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TAX INFORMATION Bulletin

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Inland Revenue
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YOUR OPPORTUNITY TO COMMENT

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

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at **taxtechnical.ird.govt.nz** (search keywords: public consultation).

Email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Tax Counsel Office
Inland Revenue PO Box 2198
Wellington 6140

You can also subscribe at **taxtechnical.ird.govt.nz/subscribe** to receive regular email updates when we publish new draft items for comment.

Your opportunity to comment

Ref	Draft type	Title	Comment deadline
PUB00421	Ruling	Income tax – Australian limited partnerships and foreign tax credits	14 April 2022
PUB00396	Interpretation statement	Cash basis persons under the financial arrangements rules	14 April 2022

IN SUMMARY

New legislation

Determinations

IN SUMMARY (continued)

IN SUMMARY (continued)

NEW LEGISLATION

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

The COVID-19 Support Payments Scheme (Omicron Outbreak) Order 2022

The COVID-19 Support Payments Scheme (Omicron Outbreak) Order 2022 came into force on 22 February 2022. This Order activated the COVID-19 Support Payments Scheme.

Background

Section 7AAB of the Tax Administration Act 1994 (the TAA) authorises the Commissioner of Inland Revenue (the Commissioner) to make grants under the COVID-19 Support Payments Scheme (the Scheme).

The purpose of this scheme is to provide for grants to support businesses affected by the effect of the public health measures (including the COVID-19 Protection Framework – Red setting) and the rapid increase of COVID-19 in the New Zealand community.

Section 7AAC of the TAA is an empowering provision for the making of an Order in Council activating the Scheme and determining the class of persons who can apply for grants under the Scheme and the payment amount.

Class of persons covered

Clause 5 of the Order sets out the class of persons eligible for a grant.

An eligible person must be one of:

- an individual who is self-employed
- a body corporate or an unincorporated body
- a registered charity
- an incorporated society
- a post-settlement governance entity
- a trust
- a partnership (as defined in sections 8 and 9 of the Partnership Law Act 2019)
- any department or organisation in the State services (as defined in section 5 of the Public Service Act 2020) that is approved by the Minister of Finance as a participant in the Scheme
- a non-government organisation
- a pre-revenue firm, or
- a joint venture.

The person must be living in New Zealand, or if a non-natural person, registered or otherwise established in New Zealand.

The Order specifies that persons who have applied or received funding under the Cultural Sector Emergency Relief Fund administered by the Ministry of Culture and Heritage are not eligible for a grant under the CSP scheme.

The Order sets out the eligibility criteria in relation to COVID-19 Vaccine Certificate (CVC) requirements. If the person is a regulated business or service, they must have been operating in compliance with the COVID-19 Vaccination Certificate requirements (whether following the CVC rules or non-CVC rules) for both the comparator period and the affected revenue period.

A regulated business or service include:

- food and drink businesses or services
- close proximity businesses or services
- gyms, and
- tertiary education providers.

Further details on the CVC requirements are specified in the COVID-19 Public Health Response (Protection Framework) Order 2021.

Applicants who are part of a commonly owned group will be eligible for the CSP if, as well as meeting other eligibility criteria, they and the group as a whole have experienced a 40% drop in revenue. If a member of a group is eligible for a CSP, the member can claim for the employees that regularly work for them.

Guidance on how a member of a commonly owned group can calculate grant payments and determine whether an employee regularly works for the member is available on the Inland Revenue website: **ird.govt.nz/covid-19/business-and-organisations/covid-19-support-payment/eligibility-for-the-csp/commonly-owned-groups**.

Further eligibility requirements have been set out by the Commissioner under section 7AAB(3) of the TAA and are published on the Inland Revenue website (**ird.govt.nz/covid-19/business-and-organisations/covid-19-support-payment/eligibility-for-the-csp**).

Revenue decline test

The person may be entitled to receive a grant under the Scheme if they experience a minimum 40% revenue decline as a result of the following COVID-19 circumstances:

- the widespread presence of COVID-19 in the New Zealand community
- public health legislative measures taken in order to reduce the spread of COVID-19 in the New Zealand community
- any business circumstances that are, or are reasonably likely to be, a consequence of the circumstances described above.

In addition, the Order specifies that the person must have taken all reasonably practical steps to minimise the decline in revenue.

Applicants are required to use a 7-day period to demonstrate the required decline in revenue and comply with the eligibility criteria set by the Commissioner. This must be a consecutive 7-day period between 5 January 2022 and 15 February 2022, compared to a consecutive 7-day period between 16 February 2022 and a date set by the Commissioner.

Amount of the grant

The Order sets out the amount of the payment that a person will be entitled to as the lesser of:

- $4,000 plus $400 for each full-time equivalent worker employed by the person (up to a maximum of 50 full-time equivalent workers), or
- 8 times the amount by which the eligible person's revenue has declined.

Applications

CSP applications for the first grant opened on 28 February 2022 and may be submitted via MyIR.

Further procedural requirements in relation to the making of an application have been set out by the Commissioner under section 7AAB(3) of the Tax Administration Act 1994 and are published on the Inland Revenue website (**ird.govt.nz/covid-19/business-and-organisations/covid-19-support-payment/apply-for-the-covid-19-support-payment**).

The COVID-19 Support Payments Scheme (Omicron Outbreak) Amendment Order 2022

The COVID-19 Support Payments Scheme (Omicron Outbreak) Amendment Order 2022 came into force on 14 March 2022. The new Order in Council:

- allows a second and third grant to be made available from 14 March and 28 March respectively

- specifies the affected revenue periods for each of the grants
- includes an alternative comparator period to measure their drop in revenue from the period, starting on 5 January 2021 and ending at the close of 15 February 2021, and
- allows applicants to apply for the second and third grant (but not first grant) even though they have received or have applied for an emergency grant from the Ministry for Culture and Heritage.

Background

The COVID-19 Support Payments Scheme (Omicron Outbreak) Order 2022 (the Omicron Order) came into force on 22 February and activated the COVID-19 Support Payment Scheme. Refer to the above item in this Tax Information Bulletin for further information.

Amendment

This amending Order made a second and third grant available under the CSP scheme.

Affected revenue period

A person is eligible for a grant under the CSP scheme if the person experienced a minimum 40% decline in revenue in relation to a business or organisation during a nominated 7-day period. A person must nominate a 7-day period within the affected revenue period for each payment. The nominated 7-day period for each payment may overlap with the nominated periods for other payments.

The affected revenue period for the three grants are as follows:

- CSP 1 - during the period beginning on 16 February 2022 and ending at the close of 4 April 2022
- CSP 2 - during the period beginning on 7 March 2022 and ending at the close of 4 April 2022
- CSP 3 - during the period beginning on 21 March 2022 and ending at the close of 4 April 2022

Comparator period

Applicants are required to use a 7-day period to demonstrate the required decline in revenue and comply with the eligibility criteria set by the Commissioner. The Omicron Order specified this must be a consecutive 7-day period between 5 January 2022 and 15 February 2022, which is the comparator period.

This amendment allows applicants to be able to select an alternative comparator period to measure their drop in revenue from the period starting on 5 January 2021 and ending at the close of 15 February 2021.

Recipients of the emergency grant from the Ministry for Culture and Heritage

The Omicron Order specifies that persons who have applied or received funding under the Cultural Sector Emergency Relief Fund administered by the Ministry of Culture and Heritage are not eligible for a grant under the CSP scheme.

Under the amendment order, applicants will now be able to get second and third payments (but not the first payment) even though they have received or have applied for an emergency grant from the Ministry for Culture and Heritage.

Applications

CSP applications opened on 14 March 2022 for the second grant and 28 March 2022 for the third grant. Applications may be submitted via MyIR.

Further procedural requirements in relation to the making of an application have been set out by the Commissioner under section 7AAB(3) of the Tax Administration Act 1994 and are published on the Inland Revenue website (**ird.govt.nz/covid-19/business-and-organisations/covid-19-support-payment/apply-for-the-covid-19-support-payment**).

Tax Administration (Financial Statements—Domestic Trusts) Order 2022

Trusts with assessable income have increased disclosure requirements for the 2021–22 and later income years. This includes the requirement to prepare a statement of profit or loss and a statement of financial position.

The Tax Administration (Financial Statements—Domestic Trusts) Order 2022 (the Order) was made on 7 March 2022. This Order sets minimum standards for financial statements prepared by trusts subject to these new disclosure rules.

Application date

The Order applies for income years ending on or after 31 March 2022.

Background

The Taxation (Income Tax Rate and Other Matters) Act 2020 was enacted on 7 December 2020 and introduced a new top personal tax rate of 39% and increased disclosure requirements for trusts for the 2021–22 and later income years. The disclosure rules are contained in section 59BA of the Tax Administration Act 1994 (TAA) and support the Commissioner of Inland Revenue's ability to assess compliance with the new 39% personal income tax rate and assist the Commissioner in understanding and monitoring the use of structures and entities by trustees.

These disclosure rules apply to trustees of trusts that derive assessable income in a tax year and do not fall within the following exclusions:

- non-active trusts
- foreign trusts
- trusts incorporated under the Charitable Trusts Act 1957
- charitable trusts registered under the Charities Act 2005
- trusts eligible to be Māori authorities
- trusts that are widely-held superannuation funds
- trusts that are employee share schemes
- trusts that are debt funding special purpose vehicles, and
- lines trusts established under the Energy Companies Act 1992.

The rules apply for the 2021–22 and later income years and require trustees to prepare a statement of profit or loss and a statement of financial position. Trustees must also disclose the following information in the form prescribed by the Commissioner:

- The amount and nature of settlements received (settlements do not need to be disclosed if they are minor services incidental to the activities of the trust and are provided to the trustee at less than market value).
- Settlor details, including details of previous settlors if not previously supplied to the Commissioner.
- The amount and nature of distributions made (distributions do not need to be disclosed if they are minor and incidental to the activities of the trust and are other than of money).
- Details of beneficiaries who received the distributions.
- Appointer details.

Overview of the Tax Administration (Financial Statements—Domestic Trusts) Order 2022.

The Order sets minimum standards for financial statements prepared by trusts and applies to all trusts subject to the disclosure rules in section 59BA of the TAA for income years ending on or after 31 March 2022.

General features

For the purposes of the Order, "financial statements" includes any notes and other supporting material forming part of the financial statements.

The standards set out in the Order are "minimum" standards. Financial statements may be prepared to any level above these requirements.

Trusts with non-standard balance dates

Financial statements may be prepared to a non-standard balance date (for example, a balance date that is not 31 March) used for accounting purposes, provided that the trust does not derive business income (which would require approval from the Commissioner of Inland Revenue for non-standard balance date reporting under section 38 of the TAA).

Trusts with early balance dates

The Order applies for income years ending on or after 31 March 2022. This means that for trusts with a balance date before 31 March 2022, the minimum requirements will apply for the 2022–23 and later income years.

For trusts with standard and late balance dates, the minimum requirements apply for the 2021–22 and later income years.

Valuation

Valuation of assets and liabilities can be either at market value, cost or tax adjusted value, at the discretion of the trustee. Tax value may only be used in relation to assets that produce assessable income (including income derived on the sale of the asset).

Core requirements for all trusts

The following minimum standards apply to all trusts subject to the disclosure rules in section 59BA of the TAA:

- The financial statements must consist of:
  - A statement of financial position setting out the assets, liabilities, and net assets of the trust as at the end of the return year, and
  - A statement of profit or loss showing income derived, and expenditure incurred, by the trust during the return year.
- Financial statements must be prepared using the double-entry method of recording financial transactions.
- Financial statements must use the prescribed valuation principles (set out above) and disclose the valuation method adopted for land, buildings, and shares/ownership interests. A trustee can choose to adopt a different valuation method for each of these categories.
- If the Commissioner has prescribed under section 35 of the TAA a form that requires amounts to be copied from the trust's financial statements (for example, the IR10 form – financial statements summary), the financial statements must contain those relevant amounts.

Simplified reporting trusts

A trust qualifies for simplified reporting requirements for a relevant income year if the trustee reports:

- less than $100,000 assessable income, and
- less than $100,000 deductible expenditure, and

- total assets in the statement of financial position (including both private and income producing assets) valued at less than $5 million as at balance date.

The assessable income and deductible expenditure thresholds in this test do not include income assessed under section CB 6A of the Income Tax Act 2007 (residential property bright-line rules) or related deductible expenditure.

Assets must be valued using the valuation principles set out above.

Additional requirements for trusts that are not "simplified reporting trusts"

For trusts that do not qualify for simplified reporting for an income year, the financial statements must:

- Be prepared applying the principles of accrual accounting.
- Include a statement of accounting policies.
- Disclose comparable figures for the previous income year to the extent that the trustee has that information.
- Disclose several specific items:
  - a reconciliation between the profit or loss in the statement of profit or loss to taxable income
  - an appropriately detailed schedule of the trust's fixed assets and depreciable property used for tax purposes.
- Matters relating to trusts with forestry and livestock businesses.
  - information about the cost of timber as at the end of the income year and a reconciliation of movements in the cost of timber during the income year,
  - if the trust is a specified livestock owner, details of livestock valuation methods, valuations, and calculations for tax purposes.
- Details of transactions between the trust and any associated person of the trustee, unless the transaction is minor and incidental to the activities of the trust.
  - transaction details include the names of associated persons, the nature of the association, the nature of the transactions and the amounts involved
  - disclosure is not required if the transaction is at a market rate.

If associated person disclosures have been made separately in any forms prescribed by the Commissioner of Inland Revenue, this information does not need to be duplicated in the financial statements.

Further information

More information about disclosure requirements for trusts can be found at **ird.govt.nz/trusts**

Taxation (Extension of COVID-19 Interest Remission) Order 2022

The Taxation (Extension of COVID-19 Interest Remission) Order 2022 came into force on 25 March 2022. It extends the time limit on the ability of the Commissioner of Inland Revenue to remit interest for taxpayers significantly adversely affected by COVID-19 from 24 March 2022 until 8 April 2024.

Background

In 2020, in response to the economic impacts of COVID-19, the Government passed legislation that allows the Commissioner to remit interest accrued after 14 February 2020 for taxpayers that are facing difficulties in paying their tax because of COVID-19. Interest remission is allowable under section 183ABAB of the Tax Administration Act 1994 when a taxpayer's ability to make a payment required by a tax law on or before the due date for the payment is significantly adversely affected by COVID-19.

To qualify for interest remission, the taxpayer must have

- asked for the relief as soon as practicable, and
- made the payment as soon as practicable.

In situations where the core tax has not yet been paid, a taxpayer may enter into an instalment arrangement to pay off the tax

owing. In these cases, interest will be suppressed (not charged during the arrangement) and then remitted once the arrangement is completed, so long as the taxpayer has complied with the terms of their arrangement.

The Commissioner's ability to remit interest was initially legislated to last from 25 March 2020 to 24 March 2022. However, section 183ABAB(4) of the Tax Administration Act 1994 permits the making of an Order in Council to extend that ability. Given the ongoing impacts of COVID-19, the Minister of Revenue has recommended an extension of the Commissioner's ability to remit interest for taxpayers significantly adversely affected by COVID-19.

Extension of remission power

The Taxation (Extension of COVID-19 Interest Remission) Order 2022 amends section 183ABAB(3)(b) of the Tax Administration Act 1994.

The amendment replaces the 24-month time limit with a time limit of 4 years and 15 days. This extends the period covered by COVID-19 interest remission until 8 April 2024, which is the first business day following the standard terminal tax date for the 2023 tax year.

The Order came into force on 25 March 2022, which is the day that immediately followed the expiry date for COVID-19 interest remission in the absence of an extension.

Tax Administration (Extension of Power to Disclose Information Relating to COVID-19 Response) Order 2022

The Tax Administration (Extension of Power to Disclose Information Relating to COVID-19 Response) Order 2022 came into force on 17 March 2022. The Order extends clause 23B(3) of Schedule 7 of the Tax Administration Act 1994 (TAA) from 17 March 2022 to 31 March 2022.

This Order extends the Commissioner's information sharing power for information relating to COVID-19 between the current expiry date of the power and the removal of the time limit.

Background

In 2020, the Commissioner was granted powers to share COVID-19 related information with other government agencies in clause 23B of Schedule 7 of the TAA.

The discretionary power allows the Commissioner to disclose any information to a government agency about a person or entity for the purpose of enabling the government agency to provide or fulfil any duty, obligation, or other thing in relation to any person or entity in connection with COVID-19.

The measure was originally limited in application to a 24-month period ending 17 March 2022. However, clause 23B(3) of Schedule 7 provides that the measure may be extended on the recommendation of the Minister of Revenue within 24 months of the date on which the clause came into force. There is an amendment in the Taxation (Annual Rates for 2021–22, GST, and Remedial Matters) Bill that removes the time limit of this provision. However, this amendment will not come into force until 31 March 2022.

This Order in Council extends the Commissioner's information sharing ability with government agencies in relation to COVID-19 to 31 March 2022 when the time limit on information sharing is set to be removed.

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.

National Standard Costs for Specified Livestock Determination 2022

The Commissioner of Inland Revenue has released a determination, reproduced below, setting the national standard costs for specified livestock for the 2021–2022 income year.

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

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

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

For bobby calves, information from spring 2021 is used while other dairy NSCs are based on the 2020-2021 income and expenditure from a DairyBase sample of owner-operated dairy farms. For sheep, beef cattle, deer and goats, NSCs are based on survey data from the 2019-2020 sheep and beef farm survey conducted by the Beef & Lamb New Zealand Economic Service. This is the most recent information available for those livestock types at the time the NSCs are calculated in January 2022. For the 2021–2022 income year the NSCs for most livestock types have remained reasonably static when compared to the previous year. The changes in Dairy Cattle costs reflect increases in key input prices, particularly fertiliser and labour. For bobby calves, this year saw significant increases in feedstuffs costs per calf, which reflects high farmgate milk prices. There was also a large increase in farm labour costs.

With regard to R1 deer, the increase is as a result of the error correction that was highlighted in last year's determination; the 2020 – 2021 determination. The values shown in this year's determination are the fully corrected costs for R1 deer.

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

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

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

National Standard Costs for Specified Livestock Determination 2022

This determination may be cited as "The National Standard Costs for Specified Livestock Determination 2022".

This determination is made in terms of section EC 23 of the Income Tax Act 2007. It shall apply to any specified livestock on hand at the end of the 2021–2022 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EC 23 of the Income Tax Act 2007 the national standard costs for specified livestock for the 2021–2022 income year are as set out in the following table.

Kind of livestock	Category of livestock	National standard cost ($)
Sheep	Rising 1 year	38.00
	Rising 2 year	27.00
Dairy Cattle	Purchased bobby calves	210.40
	Rising 1 year	512.80
	Rising 2 year	346.50
Beef Cattle	Rising 1 year	398.10
	Rising 2 year	228.10
	Rising 3 year male non-breeding cattle (all breeds)	228.10
Deer	Rising 1 year	135.20
	Rising 2 year	68.90
Goats (Meat and Fibre)	Rising 1 year	31.70
	Rising 2 year	21.70
Goats (Dairy)	Rising 1 year	287.80
	Rising 2 year	49.90
Pigs	Weaners to 10 weeks of age	113.20
	Growing pigs 10 to 17 weeks of age	94.40

This determination is signed by me on the 28th day of February 2022

Rob Falk
Technical Lead
Technical Standards, Legal Services

COV 22/01: Variation to section EI 1 of the Income Tax Act 2007

Variation

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

> Under s EI 1 of the Income Tax Act 2007, for a person to allocate timber income derived in an income year ending on a date between 28 February 2021 and 30 June 2021 to any one or more of the person's previous three income years, the date the application in writing must be received by the Commissioner is extended to 31 July 2022.
>
> This variation only applies to a taxpayer that, during the period from 1 March to 30 June 2022, has had difficulty in making an application because of circumstances arising either from the imposition of COVID-19 response measures or as a consequence of COVID-19. This could include the impact of a key staff member or advisor having reduced availability, or the financial impact of COVID-19 causing significant disruption to the normal business operations of the taxpayer.

Application date

This variation applies from 1 March 2022 to 31 July 2022.

Signed at Wellington on 2 March 2022.

Jonathan Rodgers
Group Leader – Tax Counsel Office
Inland Revenue

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

Summary of effect

1. This variation extends the deadline for making an application to the Commissioner under s EI 1 to spread back income from timber to previous income years. The deadline under s EI 1 is one year from the end of a person's income year. This variation extends this deadline to 31 July 2022.

Provisions affected

2. Section EI 1(3) of the Income Tax Act 2007.

Application of variation

3. This variation applies to taxpayers with an income year ending on or between 28 February 2022 and 30 June 2022.
4. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s EI 1(3)

COV 22/02: Variation to section HB 13(3)(b) of the Income Tax Act 2007

Variation

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

> For the 2021 income year, where a company makes an election to be a look-through company and s HB 13(3)(b) of the Income Tax Act 2007 applies, the deadline by which that election must be received by the Commissioner is extended to include an election received by the Commissioner on or before 30 June 2022.

This variation only applies to a taxpayer that has had difficulty making a notice of election because of circumstances arising either from the imposition of COVID-19 response measures or because of COVID-19. This could include the impact of a key staff member or advisor having reduced availability, or the financial impact of COVID-19 causing significant disruption to the normal business operations of the taxpayer.

Application date

This variation applies from 1 March 2022 to 30 June 2022.

Dated at Wellington on 3 March 2022.

Jonathan Rodgers
Group Leader – Tax Counsel Office
Inland Revenue

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

Summary of effect

1. Section HB 13(3)(b) of the Income Tax Act 2007 provides that in the case of a company that has not previously been required to file a return of income prior to the year in which they wish to be treated as a look-through company (LTC), the LTC election must be received by the Commissioner before the last day for filing the return of income. The due date for filing that LTC election has been extended to 30 June 2022 using s 6I of the Tax Administration Act 1994.

Provisions affected

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

Application of variation

3. This variation applies to all companies who wished to elect to be an LTC and have not previously been required to file a return of income. It recognises that the impact of COVID-19 may have adversely affected some companies' ability to file their LTC election on time, and this will mean they are unable to be treated as an LTC for the year in question. For this reason, the due date for providing this election has been extended.
4. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you have already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s HB 13(3)(b)

COV 22/03: Variation in relation to s DB 31 of the Income Tax Act 2007 to extend time for writing off bad debts

Variation

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

> For the 2022 income year, for taxpayers with 31 March balance dates, the timeframe by which a debt must be written off as bad in order for a deduction to be available in that income year is extended to 30 June 2022.

This is subject to the conditions that:

- The taxpayer has had difficulty writing off their debt as bad by the end of the 2022 income year because of circumstances arising either from the imposition of COVID-19 response measures or as a consequence of COVID-19. This could include the impact of a key staff member or advisor having reduced availability, or the financial impact of COVID-19 causing significant disruption to the normal business operations of the taxpayer.
- In deciding a debt is bad the taxpayer takes into account only information that was relevant as at the end of their 2022 income year.

Application date

This variation applies from 1 April 2022 to 30 June 2022.

Dated at Wellington on 3 March 2022.

Jonathan Rodgers
Group Leader - Tax Counsel Office
Inland Revenue

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

Summary of effect

1. In order to claim a deduction in an income year for a bad debt, s DB 31 of the Income Tax Act 2007 requires the debt to have been written off as bad in the income year. The effect of the variation is to extend the timeframe within which a taxpayer with a 31 March balance date can write off a debt as bad (and obtain a deduction) for the 2022 income year.

Provisions affected

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

Application of variation

3. This variation applies to a person who wishes to claim a deduction in the 2022 income year for a bad debt. The variation recognises that the impact of COVID-19 means that some taxpayers may not have been able to write off debts as bad during their 2022 income year, and it extends the time for writing off debts as bad to 30 June 2022. The variation is subject to the two conditions that the person did not write off the debt by the end of the 2022 income year as a result of the impacts of Covid-19, and that the person takes into account only information that was relevant as at the end of their 2022 income year.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s DB 31

COV 22/04: Variation to section FN 7(5) of the Income Tax Act 2007

Variation

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

> For the 2022 tax year, s FN 7(5) of the Income Tax Act 2007 is varied to state that a notice of election to form an imputation group under subsection (1) and (4) has effect from the start of the tax year ending 31 March 2022, in circumstances where the Commissioner receives the notice after 31 March 2022 but before 1 June 2022.
>
> This variation only applies where a taxpayer has had difficulty making a notice of election because of circumstances arising either from the imposition of COVID-19 response measures or because of COVID-19. This could include the impact of a key staff member or advisor having reduced availability, or the financial impact of COVID-19 causing significant disruption to the normal business operations of the taxpayer.

Application date

This variation applies from 4 March 2022 to 31 May 2022

Dated at Wellington on 4 March 2022

Jonathan Rodgers
Group Leader – Tax Counsel Office
Inland Revenue

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

Summary of effect

1. Section FN 7(5) of the Income Tax Act 2007 provides that an election notice to form an imputation group has effect from the start of the tax year in which the Commissioner receives the notice.
2. The effect of the variation will be to extend the time for making an election to form an imputation group for the 2022 tax year. Taxpayers will now have until 31 May 2022 to provide the Commissioner with a notice of an election to form an imputation group. That election notice will be effective from the start of the 2022 tax year.
3. This variation will assist taxpayers who have been adversely affected by COVID-19 and have been unable to give the Commissioner a notice of election to form an imputation group in time.

Provision affected

4. Section FN 7 of the Income Tax Act 2007.

Application of variation

5. This variation applies to taxpayers who wish to form an imputation group for the 2022 tax year. The variation recognises that the impact of COVID-19 means that some taxpayers may not have been able to provide a notice of election to the Commissioner by the 31 March 2022 deadline. It provides those taxpayers with an additional two months to provide the Commissioner with a notice of election to form an imputation group.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s FN 7(5)

COV 22/05: Variation to section HC 6 of the Income Tax Act 2007: Beneficiary income

Variation

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

> Where a trustee of a trust was unable for the 2021 income year to meet the requirements of section HC 6(1B)(b)(ii) of the Income Tax Act 2007 to make payment to a beneficiary, the Commissioner will treat any such payment that is made on or before 15 July 2022 as having met those requirements.

This is subject to the conditions that:

- This variation only applies to a trustee that has had difficulty in meeting the requirements of section HC 6(1B)(b)(ii) of the Income Tax Act 2007 because of circumstances arising either from the imposition of COVID-19 response measures or as a consequence of COVID-19. This could include delays in the preparation of the trust's financial accounts as a result of COVID-19, the effect of COVID-19 on the ability of the trustees (and their advisor) to meet to make decisions concerning the distribution of beneficiary income, and the financial impact of COVID-19 causing significant disruption to the normal business operations of the trust, the trustees or the trustees' advisor.
- Where any such payment is made to a beneficiary, the trustee must advise the beneficiary to take such steps as are necessary to ensure that any income tax assessment already made for the 2021 tax year is amended to include the beneficiary income.

Application date

This variation applies from 4 March 2022 to 15 July 2022.

Dated at Wellington on 4 March 2022.

Jonathan Rodgers
Group Leader, Tax Counsel Office
Inland Revenue

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

Summary of effect

1. The effect of the variation is to allow those trustees who have not already paid 2021 beneficiary income and for whom 31 March 2022 is the last date by which they must determine and pay amounts of beneficiary income in respect of a trust's 2021 income year an additional period to determine and pay amounts of 2021 beneficiary income.

Provisions affected

2. Section HC 6 of the Income Tax Act 2007.

Application of variation

3. This variation applies to trustees who have not already paid all amounts of beneficiary income in respect of the 2021 income year and for whom 31 March 2022 is the last date by which they must determine and pay amounts of beneficiary income in respect of a trust's 2021 income year. The variation recognises the impact COVID-19 may have on the ability of some trustees or their advisors to get the necessary advice and make the required decisions and payments within the usual timeframe.
4. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s HC 6

COV 22/06: Variation to s YD 1(3) and (5) of the Income Tax Act 2007: Residency of natural persons

Variation

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

> The time period of "183 days in total in a 12-month period" in s YD 1(3) is modified under s 6I(1)(a)(i) to exclude days where a person was personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.
>
> The time period of "325 days in total in a 12-month period" in s YD 1(5) is modified under s 6I(1)(a)(i) to include days where a person was personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.

These variations are subject to the following conditions:

- A person being practically restricted from leaving New Zealand must be due to the imposition of COVID-19 response measures or as a consequence of COVID-19;
- The person must leave New Zealand within a reasonable time after they are no longer practically restricted in travelling outside of New Zealand;
- Factors that may be considered in deciding if a person is practically restricted in leaving New Zealand include:
  - Border controls or entry restrictions. A person is unable to practically leave New Zealand if they cannot enter a country of which they are a citizen or permanent resident or visa holder;
  - The availability of commercial flights; and/or
  - A requirement to self-isolate, or isolating in a managed isolation and quarantine (MIQ) facility, as required by the guidance of the New Zealand government, that practically prevents a person from taking pre-arranged travel out of New Zealand during that period of isolation.
- Personal considerations or preferences are not factors that impact on whether a person is practically restricted from leaving New Zealand.

Application date

This variation applies from 17 March 2020 to 30 June 2022.

Dated at Wellington on 7 March 2022.

Jonathan Rodgers
Group Leader, Tax Counsel Office
Inland Revenue

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

Summary of effect

1. The effect of this variation is to allow a person, for the purpose of determining whether they are a New Zealand resident under either s YD 1(3) (the 183 day rule) or YD 1(5) (the 325 day rule) of the Income Tax Act 2007, to exclude those days where they were personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.

Provisions affected

2. Section YD 1(3) and (5) of the Income Tax Act 2007.

Application of variation

3. The variation to s YD 1(3) and (5) applies persons who need to determine whether they are resident in New Zealand for the purposes of the Income Tax Act 2007.
4. The variation recognises the impact COVID-19 may have on the ability of some people to leave New Zealand when intended.
5. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s YD 1(3) and (5)

COV 22/07: Variation to day test for visitors to New Zealand in s CW 19 of the Income Tax Act 2007

Variation

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

> The "92 or fewer days" time period specified in s CW 19(1) is modified under s 6I(1)(a)(i) to exclude days where a person was personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.

This variation is subject to the following conditions:

- A person being practically restricted from leaving New Zealand must be due to the imposition of COVID-19 response measures or as a consequence of COVID-19;
- The person must leave New Zealand within a reasonable time after they are no longer practically restricted in travelling outside of New Zealand;
- Factors that may be considered in deciding if a person is practically restricted in leaving New Zealand include:
  - Border controls or entry restrictions. A person is unable to practically leave New Zealand if they cannot enter a country of which they are a citizen or permanent resident or visa holder;
  - The availability of commercial flights; and/or
  - A requirement to self-isolate, or isolating in a managed isolation and quarantine (MIQ) facility, as required by the guidance of the New Zealand government, that practically prevents a person from taking pre-arranged travel out of New Zealand during that period of isolation.
- Personal considerations or preferences are not factors that impact on whether a person is practically restricted from leaving New Zealand.

Application date

This variation applies from 17 March 2020 to 30 June 2022.

Dated at Wellington on 7 March 2022.

Jonathan Rodgers
Group Leader, Tax Counsel Office
Inland Revenue

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

Summary of effect

1. The effect of this variation is to allow a person, for the purpose of determining if income from performing personal or professional services in New Zealand during a visit is exempt income, to exclude days where they were personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.

Provisions affected

2. Section CW 19 of the Income Tax Act 2007.

Application of variation

3. The variation to s CW 19 applies to visitors to New Zealand who earn income from performing personal or professional services in New Zealand during their visit.
4. The variation recognises the impact COVID-19 may have on the ability of some people to leave New Zealand when intended.

5. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s CW 19

COV 22/08: Variation to day test for non-resident crew members in s CW 21 of the Income Tax Act 2007

Variation

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

> The "365 days in any 2-year" time period specified in s CW 21(2)(c) is modified under s 6I(1)(a)(i) to exclude days where a person was personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.

This variation is subject to the following conditions:

- A person being practically restricted from leaving New Zealand must be due to the imposition of COVID-19 response measures or as a consequence of COVID-19;
- The person must leave New Zealand within a reasonable time after they are no longer practically restricted in travelling outside of New Zealand;
- Factors that may be considered in deciding if a person is practically restricted in leaving New Zealand include:
  - Border controls or entry restrictions. A person is unable to practically leave New Zealand if they cannot enter a country of which they are a citizen or permanent resident or visa holder;
  - The availability of commercial flights; and/or
  - A requirement to self-isolate, or isolating in a managed isolation and quarantine (MIQ) facility, as required by the guidance of the New Zealand government, that practically prevents a person from taking pre-arranged travel out of New Zealand during that period of isolation.
- Personal considerations or preferences are not factors that impact on whether a person is practically restricted from leaving New Zealand.

Application date

This variation applies from 17 March 2020 to 30 June 2022.

Dated at Wellington on 7 March 2022.

Jonathan Rodgers
Group Leader, Tax Counsel Office,
Inland Revenue

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

Summary of effect

1. The effect of the variation is to allow a person, for the purpose of determining whether they are a "non-resident crew member" of a pleasure craft, to exclude days where they were personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.

Provisions affected

2. Section CW 21 of the Income Tax Act 2007.

Application of variation

3. The variation to s CW 21 applies to people who need to determine if they are a "non-resident crew member" of a pleasure craft that is visiting New Zealand.
4. The variation recognises the impact COVID-19 may have on the ability of some people to leave New Zealand when intended.

5. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s CW 21

COV 22/09: Variation to day test for non-resident contractors in s RD 8(1)(b)(v) of the Income Tax Act 2007

Variation

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

> The "92 or fewer days" time period specified in s RD 8(1)(b)(v) is modified under s 6I(1)(a)(i) to exclude days where a person was personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022.

This variation is subject to the following conditions:

- A person being practically restricted from leaving New Zealand must be due to the imposition of COVID-19 response measures or as a consequence of COVID-19;
- The person must leave New Zealand within a reasonable time after they are no longer practically restricted in travelling outside of New Zealand;
- Factors that may be considered in deciding if a person is practically restricted in leaving New Zealand include:
  - Border controls or entry restrictions. A person is unable to practically leave New Zealand if they cannot enter a country of which they are a citizen or permanent resident or visa holder;
  - The availability of commercial flights; and/or
  - A requirement to self-isolate, or isolating in a managed isolation and quarantine (MIQ) facility, as required by the guidance of the New Zealand government, that practically prevents a person from taking pre-arranged travel out of New Zealand during that period of isolation.
- Personal considerations or preferences are not factors that impact on whether a person is practically restricted from leaving New Zealand.

Application date

This variation applies from 17 March 2020 to 30 June 2022.

Dated at Wellington on 7 March 2022.

Jonathan Rodgers
Group Leader, Tax Counsel Office
Inland Revenue

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

Summary of effect

1. The effect of this variation is to allow a non-resident contractor to exclude days where they were personally present in New Zealand but practically restricted from leaving New Zealand between 17 March 2020 and 30 June 2022 when determining if a payment for services is excluded from being a schedular payment under s RD 8(1)(b)(v).

Provisions affected

2. Section RD 8(1)(b)(v) of the Income Tax Act 2007.

Application of variation

3. The variation applies to non-resident contractors for the purposes of determining if a payment for services is excluded from being a schedular payment under s RD 8(1)(b)(v).
4. The variation recognises the impact COVID-19 may have on the ability of some people to leave New Zealand when intended.

5. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s RD 8

COV 22/10: Variation of section 15D(2) of the Goods and Services Tax Act 1985 for applications to change GST taxable period

Determination

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

> *Section 15D(2) of the Goods and Services Tax Act 1985 is varied to state that a change in taxable period takes effect at the **commencement** of the [6-month] taxable period in which the person applies to change the basis on which the person's taxable period is set.*
>
> *This variation applies to a registered person who wishes to change from a 6-month to a 1-month taxable period, and for a 6-month taxable period commencing between 1 April 2022 and 30 September 2022.*

The variation is subject to the following conditions:

- *The person notifies the CIR before 30 September 2022 that they wish their election to have this effect; and*
- *The person does not elect to change back from a 1-month taxable period before 31 March 2023.*
- *This variation only applies to a taxpayer that, during the period from 1 February 2022 to 31 March 2022, has had difficulty in electing to change from 6-monthly to 1-monthly filing because of circumstances arising either from the imposition of COVID-19 response measures or as a consequence of COVID-19. This could include the impact of a key staff member or advisor having reduced availability, or the financial impact of COVID-19 causing significant disruption to the normal business operations of the taxpayer.*

Application date

This variation applies from 1 April 2022 to 30 September 2022

Dated at Wellington on 8 March 2022

Jonathan Rodgers
Group Leader – Tax Counsel Office
Inland Revenue

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

Summary of effect

1. Section 15(3) of the Goods and Services Tax Act 1985 allows a person to apply to the Commissioner to have a one-month taxable period for GST. Under s 15D(2) of the GST Act, the change in taxable period takes effect at the end of the taxable period in which the person applies. The effective date of the change has been modified to the start of the taxable period using s 6I of the TAA.

Provisions affected

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

Application of variation:

3. This variation applies to a person who wishes to change from a six-month taxable period to a one-month taxable period for GST. A person is permitted to do so under s 15(3) of the GST Act, but the change will take effect from the end of the taxable period in which they apply. This variation allows that change to be effective from the start of the taxable period in which a person applies. The variation recognises that the impact of COVID-19 means that some taxpayers may now wish to file on a one-monthly basis to provide earlier access to any GST refunds. It allows the change of taxable period to take effect much sooner than would otherwise be the case.

4. The variation may apply to a person with a standard or non-standard balance date who applies on or after 1 April 2022 and would otherwise have to wait until 1 October 2022 or later for a change of taxable period to take effect. A person who applies on or before 31 March 2022 may apply variation COV 21/03.

Associated variations: COV 20/03, COV 20/11 and COV 21/03

5. See also "Variation of the application of s 15D(2) of the Goods and Services Tax Act 1985 to extend time to make an application to change GST taxable period" issued 6 June 2020, "Variation of section 15D(2) of the Goods and Services Tax Act 1985 for applications to change GST taxable period" issued 4 November 2020 and "Variation of section 15D(2) of the Goods and Services Tax Act 1985 for applications to change GST taxable period" issued 29 September 2021.

References

Legislative References

Tax Administration Act 1994: ss 6H and 6I

Goods and Services Tax Act 1985: ss 15(3) and 15D

COV 22/11: Variation to sections 33E, 68CB(2) and 68CC(3) of the Tax Administration Act 1994

Variation

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

For a supplementary return for the 2020-2021 tax year under s 33E of the Tax Administration Act 1994, the date by which a supplementary return must be filed is amended to be 31 May 2022 for a person whose due date for filing under s 33E would otherwise be 30 April 2022.

For a general approval application in relation to the R&D tax credit for the 2021-2022 income tax year under section 68CB(2) of the Tax Administration Act 1994, for applicants whose 2021-2022 income year ends between 31 December 2021 and 31 March 2022 inclusive, the date by which that application must be filed with the Commissioner is amended to be the earlier of 31 May 2022 or a date that represents a two-month extension to their filing date.

For a criteria and methodologies notice in relation to the R&D tax credit for the 2021-2022 and 2022-2023 income tax years under section 68CC(3) of the Tax Administration Act 1994:

- for applicants whose 2021-2022 income year ends on 31 August 2022 or 30 September 2022, the date by which that notice must be filed with the Commissioner is extended to the earlier of 31 May 2022 or a date that represents a two-month extension to their filing date
- for applicants whose 2022-2023 income year ends on 31 October 2022, the date by which that notice must be filed with the Commissioner is extended to 31 May 2022.

This variation applies in circumstances where the planning or conduct of eligible research and development or the ability to appropriately obtain necessary information, seek advice and formulate an application under sections 68CB or 68CC or prepare a return under sections 33E of the Tax Administration Act 1994 on time has been materially delayed or disrupted because of circumstances arising either from COVID-19 or COVID-19 response measures. This could include the impact of a key staff member or advisor having reduced availability, or the financial impact of COVID-19 causing significant disruption to the normal business operations of the taxpayer.

Application date

This variation applies from 9 March 2022 to 31 May 2022.

Dated at Wellington on 9 March 2022.

Jonathan Rodgers
Group Leader – Tax Counsel Office
Inland Revenue

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

Summary of effect

1. This variation extends:
   - By one month (to 31 May 2022), the time by which a person with an extension of time for filing under s 37 of the Tax Administration Act 1994 must make a supplementary return for the 2020-2021 tax year;
   - By up to two months the times by which a person with a balance date between December 2021 and March 2022 (to 31 May 2022 for a person with a standard balance date), to be entitled to research and development tax credits under s LY 1 of the Income Tax Act 2007, must apply for general approvals for the 2021-2022 income year;
   - By two months (to 30 April 2022) for a person with an August balance date and by one month (to 31 May 2022) for a person with a September balance date, to be entitled to research and development tax credits under s LY 1 of the Income

Tax Act 2007, the time by which they must apply for criteria and methodology approval for the 2021-2022 income year;

- By two months (to 31 May 2022), the time by which a person with an October balance date, to be entitled to research and development tax credits under s LY 1 of the Income Tax Act 2007, must apply for criteria and methodology approval for the 2022-2023 income year.

Provisions affected

2. Sections 33E, 68CB(2) and 68CC(3) of the Tax Administration Act 1994.

Application of variation

3. This variation applies to a person who is filing a research and development supplementary return for the 2020-2021 tax year or who is seeking the Commissioner's approval of their research and development activities by filing a general approval application for the 2021-2022 income year under s 68CB of the Tax Administration Act 1994 or who is seeking the Commissioner's approval of their research and development activities by filing a criteria and methodologies application for the 2021-2022 or 2022-2023 income years under s 68CC of the Tax Administration Act 1994.
4. The variation recognises that the impact of COVID-19 means the planning or conduct of research and development or the ability to obtain information, seek advice and formulate an application or complete a return may have been delayed.
5. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I, ss 33E, 68CB(2) and 68CB(3).

COV 22/12: Variation to section YD 1(5) of the Income Tax Act 2007

Variation

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

> For the purposes of determining the days that a natural person who was a New Zealand resident only under section YD 1(3) was personally absent from New Zealand under section YD 1(5) of the Income Tax Act 2007, any days that the person was personally absent from New Zealand because they were unable to, or reasonably prevented from, returning to New Zealand, due to circumstances arising either from the imposition of COVID-19 response measures or as a consequence of COVID-19, may be ignored.

This variation is subject to the following conditions:

> The person applying the variation is able to demonstrate to the Commissioner's satisfaction that the absence was due the imposition of COVID-19 response measures or as a consequence of COVID-19; and
>
> The person applying the variation returned to New Zealand as soon as practicable after it was reasonable to do so.

The person applying this variation must notify the Commissioner in writing, and provide such information as the Commissioner may request.

Application date

This variation applies from 17 March 2020 to 30 September 2022.

Dated at Wellington on 9 March 2022.

Jonathan Rodgers
Group Leader – Tax Counsel Office
Inland Revenue

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

Summary of effect

1. When a natural person is New Zealand resident (for tax purposes) only by virtue of being personally present in New Zealand for more than 183 days in total in a 12-month period, they will become non-resident if they are subsequently personally absent from New Zealand for more than 325 days in total in a 12-month period.
2. Where a person was absent from New Zealand and had the demonstrable intention to return to New Zealand before being absent for more than 325 days, they may have become non-resident because they were unable to return to New Zealand because of the imposition of COVID-19 response measures or as a consequence of COVID-19.
3. If that has occurred, an affected person may ignore the days that they were unable to return to New Zealand in calculating the number of days they were personally absent from New Zealand.
4. The use of this variation is subject to the condition that the person returned to New Zealand as soon as practicable after it was reasonable to do so.

Provisions affected

5. Section YD 1(5) of the Income Tax Act 2007.

Application of variation

6. This variation applies to taxpayers who were New Zealand resident under section YD 1(3) of the Income Tax Act 2007 and who were personally absent from New Zealand for 325 or more days in a 12-month period due only to either the imposition of COVID-19 response measures or as a consequence of COVID-19.

References

Legislative references

Tax Administration Act 1994: sections 6H and 6I

Income Tax Act 2007: sections YD 1(3) and (5)

COV 22/13: Extension of time to provide IRD number to allow continuation of WFF instalments

Variation

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

> For a tax credit under the family scheme for a child born between 12 January 2022 and 30 June 2022, the 56-day timeframe under s 80KC(2)(b) and (3) of the Tax Administration Act 1994 may be extended by a period not exceeding a further 56 days as determined by the Commissioner having regard to the effect on the person of COVID-19 or a COVID-19 response.
>
> This variation only applies to a taxpayer that has had difficulty in providing an IRD number because of circumstances arising either from the imposition of COVID-19 response measures or as a consequence of COVID-19. This could include a person's reduced ability to visit a service provider to obtain verification of identity due to COVID-19 or COVID-19 response measures.

Application date

This variation applies for a child born between 12 January 2022 and 30 June 2022.

Dated at Wellington on 9 March 2022.

Jonathan Rodgers
Group Leader
Inland Revenue

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

Summary of effect

1. The effect of the variation will be to extend the timeframe within which an IRD number must be provided to allow instalment payments of family tax credits to continue. The proposed extension is for a period not exceeding a further 56 days as determined by the Commissioner having regard to the effect on the person of COVID-19 or a COVID-19 response. This variation will apply for children born between 12 January 2022 and 30 June 2022.

Provisions affected

2. Section 80KC(2)(b) and (3) of the Tax Administration Act 1994.

Application of variation

3. This variation applies for a child born between 12 January 2022 and 30 June 2022.
4. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H, 6I, 80KC

COV 22/14: Variation to section RC 15 of the Income Tax Act 2007

Variation

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

The deadline in section RC 15 by which a person must inform the Commissioner of their election to use a GST ratio for a tax year is extended:

- for a person with a February balance date to 30 April 2022
- for a person with a March or April balance date to 31 May 2022.

This variation only applies to a person that has had difficulty making an election or informing the Commissioner of their election because of circumstances arising either from the imposition of COVID-19 response measures or because of COVID-19. This could include the impact of a key staff member or advisor having reduced availability, or the financial impact of COVID-19 causing significant disruption to the normal business operations of the person.

Application date

This variation applies from 10 March 2022 to 31 May 2022.

Dated at Wellington on 10 March 2022.

Jonathan Rodgers
Group Leader – Tax Counsel Office
Inland Revenue

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

Summary of effect

1. The effect of this variation is to extend the deadline by which a person with provisional tax obligations must have informed the Commissioner of their election under s RC 15 to use a GST ratio to calculate their provisional tax liability. The extension is to 30 April 2022 for a person with a February balance and to 31 May 2022 for a person with a March or an April balance date.

Provisions affected

2. Section RC 15 of the Income Tax Act 2007.

Application of variation

3. This variation applies to customers who wish to change their method of calculating provisional tax to the GST ratio method. The variation recognises that the impact of COVID-19 means that some customers may not have been able to choose to use a GST ratio and inform the Commissioner of their election before the start of their income year. It provides those customers with extra time to inform the Commissioner.
4. Customers can choose not to apply the variation to their circumstances. You can make that decision by taking a tax position, such as in a tax return, or by telling us. If you've already complied with the existing legislation in taking a tax position, we will consider that you have not chosen to apply the variation.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s RC 15

International taxation: International taxation disclosure exemptions

2022 International tax disclosure exemption ITR33

Introduction

Section 61 of the Tax Administration Act 1994 ("TAA") requires taxpayers to disclose interests in foreign entities.

Section 61(1) of the TAA states that a person who has a control or income interest in a foreign company or an attributing interest in a foreign investment fund ("FIF") at any time during the income year must disclose the interest held. In the case of partnerships, disclosure needs to be made by the individual partners in the partnership. The partnership itself is not required to disclose.

Section 61(2) of the TAA allows the Commissioner of Inland Revenue to exempt any person or class of persons from this requirement if disclosure is not necessary for the administration of the international tax rules (as defined in section YA 1) contained in the Income Tax Act 2007 ("ITA").

To balance the revenue forecasting and risk assessment needs of the Commissioner with the compliance costs of taxpayers providing the information, the Commissioner has issued an international tax disclosure exemption under section 61(2) of the TAA that applies for the income year corresponding to the tax year ended 31 March 2022. This exemption may be cited as "International Tax Disclosure Exemption ITR33 "("the 2022 disclosure exemption") and the full text appears at the end of this item.

Scope of exemption

The scope of the 2022 disclosure exemption is the same as the 2021 disclosure exemption.

Application date

This exemption applies for the income year corresponding to the tax year ended 31 March 2022.

Summary

In summary, the 2022 disclosure exemption **removes** the requirement of a resident to disclose:

- An interest in a foreign company if the resident has an income interest of less than 10% in that company and either that income interest is not an attributing interest in a FIF or it falls within the $50,000 de minimis exemption (see section CQ 5(1)(d) and section DN 6(1)(d) of the ITA). The de minimis exemption does not apply to a person that has opted out of the de minimis threshold by including in the income tax return for the income year an amount of FIF income or loss.
- If the resident is not a widely-held entity, an attributing interest in a FIF that is a direct income interest of less than 10%, if the foreign entity is incorporated (in the case of a company) or otherwise tax resident in a treaty country or territory, and the fair dividend rate or comparative value method of calculation is used.
- If the resident is a widely-held entity, an attributing interest in a FIF that is a direct income interest of less than 10% (or a direct income interest in a foreign PIE equivalent) if the fair dividend rate or comparative value method is used for the interest. The resident is instead required to disclose the end-of-year New Zealand dollar market value of all such investments split by the jurisdiction in which the attributing interest in a FIF is held or listed.

The 2022 disclosure exemption also removes the requirement for a non-resident or transitional resident to disclose interests held in foreign companies and FIFs.

Commentary

Generally, residents who hold an income interest or a control interest in a foreign company, or an attributing interest in a FIF are required to disclose these interests to the Commissioner. These interests are considered in further detail below.

Attributing interest in a FIF

A resident is required to disclose an attributing interest in a FIF if FIF income or a FIF loss is calculated using one of the following calculation methods:

- attributable FIF income, deemed rate of return or cost methods; or
- fair dividend rate or comparative value methods, if the resident is a "widely-held entity"; or
- fair dividend rate or comparative value methods, if the resident is not a "widely-held entity" and either the foreign entity is incorporated or otherwise tax resident in a country or territory with which New Zealand does not have a double tax agreement in force as at 31 March 2022
- or the resident has a direct income interest of 10% or more.

For the purpose of this disclosure exemption, the term "double tax agreement" does not include tax information exchange agreements or collection agreements and is limited to the double tax agreements in force as at 31 March 2022 with the 40 countries or territories listed below.

Australia	Indonesia	Singapore
Austria	Ireland	South Africa
Belgium	Italy	Spain
Canada	Japan	Sweden
Chile	Korea	Switzerland
China	Malaysia	Taiwan
Czech Republic	Mexico	Thailand
Denmark	Netherlands	Turkey
Fiji	Norway	United Arab Emirates
Finland	Papua New Guinea	United Kingdom
France	Philippines	United States of America
Germany	Poland	Viet Nam
Hong Kong	Russian Federation	
India	Samoa	

For the purpose of this disclosure exemption, a "widely-held entity" is an entity which is a:

- portfolio investment entity (this includes a portfolio investment-linked life fund); or
- widely-held company; or
- widely-held superannuation fund; or
- widely-held group investment fund ("GIF").

Portfolio investment entity, widely-held company, widely-held superannuation fund and widely-held GIF are all defined in section YA 1 of the ITA.

The disclosure required, by widely-held resident entities, of attributing interests in FIFs in which the resident has a direct income interest of less than 10% (or a direct income interest in a foreign PIE equivalent) and for which they use the fair dividend rate or the comparative value method of calculation is that, for each calculation method, they disclose the end-of-year New Zealand dollar market value of investments split by the jurisdiction in which the attributing interest in a FIF is held, listed, organised or managed.

In the event that the jurisdiction is not easily determined, a further option of a split by currency in which the investment is held will also be accepted as long as it is a reasonable proxy - that is at least 90-95% accurate - for the underlying jurisdiction in which the FIF is held, listed, organised or managed. Investments denominated in euros will not be able to meet this test and so euro denominated investments will need to be split into the underlying jurisdictions.

FIF interests

The types of interests that fall within the scope of section 61(1) of the TAA are:

- rights in a foreign company (a company includes any entity deemed to be a company for the purposes of the ITA (e.g. a unit trust))
- rights in a foreign superannuation scheme held by a person as a beneficiary or member, if the person acquired the interest before 1 April 2014 and treated the interest as a FIF interest in a return of income filed before 20 May 2013 and for all subsequent income years
- rights in a foreign superannuation scheme held by a person as a beneficiary or member, if the person's interest in the scheme was first acquired whilst the person was tax resident of New Zealand
- rights to benefit from a life insurance policy offered and entered into outside New Zealand
- rights in an entity specified in schedule 25, part A of the ITA.

However, interests that are exempt (under sections EX 31 to EX 43 of the ITA) from being an attributing interest in a FIF do not have to be disclosed. The following is a summary of these exemptions:

- certain interests in Australian resident companies included on the official list of the Australian Stock Exchange and required to maintain a franking account (refer to Inland Revenue's website **ird.govt.nz** (keyword: other exemptions))
- certain interests in Australian unit trusts that have a New Zealand RWT proxy and either a high turnover or high distributions
- interests held by a natural person in foreign superannuation schemes that are an Australian approved deposit fund, Australian exempt public sector superannuation scheme, Australian regulated superannuation fund or Australian retirement savings account
- income interests of 10% or more in controlled foreign companies ("CFCs") (although separate disclosure is required of these as interests in foreign companies – refer below)
- certain interests of 10% or more in foreign companies that are treated as resident, and subject to tax, in Australia (although separate disclosure is required of these as interests in foreign companies – refer below)
- interests in certain unlisted grey-list companies which have migrated out of New Zealand for a year which begins within 10 years of that migration, where the person has held the interests continuously since the migration and the company has retained a significant presence in New Zealand through a fixed establishment
- interests in certain unlisted grey-list companies which hold more than 50% of a New Zealand company for a year which begins within 10 years of the company first holding that 50%, where the New Zealand company has retained a significant presence in New Zealand
- certain interests in grey-list companies resulting from shares acquired under a venture investment agreement
- interests in certain grey-list companies resulting from the acquisition of shares under certain employee share schemes
- certain interests held by natural persons in FIFs located in a country where exchange controls prevent the person deriving amounts from the interests, or from disposing of the interests, in New Zealand currency or consideration readily convertible to New Zealand currency.
- certain interests in foreign superannuation schemes or life insurance policies (offered and entered into outside New Zealand) held by natural persons who acquired the interests when a non-resident or transitional resident
- beneficial interests in foreign superannuation schemes which are not FIF superannuation interests
- certain interests in pensions or annuities provided by FIFs and held by natural persons who acquired the interests when a non-resident (or in certain cases, a resident) (see Inland Revenue's guide *Overseas pensions and annuity schemes* (IR257) for more information)

De minimis

Interests of less than 10% in foreign companies which are attributing interests in a FIF held by a natural person not acting as a trustee also do not have to be disclosed if the total cost of the interests is $50,000 or less at all times during the income year. This disclosure exemption is made because no FIF income under section CQ 5 of the ITA or FIF loss under section DN 6 of the ITA arises in respect of these interests.

- This de minimis exemption does not apply to a person who has included in the income tax return for the year a FIF income or loss. Please note that a person opting out of the de minimis threshold is generally required to continue to apply the FIF rules in each subsequent tax year. Where a person has included FIF income or loss from attributing interests in FIFs where the total cost was $50,000 or less in 1 of the preceding 4 income years, they will be required to apply the FIF rules in the current year.

Format of disclosure

The forms for the disclosure of FIF interests are as follows:

- IR443 form for the deemed rate of return method
- IR447 form for the fair dividend rate method (for individuals or non-widely-held entities)
- IR448 form for the comparative value method (for individuals or non-widely-held entities)
- IR449 form for the cost method
- IR458 spreadsheet form (this spreadsheet form can be used to make electronic disclosures for all methods)
- myIR income tax return attachment form (this form can be used to make electronic disclosures for all methods)

The IR458 spreadsheet and myIR income tax return attachment forms, which are the only disclosure options for the fair dividend rate and comparative value methods for widely-held entities, must be filed online. Disclosure of FIF interests by widely-held entities using the fair dividend rate or comparative value methods may be made by country rather than by individual investment where the direct income interests are less than 10% (or are direct income interests in a foreign PIE equivalent).

If you choose the spreadsheet option you will be able to save the form as a working paper on your computer. When completed, submit the form by logging into your myIR account and uploading it as part of the electronic income tax return filing process, or by logging into your myIR account and attaching it to a web message with 'FIF disclosure' in the subject line.

Alternatively, you can complete the myIR income tax return attachment disclosure form online when preparing your income tax return electronically in myIR.

The IR443, IR447, IR448, IR449 and IR458 forms can be found at **ird.govt.nz/income-tax/income-tax-for-businesses-and-organisations/types-of-business-income/foreign-investment-funds-fifs/file-a-foreign-investment-fund-disclosure**. Click 'Other ways to do this' on this web page to access the IR458 spreadsheet form.

Income interest of 10% or more in a foreign company

A resident is required to disclose an income interest of 10% or more in a foreign company. This obligation to disclose applies to all foreign companies regardless of the country of residence. For this purpose, the following income interests need to be considered:

a. an income interest held directly in a foreign company

b. an income interest held indirectly through any interposed foreign company

c. an income interest held by an associated person (not being a CFC) as defined by subpart YB of the ITA.

To determine whether a resident has an income interest of 10% or more for CFCs, sections EX 14 to EX 17 of the ITA should be applied. To determine whether a resident has an income interest of 10% or more in any entity that is not a CFC, for the purposes of this exemption, sections EX 14 to EX 17 should be applied to the foreign company as if it were a CFC.

Format of disclosure

The forms for disclosure of all interests in a CFC are:

- IR458 spreadsheet form, or
- myIR income tax return attachment form

If you choose the spreadsheet option you will be able to save the form as a working paper on your computer. When completed, submit the form by logging into your myIR account and uploading it as part of the electronic income tax return filing process.

Alternatively, you can complete the myIR income tax return attachment disclosure form online when preparing your income tax return electronically in myIR.

The IR458 spreadsheet form must be accessed online at **www.ird.govt.nz** (keyword: IR458).

Please note that electronic filing is a mandatory requirement for CFC disclosure.

Overlap of interests

It is possible that a resident may be required to disclose an interest in a foreign company which also constitutes an attributing interest in a FIF. For example, a person with an income interest of 10% or greater in a foreign company that is not a CFC is strictly required to disclose both an interest held in a foreign company and an attributing interest in a FIF.

To meet disclosure requirements, only one form of disclosure is required for each interest. If the interest is an attributing interest in a FIF, then the appropriate disclosure for the calculation method, as discussed previously, must be made.

In all other cases, where the interest in a foreign company is not an attributing interest in a FIF, the IR458 spreadsheet form or myIR income tax return attachment form for CFCs must be filed.

Interests held by non-residents and transitional residents

Interests held by non-residents and transitional residents in foreign companies and FIFs do not need to be disclosed.

This would apply for example to an overseas company operating in New Zealand (through a branch) in respect of its interests in foreign companies and FIFs; or to a transitional resident with interests in a foreign company or an attributing interest in a FIF.

Under the international tax rules, non-residents and transitional residents are not required to calculate or attribute income under either the CFC or FIF rules. Therefore, disclosure of non-residents' or transitional residents' holdings in foreign companies or FIFs is not necessary for the administration of the international tax rules and so an exemption is made for this group.

Persons not required to comply with section 61 of the Tax Administration Act 1994

This exemption may be cited as "International Tax Disclosure Exemption ITR33".

1. Reference

This exemption is made under section 61(2) of the Tax Administration Act 1994 ("TAA"). It details interests in foreign companies and attributing interests in foreign investment funds ("FIFs") in relation to which any person is not required to comply with the requirements in section 61 of the TAA to make disclosure of their interests, for the income year ended 31 March 2022.

2. Interpretation

For the purpose of this disclosure exemption:

- to determine an income interest of 10% or more in a foreign company, sections EX 14 to EX 17 of the Income Tax Act 2007 ("ITA") apply for interests in controlled foreign companies ("CFCs"). In the case of attributing interests in FIFs, those sections are to be applied as if the FIF were a CFC, and
- "double tax agreement" means a double tax agreement in force as at 31 March 2022 in one of the 40 countries or territories as set out in the commentary.

The relevant definition of "associated persons" is contained in subpart YB of the ITA.

Otherwise, unless the context requires, expressions used have the same meaning as in section YA 1 of the ITA.

3. Exemption

i. Any person who holds an income interest of less than 10% in a foreign company, including interests held by associated persons, that is not an attributing interest in a FIF, or that is an attributing interest in a FIF in respect of which no FIF income or loss arises due to the application of the de minimis exemption in section CQ 5(1)(d) or section DN 6(1)(d) of the ITA , is not required to comply with section 61(1) of the TAA for that person's interests in the foreign company and that income year.

ii. Any person who is a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct income interest of 10% or more in a foreign company that is not a foreign PIE equivalent, and uses the fair dividend rate or comparative value calculation method for that interest, is not required to comply with section 61(1) of the TAA in respect of that interest and that income year, if the person discloses the end-of-year New Zealand dollar market value of investments, in an electronic format prescribed by the Commissioner, split by the jurisdiction in which the attributing interest in a FIF is held, organised, managed or listed.

iii. Any person who is not a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct income interest of 10% or more in a foreign company, and uses the fair dividend rate or comparative value calculation method is not required to comply with section 61(1) of the TAA in respect of that interest and that income year, to the extent that the FIF is incorporated or tax resident in a country or territory with which New Zealand has a double tax agreement in force at 31 March 2022.

iv. Any non-resident person or transitional resident who has an income interest or a control interest in a foreign company or an attributing interest in a FIF in the income year corresponding to the tax year ending 31 March 2022, is not required to comply with section 61(1) of the TAA in respect of that interest and that income year if either or both of the following apply:

- no attributed CFC income or loss arises in respect of that interest in that foreign company under sections CQ 2(1)(d) or DN 2(1)(d) of the ITA; and/or
- no FIF income or loss arises in respect of that interest in that FIF under sections CQ 5(1)(f) or DN 6(1)(f) of the ITA.

This exemption is made by me acting under delegated authority from the Commissioner of Inland Revenue pursuant to section 7 of the TAA.

This exemption is signed on 31 March 2022

Glen Holbrook
Technical Specialist

OPERATIONAL STATEMENT

Operational statements set out the Commissioner of Inland Revenue's view of the law in respect of the matter discussed and deal with practical issues arising out of the administration of the Inland Revenue Acts.

OS 22/01: Available Subscribed Capital record-keeping requirements

Introduction

This Statement sets out the Commissioner's approach to the record-keeping requirements necessary to substantiate an amount returned to a shareholder tax-free, as a distribution of **Available Subscribed Capital** (ASC). For an amount to be distributed tax-free it will need to not be caught under the definition of a dividend.

What is a dividend?

1. A transfer of value from a company to a person will be a dividend (and therefore income to that person)[1] if:
   - the cause of the transfer is a shareholding in the company;[2] and
   - none of the statutory exclusions apply.[3]
2. While the definition of a dividend is wide, it is subject to several statutory exclusions. These are set out in ss CD 22 – 37. Sections CD 22 *Returns of capital: off-market share cancellations* and CD 26 *Capital distributions on liquidation or emigration* cover exclusions involving ASC.

The purpose of ASC – Return of capital

3. The purpose of calculating the ASC of a company is to determine the amount of capital that shareholders have paid into the company when subscribing for shares. This amount can generally be returned to the shareholders free of tax when there is a repurchase of shares or the company is liquidated (under either ss CD 22 or CD 26), so comes within the statutory exclusion from the definition of dividend in s CD 4 *Transfers of company value generally*. The calculation rules for ASC are provided for in s CD 43 *Available subscribed capital (ASC) amount.*
4. However, the Commissioner has seen a number of cases where there are concerns around the company's calculation of ASC and the taxpayers have been unable to provide sufficient information when requested, as they have not retained sufficient records to substantiate their tax positions taken at the time that the distribution was made.
5. This leads to questions around the basis for the tax position that the distributions are tax-free. It is noted that this has often happened where there has been a period of time in excess of 7 years from when the amount of ASC increased (ASC uplift) to when the distribution occurs (purporting to utilise the ASC uplift) and the tax position is taken (i.e., that the distribution is a tax-free return of capital).

Operational approach

6. The Commissioner may, in cases where the taxpayer has not been able to provide sufficient evidence to support their ASC calculation, dispute the taxpayer's tax position on the basis that the distribution is a dividend under s CD 4. This is consistent with the onus of proof in s 149A(2)(b) of the Tax Administration Act 1994 (the TAA) resting with the taxpayer (see below).
7. The reasoning for this approach is as follows:
   - The taxpayer company has made a distribution to the shareholder (i.e., a transfer of value from the company to the shareholder).[4]

[1] Section CD 1.
[2] Section CD 4(1)(a).
[3] Section CD 4(1)(b).
[4] Section CD 4(1).

- The cause of the transfer is the shareholding in the company.[5]
- None of the exclusions from the definition of dividend apply.[6]

The onus of proof

8. The onus of proof is on the taxpayer to show that the basis for their self-assessment is correct (i.e., their tax position that the distribution is excluded from being a dividend because it is sheltered by ASC under either ss CD 22 or CD 26). A taxpayer needs to be able to provide sufficient evidence to support their position that they have enough ASC to shelter the distribution from being a dividend.
9. Section 22 *Keeping of business and other records* of the TAA lays out the record-keeping requirements. Under s 22(2), taxpayers are required to keep sufficient records to allow the Commissioner to ascertain a taxpayer's tax position for a period of at least 7 years after the end of the income year to which they relate. A taxpayer may also be required to keep their records for a further 3 years because of audit or investigation activity.[7]
10. The formula for calculating ASC includes, amongst other elements, the 1 July 1994 balance and the consideration that the company received for the issue of shares after 30 June 1994 (i.e., the amount contributed by shareholders).[8] Given this requirement, the ASC formula is clear that the calculation of ASC can require consideration of circumstances that happened more than 7 years ago (including, for example, the 1 July 1994 balance). A taxpayer taking a tax position based on the company's level of ASC would, consistent with the onus of proof, need to be able to substantiate the ASC calculation (and to be able to provide this information to the Commissioner - if requested). This is the case irrespective of whether the events feeding into that calculation may have happened more than 7 years ago.
11. Therefore, in line with the ASC calculation requirements and the statutory onus of proof being on the company, Inland Revenue would, in such cases, expect the company to keep sufficient records of their calculation of ASC, so that they are able to substantiate their tax position.
12. This operational approach is consistent with a number of other parts of the Act where a tax position may be taken based on (or taking into account) events or circumstances that may have happened more than 7 years ago and where taxpayers will need to keep sufficient records to substantiate their tax positions.[9]
13. This Operational Statement is based on the Commissioner's view of the law at the date of issue and applies until the statement is withdrawn, amended or any law change occurs.
14. This Statement was signed on 11 March 2022.

Rob Falk
Technical Lead, Legal Services – Technical Standards

[5] Section CD 4(1)(a).
[6] Sections CD 22 to CD 37.
[7] Section 22(5) of the TAA.
[8] Section CD 43(2).
[9] An example of this are the bright-line rules regarding the sale of residential property within 10 years of purchase.

TECHNICAL DECISION SUMMARIES

Technical decision summaries (TDS) are summaries of technical decisions made by the Tax Counsel Office. As this is a summary of the original technical decision, it may not contain all the facts or assumptions relevant to that decision. A TDS is made available for information only and is not advice, guidance or a "Commissioner's official opinion" (as defined in s 3(1) of the Tax Administration Act 1994). **You cannot rely on this document as setting out the Commissioner's position more generally or in relation to your own circumstances or tax affairs**. It is not binding and provides you with no protection (including from underpaid tax, penalty or interest).

TDS 22/02: Whether GST taxable activity and whether in business

Technical decision summary - Adjudication

Decision date: 22 October 2021

Issue date: 25 February 2022

Subjects | Ngā kaupapa

GST: Taxable Activity; Income Tax: Whether in business; TAA: Shortfall penalties

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

CCS	Customer and Compliance Services, Inland Revenue
Commissioner	Commissioner of Inland Revenue or CIR
GST	Goods and Services Tax
GSTA	Goods and Services Tax Act 1985
ITA 2007	Income Tax Act 2007
NOPA	Notice of proposed adjustment
NOR	Notice of response
TAA	Tax Administration Act 1994
TCO	Tax Counsel Office, Inland Revenue

Taxation laws | Ngā ture take

Goods and Services Tax Act 1985; Income Tax Act 2007; Tax Administration Act 1994

Facts | Ngā meka

1. The Taxpayer is an individual and was registered for GST. The Taxpayer claimed input tax deductions for GST and returned self-employment losses for income tax.
2. An audit was conducted by Customer and Compliance Services of Inland Revenue (**CCS**). CCS concluded that:
   - the Taxpayer's GST and income tax returns were fraudulent
   - no taxable activity existed for GST purposes
   - the Taxpayer was not in business for income tax purposes
   - the expenditure was private in nature.

3. As a result, CCS reassessed the Taxpayer's GST returns to disallow the deductions claimed and cancelled the Taxpayer's GST registration from the start date as there was no taxable activity. CCS also reversed the selfemployment losses in the income tax returns. Evasion shortfall penalties were applied.
4. The Taxpayer argued that:
   - All the GST assessments for the disputed periods should be returned to the original amounts.
   - The income tax assessment for the latest income tax year should be returned to its original amount.
   - The decision to cancel the GST registration should be reversed.
5. The Taxpayer did not dispute CCS's income tax assessments for the earlier two income tax years.

Issues | Ngā take

6. The main issues in this case were:
   - Did the Taxpayer carry on a taxable activity for GST purposes? If so, did the Taxpayer claim input tax they were not entitled to?
   - Was the Taxpayer in business for income tax purposes? If so, did the Taxpayer claim deductions they were not entitled to?
   - Was the Taxpayer liable for a shortfall penalty for evasion or a similar act?
7. This case also involves the following preliminary issues:
   - The onus and standard of proof.
   - Whether the Taxpayer has accepted the Commissioner's income tax assessments for the earlier two income tax years.
   - Taxpayer credibility.

Decisions | Ngā whakatau

8. TCO decided that:
   - The Taxpayer did not have a taxable activity in the disputed periods. As a result the GST assessments made by CCS for the disputed periods were confirmed. Similarly, CCS's decision to cancel the Taxpayer's GST registration from the start date was also confirmed.
   - Even if the Taxpayer did have a taxable activity, it was not shown that the Taxpayer was entitled to all of the input tax deductions that CCS proposes, in the alternative, to disallow.
   - The Taxpayer was not in business in the latest income tax year. As a result the assessment made by CCS for the latest income tax year was confirmed.
   - Even if the Taxpayer was in business, it was not shown that the Taxpayer was entitled to all of the income tax deductions that CCS proposes, in the alternative, to disallow.
   - The Taxpayer was not liable for evasion shortfall penalties for the disputed GST periods or the disputed income tax year.

Reasons for decisions | Ngā take mō ngā whakatau

Preliminary Issue 1 | Take tōmua tuatahi: Onus and standard of proof

9. The onus of proof in civil proceedings[1] is on the taxpayer, except for shortfall penalties for evasion or similar act, or obstruction.[2] The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.[3]
10. The standard of proof in civil proceedings is the balance of probabilities.[4] This standard is met if it is proved that a matter is more probable than not.

[1] Challenge proceedings (ie, the proceedings that would follow if a dispute proceeds to a Taxation Review Authority or a court) are civil proceedings.

[2] Section 149A(2) of the TAA.

[3] *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA); *Beckham v CIR* (2008) 23 NZTC 22,066 (CA).

[4] Section 149A(1) of the TAA; *Yew v CIR* (1984) 6 NZTC 61,710 (CA); *Birkdale Service Station Ltd v CIR* (1999) 19 NZTC 15,493 (HC); *Case X16* (2005) 22 NZTC 12,216; *Case Y3* (2007) 23 NZTC 13,028.

11. The onus of proof rests with the Commissioner to show that a taxpayer is liable for a shortfall penalty for evasion under s 141E of the TAA.[5] This is different from the other shortfall penalties where the onus of proof is on the taxpayer. The standard of proof is the balance of probabilities.[6]

Preliminary Issue 2 | Take tōmua tuarua: Income tax assessments for the earlier two income tax years

12. CCS raised the issue of whether the Taxpayer had accepted (or was deemed to have accepted) the Commissioner's income tax assessments for the earlier two income tax years.
13. Under s 89D of the TAA the Taxpayer can issue a NOPA in relation to assessments but must do so within the response period set out in s 89AB of the TAA.
14. CCS argued that the Taxpayer's NOPA did not dispute the income tax assessments for the earlier two income tax years and therefore these assessments were accepted (or were deemed to have been accepted) by the Taxpayer.
15. The Taxpayer's second NOPA referred to the latest income tax year only and not to the assessments for the earlier two income tax years. Therefore, TCO concluded that the response periods for the earlier two income tax years had passed and the Taxpayer had no further ability to dispute those assessments.

Preliminary Issue 3 | Take tōmua tuatoru: Credibility

16. The Tax Counsel Office adjudicates disputes solely on the documentary evidence provided by the parties to the dispute. It does not see or hear taxpayers give evidence and so is not able to assess their credibility first hand.
17. Sometimes CCS assesses credibility based on its dealings with the taxpayer. When adjudicating a dispute, the Tax Counsel Office will consider any assessment made by CCS as to a taxpayer's credibility. All the parties' arguments and the available evidence will also be considered.
18. A taxpayer will have the opportunity in any later challenge proceedings to have their credibility assessed by the TRA or a Court.

Issue 1 | Take tuatahi: Taxable activity

19. The Taxpayer argued that there was a taxable activity. The Taxpayer argued that this was demonstrated by the time and effort put into the activity up until the Taxpayer was injured (during the latest income tax year). The Taxpayer argued that for a number of reasons the activity was not very successful but that there was still a taxable activity in the disputed periods.
20. CCS argued that the Taxpayer did not have a taxable activity as there was no evidence of the Taxpayer making supplies on a continuous or regular basis for consideration. CCS argued that any activity was a hobby and the exclusion in s 6(3)(a) of the Goods and Services Tax Act 1985 (**GSTA**) applies.
21. If there was no taxable activity, the assessments and decision made by CCS would be confirmed. If there was a taxable activity, a second issue arises which is whether the Taxpayer claimed input tax deductions that they were not entitled to. This issue will be dealt with separately.
22. GST is imposed on taxable supplies of goods and services made by a registered person in the course or furtherance of a taxable activity carried on by the registered person.[7] Establishing that there is a taxable activity is crucial to whether a person should be registered for GST and subject to the GSTA.
23. There are four requirements that must be satisfied to show there is a taxable activity (s 6(1)(a) of the GSTA):[8]
    - There must be an activity.[9]
    - The activity must be carried on continuously or regularly by a person.[10]

[5] Section 149A(2) of the TAA.

[6] Section 149A(1) of the TAA.

[7] Section 8(1) of the GSTA.

[8] *Case 14/2016* [2016] NZTRA 14, (2016) 27 NZTC 3-036 at [63]-[70].

[9] *Newman v CIR* (1994) 16 NZTC 11,229 (HC) at 11,233; *CIR v Bayly* (1998) 18 NZTC 14,073 (CA) at 14,078; *CIR v Newman* (1995) 17 NZTC 12,097 (CA) at [32]; *Case 14/2016* at [63].

[10] *Newman* (CA) at 12,100; *Smith v Anderson* (1880) 15 Ch D 247 at 277, 278; *Premier Automatic Ticket Issues Ltd v FCT* (1933) 50 CLR 268 (HCA) at 298; *Case 14/2016* at [67]-[68]; *Wakelin v CIR* (1997) 18 NZTC 13,182 (HC) at 13,185-13,186; *Case N27* (1991) 13 NZTC 3,229 at 3,238-3,239; *Allen Yacht Charters Ltd v CIR* (1994) 16 NZTC 11,270 (HC) at 11,274.

- The activity must involve, or be intended to involve, the supply of goods and services to another person.[11]
- The supply or intended supply of goods and services must be made for a consideration.[12]

24. It is noted that:
    - Activity is not defined in the GSTA.
    - Activity is a broad concept involving a combination of tasks undertaken, or a series of acts or course of conduct pursued by a person.
    - The focus is on the activity as a whole and not on the individual steps involved in carrying on that activity.
    - Activity for GST purposes is not the same as a "business" for income tax purposes.
25. Section 6(2) of the GSTA provides that anything done in the beginning or ending of a taxable activity is treated as carried out in the course or furtherance of that taxable activity.
26. An activity will not be a taxable activity if it is carried on essentially as a private recreational pursuit or hobby (s 6(3) of the GSTA). To be carried on "essentially as a private recreational pursuit or hobby", an activity must be in essence of such a nature.[13]
27. An activity, organised in a coherent fashion to achieve a pecuniary profit, would not be carried on essentially as a private recreational pursuit or hobby. The derivation of enjoyment or pleasure by a taxpayer will not detract from this conclusion. However, if the dominant reason for carrying on the activity has the characteristics of personal refreshment, pleasure or recreation, the activity will be classed as a private recreational pursuit or hobby. As part of an overall assessment, it may be useful to contrast the activity stated to be a private recreational pursuit or hobby with how a taxpayer spends the rest of their time.
28. For the Taxpayer to have a taxable activity, that activity must be carried on continuously or regularly. An activity is carried on regularly if the elements of it recur at fairly fixed times, or at generally uniform intervals, to be of a habitual nature and character. The focus is on the activity as a whole and not the individual steps of the activity. There need not be continuous and regular sales.
29. In this dispute the activity was not just the maintaining of the activity's assets, but also using those assets to produce a product for sale. Looking at the Taxpayer's activity as a whole and realistically, TCO considered that the Taxpayer had not provided enough evidence to show that the activity had been carried on continuously or regularly. This was because:
    - the Taxpayer stated that there was no production in the first year
    - there was little evidence of any production in the second year
    - there was no evidence of any production in the latest year
    - in any event, there was no plan or evidence of any attempt to systematically sell any product that may have been produced.
30. In addition, the Taxpayer wished to cease the GST registration from the end of the latest tax year.
31. TCO concluded that the Taxpayer had not shown on the balance of probabilities that a taxable activity was being carried on. As it was concluded that the Taxpayer was not carrying on a taxable activity there was no need to consider whether the activity was a private recreational pursuit or hobby.

Issue 2 | Take tuarua: Input tax deductions

32. The conclusion in the earlier section that the Taxpayer was not carrying on a taxable activity made it unnecessary to consider whether the Taxpayer was entitled to all the input tax deductions claimed.
33. However, TCO considered the issue in case the dispute proceeded to the challenge stage and the TRA or a court subsequently decided that the Taxpayer was carrying on a taxable activity.
34. CCS argued that, if the Taxpayer was carrying on a taxable activity, the Taxpayer was not entitled to all the input tax deductions that were claimed because they were either private in nature or unsupported by evidence.

[11] Definition of "supply" in s 5(1); *Databank Systems Ltd v CIR* (1987) 9 NZTC 6,213 (HC) at 6,223; *Pacific Trawling Ltd v Chief Executive of the Ministry of Fisheries* (2005) 22 NZTC 19,204 (HC); *Case S77* (1996) 17 NZTC 7,483; *Case L67* (1989) 11 NZTC 1,391; *Case N27* at 3,238-3,239; *Case 14/2016* at [69].

[12] Definition of "consideration" in s 2(1); *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA) at 12,314.

[13] *Case N27* (1991) 13 NZTC 3,229 at 3,240.

35. The calculation of GST payable by a registered person is set out in s 20 of the GSTA. Broadly, the input tax that a registered person has paid for acquiring goods and services for making taxable supplies can be offset against the GST output tax payable on taxable supplies made by the person in the same period.
36. For a taxpayer to be eligible for GST input tax deductions under s 20(2) of the GSTA:
    - The goods or services acquired by the taxpayer must be used for, or available for use in, making taxable supplies (s 20(3C)).
    - The taxpayer must have held the relevant tax invoices when the input tax deductions were claimed (s 20(2)(a)).
    - The tax invoice must generally satisfy the requirements for a "tax invoice" (ss 24(3) or 24(4)).
    - The Commissioner may determine that no input tax deduction is available if sufficient records are not kept in accordance with s 75 of the GSTA.
    - It is not enough that the taxpayer merely shows there was a supply made to them. The taxpayer must go further and provide sufficient particulars of the supply, generally in a tax invoice.[14]
    - The requirement for a tax invoice is an evidential requirement of the GST Act to ensure real supplies are being made which are within the GST base.[15]
37. The evidence provided for this dispute in relation to input tax deductions falls into three categories:
    - Expenses related to the taxable activity with tax invoices provided.
    - Expenses likely related to the taxable activity but without the required tax invoice or other documentation to support an input tax deduction.
    - Expenses where the Taxpayer has not shown the goods or services were used, or available for use, in the taxable activity (with or without a tax invoice).
38. TCO concluded that even if the Taxpayer was carrying on a taxable activity, it was not shown that the Taxpayer was entitled to all the input tax deductions claimed. The Taxpayer had not shown that:
    - All of the goods and services to which the input tax relates were used or available to use in making taxable supplies.
    - The required tax invoices were held.

Issue 3 | Take tuatoru: Business

39. If the Taxpayer was not in business, the assessment made by the Commissioner to remove self-employed income losses in the disputed period would be confirmed.
40. If the Taxpayer was in business, a second issue arises which is whether the Taxpayer claimed deductions for expenditure to which they were not entitled. This issue will be dealt with separately.
41. The Taxpayer argued that there was a business for the latest income tax year (although as noted above under preliminary issues the Taxpayer did not dispute the Commissioner's income tax audit assessments for the previous two income tax years). The Taxpayer argued that the time and effort that was put into the activity up until they were injured shows that there was a business. The Taxpayer argued that for a number of reasons the business was not very successful but that they were still in business.
42. CCS argued that the Taxpayer did not intend to make a profit from the activity in the latest income tax year (or any previous tax years) and that the character and circumstances of the Taxpayer's activity meant that the Taxpayer was not in business. CCS also stated that the Taxpayer admitted that the activity was probably a hobby.
43. "Business" is defined in s YA 1 of the Income Tax Act 2007 as including "any profession, trade, or undertaking carried on for profit". The courts have considered the meaning of "business" and the leading case is *Grieve v CIR*.[16]
44. In *Grieve* the court held that whether a business exists involves a twofold inquiry into:
    - The nature of the activities carried on.
    - The intention of the taxpayer in engaging in those activities.

[14] *Case 1/2012* (2012) 25 NZTC 1-013 at [147].

[15] *Case Z12* (2009) 24 NZTC 14,142 at [27].

[16] *Grieve v CIR* (1984) 6 NZTC 61,682 (CA).

45. Factors relevant to the inquiry include:
    - the period over which the activity is engaged in
    - the scale of operations and the volume of transactions
    - the commitment of time, money, and effort
    - the pattern of activity
    - the financial results.
46. It may also be helpful to consider whether the activity is carried on in a manner similar to other activities of a similar nature. However, it is the character and circumstances of the activity in question which are crucial.
47. Statements by the taxpayer regarding their intent are relevant although these will be objectively assessed in light of the evidence. Actions will often speak louder than words.
48. Although there must be an intention to make a profit, there need not be a reasonable prospect of doing so. An activity that is carried on unprofitably can still be a business.
49. The broadest of the concepts covered by the definition of a business is an undertaking. There must at least be an organised and coherent plan, and sufficient in time, scale, volume and the commitment of money and effort, to warrant calling the whole an undertaking. An undertaking is organised and directed to an end result.[17]
50. A business commences when a profit-making structure has been established and ordinary current business operations have begun.[18]
51. An activity engaged in not to make income, but to make casual gains, or for sport, amusement, or other recreation, may not be a business.[19]
52. TCO considered that the Taxpayer had not provided sufficient evidence to prove that they were carrying on the activity in a business-like way in the latest income tax year for the following reasons:
    - The Taxpayer was not registered with the industry body as required by legislation.
    - The Taxpayer had not provided any evidence such as a vehicle log book to prove how much time was spent on the activity once it had been set up.
    - The Taxpayer had not provided sufficient proof of the level of production that was claimed; no invoice or other documentation from the product processor was supplied.
    - Sales amounts were very small and were not done in a commercial way (being to workmates).
    - The Taxpayer had not provided any evidence of sales or marketing activity to sell the indicated quantity of product.
    - The Taxpayer had not provided any information regarding the activity in the second half of the latest income tax year. For example, invoices, bank statements, GST workings.
53. In summary the Taxpayer had not proved on the balance of probabilities that they were in business in the latest income tax year. While it was considered that the Taxpayer had an intention to make a profit, the nature of the Taxpayer's activities did not reflect the carrying on of a business. The Taxpayer had not provided sufficient evidence to prove that the activity was undertaken in a business-like way, sufficient in time, scale, volume and the commitment of money and effort, organised and directed to achieving an end result, such that it could be considered to be a business.

Issue 4 | Take tuawhā: Deductions

54. The conclusion in the earlier section that the Taxpayer was not in business in the latest income tax year made it unnecessary to consider whether the Taxpayer was entitled to all the income tax deductions claimed.
55. However, TCO considered the issue in case the dispute proceeded to the challenge stage and the TRA or a court subsequently decided that the Taxpayer was in business.
56. CCS argued that, if the Taxpayer was in business, the Taxpayer was not entitled to all of the income tax deductions that were claimed because they were either private in nature and had no nexus with income or they were unsupported by evidence.

[17] *Calkin v CIR* (1984) 6 NZTC 61,781.

[18] *Slater & Ors v CIR* (1996) 17 NZTC 12,453 (HC).

[19] *Case F55* (1983) 6 NZTC 59,840 and *Case L24* (1989) 11 NZTC 1,154.

57. To establish that a deduction for expenditure or loss is allowable under the general permission in s DA 1 of the ITA 2007 a taxpayer must show that:
    - they have incurred the expenditure or loss[20]
    - that there is a sufficient nexus or connection between the expenditure or loss and the derivation of income by the taxpayer, or the carrying on of a business for that purpose.[21]
58. Even if a deduction for an expense is allowed under the general permission in s DA 1, the deduction may be denied under s DA 2 of the ITA 2007 if the expense is capital or private in nature.
59. A taxpayer who carries on an activity or business for the purpose of deriving assessable income is required to keep sufficient records to enable the taxpayer's deductions to be readily ascertained.
60. TCO concluded that even if the Taxpayer was in business, the Taxpayer had not provided sufficient evidence to show that they were entitled to all the deductions claimed in the latest income tax year. From the information provided it was not possible to identify exactly what deductions have been claimed making it difficult to consider whether the requirements for claiming those deductions had been met.

If this dispute goes further and the Taxpayer is found to be in business, the quantity of any income tax deductions available to the Taxpayer is a matter that can be determined at that time.

Issue 5 | Take tuarima: Evasion shortfall penalty

61. The issue is whether the Taxpayer is liable under s 141E of the TAA for a shortfall penalty for evasion or a similar act (reduced by 50% under s 141FB of the TAA for previous behaviour).
62. Section 141E(1)(a) of the TAA imposes a shortfall penalty for evasion on a taxpayer if the following requirements are satisfied:[22]
    - The taxpayer has taken a tax position. A tax position is a position or approach to tax under a tax law as taken in or in respect of a tax return, income statement, or due date.[23]
    - Taking the tax position has resulted in a tax shortfall. A tax shortfall is the difference between the tax effects of the correct tax position and the tax effects of the taxpayer's tax position.[24]
    - The taxpayer has evaded the assessment or payment of tax. Evasion requires an intention to avoid the assessment or payment of tax known to be chargeable:
        - The element of intention will be satisfied if the taxpayer knows that their action or omission will breach a tax obligation. There must be some blameworthy act or omission on the part of the taxpayer. The required intent for evasion can be inferred from surrounding circumstances and conduct.[25]
        - Recklessness can amount to evasion and involves the conscious taking of risk. Recklessness will be proven where:[26]
            - Facts actually known to the taxpayer were such that they must have put the taxpayer on inquiry that a tax obligation may not be met.
            - The taxpayer made a conscious decision to ignore the facts without making further inquiry.
63. The penalty payable for evasion or similar act is 150% of the resulting tax shortfall.

[20] *FC of T v James Flood* (1953) 88 CLR 492; *New Zealand Flax Investments Ltd v FC of T* (1938) 61 CLR 179 at 207 per Dixon J; *A M Bisley & Co Ltd & Ors v CIR* (1985) 7 NZTC 5,082.

[21] *CIR v Banks* [1978] 2 NZLR 472 (CA); *Buckley & Young Ltd v CIR* [1978] 2 NZLR 485 (CA); (1978) 3 NZTC 61,271; *Cox v CIR* (1992) 14 NZTC 9,164 (HC) at 9168.

[22] The shortfall penalty for evasion or a similar act is considered in the Interpretation Statement: Shortfall Penalty—Evasion as published in *Tax Information Bulletin* Vol 18, No 11 (December 2006).

[23] Definitions of "tax position" and "taxpayer's tax position" in s 3 of the TAA.

[24] Definition of "tax shortfall" in s 3 of the TAA.

[25] *Taylor v Attorney-General* [1963] NZLR 261 (SC); *Lloyds Bank Ltd v Marcan* [1973] 2 All ER 359; *Case H90* (1986) 8 NZTC 619; *Case N47* (1991) 13 NZTC 3,388; *R v G* [2013] NZCA 146.

[26] *Case H90* (1986) 8 NZTC 619; *R v Harney* [1987] 2 NZLR 576 (CA); *Case P29* (1992) 14 NZTC 4,213; *Case S100* (1996) 17 NZTC 7,626; *R v G* [2013] NZCA 146.

64. The onus of proof rests with the Commissioner to show that a taxpayer is liable for a shortfall penalty for evasion under s 141E of the TAA.[27] This is different from the other shortfall penalties where the onus of proof is on the taxpayer. The standard of proof is the balance of probabilities.[28]

65. CCS was not able to prove, on the balance of probabilities, that the Taxpayer claimed certain income tax deductions or input tax deductions which had some connection with the activity knowing that the Taxpayer was not lawfully entitled to the refunds. CCS has proved on the balance of probabilities that the Taxpayer may have obtained or attempted to obtain certain other refunds, knowing that he was not lawfully entitled to those refunds where those refunds were not related to the activity. There were other amounts where it was not possible on the evidence provided for the Tax Counsel Office to determine their connection or otherwise with the activity.

66. Accordingly, CCS has not proved on the balance of probabilities that the tax shortfall used for the calculation of the evasion shortfall penalty was correct. Consequently, based on the evidence before it, TCO concluded that the Commissioner had not proven on the balance of probabilities that the Taxpayer was liable to a shortfall penalty for evasion or similar act for the disputed GST periods or the disputed income tax year.

[27] Section 149A(2) of the TAA.

[28] Section 149A(1) of the TAA.

TDS 22/03: GST – Deemed consideration for taxable supply

Technical decision summary - Adjudication

Decision date: 2 November 2021

Issue date: 25 February 2022

Subjects | Ngā kaupapa

GST: Deemed consideration for taxable supply

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

CCS	Customer & Compliance Services of Inland Revenue
Commissioner	Commissioner of Inland Revenue
GST	Goods and services tax
GST Act	Goods and Services Tax Act 1985

Taxation laws | Ngā ture tāke

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

Facts | Ngā meka

1. The Taxpayer is an incorporated company and is registered for GST. The Taxpayer has one director.
2. The Taxpayer and its director were involved in a negligence claim against their former solicitors.
3. The former solicitors held an indemnity policy with an insurance company. In accordance with that policy, the insurance company made a payment to the trust account of the Taxpayer's current solicitors. The payment reflected part payment of an order for damages made by the High Court. The Taxpayer was the ultimate recipient of the payment.
4. The premiums paid under the contract of insurance between the Taxpayer's former solicitors and the insurance company were charged with GST.
5. The insurance company claimed an input tax deduction in respect of the payment it made to the Taxpayer.
6. The Taxpayer claimed GST input tax deductions for the legal costs incurred in pursuing the negligence claim and damages from the Taxpayer's former solicitors.
7. The Taxpayer did not return any GST output tax in respect of the payment it ultimately received from the insurance company.
8. A time bar waiver was agreed between CCS and the Taxpayer for one year.

Issues | Ngā take

9. The issues considered in this dispute were:
    - whether the Taxpayer received the payment under a contract of insurance for the purposes of s 5(13);
    - if it is determined that s 5(13) does apply, whether the supply is standard rated or zero-rated under s 11(1)(mb);
    - if it is determined that s 5(13) does not apply, whether a consequential adjustment is required to disallow the input tax deductions claimed.
10. There was also a preliminary issue on the onus and standard of proof.

Decisions | Ngā whakatau

11. The Tax Counsel Office decided that:
    - The payment received by the Taxpayer is deemed to be consideration for a taxable supply under s 5(13). The Taxpayer is therefore liable for GST on the payment.
    - The supply is standard rated, and GST is payable at 15%.

Reasons for decisions | Ngā take mō ngā whakatau

Preliminary issue | Take tōmua: Onus and standard of proof

12. The onus of proof in civil proceedings[1] is on the taxpayer, except for shortfall penalties for evasion or similar act, or obstruction.[2] The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.[3]
13. The standard of proof in civil proceedings is the balance of probabilities.[4] This standard is met if it is proved that a matter is more probable than not. Whether the Taxpayer has discharged the onus of proof is considered in the relevant issues.

Issue 1 | Take tuatahi: Does s 5(13) apply?

14. The issue is whether the Taxpayer received the payment under a contract of insurance for the purposes of s 5(13). Section 5(13) applies to deem a payment to be consideration for a taxable supply, and thus liable for GST, where the payment is received:
    - by a registered person;
    - under a contract of insurance (whether or not the person is party to the contract); and
    - in relation to a loss incurred in the course or furtherance of their taxable activity.
15. Where a registered person is deemed to have received consideration for a taxable supply under s 5(13), output tax will be payable on the consideration.
16. It is not in dispute that the Taxpayer is a registered person and was carrying on a taxable activity. This issue was not considered by the Tax Counsel Office.

The meaning of "receives"

17. The first question is what the word "receives" means in the context of s 5(13). The possible meanings put forward by the parties are:
    - a narrow interpretation, applying to the direct recipient of the payment (ie, the Taxpayer); or
    - a broader interpretation where an amount is not physically received by a person (ie, the former solicitors) but is paid to a third party claimant (ie, the Taxpayer) to discharge a liability. This could be considered "constructive receipt" by the person.
18. The word "receives" is not defined in the GST Act and so takes its ordinary meaning. The ordinary meanings of "receive" include to be given or paid or provided with, or to take, get or acquire something. In the context of the rest of the phrase "receives a payment", this indicates that the person is given, paid or provided with a payment. This ordinary meaning does not appear to include "constructive receipt" where a third party is given, paid or provided with a payment by an insurer in order to discharge an obligation of the insured.

[1] Challenge proceedings (ie, the proceedings that would follow if this dispute proceeds to the Taxation Review Authority or a court) are civil proceedings.

[2] Section 149A(2) of the Tax Administration Act 1994.

[3] *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA); *Beckham v CIR* (2008) 23 NZTC 22,066 (CA).

[4] Section 149A(1) of the TAA; *Yew v CIR* (1984) 6 NZTC 61,710 (CA); *Birkdale Service Station Ltd v CIR* (1999) 19 NZTC 15,493 (HC); *Case X16* (2005) 22 NZTC 12,216; *Case Y3* (2007) 23 NZTC 13,028.

19. Analysis of the case law referred to by the parties indicates that in some contexts it is possible for the word "receives" to include both direct receipt and constructive receipt.[5] It is important then to consider the legislative purpose of the provision to determine the most appropriate meaning of "receives" in the context of s 5(13).[6]

20. Prior to 10 October 2000, the wording of s 5(13) was different and did not include the phrase "whether or not the person is party to the contract". There were concerns that this former wording was insufficient to impose GST in circumstances where an insurance payment was made directly to a GST registered third party claimant rather than to the insured person.

21. Several officials' papers were produced as the Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill 2000 made its way through the legislative process.[7] Of particular relevance to this dispute is a report produced by the Finance and Expenditure Committee which states:[8]

    General insurance

    In order to address concerns raised by the Insurance Council, we recommend the following changes to the proposed legislation affecting the treatment of general insurance:

    - The clause that would impose a GST liability on an insured person in relation to an insurance payment to a third party (if registered for GST) should be amended to place the liability instead on the third party where the third party receives the payment. This change is recommended after the Insurance Council indicated that the existing proposal would impose significant compliance costs on the industry.
    - … [Emphasis added]

22. The changes as outlined in the report of the Finance and Expenditure Committee were reflected in the revised Bill which became law during 2000.

23. Having regard to the amendment to the Bill made by the Finance and Expenditure Committee, it was clearly intended by the legislator that "receives" would only take the narrow interpretation in the amended provision. If that were not so and constructive receipt by the insured was also included, then the identified "significant compliance cost concerns" would not have been avoided.[9] Given that was the only identified reason for the change to the amendment proposal included in the Bill, the inclusion of constructive receipt by the insured cannot have been within the intended meaning of "receives" following the amendment.

24. Accordingly, the Tax Counsel Office concluded that:

    - The meaning of the word "receives" must be limited to direct receipt by the person actually paid, at the exclusion of constructive receipt by the insured due to the discharge of their liability to the claimant.
    - Therefore, for the purposes of s 5(13), the insured party (the former solicitors) did not "receive" the payment. The recipient of the payment was the Taxpayer.

Under a contract of insurance

25. The second question is what the phrase "under a contract of insurance" means in the context of s 5(13). The Tax Counsel Office concluded that the starting position for the meaning of the word "under", given that it is followed by the words "whether or not the person is a party to the contract", is that "under" should be interpreted widely. This would favour an interpretation along the lines of "by virtue of" or "because or as a result of". This interpretation is also consistent with the legislative intent.

26. In this case, it was considered that the payment was made "under" a contract of insurance because the payment was made to the Taxpayer because of or as a result of an indemnity policy between the insurance company and the Taxpayer's former solicitors.

[5] See, for example, *Innovative Installation Inc v The Queen* 2009 TCC 5810 at [21]; *Pilcher v Logan* (1914) 15 SR(NSW) 24 at 27; *West v Miller* LR 6 Eq 59; *Re Hill, Hill v Caile* [1948] NZLR 356 at 363364.

[6] The meaning of an enactment must be ascertained from its text and in the light of its purpose - *Commerce Commission v Fonterra Co-operative Group Limited* [2007] NZSC 36 at [27].

[7] See, for example, *Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill: Commentary on the Bill* (Inland Revenue, May 2000); *Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill 2000* (Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill, Inland Revenue and Treasury, 21 August 2000).

[8] *Taxation (Annual Rates, GST and Miscellaneous Provisions) Bill 2000,* Commentary, as reported from the Finance and Expenditure Committee.

[9] The Insurance Council was concerned that an insurer would have to issue two payments – one (exclusive of GST) to the third party claimant, and a second one for the GST amount to the insured to be used to discharge their output tax liability.

Whether or not the person is a party to the contract

27. The final wording in s 5(13) that is discussed in any detail is the phrase "whether or not the person is a party to the contract". The "person" in question being the person who receives the payment under a contract of insurance.[10]

28. The Tax Counsel Office concluded that the reference in s 5(13) to "whether or not the person is a party to the contract" is intended to have a broad meaning to reinforce the GST liability of a registered person third party claimant who receives a payment from an insurer – even when they are not a party to that contract of insurance.

Conclusion

29. Overall, the Tax Counsel Office concluded that s 5(13) applies to deem the payment to be consideration for a taxable supply made by the Taxpayer. It is noted that this conclusion is consistent with the decision of Dunningham J in *Southland Indoor Leisure Centre*.[11]

Issue 2 | Take tuarua: If it is determined that s 5(13) does apply, is the supply standard rated or zero-rated under s 11(1)(mb)?

30. A supply will be zero-rated under s 11(1)(mb) where it includes the supply of land. The taxable supply in this dispute was deemed to have taken place by s 5(13). Although it is difficult to identify the true nature of a supply that would not have occurred if not for this deeming provision of the legislation, it is still necessary to have regard to the legal form of the contracts and transactions underlying the payment received as consideration for a supply. The payment in this case was received as a result of a court award for damages for negligence and an indemnity insurance contract held by the negligent party. The supply is a supply of services relating to the insurance contract and the Taxpayer's former solicitors' negligence; it does not include a supply of land for the purposes of s 11(1)(mb). Accordingly, the Tax Counsel Office concluded that the supply should be standard rated, and not zero-rated under s 11(1)(mb).

Issue 3 | Take tuatoru: If it is determined that s 5(13) does not apply, is a consequential adjustment of input claims for expenditure incurred required?

31. As explained above, it is concluded that s 5(13) applies to deem the payment received by the Taxpayer to be consideration for a taxable supply, and thus liable for GST at the standard rate. Notwithstanding this conclusion, consideration was also given to the consequential issue: Whether the input tax claimed was allowed as a deduction under s 20(3). Section 20(3C) states that the deductions are allowed to the extent the services have been used for or available for use in making taxable supplies. The Tax Counsel Office concluded that if s 5(13) did not apply to deem a taxable supply, then there are no supplies that the services acquired could relate to, and therefore the legal services were not acquired for use or available for use in making taxable supplies. Accordingly, the claimed input tax deductions would be disallowed in the alternative.

32. The Tax Counsel Office further concluded that the time bar waiver would not limit the ability of CCS to make an adjustment to the input tax claims. There is no provision in the law for parties to agree to limit the scope of a time bar waiver to specific issues. The only exception to a time bar waiver is in regard to issues that a Taxpayer has not been made aware of. This consequential issue had previously been raised with the Taxpayer before the signing of the time bar waiver, and therefore the exception does not apply.

[10] Where a third party enforces the obligation and is paid by the insurer, such a payment is paid under a contract of insurance – *Pegasus Group Limited v QBE Insurance (International) Limited and another* (unreported, High Court, CIV 2006-404- 6941, Auckland Registry, 24 September 2010) at [12].

[11] *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council and others* [2015] NZHC 1983.

TDS 22/04: Disputable decision and employer registration requirements

Technical decision summary - Adjudication

Decision date: 24 September 2021

Issue date: 8 March 2022

Subjects | Ngā kaupapa

TAA: disputable decision, NOPA requirements, employer registration; income tax: PAYE obligations.

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

CCS	Customer and Compliance Services, Inland Revenue
Commissioner or CIR	Commissioner of Inland Revenue
ITA	Income Tax Act 2007
NOPA	Notice of proposed adjustment
TAA	Tax Administration Act 1994
TCO	Tax Counsel Office, Inland Revenue
TNOPA	Notice of proposed adjustment issued by the Taxpayer

Taxation laws | Ngā ture take

All legislative references are to the Tax Administration Act 1994 (**TAA**) unless otherwise specified.

Facts | Ngā meka

1. The Taxpayer is an incorporated company. It sent a request to Customer and Compliance Services, Inland Revenue (**CCS**) to be registered as an employer via its MyIR account.
2. CCS sent a letter to the Taxpayer advising that its registration request could not be approved until further information was provided to verify the company's status as an employer and the time that it first began to employ staff.
3. CCS did not receive the information requested and as a result sent a further letter to the Taxpayer to inform it that its registration request had been denied. CCS also advised that they still required the information, and their request was being made pursuant to the Commissioner's information gathering power in s 17B. The Taxpayer did not, however, provide any of the information.
4. The Taxpayer issued a notice of proposed adjustment (**NOPA**) disputing the decision of the Commissioner to deny the registration request.

Issues | Ngā take

5. The main issues considered in this dispute were:
   - whether CCS's decision to decline the Taxpayer's request to be registered as an employer was a disputable decision;
   - whether the NOPA issued by the Taxpayer (**TNOPA**) met the requirements of ss 89F(3)(b) and 89F(3)(c);
   - whether CCS's decision to decline the Taxpayer's registration request was correct;
   - whether the Taxpayer was required to meet any PAYE obligations it may have.

Decisions | Ngā whakatau

6. The Tax Counsel Office (**TCO**) decided that:
   - CCS's decision was a disputable decision that the Taxpayer was entitled to challenge by issuing a NOPA.
   - Although the TNOPA was brief and lacking in detail, it would meet the requirements of s 89F(3)(b) and (c) as it contained sufficient information from which the Taxpayer's position can be inferred.
   - CCS had the discretion to decline the Taxpayer's registration request and that discretion was exercised correctly.
   - CCS's decision to decline the Taxpayer's request did not mean that the Taxpayer was exempted from meeting any obligations that it may have under s RA 5 of the Income Tax Act 2007 (**ITA**) and the PAYE rules.[1]

Reasons for decisions | Ngā take mō ngā whakatau

Issue 1 | Take tuatahi: Disputable decision

7. CCS argued that the Taxpayer was not entitled to initiate the statutory disputes process by issuing a NOPA because their decision was not a "disputable decision" as defined in s 3. The Taxpayer argued that CCS's decision was a disputable decision for the purposes of that definition.
8. The term "disputable decision" is relevantly defined in s 3 to mean an assessment or a decision of the Commissioner under a tax law.[2] A decision that cannot be challenged under Part 8A is, however, excluded from the definition. Relevantly, a matter by which a provision in the PAYE rules is left to the discretion, judgment, opinion, approval, consent, or determination of the Commissioner cannot be challenged under Part 8A and is not a disputable decision.[3]
9. For the purposes of the definition of "disputable decision", the word "decision" is defined in s 3 to include the making, giving, or exercising of a discretion, judgment, direction, opinion, approval, consent, or determination by the Commissioner.
10. This dispute involved an issue concerning the meaning of the words "under a tax law" in the definition of "disputable decision". The meaning of an enactment must be ascertained from its text and considering its purpose.[4] The purpose of the definition of "disputable decision" is to define the types of decisions for which taxpayers have challenge rights and dispute rights. Specifically, the definition confers challenge rights and dispute rights on a taxpayer if a decision is "made under a tax law" and the decision affects the taxpayer.
11. On one view, CCS's decision to decline the Taxpayer's registration request was not made under a tax law because there is no provision that deals with employer registration and the specific laws that CCS considered does not confer decision-making powers on the Commissioner. However, it is considered that this is an overly restrictive interpretation of the words "under a tax law" because it produces an outcome that is inconsistent with the purpose of the definition of "disputable decision". That is, the interpretation would deny a taxpayer dispute and challenge rights in relation to decisions that affect a taxpayer. In the present dispute the relevant decisions are whether a taxpayer is an employer and whether it has withholding, payment and filing obligations and, consequentially, whether it is entitled to be registered as an employer.
12. For this reason, it is considered that a broader approach to the interpretation of the words "under a tax law" is appropriate and useful guidance for this is provided by the decision in *Australian National University v Burns* where similar wording was considered.[5] The issue in that case was whether a decision to dismiss a professor came within s 3 of the Administrative Decisions (Judicial Review) Act 1977 being "a decision of an administrative character made … under an enactment". In dealing with this issue the Full Federal Court agreed with Fox J who said in *Evans v Freimann* that the word "under" in the context of the Judicial Review Act, connotes "in pursuance of" or "under the authority of".[6]
13. When CCS decided that the Taxpayer was not an employer and that it did not have withholding, payment and filing obligations they interpreted and applied tax laws to the Taxpayer. CCS's conclusions about how the laws applied to the Taxpayer were the basis on which they made their decision to decline the Taxpayer's request. It is considered that this

[1] Defined in s RD 2(1) of the ITA.

[2] A "tax law" is defined in s 3 to be a provision of the Inland Revenue Acts of which the TAA is one.

[3] Section 138E; s RD 2(1) of the ITA.

[4] Section 5(1) of the Interpretation Act 1999. See also *Commerce Commissioner v Fonterra Co-operative Group Ltd* [2007] NZSC 36 and *CIR v Alcan New Zealand Limited* (1994) 16 NZTC 11,175, at 15, 17 and 24.

[5] *Australian National University v Burns* (1982) 43 ALR 25.

[6] *Evans v Freimann* 35 ALR 428 at 436; 3 ALD 326 at 333.

means CCS's decision was a decision made "under" a tax law in the first sense of that word discussed in *Australian National University v Burns*. In reaching this conclusion it is considered material that the laws were specific, identifiable tax laws that affected the Taxpayer because they were applied for the purpose of determining whether the Taxpayer was an employer and whether it had withholding, filing and payment obligations under the PAYE rules. Further, CCS's decision also affected the Taxpayer in a practical sense because it resulted in the Taxpayer being denied access to Inland Revenue's MyIR employer registration platform. It is considered that in these circumstances CCS's decision was made in pursuance of the tax laws that they applied to the Taxpayer. As such, CCS's decision to decline the Taxpayer's registration request, and the prior decisions upon which it was based, were decisions made under tax laws for the purposes of the s 3 definition of "disputable decision".

14. A decision to refuse an employer registration request is not a matter that is mentioned in the PAYE rules. Consequently, CCS's decision to reject the Taxpayer's registration request is not a matter that a provision in the PAYE rules left to the discretion, judgment, opinion, approval, consent, or determination of the Commissioner. Furthermore, CCS's decision that the Taxpayer was not an employer and that it did not have withholding, payment and filing obligations is not excluded from challenge under Part 8A. This is because the provisions that CCS applied do not leave these matters to the discretion, judgment, opinion, approval, consent, or determination of the Commissioner. Instead, they apply independently of any action of the Commissioner.

15. Consequently, CCS's decision to decline the Taxpayer's application was a disputable decision for the purpose of the definition of "disputable decision" in s 3. CCS gave notice of the decision to the Taxpayer in their letter and the notice affected the Taxpayer because it concerned the Taxpayer's obligations under the PAYE rules, and it resulted in the Taxpayer's registration request being declined. Consequently, the Taxpayer was entitled to issue a NOPA under s 89D(3) for the purpose of disputing CCS's decision to decline its registration request.

Issue 2 | Take tuarua: NOPA requirements

16. The requirements that a NOPA must meet are set out in s 89F. If the TNOPA does not meet those requirements, the Taxpayer will not have initiated the statutory disputes process in Part 8 of the TAA as the first step in that process is the issuing of a valid NOPA. The Taxpayer followed the procedure set out in s 89D(3) for initiating a dispute by issuing the NOPA. The validity of the TNOPA was raised by CCS.

17. The Court of Appeal in *Alam and Begum* set out the approach to be taken when the validity of a taxpayer's notice of response (**NOR**) is disputed.[1] From this decision it is concluded:

    - The Commissioner does not have the statutory power to determine the validity of a NOR by rejecting it on the ground that it is non-compliant.
    - The Commissioner may take a view on whether the NOR is compliant, but that will not "determine" the validity of the NOR.
    - The validity of a NOR can only be determined by the TRA or a court.

18. The High Court has held that the approach taken in *Alam and Begum* also applies where the validity of a taxpayer's NOPA is disputed.[2]

19. Based on *Alam and Begum* and *Riccarton Construction Limited v CIR*, it is considered that if CCS forms the view that a NOPA issued by a taxpayer is invalid then CCS should still proceed with the dispute as if the document is valid. If the dispute proceeds to challenge stage, the Commissioner may contest the validity of the disputes document before the TRA or a court. Therefore, despite forming the view that the TNOPA is invalid, CCS followed the correct approach by continuing with the present dispute. If the dispute proceeds to challenge stage, the Commissioner may contest the validity of the TNOPA before the TRA or a court.

20. Although the TNOPA is very brief and lacking in detail, it could be seen to meet the requirements of s 89F(3)(b) on the grounds that it contains sufficient information from which the Taxpayer's position can be inferred. Ultimately, however, the issue as to whether or not the TNOPA meets the requirements of s 89F(3)(b) and (c) is a matter for the TRA or a court to decide.

21. Furthermore, although there are grounds upon which a court might conclude that the TNOPA does not meet the requirements of s 89F(3)(b) and (c), it is considered that a court would be unlikely to dispose of this dispute on this basis.

[1] *Commissioner of Inland Revenue v Alam and Begum* [2009] NZCA 273; (2009) 24 NZTC 23,564.

[2] *Riccarton Construction Limited v CIR* (2010) 24 NZTC 24,191 (HC) at 24,202.

The dispute has now progressed to a point where the parties' arguments are reasonably clear and well defined. Therefore, if this matter were to proceed to court, it could be decided by assessing the merits of the parties' arguments. This is the approach taken by TCO in considering this dispute.

Issue 3 | Take tuatoru: Declining employer registration

Onus and standard of proof

22. The onus of proof in civil proceedings[3] is on the taxpayer, except for shortfall penalties for evasion or similar act, or obstruction.[4] The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.[5]

23. The standard of proof in civil proceedings is the balance of probabilities.[6] This standard is met if it is proved that a matter is more probable than not. Whether the Taxpayer has discharged the onus of proof is considered in this issue.

Allegations of impropriety

24. The Taxpayer contends that CCS acted vexatiously and in bad faith when they declined its registration request. An allegation of bad faith is best addressed in the challenge process before the TRA or the courts. Any defects in the Commissioner's actions or procedures can be addressed by the TRA or a court if a dispute proceeds to challenge stage.[7] Therefore, as stated by the High Court in *Dandelion Investments Ltd v CIR*,[8] the proper course for challenging the assessment is not to attack the method by which the Commissioner made it but to provide the TRA or court with the evidence and arguments necessary for it to deal with the matter in the manner the taxpayer contends.

Correctness of CCS's decision

25. The TAA confers specific powers on the Commissioner which enable the Commissioner's delegates to do a range of things while conducting the Commissioner's administrative functions and responsibilities under the Inland Revenue Acts. There are, however, no provisions in the Inland Revenue Acts that deal specifically with employer registration. As such, there is no provision that confers a power on the Commissioner to review employer registration applications and to decline them if she considers it appropriate to do so.

26. The absence of an express provision of this nature is not by itself a reason for concluding that the Commissioner does not have the power to review and decline employer applications in appropriate cases. At the time CCS declined the Taxpayer's request, s 34(2) of the State Sector Act 1988 (**SSA**) provided that the Commissioner had all the powers necessary to carry out the statutory functions, responsibilities, and duties imposed on the Commissioner under any Act. Therefore, in determining whether CCS were empowered to decline the Taxpayer's request, it is necessary to ask whether CCS's review of the Taxpayer's application was the carrying out of a statutory function, responsibility or duty imposed on the Commissioner under any Act. If it was, it will be a task that the Commissioner was empowered to carry out as such a power is necessary to enable the task to be performed.

27. Section 6A charges the Commissioner with the care and management of the taxes covered by the Inland Revenue Acts. This involves a general duty of administering the Inland Revenue Acts and, as the PAYE rules are a part of the Inland Revenue Acts, the Commissioner has a statutory duty to administer the PAYE rules. Furthermore, in doing so the Commissioner must act in accordance with s 6 and use her best endeavours to protect the integrity of the tax system.

28. The PAYE rules contain provisions that require employers to withhold tax from PAYE income payments and pay the tax to the Commissioner. They also contain rules that require employers to provide employer income information to the Commissioner. Information published on Inland Revenue's public website indicates that the purpose of the employer registration platform is to facilitate employers meeting these obligations. In this regard, the platform enables registered employers to provide employer income information to Inland Revenue,[9] to receive employer related information from

[3] Challenge proceedings (ie, the proceedings that would follow if a dispute proceeds to a Taxation Review Authority or a court) are civil proceedings.

[4] Section 149A(2).

[5] *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA); *Beckham v CIR* (2008) 23 NZTC 22,066 (CA).

[6] Section 149A(1) of the TAA; *Yew v CIR* (1984) 6 NZTC 61,710 (CA); *Birkdale Service Station Ltd v CIR* (1999) 19 NZTC 15,493 (HC); *Case X16* (2005) 22 NZTC 12,216; *Case Y3* (2007) 23 NZTC 13,028.

[7] *Tannadyce Investments Ltd v CIR* [2011] NZSC 158, (2011) 25 NZTC 20-103.

[8] *Dandelion Investments Ltd v CIR* (1996) 17 NZTC 12,689 (HC). This approach was expressly approved by the Court of Appeal in *Dandelion Investments Ltd v CIR* (2003) 21 NZTC 18,010 (CA) at [62].

[9] https://www.ird.govt.nz/employing-staff/payday-filing

Inland Revenue,[10] to make payments to Inland Revenue,[11] and to access and review payment and filing information recorded in their PAYE accounts.[12]

29. As the purpose of the employer registration platform is to facilitate employers meeting their obligations under the PAYE rules, activities undertaken by CCS in the administration of the platform are activities carried out in the performance of the Commissioner's statutory duty to administer the PAYE rules. It follows that a decision to review a registration application to ensure that the person who made the application is an employer is a task carried out in the administration of the platform. For this reason, it is considered this was a task which CCS, as the Commissioner's delegates, were empowered to perform by s 34(2) of the SSA.
30. As the purpose of Inland Revenue's employer registration platform is to facilitate employers meeting their obligations under the PAYE rules, it is appropriate that access to the platform is restricted to employers. As noted, an employer is a person who pays or is liable to pay a PAYE income payment. Although CCS repeatedly asked the Taxpayer to provide information that would substantiate its claim that it is an employer, the Taxpayer has not done this. The Taxpayer argues that CCS have no power to require the provision of such information because they do not have the power to decline an employer registration request. However, for reasons noted above, it is considered that this is not correct. Further, pursuant to s 17B, CCS may require a person to provide information that they consider necessary or relevant and CCS elected to exercise that power in relation to their information request issued to the Taxpayer.
31. Ultimately, however, the issue as to whether CCS were correct to decline the Taxpayer's registration request does not turn on s 17B. As the onus of proof is on the Taxpayer, it must prove that it is an employer if it wishes to successfully dispute CCS's decision. It is considered that the Taxpayer's failure to provide any evidence to show that it pays or is liable to pay a PAYE income payment means it has not done this.
32. For this reason, it is considered that CCS's decision to decline the Taxpayer's registration request was correctly made and no evidence of impropriety by CCS has been provided by the Taxpayer.

Issue 4 | Take tuawhā: PAYE obligations

33. Section RA 5 of the ITA provides that a person who pays a PAYE income payment must withhold an amount of tax from the payment and pay the tax to the Commissioner under subpart RD of the ITA. There is no provision in the ITA or the TAA which provides that a person may be exempted from these obligations. Therefore, if the Taxpayer pays a PAYE income payment, it must meet the obligations set out in s RA 5 and subpart RD of the ITA.
34. The Taxpayer argues that CCS's refusal to accept its registration application has made complying with its PAYE obligations impossible. However, it is considered that this is incorrect. If the Taxpayer pays a PAYE income payment the appropriate course is for the Taxpayer to calculate the amount of tax to be withheld from the payment and to withhold the amount when the payment is made. The Taxpayer calculates the amount of tax to be withheld by applying the provisions in subpart RD of the ITA that apply to the PAYE income payment. Similarly, the Taxpayer determines the date that it is required to pay the tax to the Commissioner by applying s RD 4 of the ITA. Inland Revenue's public website lists the payment methods available to the Taxpayer for this purpose. They include internet banking, credit card, debit card and direct debit.[13] The website also publishes details of the account that the withheld amounts must be paid into.[14]
35. Therefore, if the Taxpayer has withholding and payment obligations under the PAYE rules it is able to meet those obligations by calculating an amount of tax to be withheld, withholding the tax, and then paying the tax into the Commissioner's bank account. It is considered that the Taxpayer does not require access to an employer account in MyIR to do any of these things. Further, Inland Revenue publishes an "Employer's guide" which is available to assist the Taxpayer in meeting these obligations.
36. If the Taxpayer pays PAYE income payments, it will also be required to provide employer income information to the Commissioner. The Taxpayer determines the information that it is required to provide and the times at which it must be provided by applying s RD 22 of the ITA and ss 23E to 23H and s 23J.

[10] https://www.ird.govt.nz/employing-staff/register-as-an-employer
[11] https://www.ird.govt.nz/managing-my-tax/make-a-payment/ways-of-paying
[12] https://www.ird.govt.nz/employing-staff/payday-filing/paying-deductions-to-inland-revenue
[13] https://www.ird.govt.nz/managing-my-tax/make-a-payment/ways-of-paying
[14] https://www.ird.govt.nz/managing-my-tax/make-a-payment/ways-of-paying/paying-electronically

37. During the first 6 months of employing people, an employer may provide employer income information in a paper format. After that time, the employer is required to provide the information electronically unless it comes within the non-electronic group in s 23F(91). Therefore, if the Taxpayer is an employer, it may at some time be required to provide employer income information electronically. For this purpose, the Taxpayer may require access to an employer account in MyIR.[15] It is considered that in such a case, the appropriate course would be for the Taxpayer to provide details of the PAYE income payments it is making, and for CCS to provide the Taxpayer with an employer account in MyIR. Alternatively, the Taxpayer may choose to provide details of the PAYE income payments it is making to CCS at an earlier time if it wishes to obtain all the advantages of being registered as an employer in MyIR.

38. The Taxpayer argued that CCS does not have the power to reverse their decision to decline its registration request. However, it is considered that this is not correct. CCS have the powers necessary to carry out the Commissioner's functions under the Inland Revenue Acts. Those functions include registering a person as an employer if the person is, in fact, an employer, regardless of whether or not CCS may have declined a previous registration application that the person made.

[15] The Taxpayer would be required to provide its employer income information via Inland Revenue's employer platform or through payroll software.

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

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