Part I Vol 21 No 8 October/November 2009

TAX INFORMATION *Bulletin*

CONTENTS Part I

1 In summary

3 Binding rulings

BR Prd 09/08: Newmont Mining NZ Companies (Consolidated Group)

BR Prd 09/09: Air New Zealand Limited

9 Legislation and determinations

FDR 2009/03: A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (PIMCO Funds: Global Investors Series plc Global Bond Fund)

FDR 2009/5: Use of fair dividend rate method for a type of attributing interest in a foreign investment fund that is a derivative income trust

Cancellation of Determination G30: Debt securities, finance leases and hire purchase agreements denominated in New Zealand dollars

Foreign currency amounts – conversion to New Zealand dollars

18 Legal decisions – case notes

Commissioner entitled to discovery

Application of High Court orders stayed by Court of Appeal

Legal expenses non-deductible

Court of Appeal says Privacy Council decision in relation to bank cheques and drafts binding

Avoidance arrangement and Commissioner's reconstruction confirmed

Judicial Review action against Commissioner struck out because disputes process not followed

Reparation and section 109 of the Tax Administration Act 1994

No right of appeal from Taxation Review Authority's interlocutory decisions

Challenge to jurisdiction of Taxation Review Authority fails

Entitlement to deregister from GST and decision on whether or not a sale was planned results in partial win for the Commissioner

Part II: New legislation

Taxation (International Taxation, Life Insurance, and Remedial Matters) Act 2009

Inland Revenue
Te Tari Taake

ISSN No : 0114–7161

YOUR OPPORTUNITY TO COMMENT

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

A list of the items we are currently inviting submissions on can be found at **www.ird.govt.nz**. On the homepage, click on "Public consultation" in the right-hand navigation. Here you will find drafts we are currently consulting on as well as a list of expired items. You can email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Office of the Chief Tax Counsel
Inland Revenue
PO Box 2198
Wellington

You can also subscribe to receive regular email updates when we publish new draft items for comment.

Below is a selection of items we are working on as at the time of publication. If you would like a copy of an item please contact us as soon as possible to ensure your views are taken into account. You can get a copy of the draft from **www.ird.govt.nz/public-consultation/** or call the Team Manager, Technical Services Unit on 04 890 6143.

Ref	Draft type/title	Description/background information
PUB0160	Deductibility of break fee paid by a landlord to exit early from a fixed interest rate loan; and, Deductibility of break fee paid by a landlord to vary the interest rate of an existing fixed interest rate loan	These two public rulings consider the deductibility of a break fee paid by a landlord to a lender to exit early from, or vary the interest rate of, a fixed interest rate loan. The two draft public rulings are being released as a single document with a combined commentary.
IS3571	Retirement villages – GST treatment	This draft interpretation statement addresses the GST treatment of payments made to the owners or operators of retirement villages and their entitlement to input tax credits on supplies received for the purpose of a retirement village. It was previously released for consultation in February/March of this year, and now takes account of submissions received during that time.
DDG0143	Loose furniture for short-term hire	This general depreciation determination sets out the rate for the asset class "Furniture (loose)" in the "Hire equipment (short-term hire of 1 month or less only)" asset category. An example of this is furniture hired to prospective home vendors. This determination replaces provisional depreciation determination PROV17, issued on 16 February 2007.
ED 0118	Reimbursing shareholder-employees for motor vehicle expenses	This draft QWBA clarifies the use of the mileage rate published by Inland Revenue to reimburse shareholder-employees. In particular it clarifies the employee criteria and whether the 5,000 km limitation on using that mileage rate applies in these circumstances.

IN SUMMARY

New legislation

Taxation (International Taxation, Life Insurance, and Remedial Matters) Act 2009 (see Part II)

Binding rulings

BR Prd 09/08: Newmont Mining NZ Companies (Consolidated Group) 3

This product ruling applies to the payment by Newmont Mining NZ Companies (Consolidated Group) to persons pursuant to their Amenity Effect Programme, as part of their compliance with the Resource Management Act 1991.

BR Prd 09/09: Air New Zealand Limited 4

This product ruling covers the accrual by a member of the Air New Zealand Airpoints Programme of Airpoints dollars provided by Air New Zealand, as a result of expenditure incurred by the member's employer on the member's work related travel, and the redemption of those Airpoints dollars for air travel and other rewards.

Legislation and determinations

FDR 2009/03: A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (PIMCO Funds: Global Investors Series plc Global Bond Fund) 9

This determination applies to an attributing interest in the PIMCO Funds held by New Zealand resident investors and prevents the investor from calculating the FiF income using the fair dividend rate method for the 2010–2011 and subsequent income years.

FDR 2009/5: Use of fair dividend rate method for a type of attributing interest in a foreign investment fund that is a derivative income trust 11

This determination applies to an attributing interest in a foreign investment fund that is a derivative income trust and allows the investor to calculate their FiF income using the fair dividend rate method for the 2009–10 and subsequent income years.

Cancellation of Determination G30: Debt securities, finance leases and hire purchase agreements denominated in New Zealand dollars 13

The revised IFRS tax rules available from the 2009–10 income year, particularly the introduction of Determination G3 (yield to maturity), mean that this determination is no longer required.

Foreign currency amounts – conversion to New Zealand dollars 14

This article provides the exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand dollars under the controlled foreign company (CFC) and foreign investment fund (FiF) rules for the six months ending 30 September 2009.

IN SUMMARY

Legal decisions – case notes

Commissioner entitled to discovery 18

The Commissioner sought general discovery against the plaintiffs and non-party discovery against two non-parties. The plaintiffs opposed general discovery on the grounds that general discovery is not appropriate in tax litigation, other than for exceptional cases.

Application of High Court orders stayed by Court of Appeal 19

The Commissioner was successful in staying the application of order made in the High Court pending resolution of his appeal to the Court of Appeal.

Legal expenses non-deductible 20

Legal expenses incurred in challenging the differential between the milk payouts to the taxpayers of a merged dairy cooperative were capital in nature and therefore non-deductible.

Court of Appeal says Privy Council decision in relation to bank cheques and drafts binding 21

The Court of Appeal held that it must follow the Privy Council decision in *CIR v Thomas Cook (NZ) Limited* (2006) 2 NZLR 722 (PC), as it considered uncashed bank cheques fell under the definition of unclaimed money in section 4 of the Unclaimed Money Act 1971.

Avoidance arrangement and Commissioner's reconstruction confirmed 22

The Commissioner's assessments based upon section 99 and section BG1 that income was personal income and not earned by business entities was confirmed.

Judicial Review action against Commissioner struck out because disputes process not followed 23

The Commissioner took bankruptcy proceedings against the taxpayer, who then took Judicial Review proceedings against the Commissioner claiming abuse of process with assessments. The High Court struck out the proceedings because the taxpayer did not follow the Disputes Process in the first instance.

Reparation and section 109 of the Tax Administration Act 1994 24

Mr Allan appealed against his conviction and sentence for aiding and abetting a company to knowingly fail to file a Goods and Services Tax ("GST") return intending to evade the payment of GST. The Court dismissed the appeal against conviction, but upheld the appeal against the amount of reparation that Mr Allan had been ordered to pay to Inland Revenue

No right of appeal from Taxation Review Authority's interlocutory decisions 26

The determination of the Taxation Review Authority ("TRA") can be appealed to the High Court under section 26A of the Taxation Review Authorities Act 1994. However, there is no right of appeal from interlocutory decisions of the TRA.

Challenge to jurisdiction of Taxation Review Authority fails 26

The appellants' challenge to the jurisdiction of the Taxation Review Authority (TRA) was unsuccessful. The appellants contended that the TRA did not have jurisdiction to determine a challenge when the notices of assessment issued were invalid. The Court of Appeal confirmed that the jurisdiction of the TRA to determine tax challenges arises from section 138B of the Tax Administration Act 1994.

Entitlement to deregister from GST and decision on whether or not a sale was planned results in partial win for the Commissioner 27

The case was a partial win for the Commissioner and Taxpayer. The Court found that the Taxpayer was not entitled to de-register on 30 November 1999. The Commissioner's assessment which assessed output tax on two property transactions sold in the Goods and Services Tax period after the Taxpayer's de-registration was consequently upheld.

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates their tax liability based on it.

For full details of how binding rulings work, see our information booklet *Adjudication & Rulings: A guide to binding rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin,* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

You can download these publications free from our website at **www.ird.govt.nz**

PRODUCT RULING BR PRD 09/08: NEWMONT MINING NZ COMPANIES (CONSOLIDATED GROUP)

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

Persons to whom the Ruling applies ("the Applicants")

This Ruling has been applied for by Newmont Mining NZ Companies (Consolidated Group) ("Newmont").

Taxation Laws

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

This Ruling applies in respect of sections CA 1(2), CB 1, CC 1(1), CD 1 and CE 1 of the Income Tax Act 2007.

The Arrangement to which this Ruling applies

The Arrangement is the payment to persons pursuant to the Amenity Effect Programme ("AEP").

Newmont is required to comply with the Resource Management Act 1991 ("the RMA"), which includes the obligation to minimise any adverse effect of its operations on the environment and its neighbours. Consequently, Newmont endeavours to use industry-leading methods to manage, monitor and record the effect of its operations on the environment and on others living in the vicinity of its operations. However, based on the results of monitoring and modelling, Newmont has identified properties within the area of the Martha and Favona mines whose amenity may be measurably affected by mining activity specifically by noise, dust and blast-induced vibration effects ("the affected area").

In response to this, Newmont has developed the AEP the full details of which have been provided to Inland Revenue in a letter dated 12 March 2009. The details are not repeated here, save to note that the AEP is not compensation for non compliance with any of the conditions imposed under the RMA.

Occupiers of residential property within the affected area will be offered an opportunity to participate in the AEP. However, any Waihi resident may request to be included in the AEP. Their inclusion or exclusion will be based on the results of monitoring and modelling at their property over the six-month payment period or a period sufficient to confirm potential effects on amenity.

Inclusion in the AEP is voluntary and an application to participate in the AEP can be made any time.

Residents who apply to participate and are accepted into the AEP ("enrolled residents") will receive an initial one-off "enrolment payment". The enrolment payment is currently $500.

Enrolled residents will also be eligible for six-monthly retrospective effect-based payments for the greater of either noise or vibration effect based on its routine environmental monitoring results.

The quantum of the effect-based payments will vary with the actual loss of amenity experienced. If there is no effect, or the effect is to a greater or lesser extent, the payment will be varied.

Payments are carefully targeted to compensate for adverse amenity effects that residents have suffered.

Assumptions made by the Commissioner

This Ruling is not subject to any assumptions.

Conditions stipulated by the Commissioner

There are no conditions stipulated by the Commissioner.

How the Taxation Laws apply to the Applicant and the Arrangement

The Taxation Laws apply to the Arrangement as follows:

The payments received by persons under the AEP are not income under sections CA 1(2), CB 1(1), CC 1(1), CD 1 and CE 1 of the Income Tax Act 2007.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 12 March 2009 to 31 March 2012.

This Ruling is signed by me on 4 August 2009.

James Mulcahy
Investigations Manager, Assurance

PRODUCT RULING BR PRD 09/09: AIR NEW ZEALAND LIMITED

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

Name of the Person who applied for the Ruling

This Ruling has been applied for by Air New Zealand Limited.

Taxation Laws

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

This Ruling applies in respect of sections CA 1(2), CB 1, CB 3, CB 4, CB 5, CE 1, CX 2(1), CX 2(2), EW 3, EW 5(21), and EW 31.

The Arrangement to which this Ruling applies

The Arrangement is the accruing by a Member of the Air New Zealand Airpoints Programme of Airpoints Dollars provided by Air New Zealand as a result of expenditure incurred by the Member's employer on the Member's work related travel and the redemption of those Airpoints Dollars for air travel and other rewards ("Rewards"). The Arrangement does not include employees of Air New Zealand and its subsidiaries (as they are not entitled to accrue Airpoints Dollars in respect of work related travel). Further details of the Arrangement are set out in the paragraphs below. Capitalised terms are defined in the Airpoints Members' Guide as provided to the Commissioner on 13 May 2009.

1. Air New Zealand operates a loyalty scheme known as the "Airpoints Programme", referred to in this Ruling as the Programme. Under the Programme, Airpoints Dollars accrue to Members by reference to the value of the fare paid and region of the world travelled, and Airpoints Dollars have a value identical to dollars on redemption for Rewards. Airpoints Dollars may also accrue to Members from expenditure incurred on goods and services sold by scheme partners ("Partners"), for example hotels and hire car companies.
2. Airpoints Dollars accruing to or accumulated by a Member can be used by them to purchase an equivalent dollar value of travel or to purchase other Air New Zealand products (such as Koru Club membership), or hotel accommodation, travel insurance, car hire and other rewards ("Rewards").
3. The terms and conditions of the Programme are contained in the Airpoints Members' Guide provided to the Commissioner on 13 May 2009 ("Terms and Conditions").

Employees of Air New Zealand's commercial customers

4. Employees of Air New Zealand's commercial customers may accrue Airpoints Dollars on travel undertaken for work purposes and paid for by their employer. The employer may pay for this travel by paying Air New Zealand for the tickets that are issued to the employee, or by reimbursing the employee for payments made by them. Any such employees wishing to accrue Airpoints Dollars would first need to become an Airpoints Member.
5. Airpoints Dollars accrue to Members by virtue of a Member's individual membership. The employer may pay the $50 membership fee, by either reimbursing the employee or paying on the employee's behalf.
6. Members' employers will not provide any consideration to Air New Zealand for Airpoints Dollars provided to those Members. Air New Zealand will not provide discounts (other than an ordinarily available discount for corporate customers provided for reasons unrelated to Airpoints Dollars) to corporate customers who request that Airpoints Dollars not be issued to their employees in respect of work related travel.
7. Employers have no influence over the Airpoints Dollars to be provided to Members (except to the extent that they purchase air travel). Airpoints Dollars will accrue to Members on the basis provided for in the Terms and Conditions, regardless of whether travel is undertaken for private purposes or for work related purposes and regardless of who pays for the travel. Airpoints Dollars accrue and are redeemed for Rewards on the same basis for any Member of the Programme, irrespective of the Member's employer.

Airpoints Membership

8. Airpoints Membership is available to residents of all countries.
9. The Membership joining fee is a cost of NZ$50 for New Zealand residents and AU$50 for Australian Members. Residents of all other countries will be

charged the local currency equivalent of NZ$50. This fee may not be paid for using Airpoints Dollars and must be paid for in cash.

10. Complimentary Membership is available to eligible first class and business class passengers who have paid for and travelled Business Premier class on Air New Zealand Operated Flights for international Sectors. Complimentary Membership is available to current fully paid-up members of Air New Zealand Koru Club.
11. Each Member may maintain only one Account. Membership is not transferable.
12. No individual Member's Account information or details will be discussed or amended or transacted unless the Member's correct Membership number along with their Personal Access Code is first quoted.
13. The Membership Card is used to assist in the earning of Airpoints Dollars and to obtain access to or the provision of Rewards. The Member agrees that his/her signing of a Card and/or quoting his/her Membership number to Air New Zealand or to any of its Partners, employees or agents for the purposes of the Airpoints Programme means that he/she has read and understood the Terms and Conditions of the Airpoints Programme and accepts them.
14. Air New Zealand reserves the right to cancel a Member's Membership in the Programme at any time without notice and without giving a reason for so doing. Air New Zealand will not provide any consideration for Airpoints Dollars earned but not redeemed at the time of termination of Membership.
15. Membership will terminate on the death of a Member. Airpoints Dollars or any other benefits earned but not redeemed at the time of death will be cancelled with no consideration. Transfer of Airpoints Dollars on the death of a Member is permitted in the situation set out in clause 8.8.2 in accordance with clause 8.5 of the Terms and Conditions (see paragraphs 31 to 32 below).

Earning Airpoints Dollars

16. Airpoints Dollars may be earned through expenditure on Air New Zealand and Partner Airline flights and on goods and services purchased from non-airline Partners (including car rental, hotel accommodation, GlobalPlus accounts and travel insurance). Transfer of credit card points/credits into Airpoints Dollars is available in some cases. Airpoints Dollars are provided by Air New Zealand regardless of whether the entitlement arises from the purchase of Air New Zealand or Partners' goods and services.

Using Airpoints Dollars

17. Rewards may be paid for using Airpoints Dollars. One Airpoints Dollar has the equivalent value of $1 in relation to the number of Airpoints Dollars required to acquire Rewards. A combination of Airpoints Dollars and cash for the acquisition of a Reward is not permitted, unless otherwise specified in writing by Air New Zealand.
18. Airpoints Dollars may be used to obtain Reward flights with Air New Zealand and Partner Airlines. Any Reward ticket that is cancelled and is refundable will be refunded by a re-crediting of Airpoints Dollars. Taxes, levies, or surcharges cannot be paid for using Airpoints Dollars and must be paid for in cash. The only exception to this is where the published fare is inclusive of taxes, levies and/or surcharges, for example on Air New Zealand Operated Flights within New Zealand or where the published fare is inclusive of insurance and fuel charges.
19. Non-flight and non-airline Rewards are available, subject to the applicable Partner's terms and conditions where those Rewards are not provided by Air New Zealand. Rewards include Koru Club membership, car hire and hotel accommodation. GlobalPlus Credit Card customers may have the ability to redeem their Airpoints Dollars on a limited range of other non-airline products (such as holiday passes, wine and CD vouchers).

Non-convertibility

20. Under the Terms and Conditions, Airpoints Dollars and Rewards cannot be redeemed, sold, assigned, gifted or otherwise transferred by a Member for cash or other consideration. The relevant clauses of the Terms and Conditions in this respect are as follows.
21. Clause 3.1.24 of the Terms and Conditions states:

    > In accepting a Reward, you agree that (subject to these Terms and Conditions and in particular the Gifting provisions in clauses 4 below and 3.4.3.10 and 3.4.4.11) you won't combine any Rewards with anyone else or sell, assign or otherwise transfer the right to a Reward to anyone else. Air New Zealand has the right to ask you for proof that you have complied with this clause in addition to any evidence required in accordance with clause 12.

22. Clause 3.1.25 of the Terms and Conditions states:

    > Rewards offered by Partners will be on the applicable Partner's terms. If you redeem a Reward in conjunction with any other loyalty programme (where such programme has our consent to use Airpoints Dollars) you agree that you won't combine any Rewards with anyone else or sell, assign or otherwise transfer Rewards for Cash or anything else. Air New Zealand is not responsible for Reward offers by Partners or their conditions, or for the Partners' performance or provision of such Rewards.

23. Clause 4.1.8 of the Terms and Conditions states:

    You must not receive any Cash or other consideration as payment for any Rewards you gift.

24. Clause 9.7 of the Terms and Conditions states:

    Notwithstanding any other provision in these Terms and Conditions or the terms and conditions of any other loyalty programme offered by a Partner and/or authorised by Air New Zealand, you can't redeem for Cash or sell your Airpoints Dollars and/or Rewards or assign or transfer them for Cash or any other consideration.

25. Clause 15.5 of the Terms and Conditions states:

    Airpoints Dollars may not be used to acquire any goods or services other than in conjunction with:

    - the Air New Zealand Airpoints Programme in accordance with these Terms and Conditions
    - any other loyalty programme, that we have given written consent to use Airpoints Dollars and in accordance with such loyalty programme's terms and conditions.

26. Clause 15.6 of the Terms and Conditions states:

    Airpoints Dollars are not convertible into Cash. Any Rewards offered by Partners or any use of Airpoints Dollars in conjunction either with the Programme or with any other loyalty programme that we have authorised the use of Airpoints Dollars in conjunction with, are subject to the restriction that you can't sell, assign or transfer any Rewards or Airpoints Dollars for Cash or any other consideration.

27. If a Member cancels a refundable Ticket, then in accordance with clause 3.1.16 the refund will be a re-credit of the Airpoints Dollars to the Member's Account. Airpoints Dollars may also be re-credited if an Upgrade for which Airpoints Dollars were redeemed is not available.

Gifting

28. Gifting is the process whereby a Member authorises the deduction of Airpoints Dollars from his/her account where such Airpoints Dollars are redeemed to provide a person resident in the same Household as the Member with a Ticket for Reward Travel or for Non-Airline Rewards. Companion Tickets may not be Gifted.

29. Gold, Gold Elite Members (Members who have accrued a specified number of Airpoints Dollars from qualifying flights) or GlobalPlus Platinum cardholders are additionally entitled to nominate as giftees two individual persons who do not need to reside in the same Household as the Gold Elite Member.

30. Air New Zealand will monitor each Member's Gifting Register to ensure that no fraudulent activities occur.

Transfer of Airpoints Dollars

31. Clause 8.5 provides for the transfer for Airpoints Dollars in accordance with clauses 1.4.5.1 and 11.4.1. Clause 1.4.5.1 provides as follows:

    1.4.5.1 Transfer of credit cards points/credit transfers to Airpoints Dollars are only available in certain countries – and in accordance with these Terms and Conditions and those of the relevant credit card issuer. Please contact your credit card issuer for full details including details on membership eligibility and transfer fees.

32. Clause 11.4.1.1 provides that Airpoints Dollars may be transferred between parties in accordance with clauses 11.4.1.2 and 11.4.1.3, which provide as follows:

    11.4.1.2 If the Nominated Earner of a joint Global Plus branded credit card (including a joint GlobalPlus Business Card) or, a joint GlobalPlus Home Loan account or a joint BNZ Credit Card dies, 100% of the Airpoints Dollars accrued from that person's joint account, and that have not yet been redeemed, may be transferred from the Nominated Earner's Airpoints Account to the other joint account holder's Airpoints Account, once the BNZ has provided verification to us of the Member's death and type of bank account.

    11.2.1.3 In the case of either separation or divorce, 50% of the Airpoints Dollars accrued from a joint GlobalPlus branded credit card (including a joint GlobalPlus Business Card) or, a joint GlobalPlus Home Loan account or a joint BNZ credit card, and which have not yet been redeemed, may be transferred from one joint account holder's Member's Account – as long as both Members ask for the transaction. The Membership details and PAC numbers for both Members must be sent to the Air New Zealand Contract Centre with supporting documentation from the solicitor of the Member from whose Account the Airpoints Dollars will be transferred. Once the Air New Zealand Contact Centre has received and verified the documentation, the relevant Airpoints Dollars that have not already been redeemed for Rewards will be equally divided and distributed into the relevant Member' Accounts.

Combining Airpoints Dollars

33. A Member may be permitted by Air New Zealand, at Air New Zealand's sole discretion, to combine his/her Airpoints Dollars with another Member's Airpoints Dollars for the purpose of booking a rental car Reward and/or a hotel Reward for a period in each case of two or more consecutive days, provided that each Member has sufficient Airpoints Dollars to redeem a rental car Reward for a minimum of one day and/or a hotel Reward for a minimum of one night.

Monitoring

34. Air New Zealand will monitor Airpoints Membership Accounts and the Programme. In particular, clause 12.2 of the Terms and Conditions states:

    If you commit fraud in connection with Airpoints Dollars or abuse your Airpoints Dollars accumulation or Rewards use or breach these Terms and Conditions, you'll be subject to appropriate administrative and/or legal action by Air New Zealand that includes, but is not limited to, Membership termination, Membership suspension, the forfeiture of all accumulated Airpoints Dollars and unused Rewards and an action to recover the monetary value of the Airpoints Dollars and credits concerned.

Termination

35. A Member may terminate his/her Membership in the Programme at any time by giving notice in writing and returning the Membership Card to Air New Zealand.
36. Partners may discontinue their participation in the Programme and their provision of Rewards at any time without notice.
37. Air New Zealand gives no warranty as to the continuing availability of the Programme and reserves the right to terminate the Programme upon giving not less than six months' notice to Members, or at any time without notice if Air New Zealand ceases to operate as an airline. Air New Zealand will not provide any consideration for Airpoints Dollars earned but not redeemed at the time of termination of the Programme.

Access to other benefits

38. Under no circumstances are the Terms and Conditions interchangeable with those of the Air New Zealand Koru Club or any other club or loyalty programme operated by Air New Zealand or any of its Partners. Membership of the Programme does not give access to the benefits of any other Air New Zealand club, facility or loyalty programme unless so stated in the conditions of membership of such other club, facility or loyalty programme.

Changes to the Programme

39. The Terms and Conditions may be amended at any time, pursuant to clause 9.1 of the Terms and Conditions.

Ruling not applicable to other loyalty programmes

40. This Ruling does not consider or rule on the tax treatment of any other loyalty programme to which, in accordance with clauses 15.5 and 15.6 of the Terms and Conditions, Air New Zealand has given written consent to use Airpoints Dollars in accordance with the terms and conditions of that other loyalty programme.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) Under no circumstances will the Terms and Conditions allow Airpoints Dollars or Rewards (including any goods or services received from redeeming Rewards such as vouchers) to be redeemed for cash or sold, assigned or transferred by a Member for cash or other consideration.

b) In any circumstance where a Reward is cancelled or unavailable or where for any other reason the Member is entitled to a refund of Airpoints Dollars, the refund is by way of re-crediting to the Member's Account the Airpoints Dollars redeemed by the Member for that Reward.

c) Employees of Air New Zealand and its subsidiaries cannot accrue Airpoints for work related travel.

d) Membership of the Programme is a contract between a Member and Air New Zealand. Employers are not entitled to enter into that contract on behalf of their employees.

e) The membership fee payable to Air New Zealand constitutes a legal liability owed by the applicant to Air New Zealand.

f) Where the Member is an employee of a Partner or a Partner Airline, the Member does not redeem Airpoints Dollars for any Reward offered by that Partner or Partner Airline.

g) Where the employer has either paid the membership fee on behalf of the employee or reimbursed the employee for that fee, the receipt or the possibility of the receipt by the employee of Airpoints Dollars or Rewards is not taken into account by the employer in determining that employee's remuneration (whether by the relative reduction of remuneration or otherwise).

h) Where the employer has either paid the membership fee on behalf of the employee or reimbursed the employee for that fee, the employer, when purchasing travel in respect of which that employee derives Airpoints Dollars, does not pay substantially more for that travel than the cost of equivalent air travel services with a more than incidental purpose of the provision of Airpoints Dollars or Rewards to that employee.

i) No changes to the Programme are made pursuant to clause 9.1 of the Terms and Conditions that are material to the tax treatment of Airpoints Dollars and Rewards derived by employees in respect of work related travel.

How the Taxation Laws apply to the Arrangement

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

- No income arises to the Member under sections CA 1(2), CB 1, CB 3, CB 4, CB 5 or CE 1 when they receive Airpoints Dollars or Rewards.
- The employer of the Member is not liable under sections CX 2(1) or CX 2(2) for FBT on any benefits obtained by the Member as a result of receiving Airpoints Dollars or Rewards.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 April 2009 and ending on 31 March 2014.

This Ruling is signed by me on the 10th day of August 2009.

Howard Davis
Director (Taxpayer Rulings)

LEGISLATION AND DETERMINATIONS

This section of the *TIB* covers items such as recent tax legislation and depreciation determinations, livestock values and changes in FBT and GST interest rates.

DETERMINATION FDR 2009/03: A TYPE OF ATTRIBUTING INTEREST IN A FOREIGN INVESTMENT FUND FOR WHICH A PERSON MAY NOT USE THE FAIR DIVIDEND RATE METHOD (PIMCO FUNDS: GLOBAL INVESTORS SERIES PLC GLOBAL BOND FUND)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994.

This power has been delegated by the Commissioner of Inland Revenue to the position of Policy Manager, Policy Advice Division, under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Shares in the PIMCO Funds: Global Investors Series plc Global Bond Fund (PIMCO) to which this determination applies are an attributing interest in a foreign investment fund (FIF) for New Zealand-resident investors.

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

PIMCO invests in global fixed interest securities for which PIMCO has made foreign currency hedging arrangements to provide investors with a New Zealand dollar denominated return on these debt instruments. Section EX 46(10)(c) of the Income Tax Act 2007 would not apply to prevent the use of the fair dividend rate (FDR) method but would apply if the New Zealand dollar denominated share class was the only class of shares issued by PIMCO.

The policy intention is that the FDR method of calculating FIF income should not be applied to investments that provide a New Zealand-resident investor with a return similar to a New Zealand dollar denominated debt investment. It is appropriate for the Commissioner to take into account the whole of the arrangement, including any interposed entities or financial arrangements, in ascertaining whether an investment in a FIF provides the New Zealand-resident investor with a return akin to a New Zealand dollar denominated debt investment.

On this basis, where the New Zealand-resident investor invests in New Zealand dollar denominated shares in PIMCO, I consider that it is appropriate for the investor holding that investment in PIMCO to be excluded from using the FDR method for the 2010–2011 and subsequent income years.

Scope of determination

This determination applies to an attributing interest in a FIF held by New Zealand-resident investors where:

1. The FIF:
   a) is an Irish company, that issues multiple classes of shares;
   b) is known as "The PIMCO Funds: Global Investors Series plc Global Bond Fund (PIMCO)";
   c) invests into an undivided pool of global bond investments;
   d) undertakes hedging in proportion to the shares issued in each currency. The NZD hedging therefore only covers the proportion of the pool of assets that corresponds to the number of NZD shares.
2. The investors in PIMCO:
   a) invest into that pool of bond assets through classes of shares that are denominated in various currencies, including one which is denominated in New Zealand dollars (NZD shares);
   b) that are New Zealand residents invest in the New Zealand dollar class of shares of PIMCO.

Interpretation

In this determination unless the context otherwise requires:

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

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

"The Act" means the Income Tax Act 2007.

Determination

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

Application date

This determination applies for the 2010–2011 and subsequent income years. However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination also applies for an income year beginning before the date of this determination for an investor in PIMCO that chooses that the determination applies for that year.

Dated at Wellington this 10th day of September 2009.

David Carrigan
Policy Manager, Policy Advice Division

DETERMINATION FDR 2009/5: USE OF FAIR DIVIDEND RATE METHOD FOR A TYPE OF ATTRIBUTING INTEREST IN A FOREIGN INVESTMENT FUND THAT IS A DERIVATIVE INCOME TRUST

Reference

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

Discussion (which does not form part of the determination)

Units in a non-resident issuer ("the issuer") to which this determination applies are attributing interests in a foreign investment fund (FiF) for portfolio investment entities (PIE) managed by New Zealand Funds Management Limited (NZFM). Each PIE is required to apply the FiF rules to determine its tax liability in respect of units in the non-resident issuer each year.

As the issuer holds New Zealand denominated cash, the balance of which may in exceptional circumstances exceed 80% or more by value of its assets, section EX 46(10)(cb) of the Act could apply to prevent the PIE from using the fair dividend rate method in the absence of a determination under section 91AAO of the Tax Administration Act 1994.

Despite the fact that the issuer may hold assets which 80% or more by value consist of financial arrangements denominated in New Zealand dollars, I consider that it is appropriate for New Zealand-resident investors in this arrangement to use the fair dividend rate method. The overall arrangement (as described to me by the applicant) contains sufficient risk so that it is not akin to a New Zealand dollar-denominated debt instrument.

Scope of determination

The investments to which this determination applies are units in a non-resident issuer which:

a) is a unit trust that is established and tax-resident in Australia;

b) has appointed, as Investment Manager, NZFM (a company incorporated and tax-resident in New Zealand) or an entity which is associated with NZFM;

c) issues New Zealand dollar denominated units (not being fixed rate shares or non-participating redeemable shares) to a PIE (or PIEs) for which NZFM is the Investment Manager;

d) has been established to hold derivative contracts to take or hedge equity or commodity risk by a single investor that is the PIE;

e) invests proceeds from the issue of units in assets which are foreign currency accounts, New Zealand dollar accounts and financial arrangements that do not provide funds to the issuer;

f) to the extent to which it invests in foreign currency accounts (or other financial arrangements that provide funds to the issuer, in relation to which the return is determined by reference in any way to underlying non-New Zealand dollar-denominated fixed-interest securities), does not invest in any currency arrangements which provide an overall economic return as if the securities were denominated in New Zealand dollars;

g) has investment guidelines that prohibit the investment manager from entering into currency arrangements (whether in the issuer itself or through any associated, or commonly controlled, entity) that are intended by the investment manager to achieve an effective hedge of more than 80% of the issuer's foreign currency exposure;

h) may make distributions to the unit holders on a regular basis, but does not guarantee that any income will be derived or that a distribution will be made;

i) may pay to the PIE an amount exceeding the issue price of the unit on redemption, but does not guarantee that the redemption price of a unit will exceed its issue price;

j) the PIE has removed no more than 80% of the foreign currency risk associated with the units.

It is a further condition of this determination that the investment in the issuer is not part of an overall arrangement that seeks to provide the PIE with a return that is equivalent to an effective New Zealand dollar-denominated interest exposure.

Interpretation

In this determination, unless the context otherwise requires:

"Associated" means associated within the meaning of subpart YB of the Act;

"Financial arrangement" means a fixed-rate share under section LL 9 of the Act;

"Investment Manager" means the person or entity appointed by the trustee to carry out the investment activities of the trustee;

"Non-participating redeemable share" means a non-participating redeemable share under section CD 22(9) of the Act;

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

"The Act" means the Income Tax Act 2007.

Determination

An attributing interest in a FiF to which this determination applies is a type of attributing interest for which a person may use the fair dividend rate method to calculate FiF income from the interest.

Application date

This determination applies for the 2009–10 and subsequent income years. However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for an income year beginning before the date of this determination for an investor in the issuer unless that investor chooses for this determination to apply for that year.

Dated at Wellington this 24th day of September 2009

David Carrigan
Policy Manager, Policy Advice Division

CANCELLATION OF DETERMINATION G30: DEBT SECURITIES, FINANCE LEASES AND HIRE PURCHASE AGREEMENTS DENOMINATED IN NEW ZEALAND DOLLARS

It should be noted that Determination G30 was withdrawn from use on 1 October 2009 as advised in the *Gazette* published on 8 October 2009.

This determination was introduced as an interim measure for use with certain New Zealand currency financial arrangements which were either held or issued by IFRS taxpayers who were in the business of lending money. It is understood that only a few taxpayers applied Determination G30 to eliminate volatility on applicable financial arrangements following the introduction of the original IFRS tax legislation.

The revised IFRS tax rules available from the 2009–10 income year, particularly the introduction of Determination G3 (yield to maturity), mean that this determination is no longer required.

Application date

The notice cancelling Determination G30 was signed on 1 October 2009.

FOREIGN CURRENCY AMOUNTS – CONVERSION TO NEW ZEALAND DOLLARS

This article provides the exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand dollars under the controlled foreign company (CFC) and foreign investment fund (FiF) rules for the six months ending 30 September 2009. These exchange rates are found in Table A.

Table B, which provides the exchange rates on the last day of the month is no longer necessary for the CFC or FiF rules but is continued to be provided to assist taxpayers that may need exchange rates on those days.

From 1 October 2009, Inland Revenue changed its information source and is using wholesale rates from Bloomberg for both Table A and Table B.

You need to choose between using the actual rate for the day for each transaction (including closing market value) and the average rate for the 12 months or period. The conversion method chosen must be applied to all interests you use the FiF or CFC income calculation method for and be used in that and each later year.

To convert foreign currency amounts to New Zealand dollars for any country listed, divide the foreign currency amount by the exchange rate shown. Round the exchange rate calculations to four decimal places wherever possible.

If you need an exchange rate for a country or a day not listed in the tables, please contact one of New Zealand's major trading banks.

Note: An overseas currency converter is available in the "Work it out" section of our website at **ww.ird.govt.nz**.

This calculator can only be used where you have actual details for each month. The calculator cannot be used where details are only available on an annual total basis, in which case you will need to use the 12-monthly average rate in Table A.

Table A – 12-month average

Table A is the average of the end of month exchange rates for that month and the previous 11 months, ie the 12-month average.

Use this table to convert foreign currency amounts to New Zealand dollars for:

- FiF income or loss calculated under the accounting profits, comparative value, fair dividend rate, deemed rate of return, or cost methods under sections EX 49(8), EX 51, EX 57 and EX 56 of the Income Tax Act 2007
- branch equivalent income or loss calculated under the CFC and FiF rules pursuant to section EX 21(4) of the Income Tax Act 2004 for accounting periods of 12 months
- foreign tax credits calculated under the branch equivalent method for a CFC or FiF under section LC 4(1B) of the Income Tax Act 2004 for accounting periods of 12 months.

Example 1

A taxpayer with a 30 September balance date purchases shares in a Philippines company (which is a FiF but does not produce a guaranteed yield) on 7 September 2009. Its opening market value on 1 October 2009 or its closing market value on 30 September 2009 is PHP 350,000. Using the fair dividend rate the opening market value is converted as follows:

PHP 350,000 ÷ 34.3916 = $10,176.90

Example 2

A CFC resident in Hong Kong has an accounting period ending on 30 September 2009. Branch equivalent income for the period 1 October 2008 to 30 September 2009 is 200,000 Hong Kong dollars (HKD), which converts to:

HKD 200,000 ÷ 5.6060 = $35,676.06

Table A: End of month rates

Currency	Code	30/04/2009	31/05/2009	30/06/2009	31/07/2009	31/08/2009	30/09/2009
Australia Dollar	AUD	0.7790	0.7991	0.8008	0.7918	0.8120	0.8194
Bahrain Dinar	BHD	0.2131	0.2413	0.2434	0.2495	0.2583	0.2725
Britain Pound	GBH	0.3821	0.3954	0.3924	0.3960	0.4206	0.4525
Canada Dollar	CAD	0.6739	0.6981	0.7505	0.7132	0.7492	0.7733
China Yuan	CNY	3.8600	4.3700	4.4100	4.5200	4.6800	4.9300
Denmark Kroner	DKK	3.1823	3.3687	3.4271	3.4568	3.5574	3.6787
Euporean Community Euro	EUR	0.4272	0.4524	0.4602	0.4642	0.4780	0.4941
Fiji Dollar	FJD	1.2447	1.3528	1.3165	1.3450	1.3654	1.3966
French Polynesia Franc	XPF	50.9411	53.9869	54.8923	55.3706	56.9923	58.9099
Hong Kong Dollar	HKD	4.3805	4.9650	5.0050	5.1286	5.3099	5.6060
India Rupee	INR	28.2798	30.1541	30.9347	31.8128	33.5107	34.7751
Indonesia Rupiah	IDR	6017.9900	6620.9100	6623.5300	6568.3700	6906.3100	6986.8300
Japan Yen	JPY	55.7400	61.0300	62.2200	62.6500	63.8000	64.8700
Korea Won	KOR	726.0428	803.4685	822.8638	808.6538	855.2901	849.8595
Kuwait Dinar	KWD	0.1645	0.1841	0.1857	0.1902	0.1968	0.2072
Malaysia Ringit	MYR	2.0117	2.2381	2.2727	2.3315	2.4126	2.5039
Norway Krone	NOK	3.7069	4.0285	4.1532	4.0481	4.1211	4.1764
Pakistan Rupee	PKR	45.4545	51.8135	52.6316	54.9451	56.8182	60.2410
Phillipines Peso	PHP	27.1299	30.1362	31.0467	31.7237	33.4179	34.3916
PNG Kina	PGK	1.5979	1.7176	1.6939	1.7020	1.8280	1.9343
Singapore Dollar	SGD	0.8372	0.9249	0.9348	0.9524	0.9873	1.0197
Solomon Islands Dollar*	SBD	4.5471	5.0566	5.1178	5.3221	5.4980	5.7580
South Africa Rand	ZAR	4.7763	5.0855	4.9817	5.1358	5.3280	5.4322
Sri Lanka Rupee	LKR	68.0272	73.5294	74.0741	75.7576	78.7402	83.3333
Sweden Krona	SEK	4.5492	4.8275	4.9742	4.7597	4.8777	5.0363
Swiss Franc	CHF	0.6447	0.6830	0.7013	0.7068	0.7255	0.7494
Taiwan Dollar	TAI	18.7266	20.8768	21.1864	21.6920	22.5527	23.2514
Thailand Baht	THB	19.9435	21.9810	21.9943	22.5228	23.3035	24.1888
Tonga Pa'anga*	TOP	1.2079	1.3252	1.3328	1.3108	1.3242	1.3867
United States Dollar	USD	0.5652	0.6405	0.6457	0.6618	0.6851	0.7232
Vanuatu Vatu	VUV	64.1026	69.9301	68.0272	68.4932	70.9220	70.9220
West Samoan Tala*	WST	1.5975	1.7162	1.6903	1.7217	1.7423	1.7919

Notes to table:

All currencies are expressed in NZD terms, ie 1NZD per unit(s) of foreign currency.

The currencies marked with an asterisk * are not published on Bloomberg in NZD terms. However, these currencies are expressed in USD terms and therefore the equivalent NZD terms have been generated as a function of the foreign currency USD cross rate converted to NZD terms at the NZDUSD rate provided.

The rates provided represent the Bloomberg generic rate (BGN) based on the last price (mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.

Source: Bloomberg CMPN BGN

Table B – 15th of the month

Table B is the exchange rate on the 15th day of the month, or if no exchange rates were quoted on that day, on the next working day on which they were quoted.

This table lists the mid-month exchange rates acceptable to us for the six-month period ended 15 October 2009. They are provided simply as a service but are not relevant for the CFC or FiF rules.

You can use the mid-month rate if you have chosen to use actual rates for conversion. This mid-month rate is acceptable to Inland Revenue as equivalent to an actual rate for transactions occurring in that month.

You can also use the mid-month rate where a branch equivalent income or loss is calculated under the CFC or FiF rules pursuant to section EX 21(4) of the Income Tax Act 2007 where the accounting period is less than or greater than 12 months.

Example 3

A resident individual with a 31 September 2009 accounting period acquires a FiF interest in a Japanese company in June 2009 for 10,500,000 yen. The interest is sold in September 2009 for 10,000,000 yen. Using the comparative value method, these amounts are converted as:

JPY 10,500,000/61.7400 = $170,068.03

JPY 10,000,000/64.1900 = $155,787.51

Example 4

A CFC resident in Singapore was formed on 21 April 2009 and has a balance date of 30 September 2009. During the period 1 May 2009 to 30 September 2009, branch equivalent income of 500,000 Singaporean dollars was derived.

(i) Calculating the average monthly exchange rate for the complete months May–September 2009:

0.8614 + 0.9212 + 0.9416 + 0.9790 + 1.0005 = 4.7037 ÷ 5 = 0.9407

(ii) Conversion to New Zealand currency:

SGD 500,000 ÷ 0.9407 = $531,519.08

Table B: Mid-month rates

Currency	15/04/2009	15/05/2009	15/06/2009	15/07/2009	15/08/2009	15/09/2009	15/10/2009
Australia Dollar	0.8053	0.7812	0.7938	0.8078	0.8148	0.8165	0.8089
Bahrain Dinar	0.2174	0.2202	0.2379	0.2445	0.2556	0.2658	0.2282
Britain Pound	0.3875	0.3857	0.3867	0.3950	0.4100	0.4276	0.3911
Canada Dollar	0.7017	0.6901	0.7151	0.7240	0.7449	0.7559	0.7044
China Yuan	3.9400	3.9900	4.3100	4.4300	4.6400	4.8100	4.1358
Denmark Kroner	3.2449	3.2280	3.4045	3.4239	3.5547	3.5800	3.2963
Euporean Community Euro	0.4356	0.4335	0.4572	0.4599	0.4776	0.4810	0.4426
Fiji Dollar	1.0122	1.2497	1.2804	1.3321	1.3550	1.3805	1.1823
French Polynesia Franc	51.9369	51.7111	54.5550	54.8206	57.0050	57.2868	52.7570
Hong Kong Dollar	4.4699	4.5358	4.8914	5.0280	5.2572	5.4638	4.6927
India Rupee	28.7885	28.8861	30.1098	31.5450	32.7246	34.2912	29.4367
Indonesia Rupiah	6277.9300	6115.9200	6388.3100	6565.2100	6735.5200	6974.2100	6,430.7058
Japan Yen	56.8500	55.7000	61.7400	61.1400	64.3800	64.1900	57.0117
Korea Won	772.3743	740.2273	800.8030	825.6780	840.7025	854.8829	791.3967
Kuwait Dinar	0.1678	0.1694	0.1822	0.1863	0.1947	0.2019	0.1734
Malaysia Ringit	2.0944	2.0772	2.2268	2.3130	2.3863	2.4679	2.1494
Norway Krone	3.8315	3.8202	4.0737	4.1430	4.1252	4.1491	3.9132
Pakistan Rupee	46.5116	47.3934	51.2821	53.1915	55.8659	58.1395	49.1197
Phillipines Peso	27.6939	27.7939	30.3162	31.0446	32.5788	34.1220	28.9382
PNG Kina	1.6952	1.6039	1.6886	1.6911	1.8278	1.8925	1.6325
Singapore Dollar	0.8674	0.8614	0.9212	0.9416	0.9790	1.0005	0.8892
Solomon Islands Dollar*	4.6299	4.6465	4.9780	5.1515	5.3535	5.6278	4.7700
South Africa Rand	5.2721	5.0977	5.1088	5.2656	5.4858	5.1923	5.3247
Sri Lanka Rupee	66.6667	68.9655	72.4638	74.6269	78.1250	80.6452	69.2691
Sweden Krona	4.7352	4.6331	4.9532	5.0366	4.8795	4.9004	4.7130
Swiss Franc	0.6571	0.6565	0.6887	0.6970	0.7270	0.7296	0.6713
Taiwan Dollar	19.6353	19.2588	20.7843	21.3833	22.3103	23.0006	20.0714
Thailand Baht	20.4948	20.2352	21.5326	22.1015	23.0860	23.9030	20.9167
Tonga Pa'anga*	1.2218	1.2156	1.2845	1.3083	1.3329	1.3568	1.2510
United States Dollar	0.5768	0.5852	0.6311	0.6488	0.6783	0.7050	0.6056
Vanuatu Vatu	65.7895	64.5161	67.1141	68.4932	69.9301	69.4444	66.2341
West Samoan Tala*	1.6248	1.6050	1.6564	1.8189	1.8088	1.7660	1.6868

Notes to table:

All currencies are expressed in NZD terms, ie 1NZD per unit(s) of foreign currency.

The currencies marked with an asterisk * are not published on Bloomberg in NZD terms. However, these currencies are expressed in USD terms and therefore the equivalent NZD terms have been generated as a function of the foreign currency USD cross rate converted to NZD terms at the NZDUSD rate provided.

The rates provided represent the Bloomberg generic rate (BGN) based on the last price (mid rate) at which the currency was traded at the close of the New York trading day. Where the date specified was not a trading day, then the rate reflects the last price on the preceding business day.

Source: Bloomberg CMPN BGN

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.

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.

COMMISSIONER ENTITLED TO DISCOVERY

Case	RadioWorks Limited v Commissioner of Inland Revenue; TVWorks Limited v Commissioner of Inland Revenue
Decision date	27 July 2009
Act	Tax Administration Act 1994
Keywords	Discovery

Summary

The Commissioner sought general discovery against the plaintiffs and non-party discovery against two non-parties. The plaintiffs opposed general discovery on the grounds that general discovery is not appropriate in tax litigation, other than for exceptional cases.

Impact of decision

This judgment provides a clear and concise summary of the relationship between discovery and the provisions of the Tax Administration Act 1994 ("TAA"). It confirms that the Commissioner is entitled to discovery in tax litigation, notwithstanding his powers under the TAA and the evidence exclusion rule.

Facts

The plaintiffs, who are related companies and part of the CanWest group, issued optional convertible notes ("OCNs") as part of intra-group funding arrangements. The OCNs were issued to off-shore related companies. The Commissioner investigated the issue of the OCNs on the basis that he considered that it was part of a tax avoidance arrangement. During the course of his investigation, the Commissioner issued notices under section 17 of the TAA to the plaintiffs requesting documents and information.

When the Commissioner received the plaintiffs' Statements of Position ("SOP"), the SOPs raised a new issue, being whether the off-shore company to whom the OCNs were issued was in fact part of the CanWest group. The plaintiffs have since advised that they will not pursue the argument that the off-shore company was not a related company.

The plaintiffs applied for an order that general discovery was not appropriate. The Commissioner applied for non-party discovery against two non-parties, NZ Guardian Trust Company Limited and the parent company of the plaintiff, Media Works NZ limited.

Decision

General discovery

Onus

High Court Rule 8.17 provides that the Court must make an order for discovery in standard track proceedings if it is appropriate. There is no specific provision for seeking or opposing general discovery. In principle, the person seeking discovery has the onus of establishing that discovery is appropriate, but the threshold is low and there is an assumption that discovery will be appropriate in standard track proceedings. If the party opposing general discovery raises issues that suggest that discovery is not appropriate, the party seeking discovery must show that discovery is appropriate, notwithstanding the issues raised.

Limitation of discovery in tax cases

The plaintiffs argued that discovery was not appropriate in tax litigation, other than for exceptional cases. They gave two reasons: first, the Commissioner has powers under section 17 of the TAA to obtain all relevant documents from taxpayers; and secondly, section 138G of the TAA excludes discovery.

The Court held that the scheme of the TAA (sections 17 and 138G) does not preclude general discovery; and there is jurisdiction to order general discovery in tax cases. The jurisdiction is supplementary to the information exchange provisions of the disputes resolution process. The Commissioner can be expected to have used his section 17 powers during the investigation, but there is no certainty that he will obtain all the relevant information this way. Section 138G of the TAA does not preclude discovery

because documents obtained from discovery may fall within the category of documents identified in the SOPs or it may fall within the exclusion to 138G or it may be a basis for cross-examination.

The Court held that the Commissioner had established that discovery was appropriate in this case.

Non-party discovery

The Court also held that the Commissioner had established that non-party discovery was relevant and necessary in this case as it may be relevant to the issue of whether the OCNs would have value to a third party. The Court held that section 17 was not a bar to non-party discovery. The Court also stated that there was a distinction between discovery and admissibility and that the Courts do not have to determine admissibility at the time of making an order for non-party discovery.

APPLICATION OF HIGH COURT ORDERS STAYED BY COURT OF APPEAL

Case	Commissioner of Inland Revenue v Chesterfields et al
Decision date	29 August 2009
Act	Court of Appeal (Civil) Rules
Keywords	Costs, stay of High Court orders

Summary

The Commissioner was successful in staying the application of orders made in the High Court pending resolution of his appeal to the Court of Appeal.

Impact of decision

This is an interlocutory step in a protracted litigation with the taxpayers.

The case highlights that the mere fact an appeal has been lodged does not stay the effect of any orders a lower court may have made: this requires a formal stay application.

Also of note is the Court's concern as to the solvency of the taxpayers when the costs were being considered. In the absence of clear evidence of solvency in the advent the Commissioner's appeal succeeds, the balance was in favour of staying the payment of costs to the taxpayers. This factor seems to create an evidential onus upon the taxpayer (in this case) to prove their solvency if costs are subject to an application for a stay.

Facts

At the High Court the taxpayers were successful in a judicial review against the Commissioner and in gaining a substantial award of costs payable to them by the Commissioner (see: *Chesterfield Preschools Ltd v CIR* (2009) 24 NZTC 23,148 and *Chesterfield Preschools Ltd v CIR* (2009) 24 NZTC 23,504). These cases were the result of an earlier judicial review: see (2007) 23 NZTC 21,125.

The Commissioner applied to the Court of Appeal to stay the application of both the substantive decision and the costs decision. The taxpayer opposed the application. The Commissioner had earlier obtained an interim stay of the judgments, pending a fully argued case upon the application before the Court of Appeal.

Before the Court of Appeal the Commissioner argued that:

> "... without a stay the appeals would be rendered nugatory because the Commissioner would be required to give irreversible effect to the High Court's orders. The Commissioner also says the respondents are probably insolvent and there is no realistic security for repayment of costs if the Commissioner is successful. Against this background, the Commissioner says the status quo should be preserved and third parties would not be prejudiced." (par [12])

The taxpayer opposed this arguing (as summarised by the Court):

> "[14] First, Mr Hampton [for the taxpayers] points to the adverse effect on the respondents of delays in resolving the issues between the parties. He notes the respondents' assets have been the subject of freezing orders since 2005. Mr Hampton says that those orders impact on the ability of the respondents to fund the litigation and on the well-being and security of the assets.
>
> [15] Secondly, the respondents submit that the Commissioner's appeals would not be rendered nugatory because Ms Sisson's undertaking gives sufficient security for the Commissioner.
>
> [16] Thirdly, Mr Hampton emphasises that the Commissioner did not appeal against the first judgment. The judicial review appeal is, he submits, a back-door means of challenging the Judge's original findings which were not appealed.
>
> [17] Finally, Mr Hampton says the various factors were appropriately considered by Fogarty J in the Judge's decision declining a stay and there is no good reason for this Court to take a different view."

Decision

The Court of Appeal granted the stays sought by the Commissioner.

In granting the stays the Court applied the test found in *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 which requires the Court to balance the competing rights of the party who obtained the judgment appealed from, and the benefits of that judgment, against the need to preserve the appellant's position against the event of the appeal succeeding.

The considerations, in granting a stay, required to be taken into account are found in *New Zealand Insulators Ltd v ABB Ltd* (2006) 18 PRNZ 459 at [11].

Despite some reservations regarding the effect of delay upon the taxpayers' financial position, the Court accepted the Commissioner's submission that the lack of a stay would force him to take statutory steps (under the High Court decisions) which could not be reversed and thus render the appeal pointless:

> "[24] The judicial review appeal would be rendered nugatory because, absent a stay, the Commissioner would have to take steps in terms of the relevant statutory powers to give effect to the second judgment that could not then be undone. It is not an answer to this point to say the Commissioner did not appeal the first judgment. That factor appears to have been influential in Fogarty J's decision to decline a stay. It was however, open to the Commissioner to act on the first judgment on the assumption that reconsideration would resolve the matter. The fact that reconsideration resulted in a further challenge does not alter the balance of convenience in the context of a stay application."

The Court also accepted that the apparent insolvency of the taxpayers meant the costs judgment should also be stayed saying;

> "Nor does the fact of Ms Sisson's undertaking alter the position. Over the course of the hearing there was some discussion about the respondents' assets and the extent to which they are encumbered. There is material in the evidence before us on the stay application which suggests that as at late 2008, there were issues about solvency but it is difficult to get a clear picture of the current state of the assets. In the end, this is not critical because Mr Hampton accepts that if the Commissioner's decisions as to the tax owing are upheld on appeal the respondents will be insolvent. In our view, the fact the costs would be paid to a party who is possibly insolvent weighs strongly in favour of a stay. Plainly, the costs appeal too would be rendered nugatory if a stay were not granted. The fact of the respondents' insolvency, should the Commissioner succeed, is also relevant to the interests of third parties (creditors) which might otherwise be relevant in this context." (at par [25])

LEGAL EXPENSES NON-DEDUCTIBLE

Case	TRA Number 05/08; Decision Number 14/2009
Decision date	20 August 2009
Act	Income Tax Act 1994
Keywords	Dairy cooperative merger, milk payout, legal expenses, deduction, capital or revenue

Summary

Legal expenses incurred in challenging the differential between the milk payouts to the taxpayers of a merged dairy cooperative were capital in nature and therefore non-deductible.

Impact of decision

This judgment confirms that whether or not legal expenses are deductible will depend upon the reason for incurring the expense.

Facts

The disputants were dairy farmers who had been supplying milk solids to a dairy cooperative (Company A). In 1996, Company A merged with another dairy cooperative (Company B).

The directors for both Company A and Company B, expected Company A's shareholders to benefit to a greater degree from the merger than Company B's shareholders. In terms of increased payouts, the merger agreement provided that, following the merger, Company A shareholders would receive a lower payment per unit of milk product supplied to the merged entity (Company B). The difference between the rates of payment for milk products supplied was referred to as "the differential".

The disputants unsuccessfully challenged the differential in the High Court and subsequently appealed the decision to the Court of Appeal where they were also unsuccessful.

For the 2002 to 2005 income tax years, the disputants claimed a deduction for their legal expenses incurred in the High Court and Court of Appeal proceedings. The disputants claimed that the legal expenses were incurred in order to obtain further revenue and were therefore deductible.

The Commissioner disallowed those claims and argued that the differential the disputants sought to recover in the High Court and Court of Appeal proceedings were capital in nature and therefore non-deductible.

Decision

The expenditure incurred by the disputants in seeking to recover the differential must be calculated from a practical and business point of view in order to determine whether it is capital or revenue in nature.

The Authority found that the differential reflected the value which Company A brought to the merger compared with what Company B brought to the merger. The merger gave company A shareholders a greater benefit than Company B shareholders in terms of an increased payout for milk-products supplied.

Part of the price to be paid by the disputants to participate in and benefit from the merger and to become supplying shareholders of the merged company, was that they accepted less income than other shareholders in Company B.

The Authority agreed with the Commissioner that the reduction in income for the first three or four seasons post merger was the price which the former Company A shareholders paid to belong to the new merged company and it was that price that the disputants sought to recover in the High Court and Court of Appeal litigation.

The fact that the price paid was taken out of the disputants income did not mean that they funded the litigation to achieve more income but that they were seeking to reduce the price required from them by the merged company for the right to supply their milk products to the merged company.

The Authority found that on the evidence presented before it, there was no rational approach to apportionment in this case, because the expenses were wholly capital in nature.

COURT OF APPEAL SAYS PRIVY COUNCIL DECISION IN RELATION TO BANK CHEQUES AND DRAFTS BINDING

Case	Westpac BNZ ANZ v Commissioner of Inland Revenue (Unclaimed Money)
Decision date	26 August 2009
Act	Unclaimed Money Act 1971
Keywords	Bank cheques, drafts, nature of instruments and unclaimed money

Summary

The Court of Appeal held that it must follow the Privy Council decision in *CIR v Thomas Cook (NZ) Limited* (2006) 2 NZLR 722 (PC), as it considered unpresented bank cheques fell under the definition of unclaimed money in section 4 of the Unclaimed Money Act 1971 ("UMA").

Impact of decision

Unless the Supreme Court agrees to hear an appeal and finds otherwise, bank cheques and drafts which remain unclaimed, will be treated as unclaimed money under the UMA. The decision of the Privy Council in *CIR v Thomas Cook* will apply.

Background facts

The Appeal relates to the meaning and effect of the UMA. In the High Court McKenzie J was satisfied that in respect of bank cheques the issuing banks are holders of unclaimed monies under section 4(1)(e) of the UMA.

McKenzie J held that the decision of the Privy Council in *CIR v Thomas Cook* [2006] 2 NZLR 722 (PC) was dispositive of the case. However he also reached the conclusion independently of the Privy Council decision.

The Court of Appeal indicated that if they found the decision of the Privy Council in *CIR v Thomas Cook* binding they would not need to decide on the independent decision of McKenzie J.

Issues and decision

Whether or not the Court of Appeal is bound in the circumstances by the decision in *Thomas Cook*? Young P and Robertson J addressed the arguments presented by Mr Kós:

Alleged incorrect legal or factual assumptions by the Privy Council as to the liabilities of the drawer of a bills of exchange

The Court of Appeal was satisfied that their Lordships fully comprehended the nature of the instruments involved and that the definitions contained in section 4(1) of the UMA had to be read within the context of the UMA and not just as an adjunct to the Bills of Exchange Act 1908.

LEGAL DECISIONS – CASE NOTES

Absence of full argument before the Privy Council on present liability to pay

Although it was apparent that the basis upon which *Thomas Cook* was decided in the Privy Council arose for the first time in that court, the Court of Appeal was satisfied that the metes and bounds of the argument were discussed, assessed and adjudicated upon.

Alleged assumption that the obligations of Thomas Cook were within section 4(1)(e)

The Privy Council in *Thomas Cook* ruled that the amounts for which the bank cheques and drafts were drawn are "money" within section 4(1)(e) of the UMA and were owing and payable to the banks' customers. The Court of Appeal disagreed with Mr Kós that this was a mere assumption on the part of the Privy Council. It was found that the particular issue had been live in the Court of Appeal and was resolved against Thomas Cook. The conclusions by the Privy Council that the obligations of Thomas Cook were money for the purposes of section 4(1)(e), was a necessary part of the ratio of the case and is binding on the Court of Appeal.

The statutory history of the UMA

Mr Kós argued that the course events took in the Privy Council meant that the statutory history of the UMA was overlooked. The overlooked statutory history was described by Robertson J as "too frail a premise" for the Court to decide that the Privy Council judgment was decided *per incuriam*. Furthermore the interpretation argued for was selective and ignored earlier, consistent definitions of "payable".

Separate findings of Baragwanath J

Baragwanath J, agreed with Young P and Robertson J and held that the Privy Council was right because it recognised that its task was to construe the UMA not the Bills of Exchange Act 1908. Section 4 of the UMA states what unclaimed money shall consist of. He saw no reason why the money should become a "windfall" in the hands of the bank. Part (1)(e) of section 4 can be construed textually to like effect to (1)(a) to (d) and there is no reason why it should receive a purposive construction to different effect. Part (1)(e) states:

> (e) Any other money, of any kind whatsoever, which has been **owing** by any holder for the period of 6 years immediately following the date on which the money has become **payable** by the holder:
>
> [Emphasis added]

He then found that the broader and not the narrower construction of "owing" and "payable" must be adopted.

The Appeal was dismissed and costs awarded to the Commissioner.

AVOIDANCE ARRANGEMENT AND COMMISSIONER'S RECONSTRUCTION CONFIRMED

Case	TRA Dec No 15/2009
Decision date	17 September 2009
Act	Income Tax Act 1976
Keywords	Avoidance, vendetta, time bar, Commissioner's Policy Statement

Summary

The Commissioner's assessments based upon section 99 and section BG1 that income was personal income and not earned by business entities was confirmed.

Impact of decision

Limited to the specific facts.

Facts

The disputant was personally assessed for income tax on income derived by various business entities on the basis that the use of those entities (which involved locating and exploitation of loss carrying companies by use of management and agency agreements) were an avoidance arrangement to disguise the fact that the income had been earned by personal exertions.

The disputant challenged the assessments (the tax years 1985 to 2000) on both substantive and procedural grounds.

The case is a complex factual one and the summary above does not include all the finer detail. For this, the decision should be consulted.

Decision

The Taxation Review Authority ("TRA") found there were no procedural defects or any substantive errors in the assessments and these were confirmed.

Procedural challenges

These are summarised at paragraph [9] of the judgment. Looking at each the Authority found:

- *Did the assessor have the necessary delegation under section 99 and BG1?* Yes at paragraphs [14] to [23];
- *Did the assessor have the necessary delegations to lift the statute bar?* Yes at paragraphs [36] to [72]. The Authority concluded at paragraph [71] that of the two options open to the Commissioner for lifting the statute bar, he may rely upon one or the other or both together.
- *Did the assessor comply with the Commissioner's Policy Statement (Feb 1990)?* Yes, even though this was not strictly necessary according to the O'Neil decision at the Privy Council. See TRA decision at paragraphs [24] to [35].

- *Was there a vendetta by the Commissioner against the disputant?* No (at par [73] to [102]). The Authority concluded there was no evidential basis for concluding there was a vendetta and further concluded that, even if there had been, if the vendetta had not made the assessments incorrect then its existence was irrelevant anyway (see at paragraph [74]).

Substantive challenges

Having dealt with the procedural points the Authority turned to address the actual assessments:

- *Was there an arrangement?* Yes, all the parties to the transactions were represented by the disputant in various different capacities and were in effect his alter egos) see decision at [131] to [170];
- *Was there tax avoidance?* Yes at paragraphs [171] to [189]. The authority referred extensively to the Court of Appeal and Supreme Court decisions in Accent Management case to conclude the use of losses in the way the disputant's arrangement achieved was not in the contemplation of Parliament: "An objective viewing of the facts in terms of commercial sense clearly leads to the conclusion that the arrangement was to avoid tax by using losses in a manner not approved by the law." (at paragraph [187])
- *Was the disputant a person affected?* Yes, at paragraph [190] to [206] saying "I now add that those monies were earned by the disputant's personal exertions. He is clearly a person affected by the tax avoidance arrangement because only he controls the profits of that arrangement." (at paragraph [206])
- *Did the disputant receive an advantage from the arrangement?* Yes, at paragraphs [207] to [216] as his personal exertions income was not taxed as a consequence of the tax avoidance arrangement.

The Commissioner's reconstruction was confirmed (at paragraphs [217] to [278]). In particular the Authority accepted that a lack of a deduction to the disputant's client (under section 104 of the 1976 Act) did not mean the disputant was not obliged to account for the receipt (see at paragraph [237]) as the fee was not addressed using section 99 or BG1 then the alleged protection of section 99(4) did not apply (at [240]).

The Abusive Tax Position Shortfall Penalty was also confirmed with the Authority wondering why a penalty for Evasion had not been applied (at paragraph [284]).

JUDICIAL REVIEW ACTION AGAINST COMMISSIONER STRUCK OUT BECAUSE DISPUTES PROCESS NOT FOLLOWED

Case	Raureti Reginald Ruka KORAKO v Commissioner of Inland Revenue
Decision date	18 September 2009
Act	Tax Administration Act 1994, section 8 of the Judicature Amendment Act 1972
Keywords	Amended and default income tax assessment, bankruptcy proceedings, judicial review and disputes process

Summary

The Commissioner took bankruptcy proceedings against the taxpayer, who then took Judicial Review proceedings against the Commissioner claiming abuse of process with assessments. The High Court struck out the proceedings because the taxpayer did not follow the disputes process in the first instance.

Impact of decision

The case follows similar strike out cases which confirm that the courts are unlikely to consider a judicial review of the Commissioner's actions in relation to the disputes process unless the Plaintiff has correctly followed the statutory process set down for disputing assessments.

Facts

The Plaintiff was the subject of amended income tax assessments and default income tax assessments for the years ending 31 March 2003, 2004 and 2005. He did not challenge the assessments within the time periods prescribed in the Tax Administration Act 1994. A default judgment was obtained by the Commissioner and bankruptcy proceedings were commenced.

On 5 March 2009, the Plaintiff's tax agent filed tax returns for the years ending 31 March 2003, 2004 and 2005. The returns contained no supporting material. Although contact was made with the investigator to establish that the returns had been received nothing further occurred. In particular no Notice of Proposed Adjustment ("NOPA") or other response notice was made in relation to the assessments.

The Plaintiff commenced judicial review proceedings seeking:

(a) an order staying the bankruptcy proceedings, and

(b) an order that the Commissioner allow the plaintiff to dispute the tax assessments through the disputes process provided for in the Act.

The Commissioner applied to strike out the proceedings on the grounds that they were clearly untenable and that the proceedings amounted to an abuse of process.

The Plaintiff then applied for an interim order under section 8 of the Judicature Amendment Act 1972, staying the bankruptcy proceedings until the determination of the judicial review proceedings.

Decision

On the facts of the case Allan J found that the Plaintiff's ignorance of the assessments stemmed from his decision to entrust the conduct of his business and tax affairs to others and his failure to pay proper attention to the conduct of his affairs. There was no evidence to say that the Plaintiff had no knowledge of the assessments. The evidence of the investigator that the Plaintiff failed to attend several meetings was also undisputed. Even now the Plaintiff has not formally responded to the Commissioner or engaged in the disputes process.

The affidavit evidence of the Plaintiff argued more about the derivation of the income which was assessed. The argument was irrelevant for judicial review purposes.

Allen J agreed that there was no breach of natural justice under the Bill of Rights Act (*Daganayasi v Minister of Immigration* [1980] 2 NZLR 130) and that it cannot be argued that the Commissioner was bound to accept excessively late filing of self-assessment on behalf of the Plaintiff. Nor was there any foundation for a pleading that the Commissioner's refusal to accept the recent tax returns (which contained no supporting evidence or explanation) amounted to an abuse of process.

The remaining cause of action (directing Commissioner to engage in disputes process) was seen as premature as the Plaintiff could still engage the disputes process.

The strike out action succeeds and the Commissioner is entitled to costs.

REPARATION AND SECTION 109 OF THE TAX ADMINISTRATION ACT 1994

Case	The Queen v Karl Andre Allan
Decision date	25 September 2009
Act	Tax Administration Act 1994, Sentencing Act 2002
Keywords	Reparation, section 109 of the Tax Administration Act 1994, disputed facts hearing

Summary

Mr Allan appealed against his conviction and sentence for aiding and abetting a company to knowingly fail to file a Goods and Services Tax ("GST") return intending to evade the payment of GST. The Court dismissed the appeal against conviction, but upheld the appeal against the amount of reparation that Mr Allan had been ordered to pay to Inland Revenue.

Impact of decision

This decision differentiates between an assessment and a loss for the purposes of reparation. Where a convicted person wants to raise evidence at sentencing that was not called at trial, but relates to aggravating or mitigating factors, the court must hold a disputed facts hearing. There is no infringement of section 109 of the Tax Administration Act ("TAA") where the amount of reparation is challenged, as the convicted person is challenging the loss to Inland Revenue, not the assessment.

Reparation is limited to core tax; penalties and use of money interest should not be included in reparation orders.

Facts

Mr Allan ran a small business of buying and selling electrical equipment. He incorporated Logical Choice Ltd in December 2003. Initially his mother was the sole director and shareholder, though it was not disputed that Mr Allan ran the business. For the first nine months following incorporation until September 2004, the company filed two-monthly GST returns, all of which claimed input tax credits. Over the following 18 months to 1 March 2006, no GST returns were filed.

In June 2006, Mr Allan asked his chartered accountant to file these returns, but only provided the necessary information in August 2006. In the meantime, he filed a GST return in July in which he claimed an input tax credit. The outstanding returns were filed in September showing that the company owed $64,000 in GST. Following this, the shareholding and directorship of the company was

transferred from his mother to Mr Allan and he put the company into voluntary liquidation. However, Mr Allan continued to operate his business and in November 2006 set up a new trading company.

Mr Allan was prosecuted for, and convicted of, nine counts of aiding and abetting a company (Logical Choice Ltd) knowingly to fail to file a GST return, intending to evade the payment of GST.

After conviction, but before sentencing, Mr Allan provided a letter from his new accountant saying that the GST appeared to have been overstated. The Judge refused to take the letter into account at sentencing.

Mr Allan was sentenced to one year's imprisonment and ordered to pay reparation of $80,000 (which included GST ($64,000) plus late payment penalties and interest).

Decision

Conviction appeal

The Court dismissed the conviction appeal. It dismissed the Crown's submission that the amount of GST owing was irrelevant at trial, as the amount of GST could be relevant to whether or not Mr Allan had an intention to evade the payment of GST by the company. However the Court dismissed Mr Allan's conviction appeal on the basis that there was ample evidence of intent, such that there was no risk that the new evidence could lead to a not guilty verdict.

Sentence appeal

At hearing, Mr Allan abandoned his challenge to the sentence of one year's imprisonment and limited his challenge to the amount of the reparation order, on the basis of the new accountant's evidence. The four issues arising are as follows:

Should the Judge have held a disputed facts hearing?

Mr Allan submitted that a disputed facts hearing should have been held before sentencing because the amount of GST was an aggravating fact that affected the amount of reparation. The Crown conceded that the amount of GST may be an aggravating factor for the purposes of sentencing, but argued that section 24(1)(a) of the Sentencing Act and the wide discretion that the trial Judge has to decide what facts were proved at trial allowed a Judge to decline to hold a disputed facts hearing where section 24(2)(b) is satisfied.

The Court stated that the accused has an absolute right not to present any evidence at trial and to put the Crown to proof. The trial Judge may therefore only hear Crown evidence on a point without any contrary evidence. The Court held that natural justice required that a disputed facts hearing be held when a convicted person wishes to call evidence that was not called at trial but which is relevant to any aggravating or mitigating factors. Under section 24(2)(a) of the Sentencing Act, the court must indicate to the parties the weight it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case.

The Court held that a disputed facts hearing should have been held unless section 109 of the TAA precluded Mr Allan from challenging the amount of GST.

What is the relevance of section 109 of the TAA?

Section 109 of the TAA provides that no disputable decision may be disputed in a court and shall be deemed to be taken as correct. Section 24(2)(c) of the Sentencing Act provides that if a fact is relevant and disputed, the prosecutor must prove beyond reasonable doubt the existence of any disputed aggravating fact.

Mr Allan submitted that section 109 only applies to civil proceedings. The Crown submitted that on its plain meaning section 109 applies to both criminal and civil proceedings and relied on the Court of Appeal and Supreme Court judgments in *R v Smith* (2009) 24 NZTC 23,004 and Smith v R (2009) 24 NZTC 23,176 where the Supreme Court stated that there was no justification for giving the words of section 109 anything other than their plain meaning. The Crown submitted that there was no impairment of any right or freedom under the Bill of Rights Act.

The Court accepted that there was no impairment of the Bill of Rights Act, but rejected the Crown's submission as contrary to the essential principles of a fair trial. The Court held that there was no conflict between sections 24(2)(b) and (c) and section 109. Reparation is concerned with loss. A challenge to a reparation order is not a challenge to an assessment. The Court held that the Court of Appeal and Supreme Court's comments in Smith were obiter.

The Court stated that if it were wrong and there was a conflict, sections 24(2)(b) and (c) of the Sentencing Act would prevail over section 109. Alternatively, the Court would have read down section 109 as applying only to civil proceedings.

Should section 32(3) of the Sentencing Act have been considered?

On behalf of Mr Allan, it was submitted section 32(3) of the Sentencing Act should have been considered by the District Court Judge as if Inland Revenue had made default assessments, it would have mitigated its loss. The Court dismissed Mr Allan's submissions and held that the responsibility for the offending rested with Mr Allan and he could not blame Inland Revenue.

Should penalties and use of money interest be included in any reparation figure?

The Crown conceded that the loss to Inland Revenue is limited to the core tax evaded and that penalties and use of money interest should not be included as part of a sentence of reparation, as neither are a loss to Inland Revenue. The Court agreed with the concession made by the Crown as to penalties and use of money interest.

The Court granted Mr Allan's application to adduce further evidence and the appeal against sentence to reduce the amount of reparation to $51,407.70.

NO RIGHT OF APPEAL FROM TAXATION REVIEW AUTHORITY'S INTERLOCUTORY DECISIONS

Case	Jacqueline Jiao, Hsueh W Huang & Shou-Chen Chiao v Commissioner of Inland Revenue
Decision date	15 September 2009 (Oral Judgment of Venning J)
Act	Taxation Review Authorities Act 1994
Keywords	Interlocutory application, appeal, determination

Summary

The determination of the Taxation Review Authority ("TRA") can be appealed to the High Court under section 26A of the Taxation Review Authorities Act 1994. However, there is no right of appeal from interlocutory decisions of the TRA.

Impact of decision

The judgment confirms that there is no right of appeal on interlocutory matters from the TRA and that an application for recall is in the nature of an interlocutory application.

Facts

The Taxpayers sought to appeal the TRA decision delivered on 5 August 2009 (Decision No 13/2009, TRA No. 024/07) refusing to recall an earlier judgment that the Authority delivered on 14 May 2009 (Decision No 11/2009, TRA No 024/07).

Decision

The Commissioner argued that no right of appeal exists under section 26A of the Taxation Review Authorities Act 2004 from the decision to decline the recall application on the ground that a recall application is in the nature of an interlocutory application rather than a final determination. The Commissioner relied on the Court of Appeal decision *M & J Wetherill Company Ltd v Taxation Review Authority* (2004) 21 NZTC 18,924. In *Wetherill*, the Court of Appeal held that no right of appeal existed from interlocutory decisions of the TRA.

The Taxpayer submitted that *Wetherill* could be restricted to the consideration of interlocutory applications in the course of the substantive proceedings.

Venning J dismissed the appeal. His Honour held that the issue was determined by the wording of the relevant statutory provision (section 26A). There is no right of appeal against the decision of the TRA to decline the application for recall as it was not a determination of a challenge.

CHALLENGE TO JURISDICTION OF TAXATION REVIEW AUTHORITY FAILS

Case	J D and CE Henson Partnership & Ors v Commissioner of Inland Revenue
Decision date	22 September 2009
Act	Income Tax Act 1976, Tax Administration Act 1994
Keywords	Assessment, validity of assessment, notice of assessment, jurisdiction of the Taxation Review Authority, procedural requirements of the Revenue Acts

Summary

The appellants' challenge to the jurisdiction of the Taxation Review Authority was unsuccessful. The appellants' argued that the notices of assessment issued by the Commissioner were invalid, as they did not quantify the amount of tax owing. The appellants contended that the Taxation Review Authority did not have jurisdiction to determine a challenge when the notices of assessment issued were invalid.

The Court of Appeal confirmed that the jurisdiction of the Taxation Review Authority to determine tax challenges arises from section 138B of the Tax Administration Act 1994 ("TAA"). A notice of assessment commences the statutory time periods to initiate a challenge to an assessment, but is a separate and ancillary step to the assessment itself.

Impact of decision

This judgment confirms the existing case law regarding the distinction between assessments and notices of assessment. It reiterates that in accordance with section 114 of the TAA, the Commissioner's failure to comply with procedural requirements of the Revenue Acts will not invalidate an assessment.

Facts

The appellants' partnership had business interests in farming and an electrical equipment company. Following an investigation into the partnership's tax affairs, the Commissioner issued manual notices of assessment for the 1992–1995 income tax years on 17 September 1996. The notices of assessment set out the adjustments to be made to the assessable income returned by the appellants, but did not quantify the amount of tax payable. On 15 October 1996, the Commissioner issued statements of account.

Further discussions regarding the assessments were held with the appellants and subsequent notices of assessment were issued on 20 February 1997. These notices were also manually prepared and specified the adjusted assessable income of the appellants and did not quantify the amount of tax to be paid. On 26 February 1997 statements of account were issued to reflect the re-assessments made.

Following a disagreement over the validity of the Commissioner's assessments and the appellants' dispute of the assessments, the appellants commenced Judicial Review proceedings against the Commissioner. The Judicial Review proceedings were settled by way of Deed. The Settlement Deed stated that the Commissioner agreed to accept the appellants' notices of proposed adjustment outside the statutory response period.

The appellants' challenge to the correctness and the validity of the assessments were unsuccessful before the Taxation Review Authority and the High Court. The appellants then appealed to the Court of Appeal, challenging the jurisdiction of the Taxation Review Authority to hear the challenge proceedings.

Decision

The appeal was dismissed.

The Court of Appeal reiterated at paragraph [19], that it is settled law that an assessment is a decision by the Commissioner quantifying the amount of tax payable by the taxpayer; it must be definitive as to the taxpayer's liability and is subject to challenge only through the statutory disputes process.

The Court noted that the legislation contemplates that a taxpayer is to be given notice of an assessment as soon as convenient (section 111 of the TAA), but that failure to give such notice does not affect the validity of the assessment itself (section 111(6) of the TAA).

A taxpayer's liability to pay tax arises when an assessment is made, the notices of assessment gives rise to the procedural process of the disputes resolution and challenge process contained in Part IVA and VIIIA of the TAA (paragraph [22] of the Judgment).

The Court of Appeal stated at paragraph [26] of the judgment that the jurisdiction of the Taxation Review Authority arises from section 138B of the TAA, not from the notice of assessment. The notice of assessment determines the commencement of the statutory time period for the challenge proceedings to be commenced.

ENTITLEMENT TO DEREGISTER FROM GST AND DECISION ON WHETHER OR NOT A SALE WAS PLANNED RESULTS IN PARTIAL WIN FOR THE COMMISSIONER

Case	LGH Thompson v Commissioner of Inland Revenue
Decision date	21 August 2009
Act	Goods and Services Tax Act 1986
Keywords	GST de-registration, *Lopas* Test, Court's power to vary interest and penalties

Summary

The case was a partial win for the Commissioner and Taxpayer. The Court found that the Taxpayer was not entitled to de-register on 30 November 1999. The Commissioner's assessment which assessed output tax on two property transactions sold in the Goods and Services Tax ("GST") period after the Taxpayer's de-registration was consequently upheld. The third property transaction which the Commissioner had assessed in a later GST period was found incorrect; rather the Court found that the output tax on that property should be returned by the Taxpayer as a deemed disposition in the Taxpayer's unregistered capacity pursuant to section 5(3) of the Goods and Services Tax Act ("the Act").

Impact of decision

For the purposes of determining if transactions are relevant to the projection of whether a Taxpayer's taxable activities will exceed the legislative threshold over the ensuing 12 months, a transaction will be "planned" prior to de-registration if there is evidence that the transaction, has at that time been advanced "in a sufficiently choate way that it is to be seen as connected with the conduct of the business, even when it is being downsized". Neither contemplation nor intention to sell will be enough. It appears that "major steps" must have been taken in relation to the sale. Therefore it would seem that the test in *Lopas v CIR* (2006) 22 NZTC 19,726 has been narrowed.

It is important to note that an amendment to section 10(8) of the Act with application on and after 10 October 2000, has removed the opportunity for Taxpayers to reduce their liability for GST by de-registering and paying GST on the cost price of the goods rather than the market value. With one exception the amendment has the effect of requiring GST to be paid on the market value of the goods. However for goods acquired prior to the introduction of GST on 1 October 1986, GST is either payable at the lower of cost or market price of the goods.

Facts

The Taxpayer had been registered for GST since 1986, on a six-monthly return basis. In November 1999, he sought to deregister. The Commissioner initially accepted the Taxpayer's de-registration application from 30 November 1999 and advised him of this in December 1999. The Taxpayer then disposed of the relevant land in three transactions, in December 1999, March 2000 and September 2000 and did not account for GST on the sales. Default assessments for GST were raised in July 2004 for the six months to 31 July 2000. A subsequent assessment was also issued in January 2005, for the period ending 31 January 2001.

The Taxpayer argued that the sales went ahead only after he was deregistered and, accordingly, liability was confined to a deemed disposition to himself in his unregistered capacity (ie one ninth of the original acquisition cost) pursuant to section 5(3) of the Act.

The Commissioner contended that the Act entitled him to revisit an approval to de-register where he was not fully informed at the time of giving approval to de-register. In this case, the Commissioner considered that he was entitled under section 52(3) of the Act to treat the Taxpayer as re-registered until all the transactions had been undertaken. Accordingly, the Taxpayer was assessed for output tax for the consideration on all three of the transactions based on the sale price rather than the original acquisition costs.

In March 2005, the Taxation Review Authority ("TRA") upheld the Taxpayer's challenge to the decision of the Commissioner to re-register him. The Commissioner appealed the decision. However, before the hearing of the appeal, the Court of Appeal delivered its decision in *Lopas v CIR* (2006) 22 NZTC 19,726. *Lopas* was a decision with similar issues where the Court of Appeal found that the TRA had erred because the projected extent of taxable supplies should include the value of deemed or actual dispositions of property that had been used in the GST registered business.

These proceedings were in part an appeal by the Taxpayer from a further aspect of the TRA decision as to the de-registration date and also a dispute over the correctness of the GST assessments.

Decision

Issue One – Whether the Taxpayer was entitled to deregister on 30 November 1999

Before considering the liability of the Taxpayer to account for GST output tax on the three land transactions, his Honour analysed the decision in *Lopas*. Dobson J stated that the facts in *Lopas* were "slightly different", in that the

Taxpayer in this case did not account for the deemed or actual disposal of any of the properties, on any basis, at the time of de-registration.

The Lopas decision

His Honour agreed with the Commissioner that the Court of Appeal's reasoning in *Lopas* "does not recognise any material distinction between immediate cessation and a staged winding-down of an about to be de-registered business". Dobson J stated that section 5(3) applies irrespective of whether the business is going to cease upon de-registration, or continue in a reduced form but in a level less than $30,000 taxable supplies for the ensuing 12 months.

His Honour also noted that the Court of Appeal in *Lopas* interpreted the proviso in section 51(1) as only applying in situations where an initial obligation to register would otherwise be triggered by the circumstances of cessation, namely, where the deemed disposal would for the first time push the scale of taxable activities over $30,000. Accordingly, in the present case, Dobson J concluded that the three land transactions were relevant to the projection of whether taxable activities would exceed $30,000 over the ensuing 12 months, on whatever basis they are to be valued.

Further, his Honour noted that in *Lopas* the Court held that where transactions were planned as at the date of de-registration, the sale will be treated as part of the taxable activity. His Honour rejected the Commissioner's argument that the test was whether a sale was "in contemplation". Rather, the transactions need be planned and firmly in place to be effected. This will require a fact specific assessment in each case to determine whether the transactions are planned in a "sufficiently choate way that is to be seen as connected with the conduct of the business, even when it is being downsized". Dobson J considered that *Lopas* suggests that an intention to sell will not be enough.

The three land transactions

Dobson J concluded that the Taxpayer was not entitled to de-register until 31 July 2000.

As for the first land transaction, his Honour concluded that it was sufficiently planned as at the de-registration date and so the Taxpayer was obliged to account for GST on the sale price. With regard to the second transaction, while his Honour determined that more would have been needed for it to be planned; he did not accept that "each transaction can be viewed in isolation". In his opinion, because of the first transaction, "the second transaction is to be assessed as it occurred within the following six month period". Accordingly, the Taxpayer was also obliged to account for GST on the second sale on the basis of the sale price.

However, as for the third transaction, Dobson J concluded that it was not planned as at 31 July 2000. Accordingly, given the Taxpayer was in a de-registered status at that time, he was only obliged to account for GST on an apportioned component of the original acquisition price pursuant to section 5(3) of the Act.

His Honour did note that, notwithstanding the land sales, the rental income derived would have amounted to more than the required level of supplies.

Issue Two – Whether the steps taken by the Commissioner to de-register and re-register the Taxpayer were adequate

His Honour also discussed the arguments raised by the Taxpayer over the adequacy of steps taken by the Commissioner to de-register and re-register the Taxpayer. Dobson J concluded that "although inconsistencies in communications from the Department are unfair, they could not be sufficient to deprive an assessment for a subsequent period of its lawful effect". His Honour stated that any unfair communication could not affect the extent of basic GST for which the Taxpayer is liable.

Issue Three – The correctness of the assessments

The Taxpayer had also asserted that the default assessments issued were incorrect. His Honour agreed that the default assessment for the 31 July 2000 period was in error because the rental income, on which output tax had been assessed, ought to have been offset against the expenses incurred in earning that rental income. Further, the default assessment for the 31 January 2001 period was wrong by virtue of the inclusion of the third sale. In addition, a further extension of his re-registration beyond 31 July 2000 was not warranted in the absence of a planned transaction. Accordingly, Dobson J held that the default assessment for the period prior to 31 July 2000 be increased as a result of the deemed disposition. Consequently, the default assessment for the period from 1 August 2000 was considered incorrect and should be cancelled.

Issue Four – The application of the anti-avoidance provision in section 76

His Honour concluded that it was unnecessary to consider whether the anti-avoidance provision applied given his conclusion on the earlier issues.

Issue Five – Whether the interest and penalties imposed on the Taxpayer should be varied

His Honour concluded that he did not have jurisdiction to vary the extent of the late payment penalties or interest but invited the Commissioner to exercise his discretion to remit the penalties under section 183D of the Tax Administration Act 1994.

REGULAR CONTRIBUTORS TO THE TIB

Office of the Chief Tax Counsel

The Office of the Chief Tax Counsel (OCTC) produces a number of statements and rulings, such as interpretation statements, binding pulic rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The OCTC also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal and Technical Services

Legal and Technical Services contribute the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters.

Legal and Technical Services also contribute to the "Your opportunity to comment" section.

Policy Advice Division

The Policy Advice Division advises the government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as the Orders in Council.

Litigation Management

Litigation Management manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

GET YOUR TIB SOONER ON THE INTERNET

This *Tax Information Bulletin (TIB)* is also available on the internet in PDF at **www.ird.govt.nz**

The *TIB* index is also available online at **www.ird.govt.nz/aboutir/newsletters/tib/** (scroll down to the bottom of the page). The website has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

If you would prefer to get the *TIB* from our website, please email us at **tibdatabase@ird.govt.nz** and we will take you off our mailing list.

You can also email us to advise a change of address or to request a paper copy of the *TIB*.