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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.

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- support the implementation of the research and development loan scheme
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Marketing Agencies Limited ("MAL") and Mountforts Pharmacy Limited ("MPL") (collectively, the companies) were removed from the New Zealand register ("the register"), in 1998 and 2011 respectively. However, the companies were restored to that register by this Court, pursuant to s 328 of the Companies Act 1993 ("the Act") on 21 September 2018 ("the restoration"), Commercial Management Ltd v Commissioner of Inland Revenue (2018) NZHC 224, (2018) 29 NZTC 23-068. While restored, the companies commenced legal proceedings in the Taxation Review Authority ("the Authority"). Thirteen months later, the Court of Appeal set that order aside, Commissioner of Inland Revenue v Commercial Management Ltd [2019] NZCA 479.

The appellants then applied to the Registrar, pursuant to s 328(1)(b) of the Act, to have the companies restored again because they were in legal proceedings at the time the Registrar removed all record of the High Court restoration. The Registrar refused to restore and notify their application because the qualifying criteria for notification were not met. This was an appeal against the Registrar's refusal to restore the companies.

The High Court dismissed these appeals. Whata J was satisfied that the refusal to notify the applications was lawful. He further noted that while the Registrar was wrong to delete all reference to the High Court restoration order, there is no proper basis upon which the companies may use the s 328 process to achieve restoration. The attempt to do so was a collateral attack on the judgment of the Court of Appeal.

IN SUMMARY (continued)

Determination

NEW LEGISLATION

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

COVID-19 Response (Further Management Measures) Legislation Act (No 2) 2020

The COVID-19 Response (Further Management Measures) Legislation Act (No 2) 2020 was enacted on 6 August 2020 and contains amendments to a range of cross-government COVID-19 response measures. Four taxation matters included in the new Act introduce amendments to:

- the power of the Commissioner of Inland Revenue to vary due dates and deadlines
- support the implementation of the research and development loan scheme
- the ability for the Commissioner of Inland Revenue to remit use-of-money interest for some provisional taxpayers, and
- the qualification periods for the in-work tax credit

Remedial amendment to administrative flexibility

Sections 6H – 6I of the Tax Administration Act 1994

This amendment to the Commissioner of Inland Revenue's existing discretion allows her to shorten a due date or deadline or otherwise modify a time period or timeframe where this is advantageous to taxpayers.

This amendment is intended to ensure the Commissioner has appropriate administrative flexibility where taxpayers are affected or likely to be affected by COVID-19 in a way which makes compliance with current tax obligations impossible, impractical, or unreasonable.

Otherwise the power for the Commissioner to make a COVID-19 variation remains unchanged.

Background

On 30 April 2020, as part of its response to the pandemic, the Government introduced legislation to increase the administrative flexibility for Inland Revenue to quickly modify due dates, timeframes or other procedural requirements for taxpayers impacted by COVID-19.

This flexibility provides the Commissioner with a more timely mechanism to assist taxpayers who encounter practical difficulties in complying or where compliance with certain requirements under the Inland Revenue Acts is impossible or unreasonable due to circumstances relating to COVID-19. The power came into force on 30 April 2020, with application from 17 March 2020.

Where taxpayers comply with a modified timeframe or requirement made under this power, they will be treated as if they complied with the relevant requirement that is set in legislation.

Key features

The amendment allows the Commissioner to vary a due date, deadline, time period or time frame to shorten or otherwise modify the time-related requirement.

This provides the Commissioner with the ability to respond to some cases with appropriate flexibility by shortening timeframes, for example, by reducing the time before a taxpayer may choose a new approach, the time for an election to take effect, or before a taxpayer may benefit from a provision.

Application date

The amendment applies from the date of application of the original legislation: 17 March 2020 in relation to requirements arising from this date.

Detailed analysis

Time-related requirements may be shortened or otherwise modified

Section 6I(1)(a) is amended to allow the Commissioner to use the discretion to shorten, reduce or otherwise modify a time-related requirement specified in 6I(1). These are due dates, deadlines, time periods or timeframes within or in relation to which:

- a person must comply with a requirement set out in the provision
- a person must make an election under the provision, and
- a person's entitlements, rights or obligations are affected.

A new subsection 6I(1B) is inserted to clarify that for the purpose of the COVID-19 variations, "modify" is defined as including a reduction in a time period or time-frame. This is restricted to where the Commissioner considers such a reduction would be advantageous for persons generally, or for a particular class of persons.

In addition, the existing legislation provides that the COVID-19 variations are optional for taxpayers to apply; taxpayers may always choose to comply with the requirements as set out in legislation rather than any relevant COVID-19 variation.

A supporting change is made to section 6H(1) which describes the discretionary power and how it may be used.

Example 1

Onya Marx is a company that provides specialist timekeeping for sporting events. During the lockdown, live sporting events were cancelled, meaning a downturn in business for Onya Marx.

Onya Marx has elected to file information to Inland Revenue quarterly, but could choose to adopt a half-yearly approach. However, taxpayers are not able to change filing options more than once a year – that is they must wait 12 months from the last election for any subsequent change of filing period to take effect.

The Commissioner considers that the time restrictions on being able to change between filing options may be unreasonable to comply with due to circumstances relating to COVID-19. The Commissioner issues a COVID-19 variation reducing the time period that taxpayers like Onya Marx must wait between changing filing periods to three months.

Amendments in support of R&D loan scheme

Section DF 1(1), YA 1, and schedule 21B part B clause 21 of the Income Tax Act 2007; schedule 7 part C clauses 23B and 38 of the Tax Administration Act 1994

The amendments support the implementation of the R&D loan scheme intended to incentivise businesses to continue research and development programmes at risk in the current economic conditions.

Amendments to the Income Tax Act 2007 ensure that expenditure funded by the loan scheme is subject to the normal income tax deductibility rules and that the loan does not affect a person's entitlement to R&D tax credits.

An amendment to the Tax Administration Act 1994 enables information sharing between Inland Revenue, Callaghan Innovation, and the Ministry of Business, Innovation, and Employment (MBIE) to support the R&D loan scheme. It also adds Callaghan Innovation to the list of agencies with which Inland Revenue can share information if necessary for carrying out duties related to COVID-19.

Background

The Government considers that lifting expenditure on R&D is necessary for the growth of the economy. However, the COVID-induced economic downturn has impacted many businesses in New Zealand, forcing them to cut down on expenditure to keep afloat. R&D programmes are particularly at risk of being cut or put on hold during the crisis. The Government has therefore provided funding through the COVID-19 Response and Recovery Fund for a temporary R&D loan scheme to encourage businesses to continue with their R&D programmes.

The R&D loan scheme is open to all R&D-performing businesses regardless of size. However, businesses are required to prove that they have suffered a significant loss in revenue or lack access to finance as a result of the pandemic. The R&D loan scheme applies similar eligibility criteria to those used for the COVID-19 wage subsidy scheme. The loan can only be spent on R&D activity, and businesses are required to account for this.

Although there are some key differences, the R&D loan scheme is intended to operate similarly to the Small Business Cashflow Scheme, with a similar tax treatment. It is also intended to be compatible with the R&D tax incentive. The loans will be administered by Callaghan Innovation and will only be available for the 2020–21 fiscal year.

The amendments described here aim to ensure the efficient functioning and appropriate tax treatment of the loans scheme.

Key features

The COVID-19 Response (Further Management Measures) Legislation Act (No 2) 2020 contains the following amendments to support the R&D loans scheme.

- The amendment to section DF 1(1) of the Income Tax Act 2007 exempts expenditure funded through the R&D loan scheme (defined in a further amendment to YA 1) from being subject to the rest of DF 1, which denies a deduction for expenditure or depreciation loss where the expenditure was funded through a government grant to a business. This ensures that expenditure funded through the loan scheme is subject to the normal income tax deductibility rules.
- The amendment to schedule 21B part B clause 21 of the Income Tax Act 2007 exempts the R&D loan scheme from the exclusion on claiming expenditure for the R&D tax credit where the expenditure relates to a government grant. Without this amendment, expenditure funded through the R&D loan scheme would likely be ineligible for the tax credit, contrary to policy intent.
- The amendments to schedule 7 of the Tax Administration Act 1994 allow for increased information sharing between Inland Revenue, MBIE, and Callaghan Innovation for the purposes of administering measures related to R&D in general and the R&D loan scheme in particular. They also allow information to be shared with Callaghan Innovation where the information is necessary for Callaghan Innovation to carry out duties related to COVID-19.

Application date

The amendments apply retrospectively from 1 July 2020, which is the date on which the R&D loan scheme became available.

Detailed analysis

Deductions not disallowed for expenditure funded through R&D loan scheme (section DF 1 of the Income Tax Act 2007)

Section DF 1 of the Income Tax Act 2007 prevents a person from claiming a deduction for expenditure or depreciation loss where the expenditure corresponds to a payment in the nature of a government grant or subsidy to business. DF 1(2) prevents the person from claiming a deduction for expenditure to which the payment corresponds, while DF 1(4) reduces the person's expenditure for the purpose of quantifying depreciation loss to the extent to which the person's expenditure on items of depreciable property corresponds to the payment.

An exception exists where the payment is an amount of a loan made under the small business cashflow scheme (DF 1(1)(cb)). Expenditure that corresponds to a loan under the small business cashflow scheme is subject to the normal deductibility rules (that is, it is not disallowed under section DF 1).

The policy intent is that the R&D loan schemes should be subject to the same tax rules as the small business cashflow scheme. An exception to the DF 1 rules for payments made under the R&D loan scheme thus ensures that these payments are subject to the normal deductibility rules.

Expenditure funded through R&D loan scheme still eligible for R&D tax credit (schedule 21B part B clause 21 of the Income Tax Act 2007)

A person cannot claim R&D tax credits for expenditure or loss to the extent that the expenditure or loss falls into any of the categories described in schedule 21B part B of the Income Tax Act 2007.

Clause 21 of schedule 21B part B provides that expenditure or loss is not eligible R&D expenditure where the expenditure or loss is a precondition to, subject to the terms of, required by, or otherwise related to a grant made by the Crown or a local authority. The policy intent of the R&D loan scheme, however, is that a person should be able to claim both the loan and the R&D tax incentive for the same expenditure. The amendment to clause 21 therefore creates an exception for expenditure funded through the R&D loan scheme. This allows expenditure funded through the R&D loan scheme to be eligible for the R&D tax credit (provided it meets all the other eligibility criteria).

Information sharing amendments (schedule 7 of the Tax Administration Act 1994)

Section 18 of the Tax Administration Act 1994 prevents Inland Revenue from disclosing any sensitive revenue information unless the disclosure is a permitted disclosure. Schedule 7 of the Tax Administration Act 1994 provides for situations in which disclosure is permitted to certain persons or agencies.

Amendments have been made to the provisions in schedule 7. The general effect of the amended provisions is to enable information to be shared with Callaghan Innovation where the information is reasonably necessary to perform duties related to COVID-19, and to explicitly include the R&D loan scheme in the existing information sharing provisions between Inland Revenue, Callaghan Innovation, and MBIE for R&D incentives. These amendments ensure that Inland Revenue can share information to enable Callaghan Innovation to make faster and better-informed decisions about an applicant's eligibility and to increase the efficacy of the scheme.

All legislative references below are to the Tax Administration Act 1994, schedule 7.

Information sharing with agencies for COVID-19 response purposes (clause 23B)

Clause 23B enables the Commissioner to disclose information about a person or entity to a prescribed list of government agencies for performing duties in response to the pandemic and economic crisis. The list of government agencies with which Inland Revenue can share information for these purposes is provided in clause 23B(6).

An amendment adds Callaghan Innovation to the list of agencies in clause 23B(6), enabling Inland Revenue to disclose information to Callaghan Innovation where the information relates to performing duties connected with COVID-19.

Information sharing with agencies for R&D purposes (clause 38)

Clause 38 provides the Commissioner with the ability to share information with various government agencies for specified purposes relating to developing and administering R&D incentives (in particular, the R&D tax incentive). Clause 38(2) enables the Commissioner to share information about a person or entity with Callaghan Innovation and MBIE where the information relates to offering R&D advice or government incentives.

New clause 38(2)(a) allows Inland Revenue to share information relating to several categories of government R&D incentive, including tax incentives, loans, grants, and any related measures. New clause 38(2)(b) specifies that Inland Revenue can share information relating to the grant and administration of loans under the R&D loan scheme.

Use of money interest remission on terminal tax

Section 183ABAC of the Tax Administration Act 1994

The amendment allows Inland Revenue to remit use of money interest (UOMI) accrued on an amount of terminal tax payable for the 2020–21 tax year where the taxpayer failed to pay the relevant portions of the amount by the provisional tax dates because their ability to reasonably accurately forecast their residual income tax has been significantly adversely affected by COVID-19.

Background

UOMI is charged immediately when a taxpayer fails to make a payment of tax on time. It is also charged retrospectively when a provisional taxpayer who uses the standard or estimate methods does not pay amounts sufficient to cover their instalment amount or residual income tax, depending on which method they use.

The purpose of UOMI is to encourage taxpayers to pay their tax on time and compensate the government for the loss of use of money from taxpayers underpaying their tax. It applies to all tax types administered by Inland Revenue. In most cases UOMI is charged immediately when taxpayers make tax payments late.

Section 183ABAB of the Tax Administration Act 1994 was introduced as part of the Government's response to the COVID-19 situation and gave the Commissioner the power to remit UOMI where the taxpayer's ability to make a payment was significantly adversely affected by COVID-19. This will cover the situation where a taxpayer is charged UOMI immediately on a missed payment but not in the situation where UOMI is charged retrospectively as the UOMI is not charged in respect of a "payment" that could not be made it is charged on the basis of the unpaid tax at those dates.

When UOMI is charged immediately the amount of actual tax owing is certain as the taxpayer has usually filed a tax return establishing the liability. With provisional tax the actual liability is not known until a taxpayer files their annual tax return sometime after their year-end so provisional instalments are calculated with reference to prior years or the taxpayer's estimate of their tax liability for the year.

Once a taxpayer files their tax return UOMI is charged retrospectively to compensate the government where a taxpayer underpays tax compared to their actual liability for the year or their instalment amounts depending on whether they use the standard or estimation methods.

A number of taxpayers have noted that because of the COVID-19 situation it is difficult for them to forecast their tax liability for the year. They know that the standard uplift multipliers of 105% of the prior year or 110% of the year before the prior year will likely be in excess of their liability for the 2020–21 year but there is uncertainty about what their tax liability may be for the year which could expose taxpayers, particularly small taxpayers, to UOMI.

Key features

Interest remission

New section 183ABAC allows the Commissioner of Inland Revenue to remit UOMI charged to taxpayers on an amount of terminal tax for the 2020–21 tax year if they:

- are a provisional taxpayer in the 2020–21 tax year;
- estimate their provisional tax;
- use the standard method and don't pay the amount of the standard instalment on the final instalment;
- would be a safe harbour taxpayer but they did not pay their instalments in full;
- have residual income tax of $1 million or less, and
- the ability to make a reasonably accurate forecast of taxable income for the year has been significantly adversely affected by COVID-19 and that resulted in interest being charged.

For interest to be remitted the taxpayer must ask for it to be remitted and the Commissioner must be satisfied that the taxpayer has asked for the relief as soon as practicable and made the payment of tax.

This amendment is aimed at remitting UOMI for smaller business who have difficulty in accurately forecasting their residual income tax for the year and incur UOMI when their actual tax liability is higher than the amount they have estimated or paid.

Example 2

Discovery Traders Limited is an export company based in Twizel that sells high quality Manuka honey to China. Due to the closing of the borders under COVID-19 it is very uncertain when the shipping lanes to China will be fully opened to international trade and how the situation will impact sales by Discovery. Based on the information that Discovery has at the time it is due to make its first instalment of provisional tax for the 2020–21 tax year it estimates its tax liability for the year to be $80,000 and makes its first provisional tax payment accordingly.

However, the trading lanes fully open a lot sooner than Discovery believed. They subsequently change their estimate and make increased payments at the second and third provisional tax instalment dates.

Despite this, they incur UOMI on the underpaid first instalment. They seek remission of that UOMI on the basis that at the time they had no idea that the trading lanes would open so quickly. Discovery's residual income tax is less than $1 million and because of the uncertainty created by the COVID-19 situation their ability to accurately forecast their income has been impaired. However, as soon as Discovery realised this, they amended their estimate accordingly. Discovery would be entitled to remission under new section 183ABAC.

The Commissioner is unlikely to remit UOMI where a taxpayer makes no effort to forecast their residual income tax for the year or where the taxpayer has resources available to accurately forecast their tax liability for the year.

Example 3

Excelsior Exteriors Limited is a building company based in Tauranga. They have been affected by COVID-19 in two ways, firstly, there was the initial lockdown which meant that work on their current projects ceased until the alert level reduced to level 2 but then, secondly, since the reduction in alert level they have been inundated with new projects as people who cannot travel overseas decide to undertake renovations to their houses. This has seen their revenue increase over prior years.

James, the owner of Excelsior, notes that the Commissioner can now remit interest on underpayments of provisional tax so decides to make no payments of provisional tax for the year on the basis that Excelsior will get this remitted when they file their tax return notwithstanding the increase in business during the year.

In this case the Commissioner would not consider a remission of interest as Excelsior's ability to forecast their income at each instalment has not been affected by COVID-19. It was clear that Excelsior was going to have a tax liability greater than zero, yet no effort was made to make tax payments to reflect that.

Example 4

Enterprise Bank Limited is a registered bank in New Zealand and has an annual turnover of $700 million. Its operations have been largely unaffected by COVID-19 and in some cases its profits have increased due to more lending being made to smaller businesses due to COVID-19.

Enterprise has a subsidiary V'ger Limited which sells pet insurance to Enterprise customers. V'ger outsources its accounting functions including forecasting to Enterprise. V'ger has been affected by COVID-19 as fewer people are getting pets than in a normal year.

V'ger estimates its provisional tax payable for the year, however, it incurs interest for underpaying its provisional tax compared with its actual tax liability for the year. V'ger underpaid as it made an error in their original estimate.

Although V'ger has residual income tax of less than $1 million it has the ability to accurately forecast and adjust their provisional tax payments for the year and that ability has not been adversely affected by COVID-19. The Commissioner will not consider remitting interest for V'ger.

Application dates

This provision has effect from the date of Royal Assent however it will apply for UOMI accrued for the 2020–21 tax year.

Grace periods for the in-work tax credit

Sections MD 9 and MD 10 of the Income Tax Act 2007

Amendments to the Income Tax Act 2007 will allow families to continue to receive the in-work tax credit (IWTC) for a period of up to two weeks as earners transition between jobs, are unpaid for a period or leave their employment.

Background

Section MD 4(1) of the Income Tax Act 2007 sets out that a person is entitled to an IWTC for a child if the person meets the five requirements set out in sections MD 5 to MD 9. The fifth of these requirements (commonly referred to as the "in employment" test) requires IWTC recipients to derive income in each week they are eligible for the tax credit.

A longstanding issue with this requirement is that working families lose their entitlement to the IWTC over small unpaid periods even though the earner returns to paid work. Examples include teacher aides and other support staff in schools or universities employed only during the school term, workers on fixed-term contracts, and workers transitioning between jobs or taking unpaid leave.

As job losses increase due to the economic downturn, the amendments will ensure that families continue to receive the IWTC for two weeks as they transition between jobs, are unpaid for a period, or leave their employment. The change is intended to boost the incomes of low and middle-income working families while supporting them to stay off a main benefit as they transition between jobs or have small gaps in employment.

Key features

Two-week grace period

New section MD 9(6) provides an exception to the "in employment" test for a person who previously met the test within the past fortnight. The amendment provides that a person is deemed to meet the test if they do not derive income or otherwise do not meet the in employment test but have met the test within the last 14 days.

The off-benefit rule in section MD 8 will still apply, meaning that payments of the IWTC will stop if the earner or their spouse, civil union partner or de facto partner goes on to an income-tested benefit.

Definition of weekly periods

Section MD 10 defines the amount of IWTC entitlement and the number of weekly periods the earner is entitled for. The definition of "weekly periods" in section MD 10(3)(d) has been amended so that it includes whole one-week periods to which the new rule in section MD 9(6) applies. The amendment ensures that the earner is entitled to continue receiving the IWTC in each week that they have a grace period under section MD 9(6), up to a maximum of two consecutive weeks.

Application date

The amendments will come into force on 1 April 2021.

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently. The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates their tax liability based on it.

For full details of how binding rulings work, see *Binding rulings: How to get certainty on the tax position of your transaction (IR715)*. You can download this publication free from our website at **www.ird.govt.nz**

BR Prd 20/02: Restaurant Brands Limited

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

Name of the person who applied for the Ruling

This Ruling has been applied for by Restaurant Brands Limited.

Taxation Laws

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

This Ruling applies in respect of:

- ss BD 2, DA 1 and DA 2(4) and the definition of "income from employment" in s YA 1 for the period from 1 April 2008; and
- the definitions of "taxable activity" in s 6 of the Goods and Services Tax Act 1985 and "employment under any contract of service" in s 6(3)(b) of the Goods and Services Tax Act 1985.

The Arrangement to which this Ruling applies

The Arrangement is a recurring arrangement in terms of s 91F(1) of the Tax Administration Act 1994. It involves the engagement of delivery drivers by Restaurant Brands Limited (RBL) pursuant to the Independent Contractor Delivery Driver Contract for Services (Delivery Driver Contract) dated June 2018 in accordance with information in the Delivery Driver Operating Guide, Delivery Driver Personal Information and Payment Details form, Independent Contractor Delivery Driver Notice of Taxation Requirements, and standard practice information provided to Inland Revenue in the ruling application dated 18 December 2019 (collectively referred to as the relevant documents). Delivery drivers are engaged to deliver RBL products to RBL customers. Details of the Arrangement are set out in the following paragraphs.

Details of the Arrangement

Relationship between RBL and its delivery drivers

1. RBL prepares and sells a range of fast-food products through its brands in New Zealand. The brands operating under RBL are KFC, Pizza Hut, Carl's Jr and Taco Bell. RBL sells its products through a chain of restaurants. RBL engages the services of delivery drivers to deliver its products to its customers from its restaurants. A delivery service is provided to its customers at some KFC and Pizza Hut restaurants. The delivery service may extend to other brands operating in New Zealand as required. Should RBL's delivery service extend, all drivers will be contracted in an identical manner using the same documents attached to this application.
2. The relationship between the delivery drivers and RBL is governed by the:
    - Delivery Driver Contract dated June 2018, which includes:
        - an outline of delivery driver payments (cls 8 and 9);
        - the motor vehicle policy (cl 5);
        - liability and insurance (cl 12);
        - the driver uniform and delivery pouches policy (cl 13); and
        - mobile phone policy (cl 6);
    - Delivery Driver Personal Information and Payment Details form, which contains details of the driver and their bank account, vehicle, and motor insurance;

- Delivery Driver Operating Guide, which incorporates:
  - the guideline on making the delivery;
  - food safety and hygiene;
  - the dress code;
  - vehicle maintenance and safety; and
  - service standards;
- Independent Contractor Delivery Driver Notice of Taxation Requirements dated July 2018; and
- standard practice information provided to Inland Revenue with the ruling application dated 18 December 2019.

3. RBL has two types of delivery driver: independent drivers (also referred to as owner–drivers) and in-store drivers. This ruling relates to only independent drivers (that is, delivery drivers who RBL contracts under the Delivery Driver Contract).
4. RBL Head Office communicates changes to the terms of the Delivery Driver Contract and Delivery Driver Operating Guide (for example, with respect to payments) to area managers and store managers by email. They then communicate changes to the delivery drivers orally with reference to the email received from RBL Head Office. The Delivery Driver Contract entered into with each respective driver is not physically amended.

Terms of the Delivery Driver Contract

Delivery driver obligations

5. Under the Delivery Driver Contract, the delivery driver agrees to:
   - perform the delivery services in a safe, proper and courteous manner with all due care and skill in accordance with the law and the Independent Contractor Delivery Driver Operating Guide (which may be varied from time to time) and must:
     - report any accident to RBL
     - deliver RBL products to the nominated address within the specified period
     - report all customer concerns to RBL; and
     - inform RBL of changes to the vehicle being used to make deliveries, including its insurance status (cl 4.1);
   - where instructed by RBL, provide a float of $20 for the purpose of providing change to customers (cl 4.2);
   - use only the motor vehicles detailed in the delivery driver's contract application to carry out the delivery services, unless otherwise approved in writing by RBL (cl 5.1);
   - be responsible for all running, fuel, licence, insurance and maintenance costs for the vehicle(s) (cl 5.3(c));
   - use a mobile phone to assist with carrying out the delivery services (cl 6.1), and that phone may be their own or rented from RBL at a cost of 50 cents per delivery (cl 6.2);
   - download and use a specific delivery app when performing their services and agree to the terms and conditions of the app (cl 6.3);
   - refer immediately to RBL any discrepancies on delivery with regards to the collection of money (cl 7.1(a));
   - provide, at the end of each delivery period, to RBL's authorised representative:
     - a complete account and record in the format specified by RBL (cl 7.1(b)(i)); and
     - all money collected from the customers of RBL during the delivery period (cl 7.1(b)(ii));
   - be liable for and indemnify RBL against any liability, loss, claim or proceedings arising out of or relating to the use of the driver's vehicles in the provision of delivery services (cl 12.1);
   - retain a minimum of third-party liability insurance in respect of the vehicle (cl 12.2);
   - return delivery pouches at the end of each delivery, and note that failure to do so entitles RBL to deduct the replacement cost from money owing to the delivery driver (cl 13.2);
   - produce to RBL's authorised representative documents that RBL considers necessary to establish that the delivery driver has complied and continues to comply with their obligations under the contract (cl 14.1).
6. Additionally, under the Delivery Driver Contract, the delivery driver:
   - may choose to wear a uniform provided by RBL; if they do not wear the RBL uniform, they must comply with the dress code requirements (discussed in [17]) (cl 13.1);

- is not liable to take out any insurance or be responsible for loss or damage to products delivered as long as the loss or damage does not result from the delivery driver's wilful default, negligence or breach of the contract (cl 12.5); and
- may assign their rights and subcontract their services under the contract, provided they give RBL prior notice and receive written consent (cl 16.1).

RBL's obligations

7. RBL's obligations under the Delivery Driver Contract are as follows:
   - RBL will pay the delivery driver for each delivery at the rate specified (cl 9.1).
   - RBL's engagement of the delivery driver does not commit RBL to a guarantee of any minimum level of deliveries (cl 1.2).
   - RBL reserves the right to engage the services of other delivery drivers (cl 1.3).
   - RBL is not responsible for any vehicle damage sustained as a result of the delivery driver's negligence or omission (cl 4.3).
   - Products carried by the delivery driver are at the risk of RBL (cl 12.5).
   - Delivery pouches remain the property of RBL (cl 13.2).

Delivery driver payments

8. RBL agrees to pay a:
   - GST-registered delivery driver within 24 days of submission and approval of an invoice (cl 8.1); and
   - non–GST-registered delivery driver:
     - within 24 days of submission of an invoice (cl 8.2(a)); or
     - within 7 business days, if the delivery driver opts for RBL issuing a weekly buyer-created invoice (cl 8.2(b)).
9. Delivery drivers receive a delivery payment for a completed delivery only once the driver accepts the delivery, fulfils the delivery, and the delivery is captured as completed in the delivery app (cl 9.3).
10. In the case of a mistake requiring redelivery, the delivery driver will receive another delivery payment if the mistake was not the fault of the delivery driver (cl 9.4).
11. The delivery driver will be reimbursed for the delivery payment for the order if, through no fault of the driver (cl 10.1):
    - a redelivery of a customer order is required because of an order complaint;
    - the delivery driver cannot complete the delivery because of wrongly supplied delivery details;
    - complaints are received indicating miscellaneous issues outside the delivery driver's control and the delivery driver is required to redeliver;
    - complaints are received arising from food quality problems so the delivery driver is required to redeliver the order back to RBL;
    - orders are cancelled after the delivery driver has left RBL's premises so the product must be returned to those premises;
    - hoax orders have been made, so the product must be returned to RBL's premises.
12. Delivery drivers will not receive payments or reimbursement when (cl 11.1):
    - complaints are received that the driver mishandled the order (eg, dropped food);
    - complaints are received about the order missing items; or
    - a delivery or pick up is of stock from other RBL stores (stock transfers are RBL's responsibility).

    Additionally, delivery drivers will not receive payments or reimbursement if they cannot complete a delivery that has the correct delivery details. If in doubt about the delivery details, the delivery driver should call the RBL representative to clarify the details. The delivery driver can contact customers and the RBL representative using the phone details in the app. Delivery drivers are not separately reimbursed for calls to customers or back to the RBL store.
13. Delivery drivers are not guaranteed any minimum per hour delivery payment (cl 10.2).

Legal relationship between the parties

14. The legal relationship between the delivery driver and RBL is as described in the Delivery Driver Contract as that of "principal and independent contractor and not that of employer and employee" (cl 3.1).

Termination of the contract

15. Either party may terminate the Delivery Driver Contract on notice to the other party at the conclusion of any delivery (cl 2.1).

Key contents of the Delivery Driver Operating Guide

16. The Delivery Driver Operating Guide covers the dress code, making the delivery, and taxation requirements.

Dress code requirements

17. The dress code requires delivery drivers to:
    - wear closed heel and toe footwear;
    - wear clothes that are clean, in good condition, and fit properly; and
    - not wear clothing with offensive slogans or messaging.

    The dress code recommends that delivery drivers wear the safety bump hat and high-visibility vest during all deliveries.

Making the delivery

18. A section in the operating guide is called "Making the delivery". It suggests how deliveries are to be made and how to handle customer complaints. The appendix to the operating guide includes a section on safety (Appendix 1.4).

Notice of taxation requirements

19. The Contract Delivery Drivers Notice of Taxation Requirements is a guide in the operating guide that states:
    - the delivery driver is not an employee of RBL;
    - the delivery driver should seek independent taxation advice to understand their rights and obligations;
    - PAYE will not be deducted from payments for deliveries;
    - the gross values of all payments received by the delivery driver for deliveries must be included in the delivery driver's annual income tax return;
    - the delivery driver must calculate and pay their earner premium at the end of the year when they file their tax return;
    - the delivery driver may be liable to pay provisional tax; and
    - the delivery driver must register for GST if the delivery driver has income of $60,000 or more.

Standard practice information

20. Delivery drivers are not:
    - entitled to overtime or sick pay;
    - required to belong to any union;
    - allowed to supervise employees of RBL;
    - allowed to access RBL's administration or support services, but they may access staff toilets;
    - allowed to advertise for work or have their own client base, in relation to RBL products. There are no restrictions on the delivery drivers providing services to any other entity or person.
21. Also, delivery drivers:
    - can decide the hours they work (provided work is expected to be available), but it is standard practice that delivery drivers make themselves available for rostered hours;
    - provide their own vehicles and associated equipment;
    - may work for another entity or person;
    - must hold an appropriate driver licence.
22. RBL trains delivery drivers in how to make deliveries and tells them the geographical area they will work in.
23. RBL employees take orders over the phone and decide the delivery sequence of the orders. A maximum of two orders can be delivered at any one time (to maintain the quality of the product).
24. RBL may, at its discretion, pay delivery drivers a minimum of two deliveries per hour during certain hours to maintain minimum coverage for RBL during quiet periods.
25. A delivery driver may find their own replacement driver, but in practice this does not happen as RBL generally uses another delivery driver.

Relationship between RBL employees and delivery drivers

26. In-store employees may sometimes make home deliveries, while also carrying out employment duties in the store. These employees are contracted with RBL under employment contracts. However, they are remunerated for each delivery performed. These employees also do other tasks (such as making pizzas and cleaning). In contrast, delivery drivers are contracted only to deliver products and are not required to perform other tasks.

No other documentation has a bearing on this Ruling

27. No other collateral contracts, agreements, terms or conditions, written or otherwise, have a bearing on the conclusions reached in this Ruling.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) RBL will provide the delivery drivers with the Independent Contractor Delivery Driver Notice of Taxation Requirements dated July 2018 at the start of the contract and advise the delivery drivers that as independent delivery drivers they are required to comply with their own income tax, GST, and accident compensation obligations.

(b) The actual relationship between RBL and the delivery driver is, and will continue to be, during the period this Ruling applies, in accordance with the terms of the relevant documents in all material respects.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- For the purposes of ss BD 2, DA 1 and DA 2(4), payments RBL makes to the delivery driver are not "income from employment" as defined in s YA 1. Therefore, the driver is not prevented from claiming deductions under these sections by reason only that the driver earns "income from employment".
- For the purposes of the Goods and Services Tax Act 1985, the driver's provision of services to RBL is not excluded by s 6(3)(b) of the Goods and Services Tax Act 1985 from the definition of "taxable activity" in s 6 of the Goods and Services Tax Act 1985 as they are not made under "contracts of service".

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 January 2020 until 31 December 2023.

This Ruling is signed by me on the 1st day of July 2020.

Jessica Griffin
Group Lead – Customer Compliance, CCS - Business

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 20/04: The Disputes Resolution Process and Fair Trial Rights

All legislative references are to the Tax Administration Act 1994 unless otherwise stated.

Introduction

1. Everyone who is charged with an offence (including offences under the Inland Revenue Acts) has the right to a fair trial. A taxpayer also has a number of other related rights in criminal proceedings.[1] For example, a defendant cannot "be compelled to be a witness or to confess guilt" and they are entitled to adequate time to prepare their defence.
2. The Disputes Resolution Process in Part 4A of the TAA (the Disputes Process) contains provisions that potentially compel a taxpayer to disclose his or her defence to criminal proceedings in the course of responding to the civil tax dispute.
3. This Commissioner's Statement sets out the broad approach that the Commissioner is taking to preserve a taxpayer's fair trial rights in criminal proceedings when there is a contemporaneous civil dispute.

Disputes Process

4. The Commissioner considers that it is important to ensure that once prosecution has commenced or is contemplated a taxpayer is not compelled to respond to an assessment or disputes document issued by the Commissioner.
5. The general approach is that when criminal proceedings have commenced or are contemplated the taxpayer will be advised of that position before they are next required to issue a disputes document to commence or continue the Disputes Process. For example, by issuing a NOPA in response to an assessment.
6. Under section 89K a taxpayer can issue a response outside the response period in "exceptional circumstances". They must issue the response to the Commissioner as soon as reasonably practicable after becoming aware of the failure to issue the response within the required timeframe.
7. The Commissioner accepts that preserving a taxpayer's rights in current or potential criminal proceedings is an "exceptional circumstance" which prevents a taxpayer from responding to the assessment or notice within the applicable response period.
8. The Commissioner considers that a taxpayer can elect not to file an outstanding disputes document until the question of prosecution is resolved. This will delay the requirement to respond and therefore either delay the start or pause the Disputes Process.
9. Once the question of prosecution has been resolved then the Disputes Process can resume (or in some cases commence) and the Commissioner will advise the taxpayer of this. The taxpayer will need to issue their outstanding disputes document by the later of 2 months from date of this advice or the original due date for that outstanding disputes document.
10. Another way that taxpayer rights can be protected is by the parties agreeing to pause (sometimes known as "park") the dispute at the conference stage until after the question of prosecution has been resolved.

Voluntarily taking part in the Disputes Process

11. There is nothing that prevents the taxpayer from voluntarily deciding to engage in the Disputes Process even though prosecution is either contemplated or underway. They may choose to issue a NOPA, NOR or SOP or otherwise participate in the Disputes Process just as a taxpayer can choose to give evidence in a criminal proceeding even though not required to do so. If a taxpayer chooses to issue a dispute document in these circumstances, the Commissioner will treat the information contained in the dispute document (or that is subsequently provided during the Disputes Process) as being voluntarily provided and it may be used in any criminal proceedings.

[1] Sometimes all these rights are described as the right to a fair trial.

12. If the taxpayer elects to continue the Disputes Process then the Commissioner will review the disputes document and potentially:
    - undertake further investigatory activities based upon the information provided;
    - use the information in any criminal proceedings.
13. Where a taxpayer elects to continue with the Disputes Process, despite being advised that they are not required to, they can at a later stage elect to not file subsequent documents until the question of prosecution has been resolved.

Outstanding tax

14. When an assessment has been issued by the Commissioner and a taxpayer advises within the response period that they intend to rely on the exceptional circumstance and to provide their dispute document when the question of prosecution has been resolved, the Commissioner will usually not take debt collection steps in relation to any disputed tax until after both the criminal proceedings and the Disputes Process has concluded.
15. However, where it is considered that a delay in collection will result in a significant risk that the tax will not be paid, the Commissioner may take steps that she considers necessary to ensure the payment of tax and/or prevent the dissipation of assets.

Time Bar

16. If pausing the Disputes Process means that it is likely that the Disputes Process will be unable to be concluded prior to the expiry of the time bar, there are options available to ensure that an assessment or challenge notice can be issued within the time bar period (eg the taxpayer can agree to an extension of the time bar (section 108B), the parties can agree to opt out of the disputes process (section 89N(1)(c)(viii)) or the Commissioner can file an application in the High Court for an extension of the time bar (section 89N(3) or section 89L(1B))).

Application

17. This Statement applies from the date of issue.

Tony Munt
National Advisor, Technical Standards

Date of Issue: 22 July 2020

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 20/08: Two appeals by DJ Hampton dismissed by Court of Appeal: His bankruptcy not stayed using High Court Rule 17.29 and High Court conditions on his discharge from bankruptcy confirmed

Case	David John Hampton v Minter Ellison Rudd Watts, Official Assignee and CIR [2020] NZCA 291
Decision date	15 July 2020
Legislative References	High Court Rules 2016 ("HCR"), Insolvency Act 2006
Legal terms	N/A

Summary

An unsuccessful attempt by Mr Hampton to stay the enforcement of his bankruptcy and, in the alternative, to have his bankruptcy discharged without conditions.

Impact

The main area of interest in this judgment was the novel use of HCR 17.29 seeking to effectively annul an order of bankruptcy by staying its enforcement. The Court of Appeal recognised an order of bankruptcy is not itself an enforcement order. Rather it determines the status of the bankrupt. That status has consequences for the administration of the bankrupt's affairs by operation of law but is not the enforcement of a liability. Also, such an order would undercut the purpose of the insolvency regime.

Facts

Mr Hampton has been engaged in litigation with Inland Revenue since the 1990s. In 2013 he was bankrupted by Minter Ellison for not paying his legal bills. In 2014 he filed his statement of affairs (about one year late) and was to be discharged from bankruptcy in 2017.

The OA objected to his discharge from bankruptcy. The CIR sought conditions be imposed on Mr Hampton's discharge. This meant a public examination was held. In a judgment in 2018 Venning J discharged Mr Hampton from bankruptcy subject to conditions. Mr Hampton appealed.

Pending the appeal, Mr Hampton applied to the High Court for a stay of Venning J's judgment and a stay of the original bankruptcy order (made in 2013) relying on High Court Rule 17.29 which allows the stay of enforcement of orders made by the High Court. As the Court of appeal explained at [8]:

> ...Mr Hampton therefore sought first for his discharge to be stayed under r 17.29, and hence for him to be returned to bankruptcy; and secondly for the adjudication itself to be stayed, and thus for the entire bankruptcy to be, in effect, undone. His interest in the Misfeasance Claim would, he suggested, therefore re-vest in him and he would be able to reapply to the Court for the 2013 stay to be lifted. In his view, a stay would lift all the associated restrictions on him personally and the Official Assignee would, thereafter and for the period of the stay, have no interest in his affairs.

These applications were before Osborne J in the High Court and he stayed Venning J's judgment to allow the appeal to proceed (relying on Court of Appeal (Civil) Rule 2005, r12). Osborne J dismissed Mr Hampton's HCR 17.29 application on the basis there was no jurisdiction to stay the adjudication order. Mr Hampton appealed the dismissal of his HCR 17.29 application.

An important point to understanding these appeals is the existence of a Misfeasance claim against the Commissioner of Inland Revenue ("CIR"). Lodged in 2008, this claim was stayed by the Court of Appeal in 2013 pending redrafting and review by a practicing lawyer and further review by a High Court judge. Because of the bankruptcy, Mr Hampton's interest in this claim vested in the Official Assignee ("OA") (so Mr Hampton could not seek to lift the stay of the Misfeasance claim). After Mr Hampton's bankruptcy ended the claim will not revert to him, effectively ending his interest in the claim.

Issues

- Does jurisdiction exist under HCR 17.29 to stay Mr Hampton's adjudication of bankruptcy?
- Did Venning J make a mistake ordering conditions on Mr Hampton's discharge from bankruptcy?

Decision

Does jurisdiction exist under HCR 17.29 to stay Mr Hampton's adjudication of bankruptcy?

The court dismissed Mr Hampton's appeal to Osborne J's decision. The court considered the purpose of HCR 17.29:

> [19] The purpose of the rule is to enable parties who are held liable under a judgment of the Court to apply for a stay of enforcement of the judgment or other relief against it. That is a poor fit for the situation here because Mr Hampton is not a liable party under a judgment: rather, he has been adjudicated bankrupt, and bankruptcy is a status rather than a form of liability. Before us, Mr Hampton maintained that he was a judgment debtor to MERW and thus a "liable party" in terms of r 17.1. However, that confuses the original judgment obtained by MERW in February 2010 with the adjudication order made … in June 2013. Unlike the 2010 judgment, the adjudication order could not be "enforced" by MERW. Once made, it took effect by operation of law: there is nothing further the creditors could do.
>
> [20] Mr Hampton further contended that the word "judgment" could be defined broadly to encompass an adjudication order and pointed to the suggestion a court order could be "enforced in the same way as a judgment" in r 17.2 and the broad definition adopted elsewhere in r 11.1. Again, however, we reject that submission simply because it misdescribes the nature of an adjudication order, which as we have noted, cannot be "enforced" and is not what is contemplated by r 17.2.

The Court also concluded a HCR 17.29 stay of enforcement of a bankruptcy order would defeat a fundamental part of insolvency law: the gaining and realisation of assets by the OA:

> [24] Mr Hampton now seeks, in effect, a temporary annulment, an order not contemplated by the [Insolvency] Act and which would cut across the insolvency regime in its entirety. His proposition is that his assets, including those represented by the benefit (such as it may be) of the Misfeasance Claim, would revert to being his property, in which the Official Assignee would have no interest nor any right to determine disposition. There is simply no room, given the fundamental principles of insolvency law and the specific terms of the Act, for such an order. We are satisfied that, howsoever r 17.29 might be interpreted, it cannot have that effect.

Did Venning J make a mistake ordering conditions on Mr Hampton's discharge from bankruptcy?

In a largely fact driven judgment on whether conditions should be imposed on Mr Hampton's discharge from bankruptcy, the Court was satisfied that Venning J was correct to impose conditions and the appeal was dismissed.

The Court of Appeal concluded Venning J was correct to be concerned about "Mr Hampton's failure "to properly distinguish between the assets, liabilities and general affairs of the separate Chesterfield entities" …"(at [34]) and "Mr Hampton's lack of co-operation with the Official Assignee during his bankruptcy, as demonstrated by the delay in filing the Statement of Affairs…" (at [34]).

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 findings of the court 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 20/09: Two appeals against the Registrar of Companies ("the Registrar") decision to decline public notice under s 328(3) of the Companies Act 1993 ("the CA 1993") following the appellants' application to restore Marketing Agencies Ltd ("MAL") and Mountforts Pharmacy Ltd ("MPL") to the New Zealand Register of Companies ("the Register"). The appeals were dismissed by the High Court.

Case	Commercial Management Limited v Commissioner of Inland Revenue [2020] NZHC 1873 [31 July 2020]
Decision date	31 July 2020
Legislative References	s 328 of the Companies Act 1993
Legal terms	N/A

Summary

Marketing Agencies Limited ("MAL") and Mountforts Pharmacy Limited ("MPL") (collectively, the companies) were removed from the New Zealand register ("the register"), in 1998 and 2011 respectively. However, the companies were restored to that register by this Court, pursuant to s 328 of the Companies Act 1993 ("the Act") on 21 September 2018 ("the restoration"), *Commercial Management Ltd v Commissioner of Inland Revenue* (2018) NZHC 224, (2018) 29 NZTC 23-068. While restored, the companies commenced legal proceedings in the Taxation Review Authority ("the Authority"). Thirteen months later, the Court of Appeal set that order aside, *Commissioner of Inland Revenue v Commercial Management Ltd* [2019] NZCA 479.

The appellants then applied to the Registrar, pursuant to s 328(1)(b) of the Act, to have the companies restored again because they were in legal proceedings at the time the Registrar removed all record of the High Court restoration. The Registrar refused to restore and notify their application because the qualifying criteria for notification were not met. This was an appeal against the Registrar's refusal to restore the companies.

The High Court dismissed these appeals. Whata J was satisfied that the refusal to notify the applications was lawful. He further noted that while the Registrar was wrong to delete all reference to the High Court restoration order, there is no proper basis upon which the companies may use the s 328 process to achieve restoration. The attempt to do so was a collateral attack on the judgment of the Court of Appeal.

Impact

None.

Facts

The companies were involved in, along with many others, what have become known as the "Russell template" tax avoidance arrangements. Following the decision in *Duvall, FB Duvall Ltd v Commissioner of Inland Revenue* (1997) 18 NZTC 13,410 (HC), Mr Russell made a claim in relation to seven other companies, culminating in a settlement agreement with the Commissioner. Mr Russell also sought to reach agreement in relation to other companies, including MAL and MPL, but the Commissioner made it clear that it would not entertain settlement discussions in relation to removed companies. This led to the 2018 application to restore.

The 2018 application sought to restore the companies to the register under s 329(1)(b) of the Act on the grounds that it was just and equitable for them to be restored. On 28 August 2018, the High Court granted the appellants' restoration application. MAL and MPL were restored to the Register on 20 September 2018. An appeal against the High Court decision was filed on 25 September 2018.

On 19 and 22 March 2019, MPL and MAL respectively commenced proceedings before the Authority under the Tax Administration Act 1994. The MPL notice of claim alleges that $3,219,154.82 was wrongly paid to the Commissioner, relying on, among other things, the *Duvall* decision. To explain the delay, it is also claimed that the Commissioner's settlement of disputes, pursuant to the *Duvall* decision, only became evident in 2018. MAL's claim, alleging $219,782.42 was wrongly paid, mirrors the MPL notice.

On 3 October 2019 the Court of Appeal allowed the Commissioner's appeal and set aside the High Court order that the removed companies be restored to the Register (the Court of Appeal decision), *Commissioner of Inland Revenue v Commercial Management Ltd* [2019] NZCA 479.

On 10 October 2019, as a result of the Court of Appeal decision, the Registrar removed MAL and MPL from the Register as if they had never been restored on 20 September 2018.

On 21 November 2019 the Court of Appeal judgment was sealed.

On 22 November 2019 the appellants applied to the Registrar to restore MAL and MPL to the Register under s 328(1)(b) of the CA 1993. The Registrar refused to restore and notify their application because the qualifying criteria for notification were not met.

Issues

Whether the restoration order of the High Court (the restoration order), *Commercial Management Ltd v Commissioner of Inland Revenue* (2018) NZHC 224, (2018) 29 NZTC 23-068, had interim legal effect pending the decision of the Court of Appeal to set aside (the appeal order), *Commissioner of Inland Revenue v Commercial Management Ltd* [2019] NZCA 479.

Whether the Registrar was wrong to refuse to exercise its power to notify the s 328(1)(b) restoration or otherwise restore the companies.

Decision

The Court found that:

- the Registrar was wrong to delete all references to the restoration order from the register and proceeded on an erroneous basis that the companies had not been restored in September 2018 or removed in November 2019. However, the companies cannot rely on the interim restoration to restore them, pursuant to s 328.
- the restoration order was invalid following the appeal order. It has no ongoing force at law and cannot now give rise to actionable rights. The companies' ongoing insistence that the restoration order remains effective in this way is plainly a collateral attack on the judgment of the Court of Appeal.
- Substantively, there is plainly no unfairness to the companies in refusing them the opportunity to seek restoration, pursuant to s 328. The object of the application is to continue litigating matters which the Court of Appeal has made clear have no prospect of success. It was also an exercise in futility, given there was no prospect of the application advancing beyond the notification stage. An objection by the CIR would have inevitably followed and there was no prospect of a successful appeal on the merits.

The appeal is dismissed.

About this document

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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.

Determination EE002A: Variation to *Determination EE002 - Payments to employees for working from home costs during the COVID-19 pandemic*

Application

Determination EE002A (the Determination) applies to payments made by employers for the period from 18 September 2020 to 17 March 2021.

Background

During the COVID-19 pandemic period of lockdown some employers made payments to employees to reimburse costs incurred by those employees as a result of the employees having to work from home. Inland Revenue was asked to clarify the tax treatment of such payments and subsequently issued *Determination EE002: Payments to employees for working from home costs during the COVID-19 pandemic* in April 2020.

Determination EE002 was issued as a temporary response to the COVID-19 pandemic only and applied to payments made by employers during the six month period from 17 March to 17 September 2020, so long as the employee who received the payment was continuing to work from home as a consequence of the COVID-19 pandemic.

Discussion

The Commissioner is currently considering issuing a public statement dealing with the tax implications of having employees working from home as a "new way of working" rather than being limited to the enforced way of working that occurs during a lockdown period of the COVID-19 pandemic.

Because this public statement will not be ready for publication before 17 September 2020, it is the Commissioner's view that both employers and employees should be able to continue applying the approach set out in Determination EE002 until 17 March 2021. This will allow time for the Commissioner to consider all matters relating to the tax consequences of employees working from home.

In order to achieve this outcome the Commissioner is issuing this determination in terms of s 91AAT(6) of the Tax Administration Act 1994, to vary and extend Determination EE002 by:

- **removing the requirement that *the expenditure or loss must be incurred by the employee as a result of the employee being required to work from home because of the COVID-19 pandemic*, wherever this requirement appears in Determination EE002; and**
- **extending the timeframe by a further 6 months; Determination EE002A applies to payments made by employers from 18 September 2020 to 17 March 2021[1].**

These variations will ensure that, for this extended period, the determination will apply to any employee that works from home whether or not they do so as a result of the COVID-19 pandemic. Should COVID-19 reappear before 17 March 2021, to the extent that employees are once again asked to work from home, these variations ensure that the Determination is able to be applied to these changed circumstances.

It is important to note that, other than for the above variations, all aspects of Determination EE002 remain in place, including the following requirements and exclusions. The requirements are that:

- An employer must make a payment to an employee.
- The payment must be for expenditure or a loss incurred (or likely to be incurred) by the employee.

[1] The timeframe has been extended by a further 6 months from Determination EE002 to 17 March 2021. This date also coincides with threshold decrease for low value assets from $5000 to $1000.

- The expenditure or loss must be incurred by the employee in deriving their employment income and not be private or capital in nature (the capital limitation does not apply to an amount of depreciation loss).
- The payment must be made because the employee is doing their job and the employee must be deriving employment income from performing their job.
- The expenditure or loss must be necessary in the performance of the employee's job.

Excluded from the determination are:

- Expenditure on account of an employee.
- Any payments made for a period after an employee ceases to work from home.
- All amounts paid under a salary sacrifice arrangement.
- Payments made to an employee to compensate the employee for the conditions of their service.

This Determination is signed by me on 14 August 2020

Rob Falk
National Advisor, Technical Standards, Legal Services

COV 20/09: Variation to sections 52(3) and 52(4) of the Goods and Services Tax Act 1985

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 GST registered customers with a taxable activity of supplying accommodation who between 14 February 2020 and 31 October 2020 change to making exempt supplies of accommodation leaving them with no taxable activity, the time periods specified in s 52(3) and s 52(4) of the Goods and Services Tax Act 1985 are extended from 12 months to 18 months.

The effect of the variation will be:

a. Under s 52(3), the Commissioner will not cancel registration for a customer if there are reasonable grounds for believing that the customer will carry on any taxable activity at any time within 18 months from the date their taxable activity ceased.

b. Under s 52(4), the information required to be provided by the customer must include whether or not the customer intends to carry on any taxable activity within 18 months of that date.

This is subject to the conditions that:

- the impacts of COVID-19 response measures or the consequences of COVID-19 were the reason the customer ceased their taxable activity of supplying accommodation;
- the customer uses the email address STRdisclosures@ird.govt.nz to inform the Commissioner of the cessation of all taxable activities, the date of cessation and that they intend to carry on a taxable activity within 18 months of that date.

Application date

This variation applies from 17 March 2020 to 31 October 2020.

Dated at Wellington on 17 August 2020.

Martin Smith
Chief Tax Counsel
Inland Revenue

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

Summary of effect

1. Under s 52(3), a GST registered person who no longer carries on any taxable activity is obliged to let the Commissioner know within 21 days of the date their taxable activity ceased. The Commissioner must then cancel their registration unless there are reasonable grounds to think a taxable activity will be carried on within 12 months.
2. The customer must also tell the Commissioner whether or not they intend to carry on any taxable activity within 12 months of cessation.
3. The variation extends the time periods above from 12 months to 18 months and will allow customers with a taxable activity of supplying accommodation to postpone or avoid cancellation of their GST registration where, due to the impacts of COVID-19, they have stopped their taxable activity and switched to making exempt supplies but intend resuming a taxable activity in the future.

Provisions affected

4. Sections 52(3) and 52(4) of the Goods and Services Tax Act 1985.

Application of variation

5. This variation applies to customers who were making taxable supplies of accommodation but have changed to making exempt supplies of accommodation in a dwelling. It recognises that COVID-19 has changed the market for short-stay accommodation in parts of New Zealand resulting in some suppliers temporarily changing to become suppliers of longer-term residential accommodation, an exempt supply. It is appropriate in the circumstances that they should not have their registration cancelled only to have to renew their registration at a later date.
6. Customers taking advantage of the variation must still make the change of use adjustments required under Part 3 of the Goods and Services Tax Act 1985.
7. The variation is subject to conditions that cessation of the customer's taxable activity was COVID-19 related and that the customer uses a specific email address to provide the information required by s 52 of the GST Act.
8. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Goods and Services Tax Act 1985: ss 52(3) and 52(4)

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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