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TAX INFORMATION Bulletin

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Inland Revenue
Te Tari Taake

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YOUR OPPORTUNITY TO COMMENT

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

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at **www.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
PUB00354	Interpretation statement	GST – Registration of non-residents under section 54B	12 March 2021
PUB00305	Interpretation statement	Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007	31 March 2021
PUB00305 QB 1	Question we've been asked	Income tax: scenarios on tax avoidance – reissue of QB 14/11 scenario 1 and QB 15/11 scenario 2	31 March 2021
PUB00305 QB 2	Question we've been asked	Income tax: scenarios on tax avoidance – reissue of QB 15/11 – scenarios 1 and 3	31 March 2021
PUB00256	Question we've been asked	When does s 5(23) of the Goods and Services Tax Act 1985 apply to shift GST liability to the purchaser of land?	31 March 2021
PUB00354	Interpretation statement	GST – Registration of non-residents under section 54B	12 March 2021

IN SUMMARY

New legislation

Order in Council: the Tax Administration (Reportable Jurisdictions for the Application of CRS Standard) Amendment Regulations 2021. 3

New Zealand's list of reportable jurisdictions was updated on 22 February 2021 by the following Order in Council: the Tax Administration (Reportable Jurisdictions for the Application of CRS Standard) Amendment Regulations 2021.

The update adds New Caledonia to New Zealand's existing list of 96 reportable jurisdictions.

Determinations

Determination FDR 2021/01 – A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (HSBC Global Liquidity Funds plc: HSBC US Dollar Liquidity Fund - Class H (Distributing) Shares) 4

Any investment in the HSBC Global Liquidity Funds plc: HSBC US Dollar Liquidity Fund - Class H (Distributing) Shares, is a type of attributing interest for which the investor may not use the Fair Dividend Rate method to calculate Foreign Investment Fund income from the interest.

Special Determination 27B: Convertible Notes in Respect of a Limited Partnership Interest 6

This determination relates to convertible notes in respect of a limited partnership interest in a public-private partnership. It replaces S27A: *Convertible Notes in respect of a limited partnership interest* (2015) to take into account amendments to the convertible notes under the 2020 Amendments.

Special Determination 28B: Application of the Financial Arrangements Rules to the Design and Construction Phase in a Public-Private Partnership 10

This determination relates to an arrangement involving the finance, design, construction and on-going provision of operation and maintenance services under a public-private partnership agreement. In particular, this determination relates to the design and construction phase of the public-private partnership agreement. It replaces S28A: *Application of the financial arrangements rules to the D&C Phase in a public-private partnership* (2015) to take the 2020 Amendments into account.

Special Determination 29B: Application of the Financial Arrangements Rules to a Public-Private Partnership 14

This determination relates to an arrangement involving the finance, design, construction and ongoing provision of operation and maintenance services under a public-private partnership agreement. It replaces S29A: *Application of the financial arrangements rules a public-private partnership* (2015) to take the 2020 Amendments into account.

National standard costs for specified livestock 2021 19

This determination is made in terms of section EC 23 of the Income Tax Act 2007 and applies to any specified livestock on hand at the end of the 2020-2021 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

Interpretation statement

IS 21/01: GST and agency 21

This interpretation statement considers whether a person is acting as an agent or as a principal for the purposes of the Goods and Services Tax Act 1985. It is primarily concerned with how sections 60(1) and (2) apply and identifies features that support an agency relationship existing for a supply. It also explains how the Act can operate to modify an agency relationship.

Question we've been asked

QB 21/01: Income tax - monthly retirement payments from the United Nations Joint Staff Pension Fund 50

This question we've been asked discusses the New Zealand tax treatment of monthly retirement benefits received by New Zealand tax residents from the United Nations Joint Staff Pension Fund.

IN SUMMARY (continued)

Legal decisions - case summaries

CSUM 21/05 - Appeals by Chesterfields Preschools Ltd dismissed by the Court of Appeal 60

This is a group of 11 appeals by Chesterfields Preschools Ltd (CPL) and Therese Sisson. These appeals were heard together by the Court of Appeal. The Court issued three judgments covering all 11 appeals. In summary the judgments are:

[2020] NZCA 686 Liquidation and related matters judgment;

[2020] NZCA 687 Vesting order and related matters judgment; and

[2020] NZCA 689 bankruptcy and related matters judgment.

The Commissioner and other respondents were successful in every appeal.

NEW LEGISLATION

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

Order in Council: the Tax Administration (Reportable Jurisdictions for the Application of CRS Standard) Amendment Regulations 2021

CRS reportable jurisdictions amendment regulations

New Zealand's list of reportable jurisdictions was updated on 22 February 2021 by the following Order in Council: the *Tax Administration (Reportable Jurisdictions for the Application of CRS Standard) Amendment Regulations 2021*.

The update adds New Caledonia to New Zealand's existing list of 96 reportable jurisdictions.

Reportable jurisdictions are relevant to the Common Reporting Standard (CRS) rules which were enacted in New Zealand in 2017 as part of New Zealand's implementation of the G20/OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters, or AEOI. Reportable jurisdictions are territories to which Inland Revenue (IRD) will provide certain information on non-residents that is reported to IRD by financial institutions in accordance with the CRS rules.

Pursuant to section 226D of the Tax Administration Act 1994 (the Act), additions and deletions to the list must be made by Order in Council.

A full listing of reportable jurisdictions can be found at the IRD website and the Order in Council can be found at **legislation.govt.nz**

Application date

New Caledonia will be a reportable jurisdiction for reporting periods beginning on or after 1 April 2020. Section 226D(2) of the Act allows for the retroactive application of these regulations.

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 FDR 2021/01 – A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (HSBC Global Liquidity Funds plc: HSBC US Dollar Liquidity Fund - Class H (Distributing) Shares)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. This power has been delegated by the Commissioner of Inland Revenue to the position of Technical Specialist under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Class H (Distributing) Shares in the HSBC US Dollar Liquidity Fund (the Fund) of HSBC Global Liquidity Funds plc to which this determination applies, are an attributing interest in a foreign investment fund (FIF) for New Zealand resident investors.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in units in the Fund each year.

The Fund invests in a range of short-term securities, instruments and obligations such as, but not limited to: certificates of deposit; medium term, variable and floating rate notes; commercial paper; bankers acceptances; government bonds, corporate bonds, Eurobonds and treasury bills; and asset backed securities. It may also invest in reverse repurchase agreements.

For New Zealand resident investors, Class H (Distributing) Shares in the Fund do not represent an attributing FIF interest that comprises of non-ordinary shares as described in section EX 46(10)(a)-(db) of the Income Tax Act 2007. Consequently, investors would not be prevented from using the FDR method pursuant to section EX 46(8)(a) of the Income Tax Act 2007 in the absence of a determination under section 91AAO of the Tax Administration Act 1994.

However, due to the nature of the overall arrangement it is considered that the application of the FDR method would impose unnecessarily high compliance costs on New Zealand investors, as it would require performing a substantial number of quick sale adjustment calculations and associated foreign exchange calculations every time that the investor withdraws funds from the Fund during the year.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination and applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

- This non-resident issuer:
  - is an Irish public limited company that issues multiple classes of shares; and
  - is known at the date of this determination as HSBC Global Liquidity Funds plc; and
  - is structured as an umbrella fund with segregated liability between sub-funds.
- The attributing interest consists of a US dollar denominated class of shares, Class H (Distributing) Shares, issued by that non-resident that provide exposure solely to the Fund.
- The Fund:
  - Holds assets that predominantly (80% or more by value at a time in the income year) comprise high-quality short-term money market instruments, which are either USD denominated financial arrangements that are debt securities or instruments that are economically equivalent to USD debt.

- Has not entered into any arrangements which provide an overall economic return as if the securities were denominated in New Zealand dollars
- May make distributions of income (if any) to the shareholders in the form of cash or additional shares but does not guarantee that any income will be derived or that a distribution will be made.

Interpretation

In this determination, unless the context otherwise requires-

"Fair dividend rate method" means the fair dividend rate method under section YA 1 of the Income Tax Act 2007;

"Financial arrangement" means financial arrangement under section EW 3 of the Income Tax Act 2007;

"Foreign investment fund" means foreign investment fund under section YA 1 of the Income Tax Act 2007;

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Income Tax Act 2007;

"The Fund" means the HSBC US Dollar Liquidity Fund, a sub-fund of HSBC Global Liquidity Funds plc.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the FDR method to calculate FIF income from the interest.

Application Date

This determination applies for the 2021 income year and subsequent income years.

However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Date on this 9th day of January 2021.

Greg Adamson
Technical Specialist

Special Determination 27B: Convertible Notes in Respect of a Limited Partnership Interest

This determination may be cited as *Special Determination S27B: Convertible Notes in Respect of a Limited Partnership Interest.*

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

1. This determination varies and replaces *Special Determination S27A: Convertible Notes in respect of a limited partnership interest* due to amendments to the terms of the subordinated convertible notes (Convertible Notes) under the 2020 Amendments.
2. This determination relates to Convertible Notes issued by the Holding Partnership to Limited Partner A that will convert to a 45% partnership interest at a single date or several nominated dates in the future to match the partnership contributions by Limited Partner B and some of the partnership contributions by Limited Partner C. The Convertible Notes were issued to provide equity funding to the Holding Partnership as part of an arrangement (the Project) involving the finance, design, construction and ongoing operation of the Facility by the Partnership under a public-private partnership agreement with the Crown.
3. Limited Partners A and C have agreed that Limited Partner A will have the option to sell up to 9.9% of the equity interest in the Holding Partnership (along with up to 9.9% of the shareholding in General Partner 1, in equal proportions) to Limited Partner C. It is envisaged that if the option is exercised it will be exercised after the Convertible Note has converted to committed capital, noting that early exercise rights do exist in limited situations.
4. The Convertible Notes earn a fixed rate of interest that is payable monthly (Coupon Interest Payments) until the Convertible Notes are converted. The Coupon Interest Payments are capitalised on each interest payment date and will be paid to Limited Partner A on the Final Repayment Date (subject to the waiver arrangements described below), so will not convert to a partnership interest.
5. The conversion to a partnership interest will be effected by way of a mandatory set off. Limited Partner A's obligation to make its capital contribution(s) will be satisfied by setting off that obligation against the Holding Partnership's obligation to repay that portion of the Convertible Notes equal to the capital contribution(s) required to be made on the relevant date.
6. At the time the Convertible Notes were issued, the rate of interest was set at an arm's length rate determined under an agreed rate setting process.
7. As part of the 2020 Amendments, Limited Partner A and the Holding Partnership have agreed to amend the Convertible Notes so that from 2 November 2020, interest will be payable at a reduced rate.
8. The 2020 Amendments include various other additional amendments to the Project, as described in the Private Rulings.
9. No commitment fees or upfront fees are payable on the Convertible Notes.
10. In accordance with s EW 6(2), an amount (whether it is income, consideration, gain, loss or expenditure) that is solely attributable to an excepted financial arrangement is not taken into account under the financial arrangement rules.
11. As an interest in a partnership is an excepted financial arrangement under s EW 5(11), only the Coupon Interest Payments are regarded as income or expenditure for the purposes of calculating accrual income or expenditure.
12. This Determination prescribes a method for determining the part of the consideration receivable by the parties to the arrangement that is solely attributable to the excepted financial arrangement as well as the method for spreading the accrual income, gain or loss, or expenditure under the financial arrangement rules. This Determination also requires an adjustment calculation to be undertaken in the income year in which the Convertible Notes are amended.

2 Reference

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

This determination varies and replaces *Special Determination S27A: Convertible Notes in respect of a limited partnership interest.*

3 Scope of determination

1. This determination applies to the Convertible Notes issued by the Holding Partnership to Limited Partner A as part of the Project as set out in detail in the Private Rulings. The Convertible Notes were issued on the following terms:
   - Limited Partner A loaned an amount to the Holding Partnership (subject to the prevailing market rates at Financial Close) with repayment to be set off against the obligation to make capital contribution(s) in respect of a 45% interest in the Holding Partnership at a single date or several nominated dates in the future. The Convertible Notes have a face value equal to 45% of the total equity requirement (being all of Limited Partner A's 45% interest in the Holding Partnership).
   - The Convertible Notes earn a fixed rate of interest that is payable monthly until conversion. At the time the Convertible Notes were entered into, the interest rate was defined as the construction swap rate exclusive of charges, plus a margin, being the rate specified in the base case financial model at Financial Close.
   - The Coupon Interest Payments are capitalised on each interest payment date, and will be paid out to Limited Partner A on the Final Repayment Date; that is, the Coupon Interest Payments will not convert to a partnership interest.
   - The rate of interest was originally set at an arm's length rate determined under an agreed rate setting process.
   - As part of the 2020 Amendments, Limited Partner A and the Holding Partnership have agreed to amend the Convertible Notes so that from 2 November 2020, interest will be payable at a reduced rate.
   - No commitment fees or upfront fees are payable on the Convertible Notes.
   - The Convertible Notes (and any interest payable on the Convertible Notes) are subordinated to senior debt. After conversion of the Convertible Notes, Limited Partner A will rank equally with Holding Partnership contributions made by the other limited partners.
2. This determination is made subject to the continued application of the Private Rulings.

4 Principle

1. The Convertible Notes have both debt and partnership interest components. They can be regarded alternatively as:
   a) a loan to a partnership with repayment by way of an interest in a partnership (debt component); or
   b) a forward purchase of a partnership interest (in which case the holder of the Convertible Notes is buying an interest in the partnership).

   The financial arrangement rules in the Act classify an interest in a partnership as an excepted financial arrangement under s EW 5(11).
2. As the Convertible Notes have this dual character, when calculating income derived or expenditure incurred in relation to the Convertible Notes it is first necessary to separate the debt and partnership interest components of the Convertible Notes.
3. This determination specifies that, apart from the Coupon Interest Payments, all amounts relate to the underlying interest in a partnership, and will not be dealt with under the financial arrangement rules (subpart EW) when calculating income derived or expenditure incurred.
4. Income and expenditure in respect of the Convertible Notes is calculated by daily apportionment of the Coupon Interest Payment to income years in accordance with *Determination G1A: Apportionment of Daily Income and Expenditure* (Inland Revenue 1989). Any potential waiver of interest will not be taken into account when applying the spreading method, but will be taken into account in the base price adjustment calculation under s EW 30.
5. An adjustment calculation must be undertaken in the income year in which the amendments to the Convertible Notes take place, following the methodology in *Determination G25: Variations in the terms of a financial arrangement* (Inland Revenue, 1992).
6. For the purposes of this determination, any change in the market value of the interest in the partnership between the issue date of the Convertible Notes and the conversion into the partnership interest relates to the partnership interest component, and therefore can be ignored when calculating income derived or expenditure incurred under the financial arrangements rules.

5 Interpretation

In this determination, unless the context otherwise requires:

- All legislative references are to the Income Tax Act 2007, unless otherwise stated.
- **Convertible Notes** are the subordinated convertible notes issued by the Holding Partnership to Limited Partner A.
- **Coupon Interest Payment** is any amount payable on the Convertible Notes by the Convertible Note issuer (the borrower) to the Convertible Note holder (the lender) other than payments relating to the redemption or conversion of the Convertible Notes.
- **Final Repayment Date** has the meaning provided in the Subscription Agreement.
- **Financial Close** has the same meaning as set out in the Project Agreement referred to in the Private Rulings.
- **Private Rulings** means BR Prv 20/64 and BR Prv 20/65, issued on 17 December 2020, and includes any private rulings issued to replace those Rulings, provided that the change to the relevant Ruling does not affect the application of this Determination.

For convenience, words and phrases defined in this determination are indicated by initial capital letters, but the absence of a capital letter does not alone imply that the word or phrase is used with a meaning different from that given by its definition.

6 Method

1. Amounts to be included when calculating income or expenditure under the financial arrangements rules with regard to the Convertible Notes in respect of income, gain or loss, or expenditure, and also of any other consideration receivable by the holder or payable by the issuer, consist of the Coupon Interest Payments.
2. The income derived or expenditure incurred in respect of the Convertible Notes must be calculated by daily apportionment of the Coupon Interest Payments to income years. Any potential waiver of interest is not included in that calculation. The required method is outlined in *Determination G1A*.
3. All other income, gain, loss, expenditure or consideration paid under or with respect to the wider financial arrangement is solely attributable to the excepted financial arrangement component of the wider financial arrangement.
4. An adjustment calculation must be undertaken in the income year in which the amendments to the Convertible Notes take place, following the methodology in *Determination G25*.

7 Example

This example illustrates the application of the method set out in this determination.

The example assumes the following:

- On 1 April 2014 a Convertible Note was issued to the holder for $1,000 with an interest coupon set at the arm's length interest rate of 8.5%. The Convertible Note was intended to convert to a 45% interest in a partnership on 31 March 2019.
- The conversion to a partnership interest will be effected by way of a mandatory set off. The holder's obligation to make its capital contribution will be satisfied by setting off that obligation against the issuer's obligation to repay the Convertible Note.
- Coupon payments accrue monthly, in arrears and are compounding. Interest will be paid to the holder on the first partnership distribution date.
- On the date of issue, the limited partners have agreed that the market value of a 45% partnership interest on 31 March 2019 is $1,000.
- The parties use a 31 March balance date and apply *Determination G1A* on a 365 day basis when apportioning daily income and expenditure.
- With effect from 1 November 2020, the terms of the Convertible Notes are amended as follows:
  - The interest coupon will be 4% per annum.
  - The Convertible Notes will convert into a 45% interest in a partnership on 22 November 2021.

Prior to amendment, the annual sum of capitalised Coupon Interest Payments, and the deduction permitted under *Determination G1A* is as follows:

Date	Coupon Interest ($)	Deduction under Determination G1A ($)
31 March 2015	85.00	108.28
31 March 2016	92.23	108.28
31 March 2017	100.06	108.28
31 March 2018	108.57	108.28
31 March 2019	117.80	108.28
31 March 2020	127.81	108.28
1 November 2020	81.69	63.78

Following the amendment to the terms of the Convertible Notes, the annual amount of capitalised Coupon Interest Payments, and the deductions that would have been permitted under *Determination G1A* had the amendments been known at the outset are:

Date	Coupon Interest ($)	Deduction under Determination G1A ($)
31 March 2015	85.00	106.13
31 March 2016	92.23	106.13
31 March 2017	100.06	106.13
31 March 2018	108.57	106.13
31 March 2019	117.80	106.13
31 March 2020	127.81	106.13
31 March 2021	89.04	106.13
22 November 2021	68.36	68.33

In the year ended 31 March 2021, an adjustment calculation must be undertaken in accordance with *Determination G25*.

This Determination is signed by me on the 17th day of December 2020.

Howard Davis
Group Leader, Tax Counsel Office

Special Determination 28B: Application of the Financial Arrangements Rules to the Design and Construction Phase in a Public-private Partnership

This determination may be cited as *Special Determination S28B: Application of the Financial Arrangements Rules to the Design and Construction Phase in a Public-Private Partnership.*

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

1. This determination varies and replaces *Special Determination S28A: Application of the financial arrangements rules to the D&C Phase in a public-private partnership* to take the 2020 Amendments into account.
2. This determination relates to an arrangement (the Project) involving the finance, design, construction and on-going provision of operation and maintenance services in respect of the Facility by the Partnership under a public-private partnership agreement (the Project Agreement) with the Crown. The Holding Partnership will be the sole limited partner in the Partnership, holding 100% of the Partnership. The limited partners in the Holding Partnership are Limited Partners A, B and C. This determination does not apply to Limited Partner C.
3. The Project Agreement comprises three basic components:
    a) a design and construction phase (the D&C Phase) under which the Partnership agrees to design and construct the Facility for the Crown in consideration for a fixed lump-sum payment (the Original D&C Payment), payable on completion of the D&C Phase;
    b) a Facility Lease in which the Partnership and the Crown enter and under which the Partnership pays an amount representing the rental under the Facility Lease to the Crown (the Rental Prepayment); and
    c) an operations and maintenance phase (the O&M Phase) under which the Partnership will provide operation and maintenance services to the Crown over a 25 year term in consideration for monthly payments (the Unitary Charge).
4. The Partnership has entered into:
    a) a Construction Agreement with a contractor (the Contractor), under which the Contractor will design and construct the Facility in consideration for monthly and milestone payments; and
    b) an Operation and Maintenance Contract (the O&M Contract) with a service provider (the Service Provider), under which the Service Provider will provide the on-going operation and maintenance (and other) services in consideration for monthly payments.
5. Under the original arrangements:
    - The Partnership raised external debt from a range of third party financiers (the Bank Debt) and Limited Partner C provided a term debt facility (the Term Debt Facility) to the Partnership to supplement the Bank Debt.
    - The Holding Partnership received funding from Limited Partner C during the D&C Phase in the form of a convertible debt instrument (the Convertible Note). Limited Partners A and B provided investment support during the D&C Phase in the form of a letter of credit to the external lenders.
    - The Partnership entered into Interest Rate Swaps in respect of the Bank Debt.
6. The Facility Lease, O&M Phase of the Project Agreement, Construction Agreement and O&M Contract are all excepted financial arrangements. The D&C Phase of the Project Agreement, Bank Debt, Term Debt Facility and Swaps are financial arrangements to which the Partnership is a party. The Project, including all of these agreements, is a wider financial arrangement.
7. In 2020, the Partnership and the Crown entered into the 2020 Amendments that (among other things):
    - extended the duration of the D&C Phase and provided for additional payments to be made for the design and construction work (the Additional D&C Payments); and
    - provided for certain Unitary Charge payments to be paid by the Crown to the Partnership before the O&M Phase commences.
8. The 2020 Amendments included various additional amendments to the Project, as described in the Private Rulings.
9. *Special Determination S27B: Convertible Notes in Respect of a Limited Partnership* applies to the Convertible Notes. *Special Determination S29B: Application of the Financial Arrangement Rules to a Public-Private Partnership* applies to arrangements in the wider financial arrangement, excluding the D&C Phase.

10. This determination prescribes the portion of the Original D&C Payment treated as income under the financial arrangement rules (the Interest Component) and the method for spreading that income. This determination also prescribes that no part of the Additional D&C Payments is income under the financial arrangements rules.

2 Reference

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

This determination varies and replaces *Special Determination S28A: Application of the financial arrangements rules to the D&C Phase in a public-private partnership*.

3 Scope of determination

1. This determination applies to the Partnership in respect of the Project (which is set out in detail in the Private Rulings), including the D&C Phase of the Project Agreement, under which the Partnership agrees to design and construct the Facility for the Crown and will receive a fixed lump-sum payment (the Original D&C Payment) once the Facility is ready for operation and Additional D&C Payments periodically from the Effective Date of the 2020 Amendments.
2. This determination is made subject to the following conditions:
   - The design and construction costs of the Facility are agreed between the Partnership and the Crown on an arm's length basis and the original design and construction costs are set out in the Base Case under the Project Agreement as referenced to in the definition of "Original Design and Construction Payment" in clause 1.1 of the Project Agreement (as amended in December 2020).
   - Limited Partner A and Limited Partner B use IFRSs to prepare financial statements and to report for financial arrangements.
   - The Private Rulings continue to apply.

4 Principle

1. During the D&C Phase of the Project Agreement, the Partnership will receive consideration from the Crown (in the form of the Original D&C Payment and the Additional D&C Payments) and will in turn provide consideration to the Crown (in the form of the completion of the Project and the transfer of its rights, set out in clause 11.2(c) of the Project Agreement, in the Facility). The D&C Phase of the Project Agreement is a "financial arrangement" under s EW 3 and an "agreement for the sale and purchase of property or services" under s YA 1.
2. The Partnership and the Crown have agreed that the Original D&C Payment includes capitalised interest (clause 12.5(c) of the Project Agreement). The Additional D&C Payments do not include any capitalised interest. The Interest Component of the original D&C Payment will be income under the financial arrangements rules under subpart EW. No part of the Additional D&C Payments will be income under the financial arrangement rules in subpart EW.
3. During the D&C Phase, the Partnership has accrued variable expenditure commitments. The capitalised interest component of the original D&C Payment is intended to offset the expected funding costs incurred in relation to these commitments.
4. The Interest Component was calculated with reference to expected funding costs. No adjustment is made for variances between actual and expected costs as the original D&C Payment, including capitalised interest, was agreed in advance.
5. The Interest Component needs to be spread over the term of the D&C Phase.

5 Interpretation

In this determination, unless the context otherwise requires:

- All legislative references are to the Income Tax Act 2007, unless otherwise stated.
- Capitalised terms have the same meaning as set out in the Project Agreement.
- **IFRS** means International Financial Reporting Standards as defined in s YA 1
- **Private Rulings** means BR Prv 20/64 and BR Prv 20/65, issued on 17 December 2020, and includes any private rulings issued to replace those Rulings, provided that the change to the relevant Ruling does not affect the application of this Determination.

6 Method

Calculation of Interest Component

1. At the time the Project Agreement was entered into, the value of the completion of the Project and transfer of the Partnership's rights to the Crown, set out in clause 11.2(c) of the Project Agreement, was the agreed design and construction costs of the Facility (excluding Fitout) set out in the Base Case under the Project Agreement.
2. The Original D&C Payment less the agreed design and construction costs of the Facility (excluding Fitout) set out in the Base Case under the Project Agreement, is the Interest Component that is income under the financial arrangements rules.
3. No part of the Additional D&C Payments is income under the financial arrangements rules.
4. The Private Rulings apply to the Additional D&C Payments and the portion to the D&C Payment that is not income under the financial arrangements rules. Those amounts are not considered in this Determination.

Spreading of Interest Component

5. The method for determining the amount of income that is to be allocated to each income year is as follows:
    a) The expected design and construction costs of the Facility (excluding Fitout) as set out in the Base Case are treated as having been incurred at the beginning of each of the six income years (the Annual Expenditure). No adjustment will be made to the Annual Expenditure in any income year to reflect actual expenditure in that year, the extension of the D&C Phase or the Additional D&C Payments.
    b) The interest allocated to each income year is then calculated in accordance with the following formula:

       Interest = OB × R

       Where:

       OB is the sum of the Annual Expenditure for that income year, plus the Annual Expenditure and interest attributable to any previous income year.

       R is the internal rate of return (based on annual rests) calculated at the time the Project Agreement was signed using the notional cash flows in paragraph (a) above at the beginning of each income year as outflows, and the Original D&C Payment at the end of the original term of the D&C Phase as the only inflow.

7 Example

This example illustrates the application of the method set out in this determination.

The Partnership and the Crown agree to the Original D&C Payment under the Base Case sheet that the Original D&C Payment equals $1,200,000. The Base Case sets out that the agreed design and construction costs of the Project (excluding Fitout) are to be $970,748.

The value of the "completion of the Project and the transfer of the rights set out in clause 11.2(c)" of the Project Agreement, as set out in Clause 12.3 of the Project Agreement, is equal to $970,748.

The Partnership and the Crown subsequently agree that Additional D&C Payments will be made from the Effective Date of the 2020 Amendments until completion of the Facility. No part of the Additional D&C Payments will be treated as income under the financial arrangements rules.

The Interest Component of the D&C Payment is $229,252 by implication of the valuation under this determination. The Limited Partners will spread the Interest Component over the original term of the D&C Phase of the Project Agreement, as follows.

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The Annual Expenditure incurred and treated as having been incurred at the beginning of the relevant income year is as follows:

Year	Actual D&C costs
1	($190,494)
2	($296,488)
3	($245,464)
4	($173,759)
5	($62,168)
6	($2,376)
Original D&C Payment	$1,200,000
	($970,748)

Based on expected receipt of the $1,200,000 D&C Payment in Year 6 the Project has an internal rate of return of 4.9171%.

The Interest Component is therefore spread as follows:

Year	Actual D&C costs	Cumulative	Interest income
1	($190,494)	($190,494)	$9,367
2	($296,488)	($496,348)	$24,406
3	($245,464)	($766,218)	$37,675
4	($173,759)	($977,652)	$48,072
5	($62,168)	($1,087,892)	$53,492
6	($2,376)	($1,149,761)	$56,239
Original D&C Payment		$1,200,000	
Total	**($970,748)**		**$299,252**

This Determination is signed by me on the 17th day of December 2020.

Howard Davis
Group Leader, Tax Counsel Office

Special Determination 29B: Application of the Financial Arrangements Rules to a Public-private Partnership

This determination may be cited as *Special Determination S29B: Application of the Financial Arrangements Rules to a Public-Private Partnership*.

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

1. This determination varies and replaces *Special Determination S29: Application of the financial arrangements rules to a public-private partnership* to take the 2020 Amendments into account.
2. This determination relates to an arrangement (the Project) involving the finance, design, construction and on-going provision of operation and maintenance services in respect of the Facility by the Partnership under a public-private partnership agreement (the Project Agreement) with the Crown. The Holding Partnership will be the sole limited partner in the Partnership, holding 100% of the Partnership. The limited partners in the Holding Partnership are Limited Partners A, B and C. This determination does not apply to Limited Partner C.
3. The Project Agreement comprises three basic components:
   a) a design and construction phase (the D&C Phase) under which the Partnership agrees to design and construct the Facility for the Crown in consideration for a fixed lump-sum payment (the Original D&C Payment), payable on completion of the D&C Phase;
   b) a Facility Lease in which the Partnership and the Crown enter and under which the Partnership pays an amount representing the rental under the Facility Lease to the Crown (the Rental Prepayment); and
   c) an operations and maintenance phase (the O&M Phase) under which the Partnership will provide operation and maintenance services to the Crown over a 25-year term in consideration for monthly payments (the Unitary Charge).
4. The Partnership has entered into:
   a) a Construction Agreement with a contractor (the Contractor), under which the Contractor will design and construct the Facility in consideration for monthly and milestone payments; and
   b) an Operation and Maintenance Contract (the O&M Contract) with a service provider (the Service Provider), under which the Service Provider will provide the on-going operation and maintenance (and other) services in consideration for monthly payments.
5. Under the original arrangements:
   - The Partnership raised external debt from a range of third-party financiers (the Bank Debt) and Limited Partner C provided a term debt facility (the Term Debt Facility) to the Partnership to supplement the Bank Debt.
   - The Holding Partnership received funding from Limited Partner C during the D&C Phase in the form of a convertible debt instrument (the Convertible Note). Limited Partners A and B provided investment support during the D&C Phase in the form of a letter of credit to the external lenders.
   - The Partnership entered into Interest Rate Swaps in respect of the Bank Debt.
6. The Facility Lease, O&M Phase of the Project Agreement, Construction Agreement and O&M Contract are all excepted financial arrangements. The D&C Phase of the Project Agreement, Bank Debt, Term Debt Facility and Swaps are financial arrangements to which the Partnership is a party. The Project, including all of these agreements, is a wider financial arrangement.
7. In 2020, the Partnership and the Crown entered into the 2020 Amendments that (among other things):
   - extended the duration of the D&C Phase and provided for additional payments to be made for the design and construction work (the Additional D&C Payments); and
   - provided for certain Unitary Charge payments to be paid by the Crown to the Partnership before the O&M Phase commences.
8. The 2020 Amendments included various additional amendments to the Project, as described in the Private Rulings.
9. *Special Determination S27B: Convertible Notes in Respect of a Limited Partnership* applies to the Convertible Notes. *Special Determination S28B: Application of the Financial Arrangement Rules to the Design and Construction Phase in a Public-Private Partnership* applies to the D&C Phase.

10. This determination prescribes:
    a) the amount of consideration that is solely attributable to the Facility Lease;
    b) how the financial arrangements rules apply to the O&M Phase of the Project Agreement, the Construction Agreement and the O&M Contract; and
    c) the method for spreading the payments made under the Bank Debt, Term Debt Facility and Interest Rate Swaps.

2 Reference

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

This determination varies and replaces *Special Determination S29A: Application of the financial arrangements rules a public-private partnership*.

3 Scope of determination

1. This determination applies to the Partnership in respect of the Project (which is set out in detail in the Private Rulings), including the following arrangements:
    - The D&C Phase of the Project Agreement, under which the Partnership agrees to design and construct the Facility for the Crown and will receive a fixed lump-sum payment (the Original D&C Payment) once the Facility is ready for operation and Additional D&C Payments periodically from the Effective Date of the 2020 Amendments. The D&C Phase is the subject of Special Determination S28B.
    - The O&M Phase of the Project Agreement, under which the Partnership will provide on going operation and maintenance services for 25 years to the Crown in consideration for monthly payments.
    - The Facility Lease, under which the Partnership will lease the Facility from the Crown for 25 years and make the Rental Prepayment to the Crown. The Rental Prepayment will be equal to and will offset the Original D&C Payment.
    - A Construction Agreement with the Contractor, under which the Contractor will design and construct the Facility in consideration for payments under the Construction Agreement.
    - An O&M Contract with the Service Provider, under which the Service Provider will provide the on going operation and maintenance (and other) services in consideration for payments under the O&M Contract.
    - Bank Debt, under which the Partnership borrowed an agreed sum from external lenders for a term of seven years from financial close of the Project (Financial Close). The Bank Debt was structured as a capitalising, interest only senior debt facility that converts to an amortising senior tranche on the Conversion Date that was expected to be refinanced within seven years of Financial Close, and every seven years thereafter over the term of the Project. Under IFRS (as the standards apply at the date of this Determination), the Bank Debt (and any subsequent re-financings) was initially recognised at fair value plus integral fees, and subsequently measured using the amortised cost using the effective interest method (regardless of whether hedge accounting is applied), and has not be treated as a hedge of another financial arrangement. Principal payments have commenced under the Bank Debt. With effect from the date the 2020 Amendments becomes effective, the Bank Debt will be extended for two years.
    - Interest Rate Swaps, under which the Partnership pays a fixed rate of interest to the swap counterparties, and receives a floating rate in return.
    - Term Debt Facility under which the Partnership borrowed an agreed sum from Limited Partner C during the D&C Phase for a market rate of interest that converts to an amortising senior tranche on the Conversion Date. The Term Debt Facility is recognised under IFRS as a financial liability and was initially recorded at fair value plus integral fees. Subsequent measurement will be at amortised cost using the effective interest method.
    - Convertible Notes issued by the Holding Partnership to Limited Partner C for the duration of the D&C Phase. On a single date or several nominated dates during the D&C Phase, the Convertible Notes will convert (by way of mandatory set off) into a partnership interest in Holding Partnership for Limited Partner C (which is the subject of *Special Determination S27B*.
2. In 2020, the Partnership and the Crown entered into the 2020 Amendments that (among other things):
    - extended the duration of the D&C Phase and provided for additional periodic payments to be made for the design and construction work (the Additional D&C Payments).

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- provided for certain Unitary Charge payments to be paid by the Crown to the Partnership before the O&M Phase commences.

3. The 2020 Amendments included various additional amendments to the Project, as described in the Private Rulings.
4. This determination is made subject to the following conditions:
   - Limited Partners A and B use IFRS to prepare financial statements.
   - Limited Partners A and B recognise income derived from the Crown during the D&C Phase of the Project Agreement and the O&M Phase of the Project Agreement, and will deduct expenditure incurred in relation to the Facility Lease, Construction Agreement and O&M Contract, in each case, under the relevant provisions of the Income Tax Act 2007 (outside the financial arrangement rules).
   - Limited Partners A and B do not use the fair value method for the Bank Debt or Term Debt Facility if the Bank Debt or Term Debt Facility is treated as a hedge of another financial arrangement under IFRS and use for the other financial arrangement a method that is neither the IFRS financial reporting method nor the method required under *Determination G29: Agreements for Sale and Purchase of Property Denominated in Foreign Currency: Exchange Rate to Determine the Acquisition Price and method for spreading income and expenditure* (Inland Revenue, 1996).
   - Limited Partners A and B recognise income and expenditure in respect of the Convertible Notes in the manner prescribed by *Special Determination S27B*.
   - Limited Partners A and B recognise income in respect of the Original D&C Payment in the manner prescribed by *Special Determination S28B*.
   - The Private Rulings continue to apply.

4 Principle

1. The Facility Lease is an excepted financial arrangement under s EW 5(9). Any amount that is solely attributable to an excepted financial arrangement described in s EW 5(2) to (16) is not an amount that is taken into account under the financial arrangement rules (s EW 6(2)). This determination specifies the amounts that are solely attributable to the Facility Lease that are not taken into account under the financial arrangement rules.
2. The O&M Phase, Construction Agreement and O&M Contract are "short-term agreements for sale and purchase" as defined in s YA 1, and are excepted financial arrangements under s EW 5(22). Any amount that is solely attributable to an excepted financial arrangement described in s EW 5(17) to (25) that is part of a financial arrangement, is an amount that is taken into account under the financial arrangements rules (s EW 6(3)). This determination specifies that no amounts payable to or by the Partnership in respect of the O&M Phase, Construction Agreement and O&M Contract are required to be spread under the financial arrangements rules in accordance with this Determination.
3. The D&C Phase, Bank Debt, Interest Rate Swaps and Term Debt Facility are "financial arrangements" under s EW 3. This determination specifies that the payments made to or by Limited Partners A and B, in proportion to their share in the Holding Partnership, under the Bank Debt, Interest Rate Swaps and Term Debt Facility must be spread under the financial arrangements rules in accordance with this determination.
4. This determination does not deal with the treatment of the D&C Payment or the Convertible Notes, which are subject to separate determinations (*Special Determination S27B* and *Special Determination S28B*).
5. The 2020 Amendments do not impact on the application of the financial arrangements rules to any of the matters considered in this Determination.

5 Interpretation

In this determination, unless the context otherwise requires:

- All legislative references are to the Income Tax Act 2007, unless otherwise stated.
- Capitalised terms have the same meaning as set out in the Project Agreement.
- IFRS means International Financial Reporting Standards as defined in s YA 1.
- Private Rulings means BR Prv 20/64 and BR Prv 20/65, issued on 17 December 2020, and includes any private rulings issued to replace those Rulings, provided that the change to the relevant Ruling does not affect the application of this Determination.

6 Method

1. The Rental Prepayment paid in respect of the Facility Lease, and the property interest granted to the Partnership under the Facility Lease, are solely attributable to the Facility Lease and are not taken into account under the financial arrangement rules.
2. Limited Partners A and B are not required to spread any amounts under the financial arrangements rules in accordance with this Determination in respect of the:
   - O&M Phase of the Project Agreement;
   - Construction Agreement; and
   - O&M Contract.
3. The IFRS financial reporting method in s EW 15D may be used to allocate income and expenditure (other than "non-integral fees" as defined in s YA 1) over the term of the Bank Debt, and none of the restrictions for application of the IFRS financial reporting method contained in s EW 15D(2B) apply.
4. The IFRS financial reporting method in s EW 15D may be used to allocate income and expenditure (other than "non-integral fees" as defined in s YA 1) in respect of any subsequent refinancing of the Bank Debt over the term of the relevant refinancing, provided the terms of any such refinancing are materially similar to the terms of the Bank Debt. This determination paragraph does not affect Limited Partner A's or Limited Partner B's obligation to perform a base price adjustment under s EW 31 at the time of each refinancing.
5. The IFRS financial reporting method in s EW 15D may be used to allocate income and expenditure (other than "non-integral fees" as defined in s YA 1) over the term of the Term Debt Facility. None of the restrictions for the application of this reporting method in s EW 15D(2B) apply.
6. The expected value method in s EW 15F may be used to allocate income and expenditure (other than "non-contingent fees" as defined in s YA 1) over the term of the Interest Rate Swaps, provided the swaps are not treated as a hedge of other financial arrangements for which the "fair value method" is used. None of the mandatory spreading methods in s EW 15H or s EW 15I apply to the Interest Rate Swaps.
7. This determination does not affect Limited Partner A's or Limited Partner B's obligation to perform base price adjustments under s EW 31 in respect of the Interest Rate Swaps.

7 Example

This example illustrates the application of the method set out in this determination.

This example is based on the following parameters:

Commencement of D&C Phase	1 July 2014
Completion of D&C Phase	21 November 2021
Completion of O&M Phase	30 June 2044
Original D&C Payment from the Crown	$1,000
Aggregate payments to the Contractor	($850)
Facility Lease prepayment	($1,000)
Monthly payments from the Crown during the O&M Phase	$30
Monthly payments to the Service Provider	($15)
Annual interest on the Bank Debt	($85)
Annual interest on the Term Debt Facility	($7)
Annual interest (& inflation adjustment) on the Convertible Note	($15)
Annual net payments in respect of the Interest Rate Swaps	($7)

The Partnership is not required to spread any amounts under the financial arrangements rules in respect of the Facility Lease, O&M Phase of the Project Agreement, Construction Agreement and O&M Contract.

The amounts that must be spread under the financial arrangement rules are:

- interest on the Bank Debt calculated in accordance with the IFRS financial reporting method in s EW 15D;
- interest on the Term Debt Facility calculated in accordance with the IFRS financial reporting method in s EW 15D;
- payments in respect of the Interest Rate Swaps calculated in accordance with the expected value method in s EW 15F;
- amounts in respect of the Convertible Note as specified in *Special Determination S27B*;
- amounts in respect of the D&C Payment as specified in *Special Determination S28B*.

This Determination is signed by me on the 17th day of December 2020.

Howard Davis
Group Leader, Tax Counsel Office

National standard costs for specified livestock 2021

The Commissioner of Inland Revenue has released a determination, reproduced below, setting the national standard costs for specified livestock for the 2020–2021 income year.

These costs are used by farmers as part of the calculation of the value of livestock on hand at the end of the income year, where they have adopted the national standard cost (NSC) scheme to value any class of specified livestock.

Farmers using the scheme apply the rising one-year NSC to stock bred on the farm each year and add the rising two-year NSC to the value of the opening young stock available to come through into the mature inventory group at year-end. The cost of livestock purchased are also factored into the valuation of the immature and mature groupings at year-end, to arrive at a valuation reflecting the enterprise's own balance of farm bred and externally purchased animals.

NSCs are developed from independent survey data of national average costs of production for each type of livestock. Only direct costs of breeding and rearing rising one-year and two-year livestock are used. Excluded from the calculation of NSC values are all costs of owning (leasing) and operating the farm business, overheads, costs of operating non-livestock enterprises (such as cropping) and costs associated with producing and harvesting dual products (wool, fibre, milk and velvet).

For bobby calves, information from spring 2020 is used while other dairy NSCs are based on the 2019-2020 income and expenditure from a DairyBase sample of owner-operated dairy farms. For sheep, beef cattle, deer and goats, NSCs are based on survey data from the 2018-2019 sheep and beef farm survey conducted by the Beef & Lamb New Zealand Economic Service. This is the most recent information available for those livestock types at the time the NSCs are calculated in December 2020.

For the 2020–2021 income year the NSCs for all livestock types except deer have remained reasonably static when compared to the previous year. While the increase in the NSC for R2 deer is in line with the increases in actual rearing costs, the rise in NSC for R1 deer has been affected by an error in the calculation for this class of deer over the past three years. In order to lessen the impact of this error it has been decided to spread the impact of it over two years, with the fully corrected calculation not coming into effect until the 2022 year.

The NSCs calculated each year only apply to that year's immature and maturing livestock. Mature livestock valued under this scheme retain their historic NSCs until they are sold or otherwise disposed of, albeit through a FIFO or inventory averaging system as opposed to individual livestock tracing. It should be noted that the NSCs reflect the **national average costs** of breeding and raising immature livestock and will not necessarily bear a direct relationship to either the market values (at balance date) of these livestock classes or the costs of production of any individual farmer. In particular, some livestock types such as dairy cattle, may not obtain a market value in excess of the NSC until they reach the mature age grouping.

One-off movements in expenditure items are effectively smoothed within the mature inventory grouping, by the averaging of that year's intake value with the carried forward values of the surviving livestock in that grouping. For the farm-bred component of the immature inventory group, the NSC values will appropriately reflect changes in the costs of production of those livestock in that particular year.

The NSC scheme is only one option under the current livestock valuation regime. The other options are market value, replacement value, the herd scheme and the self-assessed cost scheme (SAC) option. SAC is calculated on the same basis as NSC but uses a farmer's own costs rather than the national average costs. There are restrictions in changing from one scheme to another and before considering such a change, farmers may wish to discuss the issue with their accountant or other adviser.

National Standard Costs for Specified Livestock Determination 2021

This determination may be cited as "The National Standard Costs for Specified Livestock Determination 2021".

This determination is made in terms of section EC 23 of the Income Tax Act 2007. It shall apply to any specified livestock on hand at the end of the 2020–2021 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EC 23 of the Income Tax Act 2007 the national standard costs for specified livestock for the 2020–2021 income year are as set out in the following table.

Kind of livestock	Category of livestock	National standard cost $
Sheep	Rising 1 year	37.50
	Rising 2 year	26.90
Dairy Cattle	Purchased bobby calves	189.60
	Rising 1 year	450.80
	Rising 2 year	309.70
Beef Cattle	Rising 1 year	399.80
	Rising 2 year	226.20
	Rising 3 year male non-breeding cattle (all breeds)	226.20
Deer	Rising 1 year	106.40
	Rising 2 year	62.00
Goats (Meat and Fibre)	Rising 1 year	31.60
	Rising 2 year	21.60
Goats (Dairy)	Rising 1 year	273.80
	Rising 2 year	58.30
Pigs	Weaners to 10 weeks of age	106.90
	Growing pigs 10 to 17 weeks of age	88.00

This determination is signed by me on the 28th day of January 2021.

Rhys Brown
National Advisor
Technical Standards, Legal Services

INTERPRETATION STATEMENT

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 21/01: GST and agency

Scope of this statement

This Interpretation Statement considers whether a person is acting as an agent or as a principal for the purposes of the Goods and Services Tax Act 1985. It is primarily concerned with how ss 60(1) and (2) apply and identifies features that support an agency relationship existing for a supply. It also explains how the Act can operate to modify an agency relationship.

Summary

1. "Agency" is not a defined term in the Act and so must take its meaning from the common law. In general terms, an agency relationship is where a person (the agent) is authorised by another person (the principal) to act on their behalf to create or affect the legal relations between the principal and a third party.
2. The general rule is that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply. Where a person acts as an agent in making a supply to a third party on behalf of a principal, the supply is deemed to be made by that principal and not by the agent (s 60(1)). Conversely, where a registered person makes a taxable supply to an agent who is acting on behalf of a principal for the purposes of that supply, the supply is deemed to be made to the principal and not to the agent (s 60(2)). In both cases, it is the principal and not the agent who must account for GST on these supplies.
3. In some cases, it can be difficult to determine whether a person is acting as an agent or as a principal in relation to a supply. For GST purposes, the nature of a supply is determined by considering the legal rights and obligations entered into between the supplier and the recipient, in light of the surrounding circumstances, including the conduct of the parties. The terminology used by the parties will not be determinative. Where the written documentation is ambiguous, or where there is no written documentation, the surrounding circumstances should be considered.
4. Part 1 of this Interpretation Statement identifies features that support the existence of an agency relationship. Authority and consent are considered essential features of agency. If they are not present, there can be no agency relationship.
5. Of the other features identified below, some strongly support the existence of an agency relationship (for example, the payment of a commission), while others may support an agency relationship existing depending on the circumstances. No one feature will be determinative, and each supply will need to be considered on its facts. It cannot be assumed that because a person has been appointed as an agent for a principal, they will always be acting in that capacity for all supplies made or received.
6. In summary, the Commissioner considers there are two essential features of an agency relationship:
   - **Authority**: the agent must be authorised to act on behalf of the principal to create or affect the legal relations between the principal and a third party, for the relevant supply.
   - **Consent**: the agent and the principal must both have consented to the conferral of such authority on the agent.
7. In determining whether authority and consent are established between the parties as principal and agent, the Commissioner considers the following features strongly support the existence of an agency relationship:
   - **Documentation**: the documentation supports an agency relationship.
   - **Payment of a commission**: the agent receives a commission from the principal as remuneration for services.
   - **Ownership of property**: the agent does not obtain a legal interest in any property it obtains as agent.
   - **Assumption of risk**: the principal assumes the risk in a transaction.

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- **Enforceability of contract**: a contract made by the agent with a third party in the exercise of its authority is enforceable by and against the principal.
- **Liability to pay debt**: the agent is not liable to pay the debts of the principal.
- **Reimbursement**: the principal reimburses the agent for expenses.

8. The Commissioner considers the following features may, depending on the circumstances, support the existence of an agency relationship:
   - **Fiduciary obligations**: fiduciary obligations may be owed by the agent to the principal.
   - **Tax**: the parties account for tax in a way that is consistent with agency.
   - **Control**: the principal has control over the agent.
   - **Use of property**: the agent does not treat the principal's goods as their own asset.
   - **Alteration of property**: the agent does not alter or manipulate property obtained as agent.
   - **Sale price**: the principal sets the sale price of goods.
   - **Notification of sale details**: the agent is required to notify the principal of the price at which the goods were sold and the identity of the customer.
   - **Separate funds**: the agent keeps the principal's money separate from its own.
   - **Appearance**: the agent holds itself out as an agent.
9. This Interpretation Statement also contrasts agency with other legal relationships to better understand the true nature of agency (from [79]).
10. Part 2 of this Interpretation Statement explains how the Act can operate to modify an agency relationship (from [94]). In some cases, the Act may permit (or require) the parties to ignore the agency relationship and the GST consequences that follow. There are also other provisions such as ss 58 and 59 where agency may be relevant.
11. Part 3 of this Interpretation Statement outlines the specific compliance obligations on agents and principals in the Act (from [116]). This includes information about tax invoicing and record-keeping requirements. Part 4 contains worked examples that illustrate how to determine whether a relationship is an agency relationship (from [133]).
12. The Appendix contains summaries of relevant agency cases from New Zealand and overseas (from [182]).

Part 1 – Analysis

Legislation

13. The general rule is that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply. Section 60 is the main provision in the Act that deals with agency:

> **60 Agents and auctioneers**
>
> (1) Subject to this section, for the purposes of this Act, where an agent makes a supply of goods and services for and on behalf of any other person who is the principal of that agent, that supply shall be deemed to be made by that principal and not by that agent:
>
> provided that, where that supply is a taxable supply, that agent, being a registered person, may, notwithstanding anything in this Act, issue a tax invoice or a credit note or a debit note in relation to that supply as if that agent had made a taxable supply, and to the extent that that tax invoice or credit note or debit note relates to that supply, that principal shall not also issue, as the case may be, a tax invoice or a credit note or a debit note.
>
> (1A) Despite subsection (1), subsection (1AB) applies to an agent who—
>
> (a) is resident in New Zealand; and
>
> (b) makes supplies of distantly taxable goods or remote services to a person resident in New Zealand for and on behalf of a non-resident principal.
>
> (1AB) The principal and the agent may agree that the agent, and not the principal, is treated as making the supply in the course and furtherance of a taxable activity carried on by them.
>
> (1B) Despite subsection (1), when a principal and their agent agree, and record their agreement in a document, either in relation to a particular supply or for a type of supply, that this subsection applies to a supply of goods or services, the supply is treated for the purposes of the Act as 2 separate supplies, being—
>
> (a) a supply of goods and services from the principal to the agent; and
>
> (b) a supply of those goods and services from the agent to the recipient, treating the agent as if they were the principal for the purpose of the supply.

(1C) For the purposes of sections 60C and 60D, an operator of a marketplace or a supplier who makes supplies of goods or services to recipients through the marketplace may treat a supply as 2 separate supplies, being—

(a) a supply of goods and services from the underlying supplier to the operator of the marketplace; and

(b) a supply of those goods and services from the operator of the marketplace to the recipient, treating the operator as if they were the underlying supplier of the goods and services.

(2) Subject to this section, for the purposes of this Act, where any registered person makes a taxable supply of goods and services to an agent who is acting on behalf of another person who is the principal for the purposes of that supply, that supply shall be deemed to be made to that principal and not to that agent:

provided that that agent may nevertheless request that that agent be issued with a tax invoice and that registered person may issue a tax invoice or a credit note or a debit note as if the supply were made to that agent.

(2B) Despite subsection (2), when a principal and their agent agree, and record their agreement in a document, either in relation to a particular supply or for a type of supply, that this subsection applies to a supply of goods or services, the supply by a person is treated for the purposes of the Act as 2 separate supplies, being—

(a) a supply of goods and services from the person to the agent, treating the agent as if they were the principal for the purpose of the supply; and

(b) a supply of those goods and services from the agent to the principal.

(3) Where a tax invoice or a credit note or a debit note in relation to a supply has been issued—

(a) by an agent pursuant to subsection (1); or

(b) to an agent pursuant to subsection (2),—

the agent shall maintain sufficient records to enable the name and address and registration number (if any) of the principal to be ascertained.

(4) For the purposes of subsection (5), the expression **auctioneer** means a registered person carrying on a taxable activity which comprises or includes the supply by auction of goods as an auctioneer or agent for or on behalf of another person (hereafter in this section referred to as a **principal**).

(5) Notwithstanding anything in the foregoing provisions of this section, where the principal and the auctioneer agree to have a supply by auction of any goods, not being a taxable supply, treated as if that supply had been made by that auctioneer and not by that principal, that supply shall be charged with tax as if it were made by that auctioneer in the course or furtherance of that auctioneer's taxable activity and that auctioneer may—

(a) recover the amount of tax charged on that supply from that principal as a debt together with the costs of recovery in any court of competent jurisdiction; or

(b) retain or deduct the same out of any money in that auctioneer's hands belonging or payable to that principal.

(6) Notwithstanding anything in subsection (2), where any registered person makes a taxable supply (not being a supply that is charged with tax at the rate of 0% pursuant to section 11, 11A, 11AB or 11B) of goods and services to an agent, being a registered person, who is acting for or on behalf of another person who is the principal for the purposes of that supply, and—

(a) that principal is a non-resident and is not a registered person; and

(b) that supply is directly in connection with either the exportation, or the arranging thereof, of goods from New Zealand to any country or place outside New Zealand, or the importation, or the arranging thereof, of goods to New Zealand from any country or place outside New Zealand, including, in either case, the transportation of those goods within New Zealand as part of that exportation or, as the case may be, importation,—

this Act shall, where that agent and that principal agree, have effect as if that supply were made to that agent and not to that principal.

(7) Despite subsection (1), a supply of goods, being goods to which section 12(1) applies, that have been imported by an agent who is acting for and on behalf of the principal, is treated as being a supply made by the agent and not by the principal if—

(a) the principal is a non-resident and is not a registered person; and

(b) the agent is a resident and is a registered person at the time the goods are imported; and

(c) the principal and agent agree that the supply was made by the agent and not by the principal.

14. The general rule is that where a person acts as an agent in making a supply on behalf of a principal, the supply is deemed to be made by the principal and not by the agent (s 60(1)). Consequently, the principal, not the agent, must account for GST on that supply. Section 60(1) therefore modifies who would ordinarily be the supplier of goods and services under the Act, to reflect the common law of agency.

15. Conversely, where a registered person makes a taxable supply to an agent who is acting on behalf of a principal for the purposes of that supply, the supply is deemed to be made to the principal and not to the agent (s 60(2)).[1]

[1] The Act contains a number of exceptions to ss 60(1) and 60(2). These are discussed from [94].

16. An agent is also unable to claim an input tax deduction on the supply because the agent does not "acquire" the goods or services, as required by the definition of "input tax" in s 3A of the Act (*Case T35* (1997) 18 NZTC 8,235). Only the principal can claim an input tax deduction and only if the goods or services are then used, or available for use, in making taxable supplies (s 20(3C)(a)).
17. The rules in ss 60(1) and 60(2) are relatively straightforward. However, in practice it can sometimes be difficult to determine whether a person is acting as an agent or as a principal in relation to a supply. This Interpretation Statement identifies features that support the existence of an agency relationship.

Key definitions

18. "Agency", "agent" and "principal" are not defined in the Act. Therefore, the common law definitions apply. The following is a brief introduction to these key concepts. They will be discussed in more detail later in the statement.

Definition of "agency"

19. A leading textbook on the law of agency, P Watts & FMB Reynolds, *Bowstead & Reynolds on Agency* (21st ed, Sweet & Maxwell, London, 2018), defines "agency" as follows, at [1-001]:

> Agency is a fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

20. "Agency" therefore refers to a legal relationship between an agent and a principal. In general terms, an agency relationship is where a person (the agent) is authorised by another person (the principal) to act on their behalf to create or affect the legal relations between the principal and a third party.

Definition of "principal"

21. A "principal" is a person who expressly or impliedly gives authority to the agent to act on their behalf to create or affect the principal's legal relations with third parties.

Definition of "agent"

22. An "agent" is therefore a person who has the authority to create or affect the principal's legal relationships with third parties.

Misuse of the term "agency" and "agent"

23. Section 60 of the Act is concerned with the legal concept of agency not the commercial or business use of the term.
24. HG Beale (ed) *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London 2018) Vol 2, at [31-005] observes that the terms "agent" and "agency" are sometimes used to describe relationships that do not involve "agency" in a legal sense:

> **Use of the terms "agent," "agency".** It follows from the indications given earlier of the ways in which the notion of the agency can be viewed, and the terms "agent" and "agency" used, that when it falls to be considered whether a person is an agent, and if so of which party to a transaction, it is often true that no simple answer can be given. Some persons who describe themselves or are described by others as agents are not really such in any legal sense of the word, but rather independent merchants, dealers, consultants or intermediaries. … The substance of the matter prevails over the form and the use of the words "agent" or "agency", or even a denial that they are applicable, is not conclusive that any particular type of relationship exists.
>
> [footnotes omitted]

25. Consequently, there may be relationships described as "agency", that are not legal agency relationships at all. Section 60 will not apply to these relationships.

Example 1: Distribution agent – not legal agency

Leigh is the New Zealand distribution agent for Cheetah sports shoes. This means she has the exclusive right to sell Cheetah in New Zealand. Leigh purchases shoes from the Cheetah Corporation in China and sells them in her shoe store. Leigh is not authorised by Cheetah to act on its behalf to create or affect the legal relations between Cheetah and third parties. Leigh is therefore not an agent in the legal sense. She is acting as a purchaser and Cheetah is acting as a vendor. (See *Gannow Engineering Co Ltd v Richardson* [1930] NZLR 361 (SC), discussed further at [199] below.)

Example 2: Real estate agent – not legal agency

Craig decides to sell his house. He appoints Tai, a local real estate agent to market his property and to arrange viewings. Under the terms of their agreement, Tai is appointed as Craig's real estate agent. However, Tai does not have authority to create or affect the legal relations between Craig and third parties. Tai is therefore not an agent in the legal sense. He is acting as an intermediary and not as an agent. (Discussed further at [81].)

Determining the nature of a supply

26. Whether there is an agency relationship will depend on the nature of the supply.
27. The nature of a supply for GST purposes is determined by considering the legal rights and obligations actually entered into between the supplier and the recipient, in light of the surrounding circumstances. The terminology used by the parties will not be determinative. (See *Marac Life Assurance Limited v CIR* (1986) 8 NZTC 5,086 (CA); *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA); *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).)
28. Where the written documentation is ambiguous, or where there is no written documentation, it is appropriate to consider the surrounding circumstances (*Masport Ltd v Morrison Industries Ltd* CA 392/92 31 August 1993).
29. Where the parties have not specified what the nature of their relationship is, the courts will consider what a reasonable person would conclude based on the relevant facts (*ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001).
30. It is also necessary to establish the relationship between the parties and in what capacity they are acting. Just because a person is an agent of a principal does not mean they are always acting as agent for that principal for every supply. Each supply (or type of supply) must be examined separately (*CIR v Databank Systems Ltd* (1989) 11 NZTC 6,093 (CA)).
31. Multi-party arrangements that may involve agency present practical difficulties and the agreements between the parties will need to be examined closely (*Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15; *Commissioner of Customs & Excise v Plantiflor* [2002] UKHL 33).

Features that support the existence of an agency relationship

32. The Commissioner has reviewed the relevant case law from New Zealand and overseas and has identified features that support the existence of an agency relationship.
33. The Commissioner considers that there are two essential features of an agency relationship – authority and consent. Several other features have been identified by the case law as strongly supporting the existence of an agency relationship. There are also several features that may support the existence of an agency relationship, but which may also appear in other legal relationships. All features are discussed in more detail below and case references are provided where relevant. The Appendix to this Interpretation Statement contains a summary of relevant cases from New Zealand and overseas.

Definition of agency

34. An agency relationship is where a person (the agent) is authorised by another person (the principal) to act on their behalf to create or affect the legal relations between the principal and a third party (*Bowstead & Reynolds on Agency; ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001; *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC)).

Essential features of an agency relationship

35. The New Zealand case law has identified two essential features of an agency relationship – authority and consent. If these features are not present, there will be no agency relationship.
36. However, even where an agency relationship exists, not all supplies that the agent makes will necessarily be on behalf of the principal. Each supply (or type of supply) must be evaluated separately.

Authority

37. The agent must be authorised to act on behalf of the principal to create or affect the legal relations between the principal and a third party (*Capital Enterprises; Commerce Commission v Harmoney Ltd* [2018] NZHC 1107; *Canada v Merchant Law Group* [2010] FCJ No 990 (FCA); *Glengarry Bingo Assn v Canada* [1999] FCJ No 316 (FCA)). Authority can be express or implied by conduct.
38. The agent's powers cannot extend beyond those of its principal. A principal must be legally capable of undertaking tasks that it delegates to its agent (*Harmoney*).

Consent

39. The agent and the principal must both have consented to the conferral of authority on the agent for the relevant supply. Consent on the part of the principal may be express or implied (*Case R34* (1994) 16 NZTC 6,190; *Capital Enterprises; Harmoney; Glengarry Bingo; Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation* [1967] 2 All ER 353 (HL)). The consent may be in writing (such as in a contract) but it does not have to be, unless required by law.
40. Consent can be inferred from conduct even if the parties do not think they are acting as agent and principal and have expressly said they are not (*Case R34* and *Garnac Grain*). The parties will be taken to have consented if they have agreed to what in law amounts to an agency relationship. The terminology used by the parties does not determine whether a relationship is one of agency.[2]

Example 3: Authority and consent for some supplies and not others

Luke owns and operates a pottery shop. He represents local potters who leave their work with him for sale. Leia makes glazed bowls and leaves them with Luke who agrees to sell them on her behalf. She authorises Luke to act as her agent and both parties consent to this arrangement. There are also several other features that support an agency relationship, including the agency agreement. Luke is therefore acting as agent for Leia for the supply of her glazed bowls.

To keep the shelves looking full and to generate some extra sales, Luke also buys in some ceramic egg cups and butter dishes directly from Leia. He pays Leia for the pieces upfront. In this supply, Luke is not acting as an agent for Leia. Leia is a vendor and Luke is a purchaser. For the purposes of this supply, Luke does not have authority from Leia to act on her behalf to create or affect the legal relations between Leia and third parties. It is important for GST purposes that each supply (or type of supply) is evaluated separately. (See *Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners* [1988] STC 424 (HC).)

Other features that support the existence of an agency relationship

41. The case law has identified several features that support the existence of an agency relationship. No one feature will be determinative. However, if authority and consent are absent, then the presence of the following features will not be enough to create an agency relationship.
42. The key cases referred to below are summarised in the Appendix.

Features that strongly support the existence of an agency relationship

43. In determining whether authority and consent are established between parties as principal and agent, the Commissioner considers the following features strongly support the existence of an agency relationship:
    - The documentation supports an agency relationship.
    - The agent receives a commission from the principal as remuneration for services.
    - The agent does not typically obtain a legal interest in any property it obtains as agent.
    - The principal assumes the risk in a transaction.
    - A contract made by the agent with a third party in the exercise of its authority is enforceable by and against the principal.
    - The agent is not liable to pay the debt of the principal.
    - The principal reimburses the agent for expenses.
44. While the above features strongly support the existence of an agency relationship, they are not essential features like authority and consent. Some agents obtain a legal interest in property they obtain as agent (see for example, bailment, from [89]). Similarly, a del credere agent will specifically assume risk in a transaction (see [57]). Whether an agency relationship exists depends on the legal arrangements entered into, in light of the surrounding circumstances. This includes the conduct of the parties.

Documentation – the documentation supports an agency relationship

45. How the parties describe their relationship will be relevant, unless it is shown to be a sham (*Harmoney*). The description of the relationship must be given its proper weight in relation to the rest of the agreement and to such other relevant circumstances as evidence of the true character of the relationship (*HMRC v Secret Hotels2 Limited* [2014] UKSC 16).

[2] *The Laws of New Zealand: Agency Part 1* (online ed, accessed 14 December 2020) at [2].

46. If an agency relationship clearly exists on the facts, a contractual term specifically precluding an agency relationship will not displace that agency (*Case R34; Harmoney; Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners* [1988] STC 424 (HC)). Similarly, if an agency relationship does not exist, labelling it as an agency relationship will not have any legal effect.

Payment of a commission – the agent receives a commission

47. The agent receiving a commission from the principal as remuneration for its services is likely to strongly support the existence of an agency relationship.
48. If the agent's earnings are referred to as a "commission" in the documentation, then this indicates agency (*Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners* [1985] STC 45 (CA)). However, there is "no magic" to the use of this word and the courts will look at whether the term has been misused (*Gannow Engineering Co Ltd v Richardson* [1930] NZLR 361 (SC)).
49. If the commission is accounted for separately, and set at a fixed rate, then this suggests agency (*ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001; *Au Pied du Mont Sainte-Anne Condominiums v Canada* [2004] TCJ No 22 (TCC)).
50. It is not necessary for the level of commission to be set by the principal – the agent can set their own commission (*Secret Hotels2 Limited*).
51. The agent should not make an independent profit from the agency (*Au Pied du Mont Sainte-Anne*). If a person makes a profit on a supply, then this suggests they are not acting as agent.
52. If a person obtains a cash-flow advantage associated with timing differences between the receipt of payments and the obligation to pay the principal, then the relationship is less likely to be one of agency (*Stiassny v North Shore City Council* [2008] NZCA 522).

Ownership of property – an agent does not typically obtain a legal interest in any property it obtains as agent

53. An agent does not typically obtain a legal interest in the principal's goods or property (*Case T35; ID Tours*). Title passes from the principal directly to the third party and from the third party directly to the principal.
54. If the principal regards the goods as theirs until sold by the agent and they can take back those goods at any time, then this supports an agency relationship (*Hill and Another*).
55. If title in the goods remains with the principal even after the principal has been paid by the agent, then this suggests agency (*Potter and Another; Customs and Excise Commissioners v Music and Video Exchange Ltd* [1992] STC 220 (HC)).

Assumption of risk – the principal typically assumes the risk in a transaction

56. The principal typically assumes the risk in a transaction (*Stiassny; Glengarry Bingo; Potter & Another*).
57. There is a certain category of agent, known as a del credere agent, who specifically assumes risk. A del credere agent promises to indemnify the principal (in exchange for extra commission) if the third party defaults on the payment due under the contract. The del credere agent's responsibility is limited to the failure of the third party to satisfy the contract debt due to insolvency. There is an acceptance at common law that a del credere agent is still an agent in the legal sense because the other features of agency are usually present. This type of agency is not common.

Enforceability of contract – a contract made by the agent with a third party in the exercise of its authority is enforceable by and against the principal

58. A contract made with a third party by the agent in the exercise of its authority is enforceable both by and against the principal (*ID Tours*). However, an agent acting for an undisclosed principal[3] may sue and be sued on the contract with the third party (*Harmoney*).

Liability to pay debt – an agent is not liable to pay the debts of its principal

59. An agent is not liable to pay the debts of its principal (*ID Tours*). The principal is responsible for any debts arising as a result of a contract made between the agent and a third party.

Reimbursement – the principal reimburses the agent for expenses

60. A principal typically reimburses the agent for expenses, although this may depend on the terms of the agency (*Glengarry Bingo*).

[3] An "undisclosed principal" is a principal whose existence is not known to the third party at the time the agent and the third party enter into a legal relationship. This usually means that the third party believes that the agent is the principal.

Features that may support the existence of an agency relationship

61. The following features have been identified by the case law as possibly supporting the existence of an agency relationship. However, in some cases, the features may also be consistent with other legal relationships:
    - Fiduciary obligations may be owed by the agent to the principal.
    - The parties account for tax in a way that is consistent with agency.
    - The principal has control over the agent.
    - The agent does not treat the principal's goods as their own asset.
    - The agent does not alter or manipulate property obtained as agent.
    - The principal sets the sale price of goods.
    - The agent is required to notify the principal of the price at which the goods were sold and the identity of the customer.
    - The agent keeps the principal's money separate from its own.
    - The agent holds itself out as acting as an agent.

Fiduciary obligations – fiduciary obligations may be owed by the agent to the principal

62. An agency relationship is a fiduciary relationship (*Capital Enterprises*; *Harmoney*). This, of itself, is not a particularly helpful feature when trying to determine if an agency relationship exists. There are of course many fiduciary relationships that are not also agency relationships. However, there are specific fiduciary duties owed by agents to principals, which if present, may support a finding of agency. It is important to note that if an agent breaches a fiduciary duty, this will not invalidate a finding of agency.
63. An agent may owe a principal the following fiduciary duties:
    - A duty to act in the principal's best interests (*Capital Enterprises; Fenswick International Ltd v GR International Ltd* [2014] NZHC 1119).
    - A duty to avoid a conflict between the agent's own interests and those of the principal (*Fenswick*).
    - A duty to avoid profiting from the agency relationship (*Fenswick*; *Westpac Banking Corporation v Savin and Ors* (1986) 1 NZBLC 102,345 (CA)). An agent must not make an improper or secret profit (Fenswick).
    - A duty of loyalty – this obligation is owed by the agent to the principal and not the other way around (*Westpac*, see also P*aper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26).

Tax – the parties account for tax in a way that is consistent with agency

64. How the parties account for GST might in some cases be a useful indication of how the parties perceive their relationship. It would go towards the assessment of the conduct of the parties. For example, if the "agent" had consistently accounted for GST as a principal, this might suggest that the relationship is not one of agency.
65. However, in *Secret Hotels2* the United Kingdom Supreme Court considered that how the parties accounted for VAT did not help determine whether the relationship was one of agency. In this case, the taxpayer did not account for VAT correctly either as an agent or as a principal.
66. It will depend on the circumstances whether this feature should be given any weight when trying to determine whether an agency relationship exists. It could indicate what the parties thought they were doing or what they were intending to do, which is itself just a factor and not determinative.

Control – the principal has control over the agent

67. The principal's control over the agent is not an essential feature of agency in New Zealand. However, control is a factor from which an agency relationship might be inferred, in combination with other factors (*Harmoney, Spearmint Rhino Ventures (UK) Limited v HMRC* [2007] EWHC 613 (Ch)). The degree of control a principal has over an agent will depend on the terms of the agency relationship. However, if the principal has no control over the "agent", then the relationship is unlikely to be one of agency.

Use of property – the agent does not treat the principal's goods as their own asset

68. It is consistent with an agency relationship where the agent does not treat the principal's goods as their own asset (*Glengarry Bingo*).

69. This feature is consistent with the other features of agency, such as the fact that an agent will not alter or manipulate property obtained from the principal or a third party (see [71]). However, in *Case T35* the Taxation Review Authority held that whether the principal's goods or property have been incorporated into the agent's business does not always indicate that there is no agency relationship.

70. In some cases, if the goods or property have been incorporated into the agent's business this will indicate that the agent considers the goods or property to be their own, or to have rights to those goods or property. This is not consistent with a typical agency relationship. However, it may depend on the surrounding circumstances as to whether this is a relevant feature.

Alteration of property – the agent does not alter or manipulate property obtained as agent

71. The agent does not typically alter or manipulate property obtained as agent (*Gannow; Merchant Law Group*).

72. However, even if the agent does alter the goods, this will not always be fatal to a finding of agency. In *Music & Video Exchange*, the agent undertook all necessary repairs to the goods before they were sold. The United Kingdom High Court thought this action was inconsistent with agency, but it was not enough to displace the finding of agency given that the risk of doing work on the goods would be one that the agent might regard as worth taking to increase the value of the goods and to increase the commission.

Sale price – the principal sets the sale price of goods

73. The principal typically sets the sale price of goods (*Potter & Another*). However, while the United Kingdom High Court in *Music & Video Exchange* noted that it would be unusual if the agent set the sale price of goods, it would not be entirely inconsistent with a finding of agency.

Notification of sale details – the agent is required to notify the principal of sale details

74. The agent is usually required to notify the principal of the price at which goods are sold (*Potter and Another*). Similarly, the agent is usually required to reveal the identity of the principal's customers.

75. However, in *Music & Video Exchange* the United Kingdom High Court noted that if the principal is not given any further information about the sale (the date, the price or the identity of the purchaser) this would not necessarily be inconsistent with a finding of agency. The Commissioner considers that while this is not inconsistent with agency, it would be unusual in an agency relationship for a principal not to have information about the price at which the goods were sold.

Separate funds – the agent keeps the principal's money separate from its own

76. An agent should keep its principal's money separate from its own. This is the general rule although it may depend on the terms of the agency whether this is required (*Westpac; Merchant Law Group; Stiassny*).

Appearance – the agent holds itself out as acting as agent

77. If a person holds themselves out as acting as agent, this might support an agency relationship (*Glengarry Bingo*).

78. If third parties understand the relationship to be one of agency, then this is a factor that might support an agency relationship (*Hill & Another*). This goes to the assessment of the conduct of the parties.

Distinguishing agency from other legal relationships

79. To better understand the nature of agency it can be helpful to distinguish it from other legal relationships. This is important from a GST perspective, as different legal relationships have different GST consequences. In *Customs & Excise Commissioners v Reed Personnel Services Ltd* [1995] BVC 222 (HC), Laws J referred to three typical contractual relationships in three-party arrangements, at 225:

    (1) Where A is contractually obliged to provide services to B, but does so by means of the acts of a third party, C. This may be described as the "vicarious performance" situation.

    (2) Where C as agent for A enters into a contract obliging A to provide services to B. This is the "agency" situation.

    (3) Where A acts no more than as an intermediary between C and B, introducing the two so that C may enter into a contract by which he undertakes to provide services to B. This I will call the "intermediary" situation.

80. Intermediaries and vicarious performance relationships are briefly discussed below. Also discussed are the relationships of trust, bailment, vendor-purchaser and employment.

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Intermediaries

81. An intermediary relationship is where one party facilitates a transaction between two other parties but does not have authority from either of the parties to create or affect their legal relations. For example, an intermediary's role may be to introduce the two parties. A introduces B and C so that B may enter into a contract by which B undertakes to provide services to C. In this case, there is no contractual relationship between A and C or between A and B for the services provided by B to C (see Example 2 at [25]).

82. An intermediary may be distinguished from an agent because it lacks the two key elements of agency – authority and consent. For example, real estate agents typically act as intermediaries.

Vicarious performance

83. A vicarious performance relationship arises when:
    - B has a contractual obligation to provide a good or service to A; and
    - B contracts with C (a third party) for the performance of that obligation; and
    - B remains liable under the terms of the contract with A to provide the good or service and must remedy any breach if the terms of the contract are not satisfied.

84. There is no contractual relationship between A and the substituted C who carries out B's contractual obligations. For example, a building company (B) agrees to build a house for a client (A). B subcontracts an electrician (C) to undertake some electrical work on the project. There is no contractual relationship between the client and the electrician.

85. Agency and vicarious performance are therefore mutually exclusive relationships. In an agency situation, the agent acts in the place of the principal to bind the principal. With vicarious performance, the principal's contractual obligations are performed by a third party. The third party cannot bind the principal (*Case 14/2014* (2014) 26 NZTC 2,024).

Other legal relationships

Trust

86. Agents and trustees both act on behalf of another person: the agent for the principal, and the trustee for the beneficiary or beneficiaries. However, the two relationships have some important differences. For example, an agent does not typically hold title to the principal's property; while a trustee holds legal title to the trust property as principal, not as agent. An agent must act within the authority of the principal. In contrast, a trustee must carry out the terms of the trust and is not subject to the directions of a beneficiary.

87. However, trustees and agents are not necessarily mutually exclusive. Trustees who hold property on trust may also be agents if they have the power to alter the legal relations of the beneficiaries by, for example, entering into contracts on behalf of the beneficiaries. (See *The Laws of New Zealand: Agency Part 1* (online ed, accessed 14 December 2020), at [5].)

88. In "QB 16/03: Goods and Services Tax – GST treatment of bare trusts" *Tax Information Bulletin* Vol 28, No 5 (June 2016):16, the Commissioner confirmed that the relationship between a beneficiary and a bare trustee acting on the directions of the beneficiary is predominantly an agency relationship. This means any supplies of trust property made by the trustee are deemed to be made by the beneficiary and the taxable activity carried on by the bare trustee is deemed to be carried on by the beneficiary.

Bailment

89. Bailment is a legal relationship where a bailor transfers property to a bailee for the bailee's own use or to perform some work for the bailor. The bailee takes possession of the property but ownership remains with the bailor. For example, where a person gives a jacket to a drycleaner for cleaning, the drycleaner (the bailee) takes possession of the jacket from the person (the bailor) for the purpose of cleaning. The dry cleaner cannot sell the jacket to someone else.

90. Agency and bailment are not always mutually exclusive. An agent may be a bailee of the principal's goods, for example, in the case of a factor. A factor is an agent who has possession of the principal's goods and has authority to sell those goods in the factor's own name. While the goods are in the factor's possession they are usually acting as a bailee. In addition, a bailee may sometimes be regarded as having agency power to do things that are reasonably incidental to the goods that they hold, for example, to have the goods repaired. (See *The Laws of New Zealand: Agency Part 1* (online ed, accessed 14 December 2020), at [5].)

Vendor-purchaser

91. In business, the term "agent" is used in many ways. A person might be described as a "selling agent", a "sole agent", a "manufacturer's agent" or a "distribution agent". In most cases these agents will be buying goods from the wholesaler or manufacturer (the vendor) and reselling the goods to their own customers. The person is therefore operating as a purchaser, not as an agent (see Example 1 at [25]). An agent will not purchase goods from the principal; the agent will hold goods for their principal so they can sell them to a third party on behalf of their principal.

Employees and independent contractors

92. An employment relationship may overlap with agency. An employee may be an agent of their employer if they are authorised by their employer to act on their behalf to create or affect the legal relations between the employer and a third party. For example, an employee is acting as an agent of their employer where the employee is authorised by the employer to enter into an agreement with a third party for the hire of a piece of equipment for use in the business. See Example 4 below.

Example 4: Employee as agent

Tina is employed by Modern Curtains Co (MCC) as a sales representative. She is asked by MCC to travel to Tauranga to visit clients. As instructed, she pays for all costs including taxis, accommodation and meals on her personal credit card. Tina retains receipts for all her expenses and submits them to the MCC accountant for reimbursement on her return to the office. Tina incurred this expenditure as agent for MCC so the reimbursing payment is not subject to PAYE. MCC can claim input tax deductions for all expenses incurred by Tina. This is even though the invoices are in Tina's name (see [121] for further discussion on invoicing and agency).

93. Similarly, an independent contractor may be an agent of an employer if they are authorised by the employer to act on their behalf to create or affect the legal relations between the employer and a third party[4].

Part 2: How the Act can modify the agency relationship

94. The general rule is that the GST consequences of a supply will differ depending on whether a person acts as an agent or as a principal for the purposes of that supply. Where a person acts as an agent in making a supply to a third party on behalf of a principal, the supply is deemed to be made by the principal and not by the agent (s 60(1)). Conversely, where a registered person makes a taxable supply to an agent who is acting on behalf of a principal for the purposes of that supply, the supply is deemed to be made to the principal and not to the agent (s 60(2)). In both cases, it is the principal and not the agent who must account for GST on these supplies.
95. However, where an agency relationship exists, the Act contains several provisions that permit (or require) the parties to ignore that relationship and the GST consequences that follow. These provisions are discussed below. The optional rules are discussed first, followed by the mandatory rules.
96. Sections 58 and 59 are also briefly discussed below because agency may be relevant to their interpretation.

Modifying the agency relationship – optional

97. Sections 60(1A), 60(1AB), 60(1B), 60(2B), 60(4), 60(5), 60(6) and 60(7) of the Act allow the parties to agree to ignore the agency relationship and the GST consequences that would typically follow.

Sections 60(1A) and (1AB) – agent treated as making the supply for non-resident principal

98. Sections 60(1A) and (1AB) allow a New Zealand-resident agent acting for a non-resident principal who supplies distantly taxable goods or remote services to New Zealand customers, to agree with the principal to treat the agent as making the supplies. If this option is exercised, the agent must register and return GST on the supplies of the distantly taxable goods or remote services.

INTERPRETATION STATEMENTS

[4] *Lower Hutt City v Attorney-General* [1965] NZLR 65 (CA).

Example 5: New Zealand-resident agent treated as making a supply of distantly taxable goods

Otto is a New Zealand-resident agent. He sells fitness trackers to customers in New Zealand on behalf of his principal, The Fit Corporation. The Fit Corporation is resident in China. The Fit Corporation has been advised that under the rules for the importation of low-value goods, it will need to register and account for GST in New Zealand. However, for compliance purposes, The Fit Corporation and Otto have agreed that Otto will be treated as making the supplies of goods in New Zealand under ss 60(1A) and (1AB).

Otto is required to register and return GST on supplies made to New Zealand customers and GST-registered businesses. The agency relationship between the parties is effectively ignored. (See "GST on low-value imported goods" *Tax Information Bulletin* Vol 31, No 8 (September 2019):28.)

Sections 60(1B) and (2B) – splitting an agency supply

99. Where an agent makes a supply to a third party on behalf of a principal, the principal and the agent can agree to treat the supply as two separate supplies:
    - a supply of goods and services from the principal to the agent; and
    - a supply of those goods and services from the agent to the third party.

100. Section 60(1B) was introduced because some accounting systems automatically issue invoices when goods and services are supplied. For example, the principal's accounting system might issue a tax invoice when goods and services are provided to the agent and the agent's accounting system might also issue a tax invoice when goods and services are provided to the third party. This results in two tax invoices being issued for one supply, which is a breach of s 24(1) of the Act.

101. Under s 60(1B) the principal and the agent must agree that the supply is to be treated as two separate supplies. The agreement must be recorded in a document. The agreement may relate to a particular supply or a type of supply. Two separate invoices can then be issued without contravening the Act. The principal then returns output tax on the tax invoice issued to the agent. Likewise, the agent returns output tax on the tax invoice issued to the third party and can claim input tax being the output tax charged to them by the principal.

102. Section 60(2B) contains the corresponding rules for supplies made to an agent by a third party. The principal and the agent can agree to treat the supply from the third party to the principal as two separate supplies:
    - a supply of goods and services from the third party to the agent; and
    - a supply of those goods and services from the agent to the principal.

103. Under both ss 60(1B) and 60(2B), the agent is now treated as making or receiving supplies in their own right.

Example 6: Splitting an agency supply

Office Co is GST-registered and sells office furniture. It has decided to engage the services of Arnold (an agent) to sell some surplus stock on its behalf. Arnold is also GST-registered. Office Co and Arnold both use the same accounting software, which automatically issues a tax invoice whenever goods and services are provided. To avoid contravening s 24(1) of the Act, the parties agree in writing that the supply of office furniture is to be treated as two separate supplies under s 60(1B). Office Co will need to return output tax on the supply of furniture to Arnold, and Arnold will need to return output tax on the supply of furniture to third parties, but he will also be able to claim an input tax deduction for the output tax charged to him by Office Co.

Sections 60(4) and 60(5) – auctions and auctioneers

104. An auctioneer is an agent who sells goods on behalf of a principal at auction (s 60(4)). Where an auctioneer sells goods on behalf of many principals, some principals may be GST-registered and others may not. Section 60(5) allows an auctioneer and a non-registered principal to agree that any non-taxable supplies made by the auctioneer at auction (on behalf of the non-registered principal) should be treated as if they were taxable supplies made by the auctioneer. The auction can then proceed on the basis that GST is charged on the supply and the auctioneer accounts for GST on that sale.

Section 60(6) – agent treated as principal when receiving goods on behalf of a non-resident principal for import or export

105. Where an agent and a non-resident, non-registered principal agree, the agent may be treated as the principal when they receive a supply directly connected with (or with arranging) the importation or exportation of goods. The agent and the third party must both be GST-registered, and the supply received by the agent must be standard-rated.

106. The agent can claim an input tax deduction on supplies made to them, related to the importation or exportation of goods (for example, GST on charges associated with transporting the goods). However, when goods are being imported by the principal, s 60(6) does not enable the agent to claim GST levied on the goods at the border on behalf of the non-resident principal. This is because the agent is not importing the goods, they are simply receiving and arranging delivery of them.

107. If the agent is importing the goods on behalf of the non-resident (and not just receiving or arranging delivering of them) then s 60(7) of the Act may apply instead (see [108]).

Section 60(7) – agent treated as principal when importing goods for a non-resident

108. Where an agent and principal agree, goods imported into New Zealand by a GST-registered agent (acting for an unregistered, non-resident principal) can be treated as being supplied by the agent. The agent will have to account for output tax on the supply in New Zealand, but the agent will also be entitled to an input tax deduction for any import GST paid at the border if the goods are used for taxable purposes.

109. Section 60(7) only applies to agents who actually import goods on behalf of a principal (as part of the agent's taxable activity) and not to agents who merely deliver or distribute those goods. These rules are discussed in more detail in "Importers acting as agents for non-residents" *Tax Information Bulletin* Vol 12, No 12 (December 2000):11.

Example 7: Agent treated as principal when importing goods for a non-resident principal

A non-resident computer company called Floppy Inc decides to test the New Zealand market by sending some of its new computers to New Zealand. Floppy Inc arranges this through a New Zealand-resident, GST-registered agent called Mia. Floppy Inc and Mia enter into an agency agreement. Mia is authorised by Floppy Inc to enter into sales contracts and to sell the computers on its behalf. Floppy Inc is not sure whether it wants to set up in New Zealand and does not want to deal with GST compliance issues.

Mia and Floppy Inc agree under s 60(7) that they will treat Mia as the supplier. This means Mia will have to account for GST on the sale of computers in New Zealand. However, she will also be able to claim an input tax deduction for any import GST.

Modifying the agency relationship – mandatory

Sections 60(1C), 60C and 60D – separate supplies of distantly taxable goods and remote services

110. Section 60(1C) applies to supplies of remote services or distantly taxable goods made by a marketplace or an underlying supplier made through a marketplace. It applies for the purposes of ss 60C and 60D. Section 60(1C) allows the underlying supplier or the marketplace to treat the supply as two separate supplies.

111. Sections 60C and 60D treat the following supplies as being made by the non-resident operator of the marketplace:
- supplies of remote services made by a New Zealand-resident underlying supplier (the principal) through a non-resident marketplace (the agent) to New Zealand-resident customers; and
- supplies of remote services or distantly taxable goods made by a GST-registered non-resident underlying supplier (the principal) through a non-resident marketplace (the agent) to New Zealand-resident customers.

112. Sections 60C and 60D effectively override the agency relationship and treat the agent as the principal (subject to ss 60C(2B) and 60C(2C) and s 60D(2)).

113. However, if the non-resident operator of the marketplace (the agent) is treated as the supplier (and therefore as the principal), supplies made through the marketplace would no longer be taxable. This means GST incurred by the underlying supplier in making the supplies would be irrecoverable. To address this, s 60(1C) allows the underlying supplier or the marketplace to treat the supply as two separate supplies — a supply of goods and services from the underlying supplier to the operator of the marketplace, and a supply of those goods or services from the operator of the marketplace to the recipient. The supply from the underlying supplier to the marketplace can be zero-rated which allows the underlying supplier to recover GST incurred in making the supply. These rules are discussed in more detail in *Tax Information Bulletin* Vol 31, No 8 (September 2019):23–24.

Other sections where agency may be relevant

Section 58 – personal representative, liquidator, receiver, etc

114. Section 58 applies where a registered person (known as the incapacitated person) dies, becomes incapacitated, or goes into receivership, liquidation or bankruptcy. In these circumstances, if another person becomes a "specified agent" and conducts a taxable activity on behalf of the incapacitated person, they are deemed to be personally carrying on that taxable activity under s 58(1A). (For further information see "GST – Specified agent for incapacitated persons" *Tax Information Bulletin* Vol 7, No 6 (December 1995):13.)

Section 59 – liability of agent of absentee principal for returns and tax

115. Similarly, s 59 deems a person who carries on a taxable activity on behalf of an absentee principal to be an agent of the principal for that taxable activity. The agent is required to file GST returns and will be liable for GST charged or levied under the Act.

Part 3: Compliance obligations

116. The Act imposes specific compliance obligations on agents and principals. The main obligations are outlined below.

Invoicing, and credit or debit notes

117. When an agent acts on behalf of a GST-registered principal in making a supply of goods and services to a third party, the supply is deemed to be made by the principal and not by the agent. The principal is therefore responsible for complying with its GST obligations, including issuing a tax invoice and any related credit or debit notes (s 24).
118. However, where the supply is a taxable supply, the proviso to s 60(1) allows a GST-registered agent to issue a tax invoice for the supply (or a credit or debit note if required) as if the agent had made the taxable supply. This means the invoice may contain the name and GST registration of the agent (acting as if they had made the taxable supply). The agent is required to keep a record of the principal's name and address and GST number for the supply (s 60(3)). This is for compliance purposes so that Inland Revenue can identify the principal and ensure that supplies have been accounted for. The principal must return the GST on the invoice. If the agent is not GST-registered it cannot issue a tax invoice (proviso to s 60(1) and s 24(1)).
119. Similar provisions exist where a GST-registered third party makes a taxable supply of goods and services to an agent acting on behalf of a principal. In these circumstances, the supply is deemed to be made to the principal and not to the agent (s 60(2)). The third party will issue the tax invoice to the principal (and any related credit or debit notes if required).
120. However, the proviso to s 60(2) permits a GST-registered third party to issue a tax invoice or a credit or debit note to the agent, as if the supply were made to the agent. (This is the position whether or not the agent is GST-registered). The agent must keep a record of the principal's name, address and GST number for each supply (s 60(3)). The agent is not entitled to an input tax deduction as the supply is not made to the agent and does not relate to goods or services "acquired" by the agent (ss 3A and 20(3)).
121. The principal is entitled to an input tax deduction if the goods and services are used or available for use in making taxable supplies. It will not matter if the principal is not the person named on the tax invoice. The input tax claim will be allowed provided the principal can establish that they are the recipient of the supply. For example, where a taxpayer is claiming expenses incurred by an employee, that claim will only be allowed where the employer can demonstrate that the costs incurred by the employee are in respect of the taxpayer's taxable activity, and the taxpayer has reimbursed the employee for the actual expenses incurred. (see "GST – Tax Invoices" *Tax Information Bulletin* Vol 11, No 9 (October 1999):80 and Example 4 at [92]).

Example 8: Invoicing

Bob sells second-hand musical equipment in his store. He is registered for GST. Lucy is also a musical equipment trader and is registered for GST. She gives Bob a trombone to sell on her behalf. Ling visits Bob's store and buys the trombone. Bob issues Ling with an invoice. The invoice contains Bob's details as if Bob had made the supply. For this supply, Bob is required to keep a copy of Lucy's name, address and GST number. Lucy cannot also issue Ling with an invoice. Lucy must return the output tax on the invoice issued by Bob.

Disbursements

122. A registered person that provides services to clients may charge those clients for costs incurred in providing the services. These costs may include:
    - payments made as agent for the client; and
    - other costs incurred as principal in order to perform the services for the client.

123. The GST treatment of these costs depends on whether the registered person charges the client for a supply received as agent or as principal.

124. A registered person may act as agent for a client if they receive a taxable supply of goods or services for which the client is legally liable to pay. For example, a law firm may pay court filing fees for their client. If an agency relationship exists, the supply by the court is deemed to be made to the client and not to the law firm (s 60(2)). If the law firm pays for the supply and the client reimburses them, the reimbursement is not consideration for a supply of services by the law firm. The law firm does not account for GST on the supply. If the client is GST registered, it may be able to claim an input tax deduction if the goods or services are going to be used to make taxable supplies. The client must hold a tax invoice to obtain an input tax deduction. It will not matter if the invoice is in the law firm's name (see [121]).

125. The agency rules do not apply where a registered person pays for taxable supplies which it receives as principal, and on-charges those supplies to the client. For example, a law firm may charge a client for secretarial support time or photocopying. Generally, the law firm incurs those costs to enable it to provide legal services. It does not incur those costs as agent for any particular client. If the firm passes the charges on to the client, the Commissioner considers that the charges form part of the total fee for the supply of legal services. The law firm should account for GST output tax on these items in the same manner as the rest of the legal fees (if taxable). A GST-registered client may claim an input tax deduction for the GST paid if the legal services are used or available for use in making taxable supplies.

Example 9: Disbursements

Property Ltd engages McBeal LLP (a law firm) to provide it with legal services in connection with a commercial property purchase. Property Ltd authorises McBeal to act as its agent in this matter. Property Ltd is purchasing the property for use in its taxable activity. Both McBeal and Property Ltd are registered for GST.

McBeal sends Property Ltd a bill with the following costs:

- legal services supplied in the course of the property conveyance;
- mobile phone charges incurred by the law firm to investigate the terms of a lease of the property; and
- transfer fees paid by McBeal to Land Information New Zealand (LINZ) as agent for Property Ltd

McBeal must charge output tax on the fee for legal services rendered. McBeal is providing these services to Property Limited as a principal. Property Ltd can claim an input tax deduction on this supply.

McBeal must also charge output tax on the on-charged mobile phone charges. These costs were incurred as principal and not as agent for Property Ltd. Property Ltd can claim an input tax deduction on this supply.

McBeal does not account for GST on the transfer and mortgage fees. Property Ltd can claim an input tax deduction for the supply by LINZ. Property Ltd uses the tax invoice issued by LINZ to McBeal to substantiate this claim.

126. For further discussion on disbursements and agency see "Disbursements by professional firms on behalf of clients – GST" *Tax Information Bulletin* Vol 6, No 1 (July 1994):5 and "Funeral expenses paid by funeral directors in connection with funeral arrangements" *Tax Information Bulletin* Vol 13, No 8 (August 2001):9.

Time of supply

127. The time of supply rules in s 9 of the Act apply to principals and agents. Therefore, a principal must account for GST when the time of supply is triggered. In some cases, the principal might not be aware that an agent has made a sale on the principal's behalf, triggering the time of supply. Agents and principals must ensure they have appropriate systems in place so that the principal is notified of the sale (see [74]) and can account for GST correctly.

Record-keeping obligations

128. Agents need to ensure they comply with the record-keeping requirements in the Act. Where an agent issues a tax invoice or a credit or debit note (under ss 60(1) or 60(2)), the agent must maintain sufficient records to enable the name, address and registration number (if any) of the principal to be ascertained (s 60(3)).

129. Similarly, where land is supplied to an agent acting for an undisclosed principal, the agent must maintain sufficient records of the undisclosed principal to enable the name, address and registration number (if any) of the principal to be ascertained (s 75(3E)).

130. Principals must also comply with standard record-keeping requirements (s 75).

Unincorporated bodies and agency

131. Section 57 of the Act provides for an unincorporated body to be registered for GST, despite not being a separate legal entity. This effectively treats an unincorporated body as separate from its members for GST purposes. Unincorporated bodies include partnerships, joint ventures and trustees of a trust (s 2).

132. The Commissioner understands that it is common for an agent (typically a company) to be appointed to represent an unincorporated body, usually for administrative ease. There will be an agreement between the members of the unincorporated body authorising the agent to act on behalf of the unincorporated body. As the unincorporated body is not a separate legal entity it is unable to appoint the agent itself.

Example 10: Unincorporated bodies

Aussie Innovations Pty Ltd and NZ Entrepreneur Ltd agree to take part in a joint venture in New Zealand to develop an exciting new product. They decide to operate the venture as a joint venture, but to incorporate a company, Agency Co Ltd, to act as agent for the joint venture. The idea is that Agency Co Ltd will enter into the relevant contracts for the joint venture for ease of administration.

Under s 57, the joint venture is treated as an unincorporated body and it is the joint venture that needs to register for GST rather than Aussie Innovations Pty Ltd and NZ Entrepreneur Ltd. However, for agency purposes, each joint venture company needs to appoint Agency Co Ltd as agent for the joint venture, rather than the joint venture purporting to appoint Agency Co Ltd as agent. This is because the common law does not recognise the joint venture as a separate entity (like s 57 effectively does) and it is under common law that the agency relationship arises.

The tax invoice implications will depend on what arrangements Aussie Innovations Pty Ltd and NZ Entrepreneur Ltd enter into with Agency Co Ltd and the GST registration status of both joint venture companies.

Part 4: Examples

133. The following examples are included to help explain how the law applies.

Example 11: Art gallery

134. The Wisteria Wall art gallery is preparing to stage an exhibition of young New Zealand artists. The gallery is GST-registered. Several artists have been approached to exhibit their latest works. Dante has recently graduated from art school and is already making a name for himself with his bold sculptures. He has only sold a few works so far and is not registered for GST. Naz will also be exhibiting. She is a more established artist than Dante and her paintings are in high demand. She is GST-registered.

135. Exhibiting artists must enter into an agreement with the gallery. The agreement authorises the gallery to sell the artwork "on behalf of the artist". The agreement records the artist's consent to that arrangement. Other terms and conditions include:

- The gallery is entitled to a 40% commission (plus GST) on all sales.
- The gallery will provide the artist with a suggested listing price, but the final decision on sale price rests with the artist.
- Artists must insure their artworks and the gallery accepts no responsibility for any damage that might occur while the artwork is in the exhibition.
- Artists are required to leave their artwork with the gallery for the duration of the exhibition and can only withdraw it with the agreement of the gallery.
- When a work is sold to a customer, the gallery issues the customer with an invoice. Whether the invoice includes GST depends on whether the artist is registered for GST or not.
- The artist is not entitled to any information about the customer.
- At the end of the exhibition, the gallery will pay the artist by direct credit into the artist's nominated bank account, less the gallery's commission.

Essential features of agency

136. Based on the terms of the agreement and the surrounding circumstances, there is an agency relationship. The gallery is authorised to act on the artist's behalf to create or affect their legal relations with the third party (the customer), ie, the sale of the artwork. The gallery and artist have consented to this arrangement.

Other features of agency

137. Other features that support a finding of agency include the fact that the gallery charges a commission rather than obtaining a share of the profits; the artist (as principal) assumes the risk and is required to insure their work while at the gallery; the gallery accepts no responsibility for damage and the artist sets the sale price for the artwork. The only feature that does not support a finding of agency is that the artist is not entitled to any information regarding the customer, however in Music & Video Exchange it was noted that this feature would not be inconsistent with agency. In this case, the gallery does not want to provide the artist with details of the customer in case the artist decides to sell directly to the customer.

GST treatment

138. The gallery is an agent for the purposes of the Act, and s 60 applies.

139. The gallery sells Dante's sculpture for $1,000. As Dante is not registered for GST, the supply is non-taxable, and no GST is charged. However, as the gallery is GST-registered, it must charge GST on its commission. The commission is for the services of offering the artwork for sale. Dante therefore receives $540 on the sale, being $1,000 less the gallery's commission of $400 (40%) plus GST of $60.

140. The gallery sells Naz's painting for $10,000 including GST of $1304.35. The gallery must charge GST because Naz is GST-registered. Naz must account for this GST in her GST return. The gallery also charges its commission of $4,000 (40%) plus GST of $600. Naz therefore receives $5,400 on the sale. She must return $1,304.35 of output tax in the relevant GST period based on the time of supply rules, but can claim an input tax deduction of $600 on the commission.

Example 12: Hotel-booking intermediary

141. Lucy owns and operates a boutique hotel called Lucy's Lodge. She enters into an agreement with a hotel-booking website called ROOM to market her hotel. The agreement describes Lucy as the principal and ROOM as the agent. It records that Lucy "appoints ROOM as her agent and ROOM agrees to act as such".

142. Under the terms of the agreement, Lucy undertakes to provide accommodation to guests who book her hotel through the ROOM website. Guests who book through the site must pay the full amount of the booking to ROOM upfront. When the stay has ended, ROOM pays Lucy for the accommodation, less its commission. The percentage of the commission is set each year by ROOM.

143. The agreement imposes several obligations on Lucy. She is required to honour bookings made through the ROOM website and to keep the hotel clean and insured. She is also required to give ROOM access to the hotel for inspections. There are no similar obligations imposed on ROOM, not even an obligation to promote the hotel.

144. The Terms of Use on the ROOM website explain that ROOM provides information about the price and availability of hotels and "that any reservations made on this site will be directly with the hotel whose services you are booking". If a guest makes a change to a booking, they are liable to pay ROOM an administrative charge. If the guest cancels a booking, they will be liable to pay ROOM a cancellation charge. In both cases, the charges are retained by ROOM.

145. If Lucy is unable to honour a booking, ROOM undertakes to try and provide the guest with similar accommodation of equal standard. If unable to do so, ROOM would allow a cancellation free of charge. However, the Terms of Use make it clear that if Lucy does not provide the accommodation the guest would only be able to sue Lucy, and not ROOM.

146. Lucy and ROOM want to know how she should account for GST on the sale of hotel accommodation made via the ROOM website, specifically, whether there is an agency relationship.

Essential features of agency

147. The agreement between Lucy and ROOM authorises ROOM to offer Lucy's accommodation to guests and to accept bookings on Lucy's behalf. Lucy and ROOM have also consented, under the terms of the agreement, to this conferral of authority on ROOM. The essential features of agency are both present.

Other features of agency

148. The next step is to consider whether there are any other features that support the existence of an agency relationship:

- The agreement refers to Lucy as the principal and ROOM as the agent, which is relevant unless it is shown to be a sham.
- The payment of a commission typically indicates an agency relationship. It is not necessary for the commission to be set by the principal.
- The Terms of Use on the ROOM website confirm that if Lucy breaches the agreement, Lucy and not ROOM could be sued. This factor is consistent with an agency relationship.
- It could be argued that the fact that ROOM retains the booking change fee and the cancellation fee is inconsistent with agency. However, the United Kingdom Supreme Court in *SecretHotels2* said that such facts merely reflect the relative bargaining positions of the parties and do not alter the nature of the relationship.
- Similarly, it could be argued that ROOM has more control over Lucy than would typically occur in an agency relationship. Lucy must keep the hotel clean and insured and must make it available for inspections. But there were very few obligations on ROOM. However, control is only a factor from which an agency relationship can be inferred, in combination with other facts. On similar facts, the court in *SecretHotels2* explained that the travel website had built up a substantial business and it was in a much more powerful negotiating position than the hotels. These factors did not overturn the agency relationship.
- The fact that ROOM tries to provide alternative accommodation if Lucy is unable to honour a booking is likely included to protect ROOM's goodwill and is not inconsistent with agency.
- Less consistent with agency is the fact that ROOM may obtain a significant cash-flow advantage because it receives payment from guests upfront but does not have to pay Lucy until the stay has ended.

149. An overall assessment of the agreements and the surrounding circumstances would suggest that an agency relationship exists, and that ROOM is acting as agent for Lucy when it makes a supply of hotel accommodation. Therefore, ROOM is ignored for GST purposes under s 60(1), unless the parties agree otherwise. Lucy must account for GST on the supply to the guest based on the time of supply rules and calculated on the total amount paid by the guest to ROOM, as agent.

Example 13: Cost-sharing arrangements

150. Lionel (a life coach), Betty (a bookkeeper) and Derrick (a designer) have decided to share an office space and operating expenses. They are sole proprietors and are not in partnership or an unincorporated body for GST purposes. All are GST-registered.

151. Lionel, Betty and Derrick hold a meeting to discuss their needs regarding appropriate office space and furniture. They agree that Betty, as a bookkeeper, will be responsible for making the arrangements and dealing with the shared costs. They agree to this verbally; there is no written agreement.

152. Betty opens a bank account to be used for the shared expenses. Lionel, Betty and Derrick all agree to deposit $2,000 a month into the account to cover their one-third share of the total estimated operating costs. All operating expenses are paid out of this account. Betty has sole signing authority on the account, and it is not used to pay any other expenses. Betty provides a quarterly report of all deposits and operational costs related to this account.

153. Betty signs a lease for office space, furniture and equipment. She also enters into contracts for all utilities. The vendors, including the landlord, are not aware of the arrangements between the parties when they contract with Betty.

154. Betty receives no payment for setting up the office, paying the bills and preparing the accounts. Is Betty acting as an agent or as a principal and how should the transactions be treated for GST purposes?

Essential features of agency

155. As there is no written agreement, it is appropriate to have regard to the surrounding circumstances.

156. The verbal agreement and the parties' subsequent actions indicate that Lionel and Derrick gave Betty authority to act on their behalf to create or affect their legal relationships with third parties in relation to the relevant supplies. The parties are viewed as having consented to that arrangement.

Other features of agency

157. Betty is not paid a commission for her work. Payment of a commission strongly indicates an agency relationship. However, in this case, Betty was also not realising a profit – which would be consistent with acting in her own right, so the Commissioner views this factor as neutral.

158. Betty also obtains title (a one-third share) in the goods and services she obtains as agent (lease of the office space and furniture, utilities). However, it is arguable that she only obtains that interest in her capacity as principal – not as agent. Again, this factor is neutral.

159. Betty does appear to assume some risks in these transactions. By entering into the agreements in her own name, she could be exposed to risk if Lionel and Derrick stop contributing to the bank account. However, if an agency relationship is held to exist, she would be able to sue Lionel and Derrick for defaulting on the agreement. This factor might therefore support the existence of an agency relationship.

160. Factors supporting a finding of agency are the fact that the principals reimburse Betty for the expenses (by way of payment into the account) and there is an element of control by Lionel and Derrick over Betty. They are aware of her activities and are well placed to object if she acts outside the scope of her authority. Betty is also required to prepare quarterly reports of the activities that she has undertaken on their behalf.

161. On balance, the transactions entered into by Betty are made as an agent on behalf of Lionel and Derrick, as well as on Betty's own behalf. She also acts as agent for expenses incurred in setting up the office (office space, furniture, utilities) and its ongoing operating requirements, including the payment of bills.

162. For GST purposes, supplies made to Betty as agent are deemed to be made to Lionel, Derrick and Betty, and not to Betty alone. (See also, *Durham Aged Mineworkers' Homes Association v Customs & Excise Commissioners* [1994] STC 553 (QB) and Revenue Canada's Policy Statement on GST and Agency - GST/HST Policy Statement P-182R.)

Example 14: Multi-level marketing arrangement

163. Arabella is a wholesale distributor of "Natural Shine" beauty products. She appoints a dealer called Milo who recruits his friend Luna to host a Natural Shine party for her friends. At the party, samples of Natural Shine are displayed and Luna's friends are encouraged to order the products.

164. The dealer application form describes Milo as an "independent agent" operating his own business. The order form used by Milo explains that the products are Arabella's property until paid for.

165. Although the beauty products are sold to Luna's friends at recommended retail prices, Milo is under no obligation to sell them at those prices or to even inform Arabella of the price the goods are sold at. However, Milo's profits on the products are fixed by reference to the recommended retail prices (Milo is required to pay Arabella 70% of the recommended retail price – which for Nature Shine is $100. This means Arabella receives $70). The amount retained by Milo ($30) is described in the dealer application form as his "commission". Milo is not indemnified against loss nor expressly obligated to account for any profit. For example, if one of Luna's friends fails to pay for their beauty products, the loss falls on Milo, not Arabella.

166. Arabella is assessed for GST on the basis that she sold Natural Shine beauty products through the agency of her dealer Milo. She is therefore assessed on the retail price of the goods (what Milo has sold them for - $100) rather than on the amount she received (70% of the recommended retail price or $70). Arabella argues that she is selling the products in her own right and should only be assessed for GST on the 70% she receives.

167. Is Milo acting as agent for Arabella, or is she acting in her own right, selling the products to Milo?

Essential features of agency

168. The dealer application form and the order form do not contain any express provisions concerning the legal relationship between the parties from which authority and consent might be inferred. Therefore, the surrounding circumstances must be considered to determine whether the relationship is one of agency.

Other features of agency

169. Payment of a commission strongly supports an agency relationship, and the dealer application form refers to the dealer's profit as "commission". However, there is "no magic" to the use of the word "commission" and it is important to determine whether the term has been misused. In this case, the way the payment process works is that Milo can make a profit on the sale of the products if he chooses to charge more than the recommended retail price. This suggests that he is acting in his own right, rather than as agent for Arabella.

170. Factors that do not support a finding of agency are: Milo can decide on the sale price of the beauty products, Milo is not required to reveal the sale price of the beauty products to Arabella and Milo assumes the risk in the sale transactions.

171. The fact that the products remain the property of Arabella until paid for might support an agency relationship, as a principal typically retains title to property until sold. However, it is also arguable that a clause specifying this would be unnecessary if the goods were being held by Milo as agent.

172. On balance, the sales entered into by Milo are made in his own right and not as agent on behalf of Arabella. Milo purchases the goods from Arabella and resells to his customers. (see *Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners* [1985] STC 45 (CA).

GST treatment

173. Arabella needs to account for GST on the amount received from Milo (70% of the recommended retail price, in this case $70). Milo must account for GST on 100% of the recommended retail price, in this case, $100). Both are entitled to claim input tax deductions.

Example 15: Bailment of livestock

174. Bret is a farmer. He bails some livestock to Diane (a neighbouring farmer) for a period of 3 years. Diane agrees to pay Bret a bailment fee for the use of the livestock during this period. Under the terms of their agreement, Diane can sell the livestock to a third party at any time, but at the end of the bailment period she must return to Bret livestock of the same quality and quantity. Diane is responsible for maintaining the herd during this time and must replace any shortfall in livestock. However, she is entitled to any resulting offspring. Is Diane also acting as agent for Bret when she sells the livestock or is she selling in her own right?

Essential features of agency

175. The bailment agreement does not contain any express provisions concerning agency. Therefore, the surrounding circumstances must be considered to determine whether the bailment relationship is also one of agency.

Other features of agency

176. Diane is not paid a commission – instead she pays Bret a bailment fee for the use of the livestock. She gets the use of the livestock, which will be beneficial for her farming business, and any resulting offspring become her property. She therefore stands to make an independent profit from the arrangement, which is not consistent with agency.

177. Diane obtains possession of Brett's livestock under the agreement. The agreement also permits her to sell the livestock, provided she returns the same quality and quantity of livestock to Brett at the end of the bailment period. That she can sell the livestock to a third party suggests that she has ownership of the livestock as well. (This is unusual in a bailment, but is a common feature of livestock bailments, see for example *Harding and Ors v CIR* (1976) 2 NZTC 61,145 (SC).)

178. Diane also assumes the risk in this transaction, which is not consistent with agency. If the livestock die during the bailment period Diane must replace them with livestock of the same quality and quantity.

179. Another factor inconsistent with agency is that an agent does not treat the principal's goods as their own assets. In this example, Diane is treating Bret's livestock as her own assets and has incorporated them into her business.

180. When Diane sells the livestock to third parties, she sets the sale price herself without consulting Bret and she is under no obligation to notify him of the sale. The proceeds from the sale are not kept separate but are incorporated back into Diane's business. All these factors are inconsistent with agency.

181. In conclusion, the surrounding circumstances do not support a finding of agency.

References

Case references

Au Pied du Mont Sainte-Anne Condominiums v Canada [2004] TCJ No 22 (TCC)
Canada v Merchant Law Group [2010] FCJ No 990 (FCA)
Case R34 (1994) 16 NZTC 6,190
Case T35 (1997) 18 NZTC 8,235
Case 14/2014 (2014) 26 NZTC 2,024
Chatham Islands Enterprise Trust v CIR (1999) 19 NZTC 15,075 (CA)
CIR v Capital Enterprises Ltd (2002) 20 NZTC 17,511 (HC)

CIR v Databank Systems Ltd (1989) 11 NZTC 6,093 (CA)
CIR v New Zealand Refining Co Ltd (1997) 18 NZTC 13,187 (CA)
Commerce Commission v Harmoney Ltd [2018] NZHC 1107
Commissioner of Customs & Excise v Plantiflor [2002] UKHL 33
Customs and Excise Commissioners v Music and Video Exchange Ltd [1992] STC 220 (HC)
Customs & Excise Commissioners v Reed Personnel Services Ltd [1995] BVC 222 (HC)
Durham Aged Mineworkers' Homes Association v Customs & Excise Commissioners [1994] STC 553 (QB)
Estate Realities Ltd v Wignall [1992] 2 NZLR 615 (HC)
Fenswick International Ltd v GR International Ltd [2014] NZHC 1119
Fraser-Ramsay (New Zealand) (Limited) v De Renzy (1912) 32 NZLR 553 (SC)
Gannow Engineering Co Ltd v Richardson [1930] NZLR 361 (SC)
Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation [1967] 2 All ER 353 (HL)
Glengarry Bingo Assn v Canada [1999] FCJ No 316 (FCA)
Harding and Ors v CIR (1976) 2 NZTC 61,145 (SC)
Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners [1988] STC 424 (HC)
HMRC v Secret Hotels2 Limited [2014] UKSC 16
ID Tours New Zealand Limited v CIR [2015] NZHC 483, (2015) 27 NZTC 22,001
Lower Hutt City v Attorney-General [1965] NZLR 65 (CA)
Marac Life Assurance Limited v CIR (1986) 8 NZTC 5,086 (CA)
Masport Ltd v Morrison Industries Ltd CA 392/92 31 August 1993
Paper Reclaim Ltd v Aotearoa International Ltd [2007] NZSC 26
Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners [1985] STC 45 (CA)
Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd [2013] UKSC 15
Spearmint Rhino Ventures (UK) Limited v HMRC [2007] EWHC 613 (Ch)
Stiassny v North Shore City Council [2008] NZCA 522
CIR v Suzuki NZ Ltd (2000) 19 NZTC 15,819 (HC)
Suzuki NZ Ltd v CIR (2001) 20 NZTC 17,096 (CA)
Westpac Banking Corporation v Savin and Ors (1986) 1 NZBLC 102,345 (CA)
Zhong v Wang [2006] NZCA 242

Legislative References

Goods and Services Tax Act 1985 – s 3A, s 20(3C)(a), s 24(1), s 58, s 59, s 60(1), s 60(1A), s 60(1AB), s 60(1B), s 60(1C), s 60(2), s 60(3), s 60(4), s 60(5), s 60(6), s 60(7), s 60C, s 60D, s 75, s 75(3E)

Related Rulings/Statements

"Disbursements by professional firms on behalf of clients – GST" *Tax Information Bulletin* Vol 6, No 1 (July 1994):5.
"GST – Specified agent for incapacitated persons" *Tax Information Bulletin* Vol 7, No 6 (December 1995):13.
"GST – Tax Invoices" *Tax Information Bulletin* Vol 11, No 9 (October 1999):80
"Importers acting as agents for non-residents" *Tax Information Bulletin* Vol 12, No 12 (December 2000):11
"Funeral expenses paid by funeral directors in connection with funeral arrangements" *Tax Information Bulletin* Vol 13, No 8 (August 2001):9.)
"QB 16/03: Goods and Services Tax – GST treatment of bare trusts" *Tax Information Bulletin* Vol 28, No 5 (June 2016):16
"GST on low-value imported goods" *Tax Information Bulletin* Vol 31, No 8 (September 2019):28

Other references

HG Beale (ed), *Chitty on Contracts* (33rd ed, Sweet & Maxwell, London 2018) Vol 2
P Watts & FMB Reynolds, *Bowstead & Reynolds on Agency* (21st ed, Sweet & Maxwell, London, 2018)
The Laws of New Zealand: Agency Part 1 (online ed, accessed 14 December 2020)
Revenue Canada's Policy Statement on GST and Agency - GST/HST Policy Statement P-182R

Appendix: Case summaries

182. The following cases have been referred to in this Interpretation Statement and are summarised below.

New Zealand

GST cases

183. Section 60 of the Act has been considered by the New Zealand courts on several occasions. The most significant cases are discussed below.

Case R34

184. In *Case R34* (1994) 16 NZTC 6,190 the taxpayer imported vehicles from its overseas parent company (MC). MC provided a warranty that the vehicles were free of defects. The taxpayer distributed the vehicles to dealers in New Zealand, with the warranty. The dealers sold the vehicles to customers and passed on the warranty. The issue was whether the dealers acted as agent for the taxpayer when they provided the customers with the warranty. The dealer agreement between the parties specifically stated that dealers were not to refer to themselves as the taxpayer's agents.

185. The TRA found that although the customer takes title from the dealer, the warranty to the customer is given by the dealer as agent for the taxpayer. It was clear from the agreement that the taxpayer had authorised dealers to conclude warranty contracts with customers and to perform work under the terms of the warranty, on its behalf. These contractual obligations outweighed the terms of the same agreement that attempted to deny an agency relationship.

186. . Therefore, there was an agency relationship between the parties, even though the agreement specifically precluded it. The TRA noted that agency can only be established by the consent of the principal and the agent and they will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it.[5]

187. This case was subsequently appealed to the High Court[6] and Court of Appeal[7]. Both courts confirmed the TRA's conclusions on agency, without analysing the issue further.

Case T35

188. In *Case T35* (1997) 18 NZTC 8,235 the taxpayer operated a storage facility for parts that it imported from an offshore manufacturer. The parts were provided free of charge to those customers who required replacement parts. The taxpayer charged the manufacturer a fee for storage and for providing the parts to customers. The manufacturer did not invoice the taxpayer for the parts and the taxpayer did not take legal title. The taxpayer paid the GST imposed by Customs and claimed an input tax deduction. The claim was disallowed. The issue was whether the taxpayer was holding the parts as agent or as principal.

189. The TRA held the taxpayer was not entitled to an input tax deduction as it did not acquire or own the parts in terms of the definition of "input tax".[8] The taxpayer held the parts as agent for the manufacturer. Therefore, the supply to customers was made by the manufacturer and not the taxpayer.

190. The TRA found that the parts were clearly incorporated into the taxpayer's business. However, this did not prevent it from finding an agency relationship. It was considered of greater significance that the taxpayer did not acquire title to the goods, nor did it pay for then.

CIR v Capital Enterprises Ltd

191. The taxpayer in *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC) sold a commercial property to an unregistered purchaser. The purchaser advised the taxpayer that they were acting as agent for their property company (which was GST-registered) so the supply could be zero-rated as a going concern. The Commissioner argued that the purchaser was acting as a principal and not as an agent and therefore the supply must be standard-rated.

192. The High Court found there was no agency relationship. The purchaser was acting in their own best commercial interests and not to effect the instructions of the property company. The taxpayer was therefore liable for output tax on the sale as the purchaser was not registered so the sale could not be zero-rated.

193. In reaching this decision, the High Court endorsed the definition of agency from *Bowstead & Reynolds* (at [19] above).

[5] From *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation* [1967] 2 All ER 353 (HL) discussed at [216].

[6] *CIR v Suzuki NZ Ltd* (2000) 19 NZTC 15,819 (HC).

[7] *Suzuki NZ Ltd v CIR* (2001) 20 NZTC 17,096 (CA).

[8] The definition of "input tax" was subsequently amended by s 85 of the Taxation (GST & Miscellaneous Provisions) Act 2000 to allow importers acting as agents for non-resident principals to claim input tax on goods they import on behalf of their principal.

ID Tours New Zealand Limited v CIR

194. In *ID Tours New Zealand Limited v CIR* [2015] NZHC 483, (2015) 27 NZTC 22,001 the taxpayer made supplies of tourism advisory services (acquired from local suppliers) to overseas tour operators. The taxpayer argued it was acting as agent for the overseas operators so the supplies could be zero-rated under s 11A(1)(k). The Commissioner argued the taxpayer was acting as principal so the supplies must be standard-rated under s 8(2B).
195. The High Court held that the taxpayer was acting as principal, not as agent. There was nothing in the contracts to indicate that the payment the taxpayer received from the overseas operators was consideration paid by the overseas operator to the local supplier. The court concluded the taxpayer entered into two separate contractual relationships – one with the local supplier, and one with the overseas operator. The taxpayer was therefore liable for GST on the full consideration received from the overseas operator.
196. The court also confirmed that a contract made with a third party by an agent in the exercise of his or her authority is enforceable both by and against the principal. An agent is therefore not legally obligated to pay the debts of its principal. Taking this into account, the court asked what would happen if a local supplier was not paid. Who would they have a claim against for breach of contract? The court considered that any claim would likely be made against the taxpayer not the overseas operator.
197. It was also considered significant that when the taxpayer invoiced the overseas operators they did not distinguish between their fee and the cost of the tourism services nor did they state how their fee was calculated. Presumably this was significant because an agent might typically invoice a principal separately for their services.

General law cases

198. Agency issues arise frequently in a commercial law context. Some significant New Zealand cases are discussed below.

Gannow Engineering Co Ltd v Richardson

199. In *Gannow Engineering Co Ltd v Richardson* [1930] NZLR 361 (SC), Gannow granted Richardson the sole selling rights for Gannow's machines. Under the agreement, Richardson had to buy the machines from Gannow. He then received a "commission", deducted from the purchase price of the machines. Gannow did not specify a retail price for the machines, so Richardson sold them for more than what he had purchased them for. Gannow sued Richardson for this profit, arguing that as an agent Richardson had a duty to hand over any profits to his principal. Richardson argued he sold the machines in his own right, not as agent.
200. The court held the relationship was one of vendor and purchaser and not of agent and principal. Myers CJ observed that while "commission" is a term primarily used to denote the remuneration of an agent, there is "no magic" in its use. In this case, it appears to have been misused, as the real meaning was "discount" or "rebate". Myers CJ also held that the phrase "sole selling rights" was a neutral expression, consistent with either of the contentions.
201. The court identified some further factors that pointed against a finding of agency. For example, the fact that the agreement contained no provision as to the terms on which Richardson was to sell the machines, nor a provision that required payments to be made by the customers from Richardson and not by Richardson himself. It was also considered significant that in some cases, Richardson altered the machines. In these cases, Richardson supplied not only the machine, but other parts obtained from third parties. The parts were required to install the machine, and the total price included the price for these parts and Richardson's own charges for engineering services. (For a similar decision see *Fraser-Ramsay (New Zealand) (Limited) v De Renzy* (1912) 32 NZLR 553 (SC).)

Westpac Banking Corporation v Savin

202. In *Westpac Banking Corporation v Savin and Ors* (1986) 1 NZBLC 102,345 (CA), Aqua sold boats on behalf of customers. The sales proceeds were paid into its overdrawn trading account, with the bank's knowledge. Aqua went into liquidation before it paid its customers. The customers argued Aqua had breached its duty as agent to keep the sales proceeds separate from its own and they were therefore entitled to their money.
203. The Court of Appeal explained the general rule that if a principal entrusts property to an agent to be sold, the property remains the principal's property until the sale. The moment the money is received it is the principal's property. Whether the agent must keep the money separate from their own depends on the terms of the agency. In this case, the court held that Aqua was not entitled to pay the sale proceeds into its account.

204. The court noted that as well as the duty to keep a principal's money separate, an agent owes fiduciary duties of loyalty and fidelity to its principal. It follows that the agent must not, without the informed consent of the principal, stand to receive any benefit other than their professional remuneration. Aqua applied the sale proceeds in discharge of its personal indebtedness to the bank. That was of immediate fiduciary benefit to it. It did so without obtaining the informed consent of its principal and was therefore in breach of these duties. As the bank had constructive notice of the breach it had to account to the customers for their property. (See also *Estate Realities Ltd v Wignall* [1992] 2 NZLR 615 (HC) and *Zhong v Wang* [2006] NZCA 242.)

Stiassny v North Shore City Council

205. In *Stiassny v North Shore City Council* [2008] NZCA 522 the Council operated a weekly rubbish collection. To recover the costs of this service, it required users to purchase branded rubbish bags. The Council entered into a contract with CPL, where CPL agreed to supply and distribute the bags to retailers at a set price. The price was made up of the Council's collection fee, plus CPL's fee. The Council then invoiced CPL for the collection fee. CPL went into receivership and the receiver asked the court whether CPL held the collection fee as agent for the Council.

206. The contractual arrangements were not clear. Some clauses were consistent with agency. For example, the contract for the sale of bags was described as being "on behalf" of the Council. Title and risk passed to the Council on delivery of the bags to the retailer by CPL and the bulk of the price paid by the retailer comprised the Council's fee.

207. However, other factors were consistent with a debtor-creditor arrangement. For example, the contract stated that nothing in this agreement shall create agency between the parties. There was also no indication that the parties intended for CPL to keep the retailer payments in a separate account. In addition, CPL took the risk of a retailer defaulting and CPL had the cash-flow advantage associated with timing differences between the receipt of retailer payments and the obligation to pay the Council.

208. The Court of Appeal held that the critical issue in these circumstances was whether CPL was required to keep the funds in a separate account. If CPL was required to keep the funds in a separate account, the relationship would be one of agency. As the contract did not require this, the relationship was held to be that of debtor-creditor.

Fenswick International Ltd v GR International Ltd

209. In *Fenswick International Ltd v GR International Ltd* [2014] NZHC 1119, Mr Jenkins purchased a block of land. A neighbouring block of land was subsequently put on the market. Mr Jenkins advised Mr Parsons to purchase it. Mr Parsons sent the funds to Mr Jenkins to purchase it for him. Mr Jenkins did not disclose to Mr Parsons that he had already purchased the land and was selling it to Mr Parsons at a $400,000 profit. Mr Parsons later discovered this, and alleged Mr Jenkins had breached his fiduciary duties because he was acting as Mr Parson's agent.

210. The court noted that agency attracts two main fiduciary duties: the duty to avoid a conflict between the agent's own interests and those of the principal; and the duty to avoid profiting from the agency. Cooper J held that Mr Jenkins was acting as Mr Parson's agent and he had a duty to tell Mr Parsons the price at which the property was acquired. By failing to do this, Mr Parsons had breached his fiduciary duties.

Commerce Commission v Harmoney Ltd

211. *Commerce Commission v Harmoney Ltd* [2018] NZHC 1107 concerned a peer-to-peer lending service operated by Harmoney. Harmoney made loans to borrowers, funded by third-party investors. When a loan was funded, Harmoney would transfer the funds to a bank account operated by its sister company HITL. HITL entered into the credit contracts with the borrowers on behalf of the investors. Harmoney then charged the borrowers a fee for arranging the loan. The Commerce Commission argued that the fee was an unreasonable credit fee and was therefore in breach of the relevant consumer legislation.

212. One of the issues for the court was whether Harmoney was a creditor. The Commission argued Harmoney was a creditor because it controlled HITL. Harmoney argued HITL was the creditor and Harmoney only acted as HITL's agent.

213. The High Court found that Harmoney was an undisclosed principal (and therefore a creditor) and HITL was Harmoney's agent. On the agency issue, the court endorsed the definition of agency from *Bowstead & Reynolds on Agency* and confirmed that authority and consent are essential features of agency.

214. The High Court then identified the following features of an agency relationship:
- Agency is a fiduciary relationship.
- An agent's powers cannot extend beyond those of its principal.
- A principal must be legally capable of undertaking those tasks that it delegates to its agent.
- How the parties describe their relationship will be relevant, unless it is shown to be a sham. However, the courts will ultimately have to weigh this up against other relevant circumstances such as evidence of the true character of the relationship.
- The extent to which the principal controls its agent is not necessarily determinative. Control is not an essential feature of agency, but a factor from which an agency relationship might be inferred, in combination with other factors.
- Where there is an undisclosed principal, the agent may also be sued by the third party.

Overseas cases

215. Relevant decisions from the United Kingdom and Canada are discussed below with a focus on decisions that have arisen in a GST or VAT context. These decisions are useful because they illustrate how agency issues can arise. This is not a comprehensive review of the case law in those jurisdictions, but it is intended to identify further agency features that would be applicable in a New Zealand context.

United Kingdom

Garnac Grain Co v HMF Faure

216. In *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd and Bunge Corporation* [1967] 2 All ER 353 (HL), four companies entered into a chain of successive contracts for the sale of lard. Each sale was at a higher price than the last, with the first sellers (A) also acting as the last purchasers (this fact was not disclosed to the second and third companies in the chain). The contracts could not be fulfilled due to the financial collapse of (A). The second buyers (B) could not recover against (A). They therefore tried to rescind their contract with the third buyers (C) on the grounds that (C) acted as undisclosed agent for (A). The issue for the House of Lords was whether there was an agency relationship between (A) and (C).

217. Lord Pearson explained that consent is necessary to establish an agency relationship, at 358:

> The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in Re Megevand, Ex p. Delhasse (7). The consent must, however, have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important. As to the content of the relationship, the question to be asked is: "what is it that the supposed agent is alleged to have done on behalf of the supposed principal?"

218. The House of Lords held there was no agency relationship because (A) had not consented to (C) acting on its behalf. Based on the contractual arrangements between the parties, the parties were buying and selling in their own right.

Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners

219. In *Potter and Another (trading as P&R Potter Wholesale) v Customs and Excise Commissioners* [1985] STC 45 (CA) the taxpayers were distributors of Tupperware. Distributors appointed dealers and then dealers recruited people to hold Tupperware parties where orders were taken from members of the public. The contracts between the parties described the dealers as "independent agents" and explained that the goods were the distributors' property until payment was made. Although the goods were usually sold at retail prices, the dealers were under no obligation to do this or to even tell the distributors the price the goods had been sold at. However, dealers' profits were fixed by reference to the retail price (dealers were required to pay the distributors 70% of the retail price).

220. The Commissioners argued that the taxpayers sold the goods as principals through the agency of their dealers. The taxpayers were therefore assessed on the retail price of the goods rather than on the amount they received (70% of the retail price). The taxpayers argued they were selling in their own right and should only be assessed for VAT on the 70%.

221. The court held that the relationship between the distributors and the dealers was a buyer and seller relationship rather than an agency relationship. In reaching this decision, Donaldson MR noted that the only factor which pointed towards agency was that the dealer referred to their gross earnings as a "commission". The fact that the dealership application form referred to the remuneration or profit of the dealer as earnings and the fact that earnings are derived from sales, were considered neutral factors.

222. However, several factors pointed away from agency:
   - The dealer was not required to reveal the identity of the customers.
   - The dealer had complete freedom to decide on the selling price.
   - The dealer was not required to notify the distributor of the price at which the goods were sold.
   - The clause providing that the goods remained the property of the distributor until paid would be unnecessary if the goods were held by an agent.
   - No objection was raised regarding dealers ordering stock in anticipation of a price rise. This amounted to raising their "commission" without the consent of their principals or alternatively to making a secret profit.
   - The dealers were responsible for bad debts.

Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners

223. The taxpayers in *Hill and Another (trading as JK Hill & Co) v Customs and Excise Commissioners* [1988] STC 424 (HC) were pottery retailers. They acquired pottery directly from the makers. The agreement between the parties stated that the order was placed by the taxpayers as agent for the makers and any remittances made by the taxpayers to the makers prior to sale represented prepayment deposits. The Commissioners argued that the taxpayers acquired pottery as principal and assessed them for VAT on the retail price of the goods. The taxpayers argued they were acting as agent for the makers so only had to pay VAT on their commission.

224. The High Court held that the taxpayers acted as agent for the makers and not as principal. The court identified the following factors as supportive of agency:
   - The reference to the taxpayers "selling on behalf of" the makers in the contracts was considered neutral. However, the court thought it significant that the taxpayers could "retain the discretion to buy in at the net supplier price". This only had meaning in the context of an agency relationship.
   - The makers understood their relationship with the taxpayers was one of agency.
   - The makers regarded the pottery they submitted as theirs until it was sold.
   - On occasion, some of the makers took back work if it remained unsold.

225. The Commissioners argued that the makers expected to be paid before the pottery was sold and that this did not support a finding of agency. The court concluded this was a subjective expectation and it was not enough to override the agency relationship.

Customs and Excise Commissioners v Music and Video Exchange Ltd

226. The taxpayer in *Customs and Excise Commissioners v Music and Video Exchange Ltd* [1992] STC 220 (HC) sold second-hand musical equipment. Owners were given a valuation based on the anticipated sale price of the equipment. If the owner accepted the valuation, the parties would enter into a written agreement. The agreement provided that the goods were accepted for sale on the owner's behalf by the company acting as agent. If the equipment fetched a higher price than the valuation, the owner would pay the taxpayer a fee, calculated as the difference between the valuation price and the sale price.

227. The Commissioners argued that while the terms of the agreement supported a finding of agency, the conduct of the parties supported the conclusion that the taxpayer sold the equipment to the buyers as principal. The taxpayer argued it was acting as agent for the owners and should only pay VAT on its fee and not on the total sale price of the goods.

228. The High Court held that the agreement between the owner and the taxpayer was a contract of agency. None of the evidence was strong enough to displace the clear words of the contract. The following facts supported a finding of agency:
   - The contract was consistent only with the relationship of principal and agent.
   - Title in the goods remained with the owners even after the taxpayer had been paid.
   - The taxpayer had the right to vary the price at which he sold the goods to buyers without the consent of the owner. This clause would be unnecessary if the taxpayer had already acquired title in the goods.
   - The taxpayer had a right to claim a handling charge.
   - Once the owner had been paid, they played no further part in the transaction.
   - The taxpayer gave a guarantee to the buyer.
   - The buyer was given no information about the owner.

- The taxpayer could repair the goods before they were sold. This was considered inconsistent with agency but not enough to displace the finding of agency. The risk of doing work on the goods would be one that the taxpayer might regard as worth taking to increase the value of the goods.
- The court also found the following factors were not typically found in an agency relationship, but were nevertheless "not inconsistent" with agency:
  - The taxpayer could decide the price to be accepted from the buyer and may decide to accept less than the valuation already paid to the owner.
  - Once a sale had taken place, the owner was given no information about it – nor did they learn the size of the taxpayer's commission.
  - The taxpayer in practice assumed responsibility for damage or loss of the goods while in the shop. This was consistent with a sale but not inconsistent with agency.

Commissioners of Customs and Excise v Plantiflor Limited

229. In *Commissioners of Customs and Excise v Plantiflor Ltd* [2002] UKHL 33 the taxpayer sold plant bulbs by mail order. It arranged delivery of the goods via Parcelforce. The taxpayer issued an invoice to the customer which included a £1.63 postage charge. VAT was not charged on this amount as under the VAT legislation public postal services were exempt. The taxpayer argued it was acting as agent for the customers in its dealings with Parcelforce and it was Parcelforce who provided the postal services to the customer. The Commissioners disagreed.
230. The House of Lords held that the contract between the taxpayer and Parcelforce established no link between Parcelforce and the customer. There was nothing in the agreement to indicate an agency relationship. Parcelforce agreed to deliver parcels for the taxpayer and the taxpayer was liable to pay the charge. Parcelforce therefore made two separate supplies. One was a supply to the taxpayer of the service of delivering the goods ordered. The other was a supply to the customer of the service of delivery.

Spearmint Rhino Ventures (UK) Limited v HMRC

231. In *Spearmint Rhino Ventures (UK) Limited v HMRC* [2007] EWHC 613 (Ch), the taxpayer was a gentleman's club. Dancers could be engaged to perform private dances for customers at the club. The dances were arranged between the customers and the dancers. The customers paid the dancers directly, not the club. The dancers entered into an agreement with the club. Under this agreement, the dancers paid the club a sum of money which entitled them to enter the club and dance.
232. The issue was whether the services were supplied by the club or by the dancers. The Commissioners argued that the services were supplied by the club to the customer via the dancers (who acted as agents for the club). Therefore, the club must account for VAT on those services. The club argued that the services were provided by the dancers.
233. The High Court held there was no agency relationship. The documents did not suggest the dancers were vested with any authority to act on behalf of the club. However, the court observed that the documents are not the entire story. The true relationship between the parties is to be gleaned from the overall effect of the documents, coupled with any other relevant facts.
234. Of crucial significance was the fact that while the fees were agreed by the club, the entire fee was kept by the dancers. That the dancers were obliged to pay a fee to the club did not mean they negotiated the dance on behalf of the club. The dancers negotiated on their own behalf.
235. The Commissioners had focused on the control the club had over the dancers. The dancers' conduct was closely controlled, and their fees were set by the club. The court noted that control does not create agency, although it might be consistent with it. The court held that while the club benefited from the dancers' activities and controlled their activities to an extent, these facts did not undermine a finding of agency. The court also attributed no real significance to the fact that advertising material for the club referred to the dancers as "our dancers".

HMRC v Secret Hotels2 Limited

236. In *HMRC v Secret Hotels2 Limited* [2014] UKSC 16, the taxpayer marketed holiday accommodation through a website. Hoteliers who wanted to be marketed on the site entered into an agreement with the taxpayer. The agreement described the hotelier as the principal and the taxpayer as its agent. Customers could book a hotel room directly with the hotelier through the website but had to pay the taxpayer directly. The taxpayer would then pay a lesser sum to the hotelier. The margin between what was received from the customer and what was paid to the hotelier was described as the taxpayer's commission.

237. The Commissioners assessed the taxpayer for VAT on the gross consideration it received from guests on the basis that it acquired the accommodation from the hotelier as principal and then supplied it to the customer. The taxpayer argued the hotelier supplied the accommodation to the customer and it was only acting as agent. The Supreme Court found for the taxpayer and agreed the taxpayer was acting as agent for the hoteliers and not as a principal.

238. The court noted that the agreement between the taxpayer and the hoteliers described their relationship as one of agency. However, the court observed that when deciding on the categorisation of a relationship the label the parties have used to describe their relationship cannot be conclusive and may often be of little weight. The correct approach was to interpret the agreement with regard to the words used, the provisions of the agreement as a whole, the surrounding circumstances and commercial common sense.

239. The Commissioners argued that the documentation between the parties did not support a finding of agency. For example:
- the taxpayer was able to set its own commission;
- the hoteliers were required to compensate the taxpayer for its losses if they did not provide the accommodation they had agreed to provide;
- the hoteliers were required to honour bookings, allow inspections by the taxpayer and keep the hotel clean and insured (the Commissioners argued these provisions indicated that the taxpayer's interest was wider than that of mere agent); and
- the agreement was very one-sided in that it contained no express obligations on the taxpayer, not even an obligation to promote the hotels.

240. The court was not persuaded by the Commissioners arguments and noted that they reflected the fact that the taxpayer had a substantial business and had substantial goodwill in the market which it wished to protect. The taxpayer was therefore in a much more powerful negotiating position than the hoteliers. The court also concluded that there is no reason why an agent should not be able to fix their own commission.

241. The court also reviewed the taxpayer's website and noted that it emphasised that the taxpayer was acting as agent. The Commissioners argued that some aspects of the website were inconsistent with agency. For example, if a customer cancelled the booking a cancellation fee was retained by the taxpayer and not passed on to the hotelier; and if the hotelier was unable to provide the room as booked, the taxpayer agreed to try and find similar accommodation, or would permit the customer to cancel free of charge. Again, the court considered that these terms simply reflected the relative bargaining power of the taxpayer and did not undermine a finding of agency.

242. Having concluded that the documentation supported a finding of agency, the court went on to consider whether the characterisations in the documentation represented the economic reality. The Commissioners raised several factors that they believed undermined the agency agreement. The court was not persuaded. For example:
- The taxpayer dealt with customers in its own name on the website. The court said this was not inconsistent with agency.
- The taxpayer dealt with customer complaints and compensation in its own name. This was contrary to the agreement between the taxpayer and the hoteliers but was not significant and was not inconsistent with agency.
- In relation to VAT, the taxpayer dealt with the hoteliers in a manner inconsistent with agency. It did not provide the hoteliers with invoices for its commission (or even notify them of the amount), making it impossible for the hoteliers to account for VAT. It also failed to account for VAT correctly as an agent (or as principal). The court did not think this was a strong point.
- The hoteliers would invoice the taxpayer for the net sum (the gross sum, minus their commission). The court concluded that, on their own, the invoices could not change the nature of the contractual arrangements between the parties.
- The taxpayer often reserved blocks of rooms and paid the net sum in advance. The court considered this factor to be consistent with agency.

Canada

Glengarry Bingo Assn v Canada

243. In *Glengarry Bingo Assn v Canada* [1999] FCJ No 316 (FCA), the taxpayer ran bingo events for its members. It leased a hall, hired staff and purchased bingo equipment. After each event, the member paid the taxpayer. The taxpayer returned GST on the rent and bingo cards but not on the equipment or staff. It argued that for those supplies it was acting as an agent for its members. The Minister of National Revenue (the Minister) assessed the taxpayer for GST on those supplies and the taxpayer appealed.
244. The court held that the taxpayer was acting as principal and not as agent for its members when it supplied equipment and staff. The taxpayer entered into the employment contract with the staff: it hired and paid them; it prepared their schedules; and identified their duties. It did not hold itself out to the staff that it was acting as agent. The court explained that "it is well established that risk is a significant factor in determining whether an agency relationship exists" and in this case the members were "insulated from the activities of the taxpayer". Regarding the equipment, the taxpayer owned the equipment and rented it to members. There was no evidence that the taxpayer held itself out as agent or that the members were at risk concerning any of the taxpayer's obligations for the equipment.
245. The court noted there was no provision in the agreement that the taxpayer would act as agent. It held funds and reimbursed its members, but this alone is not determinative of agency. Furthermore, the taxpayer did not keep the funds received for expenses in a separate account and its financial statements treated the funds as the taxpayer's property. This suggested the taxpayer treated the money as an asset and was not holding it as an agent.

Au Pied du Mont Sainte-Anne Condominiums v Canada

246. In *Au Pied du Mont Sainte-Anne Condominiums v Canada* [2004] TCJ No 22 (TCC), the taxpayer operated a resort. The condominium company also entrusted the taxpayer with some management tasks, such as negotiating contracts and hiring staff. The taxpayer did not account for GST on these services as it argued it was acting as agent for the company. The Minister disputed this.
247. The court concluded that in this case there was no agency relationship. Based on the agreements, the taxpayer did not have the authority to commit and bind the company. It was not enough for the taxpayer to negotiate an agreement; the agreement must commit and bind the principal.
248. The court noted there were some indications of an agency relationship: the taxpayer did not realise profits, the management fees were set at a fixed rate (like a commission), and the taxpayer was required to act with prudence and diligence. However, this was not enough to overcome the lack of authority.

Canada v Merchant Law Group

249. In *Canada v Merchant Law Group* [2010] FCJ No 990 (FCA), the taxpayer (a law firm) acquired goods and services from third-party suppliers. The taxpayer argued the goods and services were disbursements that it incurred as agent for its clients and did not need to account for GST. The Minister argued the disbursements were consideration for the supply of legal services and were therefore taxable.
250. The court held there was no agency relationship. The taxpayer did not possess the authority to affect their client's legal position and therefore the clients were not bound by the third-party contracts. The court said it did not follow that because the solicitor-client relationship was generally one of agency, all financial obligations incurred by a lawyer while providing legal services were incurred as agent. The disbursements were therefore taxable supplies.
251. The taxpayer argued that the disbursements were paid for by monies held in trust by the taxpayer and that this indicated agency. The court agreed that this feature was an indicator of agency, but without authority it was insufficient to create an agency relationship.

QUESTION WE'VE BEEN ASKED

This section of the *TIB* sets out the answers to some day-to-day questions people have asked. They are published here as they may be of general interest to readers.

QB 21/01: Income tax – Monthly retirement payments from the United Nations Joint Staff Pension Fund

Question

Is a retired United Nations staff member who is a New Zealand tax resident exempt from New Zealand income tax on the monthly retirement payments they receive from the United Nations Joint Staff Pension Fund?

Answer

No, the tax exemption in the Diplomatic Privileges (United Nations) Order 1959 does not extend to the monthly retirement payments United Nations staff members receive from the United Nations Joint Staff Pension Fund.

In general, monthly retirement payments received by retired United Nations staff members are taxed as pensions under s CF 1(g). The foreign superannuation rules in s CF 3 do not apply to pensions.

There are two exceptions to this general rule:

- the retired United Nations staff member's interest in the United Nations Joint Staff Pension Fund is covered by the foreign investment fund rules; or
- the retired United Nations staff member is provided relief from tax under the transitional residency rules for the period of their transitional residency.

Key terms

UNJSPF means the United Nations Joint Staff Pension Fund.

Retired UN staff means former staff of the United Nations who have retired and are receiving monthly retirement payments from the UNJSPF.

Monthly retirement payments means a monthly retirement benefit received from the UNJSPF, as set out in arts 28, 29 or 30 of the UNJSPF Regulations, other than a commuted payment.

Transitional resident means someone who qualifies for a temporary tax exemption for usually up to 4 years on foreign income that is not employment income or income from services (s HR 8(2)).

Explanation

1. This Question We've Been Asked (QWBA) updates and replaces the QWBA published as "Tax treatment of United Nations Joint Staff Pension Fund pensions", *Tax Information Bulletin* Vol 8, No 10 (December 1996) (the 1996 QWBA). The answer regarding the taxation of monthly retirement payments received by retired UN staff remains the same but some of the rules around how such payments are taxed have changed.

What this QWBA covers

2. This QWBA addresses two issues:
   - whether retired staff of the United Nations and its associated member organisations (UN Staff) who are tax resident in New Zealand are exempt from New Zealand income tax on the monthly retirement payments they receive from the United Nations Joint Staff Pension Fund (UNJSPF) under New Zealand's diplomatic privileges and immunities rules; and
   - how the Income Tax Act 2007 (ITA 2007) taxes the monthly retirement payments of those retired UN staff.
3. This QWBA sets out the tax treatment for retired UN staff who are New Zealand tax residents, including those residents who are transitional residents. For more information on determining tax residence and transitional residence status refer to Interpretation Statement IS 16/03 *Tax residence and the Transitional residency flowchart* IR1028.
4. This QWBA does not address the tax treatment of lump sum payments received from the UNJSPF, either as a withdrawal settlement amount or as a commutation of the monthly retirement payments, or other benefits payable by the UNJSPF to former UN staff or their families. Lump sum payments from the UNJSPF may be taxed differently from monthly retirement payments.

Background

5. The UNJSPF is a fund established to provide retirement, death, disability and related benefits to UN staff after their service to the United Nations or one of its member organisations (UN) has ended. It was established in 1948 by a resolution of the General Assembly of the United Nations and is governed by the *Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund* (UNJSPF Regulations). This QWBA refers to the UNJSPF Regulations as at 1 January 2020.
6. In general, UN staff become participants in the UNJSPF (Participants) when they start working for the UN under an appointment that lasts longer than six months. UN staff contribute to the UNJSPF while employed by the UN. The UN also contributes to the UNJSPF, currently at twice the Participants' rate.
7. Contributions cease when a Participant "separates" from the UN. "Separation" means ceasing to be in the active service of the UN (otherwise than by death). Separation includes retirement. "Service" is employment as a member of staff of the UN.
8. A record is kept of a Participant's contributions to the UNJSPF over their years of contributory service. However, a Participant's entitlement to benefit from the UNJSPF only vests after their separation from the UN and is limited to the benefits they qualify for under the UNJSPF Regulations.
9. A Participant's entitlement to a retirement benefit from the UNJSPF vests on the day following the last day of their contributory service if they satisfy the necessary conditions for reaching retirement age and years of contributory service. Retirement benefits are paid monthly for life.
10. The UNJSPF is a foreign superannuation scheme for New Zealand tax purposes. It is a defined benefit scheme. The assets of the UNJSPF are acquired, deposited and held in the name of the UN, separately from the assets of the UN, on behalf of all the Participants and beneficiaries of the UNJSPF. If there is a deficiency in funds to meet its obligations to its beneficiaries, the UN will make good the deficiency.

Are the monthly retirement payments taxable?

11. UN staff currently in active service to the UN are exempt from New Zealand income tax on emoluments received by them as officers or servants of the UN. This is because the UN is an international organisation, and it is usual for New Zealand and other member states of such an organisation to extend immunities and privileges (like tax exemptions) to those organisations and its officials.
12. A common question asked by retired UN staff is whether their UNJSPF monthly retirement payments are exempt from New Zealand income tax on the same basis as the emoluments of UN staff currently in active service to the UN.

New Zealand's tax exemption for current UN staff

13. The ITA 2007 contains a provision that exempts income from income tax if it is exempted by another Act (s CW 64).
14. The Diplomatic Privileges and Immunities Act 1968 (the DPI Act) allows the Governor-General to make Orders in Council specifying tax exemptions for representatives of international organisations, like the UN.[1]
15. Since New Zealand acceded to the Convention on the Privileges and Immunities of the United Nations (the UN Convention) on 10 December 1947, a number of Orders in Council have been made by the Governor-General of New Zealand. Essentially, these Orders are intended to give effect to New Zealand's obligations under the UN Convention in New Zealand law. The UN Orders in Council each contain broadly the same terms and so this QWBA focuses on the Diplomatic Privileges (United Nations) Order 1959 (the UN Order).
16. To determine if the income tax exemption in s CW 64 of the ITA 2007 applies to the monthly retirement payments received by retired UN staff it is necessary to determine if the tax exemption provided in the UN Order which gives effect to the UN Convention applies to those payments.

Does the UN tax exemption apply to the monthly retirement payments?

17. No. The tax exemption in the UN Order does not extend to monthly retirement payments received by retired UN staff from the UNJSPF. The UN Order was intended only to provide a tax exemption for emoluments earned by UN staff while they were actively serving as officers or servants of the UN.

[1] The predecessor to the DPI Act was the Diplomatic Immunities and Privileges Act 1957 (the 1957 Act). Orders in Council made under the 1957 Act have continued effect under the DPI Act because of s 20 of the Interpretation Act 1999.

Why are the monthly retirement payments taxable in New Zealand?

Approach to interpreting the UN Order

18. While the UN Order is a domestic enactment, it reflects and gives effect to New Zealand's international commitment to the UN as a member country. Accordingly, in the Commissioner's view, it is not a narrow domestic view of the words that is required, but rather a broader purposive approach along the lines of the interpretation of international treaties and conventions. This is consistent with the approach Sinclair J took in *Andrews v CIR; Muir v CIR* (1979) 4 NZTC 61,443 when interpreting the legislation incorporating New Zealand's commitments to the Asian Development Bank. Sinclair J accepted that interpreting such legislation calls for an approach of "ascertaining the true meaning of the words" used. Also, there needs to be "a degree of pragmatism"[2] when interpreting the words in the UN Order to recognise the fact that the underlying UN Convention was an agreement negotiated by many countries and not simply by New Zealand.

19. Therefore, the Commissioner's approach to interpreting the tax exemption in the UN Order has been to ascertain the true meaning of the words used in the UN Order by considering:
    - the purpose of New Zealand granting the tax exemption in the UN Order;
    - the wording and construction of the tax exemption granted in the UN Order;
    - the ordinary meaning of the word "emoluments", including how courts in New Zealand and overseas have interpreted that word domestically; and
    - the international stance on tax exemptions in international agreements.

Purpose of the tax exemption in the UN Order

20. To assist with ascertaining the true meaning of the words used in the tax exemption in the UN Order it is helpful to understand the purpose of the tax exemption. There is limited case law in New Zealand relevant to understanding the purpose of a tax exemption clause in one of New Zealand's international agreements and none directly considering the UN Order. However, the High Court in *Andrews* provides some assistance. It considered the purpose of the tax exemption clause contained in the Asian Bank Development Agreement that was implemented into New Zealand law by the International Finance Agreements Amendment Act 1966. The issue was whether amounts paid by the Asian Development Bank to independent contractors were exempt from New Zealand income tax as "emoluments". When interpreting the term "emoluments" for the purposes of the Asian Development Bank Agreement the High Court concluded that one of the tax exemption's purposes was to benefit the individual receiving the exemption and to incentivise people to undertake development work for the Bank in less-developed areas of the world covered by the Agreement.

21. Sinclair J explains at [61,448] what he considers to be the purpose of the Asian Development Bank income tax exemption:

    > He [Mr Molloy acting for the taxpayer] submitted that one of the purposes of the article was to encourage experts to go to inhospitable places to discharge New Zealand's duty under the treaty. I think that that submission is sound but I think it may also be said that the New Zealand Government recognised it had some obligations under the agreement and that it was prepared to forgo tax on monies paid to Experts performing missions for the Bank as part of the Government's contribution to the purposes of the agreement. Additionally I am of the view that the fact that no tax was to be payable in such circumstances was an inducement to experts to undertake such work at a lower rate than normal, thus assisting the Bank to discharge its obligations by obtaining top class expert advice at a discounted rate.

22. The High Court accepted that when ascertaining the true meaning of a tax exemption in an international agreement, the exemption may serve more than one purpose. The fact no tax was payable by workers was recognised as an inducement to Asian Development Bank workers to undertake work at a lower rate than normal and in inhospitable places, and in turn that helped the Bank achieve its economic development purposes in those countries and supported New Zealand in fulfilling its obligations to the Bank.

23. The Commissioner considers the decision in *Andrews* is consistent with the general international law principle that privileges and immunities granted to officials serving international organisations are not primarily for their personal benefit (although personal benefits can flow from the exemption as is demonstrated in *Andrews*) but are rather designed to benefit the relevant organisation and its objectives.

24. One of the most common reasons for member countries granting national tax exemptions for international organisations and their staff is to preserve the independence of the international organisation. National tax exemptions can prevent inequalities arising between the member countries that fund the organisation. Tax exemptions also ensure the independence of the organisation's serving staff, which could otherwise be jeopardised if their salaries and emoluments were taxed differently under the various national tax regimes of the member countries. This is so for the UN.[3]

[2] Craig Elliffe "Interpreting International Tax Agreements: Alsatia in New Zealand" (2018) 28 NZULR 1 at 4

[3] See Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, and James Sloan Oppenheim's International Law: United Nations, Volume 1 (Oxford University Press, Oxford, 2017) at [16.70]

25. Further, s 20 of Article V of the UN Convention confirms that the privileges and immunities for officials of the UN (including the exemption from taxes on the salaries and emoluments paid to them by the UN in s 18(b)) are granted to them in the interests of the UN and not for the personal benefit of the officials:

    SECTION 20.

    Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

26. The High Court of Australia in *Macoun v Commissioner of Taxation* [2015] HCA 44 considered the purpose of a tax exemption granted under an Australian statute and regulations that gave domestic effect to their international commitments under certain international conventions. The Court viewed the purpose of privileges and immunities as being to benefit the international organisation, and not the individual. The Court's view was that the tax exemption would allow officials to remain independent since they would not be subject to the receiving state's tax laws. The Court noted that once the person was no longer an official, the international organisation had no interest in the person receiving a tax exemption.
27. In *Macoun*, the Court was influenced by the fact that relevant regulations provided the Secretary-General of the United Nations with the ability to waive an individual's privileges and immunities. The Court saw this as an indication that the privileges and immunities were intended to benefit the international organisation rather than the individual.
28. Taking account of the decision in Andrews, the High Court of Australia's decision in *Macoun* and the general international law principles, a New Zealand court would likely find that the purpose of the tax exemption in the UN Order is primarily to support the independence of the UN as an organisation by enabling pay equality for UN staff currently serving from different member countries. Interpreting the tax exemption more expansively to include monthly retirement payments to retired UN staff does not directly support the independence of the UN in this way.
29. Therefore, a New Zealand court, in the absence of any wording suggesting a different purpose, would likely look to interpret the UN Order in a way that gives effect to a tax exemption that benefits the United Nations, and not its officials. In the present context, this supports an interpretation that a tax exemption should apply only for current UN staff. This is because, as noted in *Macoun*, the United Nations would not have any interest in a continued tax exemption once a staff member has retired.

Wording and construction of the UN Order

30. There are four clauses in the UN Order that provide for tax exemptions for individuals. The most relevant clause is cl 14(b):

    Immunities and Privileges of Other Officials

    (14) Except in so far as in any particular case any immunity or privilege is waived by the Secretary-General of the United Nations, all officials of the United Nations (other than those referred to in clause 12 hereof) shall enjoy-

    ...

    (b) Exemption from ordinary income tax and social security income tax in respect of emoluments received by them as officers or servants of the United Nations:

31. Clause 14(b) applies generally to officials of the UN when none of the preceding tax exemptions in cl 11 to 13 for specific UN officers and certain UN representatives apply. The Commissioner considers it is useful when seeking to ascertain the true meaning of the words used in cl 14 to consider it in the context of the other specific tax exemption clauses in the UN Order.

Clause 11 – government representatives

32. Clause 11 provides a tax exemption for government representatives serving at the UN. The exemption is only available "while [the representatives are] exercising their functions as such". These words indicate that only current UN representatives receive an exemption.
33. The exemption provided by cl 11 is also stated to be equivalent to that of a "foreign envoy", or foreign diplomat. For foreign diplomats, art 39 of the Vienna Convention on Diplomatic Relations 1961 (the VCDR)[4] provides, in cl 2, that a diplomat's privileges and immunities finish when their functions come to an end (allowing time for the diplomat to leave a country, or a reasonable period thereafter). Only the diplomat's immunity from criminal and civil liability subsists after their functions come to an end. That immunity only applies for acts that were carried out as part of their diplomatic functions.

[4] The VCDR is set out at sch 1 to the Diplomatic Privileges and Immunities Act 1968.

Clause 12 – Secretary-General, Under-Secretaries and equivalently ranked officials

34. In cl 12, the tax exemption available for the Secretary-General of the UN, Under-Secretaries and officers of equivalent rank is also equivalent to the tax exemption available to foreign diplomats. For the same reasons as in cl 11, the tax exemption in cl 12 only applies to people who currently hold one of those positions and finishes when their UN functions end.

Clause 13 – people on UN missions

35. In cl 13, the tax exemption is only available "while [those employed on UN missions are] performing their duties". Like cl 11, these words indicate that only current UN representatives receive an exemption.

Clause 14 – other UN officials

36. In cl 14, the tax exemption is available to "officials of the United Nations … (b) … in respect of emoluments received by them as officers or servants of the United Nations".

37. The ordinary meaning of the term "emoluments" includes a wide range of payments but generally limits them to payments received from a person's current office or employment. The meaning of the term "emolument" in cl 14 is considered in more detail at [40] below.

38. For emoluments to be "received by them as officers or servants of the United Nations", the emoluments need to be received by UN officials in that capacity. The phrasing in cl 14(b) narrows cl 14's opening reference to "officials of the United Nations". The two phrases cannot have been intended to be given the same meaning. The words "received by them as officers or servants of the United Nations" in cl 14(b) has the effect of restricting the tax exemption granted to UN officials in the opening words of cl 14 to payments received by them in their capacity as active UN staff members, and not as former or retired UN staff members.

39. When a monthly retirement payment is received, the former UN staff member is separated from the UN and is no longer an officer or servant. Article 1 of the UNJSPF Regulations defines the terms "separation" and "service" as:

    (v) "Separation" shall mean ceasing to be in the service of a member organization otherwise than by death.

    (w) "Service" shall mean employment as a full-time member of the staff of a member organization.

40. An entitlement to a retirement benefit only arises on separation from the UN. For example, art 28(a) of the UNJSPF Regulations provides:

    (a) A retirement benefit shall be payable to a participant whose age on separation is the normal retirement age or more and whose contributory service was five years or longer.

41. For these reasons, cl 14(b) is interpreted as being intended to exempt from income tax in New Zealand only amounts received in the recipient's capacity as a servant of the UN, and not amounts received for some other reason after the recipient has retired or otherwise left the UN.

42. The Commissioner considers that restricting the scope of cl 14 to amounts received in the retiree's capacity as a servant of the UN (as opposed to after their separation from the UN) is consistent with the scope of the tax exemptions in cl 11 to 13, none of which extend after separation except as specifically provided (eg, diplomatic immunity under art 39 of the VCDR.) Further, there is no indication that the tax exemption for other officials in cl 14 was intended to be any more generous than the specific tax exemptions in cls 11 to 13. While not determinative, the Commissioner considers the above supports the view that the tax exemption was not intended to apply to monthly retirement payments.

Meaning of "emolument"

43. The term "emoluments" is used in cl 14(b) of the UN Order to describe the types of payments received as a servant or officer of the UN that will be exempt from tax in New Zealand.

44. An "emolument" is defined in the *Concise Oxford Dictionary* (12th ed, Oxford University Press, New York, 2011) as "a salary, fee, or profit from employment or office".

45. The following principles taken from New Zealand and overseas cases summarise the meaning given by the courts to the term "emolument" when used in domestic legislation:

    - "Emoluments" are the advantages in money or money's worth which flow from occupation of an office or the like. Accordingly, a lump sum payment of the contributions an employee had made to the State Provident Fund before resigning, paid after employment ceased, was not an emolument: *Nette v Howath* [1935] 53 CLR 55 at [60].
    - Emoluments must "arise" from the employment or office. If the profit arises from "something else" or arises for a different reason, it is not an emolument: *Brumby (Inspector of Taxes) v Milner* [1976] 3 All ER 636.

- The term emolument is intended to catch any other payment to a worker connected with their employment or contract for service. It can extend to compensation or "tide-over" payments resulting from loss of employment: *Re Wellington Hospital Board's Clerical Workers* [1982] ACJ 207 at [211].
- A scholarship awarded to an employee's child by an educational trust established by the employer company was held to be an "emolument": *Wicks v Firth (Inspector of Taxes); Johnson v Firth (Inspector of Taxes)* [1982] 2 All ER 9 (CA).
- The proceeds of trusts established for the benefit of a company's employees, and distributed to former employees eight months after the company's cessation, were "emoluments" because they arose from the existence of the employer-employee relationship and not from "something else": Laidler v Perry [1966] AC 1 at [30], *Bray (Inspector of Taxes) v Best* [1989] 1 All ER 969 (HL).
- A transfer fee paid by the former employer of a professional football player was an emolument: *Shilton v Wilmshurst (Inspector of Taxes)* [1991] 3 All ER 148 (HL).

46. These cases confirm the dictionary definition that "emolument" is a broader term than simply "salary". It is also clear that the ordinary meaning of the term "emoluments" includes a wide range of payments but they are generally limited to payments received from a person's current office or employment - although on occasions for practical reasons some emolument payments may be received after the cessation of the relationship (eg, back pay, cost reimbursements or late payments).

47. In the Commissioner's view the ordinary meaning of the term "emoluments" is not so wide as to include retirement benefits paid by a pension fund. An entitlement to monthly retirement payments paid by the UNJSPF does not arise from employment or office; they arise after the UN staff member has retired from employment (see [36] and [37] above). That entitlement and the payment of benefits is governed by the rules of the UNJSPF, and not by the employment relationship.

48. In addition, emoluments will usually be paid by or at the direction of the employer. Monthly retirement payments made to retired UN staff members are made by the UNJSPF, and not the UN.

International stance on scope of tax exemption under the UN Convention

49. The Commissioner acknowledges that there is no fixed international stance on whether pensions paid by international organisations are salary or emoluments and whether they are exempt from national taxes, and acknowledges some member countries treat the pensions as being exempt from national taxes, like Spain and India (see [53] below). However, on balance, the Commissioner considers the international view that best accords with New Zealand's approach to interpreting legislation such as the UN Order, is that the tax exemption in the UN Order does not extend to monthly pension payments.

50. Some overseas authorities that support the Commissioner's view that the tax exemption in the UN Order does not extend to monthly retirement payments are:
    - *Tax regime governing pensions paid to retired UNESCO officials residing in France* 14 January 2003 as reported in the UN Reports of the International Arbitral Awards (Vol XXV at [231]–[266]) (the UNESCO-France decision). The UNESCO-France decision concerns the proper interpretation of the tax exemption in article 22(b) of the Headquarters Agreement between the French Government and UNESCO. Article 22(b) was modelled on s 18(b) of the UN Convention (and to which cl 14(b) of the UN Order relates). The United Nations Tribunal (UN Tribunal) held that:
        - the ordinary meaning of the term "officials" as it is used in the context of the tax exemption in art 22(b) does not include former officials (ie, officials who are no longer in active service with UNESCO); and
        - the ordinary meaning of the term "salaries" and "emoluments" does not cover retirement benefits.
    - *X v State Secretary for Finance, Supreme Court* (Netherlands) 16 January 2009: The Netherlands' Supreme Court followed the UNESCO-France decision and found that the term "salaries and emoluments" does not cover retirement benefits. They were also influenced by the drafting history of the UN Convention that in their view indicated pensions were not intended to be covered by the words "salaries and emoluments".
    - *Macoun v Commissioner of Taxation*: The High Court of Australia considered the phrase "salaries and emoluments" and decided that the term "emolument" is intended to capture a broader range of additional benefits than "salaries". However, it held monthly pension payments are not "advantages in money or money's worth which flow from occupation of an office or the like". Pensions do not flow from occupation of an office – they only flow from cessation of that office: see at [65]. A pension is not an entitlement that exists when the staff member holds office – it exists only when the person leaves office.

51. Some further reasons given internationally for not extending the exemption to pension payments are:
    - there is no generally accepted practice by member states to extend a tax exemption for monthly retirement payments from the UNJSPF, and so the Vienna Conventions on the Law of Treaties do not require the UN Convention to be interpreted as requiring a tax exemption to be extended for monthly retirement payments;
    - the preparatory drafting work for the UN Convention indicates it was agreed not to include a provision in the Convention exempting pension payments; leading to the conclusion that an express provision is needed for a member state to exempt monthly retirement benefits from the UNJSPF;
    - immunity from tax for officials is mainly for the benefit of the UN and not its officials. The independence of the UN is not reduced by its former officials being taxed on their monthly retirement payments;
    - monthly retirement payments are not "emoluments" in the ordinary sense of the words as they do not arise from office or employment, but from retirement or separation from the UN;
    - the focus should be on the time of receipt of the monthly retirement payment and therefore on the official's status at the time the payment is received – monthly retirement payments are amounts received as former officials after separation from the UN;
    - an official's right to a monthly retirement payment from the UNJSPF does not vest until after the official has separated from the UN;
    - monthly retirement payments are paid by the UNJSPF, and not the UN. The UNJSPF is a separate fund. While its assets are held by the UN, they are held on trust for Participants and beneficiaries; and
    - the UN itself does not treat pension payments made by the UNJSPF to retired officials as salary or emoluments as the pension payments are not subject to the UN's "staff assessment" rules.

Alternative argument – deferred salary or emolument

52. The Commissioner has also considered the alternative view that the monthly retirement payments received from the UNJSPF retain their character as "salary". They are an occupational pension, and therefore arguably the monthly retirement payments are a form of deferred salary. While employed by the UN, the Participant contributes a part of their salary to the UNJSPF. If the contributions had not been made, those contributions would have been received by the Participant tax-free as salary. This means, at least to the extent of the Participant's contributions, it is arguable that the monthly retirement payments should be characterised as deferred salary when received by the retired staff member. As deferred salary the monthly retirement payments (or part of them) would fall within the tax exemption for "emoluments" in cl 14(b) of the UN Order.
53. The Commissioner is aware of decisions from Spain and India where monthly retirement payments have been treated as payments of deferred salary or as emoluments when received, and the tax exemption in an international agreement has been found to apply.
54. For example, the Superior Court of Justice in Madrid *STSJ M* 8207/2020, 22 July 2020 decided that because pensions are taxed domestically as work income in the same way as salaries, they should therefore be included as emoluments for the purposes of the NATO tax exemption. Similarly, the Calcutta High Court in *Commissioner of Income-Tax vs Smt. Dipali Goswami* 1985 156 ITR 36 Cal found that because pensions are included within the definition of "salary" for Indian income tax purposes the tax exemption in the UN Convention should extend to them. Neither court was concerned that the payments were made to retired officials, who had separated from the international organisation.
55. In both these decisions the Commissioner considers the courts were influenced by their domestic approach to taxing retirement payments when interpreting the tax exemption in the UN Convention. Taking a domestic approach when interpreting international conventions is not the interpretative approach that has been accepted by New Zealand courts (see [18] above). Further, there is no general acceptance of the deferred salary argument internationally. This was confirmed in the UNESCO-France decision and *X v State Secretary for Finance*.
56. Accordingly, the Commissioner does not accept the alternative argument and considers the better view is that monthly retirement payments are not payments of deferred salary or emoluments under the UN Order.

How are the monthly retirement payments from the UNJSPF taxed in New Zealand?

57. Given UNJSPF monthly retirement payments are not exempt from New Zealand tax under the UN Order and s CW 64, the second issue addressed in this QWBA is to explain how those payments are taxed in New Zealand.
58. In general, monthly retirement payments received by retired UN staff members from the UNJSPF will be taxed as pensions under s CF 1(g). The foreign superannuation rules in s CF 3 do not apply to the monthly retirement payments because s CF 3 does not apply to pensions.
59. There are two exceptions to this general rule that the monthly retirement payments will be taxed as pensions under s CF 1(g):
    - the retired UN staff member's interest in the UNJSPF is covered by the foreign investment fund rules (FIF rules); or
    - the retired UN staff member is provided relief from tax under the transitional residency rules for the period of their transitional residency.
60. For completeness, it is noted that since 2014, monthly retirement payments from the UNJSPF are not taxed as dividend income as was stated in the 1996 QWBA (s CD 36B). Nor are the payments taxable distributions from a foreign trust (s HC 15(4)(cc)). The UN officials are not settlors of a foreign trust when they make their contributions to the UNJSPF (s HC 27(3C)).
61. It is also noted that in New Zealand there is no mechanism within the income tax rules for that portion of a retiree's monthly retirement payment that correlates to the contributions they made to an occupational pension fund when they were employed to be returned to them tax free.

Do the FIF rules apply?

62. Since 1 April 2014 the FIF rules do not apply to interests in foreign superannuation schemes like the UNJSPF unless the interest is a "FIF superannuation interest" (as defined in s YA 1), and then only if the other requirements of the FIF rules in s CQ 5 are met.
63. A retired UN staff member's interest in the UNJSPF will only be a FIF superannuation interest if when they first started making contributions to the UNJSPF they were:
    - a New Zealand tax resident (under s YD 1 or any double tax agreement); or
    - not a New Zealand tax resident and they:
        - applied the FIF rules to their interest for an income year ended before 1 April 2014;
        - continued to apply the FIF rules to their interest in every subsequent income year since first applying the FIF rules; and
        - filed their 2013 or prior income tax return by 20 May 2013.
64. More information about how to determine New Zealand tax residency and what it means is in Interpretation Statement IS 16/03 *Tax residence*, available at **www.taxtechnical.ird.govt.nz**. Having a permanent home or continuing close ties to New Zealand, even when living and working overseas for extended periods, may mean a person remains a New Zealand tax resident.
65. More information about applying the FIF rules if the retired UN staff member's interest in the UNJSPF is a "FIF superannuation interest" and calculating FIF income can be found in IR257 *Overseas pensions and annuity schemes* (at 20) and IR461 *Guide to foreign investment funds and the fair dividend rate*, available at **www.ird.govt.nz**.

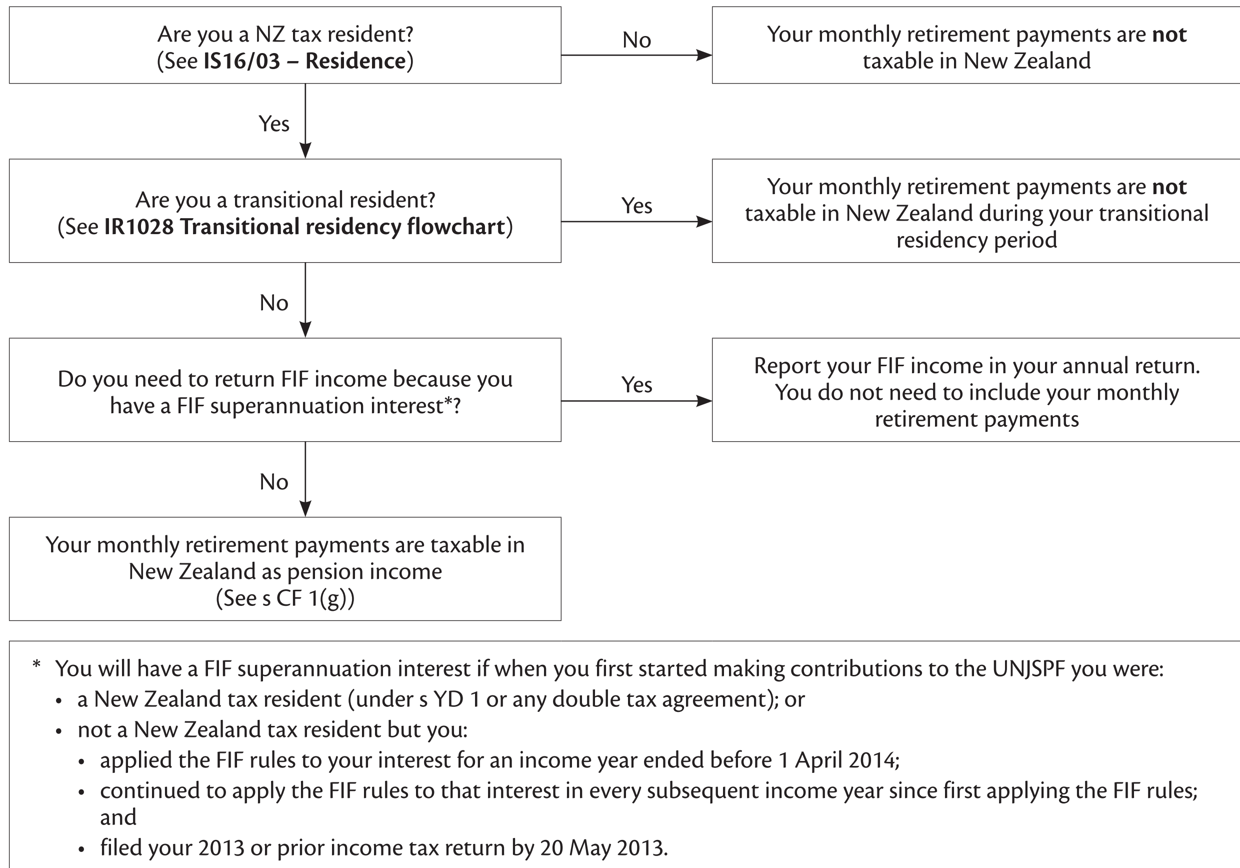
Do the transitional residency rules apply?

66. A transitional resident is someone who has recently immigrated or returned to New Zealand after an extended period overseas (around 10 years). The transitional residency rules provide a limited period of tax relief (for usually up to 4 years) on foreign-sourced income, except for employment income or income from services. This one-off exemption allows transitional residents time to organise their affairs and consider reinvesting any foreign investments or overseas savings in New Zealand.
67. If a retired UN staff member is a transitional resident, then they do not need to include FIF income or monthly retirement payments in their income tax return. At the end of their transitional residency period, the retired UN staff member will need to start paying tax on any monthly retirement payments received following the end of their transitional residency.
68. A retired UN staff member can choose to opt out of the transitional residency rules if they want (but – should it be relevant - would lose the exemption if they apply for Working for Families Tax Credits).

69. More information about transitional residency, how to qualify and what it means, is in Interpretation Statement IS 16/03 *Tax residence* from [206], and the *Transitional residency flowchart* IR1028, available at **www.ird.govt.nz**

Flowchart

70. The rules for taxing monthly retirement payments are summarised in the following flowchart:



Examples

Example 1 – Non-resident retired UN official immigrates to New Zealand

Vincent turns 65 and retires from his job at the United Nations in New York. He has worked there for the past 30 years and contributed to the UNJSPF.

Vincent decides to immigrate to New Zealand as many of his former colleagues have also retired here. He becomes a New Zealand tax resident.

On his retirement, Vincent became eligible to receive a retirement benefit from the UNJSPF. He opts to receive monthly retirement payments.

Vincent's monthly retirement payments are taxable income in New Zealand.

For the period of his transitional residency (approximately 4 years from becoming NZ tax resident) Vincent will not need to include his monthly retirement payments in his income tax return. However, once his transitional residency period expires, he will need to start including the monthly retirement payments as a pension in his annual tax return (s CF 1(g)).

Example 2 – New Zealand resident UN official returns to New Zealand to retire

Hemi is 65 years old and a New Zealand tax resident. For the past 6 years he has been working for the UN in Bangkok, spending 10 months each year working in Thailand. His partner has remained in New Zealand, living in their family home. Hemi remains a New Zealand tax resident according to the Income Tax Act 2007 and the NZ-Thailand double tax agreement.

Hemi retires and returns to New Zealand. While employed by the UN, Hemi and the UN contributed to the UNJSPF. Hemi's salary was the equivalent of around NZD$200,000 per year, so at current contribution rates he and his employer together contributed just over NZD$250,000.

Since starting work in Thailand, Hemi has been applying the FIF rules to his interest in the UNJSPF because he acquired it while a New Zealand tax resident and he remains a New Zealand resident. Even though he has no other foreign investments, he cannot apply the de minimis rule because the total contributions to the UNJSPF for his benefit are more than NZD$50,000. None of the other FIF exemptions apply to Hemi's interest in the UNJSPF.

Hemi applies the fair dividend rate method to his interest in the UNJSPF and has included income calculated under that method in his income tax return for the past 4 years. He does not need to include his monthly retirement payments in his annual tax return, as he has already paid tax on the attributed income he calculated under the FIF rules. His UN salary and emoluments were exempt from New Zealand income tax and so he does not include them in his annual tax return.

On his return to New Zealand, he must continue to apply the FIF rules each year to his interest in the UNJSPF, and return attributed income as appropriate.

Hemi gets no relief from the transitional residency rules as he has always maintained his New Zealand tax residency.

References

Legislative references

Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, ss 18(b), 20
Diplomatic Immunities and Privileges Act 1957
Diplomatic Privileges and Immunities Act 1968
Diplomatic Privileges (United Nations) Order 1959, cls 11, 12, 13, 14
Income Tax Act 2007, ss CD 36B, CF 1, CF 3, CQ 5, CW 64, HC 15(4)(cc), HC 27(3C), YA 1 "FIF superannuation interest", YD 1
Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund, arts 1, 28
Vienna Convention on Diplomatic Relations 1961, art 39

Case references

Andrews v CIR; Muir v CIR (1979) 4 NZTC 61,443
Bray (Inspector of Taxes) v Best [1989] 1 All ER 969 (HL)
Brumby (Inspector of Taxes) v Milner [1976] 3 All ER 636
Commissioner of Income-Tax vs Smt. Dipali Goswami 1985 156 ITR 36 Cal (India)
Laidler v Perry [1966] AC 1
Macoun v Commissioner of Taxation [2015] HCA 44
Nette v Howath [1935] 53 CLR 55 (HCA)
Re Wellington Hospital Board's Clerical Workers [1982] ACJ 207
Shilton v Wilmshurst (Inspector of Taxes) [1991] 3 All ER 148 (HL)
STSJ M 8207/2020 (Spain) 22 July 2020
Tax regime governing pensions paid to retired UNESCO officials residing in France (14 January 2003) as reported in UN Reports of the International Arbitral Awards (Vol XXV at [231]–[266])
Wicks v Firth (Inspector of Taxes); Johnson v Firth (Inspector of Taxes) [1982] 2 All ER 9 (CA)
X v State Secretary for Finance, Supreme Court (Netherlands) 16 January 2009

Other References

Interpretation Statement IS 16/03 *Tax residence*
IR257 *Overseas pensions and annuity schemes*
IR461 *Guide to foreign investment funds and the fair dividend rate*
IR1028 *Transitional residency flowchart*

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 21/05: Appeals by Chesterfields Preschools Ltd dismissed by the Court of Appeal

Case	Chesterfields Preschools Ltd & Sisson v CIR & Ors [2020] NZCA 686 Sisson & Chesterfields Preschools ltd v CIR & Ors [2020] NZCA 687 Sisson & Chesterfields Preschools ltd v CIR & Ors [2020] NZCA 689
Decision date	22 December 2020
Legislative References	Companies Act 1993 Insolvency Act 2006 High Court Rules 2016
Legal terms	Liquidation, Bankruptcy, stay of enforcement, recall of judgment

Summary

This is a group of 11 appeals by Chesterfields Preschools Ltd ("CPL") and Therese Sisson. These appeals were heard together by the Court of Appeal. The Court issued three judgments covering all 11 appeals. In summary the judgments are

[2020] NZCA 686 Liquidation and related matters judgment;

[2020] NZCA 687 Vesting order and related matters judgment; and

[2020] NZCA 689 bankruptcy and related matters judgment.

The Commissioner and other respondents were successful in every appeal.

Impact

There is useful guidance on the application of High Court Rule 5.61 (1) in the liquidation process in [2020] NZCA 686. This overturns an earlier approach in *CIR v The Fishing Company Ltd* (2011) 25 NZTC 20-016 (HC).

Also, in [2020] NZCA 686, the Court confirmed High Court Rule 17.29 that provides for a stay of enforcement does not apply to liquidation orders. This is consistent with its approach to bankruptcy orders (see *Hampton v Minter Ellison Rudd Watts* [2020] NZCA 291).

These judgments represent a major step towards the final resolution of the lengthy CPL litigation which has been going on since 2004.

Facts: [2020] NZCA 686 Liquidation and related matters judgment

CPL was placed into liquidation by the High Court in 2015. CPL appealed this decision and ultimately the Supreme Court set aside the liquidation order and referred the case back to the High Court for re-hearing ([2017] NZSC 176). CPL was put into interim liquidation to preserve its assets ([2017] NZHC 3172) pending re-hearing of the actual liquidation. After the re-hearing CPL was once again put into liquidation in 2019 ([2019] NZHC 272). It is this second liquidation that was appealed by Ms Sisson on behalf of CPL. CPL argued:

- It was an abuse of process to put it into liquidation prior to the resolution of a misfeasance claim CPL had against the CIR. Once the misfeasance (called the MASOC) was resolved in CPL's favour it would also resolve the liquidation proceedings; and
- The debt was incorrectly calculated by CIR and CPL was, accordingly, able to pay its debts.

Additionally, CPL (by Ms Sisson) argued there was tax litigation at the TRA and various unanswered NOPAs (issued by CPL) that needed to be resolved before the liquidation should proceed.

Issues

Should the appeal of the liquidation of CPL be allowed?

Decision

The Court of Appeal rejected Ms Sisson's reliance on any alleged existing tax litigation and the NOPAs on the basis these had been previously considered and resolved by the Court: ([2017] NZCA 326) at [99] to [101]). The Court also rejected any reliance on later NOPAs as these were issued by Ms Sisson after CPL went into liquidation. This meant she lacked the authority to issue any NOPAs on behalf of CPL.

The court also rejected the possibility of set off against the CIR's claimed tax debt by reason of the potential damages CPL may get under the MASOC. The Court recognised s 310 Companies Act 1993 which allowed the set off of a claim made by a creditor of a liquidated company and a counter claim by the liquidated company against the same creditor. But the Court rejected some case law (*CIR v The Fishing Company Ltd* (2011) 25 NZTC 20-016) to the effect that s 310 Companies Act applied prior to the company being put into liquidation. At [37] the Court confirmed that **section 310 Companies Act only takes effect AFTER the company was in liquidation. This approach meant High Court Rule 5.61 (which expressly precludes arguing any set off or counter claim in proceedings to recover taxes) applies BEFORE the company goes into liquidation.**

In addition, the Court recognised the MASOC was stayed by the High Court and that stay had not been lifted. It was at best a contingent, unliquidated claim. The Court also did not consider it appropriate that the merits of the MASOC be considered in proceedings to determine CPL's ability to pay its debts. Finally, both the Court of Appeal and the Supreme Court had rejected the suggested potential MASOC claim could be set off against the CIR's claim: [2017] NZCA 326 at [106]-[107]; [2017] NZSC 168 at [11].

The Court then considered the calculation of the debt claimed by the CIR. CPL had no income having ceased business many years ago but did hold assets. The Court at [100] concluded that CPL has assets of $1,138,064.77 and debts (actual and contingent) of $1,395,805.16 leaving a short fall of $257,785.39. The Court was satisfied CPL was insolvent and properly placed into liquidation. Of note here:

- The issue regarding quantum of debt essentially revolved around the amount of interest and penalties the CIR could charge CPL after June 2004. This is factually unique to the circumstances of this litigation. On the facts, the Court concluded that the CIR could charge interest and penalties after June 2004 and that the CIR had correctly calculated the balance of tax, including interest and penalties, owing (reduced by 15% to give effect to the first judicial review decision as allowed for by the Court in a 2010 decision ([2010] NZCA 400). There was no Court expectation the CIR would simply stop charging penalty and interest after June 2004 (although the CIR did stop charging interest and penalties in 2008 of her own volition).
- In quantifying the debt, the Court took account of contingent debts owed to the CIR but expressed some doubt whether sums advanced to the liquidators could be regarded as a debt of CPL. The Court considered these were more in the nature of a loan to the liquidator to be repaid from the assets of CPL, but the loans were not debts of CPL.

Ms Sisson also argued the liquidation could be stayed using High Court Rule 17.29 as the liquidation was an enforcement process. The Court rejected this submission saying Rule 17.29 applied to one party enforcing a judgment that created a debt or other liability against another party and not to a judgment that changed the status of a party which was the effect of a liquidation. The Court also stated (at [109]): "The effect and consequences of a liquidation order are provided for by the provisions of pt 16 of the Companies Act. They are quite different to the steps a creditor may take to enforce a judgment debt. There is no enforcement process in relation to the liquidation order. There is, therefore, nothing to stay under r 17.29."

The Court also relied on its reasoning in the earlier decision in *Hampton v Minter Ellison Rudd Watts* [2020] NZCA 291.

Ms Sisson, on behalf of CPL had also made interlocutory applications in the High Court to remove freezing orders (and an associated caveat on a certificate of title) over the assets of CPL. These applications were dismissed by the High Court on the basis Ms Sisson lacked standing to make the applications and that the applications were not part of the liquidation proceedings which should not have been accepted for filing. Ms Sisson appealed. The Court of Appeal accepted the High Court's conclusion that Ms Sisson lacked standing and any application to remove a caveat should have been made by way of originating application. appeal. The Court also noted that, having confirmed the liquidation of CPL, there was no justification for giving Ms Sisson any control of CPL's assets.

Facts: [2020] NZCA 687 Vesting order and related matters judgment

By consent the High Court made a vesting order, vesting assets of CPL in the hands of the liquidator ([2017] NZHC 181]) which was sealed by the (now) respondents in the appeal. The assets had previously been held by Ms Sisson on trust for CPL. The appellants unsuccessfully sought the recall of that order ([2017] NZHC 859). The appellants then appealed the High Court decision not to recall the vesting order. The appellants did not appeal the making of the vesting order directly.

Issues

Should the appeal of the refusal to recall the vesting order be allowed?

Decision

The Court concluded that once an order has been sealed by the Court it cannot normally be recalled unless the Court exercises its inherent jurisdiction (that the judgment should be recalled due to duress, undue influence, unconscionability or mistake). The ultimate test is where the interest of justice lies (*Herron v Wallace* [2016] NZHC 2426).

The appellant sought the orders be set aside:

- **Pending the resolution of the misfeasance claim against the CIR.** The Court accepted the High Court's conclusion that the misfeasance was irrelevant to the recall of the vesting order. This was because the vesting order is concerned with the ownership of CPL's assets and the alleged misfeasance is not relevant to that matter. Further, due to her bankruptcy, Ms Sisson's interest in any misfeasance claim was now held by the Official Assignee and did not revest in her on her discharge. More generally the misfeasance claim was now in the hands of the liquidator of CPL who does not intend to pursue it.
- **Pending the appeal of the liquidation.** As the appeal of the liquidation was unsuccessful this ground failed.
- The consent was compromised by Ms Sisson's illness at the time and because she did not fully understand what she was consenting to. The Court did not accept that Ms Sisson's illness impaired her ability to consent to the vesting orders. It also considered there was no evidence she did not fully understand what she was consenting to when agreeing to the making of the vesting orders. The Court agreed with the High Court that Ms Sisson's litigation was "entirely without merit" giving another reason not to allow her appeal.

Facts: [2020] NZCA 689 bankruptcy and related matters judgment

Ms Sisson had costs awarded against her by the High Court for an unsuccessful attempt to set aside the liquidation of CPL ([2016] NZHC 2367) and to stay the liquidation order ([2016] NZHC 2368). The High Court added her to the relevant proceedings so she could appeal on behalf of CPL.

CPL (now in liquidation) sought to recover the costs awarded against Ms Sisson. This led to Ms Sisson's bankruptcy by CPL (in liq). Ms Sisson appealed her bankruptcy on the grounds it was a tactical move by the liquidators and CIR to remove her standing to represent CPL and to prevent her pursuing a misfeasance claim against the CIR.

She also appealed a decision not to stay the bankruptcy to allow her to pursue a stay of CPL's liquidation. Ms Sisson argued the two proceedings were closely related and the determination of the liquidation would be determinative of the stay application in her own bankruptcy.

Issues

Should the appeal of Ms Sisson's bankruptcy be allowed?

Decision

The Court reminded itself the liquidation appeal had been dismissed. Consequently, Ms Sisson's bankruptcy appeal must also fail.

> [21] In the liquidation judgment we have dismissed the liquidation appeal. It follows that Ms Sisson's challenge to the adjudication order must also fail. It rests on the premise that the company, whose claim it is, should not be wound up before the misfeasance claim is resolved. She does not otherwise challenge the quantum of the costs award or its underlying premise, which was that she lacked standing to bring the setting aside proceeding on behalf of the company in liquidation.

Ms Sisson argued the existence of a set off (based on the anticipated successful outcome of the misfeasance claim) which the Court should have considered when considering making her bankrupt. She highlighted s 254 of the Insolvency Act 2006.

The Court noted at [22] that "Section 254 of the Insolvency Act is in identical terms to s 310 of the Companies Act 1993 but there is one critical difference; r 5.61 of the High Court Rules does not exclude setoff, for this is a not a claim by the Commissioner for recovery of taxes." However, the claim of set off was rejected on three grounds:

- The statutory set off occurs after the company is liquidated. The possibility of set off will not prevent the liquidation order being made. (*Although not expressly stated in the judgment, it is a necessary implication that this is also true of s 254 of the Insolvency Act as the Court expressly recognised s310 Companies Act is identical to s 254 Insolvency Act.*)
- "[T]here is an absence of the mutuality that s 254 of the Insolvency Act requires. A setoff for purposes of s 254 requires mutual dealings between the bankrupt and the party to whom the bankrupt is indebted. In this case, that other party is the liquidators, to whom the costs are owed. But the setoff which Ms Sisson relies upon is against the Commissioner." (at [24])
- There was no substance to Ms Sisson's claim the liquidators were usurpers or mere instruments of the CIR.

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.

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