

Factors the Commissioner may consider in more complex cases

12. When exercising the s 113 discretion in more complex cases, the Commissioner will evaluate any amendment request using the care and management principles. To best inform this care and management decision, the Commissioner will objectively consider the relevant factors discussed in this Statement (as required on a case-by-case basis).

How does a taxpayer make a request to amend their assessment?

13. Requests to correct clear errors, such as arithmetic, transposition and keying errors, may be made to Inland Revenue by telephone or in writing. The term "in writing" includes a taxpayer modifying their tax return by using myIR, as well as other communication with the Commissioner by electronic means.
14. Requests to amend returns where the tax effect of the amendment requested is $10,000 or less may generally be made by telephone or in writing.
15. Requests to amend returns where the tax effect of the amendment requested is greater than $10,000 must be made in writing.
16. Taxpayers or their agents making amendment requests must supply the Commissioner with all relevant information to substantiate the merits of the amendment requested.

How does s 113 reconcile with s 113A and the proviso to s 20(3) of the Goods and Services Tax Act 1985?

17. Where the taxpayer is able to make the required correction for themselves in a later period (under s 113A or the proviso to s 20 (3) of the Goods and Services Tax Act 1985 (the GST Act)) the Commissioner's practice is (generally) not to expend limited resources considering whether to exercise the discretion under s 113. This is because both s 113A and the proviso to s 20(3) of the GST Act provide a specific mechanism by which the taxpayer is able to self-correct the error: the taxpayer does not need to use s 113 to make the correction. This outcome is more consistent with the scheme of the legislation which requires that taxpayers take responsibility for ensuring they make correct assessments.

What is the relationship between s 113 and s 22G of the TAA?

18. Section 22G(3) provides that a qualifying individual may amend the income information in their final account at any time before their terminal tax date for the tax year. The amended income information forms a new, original assessment and any earlier assessment for the tax year is regarded as not having been made. Because of this s 113 is not engaged in amending an assessment.

19. When a qualifying individual wishes to amend the information in their final account after their terminal tax date, or a taxpayer who is an "other income earner" wishes to amend their assessment after their account has been finalised, the taxpayer must either request an amendment from the Commissioner per s 113 or they may choose to issue a notice of proposed adjustment (NOPA) and enter the disputes process.

Detailed discussion

Section 113 and the Commissioner's discretion

20. The Commissioner acknowledges that both taxpayers and the Commissioner will occasionally make errors and that correcting these is an integral part of tax administration.

21. Section 113 contains a broad discretion allowing the Commissioner to amend assessments to ensure their correctness. This Statement outlines the general principles that will be followed when a taxpayer requests that an amendment be made to their assessment.

22. The Commissioner will generally agree to amend assessments where the requested amendment is clearly correct. This is despite the fact that, as a matter of law, the Commissioner cannot be compelled either to investigate amendment requests or subsequently to amend the assessments.[1]

23. In determining whether to exercise the s 113 discretion, the Commissioner will evaluate an amendment request using the care and management principles in ss 6 and 6A balanced with the obligations of taxpayers to make correct self-assessments.

24. The care and management principles are discussed below. More detailed guidance can be found in Interpretation Statement IS 10/07 *Care and Management of the taxes covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994.*[2]

Care and management of the taxes

Section 6: Integrity of the tax system

25. Section 6 requires the Commissioner to use her best endeavours to protect "the integrity of the tax system", including public perception of that integrity. In carrying out this function, the Commissioner is bound not only to protect the rights of taxpayers to have their liability determined fairly, impartially and according to law, but also to have regard to the responsibilities of taxpayers to comply with the law. Section 15B sets out taxpayers' responsibilities and, in particular, the obligations to:

    (aa) if required under a tax law, make an assessment:

    (a) unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:

    (b) deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:

26. Given this, the Commissioner may consider a taxpayer's compliance history when deciding whether to exercise the discretion in s 113. Although not decisive, a particularly poor compliance history may support the Commissioner declining to make the requested amendment where, in her opinion, making such an amendment would not promote public perception of the integrity of the tax system or voluntary compliance. To decline a s 113 request in this circumstance will be a rare occurrence and will require the approval of a senior officer (see further at [57] and [58] below).

Section 6A

27. Section 6A (together with s 6) was enacted to provide the framework within which the Commissioner administers the tax system. Section 6A(2) clarifies the Commissioner's overall objective in carrying out those functions.

[1] *Commissioner of Inland Revenue v Wilson* (1996) 17 NZTC 12,512 (CA); *Lawton v Commissioner of Revenue* (2003) 21 NZTC 18,042 (CA).

[2] More information on this statement can be found at **www.taxtechnical.ird.govt.nz/** (search keywords: Care and management).

28. To discharge her s 6A(2) duties, the Commissioner must compare the available courses of action with the likely effect on the amount of net revenue collected over time. To do this, the Commissioner must consider both the short- and long-term implications of each course of action and have regard to all three factors listed in s 6A(2). These factors are:
    - the resources available to the Commissioner (s 6A(2)(a));
    - the importance of promoting compliance, especially voluntary compliance, by all persons with the Inland Revenue Acts (s 6A(2)(b)); and
    - the compliance costs incurred by persons (s 6A(2)(c)).
29. The practical effect of these words is that the Commissioner can adopt courses of action that forgo the collection of the highest net revenue:
    - in the short term, if it is considered that this will enable the collection of more net revenue in the longer term; and
    - from particular taxpayers, if it is considered that this will enable more net revenue to be collected from all taxpayers.
30. The words "despite anything in the Inland Revenue Acts" in s 6A(2) mean that the Commissioner can carry out the course of action she considers will collect over time the highest net revenue that is practicable within the law, even if it results in less tax being collected than is imposed, or required to be collected, by another provision. However, the words "within the law" in s 6A(2) also mean that the Commissioner must act consistently with the rest of the Inland Revenue Acts.

Resources available to the Commissioner

31. Inland Revenue has limited resources to undertake what sometimes could be lengthy verification processes to determine whether the proposed amendment would result in a correct assessment. While the Commissioner is obligated to collect over time the highest net revenue that is practicable within the law under s 6A(2), the Commissioner must take into account the resources available, the promotion of compliance (especially voluntary compliance) by all taxpayers and any compliance costs incurred by taxpayers.
32. Accordingly, it is consistent with the obligation under s 6A(2) for the Commissioner to limit the amount of time and other resources that will be spent investigating amendment requests. Not all requested amendments will necessarily be made. Ensuring a balance between time spent considering an amendment request and other activities is also consistent with the obligation to protect the integrity of the tax system under s 6.
33. The Commissioner will be reluctant to agree to investigate the correctness of an amendment request that would require the application of disproportionate amounts of Inland Revenue resources (that is, excessive resources when compared to the amount of tax at stake). This is not to say that the Commissioner will only ever use minimal resources to determine the correctness of amendment requests or decline complex amendment requests. The extent and relevance of a taxpayer's disclosure and the amount of tax involved will potentially indicate the amount of resources required to determine whether an amendment will result in a correct assessment.

The process used to consider s 113 requests

34. As stated in *Westpac Securities NZ Ltd v Commissioner of Inland Revenue*[3] (*Westpac*), "…the focus of the inquiry as to whether the power was available would be centred on whether the amendment the taxpayer seeks to have made will ensure the assessment is correct when amended, even if it was also correct beforehand".
35. Once a taxpayer is able to show that making the requested amendment will result in a correct assessment being made, the next step involves "the Commissioner's decision whether or not to exercise her discretion in a particular case".[4]
36. The Commissioner's process for considering requests under s 113 is carried out under four possible phases:
    - Phase one: An initial examination of the request. If it is clear that an error has occurred and that the error can be easily corrected, then the amendment will be made (subject to the application of phase four). In that case, the request will not have to progress through phases two and three. Conversely, if it is clear that agreeing to the request will not result in a correct assessment, the request will be declined at this point.
    - Phase two: If it is unclear whether agreeing to the request will result in a correct assessment being made, the Commissioner will need to consider whether additional limited resources should be applied to consider the request further.
    - Phase three: In cases where it is decided to apply further resources, the Commissioner will consider whether a correct assessment will result from the requested amendment.

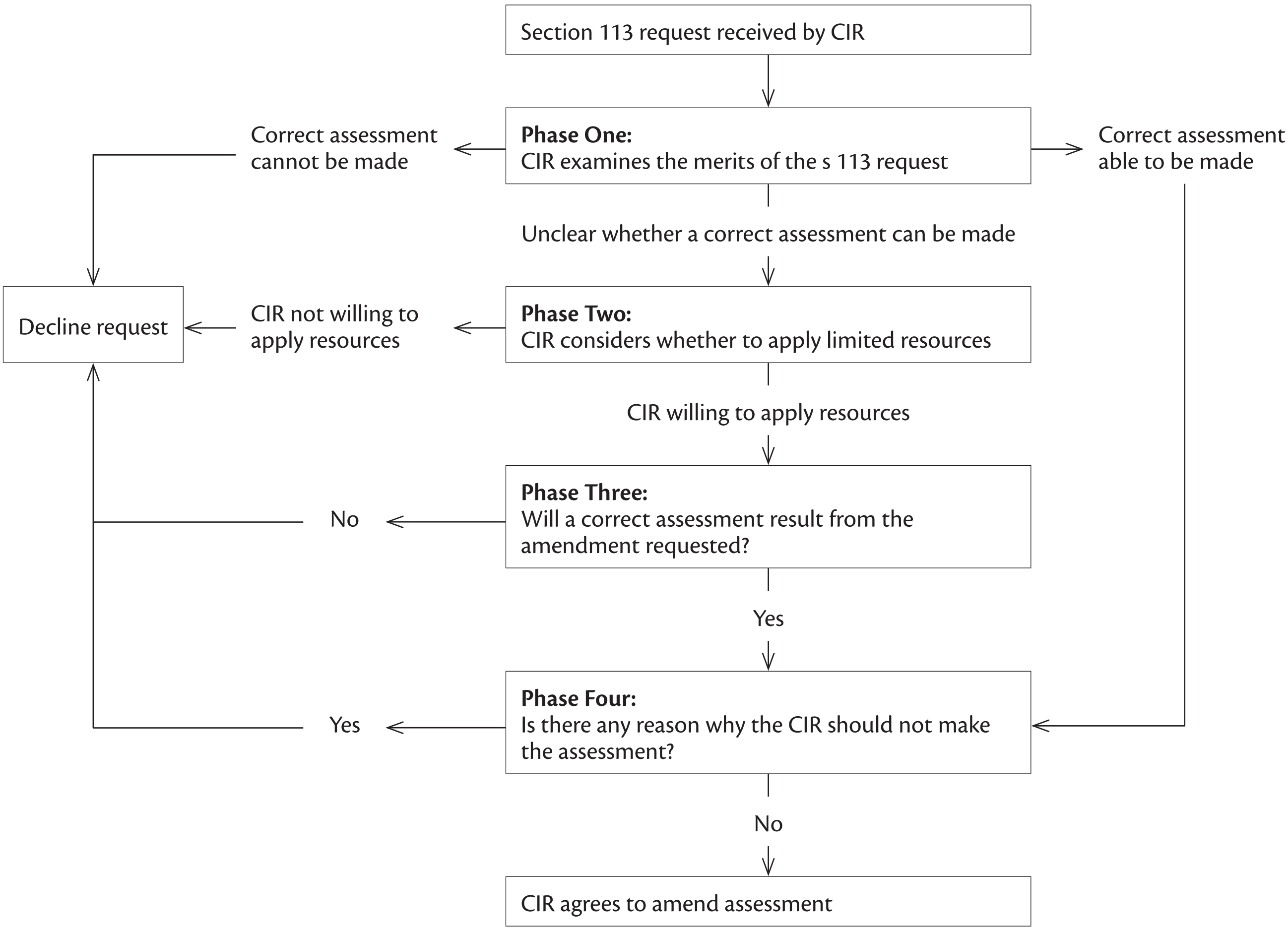
[3] *Westpac Securities NZ Ltd v Commissioner of Inland Revenue* [2014] NZHC 3377, (2014) 26 NZTC ¶21-118 at [65].

[4] *Westpac* at [66].

STANDARD PRACTICE STATEMENTS

- Phase four: Determine whether there is any residual reason (other than the Commissioner's limited resources) why the Commissioner should not make the requested amendment.

The following flowchart illustrates the progress of a s 113 request through the four phases:



Each of these phases is summarised below:

Phase One: Initial examination of request

37. **At this phase, the Commissioner considers the appropriate merits of all s 113 requests.** The Commissioner receives thousands of s 113 requests each year, pointing out errors that have been made by taxpayers or the Commissioner, and requesting that the appropriate assessment be amended. This consideration is based on the facts that are presented by the taxpayer (and those that may already be known to the Commissioner). In the vast majority of these cases the facts are clear that either making the amendment will correct an error and therefore result in a correct assessment or that the amendment will not result in the correct assessment. **The aim of this phase is to act as a "filter" for a clearly correct/incorrect request. Once the Commissioner has considered the merits of the request, the Commissioner will either decline the request or progress it directly to phase four (with the minimum use of the Commissioner's resources possible).** There can be a number of factors that determine whether a request is able to be progressed to phase four (or declined) at this point, for instance:

- If the amendment is being requested to correct an arithmetic, transposition or keying error made by either the taxpayer or Commissioner, the correction will be made without further consideration. See [38].
- Has the taxpayer provided all the required information and has the request been made in the appropriate format? If not, the matter will not proceed unless the necessary information is provided. Note that this factor might also emerge at a later stage, when the Commissioner has begun to examine the question more closely, in which case the matter might not proceed further unless the necessary information can be easily provided by the taxpayer. See further at [66] to [69].
- Is the taxpayer under investigation by Inland Revenue or involved is a dispute with the Commissioner? If so, the request is unlikely to proceed, subject to the outcome of any dispute. See further at [46] and [77] to [80].

- Is the amendment able to be made by the taxpayer in a later period? See further at [88] to [99].
- Is the period that the taxpayer wishes to have amended subject to a statutory time bar? For example, where the Commissioner is unable to refund an amount of tax because the period subject to the amendment request is time barred, resources will not be applied to considering the request for that statute-barred period further. See further at [81] to [86].

Arithmetic, transposition and keying errors

38. As already stated, if a request is made to correct an arithmetic, transposition or keying error made by either the taxpayer or the Commissioner, the correction will be made without further consideration. The Commissioner has made a decision, based on the care and management principles discussed above, to allocate resources to ensure these previously incorrect assessments are corrected. This is on the basis that the amendment is straight-forward and the amount of resources required is minor.

Phase Two: Whether the Commissioner will apply resources to consider the request further

39. **Given the correctness of the majority of requests are clear at phase one (see above at [37]), these will not need to be considered at phase two. Those cases that do need to be considered at phase two will be cases where, following the phase one consideration of the merits of the request, it remains uncertain whether acceding to the request will result in a correct assessment. These cases will be more complex. At this second phase, the Commissioner must decide whether to devote her limited resources to resolving a request when the correctness of that request remains uncertain after the initial examination.** In some cases, a balancing of the factors set out below will mean that the Commissioner can simply decide under s 113 to take the matter no further. This is because the courts have recognised that the allocation of resources is a matter for the Commissioner, who is not obligated to allocate resources to determine whether a proposed amendment is correct. Resource consideration commences at this phase and continues throughout the s 113 process.

40. The more easily verifiable the correctness of the proposed amendment is, the more likely it will be that the Commissioner will allocate resources to making the requested amendment. Where the proposed adjustment is merely arguable (or involves disputed facts or statutory interpretation) it is less likely that the Commissioner will devote resources to processing the request further (see further at [43] to [46]).

Factors the Commissioner may consider at Phase Two when determining whether to devote resources

41. In circumstances where the Commissioner is not immediately certain that making the requested amendment will result in a correct assessment, the Commissioner will consider whether the request justifies the commitment of additional resources.

42. When determining whether to apply the s 113 discretion to these more complex cases, the Commissioner will evaluate any amendment request using the care and management principles (discussed at [25] to [33]). These care and management factors (that will be relevant on a case-by-case basis) will each be weighed up in reaching a decision. T**his is a balancing exercise where it will be rare for one factor to be determinative.** Even if it is decided to proceed, it may later be necessary to re-evaluate the position if, for example, further information is required or the issue becomes particularly difficult to resolve. The Commissioner may later determine that no further resources will be applied to the request.

Primacy of disputes resolution process

43. Requesting an amendment under s 113 cannot be used to circumvent the statutory disputes procedure[5]. Further, the Commissioner does not consider it appropriate to use s 113 to amend assessments when the facts of a case or the interpretation of the law relevant to those facts is at issue. Disputed facts and statutory interpretation, or instances where the facts or law is unclear, should properly be considered using the disputes resolution process.

44. The Commissioner will consider whether a taxpayer was aware that they had the disputes resolution procedure available to them. A taxpayer who knowingly does not engage with the disputes process within the available time period, and then attempts to use s 113 to challenge an assessment outside the disputes process timeframe is something that the Commissioner will take into account in deciding whether to accept or decline a request.[6]

45. To accede to a taxpayer's amendment request in these circumstances would potentially mean treating that taxpayer more advantageously than other taxpayers who have appropriately followed the disputes process regime. Section 6(2)(c) requires that the Commissioner protect the rights of taxpayers to have their tax affairs *treated with no greater or lesser favour than the tax affairs of other persons*. As Wylie J observed in *Arai Korp* (at [68]); "A taxpayer who has sat on his or her hands and done nothing, is not entitled to expect preferential treatment".

[5] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, (2011) 25 NZTC 20-103.

[6] *Arai Korp Limited v Commissioner of Inland Revenue* [2013] NZHC 958, (2013) 26 NZTC 21,014.

46. As stated previously (at [37]) the Commissioner will not amend assessments while any item of those assessments remains the subject of a current dispute under Part 4A of the TAA. If the period and tax type relating to an amendment request is already under investigation, the Commissioner will make any appropriate consequential amendments at the conclusion of the investigation, or if the result of the investigation is disputed, at the conclusion of the dispute. That is, if the Commissioner is already devoting resources to verify the correctness of an assessment, all reasonable consequential effects of the investigation (including the amendment request) will be considered as part of that process. See [77] to [80] for further discussion.

Whether the subject matter of the request could apply to other taxpayers

47. The focus of this factor is on whether the request could also have application for other taxpayers and, if so, the extent to which this would impact on the Commissioner's resources. Commonly, in such cases, it will make sense for the matter to be considered further in order for the Commissioner to clarify the position for all taxpayers potentially affected. The more significant the precedential value, the more likely it is that resources will be applied.

How similar requests have been treated by the Commissioner

48. Similarly, if the Commissioner has agreed to amendments that involve the same facts and legal analysis, then this would be a factor that would generally support exercising the discretion. However, if an assessment was previously amended under s 113 but that assessment was made on what the Commissioner now considers to be an incorrect basis, then that would not provide authority for treating similar requests in the same manner.

Whether the request is a voluntary disclosure

49. The Commissioner will, as a matter of practice, always apply resources to considering a s 113 request that amounts to a voluntary disclosure (in that the request discloses a tax shortfall). This is on the basis that resources need to be applied to considering whether the disclosure is full and complete and whether a shortfall penalty should be imposed in accordance with the process set out in SPS 19/02 *Voluntary disclosures*. Therefore, the Commissioner is not applying any additional resources in considering the s 113 request. See further at [73] to [75].

Whether the taxpayer took their original position relying on advice from the Commissioner

50. As a matter of practice, the Commissioner will generally apply public statements. However, the Commissioner is not legally bound by such statements or other advice (unless the statements are binding rulings that apply to the particular taxpayer and arrangement).[7]

51. From time to time, the Commissioner will take the view that advice that has previously been given is incorrect. This may occur, for example, where the court clarifies the law or the Commissioner takes a different view of the law.

52. Where the Commissioner has given incorrect advice (other than a binding ruling) this does not operate to change the amount of tax legally payable on the basis of the correct application of the law (because the Commissioner cannot simply choose to alter the statutory basis of an assessment[8]). However, it may mean that an assessment previously made on the basis of that advice is now incorrect. Accordingly, that assessment may be corrected by the Commissioner following the application of the principles set out in this Statement. For example, the assessment may be corrected provided it is possible to establish the correct position without undue application of the Commissioner's resources.

53. The Commissioner's statement: *Status of the Commissioner's advice*[9] fully sets out the status of advice that is given by the Commissioner. It discusses the circumstances in which a change of view will be applied retrospectively and may therefore result in the approval of a request to amend existing assessments made in reliance on the former view of the Commissioner.

Whether there has been a delay in making the request

54. This factor relates to the length of time since the original position was first taken, when the taxpayer became aware of the issue, or between the taxpayer becoming aware of the issue and the s 113 request being made.

55. When a substantial amount of time has passed between the events relevant to the proposed amendment and the request, it may be difficult for the Commissioner to ascertain and/or verify the relevant facts.

[7] *Commissioner of Inland Revenue v Ti Toki Cabarets* (1989) Ltd (2000) 19 NZTC 15,874 (CA); *Lemmington Holdings Ltd (No 2) v Commissioner of Inland Revenue* (1983) 6 NZTC 61,576 (HC); *Westpac Banking Corporation v Commissioner of Inland Revenue* (2008) 23 NZTC 21,694 (HC).

[8] *Vestey v IRC* (1979) 3 All ER 976 (HL); *R v IRC, ex p Wilkinson* [2006] 1 All ER 529 (HL).

[9] More information on this statement may be found **www.taxtechnical.ird.govt.nz/** (search keywords: status of Commissioner's advice).

The size of the proposed amendment

56. If the size of the amendment is large in absolute terms or material for the taxpayer, this may support the Commissioner devoting resources to determine the correctness of the requested amendment. Conversely, very small amounts may not justify the allocation of resources when the care and management factors are viewed as a whole (unless the Commissioner considers that the matter is very straightforward). However, this factor should never be decisive.

Taxpayer's compliance history

57. The Commissioner may take a taxpayer's compliance history into consideration when deciding whether to apply resources to an amendment request. Although rarely decisive, a particularly poor compliance history may support a decision not to devote resources to consider the correctness of the requested amendment.[10] This may occur, for instance, when a taxpayer's compliance history means the Commissioner is unable to accept the evidence for the requested amendment at face value and considers that further investigation is required.

58. Agreeing to the requested amendment in this circumstance, without further investigation, could be seen as undermining public perception of the integrity of the tax system and voluntary compliance.

Any other considerations relevant to the particular case

59. Recognising the broad discretionary power contained in s 113, the above list of factors is intended to be comprehensive, but not exhaustive. There may be other considerations arising out of a particular case that are relevant in determining what impact the proposed course of action for that particular case would have on voluntary compliance and on the integrity of the tax system, including public perception of that integrity.

Phase Three: Whether a correct assessment will result from the requested amendment

60. Where it is decided to apply additional resources to consider the requested amendment (which will most often be the case), the Commissioner will then consider the merits of the request and proceed accordingly. This may require the taxpayer to provide further information and/or additional legal analysis. It is noted that this step may take some time. The position requested must be consistent with the Commissioner's view of the law on the facts available. If, after examining the request, the Commissioner concludes that a correct assessment can be made, the request will be progressed to phase four. However, if the requested position is contrary to the Commissioner's view of the law, or the Commissioner remains uncertain that a correct assessment can be made, the request will be declined. In addition, if the commitment of resources proves to be much greater than anticipated in the context of the matters raised during this phase, the request will revert to phase two and the issue of the Commissioner's resources will be reconsidered.

Phase Four: Final considerations: Whether the discretion will always be exercised

61. When the Commissioner is satisfied the amendment requested will lead to the making of a correct assessment, that assessment will be made unless circumstance exists that suggests that, on balance, the integrity of the tax system will be undermined by the making of that assessment. These circumstances can include, for example:

    (a) Where the request is, or is part of, a tax avoidance arrangement.

    This is because, while the requested adjustment may be a correct interpretation of the law when considered in isolation, the Commissioner would not be convinced that the resulting assessment would be correct if s BG 1 was applied. The Commissioner's view of the law on tax avoidance is set out in Interpretation Statement *IS 13/01 – Tax avoidance and the interpretation of sections BG 1 and GA 1 of the Income Tax Act 2007.*

    (b) Where a taxpayer requests the Commissioner to amend an assessment from one correct tax position to another position that is also correct.

    When a taxpayer requests the Commissioner amend an assessment from one correct tax position to another tax position that is also correct, the fact the original position was correct is a factor the Commissioner may take into account in deciding whether to exercise the discretion in s 113. As stated by Clifford J in *Westpac* at [67]:

    > There could be any number of valid reasons why the Commissioner may decline to exercise her discretion in situations of regretted correct tax positions including where the taxpayer appears to be gaming the system. …The fact that Westpac, a well-resourced, sophisticated and well-advised taxpayer says that it "erred" when the relevant offset elections were made may be a proposition that the Commissioner will need to consider carefully when deciding whether or not to exercise her discretion.

[10] *Arai Korp: Charter Holdings Ltd v Commissioner of Inland Revenue (No 2)* [2015] NZHC 2041, (2015) 27 NZTC 22-022.

Two matters flow from these judicial comments. Firstly, whether a taxpayer erred in taking their original tax position is a factor the Commissioner may take into account in deciding whether to make the requested adjustment. A taxpayer could be said to have "erred" where they:

(1) did not take the tax position they intended, through mistake or oversight, or

(2) the tax position they took, though technically possible and therefore already correct, was not one they would have taken if they had been in possession of all the relevant facts at the time that the original tax position was taken.

If the request arises from such a mistake or oversight, it is more likely the amendment will be made than if the request is simply the result of the taxpayer changing their mind. This is because the TAA places an obligation on taxpayers to make correct assessments and it is not contemplated that unlimited additional variations can be made at a cost to the Commissioner. Amendments should not be able to be made merely at will. On this basis, it is unlikely that the Commissioner will agree to on-going requests for changes to tax positions.

The Commissioner may also take into account the fact a taxpayer is "well resourced, sophisticated and well advised" (per Clifford J) and therefore generally better equipped to be able to provide evidence that they erred in taking their original position.

62. To allow an amendment in these circumstances may have a negative impact on public perceptions of the integrity of the tax system, especially as they relate to the concepts of statutory timeframes,[11] certainty, and their own future voluntary compliance. In these instances, the decision not to apply the discretion will be made by a senior Inland Revenue officer, after advice from the Legal Services group.

How does a taxpayer make a request to amend their assessment?

Mode of request

63. A request to correct clear errors, such as arithmetic, transposition and keying errors may be made by telephone or in writing. For the purposes of this Statement the term "in writing" includes a taxpayer modifying their existing tax return by using myIR, as well as other communications with the Commissioner by electronic means.

64. A request to make adjustments other than for these errors must be made as follows:

- Requests to amend returns where the tax effect of the amendment requested is $10,000 or less may be made by telephone or in writing. However, where the request is made by telephone, Inland Revenue may ask that the request be put in writing, especially where, for example, there are consequential adjustments that may need to be made to other returns or taxpayers.
- Requests to amend returns where the tax effect of the amendment requested is greater than $10,000 must be made in writing.

65. To ensure there is a record of the amendment request made by a taxpayer, other than a request to adjust for a clear error (as provided in [63]) the ability to accept an amendment request by telephone is limited to calls that are received by Inland Revenue at a site that has call recording. That can be achieved by calling one of Inland Revenue's 0800 numbers. Where a call is received by a site that does not have call recording, the taxpayer may be asked to put their request in writing.

Information required with request

66. The onus is on the taxpayer (or their agent) making amendment requests under s 113 to supply the Commissioner with all relevant information to substantiate the merits of the amendment requested. This information will enable the Commissioner to consider the merits of the amendment request and verify that the amendment will lead to a correct assessment. Providing all relevant information at this early stage will help to have the request dealt with in the truncated phase one/phase four process (see further at [37]).

67. Information supplied with the s 113 request should include the following (as relevant):

- the tax types and periods containing the tax position that the taxpayer wishes to amend;
- the decrease in tax liability[12] that will result from any amendment;
- a description of the original tax position, including the background circumstances and the reasons the original tax position was taken;

[11] *Wilson; Charter Holdings Ltd.*

[12] An amendment request that results in an increase in the tax payable is a voluntary disclosure and will be dealt with by following the process set out in SPS 19/02 *Voluntary disclosures*. See [73] to [75] below

- the nature of the amendment, including any relevant tax laws;
- how and why the need for the amendment was identified;
- details of any incorrect advice given directly to the taxpayer by Inland Revenue and how the taxpayer relied on that advice;
- the action required to ensure correctness;
- all relevant documents and records or other information supporting the amendment request;
- whether the taxpayer is aware of any relevant view published by the Commissioner and the extent to which the taxpayer's amended tax position is consistent with that published view.

Where an amendment request is made by a taxpayer to modify an existing return using myIR, much of the above information will be supplied while undertaking that modification. The additional information that is required can be provided by the taxpayer in the space that provides for the "description" of the "amendment information".

68. If insufficient information is provided to enable the Commissioner to confirm that a correct assessment will result from the requested amendment, the request may be declined, or the taxpayer will be asked to supply the required information (if this is known). Where a request is declined because of insufficient information, the taxpayer is able to reapply once the requisite information is obtained.

69. As already stated, whether the Commissioner will devote resources to determine the correctness of the amendment requested is something that will continue to be considered throughout the verification process, using care and management principles. The Commissioner must make appropriate resourcing decisions using these principles, regardless of the effort and resources committed by the taxpayer.

Amending assessments

Advice to taxpayers

70. Where the decision is made to decline to amend the assessment, the Commissioner will advise the taxpayer or their agent of the decision and the reasons the request was declined. Where the request has been made by telephone, the decision to decline and the reasons for declining the request may be given during the telephone call. If a final decision cannot be given at the time the telephone call is received, the final decision (to decline the request, together with the reasons for declining) may be given either by a telephone call or in writing to the taxpayer (or their agent).

Consequential adjustments

71. When amending an assessment, the Commissioner will ensure that all consequential adjustments to other tax types and/or periods (including other taxpayer's assessments) are made once they are confirmed by the affected taxpayers. That may mean that in some cases the Commissioner will require further information before making such consequential amendments.

Fresh or increased liability

72. Under s 113(2), if any amended assessment imposes a fresh or increased liability, the Commissioner will give notice to the taxpayer.

Voluntary disclosures

73. For the purposes of this statement, a "voluntary disclosure" is defined as any amendment request that, if accepted by the Commissioner, would result in an increase in the tax payable by a taxpayer or a decrease in the amount of any loss available to be utilised by the taxpayer.

74. Where a taxpayer makes an amendment request that is a voluntary disclosure, that disclosure must follow the process outlined in SPS 19/02 *Voluntary disclosures*[13] or any statement issued in replacement. Further information on the voluntary disclosure process may also be found in Parts 3 and 4 of the Guide: IR280 *Putting your tax returns right*.[14]

75. Once a taxpayer's voluntary disclosure has been accepted as being valid by the Commissioner, s 113 provides the legislative authority for effecting the reassessment. Generally, a similar approach to that outlined in this statement will apply, except that the Commissioner will always commit resources to the request (see [49]).

[13] More information on this statement may be found at **www.taxtechnical.ird.govt.nz/** (search keywords: SPS 19/02).

[14] More information on this guide may be found at **www.ird.govt.nz** (search keyword: IR280).

Shortfall penalties

76. Where an amendment request that constitutes a voluntary disclosure imposes a fresh liability or increases an existing liability, the taxpayer may also be liable to a shortfall penalty. Whether a shortfall penalty will be imposed and whether the penalty will be reduced to take account of the voluntary disclosure are matters that will be considered as part of the voluntary disclosure process. This is discussed further in SPS 19/02 *Voluntary disclosures*.

Related matters

Investigations

77. Inland Revenue undertakes various types of investigation (or auditing) activities. For the purposes of this Statement, an investigation means any examination of a taxpayer's financial affairs to verify that they have paid the correct amount of tax and complied with their tax obligations.

78. As previously stated (at [48]), irrespective of whether there is a current dispute, if the period and tax type relating to an amendment request is already under investigation, the Commissioner will make any appropriate consequential amendments.

79. The Commissioner may make any consequential adjustments (that is, adjustments not requested by the taxpayer under investigation) to the taxpayer's other assessments or to other taxpayers affected by adjustments resulting from the investigation. The consequential adjustments could relate to the same or different tax types.

80. If the Commissioner agrees with the amendment request, then (subject to the limitations set out below) the amendments will be incorporated into the amended assessment arising from the investigation. The Commissioner cannot amend an assessment (to reflect an amendment request) before finalising the position for the other issues arising from the investigation that affect the assessment; the Commissioner cannot issue a partial assessment. The amendments requested under s 113 will be treated in the same way as any other agreed adjustments arising out of the investigation.

Time limits on increasing assessments

81. Generally, the Commissioner cannot increase an amount previously assessed (or decrease the amount of a net loss) after the expiration of four years from the end of the tax year in which the income tax returns were provided (ss 108 and 108A).

82. As stated at [73], for the purposes of this Statement, a "voluntary disclosure" is defined as any amendment request that, if accepted by the Commissioner, would result in an increase in the tax payable by a taxpayer or a decrease in the amount of any loss available to be utilised by the taxpayer. Given this, whether the period subject to the voluntary disclosure is time barred is a matter that will be considered as part of that process.

Time limits on tax refunds

83. Before the Commissioner is able to refund an amount of overpaid tax, the s 113 discretion must first be exercised. As already stated, where the Commissioner is unable to refund an amount of tax because the period subject to the amendment request is time barred, resources will not be applied to considering the request for that time barred period. Generally, the Commissioner is unable to refund an amount of overpaid tax where the 4-year period in s 108 has expired. For all taxes (other than GST) this rule, together with a number of exceptions to it, is set out in Subpart RM of the Income Tax Act 2007.

Time limits on GST refunds

84. As with the refund of other taxes, before the Commissioner will make a refund of overpaid GST, the Commissioner must first decide whether to exercise the s 113 discretion. Where it is decided to apply resources, the general rule is that the Commissioner cannot refund an amount of overpaid GST after the expiry of the 4-year period in s 108A. The exceptions to this general rule are set out in s 45 of the GST Act. If the Commissioner is unable to refund an amount of tax because the period subject to the amendment request is time barred, resources will not be applied to considering the request for that time barred period.

Amended assessments after expiry of the 4-year time limit for increasing assessments

85. As noted above, in some instances there are exceptions to the general 4-year time limit for the Commissioner either to increase an amount assessed or make a refund. When a taxpayer requests a refund after the 4-year limitation period, the Commissioner will also incorporate any debit adjustments that would have been made but for the application of the 4-year time limit in any consideration. This will ensure the correctness of the assessment.

86. Given that (generally) the Commissioner cannot increase an assessment outside the 4-year limitation period, if the amount of any required debit adjustment exceeds the refund requested by the taxpayer, the amendment will not be made.

Default assessments

87. If the Commissioner has made assessments under s 106 (commonly known as default assessments) and the taxpayer subsequently files tax returns for the relevant periods outside the disputes resolution response periods, the Commissioner will treat the tax returns as requests under s 113. The Commissioner will generally amend the assessments under s 113 after confirming that the tax returns contain correct tax positions. In addition, if the taxpayer is within the relevant disputes resolution response periods, they should consider issuing NOPAs under s 89D(1) along with their tax returns to preserve their dispute rights in circumstances where the Commissioner declines to exercise the discretion in s 113.

The relationship between s 113 and s 113A

88. Under s 113, errors are generally required to be corrected in the return period in which they arose. However, s 113A allows taxpayers to correct some errors made in income tax, FBT or GST returns "in the next return that is due after the discovery of the error". See [91] for further discussion on how the Commissioner interprets this phrase.

89. The legislation is clear that s 113A only applies to allow a taxpayer to make an adjustment in their next return. Although s 113A is not available to the Commissioner as a means of amending a taxpayer's return, a taxpayer may request that they make the adjustment themselves (using s 113A) rather than the Commissioner making any adjustment under s 113. However, when the Commissioner determines it is more appropriate to amend the assessment using s 113, she cannot be prevented from doing so merely because the taxpayer may prefer to use s 113A to make the adjustment in their next return.

90. Section 113A may only apply where the taxpayer has provided a tax return (in which the assessment of their liability contained one or more errors) and the taxpayer (or their agent) has subsequently identified an error, which, for a single return:
    - The total discrepancy in the assessment caused by all errors is tax in the amount of $1,000[15] or less. When calculating the $1,000[16] discrepancy, income tax, FBT and GST returns are considered separately; or
    - The total tax discrepancy in the assessment caused by all errors is equal to or less than the lesser of:
    - $10,000; and
    - 2% of the taxpayer's annual gross income or output tax as applicable.[17]

91. The Commissioner accepts that it may take a taxpayer some time to confirm that an error has occurred and the extent of that error. This being so, the phrase "the next return that is due after the discovery of that error" (see [88]) means the next return after the taxpayer has completed all the enquiries necessary to confirm the quantum and extent of the error and the reason that the error occurred.

92. An adjustment made under s 113 corrects the return in which the error appeared (the initial return), albeit that the error is physically corrected in a subsequent return. As the initial return is treated as having been corrected it cannot be subsequently amended by the Commissioner in respect of that same error using s 113.

93. While the Commissioner is not prevented from exercising the discretion under s 113 where the taxpayer is able to make the required correction themselves in a later period, the Commissioner's practice is generally not to expend resources in these circumstances. This is because s 113A provides a specific mechanism by which the taxpayer is able to correct the error themselves. As such, the taxpayer does not need to request that the Commissioner amend an assessment under s 113 to make the correction.

94. Notwithstanding this, in certain circumstances the Commissioner will exercise the discretion under s 113, even where the taxpayer is entitled to make the required corrections using s 113A (per [89]). This will generally be when the taxpayer is either unable to make a subsequent adjustment or using s 113A to make that subsequent adjustment is not in the taxpayer's best interests. For example:
    - Where the error has occurred in a taxpayer's final return for that revenue type and therefore there is no future return in which to make an adjustment under s 113A;
    - Where not correcting the error in the earlier period using s 113 will negatively impact an entitlement of the taxpayer. For example, where making the amendment under s 113 will increase the taxpayer's family tax credit entitlement from that earlier date.

[15] Previously $500. Amended by s 112 of the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Act 2017, with effect from 1 April 2017.

[16] Above n 15.

[17] Inserted by s 76 of the Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019, with effect from the ate of Royal assent; 18 March 2019.

95. Taxpayers are not required to notify the Commissioner of any correction made using s 113A. However, Inland Revenue may review these adjustments as part of its investigation activity to ensure that the adjustments were correctly made. Inland Revenue expects taxpayers to maintain sufficient records to substantiate any adjustments made and explain why the errors arose in the first place. The usual time bar rules apply to adjustments made under s 113A as apply to s 113. See [81] to [86] for further discussion.

96. Further information regarding the application of s 113A may be found in *Tax Information Bulletin* Vol 31, No 4 (May 2019), at pages 64 – 66, and Tax Information Bulletin Vol 32, No 4 (May 2020) at pages 69 – 72.

The relationship between ss 113, 113A and the proviso to s 20(3) of the GST Act

97. When a registered person has not claimed a GST input tax deduction in an earlier taxable period then the proviso to s 20(3) of the GST Act allows the person to claim that deduction in a later period. As discussed above (at [88]), a registered person is also able to use a future return to correct some errors (including input tax deduction errors) by using the provisions of s 113A. This contrasts with the treatment of the same error(s) under s 113, which would be to correct the earlier GST return to which the input tax deduction related.

98. It is the Commissioner's view that where a registered person is seeking to correct input tax deductions that meet the thresholds set out in s 113A, that provision should be used. Any errors in input tax deduction errors that do not meet the threshold tests are more appropriately corrected under the proviso to s 20(3) of the GST Act. Notwithstanding this however, the Commissioner acknowledges that the use of either provision is discretionary and a registered person may use either s 113A or s 20(3) of the GST Act to correct an input tax deduction error. Accordingly, despite the Commissioner's view on the appropriate approach, the Commissioner accepts that either provision may be used to correct these GST errors in a subsequent return (subject to the threshold tests).

99. While the Commissioner is not prevented from exercising the discretion under s 113, the presence of the specific provision in s 20(3) of the GST Act for this type of GST error means that the Commissioner's practice is generally not to exercise the discretion in these circumstances. Because s 20(3) of the GST Act provides taxpayers with a specific mechanism to correct a GST input tax deduction error, the Commissioner's view is that a general provision such as s 113 should not be used. For further guidance see QB 09/04 *The relationship between section 113 of the TAA and the proviso to section 20(3) of the GST Act when a registered person has not claimed an input tax deduction in an earlier taxable period.*[18] This outcome is considered to be more consistent with the scheme of the legislation and in particular s 15B of the TAA, which requires taxpayers correctly determine the amount of tax payable (and make an assessment).

The relationship between s 113 and s 22G of the TAA

100. The Taxation (Annual Rates for 2018-19, Modernising Tax Administration, and Remedial Matters) Act 2019 introduced changes that simplified individuals' year-end filing obligations and introduced a simplified method for correcting errors in some circumstances, without going through the formal disputes resolution process.

Correcting pre- and post-assessment errors for qualifying individuals before their terminal tax due date

101. Section 22D(2) introduced a number of terms. The term "qualifying individual" means an individual who only earns "reportable income" for an income year and has no other income information that must be provided to Inland Revenue. "Reportable income" is defined in s 22D(3) and means income that Inland Revenue receives regular information about, typically from third parties (such as employers) during the income year or by 31 May following the end of the income year. This includes PAYE income payments, along with resident and non-resident passive income (where the third parties have the recipient's tax file number).

102. Section 22G(2) provides that a qualifying individual (or an individual who has been treated as a qualifying individual) may amend the income information in their pre-populated account prior to an assessment. Section 22G(5) also allows the Commissioner to amend incorrect pre-assessment income information.

103. Once the Commissioner is satisfied that the income information is correctly and completely recorded, the Commissioner will finalise the taxpayer's account for the tax year.[19] By virtue of s 22I, when the account is finalised the taxpayer is treated as having made a return of income that is a statement of the taxpayer's tax position and an assessment under s 92 in relation to the return.

[18] More information on this statement may be found at **www.taxtechnical.ird.govt.nz/** (search keywords: QB 09/04).

[19] Section 22H.

104. Section 22G(3) provides that a qualifying individual may also amend the income information in their finalised account at any time before their terminal tax date for the tax year. Where the taxpayer's final account is amended under s 22G(3), the amended information forms a new assessment and any earlier assessment for the tax year is regarded as not having been made. Because there is no prior assessment, s 113 is not engaged. This new process does not amend an assessment. It creates a new original assessment instead.

105. This means that when a taxpayer who is a qualifying individual (or is mistakenly treated as such), amends their final assessment under s 22G(3) prior to their terminal tax date, they will not be subject to penalties or interest (unless they are subject to the provisional tax regime).

106. Notwithstanding a taxpayer's ability under s 22G(3) to correct their final account income information, s 22G(4) clarifies that if the Commissioner has reason to believe the amended income information is incorrect, the Commissioner can decide not to accept the taxpayer's amendment and make a default assessment under s 106. This process protects the integrity of the tax system by ensuring that the Commissioner's assessment is not immediately displaced with an incorrect assessment. Rather, disputed amendments of this nature are processed under the existing disputes rules.

Correction of post-assessment errors by the Commissioner for qualifying individuals

107. Section 22G(6) provides that the Commissioner may amend income information in a qualifying individual's final account for the tax year to correct errors in the information provided to a taxpayer at any time before the end of the time bar period in s 108(1), by notifying the individual of the amendment. This means that the Commissioner can correct the final accounts without first issuing a NOPA. Section 22G(6) is limited to qualifying individuals because it reflects the way in which qualifying individual's assessments are finalised by the Commissioner. It does not apply to instances where the Commissioner disagrees with an adjustment proposed by a taxpayer (see [105] for this discussion).

Later requests for changes by qualifying individuals

108. When an individual wishes to amend the income information in their final account after their terminal tax date, s 22G(8) provides that the individual may make a request to the Commissioner to amend their final account under s 113.

Correction of post-assessment errors of "other income" earners

109. "Other income earners" are those taxpayers that have income other than reportable income, that must be provided to Inland Revenue. An individual who is an "other income earner" and has finalised their account (per s 22H(2)) but wishes to amend their assessment after the account has been finalised, must either request an amendment from the Commissioner under s 113, or they may choose to issue a NOPA if they are still within the applicable response period (s 22G(8)). Similarly, when the Commissioner wishes to make an adjustment in relation to an individual, other than a qualifying individual, s 22G(7) requires the Commissioner to first issue a NOPA under s 89B.

Other matters

110. It is noted that the use of s 22G is discretionary: a taxpayer may use the section to amend income information. Given this, the Commissioner accepts that, provided the adjustment meets the threshold tests, taxpayers may use s 113A to correct errors in a subsequent return.

111. As stated previously (at [103]) once the Commissioner is satisfied that the income information is correctly and completely recorded, the Commissioner will finalise the taxpayer's account for the tax year.[20] When the account is finalised, s 22I provides that the taxpayer is treated as having made a return of income, that is a statement of the taxpayer's tax position, and an assessment under s 92 in relation to the return. Having taken a tax position, the shortfall penalty provision may have application to any incorrect tax positions taken by a taxpayer.

112. Further information regarding the application of s 22G may be found in *Tax Information Bulletin* Vol 312, No 4 (May 2019) at pages 6-15.

Challenge rights

113. A taxpayer cannot challenge the exercise of the Commissioner's discretion (or a decision not to exercise this discretion) under s 113 by commencing proceedings in a hearing authority.[21] However, any decision under s 113 may be subject to judicial review.

[20] Section 22H.

[21] Section 138E(1)(e)(iv).

Reconsideration and complaint rights

114. If a taxpayer is concerned that their circumstances have not been given proper consideration, they should raise their concern with the staff member that considered their request and ask for the decision to be reviewed by a more senior officer.

115. If a taxpayer is still not satisfied with the level of service they receive, they can obtain more information about the Inland Revenue complaints management service at **www.ird.govt.nz/contactus/complaints-disputes-compliments/complaints** or phone 0800 274 138 (Monday to Friday, between 8am and 5pm).

This Standard Practice Statement is signed on 29 May 2020.

Natasha Delamore
Group Lead, Technical Standards, Legal Services

References

Legislative References

Of particular relevance to the Commissioner when considering requests to amend assessments are the following sections of the TAA:

Section 6: Responsibility of Ministers and officials to protect integrity of tax system

Best endeavours to protect integrity of tax system

(1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of tax and for the other functions under the Inland Revenue Acts must at all times use their best endeavours to protect the integrity of the tax system.

Meaning of integrity of tax system

(2) Without limiting its meaning, the **integrity of the tax system** includes-

(a) the public perception of that integrity; and

(b) the rights of persons to have their liability determined fairly, impartially, and according to law; and

(c) the rights of persons to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other persons; and

(d) the responsibilities of persons to comply with the law; and

(e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of persons; and

(f) the responsibilities of those administering the law to do so fairly, impartially, and according to law.

Section 6A: Commissioner of Inland Revenue

Care and management

(1) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

Highest net revenue practicable within the law

(2) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

(a) the resources available to the Commissioner; and

(b) the importance of promoting compliance, especially voluntary compliance, by all persons with the Inland Revenue Acts; and

(c) the compliance costs incurred by persons.

Section 15B: Taxpayer's tax obligations

A taxpayer must do the following:

(aa) if required under a tax law, make an assessment:

(a) unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:

(b) deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:

(c) pay tax on time:

(d) keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws:

(e) disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose:

(f) to the extent required by the Inland Revenue Acts, co-operate with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws:

(g) comply with all the other obligations imposed on the taxpayer by the tax laws:

(h) if a natural person to whom section 80C applies, inform the Commissioner that the person has not received an income statement for a tax year, if the income statement is not received by the date prescribed in section 80C(2) or (3):

(i) if the taxpayer is a natural person, correctly respond to any income statement issued to the taxpayer.

Section 22G: Amending accounts for incorrect or missing information

(1) WHEN THIS SECTION APPLIES This section applies for an individual and a tax year when incorrect information relating to the individual has been provided to the Commissioner, or information relating to the individual is missing.

(2) CORRECTION OF PRE-ASSESSMENT ERRORS BY INDIVIDUALS An individual may amend income information in their pre-populated account an any time before the account is finalised under section 22H.

(3) CORRECTION OF POST-ASSESSMENT ERRORS BY QUALIFYING INDIVIDUALS Despite subsection (2), a qualifying individual, or an individual who is treated as a qualifying individual, may amend the income information in their final account at any time before their terminal tax date for the tax year. Any earlier assessment for the tax year is regarded as not having been made.

(4) WHEN AMENDED INFORMATION INCORRECT Subsection (3) does not apply if the Commissioner has reason to believe that the amended information is incorrect. The Commissioner may decide not to accept all the information as correct and provide an assessment for the individual under section 106.

(5) CORRECTION OF PRE-ASSESSMENT ERRORS BY COMMISSIONER The Commissioner may amend information in the individual's pre-populated account for the tax year to correct errors in the information. The Commissioner must notify the individual of the amendment.

(6) CORRECTION OF POST-ASSESSMENT ERRORS BY COMMISSIONER: QUALIFYING INDIVIDUALS The Commissioner may amend information in a qualifying individual's final account for the tax year to correct errors in the information at any time before the end of the period referred to in section 108(1), notifying the individual of the amendment.

(7) CORRECTION OF POST ASSESSMENT ERRORS BY COMMISSIONER: OTHER INDIVIDUALS If the Commissioner wishes to make an adjustment in relation to the information of an individual other than a qualifying individual, the Commissioner must issue a notice of proposed adjustment under section 89B subject to the exceptions set out in section 89C.

(8) LATER REQUESTS FOR CHANGES BY INDIVIDUALS After the terminal tax date, an individual may ask the Commissioner to amend information in their final account for the tax year under section 113.

Section 113: Commissioner may at any time amend assessments

(1) Subject to sections 89N and 113D, the Commissioner may from time to time, and at any time, amend an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid.

(2) If any such amendment has the effect of imposing any fresh liability or increasing any existing liability, notice of it shall be given by the Commissioner to the taxpayer affected.

Section 113A: Correction of certain errors in subsequent returns

(1) This section applies for the purposes of this Act and the Goods and Services Tax Act 1985 when-

(a) A person-

(i) has made an assessment of income tax or goods and services tax in a return that results in a tax liability for the person; or

(ii) has provided a return that results in a liability for fringe benefit tax for the person; and

(b) 1 or more errors in the assessment or return, as applicable, cause a tax discrepancy in the amount of the liability.

(2) This section does not apply in relation to an assessment or return for an ancillary tax other than fringe benefit tax as described in subsection (1)(a)(ii).

(3) If the total tax discrepancy amounts to $1,000 or less, the person may make correction in the next return that is due after the discovery of the error or errors.

(3B) If the total tax discrepancy is caused by an error or errors that, for the person, is not a material error or are note material errors, the person may make a correction in the next return that is due after the discovery of the error or errors.

(4) For the purposes of subsection (3B) and in relation to a single return of a person, an error is not material if the amount of the total tax discrepancy caused by the error or errors in the assessment is equal to or less than the lower of-

(a) $10,000; and

(b) 2% of the person's annual gross income or output tax, as applicable.

(5) Subsection (3) and (3B) do not apply to a person who applies the materiality threshold in subsection (4) in relation to an assessment of their liability for income tax or goods and services tax or return for fringe benefit tax if their main purpose in applying the threshold is to delay the payment of tax.

Other relevant legislative provisions are:

- Sections 78B, 89C, 89D, 89N, 106(1), 107A, 108, 108A, 113A, 113D, 138E, 141FB, and 141G of the TAA.
- Subpart RM 2 of the Income Tax Act 2007.
- Sections 19C(8), 20, 45 and 46 of the GST Act.
- Section 202 of the Student Loan Scheme Act 2011.

Published statements

This Statement should be read in conjunction with the following statements published by the Commissioner and any issued in replacement:

- SPS 19/02 *Voluntary Disclosures and SPS 06/03 Reduction of shortfall penalties for previous behaviour*.
- IS 10/07 *Care and Management of the taxes covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994*.
- QB 09/04 *The relationship between section 113 of the TAA and the proviso to section 20(3) of the GST Act when a registered person has not claimed an input tax deduction in an earlier taxable period*.
- *Status of the Commissioner's advice* (*Tax Information Bulletin* Vol 24, No 10 (December 2012): 86).

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 20/02: Goods and services tax – supplies by New Zealand hunting outfitters and taxidermists to overseas hunters

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

Scope of this Interpretation Statement

1. This Interpretation Statement considers the GST treatment of supplies made by New Zealand hunting guides or outfitters and taxidermists to overseas hunters. It explains which supplies of goods and services made to overseas hunters are standard-rated and which are zero-rated for GST purposes.
2. This Interpretation Statement replaces three earlier public statements the Commissioner made on GST and hunting and taxidermy supplies to overseas hunters:
   - "Trophies and animal products derived from the tourist, hunting and safari industry – zero-rating under GST" *Tax Information Bulletin* Vol 9, No 6 (June 1997): 1;
   - "Trophies and animal products derived from the tourist, hunting and safari industry – zero-rating under GST" *Tax Information Bulletin* Vol 15, No 7 (July 2003): 23; and
   - "QWBA 07/04: Trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand – zero-rating" *Tax Information Bulletin* Vol 19, No 7 (August 2007): 19.

Structure of this Interpretation Statement

3. This Interpretation Statement is summarised in [4] to [12]. A detailed legal analysis of the transactions between outfitters, taxidermists and overseas hunters is in [13] to [139]. Four examples then illustrate the application of the GST rules in a practical context (from [141]).

Summary of this Interpretation Statement

4. For clarity, in this Interpretation Statement the Commissioner of Inland Revenue uses certain terms to assist with her analysis and explanations of how the GST rules apply to the industry. It is important this Interpretation Statement is read in the context of these terms:
   - New Zealand hunting outfitters and guides who provide hunting experiences for overseas hunters visiting New Zealand are referred to collectively as "outfitters";
   - outfitters and taxidermists are referred to collectively as the "industry";
   - "trophy fee" refers to the amount paid by the hunter for the opportunity to hunt and kill the animal and for its souvenir parts. It is a separate amount from amounts paid by the hunter for accommodation, food and the like.
   - "souvenir animal parts" refers to the parts of a trophy hunting animal killed by a hunter (for example, heads, shoulders, skins, antlers and bodies) that may later be expedited or mounted;
   - "hunting souvenir" refers to the souvenir animal parts once they have been expedited or mounted by a taxidermist;
   - "expediting" refers to the processes used by taxidermists to preserve and prepare souvenir animal parts ready for mounting; and
   - "mounting" refers to the process used by taxidermists of using the expedited souvenir animal parts to create life-like hunting souvenirs.

5. In the Commissioner's view, for GST purposes, an outfitter makes:
   - one composite GST supply to the hunter of a hunting experience in New Zealand; or
   - two separate GST supplies where souvenir animal parts or hunting souvenirs are supplied by the outfitter, being:
     - a single composite supply of a hunting experience in New Zealand; and
     - the supply of souvenir animal parts or a hunting souvenir.
6. In the Commissioner's view, the outfitter's single composite supply of a New Zealand hunting experience to an overseas hunter is a standard-rated supply of goods and services. This means GST is charged on the supply by the outfitter at the standard rate of 15%. All the elements of the single composite supply will be standard-rated for GST purposes. A deposit triggers the time of supply.
7. Different GST treatments apply to the supply of souvenir animal parts or hunting souvenirs, depending on the circumstances and contractual arrangements between the parties. When a supply is referred to as being "zero-rated" that means GST is charged on the supply by the outfitter (or the taxidermist) at the rate of 0%. This Interpretation Statement sets out six scenarios involving supplies of souvenir animal parts or hunting souvenirs for export:
   - Scenario 1 – No supply of exported wild souvenir animal parts by outfitter;
   - Scenario 2 – Standard-rated supply of souvenir animal parts by outfitter;
   - Scenario 3 – Zero-rated supply of hunting souvenir by outfitter using an independent taxidermist;
   - Scenario 4 – Zero-rated supply of hunting souvenir by outfitter using an in-house taxidermist;
   - Scenario 5 – Zero-rated supply of souvenir animal parts by outfitter and zero-rated supply of taxidermy services by taxidermist; and
   - Scenario 6 – Zero-rated supply of hunting souvenir by taxidermist.
8. Before souvenir animal parts can be entered for export and exported to the overseas hunter they must at least be expedited by a taxidermist. That taxidermist might be employed by the outfitter or operate independently. Taxidermists usually process or work on souvenir animal parts owned by someone else, such as an outfitter or a hunter. Therefore, when they expedite or mount souvenir animal parts, they are providing a taxidermy service. Only when taxidermists sell hunting souvenirs they own themselves will they be making supplies of goods.
9. Once a taxidermist has completed working on the hunting souvenir, they will usually crate and pack it ready for shipping overseas. The GST treatment of the crating and packing services is the same as the GST treatment of the taxidermy services. However, the costs of arranging insurance and transport and of transporting goods overseas are zero-rated.
10. Where souvenir animal parts or hunting souvenirs are supplied by an outfitter to the overseas hunter and the outfitter in the course of, or as a condition of, the supply enters those parts or souvenirs for export and exports them within 28 days, the supply is zero-rated. On application by an outfitter (or their agent), an extension period for exporting will generally be allowed by the Commissioner. An outfitter may make one application for an extension of time for future supplies of souvenir animal parts or hunting souvenirs for export. If the Commissioner is satisfied a determination covering those future supplies is appropriate, she may make one.
11. Valuation of GST supplies is particularly important where a supplier is making a mixture of standard-rated and zero-rated supplies to an overseas person. The Commissioner considers a "trophy fee", as that term is used in the industry, is for both the outfitter's supply of souvenir animal parts or hunting souvenirs and the opportunity to hunt and kill a particular breed and quality of animal during the supply of a hunting experience.
12. The value attached to those separate supplies for GST purposes should properly represent the consideration paid for those separate supplies of goods and services. The onus is on taxpayers to show that a payment has been made in respect of, in response to, or for the inducement of, a supply.

Introduction to the legal analysis

13. New Zealand outfitters supply hunting trips in New Zealand to overseas hunters. Overseas hunters who purchase these hunting trips usually come to New Zealand expecting to have the opportunity to hunt and kill particular breeds and quality of animals. If the hunt is successful and some souvenir animal parts are recoverable, then, in the absence of any other arrangements, the hunter may also expect those souvenir animal parts to be exported to them overseas. Hunting in New Zealand might take place on an outfitter's game estate, private land with permission or Crown land with appropriate permits.

14. Outfitters supply a variety of goods and services to overseas hunters during their visit to New Zealand such as airport transfers and accommodation, guiding, licences, the use of firearms and, sometimes, helicopter flights. On some occasions, if the overseas hunter is a member of Safari Club International, an animal may be given a score before it is killed so a Safari Club International record book entry can be made.

15. After a hunt, if an animal's carcass is recoverable and in a suitable condition, some souvenir animal parts may be taken from it. The GST treatment of the supply of those animal parts and the associated taxidermy depends on the contractual arrangements between the parties. For example:
    - taxidermy and exporting of the souvenir animal parts as a hunting souvenir might be included in the outfitter's package or it might be negotiated by the outfitter for an additional fee;
    - the souvenir animal parts might be supplied for export by the outfitter, with the hunter contracting with a New Zealand taxidermist separately for the taxidermy; or
    - the hunter might contract separately with a New Zealand taxidermist for expediting or mounting services, and on completion the hunting souvenir is exported to the hunter overseas by the taxidermist.

16. Overseas hunters may pay outfitters for an all-inclusive hunting package or the hunt price may be calculated using a price list for all the different goods and services supplied by the outfitter. Whatever the arrangement, it is usual for an overseas hunter to pay the outfitter a deposit at the time of booking to secure their hunt dates.

Legislation

17. GST is a consumption tax. It is intended to tax supplies consumed in New Zealand. Generally, a GST-registered person making a supply in the course or furtherance of their taxable activity must charge GST at the prevailing standard rate on the supply (see s 8(1)). However, where the goods and services will not be consumed in New Zealand (for example, where goods are being sold and exported by the supplier to an overseas customer) the GST zero-rating rules apply to modify the general rule in s 8(1) by reducing the rate of GST that must be charged to 0% (see ss 11 and 11A).

18. To determine the GST treatment of supplies made by a New Zealand outfitter or taxidermist to an overseas hunter, two questions need to be answered:
    - First, are the supplies made to the overseas hunter subject to GST under s 8(1)?
    - Then, if the answer to the first question is yes, are those supplies zero-rated under s 11 or s 11A?

Supplies subject to GST

19. Section 8(1) provides that GST is charged on the supply in New Zealand of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person:

> **8 Imposition of goods and services tax on supply**
>
> (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act **at the rate of 15% on the supply** (but not including an exempt supply) **in New Zealand of goods and services**, on or after 1 October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply. [Emphasis added]

20. Accordingly, where supplies are made in New Zealand to an overseas hunter by a New Zealand outfitter or taxidermist and those supplies are made in the course or furtherance of their taxable activities, GST is chargeable on those supplies by reference to the value of the supply. It is assumed the New Zealand outfitter or taxidermist is registered for GST purposes and is carrying on a taxable activity in New Zealand. (The valuation of supplies is discussed at [113] to [123].)

21. Further, s 8(2) deems goods and services to be supplied in New Zealand, if the supplier is resident in New Zealand.

22. Therefore, even though an overseas hunter might purchase their hunting package overseas, or might enter into a contract with the outfitter overseas, this does not prevent GST from being charged on the supply. This is because the supplies will be made in New Zealand by a New Zealand–resident, GST-registered person in the course or furtherance of their taxable activity. The place where the contract is entered into or where payment is made is not relevant to the GST treatment of the supply.

23. (Deposits, the time of supply and the impact of overseas intermediaries are discussed at [125] to [135].)

Zero-rated supplies

24. The second question concerns the rate at which a supplier should charge GST on those supplies: the standard rate of 15% or the reduced rate of 0%. The residence of the customer or whether any goods supplied are being exported overseas by the supplier can be relevant factors when determining whether a supply of goods or services is zero-rated, as these factors might indicate that the goods and services will not be consumed in New Zealand.

25. The zero-rating rules are divided into two parts: s 11 addresses the zero-rating of supplies of goods and s 11A addresses the zero-rating of supplies of services.

Zero-rating of goods

26. Paragraphs (a) to (eb) of s 11(1) are relevant to supplies of goods to overseas hunters.

27. Section 11(1)(a) to (eb) provides that a supply of goods that is chargeable with tax under s 8 must be zero-rated (and not standard-rated) in the following situations:

> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> (a) the supplier has entered the goods for export under the Customs and Excise Act 1996 and the goods have been exported by the supplier; or
>
> (b) the goods have been deemed to be entered for export under the Customs and Excise Act 1996 and the goods have been exported by the supplier; or
>
> (c) the supplier has satisfied the Commissioner that the goods have been exported by the supplier to a place outside New Zealand; or
>
> (d) subject to subsection (4), the supplier will enter the goods for export under the Customs and Excise Act 1996 in the course of, or as a condition of, making the supply, and will export the goods; or
>
> (e) subject to subsection (4), the goods will be deemed to be entered for export under the Customs and Excise Act 1996 and will be exported by the supplier in the course of, or as a condition of, making the supply; or
>
> (eb) subject to subsection (4), the goods supplied—
>
> (i) are supplied to a recipient who is a non-resident; and
>
> (ii) have been entered for export under the Customs and Excise Act 1996 by the supplier or will be entered for export by the supplier in the course of or as a condition of making the supply; and
>
> (iii) are exported by the recipient; and
>
> (iv) are not intended by the recipient for later importation into New Zealand for use other than in making taxable supplies or exempt supplies, with the absence of such an intention being confirmed by the recipient in a document retained by the supplier; and
>
> (v) are not used or altered by the recipient before being exported, except to the extent necessary to prepare the goods for export; and
>
> (vi) leave New Zealand under an arrangement agreed by the supplier and the recipient at or before the time of the supply; and
>
> (vii) do not leave New Zealand in the possession of a passenger or crew member of an aircraft or ship;

28. It is assumed:

- the New Zealand outfitter or taxidermist is registered for GST purposes and is carrying on a taxable activity in New Zealand; and
- the overseas hunter is not GST registered and is not carrying on a taxable activity in New Zealand.

29. Essentially, s 11(1)(a) to (c) requires that:

- the supplier has entered the goods for export or the goods have been deemed to be entered for export; and
- the goods have been exported by the supplier; or
- the supplier has satisfied the Commissioner that the goods have been exported by the supplier to a place outside New Zealand.

30. A supply of goods may also be zero-rated if s 11(1)(d) or s 11(1)(e) applies. Subject to s 11 (4), that is where:

- in the course of, or as a condition of, making the supply the supplier will enter the goods, or the goods will be deemed to be entered, for export under the Customs and Excise Act 1996; and
- the goods will be exported by the supplier.

31. Section 11(1)(eb) is essentially the same as s 11(1)(d) in that it requires a supply of goods to be zero-rated where the supplier will enter the goods for export in the course of, or as a condition of, making the supply but, under s 11(1)(eb) the goods are exported by the purchaser (not the supplier). This means that while the goods will be entered for export by the supplier, it is the customer who causes them to be removed from New Zealand and sent to another country. The provision was added to the Act to take account of goods being exported from New Zealand by an overseas customer on free-on-board terms (that is, where the customer (rather than the supplier) pays the cost of transporting the goods from New Zealand). Section 11(1)(eb) does not apply where the goods are delivered to the overseas customer in New Zealand before they are exported.

32. Paragraphs (d), (e) and (eb) of s 11(1) are each subject to s 11(4), so zero-rating does not apply unless the supplier exports the goods from New Zealand within 28 days from the time of supply (or such longer period allowed by the Commissioner). For GST purposes, the time of supply is usually the earlier of the time when an invoice is issued or the time any payment is received by the supplier (for example, when a deposit is received by the supplier (or their agent): see s 9(1)).

33. The Commissioner has a discretion to extend the 28-day period within which goods must be exported to allow zero-rating (see s 11(5)). For an extension, it must not be practicable for the supplier to export the goods within 28 days. Where an extension is granted, the supply can be zero-rated so long as export occurs within the term of the extension. (The Commissioner's extension for hunting souvenirs is addressed at [136] to [139].)

Zero-rating of services

34. Section 11A specifies those supplies of services that may be zero-rated for GST purposes. Of relevance to New Zealand outfitters and taxidermists are paras (k) and (m) of s 11A(1).

35. Section 11A(1)(k) provides that a supply of services that is chargeable with tax under s 8 may be zero-rated where the customer of the supply is a non-resident and is outside New Zealand at the time the services are performed, unless one of the exclusions in subparas (i) to (iii) applies. Of relevance to New Zealand outfitters and taxidermists is subpara (ii):

> (k) subject to subsection (2), **the services are supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed, not being services which are—**
>
> (i) supplied directly in connection with land situated in New Zealand, or with an improvement to such land, or are supplied in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement; or
>
> (ii) **supplied directly in connection with moveable personal property**, other than choses in action or goods to which paragraph (h) or (i) applies, **situated in New Zealand at the time the services are performed**; or
>
> (iii) the acceptance of an obligation to refrain from carrying on a taxable activity, to the extent to which the activity would have occurred within New Zealand … [Emphasis added]

36. It is assumed that the overseas hunter is a non-resident in New Zealand for the duration of their hunt and is otherwise outside New Zealand.

37. Services provided to an overseas hunter while they are present in New Zealand are not zero-rated. Generally, services provided to an overseas hunter in connection with moveable personal property situated in New Zealand at the time the services are performed will not be zero-rated under s 11A(1)(k), even if the hunter is overseas at the time. This is because in both those circumstances the services are seen as being consumed in New Zealand, so are subject to GST at the standard rate.

38. However, services supplied directly in connection with goods, which are a zero-rated supply of exported goods under s 11(1)(a) to (eb), can be zero-rated under s 11A(1)(m) where the supply of services is made to a non-resident who is outside New Zealand at the time the services are performed:

> (m) the services are supplied—
>
> (i) directly in connection with goods, the supply of which was subject to any one of section 11(1)(a) to (eb); and
>
> (ii) to a recipient who, when the services are performed, is a non-resident and outside New Zealand;

Identifying the GST supplies in a transaction

39. Before applying the GST rules in ss 8, 11 and 11A to outfitters and taxidermists, it is necessary to first understand the nature of the transaction being entered into by the parties. A transaction may comprise many different elements that together or separately may amount to supplies for GST purposes. The approach of the New Zealand courts when seeking to identify the GST supplies in a transaction has been to consider the true nature of the legal arrangements actually entered into and carried out by the supplier and the customer in light of the surrounding circumstances: *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5,086 (CA); *CIR v Gulf Harbour Development Ltd* (2004) 21 NZTC 18,915 (CA).

40. Sometimes, where a transaction involves multiple elements, it might be unclear whether there is one composite GST supply (of multiple elements) or multiple separate GST supplies. In those circumstances, the transaction must be analysed to determine the supplies made for GST purposes. This can be important for several reasons, for example if there are multiple separate supplies, then some of those supplies might be standard-rated and others might be zero-rated. Also, separate supplies might have different times of supply, which can be important for knowing when GST needs to be returned, when currency conversions need to be made or when extensions of time for exporters expire.

41. Case law has established numerous principles to assist in determining the separate supplies made for GST purposes. These principles are discussed in detail, with practical examples, in "IS 18/04: Goods and services tax – single supply or multiple supplies" *Tax Information Bulletin* Vol 30, No 10 (November 2018): 5.

42. IS 18/04 summarises (at [35] to [39]) the leading New Zealand decision on single and multiple supplies (*Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685 (HC)). It sets out the approach to be taken when analysing a transaction to determine whether there is one composite supply (of multiple elements) or multiple separate supplies:

> 35. … In *Auckland Institute*, Hansen J considered the GST treatment of supplies to international students studying in New Zealand. The taxpayer provided tuition services to students coming to New Zealand from overseas. An associated company provided pre-arrival services. The students paid a single "global fee" to the taxpayer for all supplies from both the taxpayer and the associated company. One of the issues before the Court was whether it was appropriate to split the supply to enable the pre-arrival services to be zero-rated.
>
> 36. Hansen J discussed the approach of the House of Lords in *Card Protection Plan v Customs & Excise Commissioners* [2001] 2 All ER 143. In that case, the House of Lords considered whether a credit card protection plan offered to cardholders was a single composite supply or two independent supplies comprising the supply of VAT-exempt insurance and a separate supply of VAT-chargeable card registration services. The House of Lords concluded the dominant supply was of VAT-exempt insurance and the supply of the card registration services was ancillary to the exempt supply. In *Auckland Institute*, Hansen J summarised the principles from *Card Protection Plan* for determining whether a supply could be separated into multiple supplies (at [32]):
>
> - Every supply of a service must normally be regarded as distinct and independent.
> - A supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system.
> - The essential features of a transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service.
> - There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.
> - Even if a single price is charged which may indicate a single supply, it must still be considered whether the arrangements indicated that the customer intended to purchase two distinct services.
>
> 37. After reviewing all the relevant authorities, Hansen J summarised the principles for determining whether a supply could be separated into multiple supplies (with one or more differing GST treatments) (at [36]):
>
> [a] In determining whether a supply may be apportioned for GST purposes, it is necessary to examine the true and substantial nature of the consideration given to determine whether there is a sufficient distinction between the allegedly different parts to make it reasonable to sever them and apportion them accordingly.
>
> [b] The enquiry is to determine whether one element of the transaction (or consideration given) is a necessary or integral part of another or whether it is merely ancillary to or incidental to that other element.
>
> [c] A service will be ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied.
>
> 38. Based on these principles, the Commissioner considers it helpful to ask three questions when analysing the transaction:
>
> - What is the true and substantial nature of what is supplied to the recipient?
> - What are the relationships between the elements supplied?
> - Is it reasonable to sever the elements into separate supplies?
>
> 39. When answering these questions, it is important to consider the supply from the perspective of a typical customer.

Determining the GST supplies made by outfitters

43. In some arrangements, the outfitter and the hunter agree that, when recoverable, the outfitter will supply souvenir animal parts to the overseas hunter but the outfitter does not agree to export those parts or any hunting souvenir to the hunter. In that case, an outfitter's transaction with an overseas hunter ends at the conclusion of the hunt with the delivery of any souvenir animal parts to the hunter. It then falls to the overseas hunter to arrange with a taxidermist for their souvenir animal parts to be expedited or mounted and exported overseas to them. Sometimes the outfitter might suggest a suitable taxidermist and deliver the hunter's souvenir animal parts to that taxidermist, but the outfitter has no contractual responsibility to the hunter beyond the end of the hunt.

44. In other cases, the contractual arrangements between an outfitter and a hunter might specify that after the hunt the outfitter will supply and export to the overseas hunter:
   - any souvenir animal parts recovered by the outfitter from the animal killed by the hunter; or
   - a hunting souvenir expedited or mounted by the outfitter from the recovered souvenir animal parts.

45. To determine the GST supplies made by an outfitter to an overseas hunter, the transaction between them needs to be considered from the hunter's perspective. In the Commissioner's view, when a hunter visits New Zealand the hunter is seeking to obtain the following elements from the outfitter:
   - the experience of hunting in New Zealand, including elements such as:
     - airport transfers to and from the hunting lodge;
     - accommodation and meals;
     - guiding services;
     - the opportunity to kill particular breeds and quality of animals;
     - transport around the hunting grounds;
     - licences and permits;
     - gun hire;
     - Safari Club International point scoring; and
   - if the hunt is successful (which they invariably are), some souvenir animal parts taken from the hunted and killed animals (which may or may not form part of the hunt transaction agreed between the outfitter and the hunter).

46. The experience of hunting in New Zealand, in particular, the opportunity to hunt certain animals of a particular breed and quality, and the potential of taking home a hunting souvenir from an animal hunted and killed by the hunter, are the two key elements that an overseas hunter seeks when purchasing a hunt in New Zealand. Some hunters may be more focussed on enjoying the New Zealand hunting experience, while other hunters may be more interested in obtaining the hunting souvenir. However, whatever their motivation, to some extent both elements are supplied by outfitters to the hunter in New Zealand.

47. As explained in IS 18/04 at [46], when determining if the supply of those elements are separate GST supplies or a single composite GST supply what is important is not whether one element is ancillary or incidental to, or even a necessary or integral part of, the whole, but whether one element is merely ancillary or incidental to, or a necessary or integral part of, *any other element* of the transaction.

48. The hunting experience in New Zealand can occur without the hunter taking a hunting souvenir from an animal hunted and killed by the hunter. Accordingly, the Commissioner does not think a hunter would consider the hunting experience to be ancillary or incidental to the taking of a hunting souvenir. The hunting experience is an aim in itself, whether or not a hunting souvenir is taken.

49. In the Commissioner's view the hunting experience includes the opportunity to hunt and kill animals of a certain breed and quality while in New Zealand. It is not possible for the hunter to enjoy that opportunity without participating in the hunting experience. Therefore, the hunter cannot have the desired hunting experience in New Zealand without:
   - the outfitter doing its best to ensure the desired animals are available to be hunted;
   - being transported and guided by the outfitter; and
   - having somewhere to eat and sleep while hunting and transport to get to and from the hunting lodge.

50. Accordingly, the Commissioner sees these elements as a necessary or integral part of the outfitter supplying a hunting experience in New Zealand to a hunter. Therefore, they are indicative of the supply of the hunting experience being a single composite supply. (In any event, in practice, all these elements have the same GST treatment, that is, they are all standard-rated as they are supplied in New Zealand.)

51. On the other hand, in the Commissioner's view, the taking of any hunting souvenir is not incidental to or necessary to the supply of the hunting experience. It is acknowledged that a hunting souvenir cannot be supplied without the hunting experience occurring but taking a hunting souvenir is not an integral or necessary part of a hunting experience. An outfitter's supply of any souvenir animal parts or a hunting souvenir from an animal killed by the hunter is a separate supply in its own right. In the case of overseas hunters, the supply of the hunting experience does not so dominate any supply of the souvenir animal parts or hunting souvenir that the supply of the parts or hunting souvenir loses its separate identity for fiscal purposes.

52. Given the somewhat uncertain nature of the supply of souvenir animal parts (that is, the outfitter and hunter do not know with certainty if and what souvenir animal parts will be able to be supplied until an animal is actually hunted and killed by the hunter), it is reasonable to sever the supply of souvenir animal parts from the supply of the hunting experience (and its associated elements).

53. As discussed in IS 18/04 at [57] and [58], the fact some outfitters may sell a hunter an "all-inclusive" hunt, including souvenir animal parts or a hunting souvenir, for a single payment does not mean that the outfitter is making only one single composite supply in that situation:

> 57. It appears from the cases cited above that the "reasonable" test focuses on the essential purpose of the transaction and on the elements themselves (whether there is a sufficient distinction between the elements to make it reasonable to sever them and apportion accordingly) rather than on whether a separate amount is charged for the element in question or on how easily a global fee can be apportioned.
>
> 58. Further, one of the principles from Card Protection Plan for determining whether a supply could be separated into multiple supplies (as summarised in Auckland Institute (at [32]) is:
>
> > Even if a single price is charged which may indicate a single supply, it must still be considered whether the arrangements indicated that the customer intended to purchase two distinct services.

54. In reality, even when a package is sold as "all inclusive", the initial price is only an estimate as there are usually additional payments that cannot be calculated until the conclusion of the hunt when it is known precisely what animals have been killed, what souvenir animal parts will be supplied and what additional elements relating to the hunt have been enjoyed in New Zealand.

55. Therefore, objectively, the Commissioner considers it would not be artificial where souvenir animal parts or a hunting souvenir are supplied together with the hunt to split the transaction into two separate supplies for GST purposes.

56. Taking all these matters into account, when the transaction between the outfitter and the hunter is looked at objectively, and from the hunter's point of view, the Commissioner concludes for GST purposes an outfitter makes either:

- one composite GST supply to the hunter of a hunting experience in New Zealand; or
- where souvenir animal parts or a hunting souvenir are supplied by the outfitter along with the hunt, two separate GST supplies being:
  - a single composite supply of a hunting experience in New Zealand; and
  - the supply of souvenir animal parts or a hunting souvenir.

Determining the GST supplies made by taxidermists

57. In addition to identifying whether a transaction comprises a single composite supply of multiple elements or separate supplies for GST purposes, it is also important to be clear whether a supply is a supply of goods or a supply of services. Usually this distinction is relatively clear, but sometimes it is not (for example, where work and materials are supplied together). This distinction is especially important when determining whether a supply is zero-rated because different zero-rating rules apply depending on whether the supply is a supply of goods (see s 11) or a supply of services (see s 11A).

58. Taxidermists usually process or work on souvenir animal parts like raw animal hides and antlers owned by their customer, such as a hunter or an outfitter. When souvenir animal parts are delivered to a taxidermist by a customer to be worked on, those parts will usually remain the property of the customer. The legal relationship between a taxidermist and their customer is one of bailment. This was confirmed in the Canadian decision *Moher v Wildlife Originals by Clarence Kriaski* [2019] AJ No. 16. While *Moher* does not address tax issues, it does address the issue of ownership of souvenir animal parts deposited with a taxidermist to be worked on:

INTERPRETATION STATEMENTS

Particular kind of bailment

178 In this case, Moher did not deliver his hides to Kriaski simply to be stored i.e. for eventual redelivery in their original form. He delivered them instead to be altered i.e. to be tanned and mounted and then returned for display in Moher's trophy barn. This is still a bailment, as the definition's reference to "or an altered form" makes clear.

179 If it were necessary to categorize this arrangement under the traditional categories of bailment, the bailment here would be a *location operis faciendi*. As defined in Palmer on Bailment, this variety of bailment arises:

> ... when goods or chattels are delivered [... and ...] something is to be done about them, for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them.

180 In this case, the "something to be done about them" was the tanning and mounting work to be performed by Kriaski.

181 Palmer expands on such bailments:

> *Locatio operis faciendi* therefore contains two elements: a contact for services, coupled with a bailment of the article upon which those services are to be performed. The goods will remain in the bailee's possession until the work is completed and will then be returned to the bailor ... in accordance with his or her instructions. A wide range of everyday commercial activities, including dry-cleaning, laundering, repair, valuation, auctioneering, alteration and the treatment of sick animals, may therefore fall within this category of bailment.

182 To these examples, I would add taxidermy services, where animal hides or other "bases" are to be converted into trophies or other preserved forms.

59. This decision is consistent with New Zealand law on bailment. The fact some souvenir animal parts are less valuable to the customer and may be substituted with replacement parts if they are damaged, does not, in the Commissioner's view, alter this legal relationship. Similarly, the fact a taxidermist can withhold (or if necessary, sell) the completed hunting souvenir to recover unpaid moneys owed by the customer does not alter this legal relationship.

60. Therefore, when a taxidermist expedites or mounts a customer's souvenir animal parts, they are providing a taxidermy service and not supplying a good. In the Commissioner's view, the materials a taxidermist uses to expedite or mount souvenir animal parts are incidental to the taxidermy services they supply and are not a separate supply of goods. Only when taxidermists sell expedited souvenir animal parts or hunting souvenirs created from souvenir animal parts that they themselves own will they be making supplies of goods.

61. The decision in *Case 4/2013* (2013) 26 NZTC 16,027 supports the Commissioner's view. In that case, Judge Sinclair held that metal spheres that had been originally intended for export to an overseas customer, but that were subsequently delivered to a different manufacturer in New Zealand and used in constructing a sculpture that was eventually exported to the overseas customer, were consumed in New Zealand (and, therefore, the supply of spheres was not zero-rated). This was on the basis that the supply of the spheres had been made in New Zealand. The spheres had lost their separate existence before being exported and had become an integral part of the sculpture. Additionally, the sculpture was eventually exported from New Zealand by someone other than the supplier of the spheres. In the Commissioner's view, the mounting materials used by a taxidermist also lose their separate existence and, instead, form an integral part of the service being supplied by the taxidermist.

62. The view that taxidermists provide services when working on souvenir animal parts and mounting hunting souvenirs for overseas hunters is also consistent with the Canadian GST decision *Robertson v Canada* [2002] TCJ No 48 (TCC). In *Robertson*, the court held that a taxidermist was providing a supply of services when mounting an animal for an overseas hunter. *Robertson* was referred to in another Canadian decision *Hawkins Taxidermists of Canada Ltd v Canada* [2005] TCJ No 308 (TCC). As in *Robertson*, *Hawkins Taxidermists* concerned the zero-rating of taxidermy supplies made to non-resident hunters.

63. To determine the true nature of the supply for GST purposes (ie, whether it is a sale of goods or a supply of services) the courts begin by trying to identify which party supplies the "principal materials". The courts acknowledge that where both the worker's goods and the customer's goods are essential and important in the creation of a product, the decision might go either way. In those circumstances, the courts' decision will be influenced by the degree of work or skill involved in the making of the product. If the worker's skill is important in the creation of the product then the contract will most likely be viewed as being "substantially" for the worker's services, and not for the supply of goods.

64. In *Hawkins Taxidermists*, the judge focused on determining whether the materials the taxidermist used to mount the animal were the principal materials (so that the taxidermist was making a supply of goods overseas) or whether the nature of the taxidermist's supply was a supply of services. The judge considered which was the principal materials:

24 **When work is performed on the customer's goods, it is more likely a contract for work and materials even where relevant materials are added by the worker**. This is confirmed in *Crown Tire* [[1984] 2 FC 219 (FCA)]. While that case drew from factors such as the absence of a material source of revenue from sales not connected with services, it does not offer a principle in

respect of which different factors might be considered when determining the possibility that accession actually goes in the opposite direction which is, essentially, the Appellant's alternative argument. That is, where both the worker's goods and the customer's goods are essential and important in the creation of a product, accession might go in either direction. **The worker's materials might merge into the customer's goods or the customer's goods might merge into the worker's tangible property supplies**.

25 In *Benjamin's Sale of Goods*, 6th ed. at page 37, paragraph 44, it is noted that:

> Where an article is to be manufactured, and all the materials are supplied by the person for whom the work is to be done, it is obvious that there can be no sale unless there is a specific transfer of the materials followed by a repurchase of the product. **Where each party provides some of the materials or components, the task of the court is to determine which of them has supplied the "principal materials"; it then follows that the materials supplied by the other vest by accession in the owner of the principal materials. It has been held that the question which are the principal materials depends on all the circumstances, and that their relative value is not conclusive**. [Footnotes omitted]

The authors go on to suggest an analogy that is noteworthy. Where an author brings a manuscript to a printer and the printer creates a book out of materials that are its property, is there a sale of property or a supply of work and materials when the finished product is delivered back to the author? The authors of Benjamin's Sale of Goods suggest that it is an extraordinary view to think that the printer has been engaged in a contract for the sale of goods. **If the employer supplies the principal materials, the contract must be for one of work and materials. At paragraph 46 the authors go on to suggest that where work or skill is involved in the making of the goods delivered, it is possible, and often correct, to view the contract as "substantially" one for the worker's services. In my view, this general principle is helpful where both contractors supply materials that might be regarded as the [principal] materials in the performance of the contract. In such cases where a finding of [principal] materials is difficult to make, the importance of the skill and expertise of the worker might be determinative in finding that the supply is of a service**. [Emphasis added]

65. The judge found that, in the case of hunting souvenirs, the principal material was the hunter's souvenir animal parts. This decision was not based on the relative value of the hunter's souvenir animal parts in comparison to the value of the taxidermy materials supplied, or on the relative size or volume of the goods. Rather, it was focussed on the significance of the souvenir animal parts to the finished product. The judge considered that the souvenir animal parts were the significant material used in the creation of a hunting souvenir, regardless of whether the taxidermist used a pre-moulded form or made their own mannequin. The judge was reassured that his finding was correct because of the importance of the taxidermist's skill in creating the hunting souvenir. This finding of skill supported his decision that a taxidermist is supplying services when creating a hunting souvenir from a hunter's souvenir animal parts:

> 28 I note that my finding, that the [principal] material in this case is the specimen, is not dependent on the relative value of inputs, the source of profit, who manufactured the components used by the Appellant to give "life" to the hunters' specimens or the extent of the Appellant's taxidermy supplies sales business. The test applied is simply to take into account the significance of the materials themselves. A fish mount is a sale of goods because the fish skin is not a [principal] material. Other wildlife mounts are a supply of work and materials because the specimens are the [principal] materials. If there is any doubt as to this conclusion, the importance of the skill of the worker in the case at bar would also lead to a determination that the supply of wildlife mounts is of work and materials. The materials employed by the Appellant are merely the means by which the taxidermist best gives expression to that skill and as such are incidental in nature. Accordingly, there is no sale of goods which is zero-rated under section 12 [of the Excise Tax Act (GST Portions)]. The supply of wildlife mounts is a service excluded from being zero-rated pursuant to paragraph 7(e).

66. The judge makes a distinction between a fish replica created by a taxidermist where the fish parts are not a principal material, and a hunting souvenir which includes the customer's souvenir animal parts. The supply of the fish replica is a supply of goods, whereas the supply of a hunting trophy, which includes the customer's souvenir animal parts, is a supply of services.

67. The judge in *Robertson* noted that treating taxidermists as supplying services (and not goods) when working on a customer's souvenir animal parts was consistent with the treatment of taxidermists in most other jurisdictions:

> 133 The treatment of taxidermists in other jurisdictions is not determinative of the issues in this case but the majority of the other jurisdictions would appear to have treated the taxidermist as a person engaged in rendering a service.

68. The Canadian decisions of *Robertson* and *Hawkins Taxidermists* were largely based on the principles set out in the English decision in *Robinson v Graves* [1935] 1 KB 579 which involved determining whether a contract to paint a portrait was a sale of a good, or for work and materials. The courts have acknowledged that the *Robinson v Graves* decision is not an easy one, and it has not always been followed. Nonetheless, the decision and the principles flowing from it, continue to be referred to by the courts, including in New Zealand, when deciding if a contract is a sale of goods.

69. For example, the High Court decision *Whyte v Owl Electrical* (1988) Limited [1995] 6 TCLR 299, considered whether a contract to supply and install electrical equipment was a sale of goods, or a contract for the supply of work and materials. In reaching his decision that the contract was one for the supply of work and materials, Barker J reviewed the established principles starting with *Robinson v Graves*, the commentary in *Benjamin's Sale of Goods*, (1992, 4th ed) para 1-041, and relevant New Zealand, Australian and English authorities. Barker J took essentially the same approach as was taken by the courts in the Canadian taxidermy decisions when deciding if a transaction was a sale of goods or a contract for the supply of work and materials (ie, a focus on the nature of the work undertaken and the importance of the worker's skill and expertise). Accordingly, in the Commissioner's view, the legal analysis undertaken by the Canadian courts is consistent with the legal analysis that would likely be undertaken by a New Zealand court in determining the nature of a contract for the preparation of a hunting souvenir where the souvenir animal parts are owned by the customer.
70. Based on this case law, the Commissioner considers that treating taxidermists as supplying services and not goods to the hunters or outfitters when they expedite or mount souvenir animal parts owned by the customer is the correct interpretation. The position is different where a taxidermist creates a fish replica. In that case the taxidermist makes a supply of goods.

Application of the law

71. In the Commissioner's view, for GST purposes, an outfitter makes:
    - one composite GST supply to the hunter of a hunting experience in New Zealand; or
    - where souvenir animal parts or a hunting souvenir are supplied, two separate GST supplies, being:
      - a single composite supply of a hunting experience in New Zealand; and
      - the supply of souvenir animal parts or a hunting souvenir.
72. Different GST treatments apply to the supply of souvenir animal parts, depending on the circumstances and contractual arrangements between the parties. For example, souvenir animal parts may be entered for export and exported by an outfitter, by a taxidermist contracted to expedite or mount the parts, or by a shipping agent.

Supply by an outfitter of a hunting experience in New Zealand

73. In the Commissioner's view, the outfitter's single composite supply of a New Zealand hunting experience to an overseas hunter is a standard-rated supply of goods and services. All the elements of the single composite supply will be treated the same for GST purposes. The goods and services are all consumed in New Zealand. No goods are exported to the hunter before being consumed and the services are not zero-rated under s 11A(1)(k) or s 11A(1)(m).

Supply by an outfitter of souvenir animal parts or hunting souvenirs

74. If the outfitter agrees to supply souvenir animal parts to an overseas hunter, but those parts are not to be exported overseas to the hunter by the outfitter, then that is a separate standard-rated supply of a good consumed in New Zealand. The amount charged by the outfitter as consideration for the supply of the souvenir animal parts will attract GST at the standard rate.
75. Where souvenir animal parts or a hunting souvenir are supplied by an outfitter to the overseas hunter, and the outfitter, in the course of, or as a condition of, the supply, enters those parts or a hunting souvenir for export and exports them (within the requisite time), the supply of the souvenir animal parts or hunting souvenir is zero-rated under s 11(1)(d) or s 11(1)(e). Accordingly, any amount charged as consideration for that supply will attract GST at zero percent. (Where the consideration for that supply forms part of another amount paid by the hunter, only the portion of that amount that is attributable to the exported souvenir animal parts or a hunting souvenir can be zero-rated. See further at [113].)
76. Where an outfitter has contracted with an overseas hunter to export souvenir animal parts or a hunting souvenir, the outfitter must be the person who enters the goods for export for the supply of goods by the outfitter to be zero-rated. This means the outfitter's name must appear on the New Zealand customs export documentation. The outfitter may appoint an agent to enter the goods for export and ship them to the overseas hunter on the outfitter's behalf. However, whether that person is acting as the agent of the outfitter will depend on the legal arrangements entered into and carried out by the parties.

77. The Taxation Review Authority in *Case P55* (1992) 14 NZTC 4,382 confirmed that the zero-rated status of the supply depends on the supplier entering the goods for export. The customs documentation must support this. In *Case P55*, a New Zealand resident sold goods to a non-resident. The non-resident accepted responsibility for all freight, customs and shipping and was recorded as the party entering the goods for export in the New Zealand customs documentation. The supply was not zero-rated for GST purposes.

No supply by an outfitter of souvenir animal parts when a wild animal is killed on Crown land

78. Souvenir animal parts of a wild animal killed on Crown land can never be supplied and exported by an outfitter to an overseas hunter for GST purposes. Wild animals are the property of the Crown and when killed on Crown land through the operation of statute they become the property of the hunter (s 9(1) of the Wild Animal Control Act 1977).

79. In that circumstance all amounts charged by the outfitter to the overseas hunter are consideration for the supply of the hunting experience. The souvenir animal parts are acquired by the hunter from the Crown, and not from the outfitter. Accordingly, any amount charged by an outfitter for assisting a hunter to kill a wild animal on Crown land should be standard-rated, as being consideration for services supplied by the outfitter in New Zealand.

80. Sometimes wild animals might cross into land where private landowners or game estates have been granted permits to take or hold them. Section 9(1) and (2) of the Wild Animal Control Act 1977 provides that in those circumstances the wild animals cease to be the property of the Crown and become the property of the owner or operator.

81. In those circumstances, souvenir animal parts or a hunting souvenir from the wild animals can be supplied and exported by an outfitter to an overseas hunter.

Taxidermy services on souvenir animal parts supplied in New Zealand by an outfitter

82. Sometimes the expediting or mounting of souvenir animal parts occurs under a separate contractual arrangement between the overseas hunter and a taxidermist, after the hunt has ended. In that situation, while the outfitter may recommend a taxidermist to the hunter or provide a list of taxidermists in the area, the outfitter's transaction with the hunter has ended with the field preparation and recovery of the souvenir animal parts and, possibly, their delivery to the hunter's taxidermist.

83. In those circumstances, the supply of services by a taxidermist to an overseas hunter is standard-rated. This is because neither s 11A(1)(k) nor s 11A(1)(m) will apply to zero-rate the services.

84. Even though the taxidermist is providing taxidermy services to someone who is overseas at the time the services are being performed, s 11A(1)(k) will not apply to zero-rate those services for GST purposes because the services are performed in connection with moveable personal property situated in New Zealand at the time the services are performed (see s 11A(1)(k)(ii)).

85. Section 11A(1)(m) also will not apply to zero-rate the taxidermist's services in those circumstances because the services are not supplied directly in connection with a supply of goods that will be entered for export as a condition of, or in the course of, making that supply (s 11(1)(d) to (e)). This is because the outfitter has not agreed to supply goods for export to the overseas hunter.

86. When the taxidermist completes their work and the hunting souvenir is exported overseas to the hunter, the exporting of the hunting souvenir is not a supply of goods in GST terms. It is simply the exporting of the hunter's hunting souvenir overseas. The exporter in that case is not the outfitter. While the taxidermist may export the hunting souvenir to the overseas hunter (by completing the New Zealand customs process), the taxidermist does not perform the services in connection with an underlying supply of zero-rated goods, so the taxidermy services cannot be zero-rated.

Taxidermy services on souvenir animal parts supplied for export by an outfitter

87. A taxidermist's services can be zero-rated under s 11A(1)(m) where:
    - the souvenir animal parts will be entered for export and exported by the outfitter in the course of, or as a condition of, their supply to the overseas hunter; and
    - the taxidermy services are supplied directly in connection with the souvenir animal parts that will be exported by the outfitter; and
    - the taxidermy services are supplied to the overseas hunter who is outside New Zealand when the services are performed.

88. Taxidermy services performed to expedite or mount souvenir animal parts are supplied directly in connection with the parts. The remaining requirements for zero-rating are all dependent on the contractual arrangements and the outfitter agreeing that it will enter the parts for export and export them as a condition, or in the course of, supplying them to the hunter.

89. If the taxidermy services are supplied to the outfitter, or the outfitter cannot zero-rate its supply of the souvenir animal parts under s 11(1)(d) or s 11(1)(e), then the taxidermist cannot zero-rate the supply of their taxidermy services. The latter could occur where someone other than the outfitter enters the goods for export and exports them. Section 11A(1)(m) is not a stand-alone permission for zero-rating of services on any goods that will be exported by someone from New Zealand. There must always be an underlying zero-rated supply of goods for export that the services are performed in connection with for the services to be zero-rated.

90. If the taxidermist undertakes the exporting process as the outfitter's agent, so that the outfitter's supply of souvenir animal parts is zero-rated, then, in that situation, if the taxidermist supplies their taxidermy services to the overseas hunter (and not to the outfitter), the taxidermist can zero-rate their taxidermy services under s 11A(1)(m). This is because the services are performed in connection with an underlying supply of zero-rated goods. However, whether the taxidermist is acting as the agent of the outfitter will depend on the legal arrangements entered into and carried out by the parties.

Sale and export of a hunting souvenir by a taxidermist

91. Where a taxidermist sells a hunting souvenir to an overseas hunter from their own trading stock of hunting souvenirs, that supply of goods may be zero-rated if the requirements of s 11(1)(d) or s 11(1)(e) are met. Similarly, where a taxidermist sells a fish replica the taxidermist makes a supply of goods.

Crating and packing services supplied by a taxidermist

92. Once a taxidermist has completed working on the hunting souvenir, they will usually crate and pack it ready for shipping overseas. The GST treatment of the crating and packing services is the same as the GST treatment of the taxidermy services. This is because crating and packing are an ancillary part of the supply of the taxidermy services.

Insurance and transport

93. Costs of arranging insurance and transport and transporting goods overseas are zero-rated (see s 11A(1)(a), (c) and (d)) regardless of whether the underlying supply of the good is zero-rated.

Scenarios showing supplies of souvenir animal parts or hunting souvenirs for export

94. The following six scenarios diagrammatically show various GST supplies that can be made when an outfitter is able to recover souvenir animal parts and the overseas hunter decides to have the parts exported to them. Some of these scenarios necessarily include the taxidermist's supply of taxidermy services, which are required for the parts to be exported. Scenario 1 explains the GST position when the souvenir animal parts exported come from a wild animal killed on Crown land. The other five scenarios all relate to animals on land controlled by outfitters.

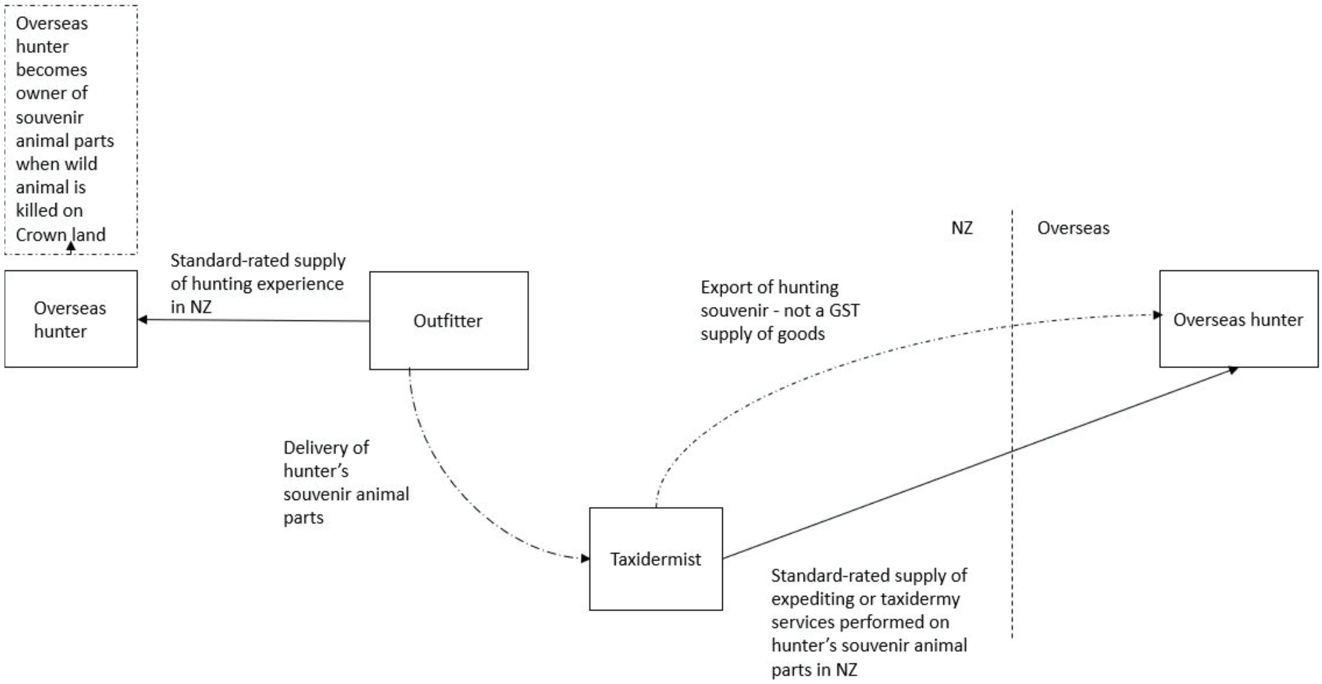
95. Then, later in this Interpretation Statement (from [141]), four examples illustrate the application of the GST rules to outfitters, taxidermists and overseas hunters in a practical context.

Scenario 1 – No supply of exported wild souvenir animal parts by an outfitter

96. In this scenario (illustrated in Figure 1), the souvenir animal parts are from a wild animal killed by the overseas hunter on Crown land. There is no supply of a good (the souvenir animal parts) by the outfitter to the overseas hunter. Even if the outfitter assists the overseas hunter by delivering the souvenir animal parts to a taxidermist for the overseas hunter, that delivery is not a GST supply of the trophy by the outfitter. This is because the overseas hunter acquires the parts from the Crown when the animal is killed.

97. The taxidermist provides taxidermy services to the overseas hunter. Those services are not zero-rated as they are performed on moveable personal property (that is, the souvenir animal parts) in New Zealand. When the taxidermist has completed their work on the souvenir animal parts, the taxidermist will typically arrange for the hunting souvenir to be shipped overseas to the hunter. The taxidermist will enter the hunting souvenir for export either in their own right or as an agent for the overseas hunter. There is no taxable supply of goods for GST purposes under s 8 for s 11 to zero-rate. Therefore, s 11A(1)(m) cannot apply to zero-rate the taxidermy services.

Figure 1: No supply of exported wild souvenir animal parts by an outfitter



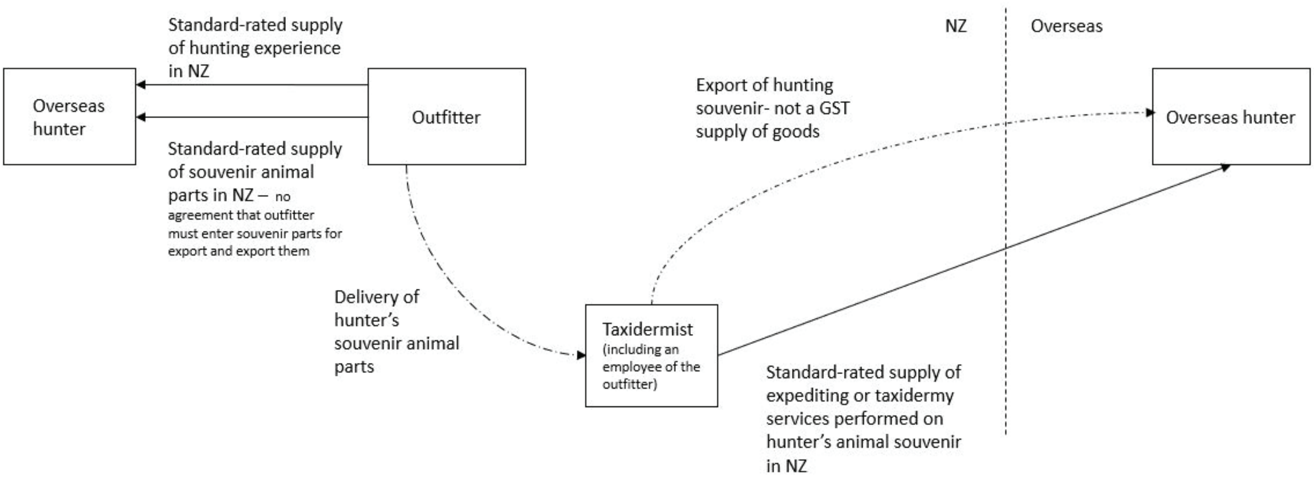
Scenario 2 – Standard-rated supply of souvenir animal parts by an outfitter

98. In this scenario (illustrated in Figure 2), an outfitter's relationship with the overseas hunter ends on completion of the hunt. The outfitter does not agree to export the souvenir animal parts they have supplied to the overseas hunter. The outfitter might introduce the overseas hunter to a taxidermist and might deliver the parts to the hunter's taxidermist but that is the end of the outfitter's relationship with the hunter.

99. The souvenir animal parts are supplied to the overseas hunter in New Zealand. Accordingly, any fee charged by an outfitter for the supply of the souvenir animal parts is standard-rated, even if the souvenir animal parts are later exported to the overseas hunter by another party.

100. The taxidermist provides taxidermy services to the overseas hunter. Those services are not zero-rated as they are performed on moveable personal property (that is, the souvenir animal parts) in New Zealand. When the taxidermist has completed their work on the overseas hunter's souvenir animal parts, the taxidermist will typically arrange for the hunting souvenir to be shipped overseas to the hunter. The taxidermist will enter the hunting souvenir for export either in their own right or as an agent for the overseas hunter. There is no taxable supply of goods for GST purposes under s 8 for s 11 to zero-rate. Therefore, s 11A(1)(m) cannot apply to zero-rate the taxidermy services.

Figure 2: Standard-rated supply of souvenir animal parts by an outfitter



Scenario 3 – Zero-rated supply of hunting souvenir by an outfitter using an independent taxidermist

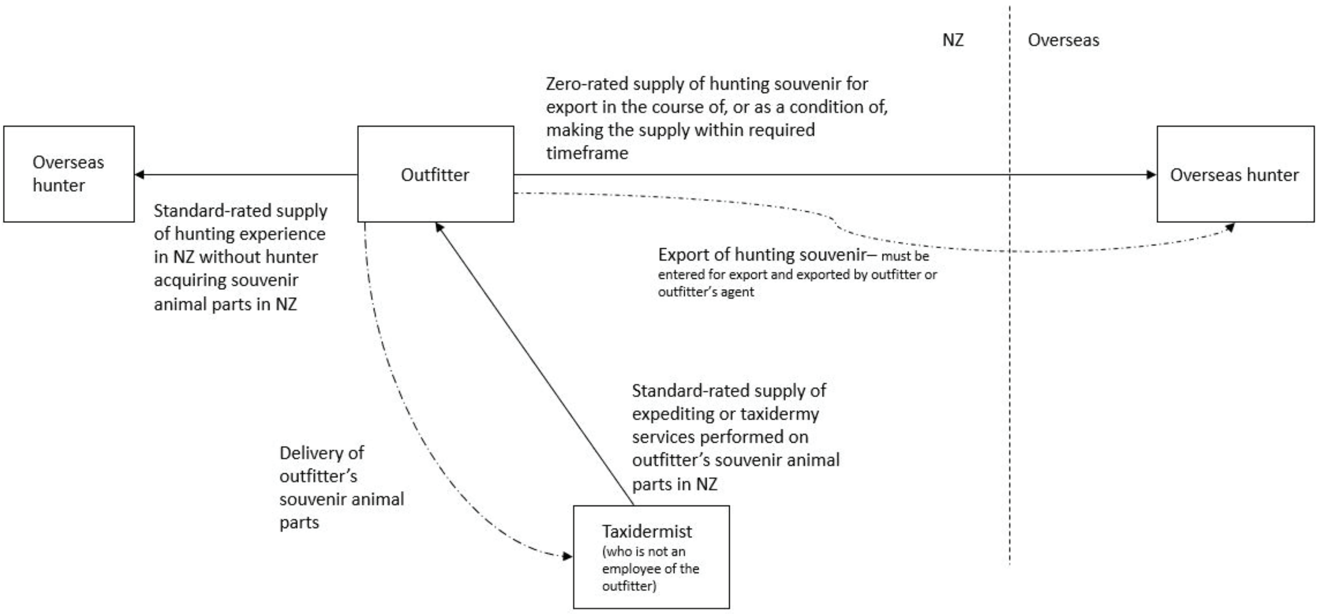
101. In this scenario (illustrated in Figure 3), the outfitter and the overseas hunter agree for the outfitter to supply and export a hunting souvenir to the hunter overseas. The taxidermy is arranged by the outfitter, and the taxidermist supplies its services to the outfitter (and invoices the outfitter for the services they perform). The outfitter can zero-rate the amount paid by the overseas hunter in consideration for the supply and export of the hunting souvenir under s 11(1)(d) or s 11(1)(e), providing the outfitter exports the hunting souvenir within the export period allowed under s 11(4). (Where the consideration for that supply forms part of another amount paid by the hunter, only the portion of that amount that is attributable to the exported hunting souvenir can be zero-rated. See further at [113].)

102. The taxidermist contracts with the outfitter and supplies the taxidermy services to the outfitter. Those services are performed in New Zealand and the customer is the outfitter, a New Zealand resident. Accordingly, the services are standard-rated, and s 11A(1)(m) cannot apply to enable the taxidermist to zero-rate the supply of services. Even though the taxidermist services are directly in connection with a zero-rated supply of goods being exported by the outfitter, the customer is not a non-resident.

103. The taxidermist could enter the hunting souvenir for export and export it as the outfitter's agent, but to ensure zero-rating of the outfitter's supply of the hunting souvenir this agency relationship must be supported by the facts and by the legal relationships between the taxidermist and the outfitter . If an agency relationship cannot be established, then the outfitter's supply of the hunting souvenir cannot be zero-rated as it will not have been entered for export or exported by the outfitter, and so the s 11 zero-rating requirements are not met (see Case P55).

104. The existence of an agency relationship in this situation will not enable the taxidermist to zero-rate the supply of its services to the outfitter. Section 11A(1)(m) will not apply in this case, even though the outfitter's supply of the hunting souvenir is zero-rated. This is because, contractually, the services are provided by the taxidermist to the outfitter, a New Zealand resident.

Figure 3: Zero-rated supply of hunting souvenir by an outfitter using an independent taxidermist

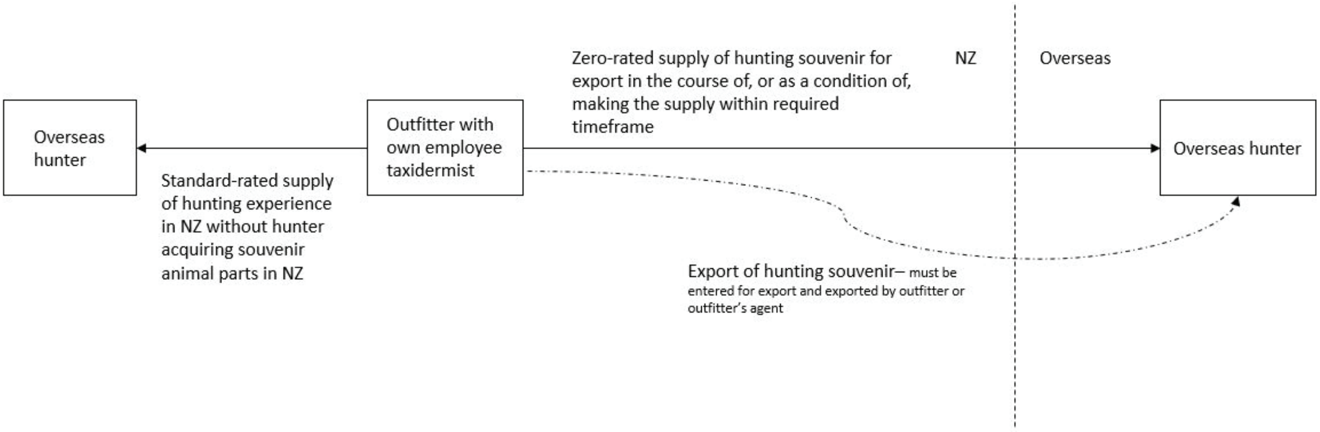


Scenario 4 – Zero-rated supply of hunting souvenir by an outfitter using an in-house taxidermist

105. In this scenario (illustrated in Figure 4) the outfitter employs their own taxidermist, so the outfitter can expedite or mount hunting souvenirs for overseas hunters itself. This enables the outfitter to export a hunting souvenir to the overseas hunter, without the outfitter or the hunter needing to engage an independent taxidermist.

106. The outfitter can zero-rate the amount paid by the hunter in consideration for the supply and export of the hunting souvenir under s 11(1)(d) or s 11(1)(e), providing the outfitter exports the hunting souvenir within the export period allowed under s 11(4). (Where the consideration for that supply forms part of another amount paid by the hunter, only the portion of that amount that is attributable to the exported hunting souvenir can be zero-rated. See further at [113].)

Figure 4: Zero-rated supply of hunting souvenir by an outfitter using an in-house taxidermist



Scenario 5 – Zero-rated supply of souvenir animal parts by an outfitter and zero-rated supply of taxidermy services by a taxidermist

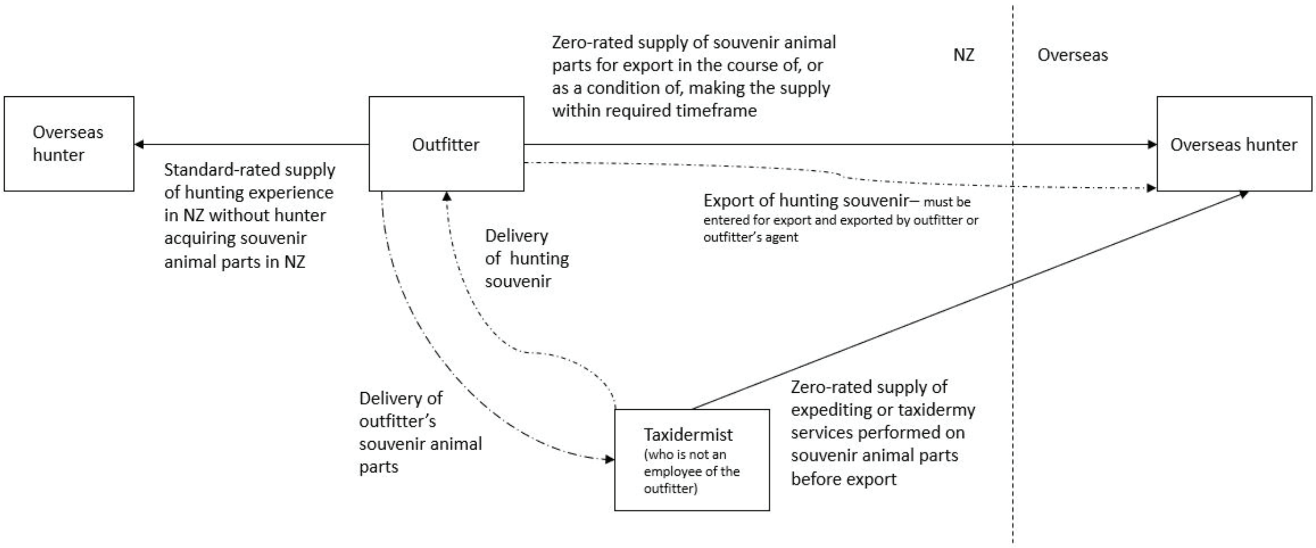
107. In this scenario (illustrated in Figure 5), the outfitter agrees with the overseas hunter to supply and export souvenir animal parts. The overseas hunter also agrees with a taxidermist for the taxidermist to provide taxidermy services on those parts before they are exported by the outfitter to the hunter.

108. The outfitter delivers the souvenir animal parts to the taxidermist, and when the expediting or mounting is completed the taxidermist returns the hunting souvenir to the outfitter. The outfitter then enters the hunting souvenir for export and exports it. The outfitter can zero-rate the amount paid by the hunter in consideration for the supply and export of the souvenir animal parts under s 11(1)(d) or s 11(1)(e). (Where the consideration for that supply forms part of another amount paid by the hunter, only the portion of that amount that is attributable to the exported souvenir animal parts can be zero-rated. See further at [113].)

109. The taxidermist can also zero-rate their supply of taxidermy services to the overseas hunter under s 11A(1)(m). This is because the taxidermy services are supplied to the non-resident, are performed when the non-resident is outside New Zealand, and are in connection with the outfitter's zero-rated supply of the souvenir animal parts for export.

110. The taxidermist could enter the hunting souvenir for export and export it as the outfitter's agent, but to ensure zero-rating this agency relationship must be supported by the facts, and by the legal relationships between them. If an agency relationship cannot be established between the taxidermist and the outfitter, then neither the supply of the souvenir animal parts nor the supply of the taxidermy services can be zero-rated as the hunting souvenir will not have been entered for export and exported by the outfitter, and so the s 11 zero-rating requirements are not met (see Case P55).

Figure 5: Zero-rated supply of souvenir animal parts by an outfitter and zero-rated supply of taxidermy services by a taxidermist

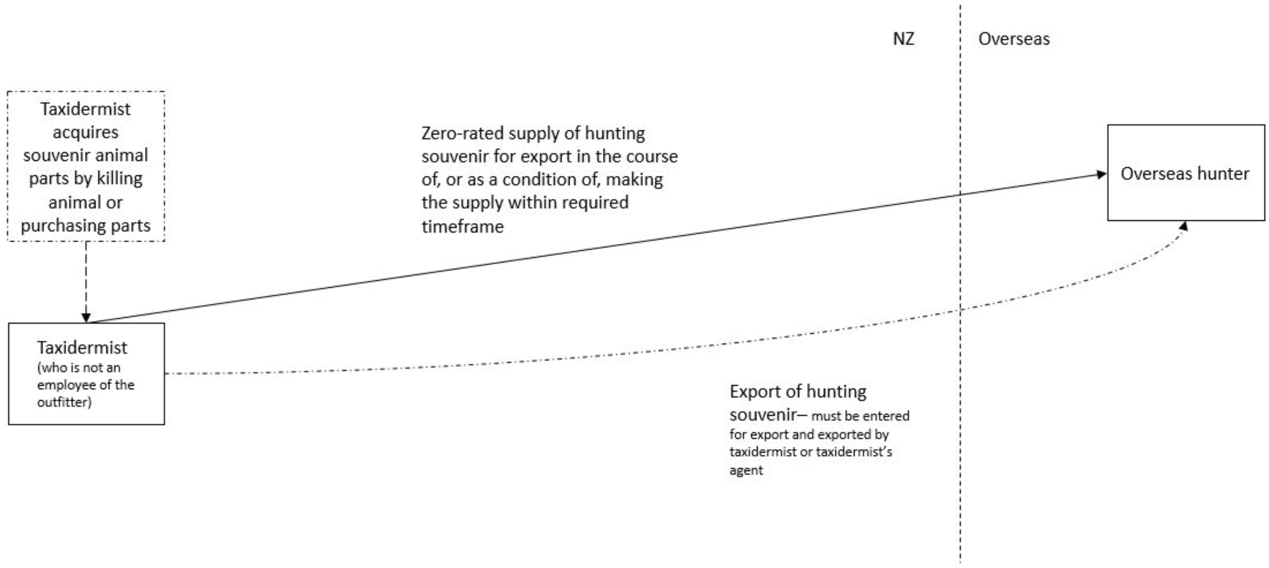


Scenario 6 – Zero-rated supply of hunting souvenir by a taxidermist

111. In this scenario (illustrated in Figure 6), a taxidermist makes a zero-rated supply of a good to an overseas hunter, rather than a supply of services. The situation envisaged is where a taxidermist performs taxidermy for their own account and sells hunting souvenirs to overseas customers. The taxidermist may purchase unwanted souvenir animal parts from an outfitter.

112. The supply of souvenir animal parts by the outfitter to the taxidermist would be a standard-rated supply of a good in New Zealand. The supply and export of the hunting souvenir by the taxidermist to an overseas hunter would be a zero-rated supply of a good entered for export under s 11(1)(d) or s 11(1)(e).

Figure 6: Zero-rated supply of hunting souvenir by a taxidermist



Valuation of supplies

113. Valuation of GST supplies is particularly important where a supplier is making a mixture of standard-rated and zero-rated supplies to an overseas person. The value attached to those separate supplies for GST purposes should properly represent the consideration paid for those separate supplies of goods and services.

114. In the hunting industry, an outfitter may agree to supply a hunting experience in New Zealand to an overseas hunter and to export souvenir animal parts or a hunting souvenir in the course of or as a condition of that supply. That is, the outfitter makes both standard-rated and zero-rated supplies to the overseas hunter.

115. The value of a GST supply is determined by reference to the consideration agreed between the parties. Section 10 sets out how to determine the value of a supply in various situations but typically, where that consideration is in money, the consideration is the amount of money the customer agrees to pay the supplier for the supply. Section 10(2)(a) provides:

> **10 Value of supply of goods and services**
>
> (1) For the purposes of this Act the following provisions of this section shall apply for determining the value of any supply of goods and services.
>
> (2) Subject to this section, the value of a supply of goods and services shall be such amount as, with the addition of the tax charged, is equal to the aggregate of,—
>
> (a) to the extent that the consideration for the supply is consideration in money, the amount of the money:

116. "Consideration" and "consideration in money" are defined in s 2:

> **consideration**, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body
>
> **consideration in money** includes consideration expressed as an amount of money

117. The Commissioner cannot interfere in commercial arrangements simply because the consideration for a supply appears to be too high or a transaction appears to be a poor deal. However, the onus is on the taxpayer to be able to show the Commissioner that a payment has been made in respect of, in response to, or for the inducement of, a supply. If the Commissioner is concerned that artificial or contrived pricing is occurring that alters the incidence of tax, then there may be grounds for the transaction to be reviewed.

118. The amount of money received by an outfitter is usually calculated by reference to the number of days hunting, the number of nights of meals and accommodation and the number, breed and quality of animals hunted and killed by the overseas hunter (that is, the "trophy fees"). It will also include additional amounts for items such as transport and, use of firearms.

119. On occasions, overseas hunters may have been charged GST at the standard rate on the hunting experience in New Zealand, and then the amount referred to as "trophy fees" by the industry has been zero-rated when some souvenir animal parts or a hunting souvenir has been exported. This is based on the assumption that a "trophy fee" is consideration only for the supply of goods being exported.

120. The Commissioner considers the better view is that a trophy fee is what a hunter pays for the opportunity to hunt and kill a particular breed and quality of animal, and, if the hunt is successful and some souvenir animal parts are recoverable, in the absence of any other arrangement, the hunter would also expect to pay for the souvenir animal parts. Accordingly, a trophy fee is in respect of, in response to, or for the inducement of both the outfitter's separate GST supplies (that is, the hunting experience in New Zealand and souvenir animal parts), and not only for the outfitter's supply of souvenir animal parts for export.

121. This conclusion is supported by the facts:

- trophy fees are payable by the hunter even if the outfitter does not agree to export any souvenir animal parts from a recovered animal or a hunting souvenir (for example, where souvenir animal parts are supplied to the hunter in New Zealand, where the souvenir animal parts are retained by the outfitter, or where killed animals are unrecoverable); and
- where an outfitter agrees to supply and export a hunting souvenir using souvenir animal parts, usually some further consideration (in addition to the amounts already agreed) is negotiated to take account of the outfitter's expediting and taxidermy services in connection with that supply.

122. In the Commissioner's view, a hunter does not pay a trophy fee only to obtain the souvenir animal parts. If that were the case, an overseas hunter could simply arrange to purchase souvenir animal parts or a hunting souvenir without attending the hunt. Rather, in the Commissioner's opinion the hunter wants both the experience and opportunity to hunt and kill a particular breed and quality of animal in New Zealand and to obtain souvenir animal parts to take home from their hunt. Some overseas hunters may value the souvenir animal parts more than the New Zealand hunting experience, while other hunters may be more interested in the hunting experience.

123. Therefore, it is appropriate for some of a trophy fee, as that term is used in the industry, to be recognised as being paid in respect of, in response to, or for the inducement of, or the consideration for, an element of the supply of the hunting experience in New Zealand (that is, the opportunity to hunt and kill a particular breed and quality of animal). The balance of the trophy fee is to be treated as consideration for the supply (and sometimes, export) of souvenir animal parts.

124. The Commissioner has issued a Commissioners Statement CS20/02: *Trophy hunting and the GST treatment of the "Trophy Fee"* to assist outfitters determine a reasonable proportion of a trophy fee to be allocated to the supply of souvenir animal parts for export. The Commissioner has established some standard apportionment percentages for each type of trophy hunting animal in New Zealand. The percentages are intended to recognise the increasing value to the hunter of souvenir animal parts and hunting souvenirs as the quality and "uniqueness" of the trophy hunting animals increases. Outfitters may use these percentages to apportion their trophy fees when they export souvenir animal parts or hunting souvenirs, and those valuations will be accepted by the Commissioner. The use of these percentages is optional. Where an outfitter wishes to attribute a greater proportion of a trophy fee to the zero-rated supply than the standard percentages provide for, they will need to satisfy the Commissioner that their valuation is reasonable. The onus is on the outfitter to do so.

Deposits and the time of supply

125. In the hunting industry, establishing the GST "time of supply" is important because it:

- determines the taxable period in which the supplier (that is, the outfitter or the taxidermist) must account for output tax (see s 20(4));
- triggers the beginning of the period within which the trophy must be exported if the supply is to be zero-rated under s 11(1)(d) or s 11(1)(e)(see s 11(4)); and
- sets the date on which transactions denominated in foreign currency amounts are to be converted to New Zealand dollars (see s 77).

126. Generally, the time of supply is determined by s 9(1). Section 9(1) provides that a supply is deemed to take place at *the earlier of the time*:

- an invoice is issued by the supplier or the customer for that supply; or
- any payment is received by the supplier for that supply.

127. A deposit constitutes "any payment". Where a supplier receives a deposit under a contract, the time of supply will be triggered under s 9(1). This will be so even if the goods or services have not been physically supplied or performed at that time.

128. At the time of booking, an outfitter will usually offer an overseas hunter a hunting package or a hunt based on a pre-set price list. In reality, that price is usually only an estimate, with the final price of any hunt not being calculated until the end of the hunt based on the number of days the hunter spends hunting, the quantity, breed and quality of the animals hunted and killed by the hunter and any additional goods or services supplied by the outfitter over the hunt's duration. The overseas hunter pays the outfitter a deposit at the time of booking (and sometimes a further deposit closer to the hunt date) that is calculated either as a fixed amount or is based on a percentage of the estimated price of the hunt. A final payment is made at the completion of the hunt when all the prices are known.

129. Because the hunting package price is only an estimate at the time the deposit is paid, the outfitter does not know exactly how much output tax they are required to pay. In that situation, the special rule in s 9(6) will apply to determine the time of supply. Section 9(6) provides a method for suppliers to account for GST on supplies of goods and services where the total consideration payable (and therefore the amount of GST that must be accounted for) is not known at the time of supply. A supply is deemed to take place, to the extent of the estimated price, *at the earlier of* when:

- a payment of the estimated price becomes due or is received; or
- the supplier or customer issues an invoice for the estimated price.

130. This means when a deposit for the estimated price becomes due or is received by the outfitter, the supply to the extent of the estimated price is deemed to take place for GST purposes. The amount of GST output tax that the outfitter is required to account for at that time depends on whether they are registered for GST on the invoice basis, payments basis or hybrid basis, and whether the supply is standard-rated or zero-rated. The outfitter should calculate the GST output tax on the basis that any souvenir animal parts or hunting souvenirs included in a package will be exported, if that is what has been agreed with the hunter. If the invoice basis is used, output tax is brought to account based on the estimated price in the taxable period in which the deposit is received. If the payments basis is used, output tax is brought to account only to the extent of the deposit relating to the standard-rated supply in the taxable period in which it is received. If the hybrid basis is used, output tax is brought to account on an invoice basis.

131. The output tax payable on the final payment will be brought to account *at the earlier of* when it becomes due or is received by the outfitter or the outfitter issues an invoice for final payment. This will generally be after the completion of the hunt.

Overseas intermediaries

132. Often New Zealand outfitters travel overseas to trade fairs and hunting conventions to seek new customers and sell their hunting experiences. Sometimes New Zealand outfitters will engage the services of an overseas intermediary to sell hunting packages for them. The intermediary might collect deposits from overseas hunters who make hunt bookings and remit these to the New Zealand outfitters. Depending on the contractual arrangements between the parties, sometimes these intermediaries sell the hunting packages on a commission basis, deducting their commission from the hunter's deposit before remitting it to the New Zealand outfitter.

133. For GST purposes, where the intermediary is acting as the commission agent of the New Zealand outfitter, the New Zealand outfitter must return GST output tax on the full estimated price of the hunting package for GST purposes, before deduction of any agent's commission.

134. Where a deposit is paid for a hunt, and the deposit is received by the intermediary from the overseas hunter, then the date on which the intermediary receives the deposit (and not the outfitter) will determine the GST time of supply. The situation is different where the intermediary receives the deposit as a stakeholder – then the time of supply is not triggered until the intermediary releases the payment to the outfitter.

135. Further explanation on deposits and the time of supply is in Interpretation Statement IS 10/03 *GST: Time of supply – payments of deposits, including to a stakeholder* (2010, Inland Revenue), which is available on the Inland Revenue website.

Extensions of time for export of souvenir animal parts or hunting souvenirs

136. Generally, goods must be exported within 28 days of the "time of supply" for their supply to be zero-rated (see s 11(4)). However, on application by the supplier of the goods, the Commissioner may extend that qualifying period if circumstances beyond the control of the supplier and the customer prevent the goods or a class of the goods being exported within the 28 days or, due to the nature of the supply, it is not practicable for the goods to be exported within 28 days of the "time of supply" (see s 11(5)).

137. The Commissioner accepts that, generally, it is not practicable for souvenir animal parts or hunting souvenirs to be exported within 28 days of the time of supply. Therefore, on application, the Commissioner may grant a supplier an extension of time for the export of a specific supply of goods, or if the Commissioner determines it is appropriate in the circumstances may, on application, grant a supplier an extension of time for multiple future supplies of souvenir animal parts or hunting souvenirs for export by the supplier.

138. All applications for extensions of the 28-day period for exports of souvenir animal parts or hunting souvenirs by New Zealand outfitters under Scenarios 3 to 5, or exports of hunting souvenirs by New Zealand taxidermists under Scenario 6, should be emailed to **GSTexportextensions@ird.govt.nz**. Outfitters and taxidermists relying on time extension arrangements applied for and granted before the publication of this Interpretation Statement should re-apply to Inland Revenue, to check that the extension continues to be appropriate for their circumstances. Applications should include relevant documentation (such as the supply contract and the anticipated period of time required for the taxidermy services to be completed and for the goods to be exported). The application must be made before the end of the 28-day period for the relevant supply of goods.

139. The Commissioner will not approve applications for extensions of the 28-day period from taxidermists who are performing taxidermy services in New Zealand on souvenir animal parts being supplied by the outfitter (unless they are acting as the outfitter's agent). This is because the exporter of the goods is the outfitter. However, if an extension is granted to the outfitter for the supply, the Commissioner accepts that the taxidermist may use the outfitter's extension to zero-rate their services but only if the requirements of s 11A(1)(m) are met.

140. A taxidermist who is acting as the outfitter's agent may make an application on behalf of the outfitter for an extension of time for goods being exported by the outfitter. However, whether the taxidermist is acting as the agent of the outfitter will depend on the legal arrangements entered into and carried out by the parties. Therefore, a copy of the agreement appointing the taxidermist as the outfitter's agent in that matter should be included with the other relevant documentation when making an application.

Examples

141. The following examples explain the practical application of the GST zero-rating rules to supplies made by outfitters and taxidermists to overseas hunters.

Example 1 – Free-range tahr and chamois hunting trip

142. While attending a hunting convention in Las Vegas, Dwayne Redding, a Canadian hunter, meets Tom Bloke a New Zealand outfitter and the owner of Chamois Downs Ltd. Dwayne is so impressed with Tom's operation he asks about booking a four-day wilderness hunt with Tom at Chamois Downs the following season, targeting free-range tahr and chamois.

143. Tom offers Dwayne the Chamois Downs' Wilderness Hunt package and notes that the package includes:

- guiding;
- the opportunity to kill one tahr and one chamois;
- fully catered accommodation;
- transfers to and from Queenstown;
- use of firearms;
- field preparation of any recoverable killed game animals; and
- transport.

144. The package does not include any agreement for Tom to export souvenir animal parts or hunting souvenirs overseas to Dwayne in the course of, or as a condition of, the supply. The package is priced at NZ$8,000 excluding GST.

145. On 1 February 2018, Dwayne pays a 30% deposit (NZ$2,400) to secure his booking on the understanding that the final amount payable will be calculated at the conclusion of his hunt, based on the quantity, size and breeds of animals he actually kills and any additional services he enjoys during his stay.

146. The following year Dwayne enjoys four days hunting at Chamois Downs. Tom recovers the head and cape from a tahr and a chamois killed by Dwayne as part of the package. Tom also recovers a red deer stag killed by Dwayne. In addition, Chamois Downs organises a 30-minute scenic helicopter flight for Dwayne.

147. Chamois Downs calculates, based on its price list, that Dwayne owes a final amount of NZ$14,850 including GST, on top of the 30% deposit he paid the previous year. On 25 April 2019, Chamois Downs prepares a GST invoice for Dwayne.

Chamois Downs
High Country Station Road
Central Otago

GST No: 12-345-000

TAX INVOICE

INVOICE # 85
DATE: 25 APRIL 2019

TO:
Dwayne Redding
1 Maple Ave
Vancouver 91210
Canada

DESCRIPTION	TOTAL
4-day Wilderness Hunt Package	8,000
1 free-range red deer stag 320 SCI	6,000
30-minute scenic helicopter ride	1,000
SUBTOTAL	**15,000**
GST AT 15%	2,250
LESS DEPOSIT PAID ON 1 FEBRUARY 2018	-2,400
TOTAL DUE	$14,850

(**Note:** all amounts in this invoice are NZ dollars)

148. All the goods and services supplied by Chamois Downs to Dwayne are consumed by Dwayne in New Zealand. Chamois Downs does not export any goods to Dwayne overseas. Accordingly, all the elements of the supply are standard-rated for GST purposes.

149. Chamois Downs accounts for GST on a payments basis. This means Tom must account for the GST output tax of $2,250 at two different times:

- First, Tom must account for output tax of $313.04 on the $2,400 deposit in the GST period in which Chamois Downs receives the deposit from Dwayne.
- Then, the remaining GST output tax of $1,936.96 must be returned in the GST period when Dwayne's final payment is received.

Example 2 – Supply of taxidermy services to overseas hunter

150. Dwayne engages Gold Town Taxidermy Ltd near Queenstown to expedite and mount his three heads and capes as hunting souvenirs and export them to him. Chamois Downs agrees to deliver the heads and capes to Gold Town Taxidermy for Dwayne.

151. Gold Town Taxidermy offers its overseas clients, such as Dwayne, a full taxidermy mounting service, including crating and packing. On receiving Dwayne's three heads from Chamois Downs, Gold Town Taxidermy processes and treats them before incorporating the treated skins and horns with other taxidermy components to create an artistic life-like rendering of the animals.

152. Once the hunting souvenirs are completed, Gold Town Taxidermy crates and packs them ready for collection by Dwayne's shipping agent. The crated hunting souvenirs are collected from Gold Town Taxidermy by Mega Freight Ltd, which arranges for the hunting souvenirs to be exported to Dwayne.

153. There is no supply of goods by Gold Town Taxidermy to Dwayne, only a supply of services. The supply of the taxidermy components that are incorporated with the treated skins and horns are ancillary to the supply of the taxidermy services, so are not a separate supply from the supply of taxidermy services, which is the dominant supply.

154. The taxidermy services and the packing and crating service are a single supply by Gold Town Taxidermy. The services are provided in New Zealand on property situated in New Zealand, so must be standard-rated.

Gold Town Taxidermy
Frankton Road
Queenstown
Central Otago

GST No: 12-345-987

TAX INVOICE

INVOICE # 100
DATE: 17 AUGUST 2019

TO:
Dwayne Redding
1 Maple Ave
Vancouver 91210
Canada

DESCRIPTION	TOTAL
To expedite and mount heads and capes from one tahr, one chamois and one red deer stag and pack ready for export overseas	
Taxidermy services	2,500
Consumables	120
Crating and packing services	180
SUBTOTAL	**2,800**
GST AT 15%	420
TOTAL DUE	3,220

(**Note:** all amounts in this invoice are NZ dollars)

155. The services provided by Mega Freight to Dwayne in collecting the hunting souvenirs from Gold Town Taxidermy and exporting them to Dwayne are zero-rated under ss 11A(1)(a), (c) and (d).

Example 3 – Game estate outfitter supplies complete hunting package to overseas hunter

156. At the Nevada Hunting and Safari Show in July 2018, Maria McCarthy, a United States hunter, purchases a Silver Medal Red Deer hunting package with Hunt Away Tourism Ltd, a New Zealand game estate operator. The agreed purchase price of the package is NZ$20,000 inclusive of any GST, and Maria pays Hunt Away Tourism's agent in Nevada a deposit of NZ$4,000 to secure her booking of the hunt. The Nevada agent is busy and remits Maria's deposit to Hunt Away Tourism, less his commission of NZ$1,500, three months after the Hunting and Safari Show.

157. The Silver Medal Red Deer hunting package includes:

- one estate red deer stag (Safari Club International 340 - 379);
- four nights fully-catered accommodation at Hunt Away Lodge;
- professional guiding;
- assessment of the red deer stag by a Safari Club International-qualified measurer;
- return transfers between Hunt Away Lodge and Christchurch Airport;
- use of firearms, and
- a full in-house taxidermy service.

158. The agreement between Hunt Away Tourism and Maria specifies that after her hunt the souvenir animal parts from the animal she kills will be expedited, crated and then exported to her in the United States. Maria will pay separately for the international freight charges.

159. Even though Maria purchases the package in the United States through a United States agent, the GST rules still apply to the supplies being made by the outfitter. The place where the contract is entered into or where payment is made is not relevant to the GST treatment of the supply.

160. Hunt Away Tourism recognises that the sale of the Silver Medal Red Deer hunting package comprises the supply of several different elements for GST purposes. For GST the elements supplied are:

- the supply of the hunting experience in New Zealand, including:
  - the opportunity to hunt and kill a silver medal red deer stag;
  - professional guiding;
  - transport for the hunter and guide;
  - use of firearms;
  - SCI-measurer services;
  - meals, accommodation and airport transfers; and
- the supply for export of expedited souvenir animal parts.

161. The supply of the hunting experience is a single composite supply for GST purposes. That supply (and all its elements) are standard-rated for GST purposes because the goods and services are supplied in New Zealand to Maria while she is in New Zealand.

162. Hunt Away Tourism agrees to export the expedited souvenir animal parts to Maria overseas in the course of, or as a condition of, the supply. This supply is treated as a separate supply for GST purposes from the supply of the other elements of the transaction. The supply of the expedited souvenir animal parts can be zero-rated providing they are exported within the requisite time for zero-rating. Previously Hunt Away Tourism has applied for and been granted a time extension for exporting expedited souvenir animal parts from the time of supply to the date the expedited souvenir animal parts are exported.

163. Because Hunt Away Tourism accounts for GST on an invoice basis and because the time of supply for the hunt was triggered when their Nevada agent received Maria's deposit for the hunt package (and not when the agent remitted the deposit to them), Hunt Away Tourism must account for GST output tax on the standard-rated portion of the NZ$20,000 purchase price in the GST period in which the Nevada agent received the deposit. No deduction is made to the purchase price for the commission paid to the Nevada agent.

164. Maria hunts and kills a silver medal red deer stag with an SCI score of 365. The guides recover the stag's antlers, head and cape. They are suitable for mounting and so are delivered to Hunt Away Tourism's in-house taxidermist for expediting. Hunt Away Tourism then invoices Maria for the hunt package:

Hunt Away Tourism Limited
Lake Road
Twizel
South Canterbury

GST No: 12-123-123

TAX INVOICE

INVOICE # 254
DATE: 31 MAY 2019

TO:
Maria McCarthy
11 Cactus Grove
Nevada 91210
USA

DESCRIPTION		TOTAL
Silver Medal Red Deer package:		
Supply of hunting experience in New Zealand	13,043.48	
GST at 15%	1,956.52	
		15,000.00
Supply of expedited souvenir animal parts for export		
Souvenir animal parts (50% of trophy fee of NZ$9,000)	4,500.00	
Expediting and crating services	500.00	
GST at 0%	0.00	5,000.00
	SUBTOTAL	**20,000.00**
	LESS DEPOSIT PAID TO AGENT	-4,000.00
	TOTAL DUE	16,000.00

(**Note:** all amounts in this invoice are NZ dollars)

INTERPRETATION STATEMENTS

165. The portion of the package price attributable to the supply and export of the expedited souvenir animal parts is zero-rated, but the remainder of the package price is standard-rated. To determine the portion of the total package price that can be zero-rated Hunt Away Tourism uses the trophy fee quoted in its current price list for a red deer stag with a SCI score of 340 – 379 (NZ$9,000) and apportions that trophy fee by applying the 50% apportionment percentage recommended in the Commissioner's Statement for a red deer with an SCI score below 400 (see CS 20/02).

166. Several months later, but before the time extension expires the expedited souvenir animal parts are crated and ready for shipping. Hunt Away Tourism engages Mega Freight as its agent to export the parts to Maria in the United States. Mega Freight collects the crate, enters it for export with the New Zealand Customs Service as agent for Hunt Away Tourism, delivers it to the international airport and arranges for it to be shipped to Maria. The supply of these services by Mega Freight are zero-rated under s 11A(1)(d).

Example 4 – Outfitter supplies hunt and souvenir animal parts for export to overseas hunter; independent taxidermist supplies taxidermy services to overseas hunter

167. Bruce Murphy, an Australian hunter, books a hunt with Lonely World Hunting Ltd using their website. The booking is for four days hunting and three nights' accommodation and meals in Faraway Lodge. In addition to the hunting and accommodation charges, Bruce agrees to pay a trophy fee for each animal he kills while hunting. The trophy fees are based on Lonely World Hunting's price list. Bruce pays Lonely World Hunting a deposit of NZ$1,200 to secure his booking.

168. Bruce hunts and kills a red deer stag and an Arapawa ram. Lonely World Hunting agrees to export the souvenir animal parts in the course of, or as a condition of, the supply on the understanding that Bruce has arranged for Furs n Spurs Taxidermists to mount them ready for export. Lonely World Hunting invoices Bruce for the hunting experience in New Zealand and for the animals killed:

Lonely World Hunting Limited
Main Road
Mangakino
Central North Island

GST No: 12-789-456

TAX INVOICE

INVOICE # 714
DATE: 12 MARCH 2019

TO:
Bruce Murphy
7 Myrtle Place
Adelaide
South Australia

DESCRIPTION			TOTAL
Hunting experience in New Zealand			
4 days hunting and guiding	2,600		
3 nights accommodation and meals in Faraway Lodge	900		
Transfers to and from Auckland International Airport	500		
1 Red Deer SCI 410 (25% of trophy fee of NZ$13,000 standard rated)	3,250		
1 Arapawa Ram (75% of trophy fee of NZ$1,500 standard rated)	1,125		
Scenic helicopter flight – 30 minutes	1,250		
		9,625.00	
Plus GST @ 15%		1,443.75	
			11,068.75
Souvenir animal parts for export to Australia			
1 Red Deer SCI 410 (75% of trophy fee of NZ$13,000 zero- rated)	9,750		
1 Arapawa Ram (25% of trophy fee of NZ$1,500 zero-rated)	375		
		10,125.00	
Plus GST @ 0%		0.00	
			10,125.00
		SUBTOTAL	**21,193.75**
		LESS DEPOSIT PAID	-1,200.00
		TOTAL DUE	**19,993.75**

(**Note:** all amounts in this invoice are NZ dollars)

169. A portion of each trophy fee attributable to the export of the souvenir animal parts in the course of, or as a condition of, the supply is zero-rated. The remaining portion of each trophy fee is standard-rated. To determine the portion of each trophy fee that can be zero-rated Hunt Away Tourism applies the recommended apportionment percentage for each animal as set out in the Commissioner's Statement for apportioning the value of a trophy fee (see CS 20/02).

170. Lonely World Hunting delivers the souvenir animal parts to Furs n Spurs Taxidermists. Four months later, Furs n Spurs Taxidermists lets Lonely World Hunting know that the hunting souvenirs are crated and ready for exporting. Furs n Spurs Taxidermists issues an invoice to Bruce for NZ$1,700 inclusive of GST at 0% for its taxidermy and packing services.

Furs n Spurs Taxidermy
Lake Front Road
Taupo

GST No: 21-543-987

TAX INVOICE

INVOICE # 1542
DATE: 17 JULY 2019

TO:

Bruce Murphy
7 Myrtle Place
Adelaide
South Australia

DESCRIPTION	TOTAL
To mount one red deer stag head and cape, one Arapawa ram and pack ready for shipping	
Taxidermy services	900.00
Consumables	500.00
Crating and packing services	300.00
SUBTOTAL	**1,700.00**
GST AT 0%	0.00
TOTAL DUE	1,700.00

(**Note:** all amounts in this invoice are NZ dollars)

171. Lonely World Hunting then engages Tasman Freight as its agent to enter the hunting souvenirs for export to Bruce in Australia. Tasman Freight collects the crate from Furs n Spurs Taxidermists, enters it for export with New Zealand Customs as agent for Lonely World Hunting, and arranges for it to be shipped to Bruce.

172. As the agent of Lonely World Hunting, Tasman Freight invoices Bruce for transporting the hunting souvenirs to Auckland International Airport, arranging shipping and insurance, and completing the export procedures. The supply of these services by Tasman Freight is zero-rated under s 11A(1)(d).

173. Tasman Freight records the value of the hunting souvenirs for New Zealand customs purposes at its free-on-board value of $12,125 – being the value of the souvenir animal parts ($10,125) plus the taxidermy costs ($1,700) plus $300 for transporting the hunting souvenir to Auckland International Airport and arranging its shipping and insurance. The cost of shipping to Australia is not included in the free-on-board value.

References

Subject references
Exported goods
Exported services
GST
Hunting
Taxidermy
Zero-rating

Legislative references
Goods and Services Tax Act 1985, ss 2 ("consideration" and "consideration in money"), 8, 9(1) and (6), 10, 11, 11A, 76, 77
Wild Animal Control Act 1977, s 9

Replaced public statements
"Trophies and animal products derived from the tourist, hunting and safari industry – zero-rating under GST" *Tax Information Bulletin* Vol 9, No 6 (June 1997): 1
"Trophies and animal products derived from the tourist, hunting and safari industry – zero-rating under GST" *Tax Information Bulletin* Vol 15, No 7 (July 2003): 23
"QWBA 07/04: Trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand – zero-rating" *Tax Information Bulletin* Vol 19, No 7 (August 2007): 19

Case references
Auckland Institute of Studies Ltd v CIR (2002) 20 NZTC 17,685 (HC)
Case 4/2013 (2013) 26 NZTC 16,027
Case P55 (1992) 14 NZTC 4,382 (TRA)
CIR v Gulf Harbour Development Ltd (2004) 21 NZTC 18,915 (CA)
Hawkins Taxidermists of Canada Ltd v Canada [2005] TCJ No 308 (TCC)
Marac Life Assurance Ltd v CIR (1986) 8 NZTC 5,086 (CA)
Moher v Wildlife Originals by Clarence Kriaski [2019] AJ No. 16
Robertson v Canada [2002] TCJ No 48 (TCC)
Robinson v Graves [1935] 1 KB 579
Whyte v Owl Electrical (1988) Limited [1995] 6 TCLR 299

Other references
Commissioner's Statement CS 20/02: Trophy hunting and the GST treatment of the "Trophy Fee" (2020, Inland Revenue)
"IS 10/03 GST: Time of supply – payments of deposits, including to a stakeholder" *Tax Information Bulletin* Vol 22, No 6 (July 2010): 7
"IS 18/04: Goods and services tax – single supply or multiple supplies" *Tax Information Bulletin* Vol 30, No 10 (November 2018): 5

Appendix – Legislation

Goods and Services Tax Act 1985

1. "Consideration" and "consideration in money" are defined in s 2:

> **consideration**, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body
>
> **consideration in money** includes consideration expressed as an amount of money

2. Section 8(1) and (2) provides:

> **8 Imposition of goods and services tax on supply**
>
> (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15% on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after 1 October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.
>
> (2) For the purposes of this Act, goods and services shall be deemed to be supplied in New Zealand if the supplier is resident in New Zealand, and shall be deemed to be supplied outside New Zealand if the supplier is a non-resident.

3. Section 9(1) and (6) provides:

> **9 Time of supply**
>
> (1) Subject to this Act, for the purposes of this Act a supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier or the recipient or the time any payment is received by the supplier, in respect of that supply.
>
> (6) Subject to subsections (2)(a) and (3), where the whole of the consideration (the **price**) for a supply under an agreement is not determined at the time of the agreement, and a supply is made under the agreement before the price is determined, the supply is deemed to take place, to the extent of a part of the price, at the earlier of when—
>
> (a) a payment of the part of the price becomes due or is received:
>
> (b) the supplier or recipient issues an invoice for the part of the price.

4. Section 10(2) provides:

(2) Subject to this section, the value of a supply of goods and services shall be such amount as, with the addition of the tax charged, is equal to the aggregate of,—

(a) to the extent that the consideration for the supply is consideration in money, the amount of the money:

(b) to the extent that the consideration for the supply is not consideration in money,—

(i) the open market value of that consideration, if subparagraph (ii) does not apply; or

(ii) the value of the consideration agreed by the supplier and the recipient, if subsection (2B) applies.

5. Section 11(1)(a) to (eb) provides:

11 Zero-rating of goods

(1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:

(a) the supplier has entered the goods for export under the Customs and Excise Act 1996 and the goods have been exported by the supplier; or

(b) the goods have been deemed to be entered for export under the Customs and Excise Act 1996 and the goods have been exported by the supplier; or

(c) the supplier has satisfied the Commissioner that the goods have been exported by the supplier to a place outside New Zealand; or

(d) subject to subsection (4), the supplier will enter the goods for export under the Customs and Excise Act 1996 in the course of, or as a condition of, making the supply, and will export the goods; or

(e) subject to subsection (4), the goods will be deemed to be entered for export under the Customs and Excise Act 1996 and will be exported by the supplier in the course of, or as a condition of, making the supply; or

(eb) subject to subsection (4), the goods supplied—

(i) are supplied to a recipient who is a non-resident; and

(ii) have been entered for export under the Customs and Excise Act 1996 by the supplier or will be entered for export by the supplier in the course of or as a condition of making the supply; and

(iii) are exported by the recipient; and

(iv) are not intended by the recipient for later importation into New Zealand for use other than in making taxable supplies or exempt supplies, with the absence of such an intention being confirmed by the recipient in a document retained by the supplier; and

(v) are not used or altered by the recipient before being exported, except to the extent necessary to prepare the goods for export; and

(vi) leave New Zealand under an arrangement agreed by the supplier and the recipient at or before the time of the supply; and

(vii) do not leave New Zealand in the possession of a passenger or crew member of an aircraft or ship; or

6. Section 11(4) and (5) provide:

(4) If subsection (1)(d), (e), or (eb) applies and the person required to export the goods does not do so within 28 days beginning on the day of the time of supply or a longer period that the Commissioner has allowed under subsection (5), the supply of the goods must be charged with tax at the rate specified in section 8 despite subsection (1)(d), (e), and (eb) but subject to subsection (1)(a), (1)(b) and subsection (5).

(5) The Commissioner may extend the 28-day period before a supply of goods is charged with tax at the rate specified in section 8 if the Commissioner has determined, after the supplier has applied, that—

(a) circumstances beyond the control of the supplier and the recipient have prevented, or will prevent, the export of the goods within 28 days beginning on the day of the time of supply; or

(b) due to the nature of the supply, it is not practicable for the supplier to export the goods, or a class of the goods, within 28 days beginning on the day of the time of supply.

7. Section 11A(1)(a), (c), (d), (k) and (m) provides:

11A Zero-rating of services

(1) A supply of services that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:

(a) the services, not being ancillary transport activities such as loading, unloading and handling, are the transport of passengers or goods—

(i) from a place outside New Zealand to another place outside New Zealand; or

(ii) from a place in New Zealand to a place outside New Zealand; or

(iii) from a place outside New Zealand to a place in New Zealand; or

…

(c) the services, including ancillary transport activities such as loading, unloading and handling, are the transport of goods from a place in New Zealand to another place in New Zealand to the extent that the services are supplied by the same supplier as part of the supply of services to which paragraph (a)(ii) or (a)(iii) applies; or

…

(d) the services are the insuring, or the arranging of the insurance, or the arranging of the transport of passengers or goods to which any one of paragraphs (a) to (cb) applies; or

…

(k) subject to subsection (2), the services are supplied to a person who is a non-resident and who is outside New Zealand at the time the services are performed, not being services which are—

(i) supplied directly in connection with land situated in New Zealand, or with an improvement to such land, or are supplied in connection with such land or improvement and are intended to enable or assist a change in the physical condition, or ownership or other legal status, of the land or improvement; or

(ii) supplied directly in connection with moveable personal property, other than choses in action or goods to which paragraph (h) or (i) applies, situated in New Zealand at the time the services are performed; or

(iii) the acceptance of an obligation to refrain from carrying on a taxable activity, to the extent to which the activity would have occurred within New Zealand; or

…

(m) the services are supplied—

(i) directly in connection with goods, the supply of which was subject to any one of section 11(1)(a) to (eb); and

(ii) to a recipient who, when the services are performed, is a non-resident and outside New Zealand; or

8. Section 77 provides:

77 New Zealand or foreign currency

(1) All amounts of money must, for the purposes of this Act, be expressed in terms of New Zealand currency, and in any case where and to the extent that any such amount is consideration in money for a supply, that amount must be expressed in terms of New Zealand currency as at the time of that supply.

(2) Despite subsection (1), a non-resident supplier of remote services to which section 8(3)(c) applies may choose to express the amount of consideration in money for their supplies in a foreign currency as at the time of supply.

(3) A non-resident supplier which makes an election under subsection (2) must, in a return, choose to convert foreign currency amounts into New Zealand currency amounts on—

(a) the last day of the relevant taxable period; or

(b) the earlier of—

(i) the date the supplier files their return for the relevant period:

(ii) the due date for filing their return for the relevant period; or

(c) another date agreed between the supplier and the Commissioner.

(4) A non-resident supplier may not revoke an election under subsection (2) or (3) until at least 24 months after making the election, unless the Commissioner agrees otherwise.

Wild Animal Control Act 1977

9. Section 9(1) and (2) provides:

9 Ownership of wild animals

(1) All wild animals shall be the property of the Crown:

provided that where any wild animal has been lawfully taken or killed or is lawfully held pursuant to this Act, it shall cease to be the property of the Crown, and the animal shall be deemed to be the property of the person by whom it was so taken or killed, or by whom it is held:

provided also that nothing in this subsection shall have effect so as to impose any obligation or liability on the Crown in respect of damage done by any wild animal.

(2) The presence of any wild animal on any land confers no right of ownership of the wild animal or its carcass on the owner or occupier of the land unless and until the animal is—

(a) captured, held, or conveyed under a valid permit issued by the Director-General; or

(b) killed by a person who hunts or kills a wild animal on the land with the consent of the owner or occupier; or

(c) hunted or killed by the owner or occupier by lawful means; or

(d) identified in accordance with an identification system—

(i) approved under the National Animal Identification and Tracing Act 2012; or

(ii) approved under section 50 of the Biosecurity Act 1993 and approved by the Director-General for the purposes of this Act.

IS 20/03: Income tax – sections GB 3B and GB 4 of the Income Tax Act 2007 – temporary loss carry-back regime

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

Summary

1. The focus of this statement is to set out the Commissioner's view of the application of the specific anti-avoidance provisions (ss GB 3B and GB 4) relevant to the temporary loss carry-back regime (s IZ 8). The regime allows a business to carry-back losses to a prior income year and receive a refund of tax paid.
2. The specific anti-avoidance provisions require:
    - that a company share is "subject to an arrangement" (which includes "an arrangement directly or indirectly altering rights attached to the shares");
    - the arrangement "allows" the relevant company "to meet the requirements" of the temporary loss carry-back regime; and
    - a "purpose" of the arrangement is "to defeat the intent and application" of the regime.
3. A share will be "subject to an arrangement" if the share or the rights attached to the share are the subject matter of the arrangement. An "arrangement" embraces all kinds of concerted action by which persons may arrange their affairs for a particular purpose or to produce a particular effect. It may involve more than one transaction or document and includes all steps and transactions by which it is carried into effect.
4. The arrangement must "allow" (ie, permit or enable) a company to obtain or maintain compliance with the ownership continuity or ownership commonality requirements during the relevant period, as required by s IZ 8.
5. If, objectively determined, the effect of the arrangement is that it defeats the intent and application of the temporary loss carry-back regime, then that will be a "purpose" of the arrangement.
6. The temporary loss carry-back regime concerns the treatment and use of tax losses. In general terms, rules around the use of tax losses are intended to ensure that the economic benefit of tax losses can only be obtained by the same people who effectively bore the direct economic burden of the losses.
7. The Commissioner considers that the test as to whether an arrangement "defeats the intent and application" of the temporary loss carry-back regime is, in effect, the same test as the parliamentary contemplation test under the general anti-avoidance provision (s BG 1), as set out by the Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115. Both tests are aimed at arrangements that in legal substance satisfy the requirements of a particular provision or regime, but when viewed in a commercial and realistic way, make use of (or circumvent) the provision or regime in a manner that is inconsistent with the provision or regime's purpose.

Introduction

8. The COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020 introduces a temporary loss carry-back regime into the Income Tax Act 2007. This regime was introduced as part of a range of business tax changes in response to the economic impact of the COVID-19 pandemic.[1]
9. The temporary loss carry-back regime enables a person who has taxable income in the 2018–19 or 2019–20 income year and anticipates a net loss in the next income year to make an election to reduce the amount of the net loss and also reduce the amount of the person's taxable income in the earlier year by the same amount.
10. The primary rule is in the new s IZ 8 (election that amount of net loss for the 2019-20 or 2020-21 income year be tax loss in preceding income year), with specific anti-avoidance rules in the new s GB 3B (arrangements for carrying back net losses: companies) and the amended s GB 4 (arrangements for grouping tax losses: companies).
11. This interpretation statement considers the potential application of those specific anti-avoidance provisions to the temporary regime.
12. The statement does not consider the potential for a "market value circumstance" (as defined in s YA 1) to exist or the potential application of the general anti-avoidance provisions (ss BG 1 and GA 1). Both these matters would need to be borne in mind if the application of the temporary loss carry-back regime is being considered.

[1] For more details of the regime, see "COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020, *A special report*" (Policy and Strategy, Inland Revenue, June 2020).

Relevant legislation

13. Section GB 3B states:

GB 3B Arrangements for carrying back net losses: companies

When this section applies

(1) This section applies when—

(a) a share in a company (the **loss company**) or another company has been subject to an arrangement, including an arrangement directly or indirectly altering rights attached to the shares; and

(b) the arrangement allows the loss company to meet the requirements of section IZ 8 (Election to use net loss for 2019–20 or 2020–21 year as tax loss in preceding year); and

(c) a purpose of the arrangement is to defeat the intent and application of section IZ 8.

Company treated as not meeting requirements

(2) The loss company is treated as not meeting the requirements of section IZ 8 in relation to the shares.

14. Section GB 4 states:

GB 4 Arrangements for grouping tax losses: companies

When this section applies

(1) This section applies when—

(a) a share in a company (the **offset company**) or another company has been subject to an arrangement, including an arrangement directly or indirectly altering rights attached to the shares; and

(b) the arrangement allows the offset company to meet the requirements of subparts IC and IP, and sections IZ 7 and IZ 8 (which relate to the use of tax losses by group companies), as applicable; and

(c) a purpose of the arrangement is to defeat the intent and application of those provisions.

Company treated as not meeting requirements

(2) The offset company is treated as not meeting the requirements of subparts IC and IP and sections IZ 7 and IZ 8, as applicable, in relation to the share.

15. Section IZ 8 is reproduced in the appendix to this statement.

16. In summary, for current purposes, ss GB 3B and GB 4 each have the following three requirements:

- A share in the relevant company is "subject to an arrangement" (which includes "an arrangement directly or indirectly altering rights attached to the shares").
- The arrangement "allows" the relevant company "to meet the requirements" of the temporary loss carry-back regime.
- A "purpose" of the arrangement is "to defeat the intent and application" of the temporary loss carry-back regime.

Meaning of an "arrangement"

17. The first requirement of ss GB 3B and GB 4 is that there is an "arrangement". An arrangement is defined in s YA 1 as follows:

arrangement means an agreement, contract, plan, or understanding, whether enforceable or unenforceable, including all steps and transactions by which it is carried into effect

18. The definition of arrangement provides for varying degrees of formality and enforceability. For example, an arrangement may be:

- a legally binding contract;
- an agreement or plan that may or may not be legally binding;
- an understanding that may or may not be legally binding; or
- a contract that is not enforceable at law due to public policy, contractual incapacity or illegality.

19. The courts have considered the predecessor definitions of arrangement to that in s YA 1, particularly in the context of the general anti-avoidance provision. They described an arrangement as embracing all kinds of concerted action by which persons may arrange their affairs for a particular purpose or to produce a particular effect.

20. For example, in the Court of Appeal, Richardson P stated in *CIR v BNZ Investments Ltd* [2002] 1 NZLR 450:

[45] **The words contract, agreement, plan and understanding appear to be in descending order of formality.** A contract is more formal than an agreement, and in ordinary usage is usually written while an agreement is generally more formal than a plan, and a plan more formal or more structured that an understanding. **And it is accepted in the definition of arrangement that the contract, agreement, plan or understanding need not be enforceable**. Section 99 thus contemplates arrangements which are binding only in honour.

> [46] In *Jaques v Federal Commissioner of Taxation* (1924) 34 CLR 328 at p 359 Isaacs J said that arrangement in s 260 meant an arrangement which was in the nature of a bargain but which might not legally or formally amount to a contract or an agreement. And in *Bell v Federal Commissioner of Taxation* (1953) 87 CLR 548 at p 573, **the High Court of Australia described arrangement as extending beyond contracts and agreements "so as to embrace all kinds of concerted action by which persons may arrange their affairs for a particular purpose or so as to produce a particular effect"**. [Emphasis added]

21. Richardson P was considering a previous definition of arrangement that listed the types of arrangement in descending order of formality. The current definition lists the same types of arrangement alphabetically, so that "agreement" comes before "contract". Despite this slight difference, Richardson P's point that the definition provides for varying degrees of formality and enforceability remains relevant.

Arrangement may involve more than one transaction or document

22. An arrangement may involve more than one transaction or document. Whether two or more transactions or documents together constitute an arrangement is a matter of fact (*Peterson v CIR* [2005] UKPC 5 at [33]). This determination requires consideration of the nature and extent of the relationship between the transactions or documents.
23. For example, in *CIR v Europa Oil* (NZ) Ltd [1971] NZLR 641 at 651, the Privy Council considered that six agreements constituted a single agreement because they were "far too close, and far too carefully worked out" to isolate and treat as "a series of independent bargains". The Privy Council considered an interdependence existed between the agreements because:
    - they were made on the same date and some of them contained references to the other agreements;
    - they indicated that one party never intended to bind itself without entering into the other agreements; and
    - the effect of one of the agreements was to enable one party to sue for any breach of the other agreements.
24. In determining whether transactions and / or documents are part of an arrangement, the courts generally ask whether:
    - the transactions or documents are:
      - sufficiently interrelated or interdependent (or both);
      - part of an overall plan to obtain a particular objective or outcome; or
    - there is prior planned linking or sequencing (or both) of the documents or transactions.
25. However, a mere sequence of events is not sufficient to constitute an arrangement (*AMP Life v CIR* (2000) 19 NZTC 15,940 (HC) at [125]). As mentioned, an arrangement requires an overall plan or some prior planned linking or sequencing (or both) of transactions or documents.

Arrangement includes "all steps and transactions by which it is carried into effect"

26. An arrangement, as defined, includes "all steps and transactions by which it is carried into effect". The words "including all steps and transactions by which it is carried into effect" reflect that an "agreement, contract, plan, or understanding" may not describe all the practical steps and transactions needed to carry out an arrangement.
27. Therefore, the definition makes clear that an arrangement includes the various actions undertaken to carry the arrangement into effect even if the actions are not themselves an "agreement, contract, plan, or understanding".
28. This interpretation is consistent with *CIR v Penny* [2010] NZCA 2,310 where Randerson J stated:

> [78] I am satisfied that an "arrangement" is not limited to a specific transaction or agreement but may embrace a series of decisions and steps taken which together evidence and constitute an agreement, plan or understanding. Any such arrangement may be continued in each of the income years in question or may be varied from year to year.

Other aspects of an arrangement

29. Other aspects of an arrangement include the following:
    - An arrangement is defined to include a "plan", which could involve a single person (*Russell v CIR* (No 2) (2010) 24 NZTC 24,463 (HC) (footnote 33 at [101]) and Russell v CIR [2012] NZCA 128 (at [54]).
    - An arrangement does not require a consensus or a meeting of minds of two or more persons so a taxpayer could be party to an "arrangement" even if they are not consciously involved in, or aware of, the details (see: *Peterson v CIR* [2005] UKPC 5 (PC) at [34]).
    - An arrangement may consist of more than one agreement, contract, plan or understanding, so an agreement, contract, plan or understanding may be part of a wider arrangement as well as being part of a separate narrower arrangement.
    - An arrangement includes steps and transactions that are entered into or carried out outside New Zealand (*BNZ Investments Ltd v CIR* (2000) 19 NZTC 15,732 (HC) at [123]).

Shares are "subject to" an arrangement, including "an arrangement directly or indirectly altering rights"

30. For ss GB 3B and GB 4 to apply, the shares in the relevant company (that is, the loss company, the offset company or another company) must be "subject to" an arrangement. A share will be subject to an arrangement if the share is the subject matter of the arrangement, meaning that the agreement, contract, plan or understanding concerns the share or the rights attached to the share.

31. Sections GB 3B(1)(a) and GB 4(1)(a) include "an arrangement directly or indirectly altering rights attached to the shares" as a type of arrangement that may be caught by the provisions. However, the alteration of rights is not a requirement of the provisions, and other types of arrangements concerning shares may be subject to the sections.

Arrangement "allows" the company to "meet" the relevant "requirements"

32. Sections GB 3B(1)(b) and GB 4(1)(b) require that the arrangement "allows" the loss company to "meet" the requirements of s IZ 8. Section IZ 8 contains the requirements for persons to make an election to use the temporary loss carry-back regime. In brief, the relevant requirements of s IZ 8 for the purposes of ss GB 3B(1)(b) and GB 4(1)(b) are the 49% share ownership continuity requirement and the 66% ownership commonality requirement.

33. The ordinary meaning of the word "allow" (and "allows") includes permitting something to happen. The Court of Appeal has stated that the meaning of "allow" can vary according to context (*McKnight v NZ Biogas Industries Ltd* [1994] NZRMA 258 (CA)). In the context of ss GB 3B(1)(b) and GB 4(1)(b), the arrangement must permit or enable a company to obtain or maintain compliance with the ownership continuity or ownership commonality requirements during the relevant period (as required by s IZ 8).

Meaning of a "purpose"

34. Sections GB 3B(1)(c) and GB 4(1)(c) refer to "a purpose" of the arrangement. The section does not require that the purpose to defeat the intent and application of s IZ 8 be a dominant or main purpose, any such purpose will suffice. However, the purpose of the arrangement must be to defeat the intent and application of s IZ 8, and not simply to enable the company to meet the requirements of that provision.

35. The way in which a purpose test is to be applied and the factors that are relevant in ascertaining purpose depend on the statutory context (*CIR v Haenga* (1985) 7 NZTC 5,198 (CA)).

36. In an avoidance context, the courts have held that the "purpose or effect" of an arrangement is determined objectively and the motives or intentions of the parties are not relevant. The Privy Council in *Ashton v CIR* [1975] 2 NZLR 717 (PC) agreed with the earlier Privy Council decision in *Newton v Commissioner of Taxation* [1958] AC 450, [1958] 2 All ER 759, stating at 721:

> In *Newton v Commissioner of Taxation* [1958] AC 450; [1958] 2 All ER 759 the Privy Council had to consider s 260 of the Commonwealth of Australia Income Tax and Social Services Contribution Assessment Act 1936–1951, a section very similar to s 108. In that case Lord Denning delivering the judgment of the Board said:
>
> > "The word 'purpose' means, not motive but the effect which it is sought to achieve — the end in view. The word 'effect' means the end accomplished or achieved. The whole set of words denotes concerted action to an end — the end of avoiding tax" (ibid, 465; 763).
>
> And:
>
> > "... the section is not concerned with the motives of individuals. It is not concerned with their desire to avoid tax, but only with the means which they employ to do it. It affects every 'contract, agreement or arrangement' (which their Lordships will henceforward refer to compendiously as 'arrangement') which has the purpose or effect of avoiding tax. In applying the section you must, by the very words of it, look at the arrangement itself and see which is its effect — which it does — irrespective of the motives of the persons who made it. Williams J put it well when he said: 'The purpose of a contract, agreement or arrangement must be what it is intended to effect and that intention must be ascertained from its terms. Those terms may be oral or written or may have to be inferred from the circumstances but, when they have been ascertained, their purpose must be what they effect'" ([1958] AC 450, 465).
>
> These observations of Lord Denning in relation to s 260 of the Australian Act are equally applicable to s 108.

37. Similarly, in *Glenharrow Holdings Ltd v CIR* [2008] NZSC 116, [2009] 2 NZLR 359 (SC), the following was stated:

> [35] ... Secondly, the Commissioner must have been properly satisfied that the arrangement was entered into between the parties to it to defeat the intent and application of the Act or any provision of the Act. T**his does not mean that the Commissioner must have been satisfied that the parties subjectively had that defeating purposes**, i.e that they were consciously trying to achieve the end of defeating the intent and application of the Act. ...
>
> [36] A natural and sensible reading of s 76, as it stood prior to 2000, is to read it as requiring the Commissioner to be satisfied that an arrangement has been entered into between persons "so as to" defeat the intent and application of the Act or any provision of the Act. **That requires the Commissioner and the Court to ask what objectively was the purpose of the arrangement, which**

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> **in turn requires examination of the effect of the arrangement**. Section 76, even in its pre-2000 version, therefore requires an examination of the purpose or effect of the arrangement, and in this respect the current version of the section has merely stated expressly what was implicit in the former version.
>
> …
>
> [38] … the general anti avoidance provision was concerned not with the purpose of the parties, but with the purpose of the arrangement. That is a crucial distinction. Once you put the purpose of the parties to one side and seek by objective examination to find the purpose of the arrangement, you must necessarily do that by considering the effect which the arrangement has had — what it has achieved — and then, **by working backwards as it were from the effect, you are able to determine what objectively the arrangement must be taken to have had as its purpose**. That approach is inevitable once any subjective purpose or motive is ruled out of contention, as the authorities say it must be. [Emphasis added]

38. While these cases relate to the general anti-avoidance provisions, the Commissioner considers that the same principles apply to ss GB 3B and GB 4. This means that if the effect an arrangement, determined objectively, is to defeat the intent and application of the temporary loss carry-back regime, then that will be the purpose of the arrangement.

"Defeat the intent and application"

39. Sections GB 3B(1)(c) and GB 4(1)(c) require that a purpose of the arrangement must be to "defeat the intent and application" of the temporary loss-carry back regime.

40. The courts have considered the meaning of provisions with similar wording in *Auckland Harbour Board v CIR* (2001) 20 NZTC 17,008 (PC), *Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618 (HC), *Ch'elle Properties (NZ) Ltd v CIR* (2007) 23 NZTC 21,442 (CA) and *Glenharrow*.

41. *Auckland Harbour Board* concerned the application of s 64J(1) of the Income Tax Act 1976 (now s GB 21), which stated:

> **64J Non-market dispositions**
>
> (1) Where the Commissioner, having regard to any connection between the parties to the issue or transfer of a financial arrangement and to any other relevant circumstances is satisfied that the parties were dealing with each other in relation to the issue or transfer in a manner that **has the effect of defeating the intent and application of sections 64B to 64M of this Act**, the Commissioner may, for the purposes of calculating the assessable income or expenditure of the parties under section 64C or section 64D or section 64F or section 64I of this Act, deem the consideration for the issue or transfer to be equal to the consideration that might reasonably be expected for the issue or transfer if the parties to the issue or transfer were independent parties dealing at arm's length with each other in relation to the issue or transfer. [Emphasis added]

42. In Auckland Harbour Board, Lord Hoffmann made the following comments in relation to s 64J(1) of the Income Tax Act 1976:

> [11] … The section appears to their Lordships to contemplate that the circumstances which justify its application will be specific to a particular transaction, arising out of the relationship between the parties and other relevant circumstances. In this respect it is similar to other anti-avoidance provisions such as s 99. Their Lordships do not of course suggest that the two sections necessarily cover the same ground, but what they have in common is that they are **generally speaking aimed at transactions which in commercial terms fall within the charge to tax but have been, intentionally or otherwise, structured in such a way that on a purely juristic analysis they do not**. This is what is meant by defeating the intention and application of the statute. [Emphasis added]

43. In summary, Lord Hoffmann considered s 64J(1) of the Income Tax Act 1976 to be in the nature of an anti-avoidance provision, which applied where a transaction fell within the charge to tax in commercial terms but had been structured in such a way that on a purely juristic analysis it did not.

44. *Ch'elle* (HC and CA) was concerned with s 76 of the Goods and Services Tax Act 1985 (as it applied before 10 October 2000):

> **76 Agreement to defeat the intention and application of Act to be void**
>
> (1) Notwithstanding anything in this Act, where the Commissioner is satisfied that an arrangement has been entered into between persons **to defeat the intent and application of this Act, or of any provision of this Act**, the Commissioner shall treat the arrangement as void for the purposes of this Act and shall adjust the amount of tax payable by any registered person (or refundable to that person by the Commissioner) who is affected by the arrangement, whether or not that registered person is a party to it, in such manner as the Commissioner considers appropriate so as to counteract any tax advantage obtained by that registered person from or under that arrangement. [Emphasis added]

45. In *Ch'elle* (HC), Rodney Hansen J made the following comments in relation to s 76 of the Goods and Services Tax Act 1985 at [39]:

> Section 76 calls for a more broadly based enquiry than is required to establish technical compliance. It is whether the arrangement has been entered into "to defeat the intent and application of the Act". I agree with Ms Ellis that this goes beyond the technical legality of the constituent parts of the arrangement. It requires the arrangement to be assessed by reference to the principles which underly the Act.

46. In Ch'elle (CA), Robertson J upheld the High Court's judgment and confirmed at [31] that:

> [i]n order to assess whether s 76 [of the Goods and Services Tax Act 1985] is triggered it is necessary to assess the scheme and purpose of the GST Act.

He also stated at [29]:

> As with all general anti-avoidance provisions, its purpose is to strike down arrangements that frustrate the taxing regime, despite the arrangement's technical compliance with substantive taxing provisions.

47. *Glenharrow* concerned s 76 of the Goods and Services Tax Act 1985 (as it applied before 10 October 2000). In the Supreme Court decision, Blanchard J stated:

> **The operation of s 76**
>
> …
>
> [34] In order for the Commissioner to be able to invoke s 76 he must be satisfied that the arrangement which he wishes to treat as void has been "entered into between persons to defeat the intent and application" of the GST Act or of any provision of the Act. Consistent with the approach to interpretation of General Anti-Avoidance Rules (GAARs) in the income tax context, and as foreshadowed in the preceding paragraph, **this determination requires an assessment that goes beyond the technical legality of the constituent parts of the arrangement**. The onus is on the taxpayer to show that the Commissioner could not properly have been satisfied in terms of the section.
>
> …
>
> **The intent and application of the Act**
>
> [40] The application to an arrangement of tax legislation such as s 76 of the GST Act is concerned with the "aim or end in view" of the arrangement. It is to be objectively assessed. **And the assessment will principally be a matter of inference from the arrangement and its effect**. The purpose of an arrangement will be deduced from the arrangement itself and its effect. **The intention of the Act will be defeated if an arrangement has been structured to enable the avoidance of output tax, or the obtaining of an input deduction in circumstances where that consequence is outside the purpose and contemplation of the relevant statutory provisions**. Lord Hoffmann in *C of IR v Auckland Harbour Board* (2001) 20 NZTC 17,008 (PC) commented that, generally speaking, GAARs were:
>
>> "aimed at transactions which in commercial terms fall within the charge to tax but have been, intentionally or otherwise, structured in such a way that on a purely juristic analysis they do not. This is what is meant by defeating the intention and application of the statute.
>
> An arrangement of this kind is not in accordance with the overall purpose of the Act because it produces a "tax advantage" not within the contemplation of the statute. [Emphasis added]

48. Having regard to principles identified in *Auckland Harbour Board*, *Ch'elle*, and *Glenharrow*, the Commissioner considers the test as to whether an arrangement "defeats the intent and application" of a particular provision under a specific anti-avoidance provision such as s GB 3B or s GB 4 is in effect the same test as the parliamentary contemplation test under the general anti-avoidance provision (s BG 1), as set out by the Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115. Both tests are aimed at transactions and arrangements that in juristic or legal terms (that is, in legal substance) satisfy the requirements of the particular provision but, when viewed in terms of their commercial and economic reality, make use of (or circumvent) the provision in a manner that is inconsistent with the purpose of that provision.

49. This means that when applying ss GB 3B and GB 4, it is necessary to consider:
    - the purpose of the temporary loss carry-back regime; and
    - whether the facts of the arrangement have the consequence (effect) that the arrangement's purpose is inconsistent with the purpose of those provisions.

50. As mentioned, the temporary loss carry-back regime was introduced as a temporary response to the economic impact of the COVID-19 pandemic. The intent and application of the regime (and the application of ss GB 3B and GB 4) must be interpreted in light of the reason for its introduction.

51. The temporary loss carry-back regime enables a person who has taxable income in the 2018–19 or 2019–20 income year and anticipates a net loss in the next income year to make an election to reduce the amount of the net loss and also reduce the amount of the person's taxable income in the earlier year by the same amount. The temporary loss carry-back regime is intended to provide fast cash-flow relief for businesses that are in a loss position during the period affected by COVID-19.

52. The temporary loss carry-back regime is one of a number of provisions in the Act that relate to the treatment and use of tax losses. In general terms, as they currently apply, those rules are intended to ensure that the economic benefit of tax losses can only be obtained by the same people who effectively bore the economic burden of the losses. The loss carry-back regime does not override the current rules that prevent the use of losses where ownership changes, albeit those rules apply to compare the loss year to the (earlier) profit year. The 49% ownership continuity requirement and the 66% ownership commonality requirement for grouping losses currently apply to prevent the use of losses by persons who were not connected in the way contemplated by the legislation with the loss-making business when the losses were incurred. The availability of relief under the temporary loss carry-back regime is subject to the same tests during the "offset ownership period" (as defined in s IZ 8(1)).

53. The intent and application of the temporary loss carry-back regime will be defeated by an arrangement that allows losses (and relief) to be claimed by businesses where, viewing the arrangement in terms of its commercial and economic reality, the required connection has not been or will not be maintained when comparing the loss year to the profit year.

Examples

54. The following examples are intended to illustrate the general approach to the application of ss GB 3B and GB 4 only. As mentioned at [12], this statement, including the following examples, do not consider whether a "market value circumstance" (as defined in s YA 1) exists or whether the general anti-avoidance provisions (ss BG 1 and GA 1) would potentially apply.

Example 1

55. A Ltd's taxable income in the 2019–20 income year was $2 million. By August 2020, it becomes clear to the company's directors that, due to the impacts of COVID-19 on the company's trading activities, A Ltd is likely to have significant tax losses for the 2020–21 income year. The losses for the part-year to August 2020 are already $1 million. It is also clear to the directors that A Ltd needs a significant injection of funds to continue trading. The company directors identify a potential new investor (B Ltd).

56. The shares in A Ltd are 100% owned by Mr and Mrs X. After a period of negotiation, the directors of A Ltd and Mr and Mrs X conclude a memorandum of understanding with B Ltd under which B Ltd will provide the necessary debt financing in addition to acquiring a controlling interest of 60% of the ordinary shares in A Ltd. Mr and Mrs X will continue to hold the remaining 40% of the shares after the transaction is completed.

57. The parties realise that one effect of implementing this arrangement in August 2020 is that A Ltd would breach the continuity of ownership rules and therefore would not satisfy the requirements to permit an election under s IZ 8. This means that any losses incurred for the remaining part of the 2020–21 income year would be unable to be carried back. A Ltd's ability to carry losses back to the 2019–20 income year under s IZ 8 and the consequent tax refund could be maximised if any change in ownership does not occur during the 2020–21 income year.

58. Accordingly, when the arrangement is implemented in August 2020:

- B Ltd unconditionally agrees to acquire 60% of the ordinary shares of A Ltd as at the end of the 2020–21 income year (1 April 2021) at the same price as originally contemplated in the memorandum of understanding but with an adjustment of 50% of the tax relief arising from any additional tax losses available to A Ltd attributable to the period 1 August 2020 to 31 March 2021;
- B Ltd agrees to provide the capital injection immediately by way of a loan on interest-only terms and at market rates in return for debentures issued by A Ltd with security over the assets of the company;
- the loan principal advanced is the same amount of consideration B Ltd is required to pay for the shares under the agreement for sale and purchase of 60% of the shares in A Ltd;
- the loan arrangement is made on usual commercial terms, including lender protection:
- to satisfy the share purchase price, B Ltd will assign the loan to Mr and Mrs X;
- the directors of A Ltd resolve immediately to appoint to the board a director nominated by B Ltd; and
- the shareholders of A Ltd, subject to the sale and purchase of the shares agreement with B Ltd, immediately enter into an agreement with B Ltd in which they agree not to exercise their shareholder decision-making rights in a way contrary to the directions and interests of B Ltd.

59. A Ltd's net loss for the 2020–21 income year is $1.8 million. A Ltd elects to apply s IZ 8 to carry the loss back to the 2019–20 income year.

60. This arrangement would be subject to s GB 3B. A Ltd is treated as not meeting the requirements of s IZ 8 from the date of the arrangement (while the losses up to the date of the arrangement may still meet those requirements). The shares in A Ltd are subject to an arrangement that enables the company to continue to meet the requirements of s IZ 8 for the entire 2020–21 income year. A purpose of the arrangement is to defeat the intent and application of s IZ 8 by preserving the ability to carry back the full amount of A Ltd's loss for that income year, while the commercial and economic reality of the arrangement is that B Ltd has immediately acquired a controlling interest in A Ltd as though the share sale had already taken place. This defeats the intent and application of the temporary loss carry-back regime.

Example 2

61. ABC Co and XYZ Co are wholly-owned subsidiaries of P Ltd and each operates a popular tourist attraction in Queenstown.

62. While both attractions have been operating profitably, P Ltd has been seeking a purchaser for ABC Co for some time. After extensive negotiations with Q Ltd, P Ltd and Q Ltd entered into a memorandum of understanding for the sale of the ABC Co shares in February 2020. The memorandum provided for the sale to take place on 1 June 2020 for a fixed price, determined by reference to an independent valuation undertaken in January 2020.

63. The COVID-19 lockdown occurred before the terms of the sale agreement could be finalised and entered into, which resulted in further negotiations between the parties taking place in April 2020.

64. In the 2019–20 income year, ABC Co made a profit of $1 million and XYZ Co made a profit of $100,000. However, due to the ongoing impact of COVID-19 on their businesses, for the 2020–21 income year, ABC Co expects to make a small profit of $50,000, while XYZ Co expects to make a substantial loss of ($500,000).

65. P Ltd would like to reduce the amount of income tax payable by the group by offsetting XYZ Co's expected losses for the 2020–21 income year against ABC Co's income from the 2019–20 income year and take advantage of the newly introduced loss carry-back regime (net of ABC Co's $50,000 profit). This would not be possible if the sale to Q Ltd takes place on the terms contemplated by the memorandum of understanding, as the commonality of ownership requirement would not be satisfied from 1 June 2020.

66. Q Ltd agrees to defer the acquisition of the shares in ABC Co until the start of the 2021–22 income year, but will take responsibility for the day to day management and operation of ABC Co's tourist attraction from 1 June 2020 under a management agreement that entitles Q Ltd to all proceeds from the operation after direct operating costs have been met. All other aspects of the memorandum of understanding, including the purchase price, are unchanged and the agreement for sale and purchase is entered into on 1 June 2020.

67. Section GB 4 applies to this arrangement. The shares in ABC Co are subject to an arrangement that allows it to continue to meet the requirements of s IZ 8 for the entire 2020–21 income year. A purpose of the arrangement is to preserve the ability to carry back the full amount of XYZ Co's 2020–21 loss. While a share sale with deferred settlement is not unusual, the specific agreement between the parties here defeats the intent and application of the temporary loss carry-back regime. Therefore, ABC Co is treated as not satisfying the requirements of s IZ 8 from the date of the arrangement (1 June 2020).

Example 3

68. F Ltd's taxable income in the 2019–20 income year was $25 million. By July 2020, it is clear to the company's directors that, due to the impacts of COVID-19 on F Ltd's business, F Ltd is likely to have significant tax losses for the 2020–21 income year. The loss is estimated at over $15 million. It is also clear to the directors that F Ltd needs a significant injection of funds to continue trading.

69. F Ltd's bank (C Bank) is prepared to lend F Ltd additional debt funding on normal arm's length, commercial terms. C Bank considers that F Ltd will be able to meet its obligations under the loan. However, due to uncertainty concerning the impact of COVID-19 on F Ltd's business, C Bank requires that the shareholders of F Ltd provide security over their shares in F Ltd.

70. If the security is called on before the end of the 2020-21 income year, and C Bank acquires the shares there would be a loss of shareholder continuity under the current law, which would cause F Ltd to fail to meet the requirements of s IZ 8 and be unable to carry back any loss that occurs after that date. However, if C Bank enforces the security after the end of the 2020-21 income year, the loss carry-back is unaffected.

71. The shares of F Ltd are the subject of an arrangement. However, the purpose of the arrangement is to provide F Ltd with funding on commercial terms. The commercial and economic reality of the arrangement is that C Bank is a secured lender, lending to F Ltd on commercial terms. In the Commissioner's view, defeating the intent and application of s IZ 8 or the temporary loss carry-back regime is not a purpose of the arrangement. Accordingly, s GB 3B would not apply to the arrangement. F Ltd would be entitled to make an election under s IZ 8 for the portion of its loss that arises after the funding from C Bank is drawn down.

Example 4

72. In the 2019–20 income year, P Ltd was a successful company with $10 million of taxable income. P Ltd has two shareholders, X Ltd, who owns 40% of the ordinary shares, and Y Ltd, who owns 60%.

73. Due to the impact of COVID-19, P Ltd expects to have a significant loss ($5 million) in the 2020–21 income year. P Ltd is also experiencing acute financial difficulty and requires a significant injection of cash to continue trading. X Ltd is in a position to provide that funding, but Y Ltd is not. The parties come to an agreement for X Ltd to provide P Ltd with additional funds in the form of a loan, with Y Ltd granting X Ltd a call option over 55% of the shares in P Ltd. The loan will be interest bearing and on arm's-length commercial terms.

74. The call option will only be exercisable if P Ltd defaults under the loan from X Ltd. If the call option is exercised, X Ltd will hold 95% of the shares in P Ltd, and there will be a loss of shareholder continuity under the current law. This would cause P Ltd to fail to meet the requirements of s IZ 8 and be unable to carry back any loss that occurs after that date.

75. At the time the loan is entered into, neither party expects that the call option will be required to be exercised.

76. The shares of P Ltd are the subject of an arrangement. However, the purpose of the arrangement is to provide P Ltd with funding on commercial terms. The commercial and economic effect of the arrangement is that X Ltd is a secured lender, lending to P Ltd on commercial terms. In the Commissioner's view, defeating the intent and application of s IZ 8 or the temporary loss carry-back regime is not a purpose of the arrangement. Accordingly, s GB 3B would not apply to the arrangement. P Ltd would be entitled to make an election under s IZ 8 for the portion of its loss arising after the loan is entered into.

Appendix: Other relevant legislative provisions

77. Section IZ 8 states:

IZ 8 Election to use net loss for 2019–20 or 2020–21 year as tax loss in preceding year

Terms used in this section

(1) This section provides that a person who has taxable income in the 2018–19 or 2019–20 income year and a net loss in the following income year may choose to reduce the taxable income in the first year by an amount, which is treated as being an available tax loss that can be used in the first income year, and subtracting the same amount from the net loss that would otherwise be available in the second income year, subject to restrictions that are expressed in terms of—

(a) the **offset years**, which refers to the period of 2 years that is affected by the election and begins with either the 2018–19 or the 2019–20 income year:

(b) the **taxable income year**, which refers to the first of the offset years:

(c) the **initial taxable income**, which refers to the amount of taxable income given by subsection (2)(a) for the person and the taxable income year:

(d) the **net loss year**, which refers to the second of the offset years:

(e) the **elected amount**, which refers to the amount by which an election under this section reduces both the initial taxable income and the net loss that, in the absence of the election, the person would have in the net loss year:

(f) the **offset ownership period**, which refers to the period in the offset years for which a person that is a company meets requirements relating to continuity of ownership for carrying forward loss balances from 1 tax year to the next:

(g) the **income ownership period**, which refers to the part of the offset ownership period that occurs in the taxable income year:

(h) the **loss ownership period**, which refers to the part of the offset ownership period that occurs in the net loss year:

(i) the **group loss excess**, which is the amount of the excess of net loss given by subsection (3)(b) for the members of a wholly-owned group of companies and the loss ownership period.

Who may make election under this section: general rule

(2) A person, other than a person who is a member of a wholly-owned group of companies during the offset ownership period, may make an election under this section for the period consisting of 2 income years beginning with the 2018–19 or the 2019–2020 income year if,—

(a) in the absence of an election under this section, the person would have an amount of taxable income remaining in the taxable income year after subtracting the total amount of charitable donations for which the person has a tax credit for the taxable year under subpart LD (Tax credits for gifts and donations); and

(b) in the absence of an election under this section, the person would have a net loss in the net loss year; and

(c) the person is not a qualifying individual, as defined in section 3(1) of the Tax Administration Act 1994, in the net loss year and is not a multi-rate PIE in the offset years; and

(d) when the person is a company, the person meets the requirements relating to continuity of ownership given by section IA 5 or IP 3 (which give the requirements for companies to carry forward loss balances) during the offset ownership period.

Who may make election under this section: rule for member of wholly-owned group

(3) A person who is a member of a wholly-owned group of companies during the offset ownership period may make an election under this section for the offset years if,—

(a) in the absence of an election under this section, the person would have a net loss in the net loss year; and

(b) in the absence of an election under this section, an excess of net loss would remain for the loss ownership period if the total amount of the net loss of the person and the other group members were reduced by the total amount of the net income of the person and the other group members for which the other group members have not used non-refundable tax credits to meet income tax liabilities; and

(c) the person meets the requirements relating to continuity of ownership given by section IA 5 or IP 3 during the offset ownership period.

Making election

(4) The person makes the election by including the elected amount, which must not exceed the amount given for the person by subsection (5), (6), or (7), as an available tax loss in calculating the person's taxable income for the taxable income year, in—

(a) a return of income for the taxable income year; or

(b) a request that the Commissioner amend under section 113 of the Tax Administration Act 1994 the assessment for the taxable income year.

Effect of election: person other than company

(5) If the person is not a company, the person's net loss for the net loss year is reduced, and the person's available tax loss for the taxable income year is increased, by an amount that is the smallest of—

(a) the initial taxable income referred to in subsection (2)(a):

(b) the amount of the net loss referred to in subsection (2)(b):

(c) the elected amount.

Effect of election: company not in group

(6) If the person is a company, other than a company that is a member of a group of companies at a time in the offset ownership period, the person's net loss for the net loss year is reduced, and the person's available tax loss for the taxable income year is increased, by an amount that is the smallest of—

(a) the initial taxable income referred to in subsection (2)(a):

(b) the amount of the net income of the person for the income ownership period:

(c) the amount of the net loss referred to in subsection (2)(b):

(d) the amount of the net loss of the person for the loss ownership period:

(e) the elected amount.

Effect of election: member of group of companies

(7) If the person is a member of a group of companies at a time in the offset ownership period, the person's net loss for the loss ownership period is reduced, and the person's available tax loss for the income ownership period is increased, by an amount that is the smallest of—

(a) the total amount of—

(i) the smaller of the initial taxable income referred to in subsection (2)(a) and the net income of the person for the income ownership period:

(ii) the part of the elected amount that is made available under subparts IC and IP (which relate to the use and grouping of tax losses) to other members of the group of companies in the taxable income year:

(b) if the person is a member of a wholly-owned group in the loss ownership period, the group loss excess referred to in subsection (3)(b) reduced by the total amount of the reductions in net loss for the period for the other members of the group from elections under this section:

(c) the elected amount.

Application of subparts IC and IP to amounts made available to members of group

(8) In the application of subparts IC and IP to the making available by a person, to another member of a group of companies, of an amount of available tax loss arising for the person under subsection (7),—

(a) the amount of available tax loss that exceeds the person's initial taxable income is a tax loss for the taxable income year for the purposes of section IC 1 (Company A making tax loss available to company B):

(b) the commonality period referred to in section IC 6 (Common ownership for period) is the period consisting of the offset years:

(c) the requirements in section IP 4(4) and section IP 5 (which relate to breaches of continuity or commonality requirements) are not applied:

(d) the requirements in section IP 4(2)(a), (ab), and (c) (Breach in income year in which tax loss component arises) are replaced by the requirements given by subsection (9).

Replacement requirements in applying section IP 4(2)

(9) The replacement requirements in section IP 4(2) are—

(a) the net loss giving rise to the available tax loss arises in the portion of the loss ownership period that is included in the common span; and

(b) the amount of the available tax loss is no more than the net income that the group company derives in the portion of the income ownership period that is included in the common span; and

(c) the person and the group company provide the Commissioner with adequate financial statements under section IP 6 (Financial statements required).

When allocation of net loss effective

(10) The increase in the person's available tax loss for the taxable income year is not effective until the person—

(a) files a return of income for the taxable income year that includes a figure for the elected amount or an updated figure replacing a figure for the elected amount; or

(b) makes a request that the Commissioner amend under section 113 of the Tax Administration Act 1994 the assessment for the taxable income year based on a figure or an updated figure for the elected amount.

Requests required for some amended assessments

(11) A person who makes an election under this section must make a request that the Commissioner amend under section 113 of the Tax Administration Act 1994 the assessment for the taxable income year if the elected amount used in the most recent assessment of that income year exceeds the amount permitted by this section in the return of income for the net loss year.

Accounting for part years in ownership continuity period

(12) If the offset ownership period for a company includes a part, but not all, of an income year, the company must provide to the Commissioner adequate financial statements for the relevant part of the income year complying with the requirements of sections IP 3(2) and (4) (Continuity breach: tax loss components of companies carried forward) and IP 6.

References

Subject references

anti-avoidance provisions
arrangement
loss carry-back regime

Legislative references

COVID-19 Response (Taxation and Primary Industries Urgent Measures) Act 2020
Goods and Services Tax Act 1985, s 76
Income Tax Act 1976, s 64J(1)
Income Tax Act 2007, ss BG 1, GA 1, GB 3B, GB 4, GB 21, IZ 8, YA 1 ("arrangement")

Case references

AMP Life v CIR (2000) 19 NZTC 15,940 (HC)
Ashton v CIR [1975] 2 NZLR 717 (PC)
Auckland Harbour Board v CIR (2001) 20 NZTC 17,008 (PC)
Ben Nevis Forestry Ventures Ltd v CIR [2008] NZSC 115 (SC)
BNZ Investments Ltd v CIR (2000) 19 NZTC 15,732 (HC)
Ch'elle Properties (NZ) Ltd v CIR (2004) 21 NZTC 18,618 (HC)
Ch'elle Properties (NZ) Ltd v CIR (2007) 23 NZTC 21,442 (CA)
CIR v BNZ Investments Ltd [2002] 1 NZLR 450 (CA)
CIR v Europa Oil (NZ) Ltd [1971] NZLR 641 (PC)
CIR v Haenga (1985) 7 NZTC 5,198 (CA)
CIR v Penny [2010] NZCA 2,310
Glenharrow Holdings Ltd v CIR [2008] NZSC 116, [2009] 2 NZLR 359
McKnight v NZ Biogas Industries Ltd [1994] NZRMA 258 (CA)
Newton v Commissioner of Taxation [1958] AC 450; [1958] 2 All ER 759 (PC)
Peterson v CIR [2005] UKPC 5
Russell v CIR (No 2) (2010) 24 NZTC 24,463 (HC)
Russell v CIR [2012] NZCA 128

IS 20/04: Goods and services tax: GST treatment of short-stay accommodation

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

Scope of this statement

1. This statement discusses the GST treatment of short-stay accommodation provided on peer-to-peer websites such as Airbnb, Bookabach and Holiday Houses. In this statement, "short-stay accommodation" means accommodation provided for less than four weeks. The focus of this statement is where a host offers accommodation to the guest in either the host's home (and they might list a room, a sleepout or the entire property) or holiday home. The statement also covers short-stay accommodation provided in a property exclusively used for that purpose. Short-stay accommodation might be for the purposes of a holiday, to visit family or friends, to attend a special event or when travelling away on business. Short-stay accommodation is not intended to cover accommodation provided to residential tenants, boarders, students or care home residents.

Summary

2. The statement approaches GST from the perspective of someone considering providing short-stay accommodation for the first time. The statement first confirms the supply of short-stay accommodation by a registered person is not an exempt supply (meaning it is potentially subject to GST). It then discusses:
   - the requirements for registration;
   - the main consequences of registration; and
   - what happens when the property is sold or the short-stay accommodation activity ceases.
3. The supply of accommodation in a dwelling is one of the few exceptions to the broad base coverage of GST. For a property to be a "dwelling", the guest must use the property as their principal place of residence and they will usually have rights of quiet enjoyment. However, the types of short-stay accommodation addressed in this statement will not be a guest's principal place of residence nor will they have a right of quiet enjoyment. Consequently, if the host is a registered person, the supply of short-stay accommodation will be subject to GST.
4. To register for GST, it is necessary to first have a taxable activity. Determining whether a taxable activity is being carried on is a question of fact. For most hosts, the crucial question is whether the short-stay accommodation activity is carried on continuously or regularly. Occupancy is a key (but not determining) factor, and regular paying guests will suggest a taxable activity. Providing occasional or intermittent short-stay accommodation, for instance renting a room for a one-off sporting event, will not be sufficient to establish a taxable activity.
5. A person making taxable supplies in the course of a taxable activity becomes liable to register for GST under s 51. The Act provides for compulsory registration for those making taxable supplies exceeding $60,000 in any 12-month period. Hosts making supplies under the $60,000 threshold may voluntarily register for GST.
6. When a person is registered for GST, they must file a GST return for each return period. The GST charged on a registered person's taxable supplies is referred to as output tax. GST that is charged on goods and services acquired by a registered person is called input tax. If a host registers for GST, they will have to account for GST output tax on the supply of short-stay accommodation. The amount of tax payable is calculated by deducting input tax from the amount of output tax.
7. Generally, a registered person may claim input tax deductions to the extent to which the goods or services are used for, or are available for use in, making taxable supplies. A full input tax deduction is allowed for goods or services that are used (or intended to be used) solely for making taxable supplies (for example, advertising services or goods such as toiletries purchased solely for use by guests). On the other hand, no input tax deduction is allowed for a good or service that is intended to be used solely for making non-taxable supplies (for example, any goods or services purchased for private use by the host).
8. Where the relevant goods or services are to be used for making both taxable and exempt supplies (for example, the power bill for electricity used by both guests and the host), then the input tax able to be deducted must be apportioned based on use (or intended use).

9. If a property is a "mixed-use asset" (this is likely to include holiday homes used both privately and to earn income), s 20G contains a formula for apportionment and adjustments. This provision is based on the mixed-use asset rules in subpart DG of the Income Tax Act 2007. Put simply, the formula ignores periods where the property is empty when apportioning between taxable and non-taxable use.
10. Various adjustments may need to be made over the period of the taxable activity. The most likely adjustments for short-stay accommodation are as follows:
    - An adjustment under ss 21 to 21I if the extent to which a good or service is used for making taxable supplies changes. Section 21 requires a registered person to ascertain at the end of an "adjustment period" whether an adjustment is required for any difference between the intended use and actual use.
    - Section 21B allows a GST input tax deduction where goods acquired before registration are subsequently used in a taxable activity.
    - Section 21FB provides for a wash-up calculation where there is a sustained change of use from mixed-use to total taxable or total non-taxable (but the registered person's taxable activity is ongoing). Rather than continue to make adjustments every year, the taxpayer can effectively get the full input tax deduction from acquisition (if 100% taxable use) or repay the GST input tax from acquisition (if 100% non-taxable use).
    - Section 21H and 21HB are transitional provisions that may apply to properties purchased before 1 April 2011.
11. A disposal of a property used to make taxable supplies of short-stay accommodation has GST consequences. A sale of such a property will be in the course or furtherance of a taxable activity and subject to GST under s 8(1). GST output tax will be charged on the sale price. To the extent that a person has not claimed the full input tax deduction they can claim an adjustment under s 21F. GST input tax is claimed on the purchase price and GST output tax is charged on the sale price. Consequently, a net GST liability on property is likely because it usually appreciates in value (sometimes significantly).
12. There will also be a deemed disposal on cancellation of registration. This is most likely to occur where a host ceases their taxable activity of providing short-stay accommodation. The host must notify the Commissioner within 21 days of ceasing their taxable activity of providing short-stay accommodation. The Commissioner can also cancel a person's registration, if she is satisfied that they are not carrying on a taxable activity. A deemed supply of the property at open market value arises on deregistration. For a host this means paying GST output tax based on the value of their property when they cease their taxable activity. Where the property has been owned since before 1986 (when GST was introduced), the adjustment can be made at the lower of the cost of the property or its market value (s 10(8)).
13. This statement confirms "GST — Supply of Accommodation in Holiday Homes", *Public Information Bulletin* 160 (March 1987): 4 (PIB 160) no longer has any current application. The PIB item discussed the GST treatment of holiday homes but the analysis is no longer correct because of amendments to the definitions of the terms "dwelling" and "commercial dwelling" in the Act.

Introduction

14. This statement is part of a series of guidance addressing the tax implications of providing short-stay accommodation through peer-to-peer websites. The Commissioner published a Determination and five Questions We've Been Asked in *Tax Information Bulletin* vol 31, no 6 (July 2019):
    - "DET 19/02: Standard-cost household service for short-stay accommodation providers" (at 67);
    - "QB 19/05: What are my income tax obligations if I rent out my home or a separate dwelling on my property as short-stay accommodation?" (at 3);
    - "QB 19/06: What income tax rules apply if I have a dwelling that I sometimes rent out as short-stay accommodation and sometimes use myself?" (at 12);
    - "QB 19/07: How do the mixed-use asset income tax rules apply to a dwelling that I sometimes rent out as short-stay accommodation and sometimes use privately?" (at 16);
    - "QB 19/08: How do the standard income tax rules apply to a dwelling that I sometimes rent out as short-stay accommodation and sometimes use privately?" (at 22); and
    - "QB 19/09: Can I register for GST if I supply short-stay accommodation to guests in my home or holiday home?" (at 27).

15. This statement builds on the discussion in QB 19/09, which focuses on whether a host can register and some of the major consequences. This statement follows the lifecycle of a taxable activity of supplying short-stay accommodation. The statement addresses the issues sequentially:
    - identifying supplies of short-stay accommodation (from [17]);
    - determining whether the supply of short-stay accommodation is an exempt supply (from [23]);
    - registering and calculating the threshold for s 51 (from [45]), specifically:
        - the consequences of making other taxable supplies when calculating the threshold (for example, the self-employed plumber who also has a taxable activity as a short-stay accommodation host); and
        - supplies to associated persons (for example, where a host makes an "associated supply" to an "associated person" the Act deems this to be a supply at open market value);
    - understanding the consequences of registration (from [92]), specifically:
        - the need to file returns for a return period; and
        - output tax (including output tax on associated supplies);
    - determining input tax (from [96]):
        - limitation of input tax deductions where property acquired from an associated person; and
        - calculation of input tax on goods and services with "mixed" use;
    - apportioning input tax on acquisition of goods and services when a property is used privately and for making taxable supplies, which, in most cases, will mean an apportionment based on a "time and space" calculation (from [114]);
    - applying special rules for mixed-use assets such as holiday homes and baches (s 20G) (from [133]);
    - making annual change of use adjustments required for property and specific adjustments under (from [141]):
        - s 21B – adjustments for goods acquired before registration;
        - s 21FB – a wash-up calculation for a change of use to total taxable or total non-taxable;
        - s 21E – adjustments for the concurrent use of land; and
        - ss 21H and 21HB – transitional provisions that may apply to the property used to make supplies of short-stay accommodation;
    - disposal of property (from [182]):
        - disposal by way of sale, which includes the final adjustment on disposal where a person has not previously had a full input tax deduction (under s 21F) and when the compulsory zero-rating of land rules may apply; and
        - deemed disposal on cancellation of registration under s 52, which is most likely to occur where a host ceases their taxable activity.
16. Seventeen examples are included throughout this statement to illustrate the issues listed above. Examples 1, 2 and 4 are copied or adapted from QB 09/19, as they illustrate the points discussed in this statement. Example 8 is adapted from QB 19/05.

Identifying supplies of short-stay accommodation

17. A wide variety of different types of accommodation are listed on peer-to-peer websites (such as Bookabach and Airbnb). This statement covers accommodation that is:
    - provided for a period of less than four weeks; and
    - not the guest's main residence during the period in question.
18. As a result, this statement is not intended to apply to accommodation provided as residential letting, boarding services, student accommodation, respite care and care homes, as they are likely to fail one or both of the requirements.
19. Instead, the focus is on the types of short-stay accommodation used when on holiday, travelling for business, visiting friends or relatives, or spending time in another part of the country. Consistent with this, the statement uses the terms "host" and "guest" (rather than owner, landlord, tenant, renter and so on) as these labels seem most appropriate in the short-stay accommodation context.

20. The most common types of premises used to provide short-stay accommodation appear to be:
    - the host's home, which may occur in different ways:
        - one or more rooms in the host's home;
        - a self-contained unit on the host's property (for example, a sleep-out, cottage or converted garage);
        - the host's entire home for periods when the host is not occupying it;
    - holiday homes or baches;
    - serviced apartments;
    - properties providing dedicated short-stay accommodation;
    - farmstays; and
    - bed and breakfasts.
21. Both the frequency of rental and the cost to the guest vary significantly from case to case. A correlation does not necessarily exist between frequency of rental and income derived (for example, a well-located apartment in a major city listed for a one-off event may make more in a week than an apartment in the suburbs of such a city makes in a whole year).
22. It will often be the owner of the property that is making the supplies of short-stay accommodation but that will not always be the case. By way of example, if a property is owned by trustees then depending on the particular arrangements it may be the trustees or beneficiaries who make the supplies of short-stay accommodation. For instance, if a property is held in trust but made available to the beneficiaries as their family home and the beneficiaries rent a room out on a peer-to-peer website then it may be the beneficiaries who are making the supplies. In this scenario where a room is being rented out in the family home it would be unusual to consider registering for GST. However, if the beneficiaries were carrying on a taxable activity and did register for GST, the property itself would not be part of the beneficiaries' taxable activity as it is owned by the trustees.

Determining whether the supply of short-stay accommodation is an exempt supply

23. When GST was introduced, one of the few exceptions to the broad-base coverage was the supply of residential accommodation. However, it was intended that short-term accommodation would be subject to GST. Broadly, this was achieved in the legislation by making the supply of accommodation by a GST-registered person in a "dwelling" an exempt supply and the supply of accommodation in a "commercial dwelling" a taxable supply.
24. Historically, there has been some uncertainty in applying the distinction, particularly to premises such as homestays and holiday homes. The Taxation (GST and Remedial Matters) Act 2010 addressed this and narrowed the definition of "dwelling" by moving away from the functional nature of the premises to focus on the nature of the occupation by the recipient of the supply. At the same time, the definition of "commercial dwelling" was widened by specifically including homestays, farmstays, and bed and breakfast establishments. Inland Revenue considers that the amendments to the legislation mean that short-stay accommodation will not be an exempt supply of accommodation in a dwelling.

Legislation

25. Supplies of accommodation in a "dwelling" are exempt from GST under s 14(1)(c). "Dwelling" is defined in s 2 as follows:

> **dwelling, for a person,—**
>
> (a) means premises, as defined in section 2 of the Residential Tenancies Act 1986,—
>
> (i) that the person occupies, or that it can reasonably be foreseen that the person will occupy, as their principal place of residence; and
>
> (ii) in relation to which the person has quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986; and
>
> (b) includes—
>
> (i) accommodation provided to a person who is occupying the same premises, or part of the same premises, as the supplier of the accommodation and who meets the requirements of paragraph (a)(i):
>
> (ii) any appurtenances belonging to or used with the premises:
>
> (iii) despite paragraph (a)(ii), a residential unit in a retirement village or rest home when the consideration paid or payable for the supply of accommodation in the unit is for the right to occupy the unit; and
>
> (c) excludes a commercial dwelling

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26. In brief, a "dwelling" is premises that a person occupies as their principal place of residence and for which they have quiet enjoyment, but does not include a commercial dwelling.

27. As noted above, the definition of "dwelling" was restricted with effect from 1 April 2011 by amendments in the Taxation (GST and Remedial Matters) Act 2010. The definition of "principal place of residence" was also introduced at this time. The intention was to restrict the definition of "dwelling" by referring to the **nature of the supply rather the nature of the premises**. Dwelling is defined "for a person" as meaning accommodation that the person occupies as their principal place of residence, and the recipient will usually have quiet enjoyment (there is an exception where the person lives with their landlord).

28. For there to be an exempt supply of accommodation in a dwelling to a person, the:
    - accommodation or dwelling must be premises (as defined in the Residential Tenancies Act 1986);
    - accommodation must be occupied as the person's principal place of residence;
    - person must have quiet enjoyment of the accommodation or dwelling; and
    - accommodation or dwelling must not be a commercial dwelling.

Whether the accommodation are "premises" as defined in the Residential Tenancies Act 1986

29. The word "premises" is widely defined in s 2 of the Residential Tenancies Act 1986. All the types of accommodation listed at [20] are "premises".

Principal place of residence

30. The definition of "dwelling" requires that the person occupies, or that it can reasonably be foreseen that the person will occupy, the premises as their principal place of residence. "Principal place of residence" in turn is defined as a place that a person occupies as their main residence for the period to which the agreement for the supply of accommodation relates.

31. "Principal place of residence" is defined in s 2:

    > **principal place of residence**, in the definition of **dwelling** means a place that a person occupies as their main residence for the period to which the agreement for the supply of accommodation relates

32. The term "short-stay accommodation" as used in this statement means accommodation provided for less than four weeks and that is not the person's principal place of residence. This is consistent with most accommodation listed on websites such as Airbnb or Bookabach. Accordingly, by its very nature, short-stay accommodation will not be the guest's principal place of residence. On this basis alone, the supply of short-stay accommodation will not be of accommodation in a "dwelling".

Quiet enjoyment

33. If the premises are not the person's principal place of residence, there will not be an exempt supply of accommodation in a dwelling. Therefore, it is unnecessary to consider whether the guests also have quiet enjoyment. However, it is highly unlikely that a guest would have quiet enjoyment as that term is used in s 38 of the Residential Tenancies Act 1986.

Commercial dwellings

34. The supply of short-stay accommodation will not be the supply of accommodation in a dwelling because the premises will not be the guest's main place of residence, and it seems unlikely that the guest will have quiet enjoyment. Consequently, the supply of short-stay accommodation is subject to GST and is not exempt. Whether it is a supply of accommodation in a "commercial dwelling" does not need to be determined to answer this question.

35. However, the statement briefly addresses this issue because the 2011 amendments to the definitions of "dwelling" and "commercial dwelling" (discussed at [27]) have an impact on old *Public Information Bulletin* items.

36. As discussed above, "dwelling" is defined by reference to the supply rather than the function of the premises. The drafting suggests that the perspective of the recipient of the supply is also relevant when it comes to commercial dwellings:

    > **dwelling**, for a person,—
    >
    > …
    >
    > (c) excludes a commercial dwelling

37. This appears to initially put the emphasis on what a "commercial dwelling" is from the perspective of the person receiving the supply. However, the definition of "commercial dwelling" in s 2 focuses on the function of the premises:

> **commercial dwelling**—
>
> (a) means—
>
> (i) a hotel, motel, homestay, farmstay, bed and breakfast establishment, inn, hostel, or boardinghouse:
>
> (ii) a serviced apartment managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986:
>
> (iii) a convalescent home, nursing home, rest home, or hospice:
>
> (iv) a camping ground:
>
> (v) premises of a similar kind to those referred to in subparagraphs (i) to (iv); and
>
> (b) excludes—
>
> (i) a hospital except to the extent to which the hospital is a residential establishment:
>
> (ii) a dwelling referred to in paragraph (b)(iii) of the definition of dwelling

38. None of the types of accommodation in para (a)(i) or para (a)(ii) are defined so all have their ordinary meaning. "Homestay", "farmstay" and "bed and breakfast establishment" were all added to para (a)(i) by the Taxation (GST and Remedial Matters) Act 2010 to broaden the definition of "commercial dwelling". These types of premises usually involve the use of the host's home in the provision of short-stay accommodation, so are potentially relevant to the types of accommodation dealt with in this statement.

Old Public Information Bulletin items

39. "GST — Supply of Accommodation in Holiday Homes", *Public Information Bulletin* 160 (March 1987): 4 (PIB 160) discussed the GST treatment of holiday homes and caravan sites. This item was categorised as being under review following the review of the old PIB items. The analysis of whether holiday homes are "dwellings" or "commercial dwellings" is no longer correct because of the 2011 amendments to the definitions. Consequently, the item has no current application and will not be re-published.

40. The reference in the PIB item to "caravan sites" refers to the underlying site or berth and not the caravan itself (caravans were addressed in Question 116 in *Public Information Bulletin* Vol 158 (November 1986). PIB 160 stated:

> The rental or lease of caravan sites is taxable in full, for the first four weeks accommodation and at the rate of 60 percent of the charge thereafter. A site is a "commercial dwelling" and the special valuation provisions of section 10(6) will apply.

41. To the extent that the caravan site is on a camping ground (or a similar establishment), it is included in the definition of commercial dwelling and the special valuation provisions in s 10(6) will apply.

Conclusion

42. The supply of accommodation in a dwelling involves an assessment of the supply to the recipient rather than an enquiry into the function of the property. The definition of "dwelling" requires the person to occupy the premises as their principal place of residence and to have quiet enjoyment (as that term is used in the Residential Tenancies Act 1986). Where a person has a residential tenancy, these aspects will usually be present. However, short-stay accommodation will not be a person's principal place of residence. It is also unlikely that the host will grant rights that correspond to quiet enjoyment.

43. On this basis, the supply of short-stay accommodation will not be the supply of accommodation in a dwelling. This means short-stay accommodation will be subject to GST. Therefore, whether the premises are a "commercial dwelling" is relevant only to scenarios where there are long-term stays (stays in excess of four weeks), as the supplies of accommodation may be subject to a lower rate of GST.

44. Example 1 illustrates the circumstances in which a property can be a "dwelling". It is based on Example 4 from QB 19/09.

Example 1 – circumstances in which a property can be a "dwelling"

Baz has the opportunity to buy a house in Turangi. The house costs $400,000 but Baz reckons the local housing market is so strong that it will be worth $480,000 in a few years. He wants to either:

- Rent the property to residential tenants; or
- List the property as a holiday home on a website. He will use the property exclusively for providing short-stay accommodation. He believes the property will be popular year-round because of the proximity to the ski fields, the Tongariro Crossing and good fly-fishing spots.

Baz wants to know whether he can register for GST.

Residential tenants

If he rents the property to residential tenants, he cannot register for GST. The supply of accommodation in a dwelling is not a taxable supply. If rented to residential tenants, it is likely to be a supply of accommodation in a dwelling because it is the tenants' principal place of residence and they have quiet enjoyment under their residential tenancy.

Short-stay accommodation

The provision of short-stay accommodation (as that term is used in this statement) is a taxable supply. It will not be an exempt supply of accommodation in a dwelling because the house will not be the guest's principal place of residence and they will not have rights akin to quiet enjoyment.

Baz can register for GST provided he has a taxable activity of providing short-stay accommodation. Based on his research, Baz believes he can rent the property year-round. He estimates 120 nights of bookings per year at an average of $200 per night ($24,000 pa). If he proceeds with his plan Baz will have a taxable activity.

The value of supplies in any 12-month period will be well below the $60,000 threshold and so registration would be voluntary.

Registering and calculating the GST threshold – entry into the GST regime

45. The Act provides for both compulsory and voluntary registration. Section 51(1)(a)–(c) provides:

> **51 Persons making supplies in course of taxable activity to be registered**
>
> (1) Subject to this Act, every person who, on or after the 1st day of October 1986, carries on any **taxable activity** and is not registered, becomes liable to be registered—
>
> (a) At the end of any month where the total value of supplies made in New Zealand in that month and the 11 months immediately preceding that month in the course of carrying on all taxable activities has **exceeded $60,000** (or such larger amount as the Governor-General may, from time to time, by Order in Council declare):
>
> provided that a person does not become liable to be registered by virtue of this paragraph where the Commissioner is satisfied that the value of those supplies in the period of 12 months beginning on the day after the last day of the period referred to in the said paragraph will not exceed that amount:
>
> (b) At the commencement of any month where there are reasonable grounds for believing that the total value of the supplies to be made in New Zealand in that month and the 11 months immediately following that month will exceed the amount specified in paragraph (a) of this section:
>
> provided that any such person shall not become liable where the Commissioner is satisfied that that value will exceed that amount in that period solely as a consequence of—
>
> (c) any ending of, including a premature ending of, or any substantial and permanent reduction in the size or scale of, any taxable activity carried on by that person; … [Emphasis added]

46. Registration is compulsory for persons carrying on a taxable activity whose taxable supplies exceed the $60,000 threshold. Taxpayers who do not exceed the s 51(1) threshold for registration may choose to voluntarily register under s 51(3), if they satisfy the Commissioner that they are carrying on any taxable activity or intend to carry on a taxable activity from a specified date. Whether registration is voluntary or compulsory, there must be a taxable activity.

Taxable activity

47. GST is imposed by s 8(1):

> **8 Imposition of goods and services tax on supply**
>
> (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15 percent on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after the 1st day of October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

48. Taxable supplies are made by a registered person in the course or furtherance of a taxable activity carried on by the registered person. Given that a taxable activity is crucial to whether a person should be registered and entitled to claim input tax deductions, the term "taxable activity" is considered further.

49. Section 6(1)(a) defines "taxable activity":

> **6 Meaning of term taxable activity**
>
> (1) For the purposes of this Act, the term **taxable activity** means—
>
> (a) Any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:

50. For a taxable activity under s 6(1)(a):

- there must be an activity;
- which is carried on continuously or regularly by a person; and
- that involves, or is intended to involve, supplies made to another person for a consideration.

51. Further the activity must not be an exempt supply, however this will not be a factor where a person is providing short-stay accommodation (see from [23]). In most cases, the issue will be whether they are carrying on their activity continuously or regularly.

Carried on continuously or regularly

52. To be a "taxable activity", the activity must be carried on continuously or regularly. In *Newman v CIR* (1995) 17 NZTC 12,097 (CA), Richardson J in the Court of Appeal considered the meaning of the words "carrying on" at [20]:

> "Carrying on" has been described as "the habitual pursuit of a course of conduct" (*Premier Automatic Ticket Issues Ltd v Federal Commissioner of Taxation* (1933) 50 CLR 268 at p 298); and as implying "a repetition of acts, and excluding the case of an association formed for doing one particular act which is never to be repeated" (*Smith v Anderson* (1880) 15 Ch D 247 at 277, 278).

53. Therefore, a taxpayer must be habitually pursuing a course of conduct or engaging in a repetition of acts to be carrying on that activity. Further guidance in determining the extent to which activities are or are not carried on continuously or regularly can be taken from the following case law.

54. In *Wakelin v CIR* (1997) 18 NZTC 13,182 (HC), Paterson J stated at [13]:

> The term "carried on continuously or regularly" as used in s 6(1) is to be given its ordinary meaning. An activity is therefore carried on continuously if it is carried on over a period or in a sequence uninterrupted in time or if it is connected. It is carried on regularly if it is carried on in accordance with a definite course or a uniform principle of action or conduct or if there is a proper correspondence between the elements of the activity (see the New Shorter Oxford English Dictionary).

55. In *Case N27* (1991) 13 NZTC 3,229 Judge Bathgate commented on the term "continuously" at [26]:

> "Continuously" does not obviously mean that the physical activity must be continuing all the time; again the analogy of a business is useful … Continuously, in this context means more that the activity **has not ceased in a permanent sense**, or has not been **interrupted in a significant way**, so that one could say with some certainty that it was not continuous. [Emphasis added]

56. Judge Bathgate also considered the word "regularly", stating at [27]:

> Whether an activity is carried on "regularly", involves similar considerations, in which the character and nature of the activity would be of importance in determining whether the activity carried on day by day, week by week, or month by month, may be said to be carried on regularly. Regular, in this context, I think means a steadiness or uniformity of action, or occurrence of action, so that it recurs or is repeated at fairly fixed times, or at generally uniform intervals, to be of a habitual nature and character.

57. The High Court also considered the meaning of "continuously or regularly" in *Allen Yachts Charters Ltd v CIR* (1994) 16 NZTC 11,270. The court found that the yacht-chartering activity in question was a taxable activity. Although it had not been carried on continuously, as there had been only 12 charters over a two-year period, it had been carried on regularly. This was the result given the number of occasions when there was a charter, and also the activities relating to the charter operation. For example, weekly marketing, availability of the boat, signs advertising its availability, and the continuation of these activities until the sale of the boat.

58. In an earlier Taxation Review Authority decision, *Case P73* (1992) 14 NZTC 4,489, which also dealt with a yacht-chartering business, Judge Barber found that no taxable activity had been carried on. The principal use of the yacht in question was racing and not chartering. Judge Barber found that the yacht company had intended to commence a chartering operation. However, that operation either never commenced, or did not commence to the necessary degree to be carried on "continuously or regularly". The following parts of the decision are relevant here (at 4,493–4,495):

> I am in no doubt that, at material times, … the objector was not carrying on a taxable activity. The objector intended to take all steps necessary to establish business as a charterer, but did not achieve that enterprise. Its activities were preparatory of that. … In fact, the objector did not get beyond development work for a business. As it dealt with survey aspects and promoted the availability of chartering, it became apparent that there was no market for the objector's enterprise.
>
> …
>
> I appreciate that sec 6(2) deems the inclusion of commencement (and termination) activity into the course of that activity. However, here there was never the establishment of any taxable activity. Commencement work can only be added to such an activity. By itself, it cannot amount to a taxable activity.
>
> …
>
> There were budgets and feasibility studies. … The objector incurred expenses in altering the vessel for passenger carrying purposes. … I also accept that chartering is a seasonal activity and that a boat can be taken out of the water for quite long periods for good reasons. I accept the intentions of the objector to commence chartering from the very outset of GST registration. … The chartering activity was never much more than a proposal and, certainly, was never continuous or regular as required by sec 6(1)(a).

59. In summary, for an activity to be carried on "regularly", it must be carried on at reasonably short intervals with a steadiness or uniformity of action. The activity must recur or be repeated at fairly fixed times or generally uniform intervals to be of a habitual nature and character. An activity that is intermittent or occasional does not qualify (*Newman*, *Case N27*, *Allen Yacht Charters Ltd*). For an activity to be carried on "continuously", the activity must not have ceased in a permanent sense or have been interrupted in a significant way.

Involves or is intended to involve supplies

60. A "taxable activity" must also be an activity that "involves or is intended to involve" the supply of goods and services to another person for consideration. This is particularly relevant where a person has yet to make any supplies, for instance they are renovating a sleep-out that they intend to list on Airbnb. If the activity is intended to involve the supply of goods and services to another person for consideration, a taxpayer may have a taxable activity before any supplies have even been made. As Judge Bathgate stated in *Case N27* at [28]:

> The actual supply of goods and services is not necessary, so long as there is an intention to be involved in that supply.

61. In *Case N27*, Judge Bathgate noted that the phrase "involves or is intended to involve" introduces a subjective element into an otherwise objective provision but that generally actions speak louder than words, stating at [24]:

> In the statutory context of sec 6(1)(a) of the Act, with its reference to intention to involve, in whole or in part, the supply of goods and services to another person for a consideration, as part of an activity, to amount to a "taxable activity", would seem to include, in part at least, a consideration in some instances of the subjective element. **Generally, actions will speak louder than words, in determining the nature and character of an activity. Any stated intention can be tested against the objective realities of the case. Nevertheless the subjective element of intention may be a relevant circumstance**. I do not think it is wholly an objective test, as to whether or not there is in any particular circumstance a "taxable activity". It is a matter of fact and degree to be ascertained from all the evidence in any particular case. In *Calkin v C of IR* (1984) 6 NZTC 61,781 at p 61,785; [1984] 1 NZLR 440 at p 445, Cooke J said that, whether there was at relevant times an "undertaking", "... must ultimately be a question of fact, to be determined by 'the character and circumstances of that particular venture' ". [Emphasis added]

Taxable activity of supplying short-stay accommodation

62. Determining whether a taxable activity is being carried on, including whether the activity is being carried on continuously or regularly, will always be a question of fact and degree. It will involve an examination of all the circumstances of the particular case.

63. Much of the short-stay accommodation offered on peer-to-peer websites is based in the host's home or a holiday home. A person's home is inherently private in nature, and it can be difficult to distinguish what is private and what is related to the taxable activity. An examination of all the circumstances, including the domestic use of the premises, is required. The factor that will usually be the strongest indicator of a taxable activity is occupancy. If, for example, a person lets out their country cottage for 30 weekends over the course of a year, they will have a taxable activity. On the other hand, if the host lets the cottage only once a year for the annual A&P show then this would not be sufficient. The Commissioner cannot prescribe a minimum level of occupancy for there to be a taxable activity because this will depend on the circumstances.

64. Factors that **may be** relevant in the short-stay accommodation context (particularly where the premises are the host's home) are:
- the level of occupancy;
- the steps the host has taken to commence operating as a provider of short-stay accommodation; for example, undertaking feasibility studies, preparing business plans, advertising (nature, and extent), and approaching local authorities for necessary consent;
- whether the property is listed on various websites and at an appropriate price;
- the type, size, design and layout of the home or premises;
- the location of the home or premises;
- the extent and nature of any modifications to the property to enable the host to provide short-stay accommodation;
- the time dedicated or able to be dedicated by the host to the activity;
- the availability of accommodation over a sustained period;
- the steps the host has taken which demonstrate a continuing commitment to supply short-stay accommodation; for example, advertising and ongoing marketing activities; and
- future bookings.

65. The following Examples demonstrate aspects of what is required to have a taxable activity. Examples 2 and 4 are from QB 19/09.

Example 2 – one-off or occasional rentals

Luke and Betty own a three-bedroom house in a suburb of Lower Hutt. They were not that interested in renting out their home to strangers and they thought the income would be only modest as demand is limited for short-stay rentals in their suburban neighbourhood. That changed when they heard the area was set to host the Golden Oldies Commonwealth Games and that they could rent out their house for $1,000 a night. They listed their home on a website, and it was booked for 10 nights. They spent the time visiting their grandchildren in Australia.

Luke and Betty thought it worked so well that they plan to do something similar in two years' time during a rugby tournament. Apart from that, they have no intention of listing their property again.

One-off or occasional rentals (even though they can be lucrative) will not be a taxable activity as the activity does not satisfy the requirement of being continuous or regular. The rugby tournament is too far away for the activity to be continuous (and Luke and Betty's plans are too uncertain). Therefore, Luke and Betty do not have a taxable activity as this was essentially a one-off.

Example 3 – a new homestay

Peggy and Paddy are looking at buying a new home and have been told by the estate agent that they can claim some GST back from the purchase if they set up as a homestay. Peggy is intrigued as she has seen various news items about Airbnb homestays. She has heard that it is a growth industry and a way of meeting interesting people. Paddy, who is in full-time employment, agrees.

The couple investigate the possibility of selling their existing home and buying a bigger property. Despite the advice of their accountant to the contrary, they register for GST stating their taxable activity to be "homestay operators". They sell their present home and buy a three-bedroom home on the outskirts of a small town. They claim an input tax deduction on part of the purchase price of the house.

As soon as they move in, they advertise the homestay on a peer-to-peer website.

Peggy did not undertake any detailed research into the local market and did not take any significant steps to ascertain the viability of the activity. She initially compared prices on the internet and decided on a rental fee higher than for the other few local properties advertised as she considered her new house to be nicer. In the six months after registration they only had two paying guests who each stayed for a weekend.

Peggy feels that the guests she has had have been quite a lot of trouble, and so she leaves the rental price at its current level even though it appears too high. This is on the basis that the guests will need to make it worth her while when they stay. Around Christmas time she has a couple of enquiries so decides to block that period out as she does not want guests ruining her summer break. For good measure she also blocks out Easter. In the remainder of the year she only has one more guest who stays overnight.

With the benefit of hindsight they should not have registered for GST. While they were initially well intentioned, they undermined their stated intention by not making the property available. Considering the totality of the activity there does not appear to be a taxable activity that was carried on continuously or regularly. The Commissioner has the ability to cancel the registration if there is no taxable activity and can backdate this to the registration date if she is satisfied that they did not have a taxable activity. This effectively means repaying the original input tax claimed plus interest.

Example 4 – periods without supplies being made

Mai owns a small one-bedroom apartment in central Auckland. To help pay the mortgage she lets her entire apartment on Airbnb and goes and stays with her family in the Waikato. To make it worth her while she lists her apartment for $350 a night for a minimum of two nights. Charging a premium means she generally has guests only for weekends when there are big events on. She researches and targets big events like concerts, sports games and cultural events.

Over the Christmas and summer holidays her apartment is rented for 4 weekends. Mai also has guests for 2 weekends for big concerts during February and a further weekend in March when the Black Caps play Australia. Over the next 9 months there are periods when there are no big events and Mai has far fewer bookings. She has guests for only 6 weekends during those remaining 9 months.

Mai has a taxable activity. Although there are periods when she does not make supplies she has not stopped the activity in a permanent sense. The activity is also carried on regularly at (mostly) short intervals. There are "seasonal fluctuations" depending on what events are scheduled but the rental activity recurs and is habitual in nature and character. Further Mai dedicates a lot of time researching events coming up in Auckland and ensuring her pricing is profitable but competitive.

Registration threshold – calculating the value of the supplies

66. Section 51(1) provides for compulsory registration where supplies exceed $60,000 in a 12-month period. It also deals with the situation where there are reasonable grounds for believing supplies will exceed $60,000. This is the total amount the host receives (or will receive) for supplies before taking expenses into account. The total is for supplies by the host, so where a website charges the guest a fee for arranging the booking this is not included in the host's total supplies.

67. A person is not liable to register where they only exceed the threshold as a consequence of ending (or downsizing) their taxable activity or the replacement of a capital asset (s 51(1)(c) and (d)). In other words, it's the supplies of accommodation and not the one-off sale of a property that is used to calculate the threshold. In calculating the value of supplies hosts should be aware that the calculation includes:

- supplies from all taxable activities – not just from the supply of short-stay accommodation; and
- deemed supplies that are valued at open market value – for example, where a trust owns a holiday home and allows the beneficiaries to stay there.

Supplies from all taxable activities

68. Section 51(1)(a) requires a person to register for GST if the value of supplies in a 12-month period, in the course of carrying on **all taxable activities**, exceeds $60,000. What this also means is that as long as the taxable activities in question collectively exceed $60,000 in annual supplies, the person must register for GST. It is not necessary that any particular taxable activity exceed $60,000 in annual supplies.

69. Alternatively, if a person is already GST registered for another taxable activity, the supply of short-stay accommodation (assuming it is part of a taxable activity) is subject to GST. *Case R38* (1994) 16 NZTC 6,212 involved a GST-registered solicitor who also had a deer farm. A block of land that was leased for grazing was sold, and the solicitor was assessed for GST on the sale of the block on the basis that the supply did not have to be in the course of the taxable activity for which he was registered.

70. Judge Barber agreed with that proposition:

> Under s.8 of the Act, GST is imposed on a supply made by a registered person in the course or furtherance of "*a*" taxable activity carried on by that person. As Judge Bathgate said in *Case N43* at page 3,366:
>
>> "An act done for the purpose or object of furthering a taxable activity or achieving its goal can be to help achieve, or advance, and thus a 'furtherance' of a taxable activity, although it may not necessarily be always in the course of that taxable activity …
>>
>> "It should be noted that the indefinite article 'a' rather than the definite article 'the' precedes taxable activity in the Act, so that it is any taxable activity that may attract GST rather than only a particular kind of activity for which a person may be registered under the Act,"
>
> It is also useful to note that a taxable activity can be something less than a business but does not cover a hobby.

71. Judge Barber thought it was clear from s 51 that registration relates to the total value of supplies made in the course of carrying on all taxable activities. Arguments were made about whether a taxable activity was being carried on. Judge Barber considered the solicitor was carrying on the taxable activity of grazing or land investment or both, and he was carrying on a commercial activity and not merely a private recreational pursuit or hobby. That being the case, Judge Barber concluded:

> the objector was properly registered for GST as a solicitor at all material times and supplied the B block to Mr & Mrs B in the course of 'a' taxable activity. The supply did not need to be in the course of the taxable activity for which he was registered. That supply is therefore subject to GST under s.8.

72. An analogy can be made with any GST-registered person who, in addition to their main business, also rents out a room in their house through a peer-to-peer website. If the short-stay rental is sufficient to be a taxable activity, then the supply will be subject to GST. For instance, if the solicitor from *Case R38* had a taxable activity of providing short-stay accommodation from his solely owned home, then this (for the reasons discussed in the case) would be subject to GST.

73. However, this is the outcome only if the different taxable activities are being undertaken by **the same person**. If the solicitor jointly owns the home with his partner and they jointly supply short-stay accommodation, then his personal GST position has no relevance to that taxable activity. The reason for this is that the Act regards unincorporated bodies as separate registrable entities under s 57. Unincorporated bodies, including partnerships, joint ventures and trustees of a trust, are treated as separate entities for GST purposes, and supplies made and received by members of the unincorporated body are treated as made and received by the body.

74. In the absence of any formal arrangements, it may be unclear whether joint owners are acting as a partnership or in some other capacity, but ultimately it does not matter so long as the solicitor is not acting in his individual capacity when supplying short-stay accommodation. However, if the joint owners were to register for GST, they would need to consider whether they were undertaking the taxable activity as a partnership, as a joint venture or in some other capacity. There is an expectation that joint owners who have a turnover exceeding $60,000 or are otherwise registering for GST will have the appropriate formal arrangements in place.

75. In summary, taxpayers need to be aware that the threshold in s 51 applies to all taxable supplies made by that person. This has two impacts if a host makes taxable supplies of short-stay accommodation.

76. First, if an unregistered person has multiple taxable activities, the additional turnover from the short-stay accommodation may take them over the $60,000 threshold. For instance, if an unregistered person runs a small catering business and rents out their bach on a peer-to-peer website, they need to add together the supplies from both activities in calculating whether they exceed the $60,000 threshold.

77. Secondly, if a person is already GST registered in respect of their main business, then the supply of short-stay accommodation will be subject to GST. It is anticipated that this will be unusual in the context of short-stay accommodation. An example is where a farmer is GST registered for their farming business and also supplies farmstay accommodation. In this case the supply of farmstay accommodation (assuming it is sufficient to be a taxable activity) would be subject to GST.

78. Example 5 illustrates this further.

> **Example 5 – Supply of jointly owned short-stay accommodation**
>
> Leslie and Sarah jointly own a large apartment near Cuba Street in Wellington. Leslie works as a graphic designer and illustrator and is GST registered. Sarah is an employee at a local business and is not GST registered. They list a room in their apartment on a short-stay accommodation website. They have a basic partnership agreement and run the short-stay activity as a partnership.
>
> Due to the excellent location, they have relatively high occupancy, although there is a limit on the amount they can charge for a room in a shared apartment. The partnership has a taxable activity and a turnover of $12,000 a year. They would prefer not to have to deal with GST but are unsure what impact Leslie's GST registration has.
>
> Leslie's GST registration in her personal capacity is irrelevant to the taxable activity undertaken by the partnership. When calculating whether they exceed the $60,000 threshold, they count only taxable supplies made by the partnership and not supplies made by the partners in their individual capacity. They decide not to register for GST.
>
> Subsequently Sarah decides to go travelling. They dissolve the partnership and the property is transferred to Leslie. Leslie continues to supply short-stay accommodation.
>
> Leslie is now the person undertaking the taxable activity, so her GST registration is relevant. As Leslie is already GST registered, all supplies made by her in the course of a taxable activity attract GST. This means the supply of short-stay accommodation is now subject to GST and the apartment is now within the GST regime.

Deemed supplies – supplies to associated persons

79. When calculating the value of supplies for the threshold in s 51 it is necessary to include a supply that is an "associated supply" (defined as a supply to an "associated person") at the deemed open market value. In the short-stay accommodation context, this issue will arise where a holiday home is owned by one entity and used by an "associated person" who does not pay market rent; for example, when the trustees of a family trust own a holiday home and allow beneficiaries to stay free of charge. Associated supplies are valued at open market value and must be included in calculating the $60,000 threshold in s 51.

80. An associated supply is defined as a supply where the supplier and recipient are associated persons. Section 2A provides a definition of "associated persons". It is a wide definition, and hosts should consider whether there is an associated supply any time there is a supply below market value.

81. Section 10(3) values supplies to associated persons at open market value:

> (3) Subject to subsections (3A), (3AB), (3B), (3C), (3D) and (8), the consideration for a supply is treated as being the open market value of the supply if—
>
> (a) the supply is made by a person for no consideration or for a consideration that is less than the open market value of the supply; and
>
> (b) the supply is an associated supply; and
>
> (c) the supply is not a fringe benefit that the supplier has, or is deemed to have, provided or granted under the FBT rules of the Income Tax Act 2007 to the recipient, being a person employed under a contract of service by the supplier.

82. Where a supply is to associated persons for no consideration or less than open market value, then the supply is treated as being made for the open market value. This is subject to the exceptions in subss (3A), (3AB), (3B)–(3D) and (8), but these provisions will not commonly apply in the context of short-stay accommodation. Open market value is defined in s 4 with subs (2) most likely to be relevant to short-stay accommodation:

> (2) For the purposes of this Act, the open market value of any supply of goods and services at any date shall be the consideration in money which the supply of those goods and services would generally fetch if supplied in similar circumstances at that date in New Zealand, being a supply freely offered and made between persons who are not associated persons.

83. These provisions have arisen in several cases, most notably *CIR v Bayly* (1998) 18 NZTC 14,073 (CA). In this case, farming trusts had supplied farming land to associated entities for no rent (although they did pay some expenses, and the trustee landowners received a share of the profits). The trusts were not registered for GST (apart from one which engaged in an unrelated activity). Because the farming entities were making taxable supplies to associated entities, the value of the supplies was held to be the open market value. This meant the farming entities were liable to be registered for GST. On sale, the farming entities were deemed to be registered persons and the sales were subject to GST.

84. For short-stay accommodation, associated supplies will most commonly be an issue where a holiday home is provided for less than market value. Examples of this include where a:

- sole owner allows relatives (within the scope of s 2A(6)) to stay in the holiday home for no or reduced consideration;
- holiday home is owned by the trustees of a family trust and used for free by family members who are beneficiaries; and
- partnership owns a holiday home and the individual partners and their families use the property for free.

85. These uses of the short-stay accommodation property are potentially a supply for GST purposes. Because it is an associated supply, the Act deems it to occur at its open market value. Where deemed supplies result in turnover exceeding the s 51 threshold, the host is required to register for GST and to account for GST output tax on all taxable supplies, including on the supplies made to associated persons.

86. However, it should be rare for "associated supplies" to give rise to any issues in the context of the family bach or holiday home. For those hosts who are not GST registered, the deemed supplies are relevant only if they mean the threshold in s 51 is exceeded. It would be uncommon for such a property's turnover (even including associated supplies) to exceed $60,000 in a 12-month period. Further, it would be unusual for a host who is making regular associated supplies to then choose to voluntarily register because they would have to account for GST on all supplies including on those supplies.

87. Nonetheless, the Commissioner understands that unregistered owners of family holiday homes in popular tourist destinations are concerned that use by family members will mean they have to register for GST. Individual cases turn on their facts, but this would seem an unlikely outcome.

88. Where family holiday homes are only used by associated persons, there will not be a taxable activity because of the exclusion for private recreational pursuits or hobbies in s 6(3). This includes situations where the host uses the holiday home at the same time as friends or family. For instance, if a couple own the holiday home and their children and a grandparent accompany them on holiday then this use is also covered by the exclusion for private recreational pursuits or hobbies in s 6(3). In other cases, whether an activity is a private recreational pursuit is a question of fact decided on the totality of the evidence. However, an activity that might seem to be a business would not be one that was carried on essentially as a private recreational pursuit or hobby (*Case N27* (1991) 13 NZTC 3,229).

89. If there is a taxable activity (for instance the property is also continuously or regularly rented through a peer-to-peer website) then the associated supplies need to be identified. This will involve determining how the property is owned, whether by a company, trust, individual, partnership, joint venture or an unincorporated body of persons. Determining the relevant entity is necessary because the s 2A definition of "associated persons" applies differently for different entities.

90. Another factor to consider is whether the supply to the associated person is the same as the supply being made to third parties via peer-to-peer websites. If the supply is different (eg, the associated person has to bring their own linen and do their own cleaning or it's a longer term stay) then the open market value of that supply may be different to the open market value of a supply via the peer-to-peer website.

91. There a number of considerations, but associated supplies of a family holiday home appear unlikely to result in compulsory registration unless the property is regularly used in a business-like way and has a significant level of turnover. Examples 6 and 7 illustrate these points.

Example 6 – supplies to associated persons

Kevin and Sally have owned a large holiday home at Foxton Beach for many years. Kevin and Sally use the property regularly, sometimes alone, and sometimes with Sally's elderly mother or with some of the grandchildren. Several times a year their daughters, Rosie and Sophie, use the property with their families. Sally's sister Gina also uses the property at least once a year. Kevin and Sally do not charge family to use the property, although Rosie and Sophie generally leave them a bottle of wine and Gina often gives them some money for power.

Over the years Kevin and Sally have occasionally rented the property to other people. In most cases their guests are repeat guests, acquaintances or "friends of friends". On average they rent the house out every year for 3 or 4 weekends and the occasional mid-week stay. They charge $150 a night but this is lower than similar properties that charge on average $200 a night.

One of Kevin's friends told him he should stop renting the property because IRD would make them register for GST. He says this is because IRD treats all the use by family as being at the open market rental value. Kevin and Sally are not registered for another taxable activity and are worried because they know very little about GST and do not want their family holiday home to be subject to GST.

Kevin and Sally should not be concerned. Kevin and Sally do not have a taxable activity because their use of the property is a private recreational pursuit. It is not used in a business-like way, they put no time or effort into seeking out paying guests and the financial returns from the few guests they do have are insignificant against the cost of the property. Considered in its totality, their activity is the private recreational use of a family holiday home and a private recreational pursuit under s 6(3) cannot be a continuous or regular taxable activity under s 6(1). For the avoidance of doubt, even if they had a taxable activity the value of supplies would be below the threshold for compulsory registration.

Example 7 – supplies to associated persons

The Smith and Jones Family Trust owns a large modern holiday home in the South Island. The holiday home is advertised on a website for $600 a night. The holiday home is rented out for most of January and is also popular in ski season. In total, it is rented out for 80 nights a year. The total income from taxable supplies is $48,000. Based on these supplies alone, the trustees would not have to register for GST.

However, during the year, some family members use the holiday home. On each occasion, the family members are beneficiaries or relatives of beneficiaries, so are "associated persons". They stay for a week at Christmas and a week in the school holidays. Family members also stay on occasional weekends when there are no other bookings. In total, family members stay 28 nights a year for which they do not pay rent to the trustees. The open market value of the supplies to associated persons is 28 × $600 = $16,800. The total value of taxable supplies is $64,800 and the trust must register for GST under s 51 and any supplies of accommodation will be subject to GST.

Understanding the consequences of registration

92. When a person is registered for GST, they must file a GST return for each return period. Section 20 prescribes the calculation of tax payable by every registered person in a taxable period. Section 20(3) provides that the amount of tax payable is calculated by deducting input tax from the amount of output tax payable.

Output tax – overview

93. Section 8(1) imposes GST on the supply of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person. GST is charged on the value of that supply. In most cases the value of the supply will be the amount of money paid for the supply (s 10(2)).

94. The two relevant exceptions are supplies to associated persons and the deemed supply of the property on cancellation of registration. In most cases, those supplies will be valued at the open market value (ss 10(3) and 10(7A)). These deeming provisions mean there may be a liability for output tax even though no consideration was received. For instance, where a registered host makes supplies of short-stay accommodation to an associated person free of charge there is still a GST output tax liability calculated on the open market value of the supplies.

Output tax on disposal of the property

95. In addition to paying GST output tax on supplies of short-stay accommodation, hosts will face a potential GST output tax liability under s 8(1) on sale of the property or a deemed supply of the property following cessation of registration. Case law supports the view that "in the course or furtherance of a taxable activity" includes the one-off sale of capital items that a registered person has used in their taxable activity (*Case K55* (1988) 10 NZTC 453, *Hibell v CIR* (1991) 13 NZTC 8,195 (HC), and *CIR v Dormer* (1997) 18 NZTC 13,446 (HC)). This is discussed in more detail from [182].

Determining input tax

96. Input tax means tax charged on a supply of goods or services acquired by a person (s 3A(1)(a)). Input tax also arises on certain purchases of secondhand goods (s 3A(1)(c), (2) and (3)).

97. The general rule for determining how much input tax is deductible on acquisition of goods or services is set out in s 20(3C)(a):

> (3C) For the purposes of subsection (3), and if subsections (3D) or (3L) do not apply,—
>
> (a) input tax as defined in section 3A(1)(a) or (c) may be deducted to the extent to which the goods or services are used for, or are available for use in, making taxable supplies:

98. The inclusion of "available for use" in s 20(3C)(a) means input tax deductions can be claimed on the acquisition of a good or service when the good or service is able to be used for making taxable supplies or is not otherwise occupied in or held for making non-taxable supplies. This is consistent with the ordinary meaning of "available" (*Concise Oxford English Dictionary*, 12th ed, (Oxford University Press, New York, 2011):

> **available adj**. 1 able to be used or obtained. 2 not otherwise occupied; free.

99. This means supplies purchased solely for use by guests give rise to an input tax deduction even though there may be an initial period of non-use. For instance, if shampoo is purchased in bulk for the guest shower, an input tax deduction is available on the bulk purchase notwithstanding much of the shampoo may remain initially unused.

Limitation on input tax deductions where property acquired from an associated person

100. This issue is relevant where the property used to make supplies of short-stay accommodation is acquired as a non-taxable supply from an "associated person". This might be the case where a home or holiday home is transferred between family members or where it has been transferred into an entity controlled or owned by the transferors. Where this occurs, the Act restricts the amount of GST input tax that can be claimed.

101. Section 3A(3)(a) (or s 3A(3C) for goods and services acquired pre-GST registration) effectively links the GST input tax claimable to the GST output tax on the original supply to the first associated person. Section 3A defines "input tax" where the supplier and recipient are associated persons. The key provision is s 3A(3)(a):

> (3) The amount of input tax is—
>
> (a) if the supplier and the recipient are associated persons, the lesser of—
>
> (i) the tax included in the original cost of the goods to the supplier; and
>
> (ii) the tax fraction of the purchase price; and
>
> (iii) the tax fraction of the open market value of the supply; …

102. The definition of associated persons under s 2A is very wide and covers many circumstances. Where property is transferred between people or entities that are connected, taxpayers need to consider whether there is an associated supply. Where s 3A(3)(a) applies, the effect is to restrict the GST input tax that can be claimed.

103. In most instances, GST input tax will be limited to that included in the original sale to the supplier. In many cases that will be nil. This is because, generally, the original sale to the associated supplier will be by a non-registered person of a residential property. Therefore, the sale will not be subject to GST.

Case law

104. In *Case 15/2014* (2014) 26 NZTC 22-025, the taxpayer company owned a substantial residential property that was used to supply short-stay accommodation. The property appears to have been a "high-end" holiday home, and every year from 2009 to 2012 the supplies of short-stay accommodation exceeded $60,000. The majority (99%) shareholder of the company originally purchased the property in his personal capacity in 2005 and spent a considerable amount of time and money renovating the property. He transferred the property to the company in 2007 for $1,100,000.

105. The company used the property to supply short-stay accommodation. These supplies were treated as exempt under a previous definition of "dwelling". Changes to the definition of "dwelling" from 1 April 2011 meant these supplies of short-stay accommodation were no longer exempt supplies of accommodation in a dwelling and effectively brought the property

into the GST regime. Section 21HB (see from [175]) allows taxpayers affected by these changes to retrospectively claim the initial GST input tax that they were not able to claim at the time of acquisition. In 2012, the company registered for GST, with effect from 1 April 2011, and claimed a GST input tax deduction under s 21HB on the purchase of the property.

106. On a supply between associated persons, s 3A(3)(a) defines "input tax" as the lesser of the:
- tax included in the original cost of the goods to the supplier;
- tax fraction of the purchase price; or
- tax fraction of the open market value of the supply.

107. The majority shareholder and the company were "associated persons" under the Act. No GST was charged when the shareholder originally purchased the property. The Taxation Review Authority concluded the consequence of this is that the input tax deduction able to be claimed under s 21HB was limited to zero.

108. *Concepts 124 Ltd v CIR* [2014] NZHC 2,140 and *Staithes Drive Development Ltd v CIR* [2015] NZHC 2,593 are other examples of cases where the GST input tax was reduced as a result of a supply from an associated person.

Summary

109. Supplies of properties between associated persons are most likely to occur in the short-stay accommodation context where an unregistered person transfers their property into an entity they control so the entity can undertake the business of supplying short-stay accommodation (for example, similar to the facts in *Case 15/2014*). The other common scenario is where a family property is transferred between family members (or a family trust).

110. Where a property used to supply short-stay accommodation is transferred by way of non-taxable supply between associated persons, then the GST input tax will effectively be restricted to the GST paid when the seller originally purchased the property. In many cases, this will be zero because the property acquired to supply short-stay accommodation will often be a residential property acquired from an unregistered person.

Calculation of input tax

111. A full input tax deduction is allowed for goods or services that are intended to be used solely for making taxable supplies. Where a property is used exclusively to make taxable supplies (that is, it is never used privately), then full input tax deductions will be allowed for most expenditure and, potentially, on the purchase of the property. Goods and services that may be acquired solely for making taxable supplies of short-stay accommodation include:
- advertising costs;
- commissions or fees paid to an advertising platform or transaction facilitator (assuming GST is charged);
- linen, toiletries and other supplies used solely by guests; and
- any additional rates or insurance premiums payable because of the rental activity.

112. On the other hand, no input tax deduction is allowed for goods or services used or intended to be used solely for making non-taxable supplies (for example, any goods or services purchased solely for private use).

113. Where goods and services are wholly used for taxable or non-taxable purposes the treatment is relatively straightforward. However, where goods and services have both a taxable and non-taxable use, then the Act limits the input tax deduction to the extent to which that asset is used (or available for use) for taxable purposes. This is achieved in two steps:
- First, apportion GST input tax on acquisition based on intended use (s 20(3C)-(3JB)).
- Secondly, in subsequent years (subject to certain exemptions), adjust the deduction to the extent that actual use is different to intended use (ss 21, 21A–21C, 21D–21F, 21FB, 21G, 21H, 21HB–21HC, and 21I).

Apportioning input tax on acquisition of goods and services

114. Where there is both taxable and non-taxable use (for example, where a host rents out their home or a holiday home they also use privately), then the different elements need to be apportioned.

115. The method of apportionment is different depending on whether or not the property is a mixed-use asset.
- If you are unsure whether you have a mixed-use asset, read "QB 19/06: What income tax rules apply if I have a dwelling that I sometimes rent out as short-stay accommodation and sometimes use myself?", *Tax Information Bulletin* Vol 31, No 6 (July 2019): 12.
- If you have a mixed-use asset, see from [133].

Goods and services used for both taxable and non-taxable supplies

116. Where the relevant goods or services are to be used for making both taxable and exempt supplies (for example, a rates bill), then a person must estimate at the time of acquisition how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result.

117. The method used to calculate the amount that may be deducted as input tax under the general rule in s 20(3C) is set out in s 20(3G):

> (3G) In determining the extent to which goods or services are used for making taxable supplies, a person must estimate at the time of acquisition how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result. The determination is expressed as a percentage of the total use.

118. In s 20(3G), the intended use on acquisition is identified by:
    - estimating at the time of acquisition how the person intends to use the goods or services; and
    - choosing a determination method that provides a fair and reasonable result (with the determination expressed as a percentage of the total use).

119. The Commissioner's view of the meaning of "intended use" and "fair and reasonable" are discussed in "Interpretation Statement – IS 15/02: Goods and Services Tax – GST and Retirement Villages", *Tax Information Bulletin* Vol 27, No 11 (December 2015): 6.

120. In the context of short-stay accommodation, intended use when acquiring the property equates to the extent to which the property will be used to provide short-stay accommodation. This will generally be determined using the same time and space approach adopted for income tax (see "QB 19/05: What are my income tax obligations if I rent out my home or a separate dwelling on my property as short-stay accommodation?", *Tax Information Bulletin* Vol 31, No 6 (July 2019): 3).

121. Once a person has identified the intended use, they can calculate the amount of input tax under s 20(3H) and (3I) by multiplying the total inputs by the percentage of intended use. This does not apply in all cases; for example, mixed-use assets use the formula in s 20G.

122. The calculation method for input tax is set out in s 20(3H) and (3I):

> (3H) The extent to which a deduction for input tax is allowed is calculated using the formula—
>
> full input tax deduction × percentage intended use.
>
> (3I) In the formula in subsection (3H),—
>
> (a) **full input tax deduction** is the total amount of input tax on the supply:
>
> (b) **percentage intended use** has the meaning set out in section 21G(1)(b).

123. Section 21G(1)(b) provides:

> **21G Definitions and requirements for apportioned supplies and adjustment periods**
>
> (1) For the purposes of this section and sections 8(4B)(b), 9(2)(h), 20(3H), 20G, 21 to 21F, and 21H,—
>
> …
>
> (b) **percentage intended use**, for a registered person, means the extent to which the goods or services are intended to be used by the person for making taxable supplies, estimated at the time of acquisition under section 20(3G) and expressed as a percentage of total use:

124. The above discussion can be summarised as follows:
    - A purchaser can deduct input tax on the acquisition of goods or services to the extent to which the goods or services are used for, or are available for use in, making taxable supplies: s 20(3C).
    - In determining the extent to which goods or services are used for making taxable supplies, a person must estimate, at the time of acquisition, how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result: s 20(3G).
    - The estimated intended taxable use of the goods or services determines the proportion of the input tax that can be deducted: s 20(3H) and (3I).

Application to short-stay accommodation – where a host rents out a room (or rooms) in their home

125. Where a host rents out a room (or rooms) in their home, it is necessary to identify the extent to which the property is used (or available for use) in making taxable supplies. This will usually be done by identifying the time the property is used to make taxable supplies and the space used to make taxable supplies. The same method is used to calculate income tax deductions and QB 19/05 includes a discussion and examples of time and space calculations.

126. The "space" part of the calculation is generally based on the floor area of the house. It will generally comprise two aspects – the areas that the guest has exclusive use of and the common areas that the guest is permitted to use. Both areas are expressed as a proportion of the total floor area of the house. This part of the calculation is usually straightforward. Where a host rents out the entire property, it is unnecessary to work out the "space", as the guest will have 100% use of the property while they are there.

127. As with "space", different considerations apply for determining "time" depending on whether the area is exclusively available for guests or a common area. In the GST context it is necessary to consider the **extent** to which the property is **used, or available for use**, in making taxable supplies. Input tax deductions are available only "to the extent" that the property is used or available for use in making taxable supplies. If a bedroom is wholly put to non-taxable use (for example, it is the host's own bedroom), then, as a matter of practicality, there is no extent to which the bedroom can be used for, or available for use in, making taxable supplies.

128. Section 20(3C)(a) first addresses actual use, which is consistent with the principle of linking input tax deductions to use. "Availability" is usually relevant only where the property (or part of the property) is unused. If the property in question is a privately owned and occupied home, there is an expectation that it is being used privately and expenditure will be private expenditure if the property (or part of it) is not rented out. QB 19/05 discusses when a privately owned and occupied home will be genuinely available for guests and unavailable to the host and their family. The host would need to demonstrate:

- The space is not used at all by the host, including for storage.
- It is essentially not used as part of the host's home.

129. For common areas in a host's home there is always an element of private use. This means the area is not 100% available for making taxable supplies. With common areas, it is often impossible or impractical to identify actual use. Where actual use of common areas cannot be identified, Inland Revenue's approach is to accept an apportionment of 50% between private and income-earning use for periods where there is dual use. A 50% figure will not be appropriate to every person's circumstances, but in many cases it will be a fair and reasonable starting point for calculating the use of common areas that have both taxable and non-taxable uses.

130. Where there is taxable use and non-taxable use it may be impossible calculate the "time and space" use of a property's curtilage. However, when a person claims a GST input tax deduction on a property, they will do so on the full value of the property, not just the buildings and improvements. In the absence of any better alternative, a fair and reasonable starting point will be to apply the percentage use of the dwelling to the whole property, including the curtilage. A separate calculation for curtilage should be considered where it has a noticeable impact on the use calculation (for example, if a significant part of the curtilage such as a swimming pool or tennis court is solely for guest use or private use).

Summary of principles

131. In summary, the principles for calculating the percentage intended use where a host rents their home or part of their property (for mixed-use assets, see from [133]) are as follows:

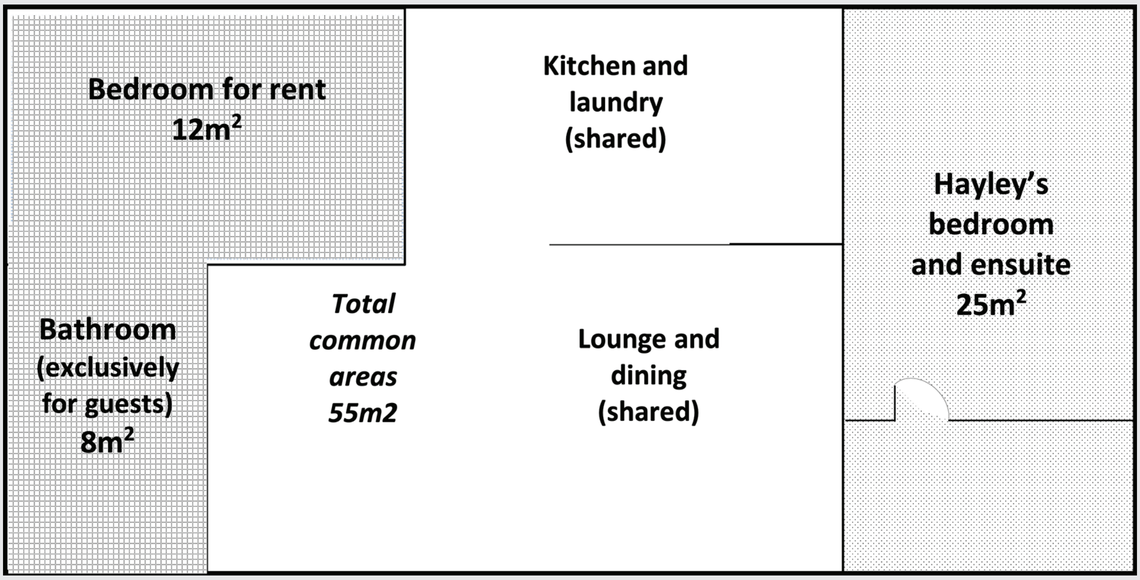
- Apportionment should be on a time and space basis or another basis that provides a fair and reasonable apportionment.
- "Space" is calculated by reference to the floor area that the guest has exclusive use of as a proportion of the total floor area of the house.
- Where a host rents out the entire property, it is unnecessary to work out the "space" as the guest will have 100% use of the property while they are there.
- "Time" should be calculated based on the extent to which the property is used, or is available to be used, in making taxable supplies.
  - "Time" should be based on use (for example, when is the room used privately by the host and when is it rented out to a guest and being used to make taxable supplies?).
  - If the property is a privately owned and occupied home, there is an expectation that it is being used privately if the property (or part of it) is not rented out.
  - When a property is unused but is available for use as short-stay accommodation, then this should be counted as taxable use when calculating the "time" element.
- For common areas, the starting point is a 50% apportionment for "space". "Time" should be calculated based on actual use. The objective is to determine an apportionment that is fair and reasonable.

- A separate calculation for curtilage should be considered where it has a noticeable impact on the use calculation; otherwise the percentage use of the dwelling may be applied to the whole property, including the curtilage.

132. Examples 8–10 illustrate apportionment calculations.

Example 8 –apportionment calculation

Hayley is buying a two-bedroom property in Queenstown for $600,000. She intends to rent out the second bedroom for short-stay accommodation through a peer-to-peer platform. She expects a high level of occupancy and will mostly use the second bedroom as a short-stay rental. This means the room will be listed online and she will not use it privately except for a month when a friend is visiting from overseas. The guests will also be able to use some common areas – the lounge room, dining room, kitchen, laundry and main bathroom. Based on her research, Hayley believes she can rent out the room for 180 nights during the year. The floor areas of the different parts of Hayley's property are shown in the diagram below.



Hayley is considering registering for GST. She wants to know what percentage of GST input tax she can claim on the purchase of the property. In claiming Hayley should apportion her use on the following basis:

20m²	Area exclusively used by guests – 100% for the days used or available to use
55m²	Common areas – 50% for days someone is renting the bedroom
25m²	Private area – 0%

The areas **exclusively used or available to use by** guests are 20m2 out of the total 100m2 floor area of the property, and are 100% deductible for the 335 days out of 365 days in the year that the room will be used, or available for use, by guests:

$$\frac{20}{100} \times \frac{335}{365} \times 100 = 18.36\%$$

The **common areas**, used by Hayley and guests, are 55m2 out of the total 100m2 floor area, and are 50% deductible for the 180 out of 365 days in the year that the room is rented out:

$$\frac{55}{100} \times \frac{180}{365} \times 50 = 13.56\%$$

Adding these figures (18.36% and 13.56%) together, Hayley calculates her percentage intended use as 31.92%. The full GST input tax deduction is:

3/23 × $600,000 = $78,260.87

The GST input tax claimable on the purchase is:

$78,260.87 × 31.92% = $24,980.87

Example 9 – apportionment calculation

Len is a short-stay accommodation entrepreneur. He owns a number of properties in the Coromandel and an apartment in Auckland that he rents on peer-to-peer websites. Len is GST registered.

Len wants to buy a large five-bedroom home in the Coromandel for $800,000. Len is considering using the property in his short-stay business as it is the sort of property that could make a lot of money during the peak Christmas and January summer period. Len wants to know what GST input tax he could claim if he was to use his new home to make taxable supplies of short-stay accommodation.

Len estimates that he will rent his house out for 40 days. During this time, he will stay in one of his other properties or visit family. Len wants to know what percentage of GST input tax he can claim.

Len estimates that over a year he will have 40 days of rental and 325 days of private use. This equates to 10.96% of taxable use. The full GST input tax deduction is:

3/23 × $800,000 = $104,347.83

The GST input tax claimable on the purchase is:

$104,347.83 × 10.96% = $11,436.52

If Len chooses to use the property in his taxable activity, he must charge GST on the supplies of accommodation and file returns. For the property, he will need to undertake an annual calculation to work out whether he needs to make an adjustment. If the actual use is different to intended use, then Len will have to make an adjustment (assuming it amounts to more than $1,000). If Len stops using the property to provide short-stay accommodation or if he sells the property, then he must account for GST output tax on the property.

Example 10 – apportionment calculation

Mai (see Example 4) wants to know what percentage of GST she could claim if she registers for GST. She can claim the full GST on any goods or services used exclusively for her taxable activity of supplying short-stay accommodation. For example, toiletries solely for use by guests. The GST input tax deduction for goods and services used both privately and for making taxable supplies (for example, the rates bill) must be apportioned. Mai could also claim a proportion of GST from the cost of her apartment. As Mai is renting out the entire apartment, the calculation is based solely on time.

The apartment is rented out for 36 nights per year = 9.9%.

Mai can claim 9.9% of GST on goods and services with mixed use.

Mai decides not to register as the administrative and compliance burden outweighs the modest amount of GST input tax she could claim back.

Applying special rules for mixed-use assets (s 20G)

133. There are special rules for apportioning input tax deductions for mixed-use assets (MUAs). These rules apply on both the initial acquisition and subsequent adjustments (ss 20(3)(hb) and (3JB) and 20G).

134. MUAs have their own regime in the Act for calculating the GST input tax able to be deducted. Section 20G refers to the definition of a MUA in s DG 3 of the Income Tax Act 2007. For a property to be a MUA it must have an income-earning use and a private use (which is not minor) and not be used for at least 62 days a year.

135. Holiday homes and baches listed on peer-to-peer websites will commonly be MUAs. Where there are two properties on a single property title, one of the properties can be an “asset” for the purposes of the MUA rules. For instance, if a host rents out a separate cottage on the same title as their main home (used 100% privately) the cottage can still be a MUA (on disposal, s 5(15) would also deem two separate supplies in this scenario). Where a person’s own home is used to supply short-stay accommodation it is less likely to satisfy the criterion of being not in use for 62 days a year.

136. To identify whether they have a MUA and for an overview of how the MUA rules apply for income tax, hosts should read QB 19/06 and QB 19/07 “How do the mixed-use asset income tax rules apply to a dwelling that I sometimes rent out as short-stay accommodation and sometimes use privately?”, *Tax Information Bulletin* Vol 31, No 6 (July 2019): 16.

137. Where a host has a MUA, s 20G provides the formula for calculating GST input tax deductions for mixed use assets:

> (1) A registered person who uses an asset described in section DG 3 of the Income Tax Act 2007 for making taxable supplies has a deduction under section 20(3)(hb) of an amount calculated using the formula—
>
> input tax for asset × total income-earning days ÷ (total income-earning days + total private days).

(2) In the formula,—

(a) **input tax for asset** is the input tax on expenditure that the person incurs in relation to the use of the asset, other than expenditure that is—

(i) related solely to the taxable use of the asset ; or

(ii) related solely to the non-taxable use of the asset:

(b) **total income-earning days** is the total number of days in the period on which the person supplies the asset for use and derives consideration for the supply, whether at, above, or below market value as that term is defined in section DG 3(5) of that Act, including any days on which—

(i) the use made of the asset is described in section DG 4(3) to (5) of that Act:

(ii) the asset has become unavailable for use because another person who had earlier reserved the asset for their own use, subsequently did not take advantage of that reservation:

(iii) a fringe benefit tax liability arises:

(c) **total private days** is the total number of days in the period on which the asset is in active use as described in section DG 3(7) of that Act and the day is not an income-earning day as described in paragraph (b).

(3) A unit of measurement of time other than days, whether relating to hours, or nights, or anything else is to be used in the formula and in subsection (2)(b) and (c), if the use of the unit provides a fair and reasonable result. For this purpose, the same unit must be used in relation to both total income-earning days and total private days.

(4) The person must ascertain at the end of an adjustment period whether an adjustment is required to be made for any percentage difference in a supply of the asset for the period in relation to the actual use of the asset for making taxable supplies.

(5) If an adjustment is required, the person must, at the end of the adjustment period,—

(a) identify the percentage actual use of the asset in accordance with the formula in subsection (1) for making taxable supplies; and

(b) compare the percentage actual use with percentage intended use as described in section 20(3JB) or previous actual use, as applicable; and

(c) if a percentage difference arises, make an adjustment for any percentage difference for the adjustment period, applying section 21D(3) to the resulting amount.

(6) For the purposes of subsection (5), all expenditure incurred in relation to the use of the asset is aggregated and included in the relevant adjustment unless section 21(2)(c) or (d) applies to the aggregated amount.

(7) Sections 8 and 21F apply to the disposal of the asset, treating the disposal as in the course or furtherance of a taxable activity.

(8) For the purposes of this section, a registered person does not include a widely-held company, as that term is defined in section YA 1 of the Income Tax Act 2007.

138. Put simply, the MUA rules ignore the days when the property is unused. The definition of "total income-earning days" is the total number of days in the period in which the person supplies the asset for use and derives consideration for the supply, **whether at, above, or below market value**. In addition, the definition of "total private days" does not include any income-earning days. Consequently, the GST treatment is different from the income tax treatment because:

- supplies at "mate's rates" (below 80%) are treated as part of the total income earning days; and
- for "associated supplies" the host will be deemed to supply the property for a consideration equal to the open market value (s 10(3)), so the use will be part of the "total income earning days" rather than part of the "total private days".

139. This treatment differs from the income tax treatment discussed in QB 19/07 because rental nights at mates rates and rental to an associate would be treated as private use in that calculation. However, "associated person" in the Income Tax Act context is narrower than "associated person" for GST purposes. When the legislation was introduced, the differences between the Income Tax Act 2007 and GST Act were discussed in "Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Act 2013", *Tax Information Bulletin* Vol 25, No 9 (October 2013): 3 (at 21):

> The main differences between the income tax and GST definitions relate to:
>
> - **the treatment of supplies for less than market value**; and
> - what constitutes "expenditure".
>
> These differences reflect the different nature of the two taxes. In particular:
>
> - GST has always recognised the right of registered persons to make supplies for lower than market value to non-associates.
> - "Expenditure" is not a word generally used in a GST context, so the GST formula replaces "expenditure" with "input tax".

> ***Below market value supplies***
>
> The definition of "income-earning days" in the GST formula includes any day on which the person supplies the asset for use and derives consideration, irrespective of whether this supply is above, at or below market value. **This allows asset owners to make supplies at below market value if they chose to do so, with these days still being "income earning"**. This is consistent with general GST principles.
>
> **It is important to note that, if the owner supplies the asset to an associated person, section 10(3) will generally require them to treat the supply as being made at market value. This will require output tax to be paid on the supply, but it will also be treated as "income-earning" for the purposes of calculating entitlement to input deductions**. Similarly, if the supply is a fringe-benefit, section 21I will apply to deem consideration to have been received — this will also be an income-earning day. [Emphasis added]

140. Example 11 illustrates the application of the special rules for mixed-use assets.

Example 11 – application of the special rules for mixed-use assets

Jayden and Ruby live in Christchurch. They are buying a holiday home in Queenstown for $900,000. They intend to list it permanently on Airbnb. Based on their research, they expect to achieve 120 nights of occupancy per year. Because of the location they can charge $700 a night, so gross rental over a 12-month period is $84,000 and they must register for GST. Jayden and Ruby will use the holiday home at various times throughout the year, staying an estimated 80 nights a year at the holiday home. The sale settles on 22 March 2019, and Jayden and Ruby register for GST from that date. They have a standard balance date. The house is a mixed-use asset (MUA).

In calculating their initial input tax deduction, they use the formula in s 20G:

- Total input tax: $117,391.30.
- Apportionment using s 20G: 120 income-earning days ÷ (200 total income-earning days + total private days) = 60%.
- Calculation of GST input tax apportionment: $117,391.30 × 60% = $70,434.78.

Jayden and Ruby should use the same percentage (60%) during their first adjustment period to claim for other input tax deductions related to both their taxable activity and private use.

Jayden and Ruby will need to revisit this calculation at the end of each adjustment period. They choose that their first adjustment period will end on 31 March 2020 under s 21G(2)(a)(ii). This means that at the end of this first adjustment period, they will have to use actual figures instead of estimated figures for the expected use of the property to make an adjustment under ss 21, 21A and 21C.

Under-estimation

For instance, say the property proves more popular than Jayden and Ruby expected and ends up being rented for 150 nights during the year. Despite their best intentions, Jayden and Ruby find that life proves busier than they expect and they only manage to stay at the property for 60 nights. On this basis, the actual figures would be as follows:

- Total input tax: $117,391.30.
- Apportionment using s 20G: 150 income-earning days ÷ (210 total income-earning days + total private days) = 71.43%.
- Under s 20G(5)(c), the percentage difference is actual use less intended use: 71.43% – 60% = 11.43%.

As the percentage difference is positive, a further input tax deduction can be claimed under s 21D of $117,391.30 × 11.43%. This means a further $13,417.83 can be claimed.

Over-estimation

On the other hand, if Jayden and Ruby over-estimated taxable use, then they may have to repay GST as GST output tax. For instance, say the property is less popular than expected, and they achieve only 80 nights rental and 80 nights private use. The actual figures would be:

- Total input tax: $117,391.30.
- Apportionment using s 20G: 80 income-earning days ÷ (160 total income-earning days + total private days) = 50%.
- Under s 20G(5)(c), the percentage difference is actual use less intended use = 50% – 60% = -10%.

As the percentage difference is negative, output tax needs to be returned: 10% of $117,391.30 = $11,739.13. This means a GST output tax of $11,739.13 needs to be returned.

Making annual change of use adjustments

141. Apportionments and adjustments work in tandem under the Act. Adjustments in effect ensure that the initially apportioned input claim (based on intended use) corresponds with the actual use.

142. The change of use adjustment provisions are in ss 21, 21A–21C, 21D–21F, 21FB, 21G, 21H, 21HB–21HC and 21I. Which provisions apply in any given situation depends on the circumstances. Where a property was acquired before 1 April 2011 the old apportionment rules may apply see [175].

143. Under the current rules the starting point is s 21, which requires a person to ascertain at the end of an "adjustment period" whether an adjustment is required for any difference between the intended use and actual use:

> (1) A registered person must ascertain at the end of an adjustment period whether an adjustment is required to be made for any percentage difference in a supply of goods or services for the period in relation to the actual use of those goods or services for making taxable supplies.
>
> (2) Despite subsection (1), the person is not permitted to make an adjustment if—
>
> (a) section 20(3D) applies to them:
>
> (ab) the person is a non-resident who has incurred input tax as defined in section 3A(1)(b) for goods and who—
>
> (i) exports the goods in or before the adjustment period; and
>
> (ii) disposes of the goods overseas in the adjustment period or holds the goods overseas at the end of the adjustment period:
>
> (b) the value of the goods or services, excluding GST, is $5,000 or less:
>
> (c) the difference between the percentage intended use on acquisition and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000:
>
> (d) the difference between the previous actual use calculated for the most recent adjustment period in which an adjustment was made and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000.

144. The exceptions in s 21(2)(b) to (d) mean adjustments will not be permitted for most day-to-day expenditure that has taxable and non-taxable elements (for example, a rates bill). However, where a GST input tax claim has been made on a property, the exceptions are less likely to apply.

145. The adjustment period (described in s 21G(2)) is a period at the end of which a person is required to estimate whether an adjustment for a subsequent change in use is required. The registered person may choose whether the first adjustment is the first or second balance date following acquisition. The calculation is then repeated annually on the subsequent balance dates.

146. Section 21G limits the number of adjustment periods, except where there is a supply of land (s 21G(5)). The practical effect of this is where a host claims initial GST input tax on a property, they **must perform an adjustment every year until they cease using the property in their taxable activity or sell the property**.

147. A person is not permitted to make an adjustment if they are below one of the thresholds in s 21(2)(b) to (d). Section 21A sets out when an adjustment is required:

> **21A When adjustments required**
>
> A registered person must, at the end of an adjustment period,—
>
> (a) identify the percentage actual use of the goods or services in making taxable supplies in the period; and
>
> (b) compare the percentage actual use with percentage intended use or previous actual use, as applicable; and
>
> (c) if a percentage difference arises and section 21(2)(c) or (d) does not apply, make an adjustment for any percentage difference for the adjustment period.

148. Section 21D calculates the adjustment by reference to the percentage difference (this is defined as the difference between intended use and actual use in s 21G):

> **21D Calculating amount of adjustment**
>
> (1) If a percentage difference arises for an adjustment period, a registered person must make a positive or negative adjustment for the period of an amount calculated using the formula—
>
> full input tax deduction × percentage difference.
>
> (2) In the formula,—
>
> (a) full input tax deduction is the total amount of input tax on the supply, including any nominal GST component chargeable under section 20(3J)(a)(i):
>
> (b) percentage difference has the meaning set out in section 21G(1)(c).

(3) For the purposes of subsection (1) and section 20G,—

(a) if the adjustment is positive and the percentage actual use is more than the person's percentage intended use or previous actual use, as applicable, the person is entitled to an additional deduction under section 20(3)(e) or (hb), as applicable:

(b) if the adjustment is negative and the percentage actual taxable use is less than the person's percentage intended use or previous actual use, as applicable, the person must treat the amount as a positive amount of output tax and attribute it to a taxable period under section 20(4).

149. Subsection 21D(3)(b) provides that where the percentage actual use is less than the percentage intended use the amount must be treated as output tax and returned.

150. Example 12 illustrates a standard change of use adjustment.

Example 12 – standard change of use adjustments

Hayley (from Example 8) registered for GST but her first year was not quite as successful as she envisaged. She had intended to rent a room for 180 nights of the year. However, she only achieved 90 nights of rental. In addition, her friends from overseas stayed with her for two months, meaning that in total the room was available for only 305 nights during the year.

The actual use of areas dedicated to the rental activity is:

$$\frac{20}{100} \times \frac{305}{365} \times 100 = 16.71\%$$

And for the common areas:

$$\frac{55}{100} \times \frac{90}{365} \times 50 = 6.78\%$$

Hayley's actual use was 23.49%. Her intended use was 33.56%. Because the difference is more than 10 percentage points (and more than $1,000), Hayley must make an adjustment. The calculation based on actual use is:

$78,260.87 × 23.49% = $18,383.48

She had previously claimed $26,264.34 on the purchase price of the property based on the intended use. Therefore, Hayley needs to return an additional $7,880.86 as GST output tax.

151. This example demonstrates a standard change of use adjustment. However, there are a number of specific adjustment provisions in ss 21 – 21I that may apply depending on the circumstances. The next part of this statement discusses the following provisions:

- Section 21B – allows adjustments for goods purchased before the person became GST registered. Where a person, before registration, owns their property that they subsequently use to make taxable supplies of short-stay accommodation, then, subject to meeting the criteria in the section, they can claim a portion of GST input tax corresponding to their use.
- Section 21FB – is a wash-up calculation where a property is used privately and to make supplies of short-stay accommodation and there is a change to 100% taxable or 100% non-taxable use.
- Section 21E – allows taxpayers to make adjustments where there is a concurrent use of the property. This provision will rarely apply in the context of short-stay accommodation.
- Sections 21H and 21HB – are transitional rules that can apply to a property provided it was owned before 1 April 2011 and certain criteria are met.

Section 21B – adjustments for goods purchased before registration

152. It is possible to make an adjustment for goods purchased before a person became GST registered. Where a person, before registration, purchases goods and services that they subsequently use to make taxable supplies they can claim some of the original GST input tax when they become registered. Most relevantly, this applies to:

- goods where GST was charged but no input tax was claimed at the time of purchase; for example, a host purchased their home from a builder or developer and GST was included but no input tax deduction was claimed by the host at the time (either because they had not commenced a taxable activity or had not yet registered for GST); and
- "secondhand goods" where goods were supplied but it was not a taxable supply; for example, a sale of a domestic dwelling between two unregistered parties (which is the focus of the following analysis as most supplies of residential properties will not be taxable supplies).

153. In the context of short-stay accommodation, the second scenario above is more common because hosts often list their private home or their holiday home on peer-to-peer websites. In many instances, these properties will have been purchased from an unregistered vendor and owned for many years before GST registration. If the host decides to register for GST or is required to register because the level of taxable supplies exceeds the threshold, then, provided they meet the requirements in the Act, some input tax from the original purchase is deductible.

Legislation

154. Section 20(3) provides that a person, in calculating the amount of output tax payable, may deduct input tax paid in relation to the supply of secondhand goods to the extent that a payment for that supply has been made during the taxable period.

155. If a person was not GST-registered when they acquired the goods, it is still possible to claim a deduction under s 21B. Section 21B allows an adjustment in the following circumstances:

> **21B Adjustments when person or partnership becomes registered after acquiring goods and services**
>
> (1) This section applies when—
>
> (a) before becoming a registered person, a person that is not a unit title body corporate acquires—
>
> (i) goods or services on which tax has been charged under section 8(1):
>
> (ii) goods entered by them for home consumption under the Customs and Excise Act 1996 on which tax has been levied under section 12(1):
>
> (iii) secondhand goods—
>
> (A) that are supplied to the person by way of sale; and
>
> (B) that have always been situated in New Zealand or have had tax levied on them as described in subparagraph (ii); and
>
> (C) the supply of which is not a taxable supply; and
>
> (b) at the time of registration or at a later time, the person or, if the person is a member of a partnership, the partnership uses the goods or services for making taxable supplies.
>
> (2) The person or partnership, as applicable, may make an adjustment under sections 20G, 21, and 21A, as applicable, treating as the first adjustment period, the period that—
>
> (a) starts on the date of the acquisition of the goods or services; and
>
> (b) ends on the first balance date that falls after the events referred to in subsection (1)(b).
>
> (3) For the purposes of this section,—
>
> (a) the person or partnership, as applicable, must either—
>
> (i) provide a tax invoice in relation to the supply, as required by section 20(2); or
>
> (ii) have adequate records that enable the identification of the particulars of an invoice as required by section 24(3) or (7), as applicable:
>
> (b) in identifying the percentage actual use of the goods or services in the first adjustment period referred to in subsection (2), the person or partnership, as applicable, may use a method that provides a fair and reasonable result.
>
> (4) *[Repealed]*
>
> (5) In relation to a supply of secondhand goods, the tax fraction applying to the supply is the tax fraction that applied at the time the goods were purchased by the person

156. Section 21B allows adjustments when a person becomes registered after acquiring goods and services. There are several requirements for a deduction for secondhand goods:

- The goods must be "secondhand goods" supplied to the person by way of sale that is not a taxable supply.
- At the time of registration, the person uses the secondhand goods for making taxable supplies.
- On registration, the person is allowed to make an adjustment for input tax under ss 20G, 21 and 21A. A tax invoice or adequate records are required to obtain an input tax deduction and there are ongoing record keeping requirements.
- The amount of input tax that can be claimed is limited to the extent the goods are used, or available for use, in making taxable supplies. In identifying the percentage actual use of the goods for the first adjustment period, the person may use a method that provides a fair and reasonable result.
- In relation to a supply of secondhand goods, the tax fraction applying to the supply is the tax fraction that applied at the time the goods were purchased by the person (that is, the GST rate applicable at the time).

157. To claim a deduction, the registered person must make an adjustment for change in use under ss 21 and 21A. The ordinary rules for apportionment of input tax are modified to treat the first adjustment period as the period that starts on the date of the acquisition of the goods or services and ends on the first balance date that falls after the person becomes registered for GST and uses the goods or services for making taxable supplies.

158. Following the determination of the length of the first adjustment period, the person must identify the percentage actual use of the goods or services in that period, using a method that provides a fair and reasonable result. This percentage actual use would then be compared with the percentage intended use (which will be 0% as the person will not have claimed any deduction on the acquisition). The resulting "percentage difference" will be used to claim an adjusted amount of the deduction under s 21D. Once the asset is in the apportionment regime, it is subject to the same apportionment rules as any other asset purchased by the registered person.

159. The practical implication of s 21B(2) is that the first adjustment period is equivalent to the entire time the host has owned the property, from the date of acquisition to the first balance date after registration. Therefore, if a host has owned a property for several years, most of the use will be non-taxable and the proportion of GST input tax deductible on the first adjustment will be modest:

- If a host purchased a family bach 10 years ago for $225,000 and started using it to make supplies of short-stay accommodation last year (on the basis of 50:50 private and taxable use), then they would have 9 years of non-taxable use and 1 year of 50% taxable use.
- Over the adjustment period that equates to 5% taxable use.
- On this basis, there would be an input tax deduction of $1,250 (5% of $25,000 – note the GST rate that applies is the one that applied at the time of purchase (s 21B(5)), so is 12.5% in this case).

160. This illustrates that where a property has been owned by the host for a long time, voluntary registration will often be commercially unappealing because the host will receive a relatively small GST input tax deduction.

161. In summary, where, before registration, GST has been incurred on goods or secondhand goods have been acquired, the host can retrospectively claim a GST input tax deduction on registering for GST (provided those goods are used, or available to be used, in their taxable activity). The first adjustment period covers the whole period of ownership, from the date of acquisition until the first balance date following registration. This means the adjustment is likely to be relatively modest in the case of a property that has been owned for a significant length of time. Obtaining the full input tax deduction to which the person would have been entitled had they purchased the property at the time of registering for GST could take several years and is technically available only if there is an adjustment under s 21FB. This point is illustrated in Example 13.

Example 13 – adjustments for goods purchased before registration

David and Jenny purchased their Queenstown property on 1 April 2015 from an unregistered vendor for $1 million. For the first two and half years they used the property solely for their personal use. They started making taxable supplies on 1 October 2017 and register for GST from this date. They expect they will have bookings for 90 days a year and use the property privately for 80 days a year. The property is a mixed-use asset as it has both taxable and non-taxable uses and is not in use for over 62 days a year. Under s 20G, they estimate taxable use of 53% (that is, 90/170).

They want to know what change of use calculation for the property can be made in the March 2018 return.

Their change of use calculation at 31 March 2018 is:

- Total GST claim – house: $1,000,000 × 3/23 = $130,435.
- Apportionment – Total GST × apportionment percentage 53% = $69,131.
- Non-taxable period: The non-taxable period (that is, before they were registered and using the house for private purposes) is 30 out of 36 months.
- Taxable period: 6/36 months × $69,131 = $11,522.

For the March 2018 GST return, they can claim an adjustment for an input tax deduction of $11,522.

If David and Jenny remain registered, they can continue to make an adjustment every March GST period until the property is sold or the activity ceases. Assuming they maintained the anticipated level of bookings the change of use calculation for 31 March 2019 is:

- Non-taxable period: = 30 out of 48 months
- Taxable period = 18/48 months × 69,131 = $25,924
- Less prior year claim = $11,522
- Total adjustment claimable for March 2019 = $14,402.

Section 21FB – total change of use and wash-up calculation

162. Section 21FB provides a wash-up calculation where use of an asset changes from **both** taxable and non-taxable use to **total taxable use** or **total non-taxable use**. Section 21FB only applies if the total change of use is maintained for the remainder of the adjustment period and the whole of the subsequent adjustment period (ie, 1 to 2 years).

163. Section 21FB relevantly states:

> **21FB Treatment when use changes to total taxable or non-taxable use**
>
> (1) This section applies when—
>
> (a) a person makes an adjustment under section 21A or 21B; and
>
> (b) the person's use of the goods or services in making taxable supplies changes in an adjustment period to either total taxable use or total non-taxable use; and
>
> (c) the total taxable use or non-taxable use remains unchanged for an unbroken period that is—
>
> (i) the remainder of the adjustment period in which the use was changed; and
>
> (ii) the adjustment period following the period in which the use was changed.
>
> (2) If the use changes to total taxable use, the person's adjustment for the adjustment period referred to in subsection (1)(c)(ii) is an amount of input tax calculated using the formula—
>
> full input tax deduction − actual deduction.
>
> (3) In the formula,—
>
> (a) **full input tax deduction** is the total amount of input tax on the supply, after taking into account any nominal GST component chargeable under section 20(3J)(a)(i):
>
> (b) **actual deduction** is the amount of deduction already claimed, taking into account adjustments made up to the end of the adjustment period referred to in subsection (1)(c)(ii).
>
> (4) If the use changes to total non-taxable use, the person's adjustment for the adjustment period referred to in subsection (1)(c)(ii) is an amount of output tax that is equal to the amount of the person's actual deduction as described in subsection (3)(b).

164. Put simply, the person either:

- claims the balance of the input tax deduction (if use changes to total taxable); or
- repays the input tax deduction already claimed (if use changes to total non-taxable) for a property.

165. Because the full adjustment is made over time (rather than immediately), the person must continue the total taxable or non-taxable use for the rest of the current adjustment period and the whole of the next adjustment period (between 1 year and 2 years). Once the wash-up calculation has been performed, the person will no longer be required to make any ongoing adjustments unless the use of the property changes again.

Change to total taxable use

166. Where there is a change to total taxable use, the person receives the full input tax deduction available on the purchase of the property less the input tax they have already claimed. This might happen where a registered person no longer uses a mixed-use bach for family holidays and rents it out for short-stay accommodation full time. This provision means they can make an adjustment under s 21FB and no longer have to perform annual adjustments unless the use changes from 100% taxable.

Change to total non-taxable use

167. An important difference exists between removing an asset from a taxable activity and ceasing the taxable activity. In the first situation, the taxable activity continues absent the asset. In the second situation, the taxable activity ceases. This distinction is crucial as different provisions apply in each situation. This is because the key asset in a taxable activity for a person supplying short-stay accommodation will be the property in which the accommodation is provided. Removing that property from the taxable activity by way of a change in use is likely to mean that the taxable activity ceases. Therefore, it is important to distinguish between a change of use where the taxable activity:

- continues, in which case s 21FB applies; and
- ceases, in which case:
  - the host must notify the Commissioner and their GST registration will be cancelled (s 52(3) and (5)); and
  - if registration is cancelled, then ss 5(3) and 10(7A) deem the property to be disposed of at open market value and an adjustment will be made under s 21F in the usual way (see from [222]).

168. Where a registered host has only a taxable activity of providing short-stay accommodation from one property (for example, their home or holiday home), ceasing to supply short-stay accommodation in that property will mean they have ceased their taxable activity. Provided they have no other taxable activity, their GST registration should be cancelled, and there is a deemed supply of the property (s 5(3)) at open market value.

169. However, s 21FB will apply where the use of the property changes to total non-taxable use and the person remains registered in respect of that or another taxable activity. This might apply, for instance, if a GST-registered farmer uses a farm cottage sometimes as accommodation for visiting family and sometimes as farmstay accommodation for paying guests. If an elderly relative then comes to live in the farm cottage full time, the use changes to total non-taxable. If the farmer had claimed any GST input tax deductions on the cottage, the farmer would have to repay the actual deductions claimed as GST output tax and then is saved from the compliance burden of having to make ongoing adjustments (which would otherwise apply forever where the asset is land). Once a wash-up calculation is performed (and assuming there is no further change of use) then the subsequent sale of the cottage would not be subject to GST.

Conclusion on s 21FB

170. Section 21FB may be applicable where a registered host's use of their property changes from mixed-use to total taxable (and that use has been maintained for the remainder of the adjustment period and the whole of the subsequent adjustment period). This may happen where a registered person no longer uses their holiday home for their private holidays and instead uses it full time in their short-stay accommodation business. In this case, s 21FB allows the person to receive the full input tax deduction less the input tax they have already claimed.

171. Section 21FB can also apply where there is a change to total non-taxable use. However, it is important to differentiate between where a host:

- removes a property from their taxable activity and continues to make taxable supplies (s 21FB applies); and
- ceases their taxable activity and GST registration is cancelled (s 5(3) applies).

172. Many hosts will fall into the latter category and will cease their taxable activity when they stop making taxable supplies of accommodation. They should cancel their GST registration and there will be a deemed supply of the property under s 5(3). However, if a host remains registered (for example, because they continue their taxable activity from another property or have another taxable activity) and they can satisfy the period of non-taxable use in s 21FB, then they can use the wash-up calculation. The host is required to make a GST output tax payment equivalent to the input tax claimed.

Section 21E - concurrent uses of land

173. Section 21E is a specific provision dealing with concurrent uses of land. This is where an area of land is simultaneously used for making concurrent taxable and non-taxable supplies. An example is where a property developer lets out properties on residential tenancies while trying to sell them.

174. Section 21E is discussed in "IS 15/02: Goods and services tax – GST and retirement villages", *Tax Information Bulletin* Vol 27, No 11 (December 2015): 6. The Commissioner considers that use of both "simultaneously" and "concurrently" in s 21E suggests the provision requires the relevant land to be used to the full extent for both taxable and non-taxable supplies (at [205]).

175. Section 21E will rarely (if ever) apply to a short-stay property because the **full extent** of the property will not be being used simultaneously and concurrently for making both taxable supplies and non-taxable supplies. Instead, the property will be **partly** used for taxable supplies and **partly** used for non-taxable supplies. Because the property is divisible the appropriate approach is to apportion based on use. Adjustments are undertaken using the normal adjustment rules in ss 21A, 21C, 21D and 21F. This outcome is more consistent with the scheme and the purpose of the Act.

Sections 21H and 21HB – transitional rules

176. The transitional rules in ss 21H and 21HB will be relevant to only a very small group of taxpayers.

Section 21H – relevant to supplies

177. Section 21H is relevant to supplies that wholly or partly consist of land (s 21H(3)). Broadly, the provision allows taxpayers who have been applying the old apportionment rules since before 1 April 2011 to continue to do so.

178. Given the passage of time the Commissioner expects relatively few registered persons will be still applying the old apportionment rules. It is unlikely that hosts supplying short-stay accommodation on peer-to-peer websites will be in this position.

Section 21HB(1)–(3) – changes to definition of "dwelling"

179. If a person was offering short-stay accommodation in a residential property before 1 April 2011, it would likely have met the definition of a "dwelling" and have been an exempt supply. The change to the definition from 1 April 2011 means the supply is now likely to be considered taxable, so the property will be in the GST regime (without the host having had an initial GST input tax claim on acquisition). These provisions allow a GST input tax deduction as though the person acquired their property on 1 April 2011 at its original cost. With the passage of time it is expected that very few hosts will now be able to apply subss 21HB(1)-(3).

Section 21HB(4) and (5) – choice to treat the supply as non-taxable

180. Subsections (4) and (5) of s 21HB recognise that the changes to the definitions could change supplies of accommodation from exempt to taxable. If a person is already registered for GST, they have no choice but to charge and account for GST. Under s 21HB(4), the host has the choice of whether to treat the supply as taxable.

181. Section 21HB(4) will be helpful to persons who are GST registered in respect of their main business or occupation and who also make taxable supplies of short-stay accommodation in a residential property (for example, a self-employed plumber who also lists a room in their home on a peer-to-peer website). The supply of short-stay accommodation (assuming it is sufficient to be a taxable activity) may "inadvertently" be brought into the GST regime. However, **provided the property was acquired before 1 April 2011** (and the supplies of accommodation are below the s 51(1)(a) threshold), they may choose to treat the supply of accommodation as non-taxable.

Disposal of property

182. For goods and services used in making taxable supplies there are GST implications on acquisition, where there is a change of use and, finally, on disposal. For registered hosts, there will be a "disposal" in two situations:
    - First, when they sell the property they use to supply short-stay accommodation.
    - Secondly, when their GST registration is cancelled, which is most likely to happen when a registered host ceases their taxable activity of supplying short-stay accommodation. They must notify the Commissioner within 21 days of ceasing the activity and the Commissioner will cancel their GST registration. If no notification is received, the Commissioner has the power to cancel registration if satisfied that the registered person is not carrying on a taxable activity.

GST output tax liability on property used to make taxable supplies

183. GST will be imposed on the disposal of a property used to make supplies of short-stay accommodation. Section 2(1) defines "output tax" as:

> tax charged pursuant to section 8(1) of this Act in respect of the supply of goods and services …

184. Section 8(1) states:

> (1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 12.5 percent on the **supply** (but not including an exempt supply) in New Zealand of goods and services, on or after the 1st day of October 1986, **by a registered person in the course or furtherance of a taxable activity carried on by that person**, by reference to the value of that supply. [Emphasis added]

185. From the definition of "output tax" in s 2(1) and the words of s 8(1), output tax is the tax charged on the supply of goods and services by a registered person in the course or furtherance of that person's taxable activity. In addition to GST output tax on supplies of accommodation, hosts will face a likely GST output tax liability on sale (or a deemed supply following cessation of registration) under s 8(1).

186. It may be questioned whether the disposal of a property will be **in the course or furtherance of a taxable activity** given the host's registered activity will be providing short-stay accommodation. Case law supports the view that "in the course or furtherance of a taxable activity" can include the one-off sale of capital items that a registered person uses in their taxable activity (*Case K55* (1988) 10 NZTC 453, *Hibell v CIR* (1991) 13 NZTC 8,195 (HC) and *CIR v Dormer* (1997) 18 NZTC 13,446 (HC)).

187. Further, the property supplied does not need to be the "usual" good supplied by the taxpayer for it to come within the scope of the taxpayer's taxable activity (*Case K55*, *Case N43* (1991) 13 NZTC 3,361 and *Case V16* (2002) 20 NZTC 10,182). Whether property comes within the scope of a taxable activity is a matter of fact and will depend on the "use" or "involvement" of the property in the taxable activity (*Case V16*, *Case K55*). In *Case K55*, this was characterised as there being a "discernible nexus" between the activity and the supply. If a host is using a property to continuously and regularly make supplies of short-stay accommodation, then the property is being used in the taxable activity and a clear relationship exists between the property and the supply. On this basis, the one-off sale of a property used to make supplies of short-stay taxable accommodation will be in the course or furtherance of a taxable activity and be subject to GST under s 8(1).

188. However, these cases were all decided under the pre–1 April 2011 "principal purpose approach". The consequence of this is that some of the cases consider what the asset was principally used for. The implication is that if an asset is principally used for private rather than business purposes the subsequent sale would not be in the course or furtherance of a taxable activity. For instance, in *Case K55* Judge Bathgate indicates that in establishing whether a nexus exists between the supply of the assets and the taxable activity, it is necessary to determine for what purposes that asset was principally used. If that asset was used more in the business than for private purposes, its supply is likely to be in the course or furtherance of that taxable activity. *Case K55* concerned the sale of a car that the taxpayer had used 56% of the time in his taxable activity (as a sheep farmer) and 44% of the time for private purposes. Judge Bathgate stated (at 457):

> The sale of the car may not be so obviously an act carried on in the course of the objector's sheep farming, although I think it was such an act, but the sale was I think more obviously in furtherance of that activity. **It was more in the furtherance of that activity than not**. The car was used more for the objector's sheep farming business than anything else, including family or private purposes. [Emphasis added]

189. The approach was similar in *Holdgate v CIR* (1995) 17 NZTC 12,036 (HC). In deciding whether a land transaction was in the course or furtherance of a taxable activity, the court considered whether the taxpayer owned land as a business asset or a private asset. The court decided it was a business asset, so the land was used in connection with the taxpayer's business activities and its supply was subject to GST. This reasoning is a consequence of the previous legislation. For the goods to be supplied in the course or furtherance of the taxable activity they would have to be acquired or applied for the principal purpose of making taxable supplies.

190. After 1 April 2011, the Act provides for GST input tax deductions based on the extent of intended use, subsequent adjustments, and then a GST output tax liability under s 8(1) when the property is taken out of the GST regime. The "principal purpose test" no longer applies when considering whether a property is being supplied in the course or furtherance of a taxable activity. If goods are used privately and in a taxable activity, then an output tax liability arises on disposal, with an adjustment under s 21F (discussed from [195]).

191. This is reflected in s 20G(7), which addresses MUAs (that is, most holiday homes and baches with taxable and non-taxable use):

> (7) Sections 8 and 21F apply to the disposal of the asset, treating the disposal as in the course or furtherance of a taxable activity.

192. This provision supports the view that the scheme of the adjustment rules after the 1 April 2011 changes is for output tax to be payable with an appropriate adjustment made under s 21F. A disposal of a MUA with more non-taxable than taxable use will still be in the course or furtherance of a taxable activity.

193. In summary, the disposal of a property that is a MUA under s 20G will be subject to GST under s 8(1). Other properties used to make taxable supplies of short-stay accommodation will also be subject to s 8(1) on disposal. Having concluded that a disposal can be subject to GST output tax, it is necessary to consider what happens:

- on the sale of a property, in particular the application of:
  - s 21F, which effectively credits the host with any GST input tax not claimed; and
  - the zero-rating of land rules;
- when the host stops supplying accommodation, including:
  - when GST registration will be cancelled;
  - when a deemed disposal of the property is triggered; and
  - the value of the deemed supply.

Sale of property

194. As discussed above, GST output tax will be charged on the sale of a property used to make supplies of short-stay accommodation. GST output tax will usually be greater than the initial GST input tax deduction because GST is paid as a proportion of the purchase and sale price. This means the GST output tax liability is likely to be greater than the initial GST input tax deduction because properties generally appreciate in value.

195. GST output tax is not apportioned under s 8, so a registered person must pay output tax on the value of the supply. This is the case even where the registered person did not receive a full input tax deduction on acquisition because GST input tax was apportioned based on taxable to non-taxable use (or intended use). Where there has not been a full input tax claim, s 21F allows for an additional adjustment for the unclaimed portion of the GST input tax.

Adjustments allowed under s 21F

196. Under s 21F, where a person has acquired goods or services and not had a full input tax deduction (being the total of amounts claimed on acquisition and in subsequent adjustments), the person is required to make a final adjustment when those goods or services are sold. Section 21F provides:

21F Treatment on disposal

(1) This section applies when a registered person—

(a) acquires goods or services in relation to which they do not have a full deduction, taking into account any adjustments made to input tax in adjustment periods after acquisition; and

(b) subsequently disposes, or is treated as disposing, of the goods or services in the course or furtherance of a taxable activity.

(2) The person must make a final adjustment of an amount calculated using the formula—

tax fraction × consideration × (1 − (actual deduction ÷ full input tax deduction)).

(3) For the purposes of the formula in subsection (2),—

(a) **tax fraction** has the meaning given in section 2(1), unless subsection (7) applies to the disposal:

(b) **consideration** is the amount of consideration received, or treated as received, for the supply:

(c) **actual deduction** is the amount of deduction already claimed, taking into account adjustments made up to the date of disposal:

(d) the amount, when added to any deduction already claimed, must not be more than the amount of the **full input tax deduction** on acquisition referred to in section 21D(2).

(4) Despite subsection (2), if the acquisition referred to in subsection (1)(a) relates to a supply that is charged at the rate of 0% under section 11(1)(mb), on a disposal referred to in subsection (1)(b), the person must make a final adjustment of an amount calculated using the formula—

tax fraction × consideration × (1 − previous use).

(5) For the purposes of the formula in subsection (4),—

(a) **tax fraction** has the meaning given in section 2(1), unless subsection (7) applies to the disposal:

(b) **consideration** is the amount of consideration received, or treated as received, for the supply:

(c) **previous use** is the percentage intended use or the previous actual use in the period before the period in which the disposal occurs.

(6) The amount given by the formula in subsection (4) must not be more than the amount of output tax that is accounted for by the person under section 20(3J)(a)(iii), taking into account any later adjustments made under the apportionment rules in sections 21 to 21H.

(7) In the formulas in subsections (2) and (4), on the disposal of the goods or services, if the supply is charged at the rate of 0%, the item **tax fraction** is treated as 15%.

197. The calculation in s 21F(2) (or s 21F(4) if the compulsory zero-rating provisions in s 11(1)(mb) apply) allows an adjustment based on the apportionment of GST input tax on the original supply. In broad terms, this recognises the person will not have had a full input tax deduction on the original acquisition.

198. Section 21F operates slightly differently depending on whether the asset has increased or decreased in value. Section 21F(3)(d) caps the amount of any GST input tax deduction at the amount of the full input tax deduction on the acquisition of the asset. For assets that appreciate in value, this effectively means the adjustment is equivalent to the unclaimed portion of the original GST input tax. The person pays GST output tax on the appreciated value of the asset and receives an adjustment capped at the original amount of GST input tax. As properties generally appreciate over time this means a registered host's output tax liability on sale will be more than the input tax claim on acquisition.

199. Example 14 illustrates an adjustment on disposal of an asset.

Example 14 – adjustment on disposal under s 21F

A semi-retired couple live in a wine region and purchased their current home for $600,000 in 2015. It is a popular destination for weekend stays. To make some extra money they occasionally rent the whole property out as a homestay on peer-to-peer websites.

They rent out their home for 70 nights a year and during this time they stay with family or organise their own holidays. They decided to register for GST in 2015, so they could claim GST input tax back on the purchase of the house as follows:

- Total GST input tax claim – house: $600,000 × 3/23 = $78,261.
- Apportionment: Total GST × apportionment percentage 19% (that is, 70/365) = $15,009.

Use remains as predicted in the subsequent adjustment periods and no further adjustments are required. In 2019, they decide to move to Auckland to be near family. Since 2015, property prices have risen significantly in the region and they sell for $800,000. They must perform an adjustment on disposal using s 21F:

- GST output tax on sale: $800,000 × 3/23 = $104,348.
- Input tax adjustment under s 21F: $104,348 × (1 – ($15,009 ÷ $78,261)) = $84,336.

Any deduction, when added to the deduction already claimed, must not be more than the amount of the full input tax deduction on acquisition. Therefore:

- $78,261 – $15,009 = $63,252 total s 21F adjustment.
- Total GST output tax payable: $104,348 – $63,252 = $41,096 GST output tax.

Because of the rise in the property's value, there is a net GST liability of $26,087. This is because GST input tax on purchase was $78,261 and GST output tax on sale is $104,348

Compulsory zero-rating of land rules

200. Where a registered person is selling to another registered person, they should consider whether the compulsory zero-rated provisions apply.

201. The compulsory zero-rating of land (CZR) rules treat certain supplies involving land between registered persons as zero-rated supplies. For more detail on the CZR rules, see "IS 17/08: Goods and services tax – compulsory zero-rating of land rules", *Tax Information Bulletin* Vol 29, No 10 (November 2017): 17.

202. The core provision of the CZR rules is s 11(1)(mb), which provides:

> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> …
>
> (mb) the supply wholly or partly consists of land, being a supply—
>
> (i) made by a registered person to another registered person who acquires the goods with the intention of using them for making taxable supplies; and
>
> (ii) that is not a supply of land intended to be used as a principal place of residence of the recipient of the supply or a person associated with them under section 2A(1)(c);

203. Under ss 8 and 11(1)(mb), a supply must be zero-rated if:

- the supply wholly or partly consists of land;
- the vendor is GST registered (or will be GST registered or will be treated as GST registered) at the time of settlement;
- the supply is being made by the vendor in the course or furtherance of their taxable activity;
- the purchaser is a GST-registered purchaser (or will be GST registered or treated as GST registered) at the time of settlement;
- the purchaser acquires the goods (including the land) with the intention of using them (in whole or part) for making taxable supplies; and
- none of the land included in the supply is intended to be used as the purchaser's principal place of residence or the principal place of residence of a relative of the purchaser.

204. Section 11(1)(mb) will not commonly apply where the property being sold is an ordinary domestic property. It seems unlikely the buyer and seller of such properties will commonly both be GST registered and that the purchaser will not be using the property as a principal place of residence. The CZR rules are likely to be most relevant to the sales of dedicated short-stay rental properties in popular tourist destinations. In such cases, it is more likely that both parties will be GST registered and that the purchaser is buying an asset that they intend to use to make taxable supplies (and do not intend to use as a principal place of residence).

205. Purchasers who acquire a property that has been compulsorily zero-rated may need to make output tax adjustments to account for any non-taxable use:

- when the property is acquired (s 20(3J)(a)); and
- in later adjustment periods under the adjustment provisions in ss 21 to 21H (s 20(3J)(b)).

206. At the time the compulsorily zero-rated property is acquired, the purchaser must identify the "nominal GST component" that would have been chargeable if the supply of the property had been standard-rated. This is done by adding GST at the standard rate to the agreed consideration for the supply. The purchaser then determines the extent to which they intend to use the property for making taxable supplies and calculates the proportion of the nominal GST component for any non-taxable use. The non-taxable use proportion of the nominal GST component is an amount of output tax and must be accounted for by the purchaser in their GST return for the period the supply is attributed to (see s 20(4)).

207. Further adjustments may be required in subsequent adjustment periods under ss 21 to 21H. This is done by comparing the intended use of the property at the time of acquisition against the actual use of the property at the end of an adjustment period. This might occur if a purchaser buys a dedicated short-stay rental property and the transaction is zero-rated, but the purchaser subsequently uses the property for a couple of weeks for their own personal (non-taxable) use.

208. An adjustment may not necessarily be required if the change in use is within the scope of s 21(2). IS 17/08 addresses this issue:

> 50. Purchasers who acquire goods (including land) that have been compulsorily zero-rated under s 11(1)(mb) may need to make output tax adjustments to account for any non-taxable use of the acquired goods. Adjustments may need to be made:
>
> - when the goods (including land) are acquired (s 20(3J)(a)); and
> - in later adjustment periods under the apportionment rules in ss 21 to 21H (s 20(3J)(b)).
>
> 51. At the time the compulsorily zero-rated goods are acquired, under s 20(3J)(a) the purchaser must identify the "nominal GST component" that would have been chargeable if the supply of goods had been standard-rated. This is done by adding GST at the standard rate to the agreed consideration for the supply. The purchaser is then required to determine the extent to which they intend to use the goods acquired for making taxable supplies and calculate the proportion of the nominal GST component for any non-taxable use of the goods. The non-taxable use proportion of the nominal GST component is an amount of output tax and must be accounted for by the purchaser in their GST return for the period the supply is attributed to (see s 20(4)).
>
> 52. To determine the intended non-taxable use of the goods acquired (including land) the purchaser needs to estimate at the time of acquisition how they intend to use the goods, choosing a determination method that produces a fair and reasonable result (see s 20(3G)).
>
> 53. Further output or input tax adjustments may be needed under the apportionment rules in subsequent adjustment periods (see ss 21 to 21H). This is done by comparing the intended use of the goods (including land) as determined at the time of acquisition against the actual use of the goods at the end of an adjustment period. Adjustments may not be required where the amounts involved are small (see s 21(2)).

209. Under s 21(2), the paragraphs most likely to apply are (c) and (d):

> (2) Despite subsection (1), the person is not permitted to make an adjustment if—
>
> (a) section 20(3D) applies to them:
>
> …
>
> (b) the value of the goods or services, excluding GST, is $5,000 or less:
>
> (c) the difference between the percentage intended use on acquisition and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000:
>
> (d) the difference between the previous actual use calculated for the most recent adjustment period in which an adjustment was made and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000.

210. Paragraphs (c) and (d) mean that a person is not permitted to make an adjustment where the difference between the actual and intended uses is relatively minor (less than 10 percentage points) and amounts to less than $1,000.

211. In summary, the CZR rules are likely to be most relevant to dedicated short-stay rental properties in popular tourist destinations. For the rules to apply:

- both the seller and purchaser must be GST registered;
- there must be an intention to make taxable supplies; and
- the property must not be intended to be a person's principal place of residence.

212. If a transaction is subject to the CZR rules, taxpayers should refer to IS 17/08. Even if a transaction is zero-rated, it may still be necessary for a purchaser to subsequently perform ongoing adjustments to reflect any change in use.

213. Example 15 illustrates the application of the CZR rules.

Example 15 – application of the CZR rules

Len (from Example 9) is a GST-registered short-stay accommodation entrepreneur who owns properties in Coromandel and Auckland. He has heard the short-stay accommodation market in Rotorua is lucrative because of the town's year-round popularity with tourists. He is looking to expand his portfolio and buy a property in Rotorua. He has identified a suitable property being sold there. Further enquires reveal that the seller is GST registered and has been using the property as a dedicated short-stay rental. Len wants to know whether the transaction will be zero-rated.

The CZR rules apply. The buyer and seller are both GST registered and Len will be using the property to make taxable supplies.

The answer would be different if Len was going to live in the property as his principal residence and merely rent out rooms for short-stay accommodation on a peer-to-peer website. In that case, he would be using the property as a principal place of residence, so the CZR rules would not apply and GST would apply at the standard rate.

Deemed disposal on cancellation of registration

214. Where a registered host's GST registration is cancelled, they will be liable for GST output tax on the open market value of their property.

Cancellation of registration

215. Under s 52 the Commissioner may cancel a person's GST registration in three situations:

- Sections 52(1) and (2) allow a person to request the Commissioner to cancel their registration where the value of the person's taxable supplies is below the registration threshold.
- Section 52(3) imposes a requirement on registered persons who have ceased all taxable activities to notify the Commissioner within 21 days. In such circumstances, the Commissioner must cancel the person's GST registration. However, there is a proviso to s 52(3) if there are reasonable grounds for believing that the person will carry on any taxable activity at any time within the next 12 months.
- Section 52(5) allows the Commissioner to cancel a registered person's GST registration, if the Commissioner is satisfied that the registered person is not carrying on a taxable activity.

216. For the supply of short-stay accommodation, there are two possible scenarios:

- Scenario 1: The registered person asks the Commissioner to cancel their registration because they are no longer making supplies in excess of the registration threshold.
- Scenario 2: The registered person ceases carrying on their taxable activity of providing short-stay accommodation. Whether a taxable activity is still being carried on in any particular situation will be a question of fact. However, if a registered host files nil returns and does not continuously or regularly make taxable supplies, then it points to them having ceased their taxable activity.

217. The Commissioner's view is that a s 21FB adjustment is not available where a person's taxable activity has ceased entirely (see [162]). In this case, the most appropriate course will be for the person to cancel their GST registration.

Deemed supply

218. When a person ceases to be registered for GST, s 5(3) deems the assets of a taxable activity to be supplied by the person. The time of that supply is immediately before the person ceases to be registered. Section 5(3) provides:

> (3) For the purposes of this Act, where a person ceases to be a registered person, any goods and services then forming part of the assets of a taxable activity carried on by that person shall be deemed to be supplied by that person in the course of that taxable activity at a time immediately before that person ceases to be a registered person, unless the taxable activity is carried on by another person who, pursuant to section 58, is deemed to be a registered person.

219. In s 5(3), a deemed supply occurs for goods and services forming part of the assets of the taxable activity carried on by the person. If a host has the taxable activity of supplying short-stay accommodation then the property in which the accommodation is supplied will be an asset of the taxable activity. The property will be the most significant asset that forms part of the assets of the taxable activity of supplying short-stay accommodation, although other assets may also be subject to s 5(3).

Value of supply

220. The value of the deemed supply under s 5(3) is determined under s 10(7A) and (8). Where the property has been owned since before 1986 (when GST was introduced), the adjustment can be made at the lower of the cost of the property or its market value (s 10(8)). But in most cases, the consideration will be treated as being the open market value of the supply (s 10(7A)). Section 5(3) does not contemplate apportionment for non-taxable use but this is offset by s 21F, which effectively allows a credit for unclaimed GST input tax where a person has not had a full GST input tax deduction.

221. Despite s 21F, the consequences of cancellation of registration will often be financially significant. The taxpayer will usually have a net liability for GST because the value of the property will have appreciated. In other words, the taxpayer will pay GST on the uplift in the property's value. Further, this is only a deemed disposal, meaning the taxpayer will not have sale proceeds from which they can pay their GST liability.

Conclusion

222. In summary, a registered person may request that the Commissioner cancel their registration where their supplies fall below the $60,000 threshold and this will trigger a deemed disposal. More commonly, a person's GST registration will be cancelled because they cease their taxable activity of making supplies of short-stay accommodation.

223. Where a person ceases their taxable activity entirely, then they should inform the Commissioner within 21 days (s 52(3)), and the Commissioner shall cancel their GST registration. Section 52(5) also allows the Commissioner to cancel a person's GST registration if the Commissioner is satisfied that the registered person is not carrying on a taxable activity.

224. On cancellation, s 5(3) deems a disposal of all assets that form part of the taxable activity. This will include the property used to make the supplies of short-stay accommodation. The deemed disposal will usually be at the open market value (s 10(7A)). This means the person will be liable for GST output tax on the open market value of the property. Where a person did not have a full GST input tax deduction, s 21F allows an adjustment that effectively credits the taxpayer with the unclaimed portion of the original GST input tax.

225. Example 16 illustrates the impact of a registration cancellation.

Example 16 – cessation of a taxable activity

David and Jenny (from Example 13) have decided to make a lifestyle change. They are selling up in Christchurch and will move permanently to their Queenstown holiday home. They will cease their taxable activity on 31 March 2020 and move into the Queenstown property on 1 April 2020. They want to know how this will impact on their GST obligations.

Cessation of a taxable activity will require their GST registration to be cancelled. There is a deemed supply of the assets forming part of the taxable activity (s 5(3)). This means a deemed supply of the property that will be subject to GST.

The value of housing in Queenstown has grown considerably in the intervening years and their property is now worth $1.5 million. Therefore, the tax fraction on the deemed supply is:

3/23 × $1,500,000 = $195,652.

An input tax deduction of $25,924 has already been claimed (the combined 2018 and 2019 adjustments – see Example 12), so the full deduction available on the original purchase is:

$130,435 less the deduction claimed of $25,924 = $104,511.

This is the limit of the adjustment. Therefore, on cessation:

- output – GST on deemed supply ($1,500,000 × 3/23) = $195,652
- input – adjustment = ($104,511)
- GST payable = $91,141.

226. Example 17 illustrates GST issues to consider when purchasing a property to use as short-stay accommodation.

Example 17 – GST considerations when purchasing a property

Neve and George are looking to buy a property in one of New Zealand's tourist hotspots. They intend to buy a large property which they will use to make supplies of short-stay accommodation. They intend to try and live off the short-stay accommodation income.

They are looking at two properties:

- A large section near Lake Wanaka. The section includes a main house and a separate holiday cottage. The house is used solely as the owners' private residence and the cottage is a dedicated short-stay rental property. The holiday cottage is a top-end property in a prime location that is advertised on various websites. It is used year-round by skiers, trampers and overseas holiday makers. The holiday cottage's current turnover is $80,000 a year. The property is advertised for sale at $1.8 million. The documentation provided by the seller includes a registered valuer's report valuing the main house at $1m and the holiday cottage at $800,000. The seller is GST registered and the properties are on one land title.
- A large apartment on the hill in Queenstown for sale for $1.1m. It is a 4-bedroom property split over three floors. It is currently used as a private holiday home. Neve and George would run it as a homestay and plan to rent out the rooms individually on a website at $100 a night. Their research indicates an occupancy rate of around 40% for such rooms which would equate to $44,000 a year.

They are GST novices and ask an accountant whether there are any GST implications for either property.

Lake Wanaka

If Neve and George are intending to continue renting out the holiday cottage (and living in the main home) they will need to register for GST because the turnover is likely to exceed the $60,000 threshold.

The Act treats the supply of a principal place of residence and other property as separate supplies. In other words, the sale of the main house and holiday cottage are treated separately for GST purposes

As the holiday cottage is used in the current owner's taxable activity, the sale of the property will be subject to GST. However, the compulsory zero-rating rules will apply where both the seller and buyer are registered persons, the buyers intend to carry on using the holiday cottage to make taxable supplies and it is not intended to be a person's principal place of residence.

Neve and George will have to charge GST output tax on the supplies of short-stay accommodation, but they will be able to claim GST input tax on their expenses for the holiday cottage. Where expenses relate to the whole section rather than just the holiday cottage, the expenses should be apportioned on a fair and reasonable basis.

The main house is used solely as the owner's private residence and will not be subject to GST. There will be GST implications if Neve and George decide to use the main house to make supplies of accommodation in the future.

Queenstown

The sellers are not GST registered and the sale will not be subject to GST output tax. Because supplies of accommodation in their homestay would be below the $60,000 threshold, Neve and George do not have to register for GST. Neve and George's accountant suggests that there might be some benefit for them in remaining unregistered. They won't have to charge GST output tax on the supplies of short-stay accommodation, and they won't have to file returns and undertake adjustments. They also would not have to return GST output tax on the property when they come to sell it. Registering for GST would likely leave them worse off because property values in Queenstown are expected to rise and consequently the GST output tax on sale will be more than the GST input tax on sale.

If they do decide to register for GST, they can claim GST input tax on expenses that relate solely to providing short-stay accommodation (eg, guest toiletries) and a portion of GST on expenses relating to both taxable and non-taxable supplies (eg, utility bills). They can also claim GST input tax on the purchase. To give an indication the accountant calculates that:

- The bottom floor has a bedroom (with ensuite) and inbuilt garage that will be used exclusively by Neve and George - 50m2 with 100% private use.
- The second level is exclusively for guests and contains three dedicated guest bedrooms and a guest bathroom - 50m2 with 100% taxable use.
- The top level contains the common areas - an open plan lounge and kitchen-dining room - 50m2 with 50% taxable use.

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The second floor area used (or available for use) exclusively by guests is calculated as:

$$\frac{50}{150} \times \frac{365}{365} \times 100 = 33.33\%$$

The common areas on the top floor are 50% deductible but only for the days that one of the rooms is rented out. Neve and George estimate that at least one of the rooms will be rented out for 200 days a year:

$$\frac{50}{150} \times \frac{200}{365} \times 50 = 9.13\%$$

Adding these figures together (33.33% and 9.13%) they could expect to deduct 42.46% of GST input tax. The full amount of the GST input tax deduction would be 3/23 × $1.1m = $143,478.26. The proportion claimable would be $143,478.26 × 42.46% = $60,920.87. Neve and George would need to weigh up the other pros and cons of registration. If they did register they would need to charge GST on the supplies of accommodation they make and the property would also be subject to GST when they sell it or cease supplying short-stay accommodation.

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GST
short-stay accommodation

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"Question 116", *Public Information Bulletin* Vol 158 (November 1986).

"QB 19/05: What are my income tax obligations if I rent out my home or a separate dwelling on my property as short-stay accommodation?", *Tax Information Bulletin* Vol 31, No 6 (July 2019): 3.

"QB 19/06: What income tax rules apply if I have a dwelling that I sometimes rent out as short-stay accommodation and sometimes use myself?", *Tax Information Bulletin* Vol 31, No 6 (July 2019): 12.

"QB 19/07: How do the mixed-use asset income tax rules apply to a dwelling that I sometimes rent out as short-stay accommodation and sometimes use privately?", *Tax Information Bulletin* Vol 31, No 6 (July 2019): 16.

"QB 19/08: How do the standard income tax rules apply to a dwelling that I sometimes rent out as short-stay accommodation and sometimes use privately?", *Tax Information Bulletin* Vol 31, No 6 (July 2019): 22.

"QB 19/09: Can I register for GST if I supply short-stay accommodation to guests in my home or holiday home?", *Tax Information Bulletin* Vol 31, No 6 (July 2019): 27.

"Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Act 2013", *Tax Information Bulletin* Vol 25, No 9 (October 2013): 3

COMMISSIONER'S STATEMENT

The purpose of a Commissioner's Statement is to inform taxpayers of the Commissioner's position and the operational approach being adopted on a particular matter. A Commissioner's Statement is not a consultative document.

CS 20/02: Trophy hunting and the GST treatment of the "Trophy Fee"

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

Background

The Commissioner has released an Interpretation Statement (IS 20/02) (the *Interpretation Statement*) setting out her interpretation of how the Goods and Services Tax Act 1985 applies to supplies made by New Zealand hunting outfitters and taxidermists to overseas hunters who hunt trophy animals in New Zealand.

Typically, when an outfitter provides a New Zealand hunting package to an overseas hunter, and as part of that package the outfitter provides souvenir animal parts[1] or a hunting souvenir[2] for export, the outfitter makes two separate GST supplies to the hunter:

- a single composite supply of a hunting experience in New Zealand; and
- a supply of souvenir animal parts or a hunting souvenir.

The supply of the hunting experience in New Zealand must be standard-rated for GST purposes. This includes the supply of such things as accommodation, transport, guiding, licences etc. And, in the Commissioner's view, it also includes the outfitter's supply of the opportunity to hunt and kill a particular breed and quality of animal in New Zealand. The consideration paid by the hunter for this last part of the standard-rated supply is typically included within the "trophy fee" charged by the outfitter.

The supply of souvenir animal parts or a hunting souvenir for export to the hunter may be able to be zero-rated for GST purposes. In the Commissioner's view, the consideration for the supply of souvenir animal parts or a hunting souvenir is the balance of the "trophy fee" that is not attributable to the opportunity to hunt and kill a particular breed and quality of animal in New Zealand.

The Interpretation Statement includes discussion on valuing supplies and apportioning consideration where there is a mixture of standard-rated and zero-rated supplies. It observes that the value attached to separate supplies should properly represent the consideration paid for those supplies, and the onus is on the outfitter to show the Commissioner that a supply has been valued appropriately. If the Commissioner is concerned that artificial or contrived pricing is occurring that alters the incidence of tax, then there may be grounds for the transaction to be reviewed.

To assist outfitters in determining what portion of a "trophy fee" the Commissioner will accept as consideration for the standard-rated supply of the hunt and what portion is consideration for the exported supply of the souvenir animal parts or hunting souvenir, the Commissioner has established some standard apportionment percentages for trophy hunting animals in New Zealand.

The percentages are intended to recognise the increasing value to the hunter of souvenir animal parts and hunting souvenirs as the quality and "uniqueness" of the trophy animal increases. Outfitters may use these percentages to apportion their trophy fees when they export souvenir animal parts or hunting souvenirs, and those valuations will be accepted by the Commissioner. The use of these percentages is optional, however if an outfitter wishes to zero-rate a greater proportion of the trophy fee, they must be able to satisfy the Commissioner that their zero-rated portion is reasonable.

Standard percentages

1. To help outfitters correctly apportion the value of the "trophy fee", the Commissioner provides in this document standard percentages that can be applied by outfitters to determine how much of the trophy fee should be standard-rated and how much can be zero-rated.
2. These percentages are set out in the table below.

[1] "souvenir animal parts" refers to the parts of a trophy hunting animal killed by a hunter (for example, heads, shoulders, skins, antlers and bodies) that may later be expedited or mounted.

[2] "hunting souvenir" refers to the souvenir animal parts once they have been expedited or mounted by a taxidermist.

3. The percentages are based on the species available for trophy hunting in New Zealand and vary according to the quality and "uniqueness" of animal parts from the respective species, based on the trophy fees typically charged. The Commissioner recognises that the portion of the trophy fee that is attributable to the animal parts rather than the hunting experience will increase as the quality and uniqueness of the animal itself increases, therefore a higher percentage of such a trophy fee can be zero-rated. For red deer in particular, the Commissioner recognises that there is a wide range of values for the animal parts. The scoring system used by Safari Club International (SCI) has been used to adjust the applicable percentage - a higher scoring red deer will have a higher zero-rated element – to recognise the greater value the hunter places on the animal parts.
4. The use of these percentages is optional. However, where they are used and the Commissioner is satisfied that fair value is being charged for the supply of the standard-rated hunting experience in New Zealand, the Commissioner will accept the outfitter's GST treatment of the trophy fee based on the standard percentages.
5. Where an outfitter wishes to attribute a greater proportion of trophy fee to the zero-rated supply than the standard percentages provide for, they will need to satisfy the Commissioner that their valuation is reasonable. The onus is on the outfitter to do so.

Standard percentages for apportioning the value of a trophy fee

	% to be zero-rated	% to be standard-rated
Small animals (eg, possums and rabbits)	0%	100%
Arapawa Ram, Feral Goat, Pacific Ram, Wild Boar, Chamois, Fallow	25%	75%
Rusa, Sika, Tahr, White tail, Elk, Sambar, Wapiti	50%	50%
Red deer: No SCI – up to SCI 399	50%	50%
Red deer: SCI 400 – 499	75%	25%
Red deer: Over SCI 500	90%	10%

The following is an example using the standard percentages provided by the Commissioner:

Example - use of the standard percentages

Kiwi Big Game Hunting is a hunting outfitter. It agrees to provide a hunting package for a United States hunter to come to New Zealand to hunt a red deer stag with a Safari Club International (SCI) score of between 500 and 550.

The agreement between Kiwi Big Game Hunting and the hunter specifies that any hunting souvenirs made from any souvenir animal parts will be exported by Kiwi Big Game Hunting to the hunter in the course of, or as a condition of, their supply.

The package booked by the hunter includes:

- four nights' accommodation;
- professional guiding and use of firearms for three days;
- assessment of the red deer stag by a Safari Club International qualified measurer; and
- shuttle transfer between the airport and accommodation.

Kiwi Big Game Hunting tells the hunter that for a three-day hunt of this type, they will charge $3,000. GST is charged on this amount at the standard rate.

The hunter arrives in New Zealand and shoots a red deer stag which has an SCI score of 510. She also shoots a tahr. She wishes for both animals to be mounted as trophies and exported to her home in the United Stated and is happy to pay the applicable trophy fee for both animals, and the necessary taxidermy and shipping costs.

Kiwi Big Game Hunting agrees to arrange that. In determining the GST treatment of the red deer and tahr trophy fees, Kiwi Big Hunting uses the Commissioner's standard percentages. Kiwi Big Game Hunting's trophy fee for the red deer is $35,000 due to the animal's high SCI score. Of that value, 10% is charged GST at the standard rate of 15%, while 90% can be zero-rated.

For the tahr, Kiwi Big Game Hunting charges a trophy fee of $8,000. Of this, 50% is to be charged GST at the standard rate, while 50% can be zero-rated.

Kiwi Big Hunt Gaming invoices the hunter as follows:

Kiwi Big Game Hunting **TAX INVOICE**

Rifle Road
Mountainville
Canterbury

Invoice # 100
Date: 12 November 2020

GST No: 12-123-123

To:
Ms D Hunter
17 Washington Ave
Chicago IL
United States

DESCRIPTION			TOTAL
3 days hunting and guiding (including use of guns)	2,000		
4 nights' accommodation and meals	950		
Transfers to and from Christchurch International Airport	50		
1 Red stag (SCI 500-550)	3,500		
1 Tahr	4,000		
		10,500	
Plus GST @ 15%		1,575	
			12,075
Red deer souvenir		31,500	
Tahr souvenir		4,000	
Red deer souvenir – expediting, taxidermy & export to USA		1,500	
Tahr souvenir – expediting, taxidermy & export to USA		1,200	
Plus GST @ 0%		0	
			38,200
		SUBTOTAL	**50,275.00**
		LESS DEPOSIT PAID	-5,000
		TOTAL DUE	45,275.00

(**Note:** all amounts in this invoice are NZ dollars)

This statement applies to New Zealand hunting outfitters who make zero-rated supplies of souvenir animal parts and hunting souvenirs to overseas hunters. The application date is **from 25 May 2020.**

This Statement is signed on 25 May 2020

Rhys Brown
National Advisor - Escalations
Technical Standards, Legal Services

LEGAL DECISIONS – CASE SUMMARIES

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.

CSUM 20/04: Court of Appeal decides that payments made in support of overseas mission services qualify for tax credits

Case	The Church of Jesus Christ of Latter-Day Saints Trust Board and Coward v Commissioner of Inland Revenue [2020] NZCA 143
Decision date	6 May 2020
Legislative References	Income Tax Act 2007, s LD 1
Legal terms	Appeal; Missionary; Overseas; Donations; Donor; Gifts; Tax Credits; Charitable; Public Benefit.

Summary

The Court of Appeal found that the High Court Judge was correct when she concluded that payments made by a missionary's sibling and other more distant relatives, as well as unrelated members of the Church of Jesus Christ of Latter-Day Saints ("the Church") were gifts for the purposes of s LD 1(1) of the Income Tax Act 2007 ("the Act").

The Court of Appeal found that the High Court Judge erred in concluding payments made by a missionary, their parents, guardians or grandparents were not gifts. The Court of Appeal determined these payments were also gifts, making the payors eligible for donation tax credits.

Impact

The decision will mean donations to support missionaries of the Church will be eligible for donation tax credits and the Church is entitled it issue donation receipts. The decision could have wider implications for other charitable or not-for-profit entities as well.

Facts

This judgment concerned an appeal of the decision of the High Court addressing two proceedings which were heard together. The first appellant is The Trust Board of the Church of Jesus Christ of Latter-Day Saints ("the Trust Board"). The Trust Board is the New Zealand based arm or entity of the Church. The second appellant is Mr Coward, a New Zealand tax resident and member of the Church, whose daughter was a missionary of the Church. The Commissioner of Inland Revenue ("the Commissioner") is the respondent in both appeals.

The Church itself is based in Salt Lake City, Utah, but has a worldwide presence, including in New Zealand. Under the Church's missionary programme, young members may take part in an 18 to 24-month mission service overseas. As part of their application, a missionary is expected to commit to raising a "standard amount" to go towards supporting the Church's missionary work. At the time of Mr Coward's daughter's application, the "standard amount" for New Zealand was $475 per month or $5,700 per annum.

These payments are made to the Trust Board and intermingled with the Trust Board's funds and applied, at the sole discretion of the Trust Board, towards activities of the New Zealand Church. The payment is voluntary and non-refundable.

The Trust Board makes no payment towards the costs of a New Zealand missionary serving overseas. Their basic travel, accommodation, food and mission-related costs are met by the relevant Church-related entity in the country where their mission takes place.

Mr Coward's tax challenge concerned the Commissioner's decision to not allow him a tax credit for the payments he made to the Trust Board. The Trust Board applied under the Declaratory Judgments Act 1908 for various declarations that payments made by a missionary, his or her family, and members of the Church in New Zealand were gifts for the purposes of s LD 1(1) of the Act.

The High Court found in *The Church of Jesus Christ of Latter-Day Saints Trust Board and Coward v Commissioner of Inland Revenue* [2019] NZHC 52 [High Court judgment] at [128]:

- The "standard amount" payments made to the Trust Board by a missionary, their parents, and/or grandparents are not gifts; and
- Payments by other relatives and Church members unrelated to the missionary are gifts.

Issues

The Court of Appeal was required to determine whether the payments made by taxpayers to the Trust Board are gifts and therefore eligible for a tax credit under ss LD 1(1) and (2) of the Act.

The Court also considered there were two sub-issues that stem from the principal issue:

- whether any of the taxpayers receive a material benefit from the financial assistance received by those performing missionary services overseas; and if so
- whether there is a connection between the payments made by the taxpayer and the financial assistance received by the New Zealand missionary serving overseas so that the payments cannot be treated as gifts.

Decision

The Court of Appeal held that the payments made to the Trust Board by a missionary, their parents, grandparents, other relatives and/or friends were "gifts" and therefore eligible for a tax credit under s LD 1 of the Act.

The Court of Appeal considered that the correct approach was to follow *Mills v Dowdal*l [1983] NZLR 154 (CA), by focusing on the legal form of the arrangements over a substance-based approach.

Text and purpose of s LD 1(1) of the Act

The Court noted that the term "gift" is not defined in the Act and so it must be taken to bear its ordinary and natural meaning.

Accordingly, in order to be a "gift" for the purposes of s LD 1(1) of the Act there must be no material benefit bestowed on the taxpayer in addition to the tax credit prescribed in the Act.

Sub Issue 1 – was there a material benefit to the taxpayers?

The Court held there was no material benefit to the taxpayers and no distinction should be drawn between the various categories of taxpayers covered in the proceedings. It noted:

- The payments are used for the purposes of the New Zealand Church.
- The overseas missionary's basic costs that are met by either the church in the host country or the Church in Utah were necessary to facilitate missionary work.
- The opportunity to participate in missionary service overseas is not a genuine material benefit because the missionary is performing a charitable service.
- The real benefit to missionaries serving overseas is a sense of spiritual and moral satisfaction.
- Taxpayers other than missionaries do not receive a material benefit. At most they gain the spiritual or moral satisfaction of knowing the missionary is performing a charitable service on behalf of the Church overseas.

Sub Issue 2 – was there a connection between the payments made and any benefit received?

The Court held there was a disconnection in fact and in law between the payments made by the taxpayers and the receipt of basic costs by a missionary serving overseas, meaning even if there was a material benefit, there was little to no connection between the payment and the benefit.

The Court noted there was no legal arrangement connecting the payment by a taxpayer to the Trust Board and the payment by the church in the host country or the Church in Utah to meet the missionary's basic costs.

About this document

These are brief case summaries, prepared by Inland Revenue, of decisions made by the Taxation Review Authority, the District Court, the High Court, the Court of Appeal or the Supreme Court in matters involving the Revenue Acts. For Taxation Review Authority matters, names have been anonymized. The holdings described in a case summary will no longer represent current law where the matter has been successfully appealed or subsequent amended legislation has been enacted.

CSUM 20/05: Taxpayer ordered by Court of Appeal to pay increased security for costs

Case	Dowden v Commissioner of Inland Revenue [2020] NZCA 152
Decision date	8 May 2020
Legislative References	Court of Appeal (Civil) Rules 2005, rr 5A and 35
Legal terms	Review; Registrar decision; Security for costs; Dispensing with Security for Costs; Increased security for costs.

Facts

In the underlying substantive matter, the appellant, Mr John Alfred Dowden ("Mr Dowden"), appealed the High Court decision that he is liable for unpaid PAYE, GST and income tax for the period from April 2003 to November 2011 in respect of two businesses conducted by him.

Mr Dowden applied for an order dispensing with security for costs for the appeal (which the Court of Appeal (Civil) Rules set at $7,060). The Commissioner of Inland Revenue ("the Commissioner") cross-applied for an order increasing security for costs by $2,500 to $9,560.

The Deputy Registrar declined Mr Dowden's application and granted the Commissioner's application. Mr Dowden then applied for review of the Deputy Registrar's decision, which the Court of Appeal upheld.

Impact

The appellant must pay the security for costs by 29 May 2020 to proceed with his appeal.

Issues

Was the Registrar correct in deciding to:

- Decline to dispense with security for costs; and
- Order increased security for costs.

Decision

The Court upheld the Deputy Registrar's decision to decline Mr Dowden's application to dispense with security for costs. See paragraphs [8] – [12] of this judgment.

Mr Dowden provided information to the Court regarding his financial circumstances. The Deputy Registrar and the Court both agreed that this information especially with regard to Mr Dowden's liabilities other than the disputed debt to the Commissioner were not sufficient to demonstrate that he was impecunious and could not afford to pay security for costs.

The Court also noted:

- Mr Dowden had not applied for legal aid and considered it appeared he would not qualify for it even if his appeal had merit; and
- It did not consider that Mr Dowden had much prospect in succeeding in his appeal.

Accordingly, the Court held it would not be right to require the Commissioner to defend the judgment under appeal without the usual protection of security for costs.

The Court upheld the Deputy Registrar's decision to increase security for costs. See paragraphs [13] – [14] of this judgment.

The Commissioner provided evidence of Mr Dowden failing to pay the Commissioner agreed or unchallenged debts including costs of prior proceedings. The Court accepted that these instances of past procedural misconduct meant there was clearly a high risk that Mr Dowden would not meet any costs award made against him if his appeal fails. The Court reiterated that in its view the appeal is without merit.

Accordingly, setting an increased amount for security for costs was justified.

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REGULAR CONTRIBUTORS TO THE TIB

Tax Counsel Office

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

Legal Services

Legal Services manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

Technical Standards

Technical Standards sits within Legal Services and contributes the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters. Technical Standards also contributes to the "Your opportunity to comment" section.

Policy and Strategy

Policy advises the Government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as Orders in Council.

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