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This *Tax Information Bulletin* is also available on the internet in PDF. Our website is at **www.ird.govt.nz**

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THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

Inland Revenue 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 perhaps a "user" of that legislation—is highly valued.

The following draft item is available for review/comment this month, having a deadline of 31 August 2007.

Ref.	Draft type	Description
IS3571	Interpretation statement	Retirement Villages – GST

Please see page 29 for details on how to obtain a copy.

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.

CHILD RESTRAINTS (CAPSULES AND CAR SEATS) FOR HIRE

DEPRECIATION DETERMINATION DEP61

In *Tax Information Bulletin*, Volume 19, No. 4 (May 2007) on page 4, we advised that a draft general depreciation determination proposing the setting of a general depreciation rate for "Rental car seats" was available for comment. The one submission we received on the draft agreed with the rates we proposed.

The Commissioner has now issued the determination. It is reproduced below and may be cited as "Determination DEP61: Tax Depreciation Rates Determination General Determination No. 61". The determination inserts a new asset class "Child restraints (capsules and car seats) for hire" into the "Transportation" asset category. It is based on an estimated useful life (EUL) for the assets of 5 years.

TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 61

This determination may be cited as "Determination DEP61: Tax Depreciation Rates General Determination Number 61".

1. Application

This determination applies to taxpayers who own assets in the "Transportation" asset category that are in the asset classes set out below.

This determination applies to "depreciable property" other than "excluded depreciable property" for the 2005-06 and subsequent income years.

2. Determination

Pursuant to section 91AAG(4) of the Tax Administration Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by inserting into the "Transportation" asset category, the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below. Columns 3 and 4 apply to items purchased prior to 1 April 2005. Columns 5 and 6 apply to items purchased on or after 1 April 2005:

1	2	3	4	5	6
General asset class	Estimated useful life (years)	DV banded dep'n rate before 1/4/05 (%)	SL equiv banded dep'n rate before 1/4/05 (%)	DV banded dep'n rate from 1/4/05 (%)	SL equiv banded dep'n rate from 1/4/05 (%)
Child restraints (capsules and car seats) for hire	5	33	24	40	30

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2004 and the Tax Administration Act 1994.

This determination is signed by me on the 19th day of June 2007.

Susan Price
(Senior Tax Counsel)

GENERAL DEPRECIATION DETERMINATION DEP62

This determination results from the depreciation changes in the Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Act 2006. This legislation changed the methods for calculating depreciation rates for items of depreciable property. The depreciation rates for certain items that are not buildings, acquired on or after 1 April 2005 are calculated using the double declining balance method (i.e. the diminishing value rate), with a straight-line equivalent. The depreciation rate for buildings, acquired on or after 19 May 2005 is calculated using a straight-line formula, with a diminishing value equivalent.

As a result of these legislative amendments, this determination amends the "Buildings and Structures (not specified)" asset class in the "Buildings and Structures" asset category in Determination DEP1: Tax Depreciation Rates General Determination Number 1. This is because the buildings and structures economic rates are calculated using different provisions and also because not all structures are buildings.

There are two parts to this determination. The first part applies to structures and to buildings acquired before 19 May 2005. It separates out structures from the "Buildings and structures (not specified)" asset class to create two separate classes: the "Buildings (not specified) (acquired before 19 May 2005)" asset class and the "Structures (not specified)" asset class. The second part of the determination inserts a new asset class: the "Buildings (not specified) (acquired on or after 19 May 2005)" asset class.

TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 62

This determination may be cited as "Determination DEP62: Tax Depreciation Rates General Determination Number 62".

1. Application

This determination applies to taxpayers who own items of depreciable property of the kind referred to in the asset classes listed below.

There are two parts to this determination. Part A of the determination applies to structures and to buildings acquired before 19 May 2005. Part B of the determination applies to buildings acquired on or after 19 May 2005.

2. Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

Part A

- Amending the "Buildings and Structures (not specified)" asset class in the "Buildings and Structures" asset category by removing the words "and structures" and changing the asset class as listed below:

Asset class	Estimated useful life (years)	DV banded dep'n rated (%)	SL equiv. banded depn rate (%)
Buildings (not specified) (acquired before 19 May 2005)	50	4	3

- Inserting into the "Buildings and Structures" asset category the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Asset class	Estimated useful life (years)	DV banded dep'n rated (%)	SL equiv. banded depn rate (%)
Structures (not specified)	50	4	3

Part B

- Inserting into the "Buildings and Structures" asset category the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Asset class	Estimated useful life (years)	DV banded dep'n rated (%)	SL equiv. banded depn rate (%)
Buildings (not specified) (acquired on or after 19 May 2005)	50	3	2

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2004.

This determination is signed by me on the 27th day of June 2007.

Susan Price
Senior Tax Counsel, Public Rulings

GENERAL DEPRECIATION DETERMINATION DEP63

TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 63

1. Application

Pursuant to section 91AAG(6) of the Tax Administration Act 1994 this determination replaces Determination Prov1: Tax Depreciation Rates Provisional Determination Number 1 issued on 15 February 1994.

This determination applies to taxpayers who own assets in the class listed below.

This determination applies to "depreciable property" other than "excluded depreciable property" for the 2005/2006 and subsequent income years.

2. Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I hereby amend Determination DEP 1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by inserting into the "Software" asset category, in the appropriate alphabetical order, the general asset class, estimated useful life, diminishing value depreciation rate and straight-line depreciation rate listed below.

General asset class	Estimated useful life (years)	DV banded dep'n rated from 1/4/05 (%)	SL equiv. banded dep'n rate from 1/4/05 (%)
Software able to be used in the preparation or filing of income tax returns relating to one particular year only	2	100	100

Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2004 and the Tax Administration Act 1994.

This determination is signed by me on the 28th day of June 2007.

Susan Price
Senior Tax Counsel

DRAFT GENERAL DEPRECIATION DETERMINATION – EXPOSURE DRAFT DDG0112

In *Tax Information Bulletin* Volume 18, No 7 (August 2006) on page 4 we advised of the availability of a draft general depreciation determination – Exposure Draft DDG0112 ('DDG0112') for comment. DDG0112 proposed the setting of general depreciation rates for the following asset classes:

- CCH Electronic New Zealand Master Tax Guide, designed for a specific tax year.
- CCH Electronic New Zealand Essential Tax Package, designed for a specific tax year.

DDG0112 if issued would have replaced Determination PROV4: Tax Depreciation Rates Provisional Determination Number 4 ('Prov4'), which was issued on 7 September 1995 and published in T*ax Information Bulletin* Volume 7, No 3 (September 1995). Prov 4 set the provisional depreciation rates for the two CCH products listed above.

As a result of comments received on DDG0112, the Commissioner is now aware that the two CCH products are no longer available in the form described in DDG0112 and Prov4. Consequently the Commissioner does not intend to proceed with finalising DDG0112.

In addition, as there is no longer any depreciable property to which Prov4 applies, Prov4 has no on-going application.

INTERPRETATION STATEMENTS

This section of the *Tax Information Bulletin* 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.

[This interpretation statement was issued by the Office of the Chief Tax Counsel on 28 June 2007. It was previously released for public consultation as exposure draft IS0092]

IS 07/02: IS AN AGREEMENT FOR THE SALE AND PURCHASE OF PROPERTY AN "INVOICE" FOR GST PURPOSES?

This interpretation statement applies to agreements for the sale and purchase of property entered into on or after 1 July 2007.

This interpretation statement was originally released for consultation on 11 May 2005 under the title "Whether a Standard Form Agreement for the Sale and Purchase of Real Estate Constitutes an "Invoice" under the Goods and Services Tax Act 1985 thus Triggering the Time of Supply under that Act". As a result of comments received, the scope of the statement has been broadened from agreements for the sale and purchase of real estate to agreements for the sale and purchase of property more generally.

As from 1 July 2007 this interpretation statement withdraws and replaces Part (a) of the Commissioner's previous public item "GST—Time of Supply of Real Estate" published in *Public Information Bulletin* 173 (April 1988), p10.

Summary

1. This interpretation statement considers whether an agreement for the sale and purchase of property constitutes an "invoice" under the Goods and Services Tax Act 1985 ("the Act") thus triggering the time of supply under that Act.[1] In doing so it considers three types of agreements for the sale and purchase of property:

   (i) conditional agreements;

   (ii) conditional agreements that become unconditional; and

   (iii) unconditional agreements.

2. It is concluded that a conditional agreement for sale and purchase of property will not constitute an "invoice" for the purposes of the Act. Also, it is concluded that a conditional agreement for the sale and purchase of property that becomes unconditional will not constitute an "invoice" for the purposes of the Act. Therefore, a conditional standard form agreement for sale and purchase of property will not trigger the time of supply—even if the conditional agreement becomes unconditional. This conclusion is consistent with the Commissioner's previous public item "GST—Time of Supply of Real Estate" published in *Public Information Bulletin* 173.

3. It is also concluded that unconditional agreements for the sale and purchase of property will not constitute "invoices" for the purposes of the Act. Therefore, the formation of an unconditional agreement for the sale and purchase of property will not trigger the time of supply. This conclusion is different to the Commissioner's previous public item "GST—Time of Supply of Real Estate" found in *Public Information Bulletin* 173.

4. While the Commissioner's previous public item "GST—Time of Supply of Real Estate" only dealt with agreements for the sale and purchase of real estate, the principles and discussion within this interpretation statement will also apply to contracts more generally. Thus, the discussion in this statement should be considered when considering whether a document (including a contract) meets the statutory definition of "invoice" for the purposes of the time of supply rules under the Act.

[1] The time of supply determines when a registered vendor is required to account for output tax on the sale of a property but (as recipients must also hold a tax invoice in respect of a supply in order to be entitled to an input tax credit: section 20(2)) the time of supply does not determine when a registered purchaser is entitled to an input tax credit on the purchase of a property. The time of supply is also relevant to determining whether the sale of a property could be zero-rated under section 11(1)(m) (as for section 11(1)(m) to apply the sale must be the supply of a taxable activity or part of a taxable activity that is a going concern at the time of supply).

Background

5. Inland Revenue has previously considered the issue of whether an agreement for the sale and purchase of real estate triggers the time of supply for GST purposes in *Public Information Bulletin* 173 under the title of "GST—Time of Supply of Real Estate" (April 1988). According to the previous statement in PIB 173, a conditional agreement for sale and purchase cannot be an invoice—either when it is executed or once the conditions are satisfied. However, the previous statement in PIB 173 did accept that an unconditional agreement for sale and purchase could constitute an "invoice" and could trigger the time of supply under section 9(1) of the Act.

The issue

6. This interpretation statement considers whether the previous conclusions in respect of agreements for sale and purchase triggering the time of supply in the earlier PIB 173 are correct. Accordingly, it considers whether an agreement for the sale and purchase of property that is:

   (i) conditional on execution;

   (ii) conditional on execution, that later becomes unconditional; and

   (iii) unconditional on execution;

   can constitute an "invoice" and thus trigger the time of supply under section 9(1) of the Act.

Legislation

7. Section 9(1) of the Act states:

   > 9(1) Subject to this Act, for the purposes of this Act a supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier or the recipient or the time any payment is received by the supplier, in respect of that supply.

8. Section 2 of the Act defines "invoice" as follows:

   > 2(1) In this Act, other than in section 12, unless the context otherwise requires,—
   > …
   > "Document" includes any electronic data, computer programmes, computer tapes, and computer discs:
   > …
   > "Invoice" means a document notifying an obligation to make payment:
   > ….

APPLICATION OF THE LEGISLATION—THE COMMISSIONER'S INTERPRETATION

Meaning of "invoice"

9. Section 9(1) of the Act states that "a supply of goods and services shall be deemed to take place at the earlier of the time an *invoice* is issued by the supplier or the recipient… " (emphasis added).

10. Under section 2(1) of the Act, "invoice" means "a document notifying an obligation to make payment".

11. The earlier public statement in PIB 173 appears to have accepted that an unconditional agreement for sale and purchase of real estate could be an "invoice" based on what was thought to be a literal reading of the words of the definition. It appears that as an unconditional contract is not contingent on the completion of a condition and obliges the purchaser to make payment in accordance with its terms this was regarded as "notifying" the purchaser of their obligation to make payment. However, since the publication of PIB 173, the Commissioner has reconsidered this issue. To be an "invoice" an agreement for sale and purchase:

   - Must be a document that notifies an obligation to make payment;
   - In the context of section 9(1), must be issued.

Notify

12. The term "notify" is not defined in the Act. In the absence of a statutory definition the meaning of a term will generally be determined in accordance with the ordinary meaning. "Notify" is defined in the Concise *Oxford Dictionary* as follows:

   > **notify • v.** (**notifies**, **notified**) inform, typically in a formal or official manner. ➢ report formally or officially.

13. The meaning of "notify" has been discussed in two Canadian cases. Lacombe JA said in *Briere v Canada (Employment & Immigration Commission*) (1988) 57 DLR (4th) 402 (CA):

   > The word 'notify' means, in its everyday sense, "to inform expressly," and in law: … "to make known, to give notice, to inform".

14. In *Re Hornby* (1993) 63 FTR 188 at 194 Cullan J said:

   > The word 'notify' is defined in the Concise Oxford Dictionary, seventh edition as:
   >
   > Make known, announce, report; inform, give notice to (person of, that)...which connotes, in my opinion, some sort of concrete action.

15. In *Shell NZ Holding Co Ltd v CIR* [1994] 3 NZLR 276 the Court of Appeal discussed the meaning of "notify" in the context of the definition of "invoice". The Court of Appeal commented (p. 283):

> "Notify" has its ordinary dictionary meaning of "to give notice to -, to inform".

16. Therefore, the term "notify" connotes information passing from one person to another and appears to require some deliberate action on the part of the person "notifying" – whether by formal or official communication or merely "some sort of concrete action".

Obligation

17. "Obligation" is also not defined in the Act. The Concise Oxford Dictionary definition of "obligation" reads as follows:

> **obligation • n. 1** an act or course of action to which a person is morally or legally bound. ➢ the condition of being so bound. **2** a debt of gratitude for a service or favour.

18. The ordinary meaning of "obligation" refers to a situation where a person is legally or morally bound. The case law on the meaning of "obligation" indicates that for there to be an obligation, there must be a present obligation.

19. In *Watkinson v Hollington* [1943] 2 All ER 573 Scott LJ stated:

> The word "obligation" primarily means a tie, and legally it was in origin the binding tie established by what is called a "bond" as between the obligor and the obligee, and I see no reason for disregarding that ordinary legal meaning of the word "obligation" in construing the long title. (p. 575)

20. Thus, the court considered that the word "obligation" referred to a situation involving a "binding tie". In order for the "tie" to be "binding", it is considered that there would need to be a present obligation.

21. In *Mercer v Pearson* (1973-1978) 51 TC 213 Fox J considered that "obligation" in the context of a provision which limited concessionary tax treatment for redundancy payments to payments "made in pursuance of an obligation incurred before 6th April 1960" meant a legally binding obligation. Fox J held:

> It seems to me that the normal meaning of 'obligation' in a legal context is a legally binding obligation, not necessarily contractual–it could be statutory–but it must be some tie or obligation which is legally enforceable. (p. 217)

22. The Commissioner considers that in the context of the definition of "invoice" an obligation means a present legal obligation. In the High Court in *Shell NZ Holding Co Ltd v CIR* (1993) 15 NZTC 10,136 Heron J said:

> Invoice is defined as "a document notifying an obligation to make payment". There is no immediate obligation to make payment on the passing of the entry in the circumstances of this case. The Act does not speak in terms of future obligation or conditional obligation or contingent obligation. It speaks of obligation. It is an obligation to make payment.

23. While the taxpayer's appeal was successful the observations of Heron J regarding the meaning of the term "obligation" remain relevant. An "obligation", then, means a present legally binding tie to make payment. Future, conditional or contingent obligations to make payment will not suffice.

24. A present or existing obligation to make payment for the goods or services is to be distinguished from a credit facility granted by the supplier of the goods or services which allows the necessary payment to be made at any time up until the date specified in a statement issued by the supplier e.g. on the 20th day of the following month. The obligation to make the payment for the goods and services would have arisen on the day the goods were handed over or the services were performed and, from that date, the supplier would have been legally entitled to payment and could have sued for its payment if necessary e.g. if bankruptcy or liquidation proceedings were instigated against the recipient before the date specified in the statement. Thus, in cases where credit facilities have been granted, the distinction needs to be drawn between the conditions that concern the creation of the liability (ie the goods being handed over or the services performed) and the conditions that merely affect the discharge of the liability. At the time the monthly statement is issued, the liability would already have been created and so the statement would constitute a document notifying an obligation to make payment ie it would constitute an "invoice".

How an invoice is issued

25. The *Concise Oxford Dictionary* definition of the verb "issue" is as follows:

> **issue • v.** (**issues, issued, issuing**) 1 supply or distribute for use or sale. ➢ (issue someone with) supply someone with. ➢formally send out or make known.

26. As with the ordinary meaning of "notify", the ordinary meaning of "issued" connotes a situation involving two parties, one of whom issues something which is received by the other. The term "issue" also seems to require a positive deliberate act on the part of the person who has "issued" the item in question.

27. In *Commissioners of Customs and Excise v Woolfold Motor Co Ltd* (1983) 1 BVC 564 the meaning of "issue" in the context of the UK VAT

rules was considered. The primary rules regarding time of supply under the VAT rules in the Finance Act 1972 relates to when the goods are removed. However, there is a general exception to those rules that if a tax invoice is issued prior to that time, then the time of supply is "at the time the invoice is issued". After considering the dictionary meanings of the term "issued", McNeill J summarised counsels' arguments and concluded as follows:

> Both counsel argued that the ordinary and natural meaning of the words 'issue a tax invoice' supported the conclusion for which they respectively contended. Mr. Shirley [counsel for the taxpayer] did not suggest that mere communication of the fact or existence of a tax invoice was sufficient, but he said communication plus acceptance was. That was truly publication or emission of the tax invoice. Mr. Brown [counsel of the Commissioners] submitted that such a contention emphasised the artificial construction Mr. Shirley was seeking to put on the word 'issue'.
>
> Having considered the submissions on both sides and having regard to the careful decision of the tribunal, I have come to the conclusion that Mr. Brown's submissions are correct. In my view the 'issue' of a tax invoice for the purposes of the Act requires the provision to the customer of the tax invoice. (p. 569)

28. These comments reinforce the dictionary definition of "issued". It is acknowledged that under the UK legislation, the issue of a "tax invoice" rather than an ordinary invoice is required to trigger the time of supply. As a tax invoice also had to be held by the purchaser under the UK legislation in order to support an input tax credit claim, McNeill J concluded that the scheme of the Act required the tax invoice to be actually provided to the purchaser in order for it to trigger the time of supply by being "issued". However, given that to be an "invoice" under the New Zealand legislation, there must be a document "notifying" an obligation to make payment, the New Zealand legislation also contemplates that when an invoice is issued, a document would be provided by one person to another.

29. Therefore, the statutory definition of "invoice" refers to a document which is provided by one person to another and gives notice to or informs the recipient of the document of an existing legal obligation to make payment. This appears to be consistent with the ordinary meaning of "invoice".

Ordinary meaning of "invoice"

30. The term "invoice" is defined in the *Concise Oxford Dictionary* (10th ed, Oxford University Press, Oxford, 1999) as follows:

> **invoice • n**. a list of goods sent or services provided, with a statement of the sum due.

31. This same meaning is also reflected in definitions from commercial and legal dictionaries. The *Penguin Macquarie Dictionary of Economics and Finance* (Penguin Books Australia, Ringwood, Victoria. 1988) states:

> **invoice** A bill for goods or services provided. It is sent by a creditor to a debtor, as the document against which payment of the debt will be made.

32. *Butterworths New Zealand Law Dictionary* (5th ed, LexisNexis Butterworths, 2002) states:

> **invoice** A list of goods that have been sold by one person to another, stating the particulars and prices. The invoice is sent by the seller to the buyer, either along with the goods or separately by post.

33. These definitions indicate that:

- an "invoice" is a record of a past transaction where goods and services have been provided;
- an invoice lists the goods and services provided and the price for those services; and
- ordinarily, an invoice will be provided by the seller to the purchaser.

34. The Commissioner considers that the statutory definition of "invoice" in the context of section 9(1) is consistent with the ordinary meaning of "invoice". Generally an invoice:

- will not be issued until the transaction has occurred;
- will be issued as the result of a positive act by the vendor to the purchaser;
- will be a document listing what has been provided and stating the price payable; and
- will give notice of a present obligation to make payment.

35. This approach is consistent with the approach of the Court of Appeal in *Shell*. *Shell* concerned whether an "import entry form" completed by the Customs Department on the importation of goods was an invoice for the purposes of triggering the time of supply. The Court concluded that the import entry form was an invoice and did trigger the time of supply. In commenting on the meaning of "invoice" Richardson J, for the Court, stated (at page 283):

> Invoices are rendered in commercial transactions where goods are supplied or work is done by one party for another. Invoices record what was done and the charge. It may be a cash or credit transaction and in the latter case it is common for a monthly or other periodic statement to be issued subsequently. Whether payable on delivery or under the credit arrangement the invoice states the price or charge involved. And

> it is both unnecessary and uncommon in practice for commercial invoices to specify the time for payment.
>
> In our view the GST obligation is in the same position. The statutory definition of "invoice" recognises that it is not a commercial two party transaction. It uses the central feature of an invoice which is "a document notifying an obligation to make payment". The time for payment is not part of the definition. "Notify" has its ordinary dictionary meaning of "to give notice to -, to inform". Certainly when completed by the Customs officer it is the Customs' document and a copy is furnished to the importer. It is the signing of the document by the Customs officer which under the statute is the entry of the goods. It is that act which constitutes the duty as a debt due to the Crown. At that point the document is notice to the importer of the obligation to make payment. On its face it states the Total Duty, Total GST and Total Payable.

36. Given the Court's conclusion that the import entry form was an "invoice" for GST purposes, the deferred payment statement (issued in cases where the Collector of Customs had exercised his discretion to allow payment of duty to be deferred) could not be an "invoice". A supply involves only one taxable event and the same goods and services cannot be supplied twice. Only one document can be the "invoice" which triggers the time of supply.

37. Despite "invoice" being defined in section 2 of the Act, Richardson J commences his comments by considering the ordinary meaning of the word "invoice". The reason for considering the ordinary meaning of the word "invoice" is that he considers the words of the definition of "invoice" to be consistent with its ordinary meaning.

38. Richardson J notes the role that invoices generally play in commercial transactions. When there has been a supply of goods or services, an invoice is created detailing "what was done" and "the charge" for that supply. He states that the definition of "invoice" in the Act recognises that it "is not a commercial two party transaction". He also says that an "invoice" does not require a due date for payment: "it is both unnecessary and uncommon in practice for commercial invoices to specify the time for payment."

39. Richardson J reads the statutory definition in light of the *ordinary* meaning. He says that the statutory definition reflects the "central feature" of an invoice which is "a document notifying an obligation to make payment". With regard to the statutory definition four points are noted.

40. Firstly, Richardson J readily accepted that the word "notify" should bear its ordinary meaning:—being "to give notice to, to inform". This ordinary meaning of "notify" implies that the notice moves from the person giving notice to the person receiving notice. This is consistent with the idea of an invoice being *sent* by the seller to the purchaser.

41. Secondly, although there was no direct comment on the words "obligation to make payment" in the Court of Appeal judgment, the Court's focus upon the ordinary meaning of an "invoice" would indicate that the "obligation" that is to be paid must be an existing obligation or an obligation that has arisen and is due for payment. This contrasts with an obligation that will or may arise in the future. As Richardson J stated: "[i]nvoices record what was done and the charge". This point is consistent with the dictionary definitions which illustrate that commonly an invoice lists what has been provided or sent—not what has been agreed or what will be provided or sent—and requires payment for the supplier completing their part of the agreement. This can be contrasted with a contract that is entered into by the parties—a contract *creates* rather than *notifies* the obligation to make payment. A contract records an agreement—it evidences the parties' meeting of minds.

42. Thirdly, to be an "invoice" there need only be a "document notifying an obligation to make payment"—the document is not required additionally to specify a due date for payment. Richardson J stated that "[t]he time for payment is not part of the [statutory] definition" and noted that "it is both unnecessary and uncommon in practice for commercial invoices to specify the time for payment."

43. Fourthly, Richardson J's interpretation of "invoice" is also consistent with the requirement of section 9 that the invoice must be "issued". The fact that an invoice must be "issued" from one party to another is consistent with the idea that an invoice "notifies" the purchaser/recipient of their "obligation to make payment". It is the *issuing* of the invoice which triggers the time of supply. A contract, in contrast, is entered into by both parties and records their agreement. It does not follow that a contract is issued by one party to the other.

44. In summary, Richardson J confirms that the statutory definition of "invoice" is consistent with the *ordinary* meaning of "invoice" and should be read in that light. The inference from Richardson J's judgment is that an "invoice" is a document issued by one party that has supplied goods or services to another party and is requesting payment for the goods or services supplied from that other party. A number of key findings in relation to the meaning of the term "invoice" as it occurs in section 9 of the Act can be identified. It is considered that the case is authority for the following propositions:

- While the word "invoice" is defined in section 2 of the Act, the definition is to be interpreted consistently with the ordinary

meaning of the term as it is generally understood in commercial parlance.

- An "invoice" is a post-transaction record—"it records what was done and the charge for the work" or goods supplied and notifies the recipient of the supply that payment is now due in respect of the work carried out or the goods supplied. In contrast, a contract *creates* the obligations between the parties.
- An "invoice" is not a two party transaction. It is ordinarily issued by the supplier to the recipient. In contrast, a contract is entered into by two parties—it records the meeting of minds.
- The ordinary meaning of the term "notify" implies a positive act in which notice moves from one person to another. This is consistent with the ordinary meaning of an invoice being "issued". In contrast, a contract *creates* and *evidences* an agreement rather than *notifying* the parties' obligations and being *issued* from one party to another.
- An obligation to make payment has to be a present legal liability. Thus, an invoice will notify a present obligation to make payment. This is to be contrasted with a contract which *creates* the obligation, but it is not necessarily a present obligation.
- An invoice need not provide a due date for payment, it need only notify that there is an obligation to make payment and be issued.

45. It is noted that Alastair McKenzie in his book *GST: A Practical Guide* (7ed, CCH, Auckland, 2002, paragraph 403) makes reference to the earlier approach in the PIB item as representing the Commissioner's view, but seems to prefer a "contrary approach". A number of the points McKenzie makes in support of the "contrary approach" are consistent with the principles set out above.

Other case law

46. Other cases have also commented on the meaning of "invoice" and/or observed that an agreement for sale and purchase of property, whether in conditional or unconditional form, could be an invoice for the purposes of the Act. These cases are:

    - In *Case K24* (1988) 10 NZTC 236, Judge Barber makes the *obiter* comment that an agreement for sale and purchase may be an "invoice" (p 238). Judge Barber also recognised that he did not hear argument on the issue (p 238).
    - In *Case N1* (1991) 13 NZTC 3,001, Judge Bathgate considered that contracts, whether conditional or not, could be "invoices" as they notified (informed) the purchaser of their obligation to pay (p 3,011). However, with respect, Judge Bathgate's comments must be read in light of the subsequent Court of Appeal decision in *Shell* where a number of his propositions were rejected. Judge Bathgate also specifically states that these points were not subject to detailed argument and should be read in that light (p 3,012).
    - In *Shell NZ Holding Co Ltd v CIR* (1993) 15 NZTC 10,136 (HC), Heron J noted that the parties accepted that an agreement would be an invoice (p 10,140), although this point does not appear to have been in dispute between the parties.
    - In *Lanauze v King* (2001) 20 NZTC 17,360 (HC), Young J had to determine the time of supply in the context of a swap of paua quota for a house and contents. It was held that an "approved form of transfer and notification of transfer of individual transferable quota or transferable term quota" was not an invoice. In the course of the judgment, Young J considered that the transfer form was not an "invoice" in the "traditional commercial sense of a notification by the supplier of goods and services to the recipient of the amount which is due" (following *Shell*) and nor was it akin to an unconditional agreement for sale and purchase of property, which he considered was an "invoice" on the basis of the decision in *Case K24* (p 17,363). However, Young J accepted that an unconditional agreement for sale and purchase of property is an invoice without any analysis or specific reference to any particular paragraph or quote from *Case K24*.

47. While these cases make reference to unconditional or conditional contracts being "invoices" for the purposes of the Act, none of these cases considered or analysed the issue in any detail and none of these cases are more authoritative than the Court of Appeal decision in *Shell*. The Commissioner was not a party to *Lanauze v King* where the High Court referred to *Case K24* as authority for the proposition that an unconditional agreement for sale and purchase is an invoice. In *Case K24* Judge Barber suggested that in some instances an agreement for sale and purchase might be an invoice, however, there was no analysis supporting that proposition. The decision in *Case N1* and the decision in *Shell* at the High Court must be regarded as being superseded by the *Shell* Court of Appeal decision. Accordingly, the Court of Appeal decision in *Shell* remains the leading judgment on the interpretation of "invoice".

Form of agreement for the sale and purchase of property

48. Obviously, the parties to a sale and purchase of property transaction can choose to document it in a variety of ways. The Auckland District Law Society/Real Estate Institute of New Zealand form of agreement for sale and purchase tends to be used in a significant number of cases. This is a word processed or printed document which comprises a number of pages. The matters particular to a specific transaction are generally handwritten or typewritten onto the standard form. In draft form, it may record an offer or counter-offer, but in its final form it records the agreement ultimately reached between a vendor and purchaser of real estate. Generally, this document will be signed on one day and the settlement of the contract will be at a time in the future. Applying the previous discussion of what is an "invoice" to agreements for sale and purchase of property in relation to the three fact situations leads to the following results.

An unconditional agreement for sale and purchase

49. While an unconditional agreement for the sale and purchase of property document creates the legal obligations between the parties, the issue is whether an unconditional agreement for sale and purchase can constitute an "invoice" from the time of execution and thus trigger the time of supply under section 9(1) of the Act. With regard to the propositions based on the ordinary meaning of the terms used in the legislation and identified in *Shell*, the following points are noted.

50. Firstly, an unconditional agreement for the sale and purchase of property is a contract. It is an agreement signed by a purchaser and a vendor. It sets out the terms and conditions of the agreement, what will be supplied and the purchase price. An agreement for the sale and purchase of property does not have the characteristics of an invoice. It does not on its face state what has been supplied and the actual amount that the purchaser is required to pay. That function is fulfilled by the settlement statement which includes the adjustments (apportionments of incomings and outgoings in respect of the property) which affect the final amount payable by the purchaser under the agreement.

51. Secondly, an invoice is a demand or request for payment. An agreement for sale and purchase is not a demand or request for payment. It is a document which evidences an agreement between the parties and creates rights and obligations on the part of both parties. Such obligations are interdependent. The agreement documents a transaction that will be completed in the future. The agreement will generally provide, for example, that at settlement date, the property will be provided and the purchase price will be payable. It is not a demand or request for payment issued by one party to another.

52. Thirdly, an invoice is not a "two party transaction". The ordinary meaning of the term invoice (as noted by the Court of Appeal in *Shell*) indicates that one would ordinarily see an invoice completed by one party to the transaction (the supplier) and provided to the recipient with, or following, the supply of goods or the completion of the contracted work giving notice that payment was now due. An unconditional agreement for sale and purchase of property is a two party transaction—it is a contract that records the parties' "meeting of minds". Some commentators have suggested that the import entry form considered in *Shell* was, in fact, a "two-party document" as import entry forms were required to be prepared by the importer. The Commissioner's view is that the Court considered that the import entry form was a document that was issued by the Customs Department rather than a two-party document. It was irrelevant that the information on the import entry form was completed by the importer as the Customs officer was not obliged to act on that information and could make a different assessment of the value of goods for the purpose of the assessment of duty: see p 11,168. The provision of a copy of the import entry form signed by the Customs officer to the importer constituted notification of an obligation to make payment of the duty assessed.

53. Fourthly, the ordinary meaning of the term "notify" implies a positive act in which notice moves from one person to another. This is also consistent with the ordinary meaning of an invoice being "issued". The fact that two parties sign the unconditional agreement for the sale and purchase of property raises difficulties with that document "notifying" a present obligation to pay and actually being "issued". As an agreement for sale and purchase ultimately reflects an agreement reached between two parties, it will not always be the case that the vendor provides the final version that is accepted by the purchaser. There may be further counter-offers by both parties. It may be that it is the purchaser's offer that is accepted by the vendor. As such, there may not be any positive act of issuing a document by the vendor to the purchaser notifying an obligation to make payment.

54. Finally, there must be an existing obligation to make payment of a present legal liability. This is consistent with an invoice seeking payment from the recipient as the supplier is entitled to do from the terms of the original obligation. Admittedly, from the terms of an unconditional agreement for the sale and purchase of real property, it is possible that there could be a present and legal obligation

to make payment although the obligation may not in fact arise until settlement occurs. In situations where a present obligation to make payment exists, this would result from the unconditional agreement for the sale and purchase of property creating the bargain *and* the obligation. However, merely having this element is not considered to satisfy the general characteristics of an invoice.

55. Accordingly, it is considered that an unconditional agreement for sale and purchase of property would not conform to these requirements to constitute an invoice. For there to be an "invoice" for GST purposes, there must be a document issued which notifies an obligation to make payment. These are cumulative requirements and must be read in light of the ordinary understanding of an invoice. The fact that a document may appear to satisfy one of the requirements does not mean that it will constitute an invoice as the whole of the statutory definition (read in light of the ordinary meaning) needs to be satisfied. An agreement for the sale and purchase of property does not come within the expression "document notifying an obligation to make payment" considered as a whole. Even if an agreement is formed by the vendor's acceptance of the purchaser's offer and that acceptance is communicated by the vendor providing a copy of the agreement to the purchaser, an agreement for sale and purchase is not a document that is issued by the vendor and it does not perform and is not intended to perform the function of notifying the purchaser of an obligation to make payment. The formation of an agreement for the sale and purchase of property results in obligations on the part of both parties. These obligations are interdependent. An agreement for sale and purchase does not on its face state the exact amount that the purchaser is required to pay. It does not contain the adjustments affecting the final amount which the purchaser is required to pay under the agreement.

56. While this statement considers agreements for sale and purchase of property, the principles stated here will generally apply when considering whether other contracts and other "documents" may meet the statutory definition of "invoice".

A conditional agreement for sale and purchase of property

57. For similar reasons discussed in relation to an unconditional agreement for the sale and purchase of property (paragraphs 49 to 56), a conditional agreement for sale and purchase cannot be an invoice. As it is a conditional contract it is an agreement for a supply that may not even proceed, due to the agreement being conditional on the fulfilment or waiver of its conditions. Further, a conditional agreement for sale and purchase is a document evidencing a contractual agreement between two parties, stating that a sale and supply may take place if the conditions are satisfied. It cannot be a demand or request for payment as it is not clear whether the transaction will proceed. There is no list of goods supplied and a price to pay. Therefore it cannot notify a present legal obligation to make payment. The nature of a conditional agreement for sale and purchase is also that it is a two party transaction. It is the document in which two parties record their agreement. Being an agreement, it is likely to reflect negotiations between the parties. As such, it will not necessarily be a notice provided by the supplier to the recipient, or issued, either.

A conditional agreement for sale and purchase of property that becomes unconditional

58. If a conditional agreement for sale and purchase becomes unconditional, this also cannot be an "invoice". This is for similar reasons discussed in relation to unconditional and conditional agreements for the sale and purchase of property (paragraphs 49 to 57). A conditional agreement for the sale and purchase of property that goes unconditional cannot be a demand or request for payment. Once the conditions are satisfied there may be a present and legal obligation to make payment. However, that obligation does not arise from the execution of the agreement. Under the terms of the agreement for sale and purchase, the agreement was conditional. It is only through the subsequent satisfaction of the conditions and the notification of that fact that the price for the supply becomes payable. Therefore, the agreement did not notify a present and legal obligation to make payment—it was the subsequent notification (due to satisfying the conditions) in conjunction with the agreement for sale and purchase that brought the obligation into effect.

59. Moreover, a conditional agreement that becomes unconditional is not issued; it would already be in the possession of the parties when it goes unconditional. If the contract was conditional on one party completing a condition of the contract then a question might arise as to whether the notice to the other party that the condition is satisfied might constitute an "invoice". In determining whether such a notice is an "invoice" one should consider the principles discussed earlier.

What if no other invoice is issued?

60. It is noted that an agreement for the sale and purchase of property may not always be followed with an "invoice", though it *may* be. In determining whether a document is an "invoice" one should consider the principles discussed earlier.

61. Nonetheless, even if there is no other document which could be regarded as an "invoice", this fact does not lead to or support the conclusion that an

unconditional, conditional, or conditional that goes unconditional, agreement for the sale and purchase of property must be an invoice. The absence of an invoice on any particular supply does not mean that the Act ceases to function. As stated in section 9 of the Act, the time of supply will be triggered "at the earlier of the time an invoice is issued by the supplier or the recipient or at the time any payment is received by the supplier, in respect of that supply". Thus, if there is no invoice, the Act directs one to consider "the [first] time any payment is received by the supplier, in respect of that supply" as triggering the time of supply. This point is consistent with the earlier PIB 173 statement.

62. It is noted that in the case of an unconditional agreement, a deposit will often be paid to the vendor when the agreement is signed. If this is done, the time of supply will generally be triggered at that time irrespective of whether an unconditional agreement for the sale and purchase of property is an invoice.

General application to contracts

63. The principles stated in this interpretation statement are generally also applicable when considering whether other contracts and other "documents" meet the statutory definition of "invoice" the purposes of the Act. Generally, a contract does not perform and is not intended to perform the function of notifying the purchaser of an obligation to make payment.

Conclusion

64. The statutory definition of "invoice" is consistent with the *ordinary* meaning of "invoice" and should be read in that light. An "invoice" is a document issued by one party to another party setting out the details of the goods and services supplied and noting the payment due. This is supported by the Court of Appeal's judgment in *Shell*. Therefore, for an "invoice" to trigger the time of supply, there must be an invoice, in the ordinary sense of the word, that notifies the purchaser of the obligation to make payment.

65. It is considered that an unconditional agreement for the sale and purchase of property will not constitute an "invoice" as it will not satisfy the definition in the Act, which is to be read consistently with the ordinary meaning of "invoice". Similarly, a standard form agreement for sale and purchase of property that is conditional on execution, or is conditional on execution that later goes unconditional, will also not constitute an invoice.

66. The conclusion that a conditional agreement and a conditional standard form agreement that goes unconditional, for the sale and purchase of property are not "invoices" is consistent with the earlier public statement in PIB 173. The conclusion with regard to the unconditional agreement is inconsistent with earlier public statement.

67. The principles stated in this interpretation statement will generally also be applicable when considering whether other contracts and "documents" may meet the statutory definition of "invoice". The Commissioner considers that a contract would not meet the statutory definition of an "invoice".

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out answers to some enquiries we've received. We publish these as they may be of general interest to readers. A general similarity to items published here will not necessarily lead to the same tax result. Each case should be considered on its own facts.

[This item was issued by the Office of the Chief Tax Counsel on 28 June 2007. It was previously released for public consultation as exposure draft QB0050].

QB 07/03: TRUSTEES IN THE CONTEXT OF THE GOODS AND SERVICES TAX ACT 1985: DOES A SEPARATE TRUSTEE CAPACITY AND PERSONAL CAPACITY EXIST AND DO SEPARATE TRUSTEE CAPACITIES EXIST FOR TRUSTEES OF MULTIPLE TRUSTS?

Goods and Services Tax Act 1985 ("GSTA"), section 2 - Definition of he term "trustee"

Background and question

We have been asked to clarify Inland Revenue's position on whether, in the context of the "associated persons" definition in section 2A(1) of the GSTA, a person acting in their capacity as a trustee of a trust is acting in a different capacity from when they are acting in their personal capacity. A related question is whether a person who is a trustee of more than one trust is to be regarded as possessing a separate trustee capacity for each particular trust.

The answer

For the purposes of the "associated persons" definition in section 2A(1) of the GSTA, a person acting in their capacity as trustee of a particular trust will be treated as acting in a different capacity from when they are acting in their personal capacity. A person who is a trustee of more than one trust is to be regarded as possessing a separate trustee capacity for each particular trust.

Legislation

Section 2A of the GSTA defines "associated persons" and provides that:

> (1) In this Act, associated persons or persons associated with each other are—
>
> (a) two companies if a group of persons—
>
> (i) has voting interests in each of those companies of 50% or more when added together; or
>
> (ii) has market value interests in each of those companies of 50% or more when added together and a market value circumstance exists in respect of either company; or
>
> (iii) has control of each of those companies by any other means whatsoever:
>
> (b) a company and a person other than a company if the person has—
>
> (i) a voting interest in the company of 25% or more; or
>
> (ii) a market value interest in the company of 25% or more and a market value circumstance exists in respect of the company:
>
> (bb) a person, or a branch or division of the person that is treated as a separate person under section 56B, and another branch or division of the person that is treated as a separate person under section 56B
>
> (c) two persons who are—
>
> (i) connected by blood relationship:
>
> (ii) connected by marriage, civil union or de facto relationship:
>
> (iii) connected by adoption:
>
> (cb) a trustee of a trust and another person (person A), if—
>
> (i) person A is associated with another person (therelative) under paragraph (c); and
>
> (ii) the relative is associated with the trustee under paragraph (f):
>
> (d) a partnership and a partner in the partnership:
>
> (e) a partnership and a person if the person is associated with a partner in the partnership:
>
> (f) a trustee of a trust and a person who has benefited or is eligible to benefit under the trust, except if, in relation to a supply of goods and services—
>
> (i) the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic or cultural purposes; and

(ii) the supply is made in carrying out these purposes:

(g) a trustee of a trust and a settlor of the trust, except if the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic or cultural purposes:

(h) a trustee of a trust and a trustee of another trust if the same person is a settlor of both trusts:

(i) a person (person A) and another person (person B) if—

(i) person B is associated with a third person (person C) under any one of paragraphs (a) to (h); and

(ii) person C is associated with person A under any one of paragraphs (a) to (h).

The "trustee" definition in section 2 of the GSTA provides that:

> "**Trustee**" includes an executor and administrator; and includes Public Trust and the Maori Trustee.

The definition of "trustee" in section OB 1 of the Income Tax Act 2004 ("ITA 2004") provides that:

> "trustee",—
>
> (a) for a trust,—
>
> (i) means the trustee only in the capacity of trustee of the trust; and
>
> (ii) includes all trustees, for the time being, of the trust:
>
> (b) includes an executor and administrator:
>
> (c) includes Public Trust:
>
> (d) includes the Maori Trustee:
>
> (e) for a superannuation scheme that is a trust or that is treated by this Act as a trust, includes a person by whom the investments of the scheme (or a part of the scheme) are managed or controlled:
>
> (f) for a unit trust, means the trustee in which is vested the money, investments, and other property that are for the time being subject to the trusts governing the unit trust:
>
> (g) is defined in section DC 14 (Some definitions) for the purposes of sections DC 11 to DC 13 (which relate to share purchase schemes).

Analysis

The definition of "trustee" in the GSTA is an inclusive definition as it states that "trustee" *includes* an executor and administrator; and also *includes* Public Trust and the Maori Trustee. It therefore does not exhaustively list what is included in the "trustee" definition. By using an inclusive definition, Parliament must have intended to also rely on the common law meaning of "trustee".

Case law recognises that a person acting in their capacity as a trustee of a trust is acting in a different capacity from when they are acting in their personal capacity (*Case K68* (1988) 10 NZTC 544; *Case L72* (1989) 11 NZTC 1,419; *Gasparini v Gasparini* (1978) 87 DLR (3d) 282; 20 OR (2d) 113). Case law also recognises that a person's capacity as a trustee of a particular trust is separate from their capacity as a trustee of any other trust (*Fraser v Murdoch* (1880-81) LR 6 App Cas 855; *Commissioner of Taxes v Trustees of Joseph (deceased)* (1908) 2 NZLR 1085; 10 GLR 556; *Case 98* (1951) 1 CTBR (NS) 423).

The definitions of "trustee" in the GSTA and the ITA 2004 differ in that the ITA 2004 definition specifically states that a reference to a "trustee" of a trust in the ITA 2004 means "the trustee only in the capacity as trustee of the trust". The GSTA is silent on this point. Prior to 1988, the GSTA and the Income Tax Act 1976 ("ITA 1976") had the same "trustee" definition. The current GSTA "trustee" definition is the definition that the two Acts originally shared.

The ITA 1976 definition of "trustee" was amended by the Income Tax Amendment Act (No 5) 1988 with application from 1 April 1988 to explicitly clarify that a reference in the ITA 1976 to a "trustee" of a trust meant that trustee only in their capacity as trustee of that trust. That approach is retained in the ITA 2004. The GSTA definition is different in that it does not contain an explicit reference to a separation between a person's capacity as trustee of a trust and their personal capacity. Therefore an issue arises as to whether the absence of this specific reference means that the separation between a person in their capacity as trustee of a trust and their personal capacity is recognised in the GSTA.

It is considered that the amendment was made to the ITA definition of "trustee" as a clarification exercise only. Although the GSTA definition of "trustee" was not amended to keep in step with the ITA definition, as noted above, it is considered that the inclusive nature of the GSTA definition means that the general principles relating to the status of trustees and their separate trustee and personal capacities are incorporated into the GSTA "trustee" definition.

Example

A is a trustee of a trust. A's wife (C) is a shareholder of a company, (B), and has a voting interest in the company of 25%. C is also a beneficiary of the trust. The trust sells property to the company. When determining the time of supply of the property under section 9(2)(a), a factor to consider is whether or not the parties are associated with each other. The question is whether the trust and the company are associated. To determine association, it is necessary to consider section 2A(1) which states:

2A(1) In this Act, associated persons or persons associated with each other are-

(a) two companies if a group of persons—

(i) has voting interests in each of those companies of 50% or more when added together; or

(ii) has market value interests in each of those companies of 50% or more when added together and a market value circumstance exists in respect of either company; or

(iii) has control of each of those companies by any other means whatsoever:

(b) a company and a person other than a company if the person has—

(i) a voting interest in the company of 25% or more; or

(ii) a market value interest in the company of 25% or more and a market value circumstance exists in respect of the company:

(bb) a person, or a branch or division of the person that is treated as a separate person under section 56B, and another branch or division of the person that is treated as a separate person under section 56B

(c) two persons who are—

(i) connected by blood relationship:

(ii) connected by marriage, civil union or de facto relationship:

(iii) connected by adoption:

(cb) a trustee of a trust and another person (person A), if—

(i) person A is associated with another person (the relative) under paragraph (c); and

(ii) the relative is associated with the trustee under paragraph (f):

(d) a partnership and a partner in the partnership:

(e) a partnership and a person if the person is associated with a partner in the partnership:

(f) a trustee of a trust and a person who has benefited or is eligible to benefit under the trust, except if, in relation to a supply of goods and services—

(i) the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic or cultural purposes; and

(ii) the supply is made in carrying out these purposes:

(g) a trustee of a trust and a settlor of the trust, except if the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic or cultural purposes:

(h) a trustee of a trust and a trustee of another trust if the same person is a settlor of both trusts:

(i) a person (person A) and another person (person B) if—

(i) person B is associated with a third person (person C) under any one of paragraphs (a) to (h); and

(ii) person C is associated with person A under any one of paragraphs (a) to (h).

Section 2A(1)(i) is a test for association in a tripartite situation such as this, and provides that two people will be associated under section 2A(1)(i) if they are each associated with a third person under any one of paragraphs (a) to (h), being the remaining paragraphs of section 2A(1). The trust (represented by A, the trustee) and the company will be associated under section 2A(1)(i) if they are each associated with a third person under any one of the remaining paragraphs of section 2A(1).

A's wife (C) holds a voting interest of 25% in the company (B). This means that C and B are associated by virtue of section 2A(1)(b)(i).

The issue to then be determined is whether A and A's wife (C) are associated. If they too are associated under any of the paragraphs (a) to (h) of section 2A(1), then the company and the trust will be associated persons.

Because A is a trustee of the trust, he is regarded as having two capacities, a trustee capacity and a separate personal capacity. In this case the transaction involves trust property being sold to the company, with A acting in his trustee capacity. Because A is viewed only in his capacity as trustee of a trust, there is no association between A and A's wife (C) under section 2A(1)(c)(ii), which associates two people through marriage. Consequently, the trust and the company cannot be associated through A's marriage to C. However, as C is a beneficiary of the trust, and is, therefore, associated with A under section 2A(1)(f), the trust and the company are associated.

Furthermore, in this scenario, it is worth noting that section 2A(4) results in A being treated as holding a 25% interest in company B.

[This item was issued by the Office of the Chief Tax Counsel on 28 June 2007. It was previously released for public consultation as exposure draft QB0054].

QB 07/04: TROPHIES AND ANIMAL PRODUCTS DERIVED FROM THE TOURIST, HUNTING AND SAFARI INDUSTRY THAT ARE TO BE MOUNTED IN NEW ZEALAND — ZERO-RATING

This item amends the Commissioner's policy statement "Trophies and animal products derived from the tourist, hunting and safari industry: zero-rating under GST", *Tax Information Bulletin* Vol 9, No 6 (June 1997) to the extent that it relates to trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand. This item is to be read with the policy statement "Trophies and animal products derived from the tourist, hunting and safari industry: zero-rating under GST" *Tax Information Bulletin* Vol 15, No 7 (July 2003).

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

Question

We have been asked whether extensions exceeding 183 days may be granted under section 11(5)(b) with respect to trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand.

Answer

The 183-day extension period limit provided for in the 1997 TIB Item no longer applies with respect to trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand. Consequently, extensions exceeding 183 days may be granted with respect to such trophies and animal products if section 11(5)(b) is satisfied in the particular case.

Industry practice indicates that generally a 12-month extension period, beginning on the day of the time of the supply, will be appropriate. However, when the information provided indicates that a 12-month extension period is not appropriate in the particular case, a shorter or longer extension period may be granted.

Analysis

Background

1. Taxidermists have stated that they are increasingly unable to mount trophies and animal products derived from the tourist, hunting and safari industry within sufficient time for the supplies of goods and services involved to qualify to be zero-rated. Taxidermists attribute this to an increased demand for mounting services resulting from growth in the tourist, hunting and safari industry, the small size of the New Zealand taxidermy industry, and the specialised and time-consuming nature of mounting.

2. Under section 11(5)(b), the Commissioner may extend the 28-day period within which a supply of goods must be exported from New Zealand in order to qualify to be zero-rated. An extension may be granted where, due to the nature of the supply, it is not practicable for the supplier to export the goods, or a class of the goods, within 28 days beginning on the day of the time of supply.

3. The Commissioner's practice has been to issue statements, published in the *Tax Information Bulletin*, governing the exercise of the discretion under section 11(5)(b) with respect to industries that require extensions to the 28-day statutory period. The Commissioner has issued statements in respect of two industries: the bloodstock industry and the tourist, hunting and safari industry. These statements recognise that the 28-day statutory period is not practicable for these industries. The statements apply on an industry-wide basis to specified supplies and set out the maximum extension period that may be granted in any particular case.

4. In "Trophies and animal products derived from the tourist, hunting and safari industry: zero-rating under GST", T*ax Information Bulletin* Vol 9, No 6 (June 1997) (the 1997 TIB Item), the Commissioner's practice on the exercise of the discretion under section 11(5)(b) with respect to trophies and animal products derived from the tourist, hunting and safari industry is set out. The 1997 TIB Item states that applications for extensions, not exceeding 183 days, may be made with respect to certain supplies associated with trophies and animal products derived from the tourist, hunting and safari industry. The implication of this is that extensions exceeding 183 days may not be granted.

5. The supplies covered by the 1997 TIB Item are specified to be the taxidermy service provided by the taxidermist, the packaging and shipping of the trophy and related animal products, and the trophy fee. The 1997 TIB Item states that the last two supplies are zero-rated provided their supply is in accordance with the relevant provisions of the Act. It also states that

the taxidermy service provided by the taxidermist is chargeable with GST at the standard rate.

6. The 1997 TIB Item was amended by "Trophies and animal products derived from the tourist, hunting and safari industry: zero-rating under GST" *Tax Information Bulletin* Vol 15, No 7 (July 2003) (the 2003 TIB Item). The 2003 TIB Item concludes that, as a result of legislative changes, the 1997 TIB Item is no longer correct in stating that taxidermy services cannot be zero-rated. The 2003 TIB Item states that taxidermy services qualify to be zero-rated if section 11A (1)(m) is satisfied. It also emphasises that the 1997 TIB Item is limited to the factual scenario described in it and that other factual scenarios may have different tax consequences.

Legislation

7. Section 11(1)(d) and (e) provides:

> 11. Zero-rating of goods—
>
> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> ….
>
> (d) subject to subsection (4), the supplier will enter the goods for export under the Customs and Excise Act 1996 in the course of, or as a condition of, making the supply, and will export the goods; or
>
> (e) subject to subsection (4), the goods will be deemed to be entered for export under the Customs and Excise Act 1996 and will be exported by the supplier in the course of, or as a condition of, making the supply; …

8. Section 11(4) and (5) provides:

> (4) If subsection (1)(d) or (1)(e) applies and the goods are not exported by the supplier within 28 days beginning on the day of the time of supply or a longer period that the Commissioner has allowed under subsection (5), the supply of the goods must be charged with tax at the rate specified in section 8 despite subsection (1)(d) and (1)(e) but subject to subsection (1)(a), (1)(b) and subsection (5).
>
> (5) The Commissioner may extend the 28-day period before a supply of goods is charged with tax at the rate specified in section 8 if the Commissioner has determined, after the supplier has applied in writing, that—
>
> (a) circumstances beyond the control of the supplier and the recipient have prevented, or will prevent, the export of the goods within 28 days beginning on the day of the time of supply; or
>
> (b) due to the nature of the supply, it is not practicable for the supplier to export the goods, or a class of the goods, within 28 days beginning on the day of the time of supply.

Extension to time period

9. The Commissioner is satisfied that, due to the nature of the supply, the 183-day extension period limit provided for in the 1997 TIB Item is insufficient with respect to trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand.

10. Having considered the industry practice, including the mounting process, the Commissioner considers that generally a 12-month extension period will be appropriate for trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand. When the information provided indicates that a 12-month extension period is not appropriate in the particular case, a shorter or longer extension period may be granted.

11. "Mounted" and "mounting" denote the taxidermy service whereby animal parts are removed, preserved, treated and attached to a form or mannequin for permanent display.

12. The Commissioner therefore considers that the 183-day maximum extension period provided for in the 1997 TIB Item no longer applies with respect to trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand. The 1997 TIB Item continues to apply with respect to trophies and animal products derived from the tourist, hunting and safari industry that are not to be mounted in New Zealand.

13. Applications for extensions of the 28-day statutory period with respect to trophies and animal products derived from the tourist, hunting and safari industry that are to be mounted in New Zealand must be made in writing and sent with the necessary documentation to the supplier's local Inland Revenue office. An extension may be granted with respect to a good or class of goods.

14. This item applies with respect to the supplies of goods and services specified in the 1997 TIB Item. In some cases, these goods and services are supplied to the tourist–hunter as part of a package, which may include the provision of other types of supplies such as accommodation, food, sightseeing and other activities. Zero-rating does not apply to these other types of supplies that are enjoyed and/or consumed in New Zealand.

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, Court of Appeal, Privy Council 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. Where possible, we have indicated if an appeal will be forthcoming.

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.

SERVICE OF NOTICE OF RESPONSE SENT TO INCORRECT ADDRESS SUFFICIENT

Case:	The Commissioner of Inland Revenue v LGH Thompson
Decision date:	8 June 2007
Act:	Tax Administration Act 1994
Keywords:	Notice of Response, service, legal privilege, authorized to act for taxpayer (s 14)

Summary

This was an appeal against the decision of a Taxation Review Authority, AAP Willy, in which he held the taxpayer was entitled to deregister for GST purposes.

Background

The High Court allowed the Commissioner's appeal in part, consistently with the Court of Appeal's decision in *Lopas v The Commissioner of Inland Revenue* (2006) 22 NZTC 19,726, holding that the taxpayer was not entitled to deregister for GST.

The Commissioner also appealed a finding of the Taxation Review Authority (TRA) that the evidence of the tax inspector was wrong, and that he knew this to be wrong at the time he gave it. On this issue, His Honour stated that he was not persuaded that the TRA was wrong. The Court, however, described the failing as an omission, which the TRA might have regarded as an unacceptable degree of carelessness. The Court also pointed out the TRA did not say the tax inspector was untruthful, and accepted the letter was posted when the inspector said it was. The Court indicated the criticism may have focused more on a degree of carelessness, which the TRA found inexcusable.

The Court also dismissed the taxpayer's cross appeal on the issue of service of the notice of response (NOR). It held (1) the NOR had been served in time, (2) the evidence of the accountant that he had taken the NOR to the taxpayer was not subject to legal professional privilege and was not therefore inadmissible, and (3) was sufficient to prove service of the NOR in time.

Facts

The taxpayer de-registered himself for GST in November 1999, claiming that his income for the succeeding 12 months would be less than $30,000. However, the Commissioner re-registered him in August 2000. The taxpayer then issued a NOPA on 9 October 2000, dealing with de-registration. The Commissioner responded by issuing a NOR on 29 November 2000, sending it not to the tax agent who had been nominated in the NOPA, but to the accountant who had served the NOPA. Upon receipt of the NOR, the accountant arranged a meeting with the taxpayer and his solicitor on 30 November 2000. At the meeting, the accountant "tabled" the NOR.

A dispute arose between the taxpayer and the Commissioner as to whether the taxpayer was entitled to de-register himself, and as to whether the NOR had been properly served. The TRA held that the taxpayer was entitled to de-register himself. The TRA also held that the NOR had been served on the taxpayer, even though the method of service did not comply with s 14 Tax Administration Act 1994. Nevertheless, that method was not fatal as s 14 TAA was facilitative, not mandatory. The TRA also held evidence of the meeting between the taxpayer and the accountant was admissible to prove that the taxpayer did receive the NOR.

The Commissioner appealed against the TRA's decision, on both the issue of entitlement to de-registration and on the issue relating to whether the accountant was authorised to receive the NOR. However, the parties were agreed that the Commissioner's appeal relating to the taxpayer's entitlement to de-registration should be allowed, following the Court of Appeal's decision in *Lopas v The Commissioner of Inland Revenue* (2006) 22 NZTC 19,726. The remaining issue thus requiring determination was that of service of the NOR.

Even though the TRA had determined that issue in the Commissioner's favour, the Commissioner appealed against certain findings of the TRA in relation to that issue. The Commissioner contended that the TRA was

wrong to hold that the accountant was not an agent for the purposes of s 14 TAA, and that the TRA was wrong to hold that a tax inspector had given evidence about service he knew to be wrong.

The taxpayer cross-appealed against the TRA's decision on the same issue. He contended that (a) the NOR had not been served because compliance with s 14 TAA was mandatory and the accountant who prepared the NOPA was not his agent; (b) the evidence that he had received the NOR was not admissible because he had received it at a meeting that was the subject of legal professional privilege; and (c) that evidence was inadequate because it proved only that the NOR had been discussed at the meeting.

In response, the Commissioner contended that he had complied with s 14 TAA, because he had sent the NOR to the accountant, who was authorised to act on behalf of the taxpayer. The Commissioner also contended that the evidence from the accountant that he had taken the NOR to the meeting could not be privileged because privilege was confined to confidential communications between a solicitor and client for the purpose of giving or getting advice.

Decision

The High Court dealt with the issues in the following way:

The NOR had been served on the taxpayer in time, even though the method of service did not comply with s 14 TAA. His Honour stated that if the Commissioner did not agree with a taxpayer's NOPA, he must notify the taxpayer (s 89G TAA). Notification may be given by any of the means specified in s 14 TAA, the section being expressed in permissive terms. The prescriptive and formal nature of the disputes procedures did not compel departure from the normal meaning of the word "may". His Honour agreed with Baragwanath J's comments in *Hieber v The Commissioner of Inland Revenue* (2002) 20 NZTC 17,774, that s 14 TAA was facilitative, not mandatory. However, the Commissioner would be well advised to comply strictly with s 14 TAA when it comes to service as it is important that taxpayers know to whom notices are being sent. The Commissioner must prove that the taxpayer who issued the NOPA had received the NOR, unless he can rely on the deeming provisions of s 14 TAA relating to postal service or service on an agent.

His Honour accepted that, in the present case, the accountant was the taxpayer's agent as he had held himself out as such by serving the NOPA. However, the question posed by s 14 TAA in relation to an agent was whether the person concerned was authorised to act on behalf of the taxpayer. That was a question of fact. A taxpayer may appoint a number of agents in a tax dispute but authorise only one of them to accept service of documents. Since the taxpayer in the present case had, in his NOPA, designated another firm as his agent for service, the Commissioner could invoke the agency provisions of s 14 TAA only by serving the NOR on the designated firm. Had the NOPA been silent about service, the inference that the accountant was the taxpayer's agent for service would have been irresistible.

However, that was not the end of the matter. His Honour held that the evidence from the accountant was admissible, and sufficient, to prove that the NOR had been served in time. The NOR itself was not privileged. It was the Commissioner's document, willingly disclosed. The Commissioner had not sought to prove the contents of the NOR by calling the accountant; rather, he had sought to establish only that it had been given to the taxpayer at the meeting. His Honour stated that privilege does not extend to communications between a client and a third party, unless the third party is an agent of the client or the solicitor and the communication passes through the agent as an intermediary: *Three Rivers District Council v The Governor and Company of the Bank of England* (No 6) [2005] 1 AC 610, 654, para 50 (HC). A communication from an employee or an agent acting otherwise than as an intermediary for the purpose of getting legal advice will not attract legal advice privilege: *Three Rivers District Council v The Governor and Company of the Bank of England* (No 5) [2003] QB 1556, 1574 (CA).

In the present case, the tabling or delivery of the NOR was a communication between the accountant and the taxpayer. The delivery provided a convenient occasion for legal advice; getting legal advice was however not the purpose of the delivery. The accountant was not engaged as an intermediary to get legal advice. Accordingly, the delivery of the NOR did not attract legal advice privilege. His Honour also stated that the NOR was not covered by litigation privilege, which applied to confidential communications between solicitor, client and third party for the dominant purpose of enabling the solicitor to advise or act in litigation. So far as the conduct of anticipated litigation was concerned, the delivery of the NOR in the present case was merely a collateral fact: *Brown v Foster* (1987) 1 H&N 736; *Dwyer v Collins* (1852) 7 Ex 639; *Brown v Bennett* (No 2) [2002] 1 WLR 713, 769.

On the issue relating to the evidence of the tax inspector, His Honour stated that he was not persuaded that the TRA was wrong. The TRA's criticism may have been focused more on the carelessness of the tax inspector, which the TRA found inexcusable.

TRINITY INVESTORS LOSE APPEAL

Case: Accent Management Ltd, Ben Nevis Forestry Ventures Ltd, Bristol Forestry Ventures Ltd, Clive Bradbury, Greenmass Ltd, Gregory Peebles, Kenneth Laird Estate, Lexington Resources Ltd, and Redcliffe Forestry Ventures Ltd v The Commissioner of Inland Revenue

Decision date: 11 June 2007

Act: Income Tax Act 1994

Keywords: Tax avoidance, Trinity Scheme

Summary

The Court of Appeal has dismissed the taxpayers appeal and upheld the finding that the Trinity Forestry arrangement is a tax avoidance scheme.

Background

This was an appeal against the judgment of Venning J *Accent Management Ltd & Ors v The Commissioner of Inland Revenue* (2000) 22 NZTC 19,027 in which he upheld tax avoidance assessments and 100% shortfall penalties against the taxpayers who were investors in the Trinity forestry scheme.

The Court of Appeal has dismissed the appeal and ordered the appellants to pay costs to the Commissioner.

Facts

Investors in the Trinity scheme acquired licences to use land for forestry purposes. The purpose of the licences was cultivation of Douglas fir trees, and the duration was 50 years, which approximates one Douglas fir growing cycle.

The licence agreement purported to give no title to the land or the trees but gave rights to proceeds of sale of the trees after deduction of various charges. The investors agreed by promissory note to pay a fixed price for the licence in 50 years time. The up-front licence fees paid to the landowner exceeded the cost of the land.

Investors in the scheme in the 1997 year (Tranche 1) also took out a loss of surplus insurance policy under which the insurer assumes risk for a stipulated value of the forest in the final year of the scheme. The value is the amount the investors must pay for the licence in 2047. Payment of the insurance premiums was also largely on a deferred basis with a small cash payment in 1997 and a further amount by promissory note for payment in 2047. Over 99% of the total expenditure claimed over the life of the investment, and 87% of the expenditure claimed for the first (1997) year was deferred until the year 2047.

The investors contended that the insurance premium and forestry agency fees were deductible in full in the first year, being the year in which they are incurred and that the licence fee was deductible as depreciable intangible property under Schedule 17 of the Income Tax Act 1994. The licence fee cost was the combination of the initial payment and the amount due in year 50, which is amortised over the 50 year duration of the licence.

Decision

The Court of Appeal dealt with the issues in the following way (and order):

Sham – Because the insurance policy creates separate insurance arrangements, it would be possible to treat the insurance arrangements as a sham in relation to the investors associated with Dr Muir and Mr Bradbury only, but while there was artificiality, pretence, and concealment [on their part], it could not be said that Muir and Bradbury intended the provisions regarding the wash-up of the scheme to be a dead letter, although the Court saw this aspect of the case as closely balanced. The Court held that the state of mind of Muir and Bradbury could best be categorised as involving indifference as to whether the wash-up transactions occurred.

Spreading of insurance deductions under the accruals regime – The Court held for the Commissioner on his cross-appeal that the deductions for insurance premiums are accruals expenditure and are required to be spread over the life of the policy. The Court held that the High Court has misapplied s EH 2 in its decision. However, because of the Court's findings on tax avoidance, this point was of no ultimate importance.

Licence premium deductibility under s EG 1 – The Court held for the taxpayers on this issue and said that the issue was one of statutory and not contractual interpretation, and that it must ignore elements of the scheme which are primarily relevant to tax avoidance arguments. Accordingly, the Court thought that if the whole of the licence premium had been paid at the outset, the Commissioner would have treated it as the cost of a right to use land, thus able to be depreciated over the term of the venture. It therefore held that the licence payment was the cost of the right to use land.

Tax avoidance – The Court upheld the High Court's finding of tax avoidance and said that the real purpose of the arrangement is not the conduct of a forestry business for profit, but rather generation of spectacular tax benefits. This was the major issue for the Court of Appeal and most of the discussion was on this issue, which involved consideration of the *Challenge, BNZI*, and *Petersen* cases. The Court found:

Manifestations of the absence of a genuine business purpose cannot be brushed aside as irrelevant because of taxpayer autonomy principles.

The scheme was well and truly across the "line" referred to by Richardson P in *BNZI*.

If the scheme is void as against the Commissioner, there is no need for the Commissioner or the Court to conjure up an alternative and more effective scheme into which the taxpayer might have entered.

Penalties – This was an entirely tax-driven scheme. The penalties were not imposed prematurely; on any sensible approach the interpretation of s BG 1 taken by the taxpayers was unacceptable.

TRINITY LITIGANTS LOSE APPEAL BASED ON TRINITY SETTLEMENTS

Case:	Accent Management Ltd, Ben Nevis Forestry Ventures Ltd, Bristol Forestry Ventures Ltd, Clive Bradbury, Greenmass Ltd, Gregory Peebles, Kenneth Laird Estate, Lexington Resources Ltd and Redcliffe Forestry Ventures Ltd v The Commissioner of Inland Revenue
Decision date:	11 June 2007
Act:	Tax Administration Act 1994
Keywords:	Application to recall judgment, settlements

Summary

The Court of Appeal dismissed the appeal and upheld the High Court's refusal to recall the judgment

Facts

The basic background facts are those relating to the "Trinity" forestry investment scheme.

Immediately prior to the High Court hearing, documents relating to the instigation and management of the investment scheme and the accompanying insurance were produced by the Serious Fraud Office and given to the Commissioner. As a result of the contents of the documents and the circumstances surrounding their production, some taxpayers settled with the Commissioner immediately prior to commencement of the trial.

The remaining test case litigants were unsuccessful in the High Court. These taxpayers then applied to recall the High Court judgment, essentially relying on inconsistency between the Commissioner's stance at trial and the terms on which he had settled with other taxpayers.

The application failed and the taxpayers appealed to the Court of Appeal.

Decision

The Commissioner is entitled to settle tax cases commercially given his care and management responsibilities under the principles in s 6 and s 6A Tax Administration Act 1994 (TAA) and authority of cases such as *Auckland Gas Co v The Commissioner of Inland Revenue* [1999] 2 NZLR 409 (CA). Settlements entered into do not need to reflect the Commissioner's view of the correct tax position. The settlements concluded were properly given effect to under s 89C(d) of the TAA.

It is not appropriate for the Court to review the litigation strategy adopted by the Commissioner in relation to the taxpayers who settled.

It is not appropriate to allow these taxpayers to achieve a judicial review of the Commissioner's decisions to settle on differing terms.

TRUSTEE LIABLE FOR POST BANKRUPTCY TAX DEBT

Case:	The Commissioner of Inland Revenue v Philip John Duncan
Decision date:	13 June 2007
Act:	Goods and Services Act 1985, Insolvency Act 1967
Keywords:	Trustee, contingent liability tax, bankruptcy, personal liability for GST

Summary

A Trustee may not after being bankrupted, continue to trade and incur debts with impunity from liability for GST. If he chooses to do so he incurs a fresh liability that is not provable in his bankrupt estate.

Facts

In proceedings brought by the Commissioner to recover the output tax and associated penalties, both the District Court and High Court held in favour of Mr Duncan, the Respondent. This was an appeal against the decision in the High Court.

The Commissioner had claimed that the Respondent, as trustee of a property development trust, was personally liable pursuant to s 57(3) of the Goods and Services Act 1985 for the GST debt of a trust. The Respondent denied personal liability and relied upon s 87 and s 114 of the Insolvency Act 1967, alleging that he had been bankrupted and the debt should have been proved in his bankruptcy.

The trust had made input tax claims before the Respondent was bankrupted but the output tax was incurred during the period of his bankruptcy.

The District Court held that, at the date of the Respondent's adjudication, the relevant output liabilities were contingent liabilities for the purposes of s 87(1) as tax would always have been payable, it was just a matter of when and how much.

In the High Court Chisholm J upheld the decision of the District Court but on different grounds. He overturned the District Court's finding that the output tax was a contingent liability of the Respondent at the date of bankruptcy. However, he went on to hold that the output tax arose out of obligations incurred before adjudication. Those obligations were the obligations that the Respondent incurred to the financier of the project to develop and sell the property.

Decision

For the purposes of s 87(1), the Respondent's potential liability for output tax was not, at the date of his adjudication, a contingent liability. At the date of adjudication the Respondent was under no commitment to pay the output tax liabilities which later came to charge.

Secondly, the output tax liabilities were not debts and liabilities to which the Respondent became subject to by reason of any obligation incurred before the time of his adjudication. The section requires that the relevant debt or liability be to the party to whom the pre-adjudication obligation was owed.

As a consequence the output tax liabilities were not provable in the Respondent's bankruptcy.

The Respondent could have resigned as trustee or left the development in the hands of the financier which would have been liable for the output tax as it sold the units. He elected to continue to trade after bankruptcy and there is no injustice in holding that he must meet the liabilities.

The appeal was allowed and judgment was entered for the Commissioner.

UNSUCCESSFUL APPEAL FROM THE COMMISSIONER OF INLAND REVENUE'S STRIKE-OUT APPLICATION

Case:	Ron West Motors (Otahuhu) Limited v The Commissioner of Inland Revenue
Decision date:	18 June 2007
Act:	Income Tax Act 1976
Keywords:	Late objection, Russell template

Summary

An unsuccessful attempt by the taxpayer to force The Commissioner of Inland Revenue to accept a late objection.

Facts

This was an appeal from the Commissioner's successful striking out of a Judicial Review at the High Court (reported at (2006) 22 NZTC 19,748).

This is a Russell template related matter.

The taxpayer sought to file a late objection to assessments made by the Commissioner in the 1982 to 1984 income tax years (based upon tax avoidance: see at (1998) 18 NZTC 13,537) on the basis the Commissioner had subsequently made inconsistent assessments of other taxpayers by assessing the same money to other taxpayers. This turned on an application of s 99(4) of the ITA 1976 (now s BG1(2) ITA 2004)

The Commissioner declined to accept the late objections (and thus did not allow them) on the basis he had no power to re-assess in the relevant years anyway as those years had been determined by the Courts.

The taxpayer sought judicial review but the Commissioner was successful in striking out the judicial review. The taxpayer appealed the Commissioner's success in the strike-out application.

Decision

The Court of Appeal agreed the Commissioner had no power to amend the assessments and that the strike-out was correct. In part, they relied upon their earlier decision in *Wire Supplies* [2007] NZCA 244 at par [128] to [130] of that decision.

In essence, the Court concluded that if there were inconsistent assessments that was an issue for challenges in relation to the later assessments. It did not offer the earlier and now confirmed assessments a new ground of objection.

The Court also agreed that the Commissioner cannot re-open an assessment once the objection is in the hands of the Taxation Review Authority. The Court observed that:

> "…The Commissioner refused to allow the appellant's proposed late objection because the Commissioner's inability to reopen the Track A assessments on the grounds of inconsistency with the Track C assessment made the objection futile.
>
> "We are satisfied that the Commissioner was not in error in the way he exercised his discretion not to accept the late objection. The application to review the Commissioner's discretion on this ground cannot succeed, and it was appropriate to strike it out." [par 26-27]

As to the other ground of judicial review, the Court of Appeal considered that, because of the conclusion above, this was strictly unnecessary to deal with but addressed it anyway. It was concluded that there was on the facts of this case "no unfairness in not allowing the present proceedings to proceed further" [par 33]

COURT OF APPEAL UPHOLDS TRA'S TAX AVOIDANCE FINDINGS FOR PROPERTY DEVELOPMENT

Case:	Ch'elle Properties (NZ) Limited v The Commissioner of Inland Revenue
Decision date:	25 June 2007
Act:	Goods and Services Act 1985
Keywords:	GST input credits, tax avoidance, s 76

Summary

An arrangement in terms of whether there were gaps of up to 20 years between the right to claim input tax and the liability for output tax was held to be tax avoidance

Background

This was an appeal from the decision of the High Court upholding the Taxation Review Authority conclusion that the Commissioner was correct in disallowing input tax credits claimed by respondent.

Facts

In 1996 and 1997, Nigel Ashby incorporated a total of 114 companies, all registered for GST purposes on a payment basis.

Michelle Wilson, a friend of Mr Ashby's former wife, registered Ch'elle in July of 1998 and for GST purposes, it was registered on a monthly invoice basis. The taxable activity was "property trader".

On 5 November 1998, each of the 114 Ashby companies entered into conditional contracts to purchase from Waverly Developments Ltd a lot in a subdivision in Papakura for $70,000.00. Each contract provided for a $10 deposit on execution with the remainder of the deposit to be payable on the date for settlement specified in the contracts which was 31 August 1999.

On 21 May 1999 Ch'elle entered into conditional contracts with the 114 Ashby companies to purchase these properties for a total price of $80 million; an average of about $700,000.00 per contract.

Settlement was deferred for between 10 to 20 years. An initial deposit of $10 was payable on execution, with the balance of the deposit (29,990.00) being payable subsequently. The vendor did not hold the deposit as a stakeholder but during the deferred period, the vendor was to construct a house on each section. Each of the vendors issued an invoice to Ch'elle for the total ultimate price.

In June 1999 Ch'elle filed a GST Return for the period ending 31 May 1999 claiming input tax credits of $398,333.00 in relation to 13 property transactions, including 10 of the 114 transactions. On 20 October 1999, Ch'elle filed a further GST return for the remaining 104 properties claiming $9 million in input tax credits based on the estimated market value on the respective settlement dates 10 to 20 years into the future.

The Commissioner issued notices disallowing the claims and all 114 contracts between Waverly Developments and the companies were cancelled for failure to settle on the stipulated date of October 1999.

Decision

The Court of appeal considered whether the arrangement defeated the intent and application of the GST Act. In doing so it held that it is the objective assessment of the arrangement which will determine the issue.

Secondly, the fact that the arrangement complied with the black letter terms of the Act was not determinative of whether s 76 applied because s 76 provides for an overview and assessment of the combined effect of the individual components of the Act. It is necessary to assess the scheme and purpose of the Act to assess whether s 76 is triggered.

The Court went on to hold that the longer the time gap between the taxpayer's eligibility for an input tax credit and its liability for an output tax, the less likely the arrangement will conform with the intent of the Act. In the present case, the gap of between 10 and 20 years between the input claims and output tax liabilities defeated the intent and purpose of the Act and triggered s 76.

Further, the proliferation of vendor companies had no rationale or utility but to create a mechanism to exploit a tax advantage by coming under the $1 million threshold. This exploited a mismatch between the invoice and payments accounting bases and defeated the intent of the Act.

REGULAR FEATURES

DUE DATES REMINDER

August 2007

20 Employer deductions

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

28 GST return and payment due

September 2007

20 Employer deductions

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

28 GST return and payment due

These dates are taken from Inland Revenue's *Smart business tax due date calendar 2007–2008*. This calendar reflects the due dates for small employers only—less than $100,000 PAYE and SSCWT deductions per annum.

YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft binding rulings, interpretation statements, standard practice statements and other items that we now have available for your review. You can get a copy and give us your comments in these ways.

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Draft interpretation statement	***Comment deadline***
☐ IS3571: Retirement Villages – GST	31 August 2007

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