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TAX INFORMATION Bulletin

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Inland Revenue
Te Tari Taake

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YOUR OPPORTUNITY TO COMMENT

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

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at **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
PUB00420	Public ruling	Charitable and other donee organisations and fringe benefit tax	6 May 2022
PUB00438	Public ruling	GST – Importers and input tax deductions	10 May 2022
PUB00439	Question we've been asked	GST – Customs brokers and GST levied by Customs	10 May 2022
PUB00440	Question we've been asked	GST – Importers and recalculated GST	10 May 2022
PUB00410	Question we've been asked	GST – Are certain services supplied by airport operators to international airline operators zero-rated?	17 May 2022

IN SUMMARY

New legislation

Order in Council - Tax Administration (Extension of Period of Relief for Certain Disposals of Trading Stock) Oder 2022 3

This order, which came into force on 16 March 2022 and is revoked on 30 April 2023, is made under section 225ABA of the Tax Administration Act 1994.

The order extends the period during which sections GZ 4 and GZ 5 of the Income Tax Act 2007 apply. Those sections, the enactment of which formed part of the Government's COVID-19 response, turn off the application of section GC 1 of that Act for trading stock that a person (A) disposes of at below market value to a donee organisation, a public authority, or a person (B) not associated with A. Section GC 1 would otherwise treat A as deriving income. (Under section GZ 5, trading stock that A disposes of to B may still result in A deriving income if A does not have a business purpose for the disposal.)

The period for which sections GZ 4 and GZ 5 of the Income Tax Act 2007 apply was set to end on 16 March 2022. This order extends that period to end on 31 March 2023.

Order in Council - COVID-19 Support Payments Scheme (Omicron Outbreak) Amendment Order (No 2) 2022 3

This order, which came into force on 28 March 2022, amends the COVID-19 Support Payments Scheme (Omicron Outbreak) Order 2022. The change made by this amending order allows owners of businesses acquired after 15 February 2021 but before 17 January 2022 to use the revenue received by the previous owner of the business during the 2021 comparator period.

Rulings

BR Prd 22/02: Ovato Residential Distribution NZ Limited 5

The engagement of supervisors by Ovato to provide supervisory services relating to the delivery of unaddressed mail to households and other premises throughout New Zealand.

BR Prd 22/03: Ovato Residential Distribution NZ Limited 8

The engagement of deliverers by Ovato to deliver unaddressed mail to households and other premises throughout New Zealand.

BR Prd 22/05: Reach Media New Zealand Limited 10

The engagement of distributors by Reach Media to deliver unaddressed mail from drop-off locations to households and other premises throughout New Zealand.

BR Prd 22/06: Reach Media New Zealand Limited 13

The engagement of drivers by Reach Media to transport unaddressed mail from Reach Media's premises to pre-determined drop-off locations.

BR Prd 22/07: Reach Media New Zealand Limited 16

The engagement of supervisors by Reach Media to provide certain supervisory services in relation to the delivery of newspapers, circulars, leaflets and other such items.

Determinations

COV 22/15: Variation in relation to s RP 17B(4) of the Income Tax Act 2007 to extend time for tax pooling transfers 19

To use funds in a tax pooling account to satisfy a tax obligation for the income year, the Income Tax Act 2007 requires a transfer request to be made. The time for making this request has been extended for the 2021 income year.

COV 22/16: Variation in relation to the definition of "finance lease" in s YA 1 of the Income Tax Act 2007 21

This applies to lessors and lessees who have extended lease terms because supply chain constraints resulting from COVID-19 have made it difficult to obtain new or replacement assets when leases expire. The time period has been extended to allow certain extended leases to continue to be treated as operating leases.

AE 22/01: 2022 Participating jurisdictions for the CRS applied standard 23

The 2022 list of participating jurisdictions as determined by the Commissioner effective from 1 April 2022.

IN SUMMARY (continued)

Operational statement

OS 22/02: Reporting requirements for domestic trusts

25

This statement sets out the Commissioner's approach to applying the trust information gathering powers contained in the Tax Administration Act 1994.

Question we've been asked

QB 22/01: Can a payment that compensates for the time value of money be taxable income if it is outside the statutory definition of "interest"?

51

This item updates and clarifies the Commissioner's view on the case of *CIR v Buis and Anor (2005) 22 NZTC 19,278* as it relates to the interaction between the specific provision taxing interest and the provision taxing income under ordinary concepts.

Legal decisions – case summaries – recent case summaries

CSUM 22/01 High Court dismisses Commissioner's application for an extension of time to issue challenge notice.

56

The Commissioner applied and was granted leave to commence a proceeding under s 89(1B) of the TAA by way of originating application. She sought an order, in accordance with s 89L(2B), for an extension of time for issuing a challenge notice to Mr Parore.

The Commissioner sought an extension of time because the civil tax disputes procedure she instituted was deferred in June 2018 while criminal proceedings against Mr Parore ran their course. The Commissioner submitted that this was an "exceptional circumstance" under s 89L(3) which prevented her from issuing a challenge notice to Mr Parore within the four-year time limit in s 89P.

Harvey J declined the application, on the basis that it would be inappropriate for the Commissioner's own prosecutorial misconduct to be accepted as an "exceptional circumstance" to justify an extension of time.

CSUM 22/02 High Court confirms that forfeiture of criminal proceeds is not 'payment in lieu' of tax

59

Mr Li and his company, AA Taxation & Accounting Service Ltd ("AA Taxation") applied for three declaratory orders under Declaratory Judgment Act 1908 to vindicate their contention that the forfeiture of assets by Mr Li and his wife under the Criminal Proceeds (Recovery) Act 2009 ("CPRA") may be treated as 'payment in lieu' of tax.

Wylie J declined to grant each of the three declarations sought by Mr Li and AA Taxation.

By way of counterclaim, the CIR sought five declarations on various grounds. Of these:

- Wylie J declined to grant two declarations in relation to whether any assets of AA Taxation were restrained or forfeited in the CPRA proceeding because that issue was not determined in the CPRA proceeding.
- Wylie J granted three declarations sought by the CIR, and emphasised that the relevant restraining orders and asset forfeiture orders did not represent the payment of tax; and the CIR was/is not prevented from collecting the tax owed by Mr Li and/or AA Taxation.

NEW LEGISLATION

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

Order in Council - Tax Administration (Extension of Period of Relief for Certain Disposals of Trading Stock) Oder 2022

Current treatment

Sections GZ 4 and GZ 5 of the Income Tax Act 2007 introduced in 2021 provided temporary relief from a deemed income rule in the Income Tax Act in response to COVID-19. The purpose of the 2021 change was to remove a tax disincentive for businesses donating goods. The change applied for certain donations of trading stock made between 17 March 2020 and 17 March 2022 (inclusive).

To qualify for the tax relief the goods must be donated to a registered donee organisation or public authority or donated to a non-associated person if the donation is made for a business purpose.

Trading stock means property that a person who owns or carries on a business has for the purpose of selling or exchanging in the ordinary course of the business, including anything produced or manufactured, and livestock. It does not include timber or land whose disposal would produce income under the Income Tax Act.

A common example is a supermarket donating items to a foodbank.

New treatment

The order extends the relief by not imposing tax on certain disposals of trading stock until 31 March 2023. The order was made on the basis that the impact of COVID-19 continues to be felt throughout New Zealand. For example, through increased demand on foodbanks.

Order in Council - COVID-19 Support Payments Scheme (Omicron Outbreak) Amendment Order (No 2) 2022

The COVID-19 Support Payments Scheme (Omicron Outbreak) Amendment Order (No 2) 2022 came into force on 28 March 2022. The new Order in Council allows recently acquired businesses to use the revenue of the previous owner for the purposes of the 2021 comparator period.

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 *Tax Information Bulletin* (vol 34 no 3 April 2022) for further information.

Amendment

This Order made a minor amendment to the scheme and the Omicron Order to allow owners of businesses acquired after 15 February 2021 but before 17 January 2022 to use the revenue received by the previous owner of the business during the 2021 comparator period.

This change extended the recently acquired business rule. Further information on this can be found on Inland Revenue's website: **ird.govt.nz/covid-19/business-and-organisations/covid-19-support-payment/eligibility-for-the-csp/recently-acquired-businesses**

This change was available for COVID support payment applications for all payments from 28 March 2022.

Applications

Applications opened on 28 February 2022 for the first grant, 14 March 2022 for the second grant and 28 March 2022 for the third grant. Applications for all payments may be submitted via MyIR and will remain open until 5 May 2022.

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**

BINDING RULINGS

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

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

BR Prd 22/02: Ovato Residential Distribution NZ Limited

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

Name of person who applied for the Ruling

This Ruling has been applied for by Ovato Residential Distribution NZ Limited (Ovato Residential).

Taxation Laws

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

This Ruling applies in respect of:

- ss DA 2, RA 5, RD 5, RD 7 and RD 8;
- s 6 of the Goods and Services Tax Act 1985 (GST Act).

The Arrangement to which this Ruling applies

The Arrangement is the engagement of Supervisors by Ovato Residential under an Independent Contractor Contract (the Contract) to provide certain supervisory services in relation to the delivery of unaddressed mail such as free newsletters, community newspapers, magazines, directories, circulars and samples and other similar items to households and other premises throughout New Zealand.

Further details of the Arrangement are set out in the paragraphs below.

1. Ovato Residential is in the business of distributing unaddressed mail such as newsletters, newspapers, circulars, flyers, mailers, catalogues, pamphlets and other similar items to households and other premises throughout New Zealand.
2. Supervisors are people who are contracted or are to be contracted by Ovato Residential to provide certain supervisory services in relation to the delivery of unaddressed mail in New Zealand.
3. Ovato Residential also contracts with Deliverers, although they are not technically parties to the Arrangement. Deliverers are people who physically deliver the unaddressed mail from drop-off locations to households and other premises throughout New Zealand.
4. Ovato Residential distributes only unaddressed mail. Ovato Residential is not registered as a "postal operator" under the Postal Services Act 1998, as it is not involved in the carriage of "letters" (as defined in s 2 of the Postal Services Act 1998) or addressed mail.
5. The Contract contains the following defined terms and their meanings.
   - "Contractor" means the same as "Supervisor".
   - "Distributor" means the deliverer who physically delivers the unaddressed mail and this term is equivalent to and interchangeable with the term "Deliverer".
   - "Manual" means the Supervisor's Instructions published by Ovato Residential.
6. Ovato Residential provides a Manual to the Supervisors that contains the Supervisor's Instructions published by Ovato Residential. This does not, however, affect the nature of the contractual relationship between Ovato Residential and the Supervisors.

Main terms of the Contract

7. Under the heading "The Services", the Contract requires the Supervisor to:

   - Ensure all unaddressed mails are delivered to households in accordance with Ovato Residential's instructions.
   - Be aware that Ovato Residential may vary the volume of deliveries or make changes in areas serviced by the Supervisor.
   - Be responsible for the appointment of Deliverers.
   - Oversee the delivery of material by contracted Deliverers in a defined area and to complete related tasks.
   - Not pay Deliverers directly.
   - Familiarise themselves with, and fully comply with, the Manual (and any amendments) and any applicable legislation, including that related to tax and health and safety.

8. Under the heading "Payment", the Contract states that Ovato Residential shall pay the Supervisor for services rendered. The basis for calculating the payment is the quantity for each job, as shown on the Supervisor's worksheet (or contractor invoice inquiry) for the Deliverers supervised by the Supervisor. Schedule 2 specifies the fees Ovato Residential is to pay the Supervisor.

9. All payments the Supervisor receives are gross payments. The Supervisor is solely responsible for their own Accident Compensation Corporation levies, income tax liabilities and GST liability, or any other income-related payments that may be legislated for in the future. As the contractor is not an employee, the contractor expressly acknowledges that they shall not be entitled to any employment-related payments or benefits.

10. Under the heading "Motor Vehicle, Telephone, Office and Storage Facilities", the Contract states that the Supervisor is responsible for providing their own equipment (such as personal office supplies, a telephone, a vehicle, and wet weather gear) at their own expense. The Supervisor is also responsible for ensuring that such equipment is well maintained, safe and fit for purpose. The Supervisor will be responsible for all costs and services incurred in providing the services.

11. Under the heading "Liability and Claims", the Contract states that the Supervisor shall be responsible for all errors, omissions, loss or damage that are their responsibility as established by standards of service and compliance with the Manual as Ovato Residential requires. This means that Ovato Residential will not be liable to the Supervisor for any loss or damage resulting from the Supervisor's deliberate actions or negligence or where there is a breach of any term of the Contract, including the Manual.

12. The Supervisor must take out an insurance to indemnify Ovato Residential against any damage or loss arising from the Supervisor's actions or relating to the services that the Supervisor will provide.

13. Under the heading "Relief Supervisor", the Contract states that the Supervisor shall appoint a Relief Supervisor to temporarily undertake the obligations of the Supervisor if the Supervisor is unable to work due to illness or temporary absence. An appointment of a Relief Supervisor by the Supervisor must have written approval from by Ovato Residential. The Supervisor is solely responsible for payment and all other obligations to others who help them in this way.

14. Under the heading "Termination", the Contract states that either party may terminate the Contract by giving the other party one month's notice in writing. Furthermore, Ovato Residential may terminate the Contract immediately if there has been a serious breach.

15. Under the heading "Relationship", the parties acknowledge that the Supervisor is an independent contracting party and not an agent or employee of Ovato Residential.

16. Under the heading "General", the Contract provides a process of resolving any dispute or conflict that arises.

17. The Contract includes two schedules:

   - Schedule 1 contains the personal information of the Supervisor contracted by Ovato Residential.
   - Schedule 2 specifies the Supervisor's rates of payment based on quantities and weights of items.

18. The Contract will remain materially the same as the version provided to Inland Revenue on 22 November 2021.

How the Taxation Laws apply to the Arrangement

Taxation Laws apply to the Arrangement as follows:

(a) For the purposes of the "PAYE rules", payments Ovato Residential makes to a Supervisor under the Contract will not be "salary or wages", or "extra pay", or a "schedular payment" within the meaning of those terms as defined in ss RD 5, RD 7 and RD 8 of the Act respectively.

(b) For the purposes of s DA 2(4) of the Act, any payment Ovato Residential makes to a Supervisor under the Contract will not constitute "income from employment".

(c) Under s RA 5(1)(a) of the Act, Ovato Residential is not required to withhold tax from payments it makes to a Supervisor under the Contract.

(d) For the purposes of the GST Act, s 6(3)(b) will not exclude the provision of services by any Supervisor under the Contract from the definition of "taxable activity" in s 6(1).

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 December 2017 and ending on 30 June 2024.

This Ruling is signed by me on the 21st day of February 2022

Graham Poppelwell
Group Lead

BR Prd 22/03: Ovato Residential Distribution NZ Limited

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

Name of person who applied for the Ruling

This Ruling has been applied for by Ovato Residential Distribution NZ Limited (Ovato Residential).

Taxation Laws

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

This Ruling applies in respect of:

- ss DA 2, RA 5, RD 5, RD 7 and RD 8; and
- s 6 of the Goods and Services Tax Act 1985 (GST Act).

The Arrangement to which this Ruling applies

The Arrangement is the engagement of Deliverers by Ovato Residential under a Deliverers' Handbook and Contract (the Contract) to deliver unaddressed mail such as free newsletters, community newspapers, magazines, directories, circulars and samples and other similar items to households and other premises throughout New Zealand.

Further details of the Arrangement are set out in the paragraphs below.

1. Ovato Residential is in the business of distributing unaddressed mail such as newsletters, newspapers, circulars, flyers, mailers, catalogues, pamphlets and other similar items to households and other premises throughout New Zealand.
2. Ovato Residential distributes only unaddressed mail. Ovato Residential is not registered as a "postal operator" under the Postal Services Act 1998, as it is not involved in the carriage of "letters" (as defined in s 2 of the Postal Services Act 1998) or addressed mail.
3. Ovato Residential engages the Deliverers under the Contract, which includes a Deliverers' Handbook that sets out the conditions that the Deliverers agree to abide by.

Main terms of the Contract

4. Under the heading "Description of Services", the Contract requires the Deliverer to deliver product as provided by Ovato Residential on a pre-agreed schedule to private addresses, and the parties acknowledge that the Deliverer is an independent contractor and not an agent, partner or employee of Ovato Residential.
5. Under the heading "Payment", the Contract states that the Deliverer is solely responsible for their own Accident Compensation Corporation (ACC) levies, income tax liabilities and GST liabilities. The Deliverer also acknowledges that the Contract is not a contract of employment governed by the Employment Relations Act 2000 and the Holidays Act 2003. Both parties acknowledge and agree that all payments received by the Deliverer pursuant to this agreement are gross payments.
6. Under the heading "Delivery Payment Rates", the Contract specifies the standard minimum rates based on the number of items delivered, type of item and weight.
7. Under the heading "Reduction/Variation of Workload", the Contract states that due to the nature of Ovato Residential's business, it may cease to distribute any regular publications without notice, and that the volume and timing of work may vary.
8. Under the heading "Performance of Services", the Contract states that:
    - The Deliverer may subcontract the services, or otherwise engage or obtain assistance from others to perform the services.
    - The Deliverer may provide and use (at the Deliverer's cost, expense and risk) a car, trolley or other carrying equipment in connection with the delivery of the items. Scooters and motorcycles are also acceptable.
    - The Deliverer is an independent contractor and as such is free to select their own means and methods of performing the services and the hours during which they will perform the services, as long as they keep within the delivery window Ovato Residential has requested.
    - The Deliverer is responsible/liable for all errors, omissions, loss or damage that are the Deliverer's responsibility/liability as established by the Contract.

9. Under the heading "Termination", the Contract states that either party may terminate the Contract by giving the other party 14 days' notice in writing. Furthermore, Ovato Residential may terminate the Contract immediately if there has been a serious breach.

10. The Deliverers' Handbook part of the Contract provides the following information to the Deliverer:

    - which houses to deliver to and how to deliver circulars;
    - when deliveries are to be done and what the regular delivery days are;
    - getting the correct number of circulars;
    - what to do in the event of absence;
    - reporting injuries and other problems with deliveries to their Supervisor;
    - dealing with dog issues and interference with delivered material;
    - completing an ACC form in the case of injury (the handbook reiterates that Deliverers are self-employed and states that they should not enter Ovato Residential as an employer on the ACC form);
    - disposing of excess circulars;
    - delivering during daylight and taking care crossing roads;
    - health and safety procedures.

11. The Contract will remain materially the same as the version provided to Inland Revenue on 22 November 2021.

How the Taxation Laws apply to the Arrangement

Taxation Laws apply to the Arrangement as follows:

(a) For the purpose of the "PAYE rules", payments Ovato Residential makes to a Deliverer under the Contract will not be "salary or wages", or "extra pay", or a "schedular payment" within the meaning of those terms as defined in ss RD 5, RD 7 and RD 8 of the Act respectively.

(b) For the purposes of s DA 2(4) of the Act, any payment Ovato Residential makes to a Deliverer under the Contract will not constitute "income from employment".

(c) Under s RA 5(1)(a) of the Act, Ovato Residential is not required to withhold tax from payments it makes to a Deliverer under the Contract.

(d) For the purposes of the GST Act, s 6(3)(b) will not exclude the provision of services by any Deliverer under the Contract from the definition of "taxable activity" in s 6(1).

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 July 2019 and ending on 30 June 2024.

This Ruling is signed by me on the 21st day of February 2022.

Graham Poppelwell
Group Lead

BR Prd 22/05: Reach Media New Zealand Limited

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

Name of person who applied for the Ruling

This Ruling has been applied for by Reach Media New Zealand Limited (Reach Media).

Taxation Laws

This Ruling applies in respect of:

- the definitions of "extra pay", "income from employment", "PAYE rules", "salary or wages" and "schedular payment" in the Income Tax Act 2007;
- s DA 2(4) of the Income Tax Act 2007; and
- s 6(3)(b) of the Goods and Services Tax Act 1985.

The Arrangement to which this Ruling applies

The Arrangement is the engagement of people (Distributors) by Reach Media to physically deliver unaddressed mail (newspapers, circulars, leaflets, brochures, catalogues, advertising material, samples and other such items) from drop-off locations to households and other premises throughout New Zealand.

Further details of the Arrangement are set out in the paragraphs below.

1. The Parties to the Arrangement are:
   a) Reach Media: a New Zealand incorporated company that carries on the business of delivering unaddressed mail to New Zealand households; and
   b) Distributors: people who physically deliver the unaddressed mail from the drop-off locations to households and other premises throughout New Zealand.
2. Reach Media also contracts with, although they are not technically parties to the Arrangement:
   a) Supervisors: people who are or are to be contracted by Reach Media to provide certain supervisory services in metropolitan or rural areas in relation to the delivery of unaddressed mail; and
   b) Drivers: people who use their own vehicles to transport the unaddressed mail from Reach Media's premises to pre-determined drop-off locations.
3. Distributors will not be carrying any item that requires Reach Media to be registered as a postal operator under the Postal Services Act 1998.
4. Reach Media is run by a management team based in Auckland with processing branches throughout the country. Unaddressed mail is delivered by a network of Distributors, Drivers and Supervisors.
5. Reach Media's processes and systems align with industry practice. The industry uses a delivery model of supervisors who co-ordinate the activities of a team of distributors. The Drivers, Distributors and Supervisors are paid on a "piece rate" basis under Contracts for Services (that is, as independent contractors).
6. The Distributors are engaged under a standard form contract for the physically delivering unaddressed mail from drop-off locations to households and other premises throughout New Zealand (Contract). The Contract refers to a health and safety manual (Manual) that Distributors are instructed to also consult.
7. Specific procedural details referred to in the Contract are also provided in specific Delivery Instructions (Delivery Instructions) given to the Distributors before each job.
8. The Manual does not replace or override any of the material terms of the Contract, and it does not affect the nature of the contractual relationship between Reach Media and the Distributors.
9. The terms of the Contract under various headings are as follows.

10. Under the heading "Deliveries", the Contract states the Distributor agrees to:
    - deliver all product (papers/circulars) received from Reach Media to the letter boxes in the Distributor's round within the timeframes (Delivery Window) communicated by Reach Media on the Delivery Instructions (exactly when each Distributor completes the deliveries within the Delivery Window is at the Distributor's discretion);
    - make all deliveries in accordance with the delivery guidelines in the Manual (which may be amended by Reach Media from time to time);
    - ensure other commitments do not affect the Distributor's obligations to Reach Media; and
    - familiarise themselves and fully comply with the Manual (including amendments) and any applicable legislation including that related to tax and health and safety.
11. Under the heading "Payment", the fees are the only amounts payable in respect of the services and are inclusive of all taxes (except GST) and other duties and levies. Each Distributor's fee for undertaking the services for Reach Media is calculated under Schedule 2 of the Contract at a rate determined by the volume of deliveries. Under the Contract, Payment is made by direct credit fortnightly on a Thursday. Reach Media will provide a buyer-created invoice to Distributors within seven days of payment. The implication of these provisions is that Reach Media will provide an invoice to Distributors (which takes the form of a buyer-created tax invoice for GST-registered Distributors or a similar invoice for Distributors who are not GST registered) before payment, with payment made fortnightly.
12. Schedule 1 of the Contract requires Distributors to provide their personal, bank and Inland Revenue details.
13. Under the heading "Delivery Equipment", the Contract states that the Distributors are responsible for providing their own equipment (such as bags, vehicles, footwear, reflective or high-visibility clothing, and wet weather gear) at their own expense. The Distributors are also responsible for ensuring such equipment is well maintained, safe and fit for its purpose.
14. Under the heading "Taxation", the Contract specifies that Distributors are responsible for the payment of their own taxes, duties and levies (including income tax, GST and accident compensation levies, if applicable), and any other income related payments or deductions that may be legislated from time to time. The Distributors will register for GST with Inland Revenue if required to do so and will advise Reach Media that they are GST registered. Reach Media will then provide them with a buyer-created tax invoice, and they must not send a GST tax invoice to Reach Media.
15. Under the heading "Termination of Contract", the Contract states that Reach Media or the Distributors may terminate the Contract for any reasons whatsoever by giving two weeks' notice in writing. However, if Reach Media believes there has been a serious breach of the Contract, then Reach Media may terminate the Contract immediately without notice. Under the Contract, Reach Media may also terminate the Contract for a serious breach of the Manual (including amendments).
16. Under the heading "Status of Contractor", the Contract defines the contractor's status as follows:
    - The Distributor is engaged by Reach Media under a Contract for Services, which means they are an independent contractor. The Contract does not create an employment relationship between the Distributor and Reach Media.
    - The Distributor is free to accept other engagements or work while they are contracted by Reach Media.
17. Under the heading "Liability", the Contract states that the Distributor is to undertake the services at their own risk. This means Reach Media will not be liable to the Distributor (or any other person) for any loss resulting from the Distributor's deliberate actions or negligence or where any term of this Contract or the Manual (including amendments) is breached.
18. Under the heading "Delivery Options", the Contracts state the following:
    - It is the Distributor's responsibility to carry out the services as required under the Distribution Contract.
    - The Distributor is responsible for arranging for someone else to carry out the Distributor's services if the Distributor is unable to work. When they do this, the Distributor is solely responsible for payment and all other obligations to others who help them in this way.
    - If the Distributor is unable to meet their contractual obligations to ensure the product is delivered within the Delivery Window, then they must notify their delivery Supervisor immediately.
19. Under the heading "Frequency of Deliveries", the Contract states that Reach Media does not guarantee any minimum amount of deliveries as the volume of product available for distribution will vary depending on the time of year and the requirements of Reach Media's clients.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) The terms of the Contract entered into between Reach Media and the Distributors are the same as those contained in the Contract provided to Inland Revenue in the Ruling Application dated 15 July 2021, except in relation to immaterial details such as fees, rates, frequency of invoices, defined areas, names and addresses that are in the Manual or specific Delivery Instructions.

(b) The relationship between Reach Media and any of the Distributors is, and during the period of this Ruling will apply, in accordance with all material terms of the Contract.

How the Taxation Laws apply to the Arrangement

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

(a) For the purposes of the PAYE rules, any payment made to a Distributor by Reach Media under the Contract will not be "salary or wages" or "extra pay" or a "schedular payment" within the meaning of those terms as defined in, respectively, ss RD 5, RD 7 and RD 8 of the Income Tax Act 2007.

(b) For the purpose of s DA 2(4) of the Income Tax Act 2007, any payment made to a Distributor by Reach Media under the Contract will not be "income from employment".

(c) For the purposes of the Goods and Services Tax Act 1985, the provision of services by any Distributor under the Contract will not be excluded from the definition of "taxable activity" (in s 6 of the Goods and Services Tax Act 1985) by s 6(3)(b) of the Goods and Services Tax Act 1985.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 July 2021 and ending on 30 June 2026.

This Ruling is signed by me on the 23 day of March 2022.

Graham Poppelwell
Group Lead – Customer Compliance

BR Prd 22/06: Reach Media New Zealand Limited

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

Name of person who applied for the Ruling

This Ruling has been applied for by Reach Media New Zealand Limited (Reach Media).

Taxation Laws

This Ruling applies in respect of:

- the definitions of "extra pay", "income from employment", "PAYE rules", "salary or wages" and "schedular payment" in the Income Tax Act 2007;
- s DA 2(4) of the Income Tax Act 2007; and
- s 6(3)(b) of the Goods and Services Tax Act 1985.

The Arrangement to which this Ruling applies

The Arrangement is the engagement of people (Drivers) by Reach Media to transport unaddressed mail (newspapers, circulars, leaflets, brochures, catalogues, advertising material, samples and other such items) from Reach Media's premises to pre-determined drop-off locations.

Further details of the Arrangement are set out in the paragraphs below.

1. The Parties to the Arrangement are:
    a) Reach Media: a New Zealand incorporated company that carries on the business of delivering unaddressed mail to New Zealand households; and
    b) Drivers: people who use their own vehicles to transport the unaddressed mail from Reach Media's premises to pre-determined drop-off locations.
2. Reach Media also contracts with, although they are not technically parties to the Arrangement:
    a) Distributors: people who physically deliver the unaddressed mail from the drop-off locations to households and other premises throughout New Zealand; and
    b) Supervisors: people who are or are to be contracted by Reach Media to provide certain supervisory services in metropolitan or rural areas in relation to the delivery of unaddressed mail.
3. Drivers will not be carrying any item that requires Reach Media to be registered as a postal operator under the Postal Services Act 1998.
4. Reach Media is run by a management team based in Auckland with processing branches throughout the country. Unaddressed mail is delivered by a network of Distributors, Drivers and Supervisors.
5. Reach Media's processes and systems align with industry practice. The industry uses a delivery model of supervisors who co-ordinate the activities of a team of distributors. The Drivers, Distributors and Supervisors are paid on a "piece rate" basis under Contracts for Services (that is, as independent contractors).
6. The Drivers are engaged under a standard form contract for the transportation of unaddressed mail from Reach Media's premises to several predetermined drop-off locations (Contract). The Contract refers to a health and safety manual (Manual) that the Drivers are instructed to also consult.
7. Specific procedural details referred to the Contract are also provided in specific delivery instructions (Delivery Instructions) given to the Drivers before each job.
8. The Manual does not replace or override any of the material terms of the Contract, and it does not affect the nature of the contractual relationship between Reach Media and the Drivers.
9. The terms of the Contract under various headings are as follows.

10. Under the heading "Services", the Contract requires the Drivers to:
    - complete the services set out in Schedule 1 of the Contract;
    - ensure other business commitments do not affect their obligations to Reach Media; and
    - familiarise themselves and fully comply with the Manual (including amendments) and any applicable legislation, including that related to tax and health and safety.
11. Schedule 1 of the Contract requires Drivers to collect particular items within a specified period from Reach Media's premises and transport those items to pre-determined drop-off locations.
12. Schedule 1 of the Contract states that the services to be performed are the:
    - collection of unaddressed mail plus delivery notifications for drop off to a defined set of Distributors from one of Reach Media's nominated premises on the day before the commencement of the delivery window;
    - physical delivery of unaddressed mail to be delivered by Distributors to nominated individual distributor drop-off points in the quantities specified in the delivery notifications; and
    - physical return of surplus stock to the nominated Reach Media processing site.
13. Under the heading "Equipment", the Contract states that Drivers are responsible for providing their own equipment (such as personal office supplies, a telephone, a vehicle and wet weather gear) at their own expense. Drivers are also responsible for ensuring such equipment is well maintained, safe and fit for its purpose.
14. The Contract sets out Drivers' obligations regarding the safe and legal operation of any vehicle used to provide the Services. The Contract also states that Drivers must have and maintain at their own cost and expense adequate public liability insurance (on terms agreed by Reach Media) and comprehensive motor vehicle insurance.
15. Under the heading "Payment", the fees are the only amounts payable in respect of the services and are inclusive of all taxes (except GST) and other duties and levies. Each Driver's fee for undertaking the services for Reach Media is calculated under Schedule 2 of the Contract at a rate determined by the volume of deliveries. The Contract specifies that Reach Media will provide a "buyer-created tax invoice" to each Driver. The Driver must not send an invoice to Reach Media. Drivers must check the invoice and advise Reach Media of any errors. Payment is made by direct credit within seven days. The implication of these provisions is that Reach Media will provide an invoice to Drivers (which takes the form of a buyer-created tax invoice for GST-registered Drivers or a similar invoice for Drivers who are not GST registered) before payment, with payment made fortnightly.
16. Schedule 3 of the Contract requires Drivers to provide to Reach Media their personal details, bank details and, if they are GST registered, their Inland Revenue number.
17. Under the heading "Taxation", the Contract states that the Drivers will register for GST with Inland Revenue if required to do so and provides the current registration threshold. The Contract specifies that:
    - Drivers are responsible for the payment of their own taxes on payments made to them by Reach Media under the Contract;
    - Reach Media may be required to withhold taxes from its payments; and if so
    - the payment made will be reduced to the extent that tax is withheld.

    If Reach Media wrongly fails to withhold tax from payments made to the Driver, it will be entitled to recover such amounts from the Driver.
18. Under the heading "Termination of Contract", the Contract states that Reach Media or the Drivers may terminate the Contract for any reasons whatsoever by giving four weeks' notice in writing. However, if Reach Media believes there has been a serious breach of the Contract, then Reach Media may terminate the Contract immediately without notice. Under the Contract, Reach Media may also terminate the Contract for a serious breach of the Manual (including amendments).
19. Under the heading "Status of Contractor", the Contract defines the contractor's status as follows:
    - The Driver is engaged by Reach Media under a Contract for Services, which means they are an independent contractor. The terms of the Contract or its operation do not create an employment relationship between the Driver and Reach Media.
    - The Driver is free to accept other engagements or work while they are engaged by Reach Media. However, the Driver agrees not to undertake other work that does or may conflict with the interests of Reach Media.

20. Under the heading "No Liability", the Contract states that the Driver is to undertake the services at their own risk. This means Reach Media will not be liable to the Driver (or any other person) for any loss resulting from the Driver's deliberate actions or negligence or where any term of this contract or the Manual (including amendments) is breached. The Driver agrees to indemnify Reach Media against any direct, indirect or consequential injury, loss or damage that Reach Media may suffer as a result of any breach by the Driver of the Contract or arising out of an act, default or omission or any representation made by the Driver. This indemnity will continue to apply after termination of the Contract.

21. Under the heading "Delivery Options", the Contract states the following:

    - It is the Driver's responsibility to carry out the Services as required under the Contract.
    - The Driver is responsible for arranging for someone else to carry out the services if the Driver is unable to work. When they do this, the Driver is solely responsible for payment and all other obligations to others who help them in this way.

22. Under the heading "Frequency of Deliveries", the Contract states that Reach Media does not guarantee any minimum amount of unaddressed mail for which the Driver will carry out the Services. The volume of unaddressed mail available for distribution will vary depending on the time of year and the needs of Reach Media's clients.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) The terms of the Contract entered into between Reach Media and the Drivers are the same as those contained in the Contract provided to Inland Revenue in the Ruling Application dated 15 July 2021, except in relation to immaterial details such as fees, rates, frequency of invoices, defined areas, names and addresses that are in the Manual or specific Delivery Instructions.

(b) The relationship between Reach Media and any of the Drivers is, and during the period of this Ruling will apply, in accordance with all material terms of the Contract.

How the Taxation Laws apply to the Arrangement

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

(a) For the purposes of the PAYE rules, any payment made to a Driver by Reach Media under the Contract will not be "salary or wages" or "extra pay" or a "schedular payment" within the meaning of those terms as defined in, respectively, ss RD 5, RD 7 and RD 8 of the Income Tax Act 2007.

(b) For the purpose of s DA 2(4) of the Income Tax Act 2007, any payment made to a Driver by Reach Media under the Contract will not be "income from employment".

(c) For the purposes of the Goods and Services Tax Act 1985, the provision of services by any Driver under the Contract will not be excluded from the definition of "taxable activity" (in s 6 of the Goods and Services Tax Act 1985) by s 6(3)(b) of the Goods and Services Tax Act 1985.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 July 2021 and ending on 30 June 2026.

This Ruling is signed by me on the 23 day of March 2022.

Graham Poppelwell
Group Lead – Customer Compliance

BR Prd 22/07: Reach Media New Zealand Limited

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

Name of person who applied for the Ruling

This Ruling has been applied for by Reach Media New Zealand Limited (Reach Media).

Taxation Laws

This Ruling applies in respect of:

- the definitions of "extra pay", "income from employment", "PAYE rules", "salary or wages" and "schedular payment" in the Income Tax Act 2007;
- s DA 2(4) of the Income Tax Act 2007; and
- s 6(3)(b) of the Goods and Services Tax Act 1985.

The Arrangement to which this Ruling applies

The Arrangement is the engagement of persons (Supervisors) by Reach Media to provide certain supervisory services in metropolitan and rural areas in relation to the delivery of newspapers, circulars, leaflets, brochures, catalogues, advertising material, samples and other such items.

Further details of the Arrangement are set out in the paragraphs below.

1. The Parties to the Arrangement are:
   a) Reach Media: a New Zealand incorporated company which carries on the business of delivering unaddressed mail to New Zealand households; and
   b) Supervisors: people who are or are to be contracted by Reach Media to provide certain supervisory services in metropolitan or rural areas in relation to the delivery of unaddressed mail.
2. Reach Media also contracts with, although they are not technically parties to the Arrangement:
   a) Distributors: people who physically deliver the unaddressed mail from the drop-off locations to households and other premises throughout New Zealand; and
   b) Drivers: people who use their own vehicles to transport the unaddressed mail from Reach Media's premises to pre-determined drop-off locations.
3. The deliveries supervised by the Supervisors are not of items the carriage of which requires Reach Media to be registered as a postal operator under the Postal Services Act 1998.
4. Reach Media is run by a management team based in Auckland with processing branches throughout the country. Unaddressed mail is delivered by a network of Distributors, Drivers and Supervisors.
5. Reach Media's processes and systems align with industry practice. The industry uses a delivery model of supervisors who co-ordinate the activities of a team of distributors. The Drivers, Distributors and Supervisors are paid on a "piece rate" basis under Contracts for Services (that is, as independent contractors).
6. The Supervisors are engaged under a standard form contract for the supervision of delivery of unaddressed mail by Distributors in a defined area (Contract). The Contract refers to a health and safety manual (Manual) that Supervisors are instructed to also consult.
7. Specific procedural details referred to in the Contract are also provided in specific delivery instructions (Delivery Instructions) given to the Supervisors before each job.
8. The Manual does not replace or override any of the material terms of the Contract, and it does not affect the nature of the contractual relationship between Reach Media and the Supervisors.
9. The terms of the Contract under various headings are as follows.

10. Under the heading "Services", the Contract requires Supervisors to:
    - complete the services set out in Schedule 1 of the Contract;
    - ensure other business commitments do not affect their obligations to Reach Media; and
    - familiarise themselves and fully comply with the Manual (and any amendments) and any applicable legislation including that related to tax and health and safety.
11. Schedule 1 of the Contract requires Supervisors to oversee the delivery of material by Contracted Distributors in a defined area and to complete related tasks.
12. Schedule 1 specifies Supervisors are contracted for the services of:
    - Processing Stock: preparing and distributing of stock to each Contracted Distributor within the Supervisor's area (this requirement is deleted for metro Supervisors);
    - Physical Delivery: overseeing the physical delivery of individual items by Contracted Distributors to nominated delivery points;
    - Administration: maintaining and supplying to Reach Media details of current Contracted Distributors and providing information in relation to any round changes and associated delivery quantities, including No Circular counts; and
    - Client Service: ensuring delivery contractors phone or text in confirmation of delivery before the close of the delivery window.
13. Under the heading "Payment", the fees are the only amounts payable in respect of the Deliveries and are inclusive of all taxes (except GST) and other duties and levies. Each Supervisor's fee for performing the services for Reach Media is calculated at the rates set out in Schedule 2 of the Contract. Under the Contract, Reach Media will provide a "buyer-created tax invoice" before payment and will make payment by direct credit fortnightly on a Thursday. The implication of these provisions is that Reach Media will provide an invoice to Supervisors (which takes the form of a buyer-created tax invoice for GST-registered Supervisors or a similar invoice for Supervisors who are not GST-registered) before payment, with payment made fortnightly. The Supervisor must not send an invoice to Reach Media. The Supervisor must advise Reach Media immediately if they believe the invoice is incorrect.
14. Under the heading "Equipment", the Contract states that Supervisors are responsible for providing their own equipment (such as personal office supplies, a telephone, a vehicle and wet weather gear) at their own expense. Supervisors are also responsible for ensuring such equipment is well maintained, safe and fit for its purpose.
15. Schedule 3 of the Contract requires Supervisors to provide their personal details, bank details and, if they are GST registered, their Inland Revenue number.
16. Under the heading "Taxation", the Contract states that Supervisors will register for GST with Inland Revenue if required to do so and provides the current registration threshold. The Contract specifies that:
    - Supervisors are responsible for the payment of their own taxes on payments made to them by Reach Media under the Contract;
    - Reach Media may be required to withhold taxes from its payments; and if so
    - the payment made will be reduced to the extent that tax is withheld.

    If Reach Media wrongly fails to withhold tax from payments made to a Supervisor, it will be entitled to recover such amounts from the Supervisor.
17. Under the heading "Termination of Contract", the Contract states that Reach Media or Supervisors may terminate the Contract for any reasons whatsoever by giving four weeks' notice in writing. However, if Reach Media believes there has been a serious breach of the Contract, then Reach Media may terminate the Contract immediately without notice. Reach Media may also terminate the Contract for serious breach of the Manual (including amendments).
18. Under the heading "Status of Contractor", the Contract defines the contractor's status as follows:
    - The Supervisor is engaged by Reach Media under a Contract for Services, which means they are an independent contractor. The terms of the Contract or its operation do not create an employment relationship between the Supervisor and Reach Media.
    - The Supervisor is free to accept other engagements or work while they are engaged by Reach Media. However, the Supervisor agrees not to undertake other work that does or may conflict with the interests of Reach Media.

19. Under the heading "Indemnity", the Contract states that the Supervisor is to undertake the services at their own risk. This means Reach Media will not be liable to the Supervisor (or any other person) for any loss resulting from the Supervisor's deliberate actions or negligence or where any term of this contract or the Manual (including amendments) is breached.
20. Under the heading "Delivery Options", the Contract states that the Supervisor is responsible for arranging for someone else to carry out the services if the Supervisor is unable to work. The Supervisor is solely responsible for payment and all other obligations to others who help them in this way.
21. Under the heading "Frequency of Deliveries", the Contract states that Reach Media does not guarantee any minimum amount of unaddressed mail for which the Supervisor will carry out the services. The volume of unaddressed mail available for distribution will vary depending on the time of year and the needs of Reach Media's clients.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) The terms of the Contract entered into between Reach Media and the Supervisors are the same as those contained in the Contract provided to Inland Revenue in the Ruling Application dated 15 July 2021, except in relation to immaterial details such as fees, rates, frequency of invoices, defined areas, names and addresses that are in the Manual or specific Delivery Instructions.

(b) The relationship between Reach Media and any of the Supervisors is, and during the period of this Ruling will apply, in accordance with all material terms of the Contract.

How the Taxation Laws apply to the Arrangement

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

(a) For the purposes of the PAYE rules, any payment made to a Supervisor by Reach Media under the Contract will not be "salary or wages" or "extra pay" or a "schedular payment" within the meaning of those terms as defined in, respectively, ss RD 5, RD 7 and RD 8 of the Income Tax Act 2007.

(b) For the purpose of s DA 2(4) of the Income Tax Act 2007, any payment made to a Supervisor by Reach Media under the Contract will not be "income from employment".

(c) For the purposes of the Goods and Services Tax Act 1985, the provision of services by any Supervisor under the Contract will not be excluded from the definition of "taxable activity" (in s 6 of the Goods and Services Tax Act 1985) by s (3)(b) of the Goods and Services Tax Act 1985.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 July 2021 and ending on 30 June 2026.

This Ruling is signed by me on the 23 day of March 2022.

Graham Poppelwell
Group Lead – Customer Compliance

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.

COV 22/15: Variation in relation to s RP 17B(4) of the Income Tax Act 2007 to extend time for tax pooling transfers

Variation

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

Section RP 17B(4)(a) and (b) of the Income Tax Act 2007 are varied to allow a taxpayer to ask a tax pooling intermediary to arrange the transfer of an amount to satisfy an obligation for provisional tax (other than under the aim method), terminal tax or use of money interest on the provisional tax or terminal tax for the 2021 income year, on or before the date that is 183 days after a person's terminal tax date for the 2021 tax year falling due on 17 January 2022 or later.

This is subject to the conditions that:

- The transfer relates to a contract the taxpayer has with the tax pooling intermediary that is in place on or before 21 June 2022 to purchase tax pooling funds.
- In the period between July 2021 and March 2022 (Affected Period) the taxpayer's business must have experienced (or for March 2022 be expected to experience) a significant decline in actual (or predicted) revenue related to the impact of COVID-19 which means that in respect of the 2021 tax year the taxpayer was either:
  - (a) unable to satisfy their existing commercial contract with a tax pooling intermediary; or
  - (b) was, prior to this variation, not able to enter into a commercial contract with a tax pooling intermediary.
- Or, in the Affected Period, the taxpayer has had difficulty finalising their tax return position prior to 31 March 2022 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.
- Any person that wishes to use funds in a tax pooling account to satisfy an obligation for provisional tax or terminal tax for the 2021 income year must provide, or have their tax agent provide on their behalf, their intermediary with a statement in writing confirming the above requirements are met. That the statement must be provided to the intermediary on or before 21 June 2022.

Application date

This variation applies from 18 March 2022 to 30 September 2022.

Dated at Wellington on 18 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 use funds in a tax pooling account to satisfy a tax obligation for the 2021 income year, section RP 17B(4) of the Income Tax Act 2007 requires a transfer request to be made on or before either 75 or 76 days of terminal tax date. For the 2021 income year, the time within which a request must be made has been extended to 183 days after terminal tax date using s 6I of the TAA.

Provisions affected

2. Section RP 17B of the Income Tax Act 2007.

Application of variation

3. This variation applies to a person who wishes to use funds in a tax pooling account to satisfy an obligation for provisional tax or terminal tax for the 2021 tax year. The variation recognises that the impact of COVID-19 means that some taxpayers who would otherwise have made use of tax pooling have been unable to do so due to cashflow difficulties and disruption to normal business operations.

4. The variation is subject to conditions requiring a contract with a tax pooling intermediary to be in place on or before 21 June 2022, and that either the person's business must have experienced (or will be expected to experience) a significant decline in revenue as a result of COVID-19, or that the person has had difficulty finalising their tax return position prior to 31 March 2022 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.

References

Legislative references

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s RP 17B

COV 22/16: Variation in relation to the definition of "finance lease" in s YA 1 of the Income Tax Act 2007

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:

> The time period of "more than 75% of the asset's estimated useful life" referred to in paragraph (b) of the definition of "finance lease" in s YA 1 of the Income Tax Act 2007 is extended to "more than 75% of the asset's estimated useful life plus an additional 44 months" where the term of the lease is extended between 14 February 2020 and 30 September 2022.

This variation is subject to the conditions that:

- The lease was entered into before 14 February 2020.
- The lease term was not more than 75% of the estimated useful life when the lease was entered into.
- The term of the lease has been increased through one or more extensions agreed between 14 February 2020 and 30 September 2022.
- The lease term is extended to no longer than 30 September 2023.
- The lease was extended due to supply chain constraints resulting from the impact of COVID-19 and the lessee's business has experienced significant difficulty in obtaining new assets or replacement assets (e.g. motor vehicles), necessitating extensions to current lease terms.

Application date

This variation applies from 14 February 2020 to 30 September 2022

Dated at Wellington on 6 April 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. Pursuant to paragraph (b) of the definition of "finance lease" in s YA 1 of the Income Tax Act 2007, a "finance lease" means a lease of a personal property lease asset entered into by a person on or after 20 May 1999 that, when the person enters the lease or from a later time, involves a term of the lease that is more than 75% of the asset's estimated useful life.

2. This means that an operating lease of an asset has a maximum term of 75% of the asset's estimated useful life before it is treated for tax purposes as a "finance lease" (with different tax treatment) under the Income Tax Act 2007.

3. Lessors and lessees may have agreed to extend lease terms (or intend to do so) due to supply chain constraints resulting from the impact of COVID-19. To alleviate this impact, the time period in the definition of "finance lease" (being up to 75% of an asset's estimated useful life) has been extended using s 6I of the Tax Administration Act 1994 (being more than 75% of the asset's estimated useful life plus an additional 44 months) to allow certain extended leases to continue to be treated as operating leases and not "finance leases" for tax purposes.

Provisions affected

4. Paragraph (b) of the definition of "finance lease" in s YA 1 of the Income Tax Act 2007.

Application of variation:

5. This variation applies to a person who has entered into an operating lease of an asset, but the lease term has been extended beyond 75% of the estimated useful life of the asset, and so in the absence of this variation it would be reclassified as a finance lease for tax purposes, with associated complexity and compliance costs.

6. The variation is subject to the conditions that the lease was entered into before 14 February 2020; that the lease term was not more than 75% of the estimated useful life when the lease was entered into; that the lease term is extended to no later than 30 September 2023; and that the lease was extended due to supply chain constraints resulting from the impact of COVID-19 and the lessee's business has experienced significant difficulty in obtaining new assets or replacement assets (e.g. motor vehicles), necessitating extensions to current lease terms.

7. Customers who may wish to apply this variation should note:
   - A lessor and lessee are not required to adopt the same treatment of the lease asset as both parties can make their own decision about whether they rely on the variation;
   - Customers do not need to take the same approach to all leases they have entered into for the same class of lease asset;
   - The variation applies to leases that are extended between 14 February 2020 and 30 September 2022 and is not limited to leases where the lease term would otherwise have ended during that period.

Associated variations:

8. This variation has the same effect as the earlier COV 20/08 "Variation in relation to the definition of "finance lease" in s YA 1 of the Income Tax Act 2007" which expired on 30 November 2020, COV 20/12 which expired on 31 March 2021 and COV 21/06 which expired on 31 March 2022. The earlier three variations provide additional time for a person to decide whether to extend their operating leases without them becoming finance leases for tax purposes with the caveat that they did so within the period required by the variation. This variation allows operating lease extensions to be made from 14 February 2020 to 30 September 2022 without them becoming finance leases for tax purposes.

Legislative References

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s YA 1, paragraph (b) of the definition of finance lease

AE 22/01: Participating jurisdictions for the CRS applied standard

Determination

New Zealand's list of participating jurisdictions made by determination under section 91AAU of the Tax Administration Act 1994 for the purposes of the CRS applied standard and associated requirements under Part 11B of the Tax Administration Act 1994 has been amended with effect from the 1st of April 2022 as follows:

Jurisdictions added to the participating jurisdictions list

Andorra	Ecuador	Kazakhstan
Oman		

Full list of participating jurisdictions from 1 April 2022

Albania	Andorra	Anguilla	Antigua and Barbuda
Argentina	Aruba	Australia	Austria
Azerbaijan	Bahamas	Bahrain	Barbados
Belgium	Belize	Bermuda	Brazil
British Virgin Islands	Brunei	Bulgaria	Canada
Cayman Islands	Chile	China	Colombia
Cook Islands	Costa Rica	Croatia	Curaçao
Cyprus	Czech Republic	Denmark	Dominica
Ecuador	Estonia	Faroe Islands	Finland
France	Germany	Ghana	Gibraltar
Greece	Greenland	Grenada	Guernsey
Hong Kong	Hungary	Iceland	India
Indonesia	Ireland	Isle of Man	Israel
Italy	Japan	Jersey	Kazakhstan
Korea	Kuwait	Latvia	Lebanon
Liechtenstein	Lithuania	Luxembourg	Macao
Malaysia	Malta	Mauritius	Mexico
Monaco	Montserrat	Nauru	Netherlands
New Caledonia	New Zealand	Nigeria	Norway
Oman	Pakistan	Panama	Peru
Poland	Portugal	Qatar	Romania
Russia	Saint Kitts and Nevis	Saint Lucia	Saint Vincent and the Grenadines
Samoa	San Marino	Saudi Arabia	Seychelles
Singapore	Slovak Republic	Slovenia	South Africa
Spain	Sweden	Switzerland	Turkey
Turks and Caicos Islands	United Arab Emirates	United Kingdom	Uruguay
Vanuatu			

Dated at Wellington on the 26th March 2022

John Nash
Manager, International Revenue Strategy Inland Revenue

References

Legislative references

Tax Administration Act 1994: s 91AAU

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 22/02: Reporting requirements for domestic trusts

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

The Income Tax Act 2007 is abbreviated to ITA.

The Tax Administration (Financial Statements – Domestic Trusts) Order 2022 is abbreviated to OIC.

Introduction

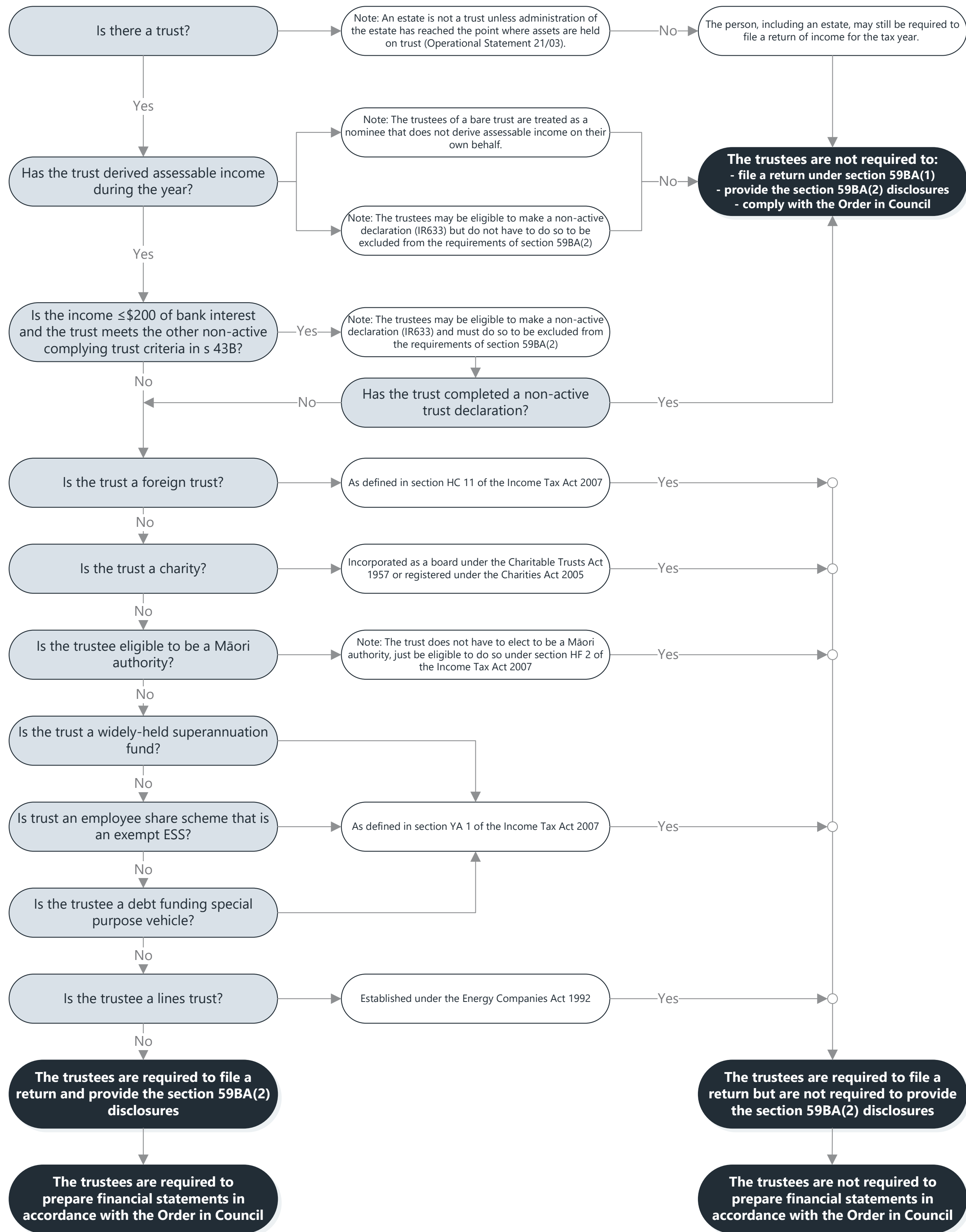
1. The trust information gathering powers in s 59BA apply for the 2021-22 and later income years. The retrospective trust information gathering powers in s 59BAB were introduced for periods beginning after the end of the 2013-14 income year.
2. The Taxation (Annual Rates for 2021-22, GST, and Remedial Matters) Act 2022 amended s 59BA to exclude minor and incidental non-cash distributions from the information required to be included with any return and to also exclude foreign trusts required to file a return from having to provide the further information required by s 59BA(2).
3. As outlined in Tax Information Bulletin Volume 33 Number 3 (April 2021) (at pp 5-8) the purpose of trust information gathering powers is to collect further information from trustees to:
    - 3.1. gain insight into whether the top personal tax rate of 39% is working effectively; and
    - 3.2. to provide better information to understand and monitor the use of structures and entities by trustees.
4. The Commissioner may use the information collected for compliance and audit purposes.

Summary

5. The key points discussed in this Statement are summarised as follows:
    - 5.1. Obligation to file returns
    - 5.2. Order in Council (OIC)
    - 5.3. Information required
        - 5.3.1. A statement of profit or loss and a statement of financial position
        - 5.3.2. Settlor & settlement details
        - 5.3.3. Beneficiary & distribution details
        - 5.3.4. Persons with powers of appointment
    - 5.4. Excluded trusts
    - 5.5. Persons responsible for performance
    - 5.6. Variation to the requirements
    - 5.7. Retrospective collection
6. Trustees who derive assessable income must file a return under s 59BA(1) for the tax year of all income derived in the corresponding income year in the form prescribed by the Commissioner. Unless the trust is an excluded trust under s 59BA(3), the trustees are also required to include the information set out in s 59BA(2)(a) to (f).
7. The obligation to provide further information with the return is different from the obligation to maintain the financial statements required by the Tax Administration (Financial Statements – Domestic Trusts) Order 2022 (the OIC). Trustees who derive assessable income are obliged to prepare the financial statements required by the OIC (see 25 for more information) but these financial statements are not required to be provided to the Commissioner (unless the Commissioner requests them).

8. Certain information will need to be copied from the financial statements and included in the tax return filed with the Commissioner. This Operational Statement sets out what information the Commissioner requires to be provided with the tax return in order to comply with s 59BA.

9. The following flowchart summarises who is, and who is not, required to comply with s 59BA:



Obligation to file returns

10. Section 59BA(1) sets out the requirement for a trustee of a trust that derives assessable income to file a return.

59BA Annual return for trusts

(1) A trustee of a trust who derives assessable income for a tax year must file a return for the tax year of all income derived in the corresponding income year by the trustee as trustee of the trust.

11. All trustees of a trust, except a non-active complying trust, who derive assessable income for a tax year must file a return for all income derived in the corresponding income year.

12. Assessable income is defined in sections YA 1 and BD 1(5) of the ITA. Assessable income does not include exempt, excluded or non-residents' foreign sourced income.

13. Section 59BA(3) excludes certain trustees from the requirement under s 59BA(2) to include further information in the return. Even if not required to include the further information, if a trustee derives assessable income, they must still file a return of that income.

Non-Active Complying Trusts

14. Section 43B allows trustees of a non-active complying trust to be excused from the obligation to furnish a return of income if the trust meets certain requirements.

43B Trustees of non-active trusts and administrators or executors of non-active estates may be excused from filing returns

(1) A person who is a trustee of a trust or an administrator or executor of an estate is not required to make a return of income for a tax year for the trust or estate if—

(a) the trust or estate is non-active throughout the income year corresponding to the tax year; and

(b) for a person who is a trustee, the trust is a complying trust under section HC 10 of the Income Tax Act 2007; and

(c) the person has provided to the Commissioner, in a form approved by the Commissioner,—

(i) a declaration that the trust or estate is non-active and that the person will notify the Commissioner if the trust or estate ceases to be non-active; and

(ii) a statement of the matters required by the Commissioner.

(2) For the purposes of this section, a trust or estate is non-active for a tax year if, throughout the income year corresponding to the tax year, the trustee of the trust or the administrator or executor of the estate—

(a) has not derived any income; and

(b) has no deductions; and

(c) has not been a party to, or perpetuated, or continued with, transactions with assets of the trust or estate which, during the corresponding income year,—

(i) give rise to income in any person's hands; or

(ii) give rise to fringe benefits to an employee or to a former employee.

(3) In determining whether a trust or estate complies with the requirements of subsection (2), no account shall be taken of any—

(a) reasonable fees paid to professional persons to administer the trust or estate; or

(b) bank charges or other minimal administration costs totalling not more than $200 in the tax year; or

(c) interest earned on trust or estate assets in any bank account during the tax year, to the extent to which the total interest does not exceed $200; or

(d) insurance, rates, and other expenditure incidental to the occupation of a dwelling owned by the trust or estate and incurred by the beneficiaries of the trust or estate.

(4) Where at any time any paragraph of subsection (2) ceases to apply to a trust or estate for which a declaration under this section has been made, a trustee of the trust or administrator or executor of the estate must notify the Commissioner that the trust or estate has ceased to be a non-active.

(5) Despite subsection (1), a person who is a trustee of a non-active trust or an executor or administrator of a non-active estate must furnish a return of income if required by the Commissioner to do so.

15. A trustee of a trust who wishes to be excused, under s 43B, from the requirement to furnish a return of income must make a declaration that it is a non-active complying trust (currently the IR633).

16. If at any time the trust no longer meets the requirements to be eligible for non-active status it must notify Inland Revenue and furnish a return of income for the relevant year.

Example 1 – non-active status

The Jane Smith Trust owns a residential property that is occupied by Jane Smith (a beneficiary of the trust). The holding costs of the property (rates & insurance) are paid by Jane, and she does not pay rent to the trust.

The trust also has an interest-bearing bank account and has advised their bank to deduct withholding tax from interest earned at 33%. The total interest earned by the Trust is less than $200 per year.

The Trust has an IRD number and has historically included only the interest income in its income tax return. The trust meets the criteria for non-active status so completes an IR633 and provides it to Inland Revenue.

Whilst it continues to meet the relevant criteria the trustees no longer have any obligation to file returns and therefore do not have to comply with the additional information disclosures required by s 59BA(2).

If, at any stage, the trust no longer meets the relevant criteria for non-active status the trustees need to let Inland Revenue know and start filing annual income tax returns.

17. If a trustee of a trust does not make the declaration as required by s 43B(1)(c) but is otherwise eligible to be excused from filing a return as a non-active complying trust, the trustee will still be required to comply with the requirements of s 59BA if they derive assessable income.

Example 2 – eligible for non-active status but no declaration made

The Bill Burns Trust owns a residential property that is occupied by Bill Burns (a beneficiary of the trust). The holding costs of the property (rates & insurance) are paid by Bill, and he does not pay rent to the trust.

The trust also has an interest-bearing bank account and has advised their bank to deduct withholding tax from interest earned at 33%. The total interest earned by the Trust is less than $200 per year.

Although the trust meets the criteria for non-active status, the trustees have not completed a non-active declaration and the trust is required to file income tax returns as it is not excused from doing so under s 43B.

As the trust has derived assessable income and is required to file an income tax return, the trustees will be required to comply with the full s 59BA(2) disclosure requirements.

Bare Trusts

18. A bare trust is a type of trust under which the trustee holds property on trust without any duties to perform other than to convey the trust property to the beneficiary or as the beneficiary directs. See Question We've Been Asked 16/03 *Goods and services tax – GST treatment of bare trusts.*

19. A bare trustee has been described as:

> *… a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and mental capacity in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so.*
>
> *Disputant Q v Commissioner of Inland Revenue [2015] NZTRA 22*

20. Section YB 21 of the ITA clarifies that a trustee of a bare trust is a nominee, and that if a person holds something or does something as a nominee for another person, the other person holds or does that thing and the nominee is ignored.

YB 21 Transparency of nominees

Treatment of nominee

(1) In this Act, unless the context otherwise requires, if a person holds something or does something as a nominee for another person, the other person holds or does that thing and the nominee is ignored.

Who is a nominee?

(2) A person holds or does something as a nominee for another person if the person acts on the other person's behalf. However, a trustee is a nominee only if the trustee is a bare trustee.

Nominal settlements

(3) A person making a nominal settlement at the request of another person is treated for the purposes of this Act as a nominee in relation to the settlement....

21. Funds held in a trust account which are held on bare trust, such as money received by a practitioner under s 110 of the Lawyers and Conveyancers Act 2006, are held by the person as a nominee for another person and the nominee is ignored.

22. The trustee of a bare trust is treated as not deriving any assessable income on their own behalf, as the trustee in that instance is a nominee and is therefore ignored.

23. As the trustee of a bare trust is treated as not deriving any assessable income, there is no obligation for the trustee to file an income tax return under s 59BA(1), or to comply with the additional disclosure requirements of s 59BA(2).

24. A trustee who holds funds in a trust account, on bare trust, such as a solicitor's trust account, is not required to file a return under s 59BA(1). It is not intended to list all the trust accounts that are considered by the Commissioner as bare trusts and not all trust accounts will be bare trusts; it will depend on the nature of the trust upon which the funds are held.

Tax Administration (Financial Statements —Domestic Trusts) Order 2022 – the OIC.

25. A trustee who is required to file a return that complies with s 59BA(2) must prepare financial statements in accordance with the applicable minimum requirements prescribed in the OIC; see s 21B(2) and clause 4 of the OIC.

26. For trust disclosure purposes, "financial statements" are the financial statements required to be prepared in accordance with the OIC and the "statement of profit and loss and statement of financial position" are the statement of profit and loss and statement of financial position required by s 59BA(2) to be included with the return.

27. If a trustee is not required to file a return that complies with s 59BA(2), then they are not required to prepare the financial statements required by the OIC.

28. While the financial statements are not required to be provided to the Commissioner with the return, they must be available if the Commissioner later requests them. The information required to be provided with the return (the statement of profit and loss and statement of financial position) should be copied from the OIC financial statements.

Minimum requirement for preparing financial statements

29. The minimum requirements for preparing the financial statements and the matters that the financial statements must show are set out in clause 5 and the Schedule of the OIC.

Simplified Reporting Trust

30. Not all of the minimum requirements in clause 5 and the Schedule of the OIC apply to a simplified reporting trust.

31. A trust is a simplified reporting trust in relation to an income year if:

    31.1. the trustee of the trust derives assessable income of less than $100,000; and

    31.2. the deductible expenditure or loss incurred during the income year by the trustee of the trust is less than $100,000; and

    31.3. the amount of total assets of the trust as at the end of the income year (or an accounting period if permitted) is less than $5 million.

32. For the purposes of determining if a trust is a simplified reporting trust:

32.1. Assessable income has the same meaning as in s BD 1 of the ITA (and includes both beneficiary and trustee income referred to in s HC 5 of that Act) but does not include an amount of income derived under s CB 6A of the ITA (bright-line test for residential land income).

32.2. Deductible expenditure or loss means a deduction for an amount of expenditure or loss that is allowed under Part D of the ITA but does not include a deduction allowed under s DB 23 of the ITA (revenue account property deduction).

32.3. The amount of the total assets must:

32.3.1. include all assets whether or not they are revenue account property as defined in s YA 1 of the ITA; and

32.3.2. in relation to each asset that are shares or ownership interests, land or buildings, be calculated using the same valuation principle that is disclosed for the asset in the financial statements; and

32.3.3. be consistent with the amounts disclosed in the financial statements.

33. Simplified reporting trusts do not have to:

33.1. apply the principles of accrual accounting. They can use cash-basis accounting in the preparation of their financial statements;

33.2. include a statement of accounting policies;

33.3. disclose comparable figures for the previous income year (or accounting period if permitted);

33.4. include a reconciliation of the profit and loss in the statement of profit and loss with the trustee's taxable income for the income year;

33.5. include a schedule of the trust's fixed assets and depreciable property;

33.6. include, if the trustee derives income from forestry, information about the cost of timber as at the end of the income year (or accounting period if permitted) or a reconciliation of movements in the cost of timber during the year;

33.7. include, if the trust includes specified livestock, details of livestock valuation methods, valuations and calculations for tax purposes;

33.8. include, for each transaction in connection with the trust that is entered into between the trustee and any associated person, the name of the associated person, the nature of the association or the nature of the transaction including the amounts involved.

34. Being a simplified reporting trust does not exempt the trustees from preparing financial statements nor from their obligation to file a return and include the information required by s 59BA(2). It only modifies the way in which financial statements are compiled in order to meet minimum standards required the OIC.

35. A simplified reporting trust will still need to file a return and provide the information required by s 59BA(2). The trustee will be able to use the information in the simplified reporting trust financial statements in their s 59BA return.

Prior year comparable figures

36. A trustee is only required to prepare financial statements in years that the trustee derives assessable income and is also required to provide the information required by s 59BA(2).

37. The minimum standards for financial statements include, for trusts that are not simplified reporting trusts, a requirement to disclose comparable figures for the previous income year (or accounting period if permitted).

38. In a year that a trustee is required to prepare financial statements and where that year follows a year that the trustee is not required to prepare financial statements, the financial statements will be required to disclose comparable figures only to the extent that the trustee has that information. Thus, if that information has not been prepared and/or is not held by the trustees for the prior year, the comparable figures will not be required to be disclosed, although it is likely that some information will be prepared or held due to the requirements of the Trusts Act 2019 to keep financial records.

39. Section 45 of the Trusts Act 2019 requires that trustees must keep "*records of the trust property that identify the assets, liabilities, income, and expenses of the trust*", so it is expected that trustees will maintain sufficient records to calculate the opening balances of assets, liabilities, and equity (discussed further at [52] to [58]) for any year that they are required to prepare financial statements.

40. The first year for which the financial statements are required to be prepared to the minimum standards is the 2021-22 income year. As trustees may not have previously prepared financial statements, or have prepared statements to a lower standard, the requirement to disclose comparable figures is only required to the extent that the trustee has that information.

Associated persons transactions

41. The minimum standards for financial statements include, for trusts that are not simplified reporting trusts, a requirement to disclose information about transactions with associated persons:

    41.1. the name of the associated person; and

    41.2. the nature of the association with the associated person; and

    41.3. the nature of the transaction, including the amounts involved.

42. Certain transactions are not required to be disclosed in the financial statements if:

    42.1. it is a minor transaction that is incidental to the activities of the trust; or

    42.2. is at market value; or

    42.3. the trustee has already separately disclosed the information required by this clause to the Commissioner in a form prescribed by the Commissioner under section 35.

43. Transactions that are not required to be disclosed in the financial statements as they will be separately disclosed in a prescribed form include (this is not intended to be an exhaustive list):

    43.1. Settlements;

    43.2. Distributions;

    43.3. Beneficiary current account balances and any movements in the account during the year;

    43.4. The year end balances of financial arrangements between the trust and associated persons.

44. A trustee may not have the necessary information to be able to provide all of the required details of transactions with associated persons for the 2021-22 year and, accordingly, only needs to include as much information in the financial statements for that year as they are reasonably able to provide.

59BA(2) Information required

45. Section 59BA(2) sets out the additional information trustees (who are required to file a return and are not excluded by s 59BA(3)) are required to provide for the 2021-22 tax year onwards.

59BA Annual return for trusts

(1) ...

(2) A trustee who is required to file a return for a tax year under subsection (1) and does not meet the requirements of subsection (3) must make the return in the form prescribed by the Commissioner and include, unless otherwise required by the Commissioner,—

(a) a statement of profit or loss and a statement of financial position:

(b) the amount, and nature, of each settlement that—

(i) is not the provision to the trustee, at less than market value, of minor services incidental to the activities of the trust; and

(ii) is made on the trust in the income year:

(c) the name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of each settlor who makes a settlement on the trust in the income year or whose details have not previously been supplied to the Commissioner:

(d) the amount, and nature, of each distribution that—

(i) is not a distribution, other than of money, that is minor and incidental to the activities of the trust; and

(ii) is made by the trustee in the income year:

(db) the name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of the beneficiary who receives a distribution referred to in paragraph (d):

(e) the name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of each person having a power under the trust to appoint or dismiss a trustee, to add or remove a beneficiary, or to amend the trust deed:

(f) the other information required by the Commissioner.

59BA(2)(a) Statement of profit or loss

46. The financial statements required to be prepared to the minimum standards in the OIC will encompass all trust income and expenditure for the year, as prescribed by the OIC.

47. The following items relating to profit or loss that are required to be included in the return, using the relevant prescribed form, are a sub-set of the information captured in the financial statements:

    47.1. Total accounting profit before tax

    47.2. Tax adjustments

    47.3. Untaxed realised gains/receipts

48. The sum of the trust's accounting profit before tax plus tax adjustments will reconcile to the total income of the trust (which is then allocated to beneficiaries or retained as trustee income). Rather than a profit, the trust may make a loss and this will be included in the return. A loss cannot be distributed to a beneficiary but can be carried forward to the following year by the trustee.

49. Some terminology used in the return may seem more applicable to companies, such as "equity" and "drawings". These terms are used in relation to the profit and loss and statement of financial position for trusts, which are accounting documents, and are to be read in context. Thus, although legally a beneficiary may not have "equity" in a trust, for accounting purposes for the return, the "equity" is the net assets of the trust. Similarly, for "drawings", legally a beneficiary may not take "drawings" from a trust, but for accounting purposes for the return, distributions from the trust are recorded in the "beneficiary account" and the beneficiary, when receiving assets (e.g. money) from the trust, is recorded as taking "drawings" from the "beneficiary account".

59BA(2)(a) Statement of financial position

50. The financial statements required to be prepared to the minimum standards in the OIC will encompass all trust assets, liabilities and equity, as prescribed by the OIC.

51. The following items relating to assets, liabilities and equity are required to be included in the return, using the relevant prescribed form; they should be copied from the information captured in the financial statements:

    51.1. Assets: Associated persons financial arrangements

        51.1.1. This should encompass all loans **to** persons associated with the trust (excluding certain beneficiary accounts which are represented under the category "Current account year-end balances").

        51.1.2. "Associated persons" has the same meaning as in subpart YB of the ITA. For more guidance, refer to *IR620 – Associated persons definitions for income tax purposes*.

    51.2. Assets: Land

        51.2.1. The trustee will need to value land and buildings separately. This may be done by using the apportionment used in the most recent rating valuation under the Ratings Valuations Act 1998. However, if the purchase price allocation rules in s GC 20 of ITA were applied to determine the purchase price of an asset, then the same apportionment methodology must be used in the year the land is acquired and can be used in future years.

        51.2.2. The valuation methodology used will need to be disclosed.

        51.2.3. The available valuation methodologies as prescribed in the OIC are:

            51.2.3.1. Historical cost with impairment or depreciation as appropriate:

            51.2.3.2. Tax value, but only in relation to assets that produce assessable income (including income derived on the sale of the asset):

            51.2.3.3. Market value (which may include, as a proxy for the market value, the most recent rating valuation).

        51.2.4. Where there is more than one asset in a particular asset category and different valuation methodologies have been applied, then the valuation method that reflects the highest proportion of assets in the category in terms of dollar value should be disclosed on the return.

Example 3 – valuation methodology

The Jane Smith Trust owns two properties. One is a residential property occupied by a beneficiary of the trust, Jane Smith, and does not produce assessable income. The other is a non-residential property rented to a third-party tenant, deriving assessable income.

The residential property is able to be valued at cost or market value, tax value is not available because the property is not used to derive assessable income. Any of the three valuation methodologies can be used for the second rented property.

The cost of the residential property was $500,000, the most recent rating valuation valued the property at $850,000 with a 60:40 split between land & improvements (buildings).

The trustees can choose to record the residential property at either valuation amount in their financial statements and statement of financial position, and the 60:40 split between land and buildings can be used to apportion both the cost price or the market value for the purposes of splitting the amount into the two categories (land and buildings) listed in the financial statements and statement of financial position.

The rented property cost $650,000 and has a current rating valuation of $1,200,000 with a 70:30 split between land and buildings. The tax value of the property is $647,000 because it has been subject to depreciation.

The trustees can choose to record the rented property at either of the three valuation amounts in their financial statements, and the 70:30 split between land and buildings can be used to apportion the value between land & buildings. If the asset price was already allocated between land & buildings using a different methodology at an earlier time then that methodology can continue to be used.

If the trustees choose to value the residential property at market value ($850,000) and the rented at tax value ($650,000 - $3,000 depreciation claimed) and uses the rating apportionment to split the amounts between land & buildings as follows:

Residential land	($850,000 * 60%)	$510,000
Non-residential land	($650,000 * 70%)	$455,000

The total value of land recorded in the financial statements and statement of financial position will be $965,000. The valuation methodology disclosed in the return will be market value, which reflects the methodology used for the highest proportion of value in the asset category (being the rented property).

Residential building	($850,000 * 40%)	$340,000
Non-residential building	($650,000 * 30% - $3,000)	$192,000

The total value of buildings recorded in the financial statements and statement of financial position will be $532,000. The valuation methodology disclosed in the return will be market value, which reflects the methodology used for the highest proportion of value in the asset category.

Note: if the purchase price allocation rules in s GC 20 of the ITA apply to determine the purchase price of an asset then the same apportionment methodology may continue to be used.

51.3. Assets: Buildings

51.3.1. As noted above, the trustee will need to value land and buildings separately and this may be done by using the apportionment used in the most recent rating valuation under the Ratings Valuations Act 1998. However, if the purchase price allocation rules in s GC 20 of ITA were applied to determine the purchase price of an asset, then the same apportionment methodology must be used in the year that the building is acquired and can be used in future years.

51.3.2. The valuation methodology used will need to be disclosed. Refer to the comments above for the available valuation methodologies and how to disclose them on the return if more than one method has been used for an asset category.

51.4. Assets: Shares / Ownership Interests

51.4.1. The valuation methodology used will need to be disclosed. Refer to the comments above for the available valuation methodologies and how to disclose on the return if more than one method has been used for an asset category.

51.5. Assets: Total assets

51.5.1. Total assets are all assets, including amounts recorded in the above four categories.

51.6. Liabilities: Associated persons financial arrangements

51.6.1. This should encompass all loans **from** persons associated with the trust (excluding beneficiary accounts which are represented under the category "Current account year-end balances").

51.6.2. Note that beneficiary accounts payable on demand are not recorded in the "Liabilities: Associated persons financial arrangements" but are recorded in the "Current account year-end balances". These categories are found in the prescribed forms.

51.6.3. "Associated persons" has the same meaning as in subpart YB of the ITA. For more guidance, please refer to IR620 *Associated persons definitions for income tax purposes*.

51.7. Liabilities: Total liabilities

51.7.1. Total liabilities are all liabilities, including amounts recorded in the above category.

51.8. Equity:

51.8.1. The equity is the value of the net assets of the trust. The statement of financial position should record the equity into the following three components (owners' equity, drawings, and current account year-end balances).

51.8.2. The IR6G *Estate and trust return guide* provides further details around what these items are expected to represent in the return.

51.9. Equity: Owners' equity

51.9.1. A trust does not have an "owner" or "equity", but for the trust disclosure rules, the term "owners' equity" is used and means the total **trust corpus** and total **trust capital**.

51.9.2. Trust corpus is the sum of all settlements made on the trust less the sum of all distributions of trust corpus made to beneficiaries over the life of the trust. Trust capital is the net assets less the trust corpus.

51.9.3. A settlement that does not increase the trust corpus (because the settlement does not give rise to value

that can be distributed to beneficiaries; see *59BA(2)(b) The amount and nature of each settlement* below) are not included in the statement of financial position but are included in the disclosures of settlements.

51.9.4. Trust capital is the sum of all taxable and non-taxable income retained and gains/losses made by the trust less the sum of all distributions of trust capital made to the beneficiaries over the life of the trust.

51.9.5. Owners' equity does not include beneficiary accounts as this is represented under the category "Current account year-end balances".

51.10. Equity: Drawings

51.10.1. Drawings in the context of a trust should reflect the total amount of funds/assets/value withdrawn from the trust by beneficiaries during the year.

51.11. Equity: Current account year-end balances

51.11.1. The current account year-end balances, in the context of a trust, should reflect the closing balance of all beneficiary accounts at the end of the year.

51.11.2. Current account year-end balances are discussed further at paragraphs [59] to [61]. Movements in beneficiary current accounts also need to be disclosed.

Opening balances

52. A trustee will need to calculate the opening balances of assets, liabilities and equity in order to calculate the closing balances for the purposes of preparing financial statements to the minimum standards prescribed in the OIC, for each year that they are required to make the s 59BA(2) disclosures.

53. The comparable figures may not be known for the 2021-22 income year and these are not expected to be included in the financial statements required by the OIC for the 2021-22 income year except to the extent that the trustee has that information.

54. Consistent with the ongoing disclosure requirements, the opening valuation of assets and liabilities should be based on:

54.1. Historical cost with impairment and depreciation as appropriate; or

54.2. Tax value, but only in relation to assets that produce assessable income (including income derived on the sale of the asset); or

54.3. Market value (which may include, as a proxy for market value, the most recent rating valuation under the Rating Valuations Act 1998).

55. The trustee can choose the valuation method but must use the same valuation method in the financial statements (OIC) and the statement of profit and loss and statement of financial position (s 59BA(2)).

56. The value of net assets, which is the equity of the trust, should reflect the difference between the value of total assets and total liabilities. For the 2021-22 tax year, the net assets should be allocated between Trust Corpus, Trust Capital and the respective Beneficiary Accounts, as accurately as possible based on known information. In future years, the trustee should be able to accurately record the opening and closing balances based on the movement in assets and liabilities.

57. Trustees will not be required to re-create records for the lifetime of the trust but will be required to value and record all the assets held by the trust as at the beginning of the 2021-22 tax year.

58. As noted above in [39], s 45 of the Trusts Act 2019 requires that trustees must keep "*records of the trust* property *that identify the assets, liabilities, income, and expenses of the trust*", so it is expected that going forward trustees will maintain sufficient records to calculate the opening balances of assets, liabilities, and equity for any year that they are required to prepare financial statements.

Trust beneficiary details: movements in beneficiary accounts

59. Trustees will be required to provide a reconciliation, on a line-by-line basis, from the opening to closing balance of all beneficiary accounts. For the purposes of movements in the beneficiary's account, beneficiary income that is allocated to the income year in the period after the end of the income year referred to in s HC 6(1B) of the ITA is not included in the reconciliations.

60. At a minimum, the return will be required to include in relation to the reconciliation of beneficiary accounts for an income year:

 60.1. Opening balance of the beneficiary's account

 60.2. ADD: Distributions

  60.2.1. A trustee can make distributions to beneficiaries made up of:

   60.2.1.1. Accounting income.

   60.2.1.2. Capital gains of the trust.

   60.2.1.3. Corpus of the trust.

   60.2.1.4. The provision of trust property/services at less than market value.

   60.2.1.5. Any debt owed by the beneficiary to the trust that has been forgiven by the trustee.

   60.2.1.6. Other transfers of value that vest absolutely in the beneficiary.

  60.2.2. A trustee must disclose all distributions made by the trust during the year (not just beneficiary income as has been required in the past).

  60.2.3. A distribution, other than of money, that is minor and incidental to the activities of the trust does not need to be included in the financial statements or statement of financial position.

  60.2.4. Refer to the IR6G *Estate or trust return guide* for the different categories that the distributions are to be broken down into on the return.

 60.3. DEDUCT: Drawings

  60.3.1. Drawings will include:

   60.3.1.1. The provision of trust property enjoyed by the beneficiary (use of trust property/services for less than market value, distribution of trust assets (other than cash) and any debt owed by the beneficiary to the trust that has been forgiven by the trustee).

   60.3.1.2. Cash or other assets paid out from the Trust during the year.

   60.3.1.3. Tax paid on behalf of the beneficiary.

  60.3.2. The total amount of Drawings by all beneficiaries is disclosed as part of the statement of financial position in the Equity section, as discussed at [51.10].

 60.4. EQUALS: Closing balance of the beneficiary's account

  60.4.1. The closing balances of **all** beneficiary accounts is disclosed as part of the statement of financial position in the Equity section (Current account year-end balances), as discussed at [51.11].

61. A beneficiary account reconciliation will be required for every beneficiary who has had a movement in their beneficiary account during the year.

59BA(2)(b) The amount and nature of each settlement

62. For each settlement made in any income year the trustee will be required to disclose:

 62.1. The amount of the settlement

 62.2. The nature of the settlement

63. The **amount** of any settlement will be determined in line with s HC 4(1B) of the ITA:

HC 4 Corpus of trust

Meaning of corpus

(1) In the trust rules, corpus for a trust means the settlement value under subsection (1B) of property settled on the trust that is not excluded by subsection (2).

Settlement value of settled property

(1B) For property meeting the requirements of subsection (1), the value under this subsection (the settlement value) of the property settled on a trust is—

(a) the market value of the property determined at the time of the settlement of the property, for a single settlement on the trust; or

(b) the total of the amounts determined under paragraph (a) for each settlement of property, if the trustee treats the settlements in the way permitted by section HC 3

Settlements excluded from corpus

(2) Corpus does not include an amount equal to the market value of the property settlements described in subsections (3) to (5).

Settlements on other trusts

(3) A property settlement by a trustee of another trust is excluded from corpus to the extent to which, if the property were distributed to a beneficiary of the other trust, and the beneficiary was resident in New Zealand, the distribution would be beneficiary income or a taxable distribution to that beneficiary.

Deductions

(4) A property settlement for which the settlor is allowed a deduction is excluded from corpus.

Income or dividend

(5) A property settlement is excluded from corpus if, but for the fact of the settlement,—

(a) it would be income of the settlor; or

(b) [Repealed]

(c) it would fall under paragraph (a) if the settlor were resident in New Zealand at the time of the settlement.

64. For the purposes of s 59BA(2)(b) the amount of a settlement is the same amount that is recognised as corpus of the trust, which for most settlements will be the market value as prescribed by s HC 4(1B) of the ITA, unless excluded by s HC 4(2).

65. As noted in IS 18/01 *Taxation of trusts – income tax*:

> *8.83. Corpus requires a "settlement of property". A "settlement of property" is not the same as a "transfer of value". Some "transfers of value" do not result in the trust receiving "property". One example is the provision of services. Although there is a transfer of value and, therefore, a settlement on the trust, there is not necessarily any property created by the provision of the services. Another example is the provision of an interest-free loan to a trust. Again, although there is a "transfer of value" and, therefore, a "settlement", there is arguably no "property" settled on the trust. Although the trust as borrower enjoys an economic benefit from being able to enjoy the use of the loan principal for the term of the loan, this is arguably not a form of property in itself. This differs from the position that was accepted in argument by the Commissioner in Case Y25 (2008) 23 NZTC 13,270.*

66. A settlement includes a settlement that the person is treated as making because the person is treated as a settlor; see s YA 1 of the ITA for the definition of settlor.

67. If there is a transfer of value (such as the provision of services at less than the market value) and therefore a settlement, but there is no property settled on the trust by that transfer of value that can be distributed, then the amount of the settlement returned under s 59BA(2)(b) will be nil.

68. Valuing such settlements as nil, there being no increase in the corpus, means there are no entries to the financial statements or statement of profit or loss and statement of financial position and, as noted, for the purposes of s 59BA(2)(b) the amount of the settlement is recorded as nil.

69. For the avoidance of doubt, this means:

69.1. A settlement has occurred so the "amount, and nature" must be disclosed under s 59BA(2)(b) even if the amount has been valued at nil. The details of the settlor must also be disclosed pursuant to section 59BA(2)(c).

69.2. There are no entries in the financial statements (OIC) or the statement of profit and loss and statement of financial position (s 59BA(2)(a)) as the amount of the settlement is nil and there is no change to the corpus.

70. Some settlements will be excluded from disclosure under s 59BA(2)(b)(i) as they are minor services incidental to the activities of the trust, or because, under s HC 27(2)(ab) of the ITA, providers of incidental services are not settlors in the first instance.

71. Although for disclosure purposes such a settlement can be valued at nil, there may be other provisions within the Inland Revenue Acts that require recognition of these transactions if recorded at less than market value.

72. The **nature** of any settlement will be classified in the return under the following categories:

72.1. Cash

72.2. Financial arrangements

72.3. Land

72.4. Buildings

72.5. Shares/Ownership interests

72.6. Services (except those excluded under s 59BA(2)(b)(i), being the provision to the trustee, at less than market value, of minor services incidental to the activities of the trust)

72.7. Other (with a description provided).

73. The trustee will need to value land and buildings separately. This may be done by using the apportionment used in the most recent rating valuation under the Ratings Valuations Act 1998.

74. Section HC 4(1B) of the ITA requires that the value of the settlement is the market value at the time of the settlement. For land, this may include, as a proxy for the market value, the most recent rating valuation under the Rating Valuations Act 1998.

75. This information is required to be disclosed for any settlements made from the 2021-22 income year onwards (unless otherwise required under s 59BAB).

76. Examples in the return of "Other" types of settlements include settlements of asset types not specifically listed, and the provision of low/no interest loans from a settlor to the trust.

77. The Commissioner does not require the individual amounts and nature of each settlement but requires the annual amount of settlements in each category in the return.

Example 4 – settlement of non-cash assets on a trust

John Smith owns a residential rental property and decides he would like to move the ownership of this asset to a trust structure. John has owned the property since before the introduction of the Brightline property rules.

John establishes the John Smith Trust and gifts the property to the trust. This gift is considered a settlement.

The original cost price of the property to John was $450,000. The tax value is also $450,000 because the property has not been depreciated. The market value, using the most recent rating valuation as a proxy, is $780,000.

The s HC 4(1B) value of the settlement is $780,000, this is the amount that must be included as the corpus of the trust in the financial statements and statement of financial position, notwithstanding the fact that the OIC may allow for alternative valuation methodologies to be used.

The value of the property needs to be split between land and buildings. The trustees can use the apportionment used in the rating valuation to apportion the amount. In this instance the rating valuation allocated a 60:40 split between land and improvements.

Recognition: The trustee will record the following in the financial statements and statement of financial position:

DR Asset: Land	$468,000
DR Asset Buildings	$312,000
CR Equity: Trust Corpus	$780,000

Disclosure:

- Amount of the settlement: $468,000
- Nature of the settlement: Land
- Amount of the settlement: $312,000
- Nature of the settlement: Buildings

Minor Services

78. A settlor of a trust is a person, who at any time, provides, for less than market value, services to the trust or for the benefit of the trust that are more than incidental to the operation of the trust; see s HC 27(2)(ab) of the ITA.

79. The provision of minor services incidental to the activities of the trust does not need to be disclosed as a settlement; see s 59BA(2)(b)(i). The services must be both minor services and incidental to the operation of the trust. Examples of services that are incidental to the operation of a trust include attending trust meetings and reviewing trust documents. An example of a service that is not incidental to the operation of a trust is the day-to-day management of a business carried on through a trust.

80. For further information see [2.45] -[2.50] in IS 18/01 *Taxation of trusts – income tax*.

Interest not paid to beneficiary who is owed an amount may be a settlement

81. Any beneficiary who is owed an amount by the trust, including a beneficiary account, that exceeds $25,000 at the end of an income year and is not paid interest at the prescribed or market rate becomes a settlor of the trust pursuant to ss HC 27(2)(bb) and HC 27(6) of the ITA:

HC 27 Who is a settlor?

…

Meaning of settlor

(2) A settlor of a trust is a person who, at any time, -

…

(bb) is a beneficiary of the trust who is owed money by the trustee and does not meet the criteria of subsection (6):

…

…

Beneficiaries owed money by trustees

(6) When a trustee of a trust owes an amount to a beneficiary of the trust, the beneficiary does not become a settlor of the trust under subsection (2) solely as a result of being owed the amount if—

(a) the amount owing at the end of the income year is not more than $25,000:

(b) the amount owing at the end of the income year is more than $25,000 and the trustee pays to the beneficiary, for each income year in which the amount is owing and by the date given for the income year by section HC 6(1B), interest on the amount at a rate equal to the prescribed rate of interest or the market rate.

82. For the purposes of the financial statements and the statement of financial position, there is no change to the net assets of the trust as a result of such a transaction. There is a settlement but there is no property settled on the trust that can be distributed.

83. For the purpose of s 59BA(2)(b), a trustee will be required to disclose the details of the settlor and the nature of the settlement, however the amount of the settlement will be recorded as nil.

84. If a trustee of a trust owes a beneficiary:

    84.1. less than $25,000, or

    84.2. more than $25,000 but pays interest at a rate equal to the prescribed rate or market rate

    the beneficiary is not a settlor and there is no information to disclose under s 59BA(2)(b). The prescribed rate of interest is defined in s YA 1 of the ITA.

Example 5 – beneficiary current account exceeds $25,000

The Trevor Tan Trust makes a $50,000 distribution to Timmy Tan during the 2021/22 tax year. The amount is credited to Timmy's beneficiary account, but he has not withdrawn the funds from the Trust.

Disclosure: Distribution nature & amount, and details of the beneficiary

The trust will disclose the nature and amount of the distribution, along with Timmy's details (name, date of birth, tax file number and jurisdiction of tax residency).

Recognition: Movements in trust capital & beneficiary account

The trust will record the transaction as a movement in both the trust capital and beneficiary accounts as follows:

Dr Trust capital – distribution

CR Beneficiary account – distribution

As there are no other transactions against Timmy's beneficiary account for the year the closing balance will be $50,000.

Disclosure: Settlement nature & amount, and details of the settlor

As Timmy is owed more than $25,000 at the end of the year and no interest was paid by the trust on the amount, he is has made a settlement.

The trustee will disclose:

- Timmy's details (name, date of birth, jurisdiction of tax residency and TFN/TIN);
- The nature of the settlement (using the category "Other – interest not charged");
- The amount of the settlement will be recorded as nil.

No transaction will need to be recognised against the Trust Corpus in the financial statement of the trust.

85. Pursuant to s HC 14(2B) of the ITA if a trustee pays interest to a beneficiary on an amount owed to the beneficiary, the payment is not a distribution by the trustee except to the extent to which the interest exceeds the amount given by the rate that is the greater of the market rate and the prescribed rate of interest.

Example 6 – beneficiary paid interest in excess of market rate

For the **2022/23** tax year the Trevor Tan Trust owes its beneficiary, Timmy Tan $50,000. The trust pays Timmy interest on the balance at a rate of 8%.

The market rate of interest for the year was 5%.

The $4,000 of interest was paid in cash to Timmy during the year. There are no other transactions against Timmy's beneficiary account for the year.

Application of section HC 14(2B): As the trust has paid interest at a rate higher than the applicable market rate, the excess over the market rate is treated as a distribution

Actual interest paid @ 8%	$4,000
Market rate of interest @ 5%	$2,500
Deemed distribution amount	$1,500

Recognition: The trust will record the interest amount as an expense (whether or not the interest is deductible will be subject to the usual deductibility tests). The amount of interest that exceeds the applicable market rate is treated as a distribution.

CR Cash/Bank	$4,000
DR Interest expense	$2,500
DR Trustee income/Trust Corpus/Trust Capital	$1,500
CR Beneficiary account (distribution)	$1,500
DR Beneficiary account (drawings)	$1,500

Disclosure: Distribution nature and amount, and details of the beneficiary

The trust will disclose the nature and amount of the distribution ($1,500), along with Timmy's details (name, date of birth, jurisdiction of tax residency and TFN/TIN).

As there are no other transactions against Timmy's beneficiary account for the year the closing balance will be $50,000.

59BA(2)(c) Settlor details

86. Section YA 1 of the ITA defines a "settlor" as being defined in s HC 27 of the ITA:

HC 27 Who is a settlor?

…

Meaning of settlor

(2) A settlor of a trust is a person who, at any time,-

(a) transfers value—

(i) to the trust; or

(ii) for the benefit of the trust; or

(iii on terms of the trust:

(ab) provides, for less than market value, services to the trust or for the benefit of the trust that are more than incidental to the operation of the trust:

(b) provides financial assistance to the trust or for the benefit of the trust with an obligation to pay on demand, and the right to demand is not exercised or is deferred:

(bb) is a beneficiary of the trust who is owed money by the trustee and does not meet the requirements of subsection (6):

(c) is treated as a settlor under section HC 28.

87. The definition of settlor in s YA 1 of the ITA is slightly modified when it relates to minor beneficiaries (ss HC 36 and 37 of the ITA) and for certain associated persons tests (s YB 10 of the ITA defines a settlor for the purposes of ss YB 7 to YB 9 of the ITA).

88. For every settlor of the trust the trustee will be required to disclose:

88.1. Name of the settlor

88.2. Date of birth / commencement date of the settlor

88.3. Jurisdiction of tax residence of the settlor

88.4. Tax File Number or Taxpayer Identification Number of the settlor.

89. If the settlor is a natural person, the date of birth is required. If the settlor is a company or another trust, then the "date of birth" is the incorporation date of the company or the initial settlement date of the trust; this is referred to as the "commencement date" of the settlor.

90. The Tax File Number (TFN) is the identification number that the Commissioner allocates to a person; see definition in s 3. The Taxpayer Identification Number (TIN), for a person in a jurisdiction other than New Zealand, is the functional equivalent of the person's tax file number in that jurisdiction; see definition in s 3.

91. This information is required to be disclosed for each settlor:

91.1. who makes a settlement on the trust during the income year, from the 2021-22 income year onwards, or

91.2. whose details have not previously been supplied to the Commissioner.

92. A trustee is required to disclose the four items listed at [88] for each settlor who makes a settlement on a trust during the 2021-22 income year or future income years. This means that if a trustee files a return under s 59BA for an income year, the four items listed at [88] will need to be included for all settlors in that income year.

93. A trustee is required to disclose the four items listed at [88] for each settlor whose details have not been previously provided to the Commissioner. This will include settlors prior to the 2021-22 income year and settlors in an income year where the trustee is not required to file the further information with a return under s 59BA(2). This means that any settlors in an income year for which the trustee does not file a s 59BA return (including years prior to 2021-22) will need to be included in the next return that the trustee files.

Example 7 – details of settlors

Socks and Boots Trust was settled by Lane Boots and Kane Socks in 2000 for the purpose of running a clothing shop. In January 2022, Jane Socks transfers a car to the trust for use in the business.

For the 2021–22 income year, the trustee of Socks and Boots Trust must provide the details of Jane Socks as a settlor in the current income year, and also the details of Lane Boots and Kane Socks as settlors whose details have not previously been provided to the Commissioner.

The trustee must also provide details on the amount and nature of the settlement Jane Socks made in the 2021–22 year.

Initial disclosure of historical settlors

94. Inland Revenue acknowledges that some trusts may have been in existence for many years, the trustees may have changed over time or sufficient records have not been retained to determine all the settlors (or "deemed" settlors) of the trust.

95. However, where a settlement has occurred prior to 2020-21, including "deemed" settlements, the details of the settlor must still be disclosed if they have not previously been provided to the Commissioner.

96. In recognition of the practicalities of making the disclosure of these historical settlors, Inland Revenue only expects trustees to disclose details based on the records held of those settlors. If, for example, they hold the name of a settlor but none of the other required details and that information cannot be reasonably obtained, then disclosure of the name will be sufficient.

97. For any settlement in the 2021-22 year or later years, the trustee will be expected to make a full disclosure of the amount and nature of settlements and the full details of those settlors (name, date of birth, jurisdiction of tax residence and TFN/TIN).

Disclosure of settlor details when settlement made in a year where there is no assessable income

98. If a settlement on the trust is made in a year in which a trustee does not derive assessable income (and therefore does not have to file a return), or the trustee is excluded by s 59BA(3) from providing the s 59BA(2) information, the trustee will be required to provide the details of the settlor when the trustee files the next return.

99. This means, for example, that if a trustee does not have to file a return for the 2021-22 year, they will be expected to provide the details of any settlors in that year if and when they next file a return in a future year.

59BA(2)(d) Distributions and details of beneficiaries

100. A "distribution" is defined in s HC 14 as being a transfer of value by a trustee to a person because the person is a beneficiary of the trust. A distribution is made when what is transferred vests absolutely in interest of the person or is paid to the person.

HC 14 Distributions from trusts

Transfers of value

(1) A trustee makes a distribution when the trustee transfers value to a person because the person is a beneficiary of the trust.

Transfers to other trusts included

(2) Despite subsection (1), a settlement for the benefit of a beneficiary is treated as a transfer of value only—

(a) if the amount or the property being settled would have been beneficiary income of, or a taxable distribution to, a beneficiary, had it been distributed at the time to a beneficiary resident in New Zealand; or

(b) when sections EW 50 or EZ 39 (which relate to forgiveness of debt) applies, if the property being settled is an amount forgiven and treated as paid as described in section EW 44(1) or (2) (Consideration when debt forgiven for natural love and affection) or EZ 39(1).

Payment of interest at rate above market rate not distribution

(2B) If a trustee pays to a beneficiary interest on an amount owed to the beneficiary, the payment is not a distribution by the trustee except to the extent to which the interest exceeds the amount given by the rate that is the greater of the market rate and the prescribed rate of interest.

When distribution made

(3) A distribution is made when what is transferred—

(a) vests absolutely in interest in the person; or

(b) is paid to the person.

Manner of distribution

(4) A distribution may be made directly or indirectly, or by 1 transaction or a number of transactions, whether related, connected, or otherwise.

Nil value of beneficiary relationship

(5) The fact that a person is, or will become, a beneficiary of a trust does not constitute the giving or receiving of value.

101. For every beneficiary of the trust who receives a distribution from the trust during the income year, from the 2021-22 income year onwards, the trustee will be required to disclose:

101.1. The amount, and nature, of the distribution

101.2. Name of the beneficiary

101.3. Date of birth / commencement date of the beneficiary

101.4. Tax jurisdiction of the beneficiary

101.5. TFN or TIN of the beneficiary

102. Distributions, other than of money, that are minor and incidental to the activities of the trust do not need to be disclosed.

103. The disclosure of distributions and details of recipient beneficiaries will be captured on the IR6B *Estate or trust beneficiary details*. The IR6B will also capture all movements in beneficiary accounts (discussed at [59] to [61].

104. Any beneficiary income allocated to the income year in the period after the income year as allowed by s HC 6 (1)(b) of the ITA is not a distribution in the income year, it is a distribution in the following year. The distribution and the beneficiary income allocation will be recorded in different sections of the IR6B, and only those distributions in the income year will be returned in that income year's return.

105. The **amount** of any non-cash distribution will be determined with reference to the tax value, historical cost or market value of the asset, the valuation methodology being determined by the trustees in accordance with the minimum standards for the financial statements required by the OIC.

106. In relation to non-cash distributions, such as the provision of services, interest free loans, or the use of assets by beneficiaries at no cost, a transfer of value, and therefore a distribution, has occurred. However, if there has been no reduction in the net

assets of the trust, the trustees can choose to value the distribution as nil.

107. To meet the disclosure requirements of s 59BA(2)(d) the trustees must disclose the amount, and nature, of the distribution and the details of the beneficiary receiving that distribution.

108. If a distribution is made to more than one beneficiary jointly, then the distribution should be apportioned between the beneficiaries who receive it and the trustee needs to disclose the separate distributions.

109. This information is required to be disclosed for any distribution made from the 2021-22 income year onwards (unless otherwise required under s 59BAB).

110. If the beneficiary is a natural person, their date of birth is required. If the beneficiary is a company or another trust, the incorporation date of the company or the initial settlement date of the trust is required. This is referred to as the "commencement date" of the beneficiary.

Example 8 – use of trust assets by a beneficiary

The trustees of the John Smith Trust are required to file a return under s 59BA as they derive assessable income from the Trust's rental property portfolio.

Use of one of the properties is provided to Julie Smith, a beneficiary of the trust, at no cost.

An equivalent property is rented to a third party for $600/week. The trustee can choose to use this market value as the basis for determining the amount of the beneficiary distribution, or they can value the distribution at nil as there has been no reduction in the net assets of the trust, either valuation methodology will meet the minimum standards for financial reporting.

If the trustee choses to record the value of the provision of property at nil

Recognition: There is no requirement to record anything in the financial statements and statement of financial position:

Disclosure:

- Amount of the distribution: $nil
- Nature of the distribution: Use of trust property for less than market value
- Details of the beneficiary

If the trustee choses to record the value of the provision of property at market value

Recognition: The trustee will record the following in the financial statements and statement of financial position and reflect the same as a movement in the beneficiary's current account:

DR Beneficiary Account: Distribution	$31,200
CR Beneficiary Account: Drawings	$31,200

The equivalent reduction in the beneficiary account recognises that the value of the benefit has been enjoyed by the beneficiary during the year.

Disclosure:

Amount of the distribution: $31,200

Nature of the distribution: Use of trust property for less than market value

Details of the beneficiary: Julie Smith

Example 9 – debt forgiveness by a trustee to a beneficiary

The trustees of the John Smith Trust are required to file a return under s 59BA as they derive assessable income from the Trust's rental property portfolio.

Some years ago, the Trust lent Craig Smith, a beneficiary of the trust, $200,000. Over time Craig has repaid some of the loan but as at 1 April 2021 the balance was $125,000.

During the year the trustees decided to forgive this debt, so Craig no longer needs to repay it.

The forgiveness of the debt is a distribution to the beneficiary.

Recognition: The trustees will have recorded the value of the loan in the financial statements and statement of financial position of the Trust under the category "Associated persons financial arrangements". When the debt is forgiven:

DR Beneficiary Account: Distribution	$125,000
CR Associated persons financial arrangements	$125,000

Disclosure: The trustees will disclose:

- Amount of the distribution: $125,000
- Nature of the distribution: Forgiveness of debt
- Details of the beneficiary: Craig Smith

Minor beneficiaries

111. Allocations of beneficiary income that the minor beneficiary rule applies to are treated as trustee income, unless one of the exceptions apply; see s HC 35 of the ITA.

HC 35 Beneficiary income of minors

When this section applies

(1) This section applies when a person who is a minor derives an amount of beneficiary income from a trust in an income year. Subsection (4) and sections HC 36 and HC 37 override this subsection.

Treatment of amount derived

(2) The amount is—

(a) excluded income of the minor under section CX 58 (Amounts derived by minors from trusts):

(b) treated as trustee income for the purposes of determining the rate of tax that applies, who pays the relevant tax, and who provides the return of income.

Meaning of minor

(3) For the purposes of this section, and sections HC 36, HC 37, LE 4, and LF 2 (which relate to the treatment of tax credits of beneficiary minors), a minor is a natural person resident in New Zealand who is under 16 years of age on the trust's balance date for the income year.

Exclusions

(4) This section does not apply—

(a) if the total amount of beneficiary income that the minor derives from the trust in the income year is $1,000 or less; or

(b) to beneficiary income derived—

(i) from a trust settled in the way described in section HC 36:

(ii) from a testamentary trust described in section HC 37:

(iii) from a Maori authority:

(iv) directly from a group investment fund:

(v) by a person for whom a child disability allowance is paid under the Social Security Act 2018.

Relationship with other provisions

(5) This section overrides sections HC 5, HC 18 to HC 20, HC 22, HC 23, and HC 32.

112. For the purposes of recording the movements in beneficiary accounts of minors in the IR6B the following approach should be taken:

112.1. Allocations of beneficiary income to which the minor beneficiary rule does not apply should be recorded as "Beneficiary Income".

112.2. Allocations of beneficiary income to which the minor beneficiary rule does apply should be recorded as "Distributions".

Example 10 – movements in beneficiary accounts of minors

In the 2021-22 tax year the trustees in the Cathy Clarke Trust make a $10,000 distribution to each of the trusts' three beneficiaries:

Cathy Clarke, aged 42

William Clarke, aged 43

Claude Clarke, aged 12

The amounts are not paid out in cash but are credited to the respective beneficiaries' current accounts.

Under s HC 35 Claude Clarke is a minor beneficiary so the minor beneficiary rule applies.

Recognition: The trustee will record the following in the financial statements and statement of financial position, and reflect the same as movements in the beneficiaries' current accounts:

DR P&L: Trustee income	$20,000
CR Equity: Beneficiary account – Distribution (Cathy)	$10,000
CR Equity: Beneficiary account – Distribution (William)	$10,000
DR Equity: Trust Capital	$10,000
CR Equity: Beneficiary account – Distribution (Claude)	$10,000

Disclosure:

- Amount of the distribution: $10,000
- Nature of the distribution: Accounting income
- Details of the recipient of the distribution – Cathy
- Amount of the distribution: $10,000
- Nature of the distribution: Accounting income
- Details of the recipient of the distribution – William
- Amount of the distribution: $10,000
- Nature of the distribution: Accounting income
- Details of the recipient of the distribution – Claude

59BA(2)(e) Persons with powers of appointment

113. Section 59BA(2)(e) requires the trustee, for every person who has a power under the trust to appoint or dismiss a trustee, add or remove a beneficiary or amend the trust deed (referred to as an "appointer"), to disclose:

113.1. Name of appointer

113.2. Date of birth / commencement date of appointer

113.3. Tax jurisdiction of appointer

113.4. TFN or TIN of appointer

114. This information is required to be disclosed for every person with any of the powers listed in s 59BA(2)(e).

115. If the appointer is a natural person, the date of birth is required. If the appointer is a company or another trust, the incorporation date of the company or the initial settlement date of the trust is required. This is referred to as the "commencement date" of the appointer.

116. If the trustee has previously disclosed the required details of an appointer, and that person retains the same power, the trustee does not need to disclose the details again. If the appointer's details change in an income year, such as the tax jurisdiction of the appointer, the updated details will need to be disclosed.

59BA(2)(f) Other information required

117. The Commissioner may require a trustee to provide any other information required by the Commissioner.

59BA(3) Trusts excluded from the requirement to comply with s 59BA(2)

118. Section 59BA(3) prescribes a list of trustees who, although required to file a return under s 59BA(1), are not required to include the information set out in s 59BA(2) in their return.

119. A trustee who does not have to include the information in s 59BA(2) in their return because they are a trustee listed in s 59BA(3) also does not have to prepare the financial statements set out in the OIC.

120. Even if a trustee derives assessable income, if they have non-active complying trust status under s 43B, they do not have to file a return.

121. The effect of this is that:

    121.1. A trustee who derives assessable income is required to file a return; s 59BA(1).

    121.2. With that return, information has to be included; s 59BA(2).

    121.3. However, if the trustee is one of the trustees listed in s 59BA(3), then the trustee does not have to provide the information required by s 59BA(2). They are still required to file a return though as they derive assessable income.

    121.4. A trustee who does not have to include the information required by s 59BA(2) in their return does not have to prepare the financial statements required by the OIC.

    121.5. As a non-active complying trust under s 43B does not have to file a return, a trustee of non-active complying trust does not have to file a return even if they derive assessable income.

59BA Annual return for trusts

(1) ...

(2) ...

(3) A trustee of a trust who is required to file a return for a tax year under subsection (1) is not required to file a return in the form required by subsection (2) if—

(a) the trustee is excluded from the requirement to make a return by section 43B (which relates to non-active trusts):

(b) the trust is a foreign trust:

(c) the trustees of the trust are incorporated as a board under the Charitable Trusts Act 1957:

(d) the trust is a charitable trust registered under the Charities Act 2005:

(e) the trustee is eligible under section HF 2 of the Income Tax Act 2007 to choose under section HF 11 of that Act to become a Maori authority:

(f) the trust is a widely-held superannuation fund, as defined in section YA 1 of the Income Tax Act 2007:

(g) the trust is an employee share scheme that is an exempt ESS, as defined in section YA 1 of the Income Tax Act 2007:

(h) the trustee is a debt funding special purpose vehicle, as defined in section YA 1 of the Income Tax Act 2007:

(i) the trustee is a lines trust established under the Energy Companies Act 1992.

Foreign Trusts

122. Section 59BA(3)(b) excludes a trustee of a foreign trust from the requirement to comply with s 59BA(2). Foreign trust is defined in s HC 11 of the ITA as a trust that has not had a New Zealand resident settlor at any time since 17 December 1987. Trustees excluded from complying with s 59BA(2) as a result of s 59BA(3)(b) include:

    122.1. A trustee required to make a return by s 59D (which relates to foreign trusts where one or more of the trustees of the trust are New Zealand tax residents).

    122.2. A trustee of a foreign trust, with no trustees that are New Zealand tax residents, that derives New Zealand source income.

123. Dual status trusts satisfy the s HC 11 of the ITA definition of foreign trust, so also will not be required to comply with s 59BA(2). Dual status trusts are trusts that satisfy the requirements to be a complying trust from inception but have only non-resident settlors so are also a foreign trust. For further information on dual status trusts see [8.47] – [8.51] of IS 18/01 *Taxation of trusts – income tax*.

Estates

124. IS 18/01 *Taxation of Trusts – Income Tax* (at [9.25]) clarifies that estates are not trusts:

    124.1. The mere fact that a person has died, and an executor has been appointed to manage their estate, does not give rise to a trust relationship. Trustees and executors have different capacities (*Re Hayes* [1971] 1 WLR 758 (Ch)).

    124.2. However, it will often be the case that a trust will be created by will (referred to as a testamentary trust). This can occur expressly by way of a statement in a will that specific property of the deceased will be held on trust for a named beneficiary. This could also occur where property is left for a minor beneficiary that needs to be held until the beneficiary is of age.

125. OS 21/03 *Excusing estates from filing income tax returns* sets out the Commissioner's approach to determining when a trust will arise in the administration of a deceased estate:

    > *6. … A trust can, and often does, arise before an estate is fully administered but administration of the estate needs to have reached the stage of the property being held by someone with the special duties of a trustee.*

126. See also IS 19/04 *Income Tax – Distributions from Foreign Trusts* for further discussion on when a trust will arise in the administration of a deceased estate.

127. After the date that a trust arises in the administration of an estate, a trustee will be required to comply with s 59BA(2) if they have an obligation to file a return under s 59BA(1). However, if the trust has complying non-active status under s 43B, it will not be required to file a return.

Notifying Inland Revenue of excluded status

128. Trustees that are required to file returns but qualify, under any of the paragraphs in s 59BA(3), to be excluded from providing the information required by s 59BA(2) will need to notify the Commissioner that they are excluded on the return filed each year.

129. Trustees that meet the exclusion under s 59BA(3)(a) (complying non-active trust) will not need to file a return so will not be required to notify the Commissioner that they are excluded under s 59BA(3)(a).

59BA(4) Persons responsible for performance

130. The obligation to comply with subsections 59BA(1) and (2) lies with a trustee of a trust. If there is more than one trustee, then the obligation to comply lies with each trustee individually but only one return is to be filed.

131. If there are trustees who are not New Zealand residents, then any New Zealand resident trustees are responsible for the performance of the obligations imposed by s 59BA. However, if no trustee is a New Zealand resident, then any settlor of the trust who is a New Zealand resident is responsible for ensuring the performance of the obligations imposed by s 59BA.

59BA Annual return for trusts

(1 ...

(2) ...

(3) ...

(4) If the trustee of a trust is a non-resident, a settlor of the trust who is a New Zealand resident is responsible for ensuring the performance of the obligations imposed on the trustee by this section.

59BA(5) Variation to the requirements

132. Section 59BA(5) allows the Commissioner to vary the requirements in s 59BA(2) for a specific trustee or a class of trustees, and subsection 59BA(6) confirms that such a variation is secondary legislation.

133. Section 59BA(2) provides that a trustee required to file a return under s 59BA(1) and who does not meet the requirements of s 59BA(3) must provide the information required by s 59BA(2)(a) to (f) "unless otherwise required by the Commissioner". If the Commissioner "otherwise require[s]" under s 59BA(2), this will be by variation under s 59BA(5).

59BA Annual return for trusts

(1) ...

(2) ...

(3) ...

(4) ...

(5) The Commissioner may vary the requirements set out in subsection (2) for a trustee or class of trustees.

(6) A variation under subsection (5) is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements)

59BAB Retrospective collection

134. Section 59BAB allows for the retrospective collection of the same information required by s 59BA.

59BAB Commissioner may require trust information for period after 2013–14 income year

(1) The Commissioner may require a trustee of a trust to provide, in the prescribed form and by the specified date, information that—

 (a) relates to the trust and a period beginning after the end of the 2013–14 income year and ending before the beginning of the 2021–22 income year; and

 (b) would be required to be provided under section 59BA if the period began after the end of the 2020–21 income year; and

 (c) is in the knowledge, possession, or control of the trustee.

(2) The Commissioner may issue a notice requiring the trustee of each trust having the characteristics specified in the notice to provide, in the prescribed form and by the specified date, information—

 (a) that is described in subsection (1) and is specified in the notice; and

 (b) is for each period that is specified in the notice and begins after the end of the 2013–14 income year and ends before the beginning of the 2021–22 income year.

(3) If the trustee of a trust is a non-resident, a settlor of the trust who is a New Zealand resident is responsible for ensuring the performance of the obligations imposed on the trustee by this section.

(4) A notice under subsection (2) is secondary legislation under the Legislation Act 2019.

135. The information may be requested for periods beginning after the end of the 2013-14 year, i.e. from the 2014-15 income year onwards, which is seven years prior to the 2021-22 income year (being the first year of disclosure required under s 59BA(2)).

136. Section 22 requires records to be kept for a period of seven years after the end of the income year to which the records relate. Section 22B requires trustees to retain information about certain forgiveness of debt for as long as the trust exists.

137. If the Commissioner requests information under s 59BAB(1), only information that is in the knowledge, possession, or control of the trustee is required to be provided.

138. If the trustee of a trust is a non-resident, then a settlor who is a New Zealand resident is responsible for ensuring compliance with the obligations imposed on the trustee under s 59BAB.

139. This Statement was signed on 6 April 2022. Rob Falk Technical Lead, Legal Services – Technical Standards

Rob Falk
Technical Lead, Legal Services – Technical Standards

References

Case References

Disputant Q v Commissioner of Inland Revenue [2015] NZTRA 22

Legislative References

Tax Administration Act 1994, sections 59BA and 59BAB

Related Rulings/Statements

Interpretation Statement 18/01 *Taxation of Trusts – Income Tax*

Interpretation Statement 19/04 *Income Tax – Distributions from Foreign Trusts*

Operational Statement 21/03 *Excusing Estates from filing income tax returns*

Tax Information Bulletin Volume 33 Number 3 (April 2021) (at pp 5-8) *Increased information required in trustees' annual returns*

Question We've Been Asked 16/03 *Goods and services tax – GST treatment of bare trusts*

QUESTION WE'VE BEEN ASKED

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

QB 22/01: Can a payment that compensates for the time value of money be taxable income if it is outside the statutory definition of "interest"?

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

Key provisions

Income Tax Act 2007 – ss CA 1(2), CC 4(1) and YA 1

Question

Can a payment that compensates for the time value of money be taxable income if it is outside the statutory definition of "interest"?

Answer

Yes. If a payment to compensate for the time value of money is outside the scope of the statutory definition of "interest" in the Act, the payment may still be income under a provision other than s CC 4(1) (which taxes interest). For example, such a payment may be taxed as income under ordinary concepts (under s CA 1(2)), if it has the necessary characteristics of income, or it may be taxed as income under another provision.

This means that a payment described as interest may be taxable income, even if it is outside the scope of the statutory definition of "interest".

Explanation

1. In 2009, the Commissioner issued a Question We've Been Asked titled QB 09/03 *Decisions on application of CA 1(2) – common law interest and income under ordinary concepts*. QB 09/03 sets out the Commissioner's view on the decision in *CIR v Buis and Anor* (2005) 22 NZTC 19,278 (HC) and what it means for the potential taxability of certain payments under s CA 1(2). In QB 09/03, the Commissioner did not agree with the judgment to the extent it suggested that s CA 1(2) could not apply to common law interest payments that did not fall within the specific provision taxing interest (s CC 4(1)).
2. The Commissioner's interpretation of the law has not changed. As in QB 09/03, the Commissioner still considers that a payment for the time value of money can be taxable as income under ordinary concepts in s CA 1(2) or under another provision. However, on review, the Commissioner now considers that the judgment in *CIR v Buis* can be read consistently with the Commissioner's view on how s CA 1(2) applies. This item concerns the Commissioner's interpretation of the judgment in *CIR v Buis*, not the Commissioner's interpretation of the law. This item does not concern the correctness of the conclusion reached in *CIR v Buis* that the particular Accident Compensation Corporation (ACC) payments at issue in that case were not income.
3. This item clarifies the Commissioner's view, which is summarised below:
    - The relevant enquiry under s CA 1(2) is whether an amount has the character of income, and this is consistent with the decision in *CIR v Buis*.
    - The outcome in *CIR v Buis* is confined to its particular facts concerning the tax treatment of certain penalty payments made under the Accident Compensation scheme.
    - *CIR v Buis* does not stand for a broader proposition that payments that compensate for the time value of money (described in QB 09/03 as common law interest) cannot be income under ordinary concepts or income under another provision.
    - The decision in *CIR v Buis* is not inconsistent with the role of s CA 1(2) as a supplement to the specific income provisions of the Income Tax Act.

Background

CIR v Buis

4. *CIR v Buis* concerned whether payments made to two claimants under s 72 of the Accident Rehabilitation and Compensation Insurance Act 1992 (now the Accident Compensation Act 2001) were assessable income.[1] The payments were described in s 72 as "interest", but were not within the statutory definition of "interest" in s OB 1 of the Income Tax Act 1994 (now s YA 1) as they were not payments for money lent.

5. The Commissioner argued in *CIR v Buis* that the payments were interest under the common law definition of that concept. On that basis, the Commissioner argued that the payments were income under ordinary concepts for the purpose of s CD 5 of the Income Tax Act 1994 (now s CA 1(2)).

6. France J determined that the ACC payments in question were not income under ordinary concepts. At paragraphs [45] to [49], France J stated the following in relation to the Commissioner's argument:

> [45] **The Commissioner's proposition is that the payment is interest at common law and therefore caught by s CD 5. In my view this gives s CD 5 too broad a scope in that it gives it an application that is in conflict with other parts of the** [Income Tax Act 1994].
>
> [46] **One can hardly imagine a more encompassing provision than s CE 1** [which captured interest payments as gross income under the Income Tax Act 1994, now section CC 4(1)]. It is not a case of the Act, despite its comprehensibility, not addressing a particular situation. **Section CE 1 starkly captures all interest payments as gross income.** On its face the Commissioner should not need s CD 5, but the "problem" lies with the definition of "interest". It fixes interest by reference to the concept of money lent, and it is common ground that makes it inapplicable to the s 72 payment.
>
> [47] The important aspects of the s OB 1 definition, however, are the opening words:
>
> > Interest, **in relation to the deriving of gross income**, means …
>
> [48] **In my view s CD 5 must be read subject to this since it deals with gross income. The Act defines what interest is for gross income purposes, and that must apply to both ss CD 5 and CE 1**. The contrary argument is that there are two definitions of interest – the statutory one, and the common law one, and both continue by virtue of s CD 5. I prefer the view that the s OB 1 definition, expressed as it is as capturing the concept of interest for gross income purposes, applies to both ss CD 5 and CE 1. Such an approach accords with ordinary statutory interpretation principles concerning general and specific provisions. It also accords with s AA 3(1) which places weight on the reading of the statute in context.
>
> [49] I accordingly conclude that, **since the Commissioner relies on s CD 5 applying on the basis that the payment is interest, the argument fails because s OB 1 defines interest exhaustively** for the purpose of determining if a payment is gross income. **It is appropriate, however, to address the underlying proposition of the Commissioner that s CD 5 applies.**
>
> [Emphasis added]

7. France J then went on to consider whether the ACC payments were income under ordinary concepts on any other basis, and concluded that they were not.

QB 09/03

8. QB 09/03 stated the following regarding the reasoning in *CIR v Buis*:

> In *Buis and Burston* France J held that section CD 5 of the Income Tax Act 1994 (now section CA 1(2)) could not apply to tax common law interest payments, because interest could be taxed only under the provision dealing with interest so defined (section CE 1 of the Income Tax Act 1994 (now section CC 4(1)). **In his Honour's view, common law interest payments were not taxable because they did not come within the definition of "interest" in section OB 1 of the Income Tax Act 1994** *(now section YA 1).*
>
> [Emphasis added]

9. QB 09/03 stated that the Commissioner does not accept the correctness of that aspect of the decision as a generally applicable principle, and intends to have the matter considered further by the courts when an opportunity arises in the future.

10. This statement was made because the Commissioner was, and remains, of the view that amounts that might be described

[1] The equivalent provision is now s 114, but as the provision is set out differently, this item does not make any statements about the taxability of payments under this newer provision or whether the provision has changed in substance.

as interest at common law can be taxable as income under ordinary concepts (under s CA 1(2)), or under other provisions, if those amounts have the necessary characteristics to be income under the relevant provision. This means an amount that might be described as common law interest is not excluded from taxable income purely because it is outside the statutory definition of interest.

Commissioner's view after reconsideration

CIR v Buis

11. The Commissioner has reviewed QB 09/03 and reconsidered the judgment in *CIR v Buis*. The Commissioner now considers that the decision in *CIR v Buis* does not preclude time value of money payments from being income under a provision other than s CC 4(1).

12. At paragraph [49], France J states that the statutory definition of interest in s OB 1 of the Income Tax Act 1994 "defines interest exhaustively" for the purpose of determining whether a payment is taxable. The Commissioner's view is that those comments were specifically responding to arguments the Commissioner raised in the context of the case. It is considered France J was not suggesting that all payments that could be described as common law interest were precluded from taxation. Instead, he was disagreeing with the specific argument raised in the case that the ACC payments were taxable **on the basis** that they were described as "interest".

13. It is correct that the s YA 1 definition defines the concept of "interest" exhaustively for the purposes of the Income Tax Act and its predecessors. This means that a payment cannot be income by virtue of being "interest" if it is outside the s YA 1 definition. However, this does not preclude a payment that might be thought of or described as interest from being income under another provision, and France J's judgment is not inconsistent with this.

14. This interpretation is supported by France J's comment at paragraph [49] that it was appropriate to address the underlying proposition that the payments in that case were income under ordinary concepts, and by the following consideration of this in the judgment. In determining whether the payments were income under ordinary concepts, France J considered the various characteristics of income and the nature of the payments in question — that is the relevant enquiry under what is now s CA 1(2). France J concluded that the payments did not have the required characteristics of income. Instead, he stated there were indications that the payments were a penalty Parliament had adopted to encourage the efficient disposal of ACC claims.

15. On reflection, for these reasons the Commissioner no longer considers *CIR v Buis* stands for a broader proposition that time-value-of-money payments cannot be income under ordinary concepts or income under another provision if they are outside the statutory definition of interest. The Commissioner considers that *CIR v Buis* is consistent with her view that the relevant enquiry under s CA 1(2) is whether an amount has the character of income. How an amount may be described or how it is defined at common law is not determinative. The outcome, in terms of the taxability of the payments at issue in *CIR v Buis*, is confined to the particular facts of that case and the nature of the specific ACC payments being considered under s 72 of the Accident Rehabilitation and Compensation Insurance Act 1992.

16. The Commissioner considers that France J's comments about the exhaustive nature of the definition of "interest" are not inconsistent with the role of s CA 1(2) as a supplement to the specific income provisions (in Part C of the Income Tax Act). As noted above, those comments were made in the context of the Commissioner's argument that the ACC payments were taxable as income under ordinary concepts **on the basis of being interest**.

17. The Commissioner therefore takes the view that this comment was not intended as a wider statement about the interaction between s CA 1(2) and specific income provisions. As France J went on to address whether the payments were income under ordinary concepts on any other basis, this indicates he was treating s CA 1(2) as supplementary to the specific provision for taxing interest. Section CA 1(2) operates as a catch-all provision to cover amounts that have the characteristics of income but are not within any of the specific income provisions. It cannot widen the scope of any of the specific provisions, or override their application, but it can be used to tax amounts that are outside these provisions if those amounts have the character of income.

18. The interaction of s CA 1(2) and specific income provisions in the context of *CIR v Buis* was briefly raised in QB 09/01 *Payments made in addition to financial redress under Treaty of Waitangi settlements – income tax treatment*:

The effect of the conclusion in *Buis* that the statutory definition of "interest" is exhaustive is that amounts that would have been income under ordinary concepts (being interest under the common law) may not be income. **This result appears to be inconsistent with the relationship between section CA 1(2) and specific provisions defining income. The role of section CA 1(2) is to supplement specific provisions of the Act defining income:** see *Tillard v C of T* [1938] NZLR 795; *Louisson v C of T* [1942] NZLR 30; *Discussion Document on Rewriting the Income Tax Act 1994* (September 1997). This result is also inconsistent with the purpose of the statutory definition of "interest" which was amended in order to widen rather than narrow the meaning of "interest" for income tax purposes: *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5,086.

However, in *Buis* the court went on to consider whether the payment in question was income under ordinary concepts on any other basis, and found in that case that it was not income.

[Emphasis added]

19. As QB 09/01 clarifies that in *Buis* the court went on to consider whether the payment was income on any other basis, it is considered that this QWBA is not contradictory to QB 09/01. However, to the extent that the comments in QB 09/01 may be viewed as inconsistent with the view in this item regarding the interaction between s CA 1(2) and specific income provisions, this QWBA supersedes QB 09/01.

NEW LEGISLATION

Tax treatment of payments outside the definition of "interest"

20. If a payment is made to compensate for the time value of money, or may otherwise be described as "interest", but is outside the statutory definition, whether it is taxable needs to be considered on a case-by-case basis. This is true of any payment or receipt. The answer will usually depend on a number of factors. Generally, the following three features are relevant in considering whether a payment is income:[2]

- Income is something that comes in.
- Income is generally periodic, recurrent and regular.
- Whether a particular receipt is income depends upon its quality in the hands of the recipient.

21. However, many payments made to compensate for the time value of money or otherwise described as interest may be one-off payments rather than made periodically or regularly. Lack of regularity or periodicity does not necessarily mean a payment is not income. In these circumstances, the most relevant factor will likely be the nature of the payment in the hands of the recipient, which involves considering what the payment is for.

22. In *CIR v Buis*, the payments were determined to be in the nature of a penalty, despite s 72 of the Accident Rehabilitation and Compensation Insurance Act 1992 referring to them as "interest". On the other hand, if a payment of "interest" were made in relation to mistakenly underpaid salary or wages, this would likely be taxable as employment income. Similarly, a payment to compensate for late payment under a compensation clause in a contract (commonly referred to as "default interest") would likely be income under ordinary concepts, if not income under another provision (for example, business income under s CB 1).

23. It is noted that if a payment is income but not within the definition of "interest", it may not have identical tax treatment to a payment within the definition of "interest". Specifically, payments of interest within the scope of s CC 4(1) will generally be resident passive income or non-resident passive income, and will therefore be subject to withholding under the RWT or NRWT rules. If a payment is described as interest but is outside the definition in s YA 1, such as default interest in the previous example, it will not be subject to this withholding.[3] The specific tax treatment will depend on the provision taxing the income, not the terminology that may be used to describe the payment.

References

Legislative References

Income Tax Act 2007 – s CA 1(2), CC 4(1) and YA 1

[2] Set out by Richardson J in *Reid v CIR* (1985) 7 NZTC 5,176 (CA).

[3] Unless the payment is otherwise captured by the RWT or NRWT rules.

Case References

CIR v Buis and Anor (2005) 22 NZTC 19,278 (HC)

Reid v CIR (1985) 7 NZTC 5,176 (CA)

Other References

QB 09/01 *Payments made in addition to financial redress under Treaty of Waitangi settlements – income tax treatment*

LEGAL DECISIONS – CASE SUMMARIES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, Court of Appeal, and the Supreme Court.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

Case summary

High Court dismisses Commissioner's application for an extension of time to issue challenge notice.

Decision date: 16-March-2022

CSUM 22/01

Case

CIR v Parore [2022] NZHC 488

Legislative References

Tax Administration Act 1994, ss 89 H, 89L(1B), 89L(2B), 89L(3), 89P

High Court Rules 2016, r 19.5

Legal terms

Originating application

Extension of time

Exceptional circumstance

Fair trial rights

Delay

Prosecutorial misconduct

Summary

The Commissioner applied and was granted leave to commence a proceeding under s 89(1B) of the TAA by way of originating application. She sought an order, in accordance with s 89L(2B), for an extension of time for issuing a challenge notice to Mr Parore.

The Commissioner sought an extension of time because the civil tax disputes procedure she instituted was deferred in June 2018 while criminal proceedings against Mr Parore ran their course. The Commissioner submitted that this was an "exceptional circumstance" under s 89L(3) which prevented her from issuing a challenge notice to Mr Parore within the four-year time limit in s 89P.

Harvey J declined the application, on the basis that it would be inappropriate for the Commissioner's own prosecutorial misconduct to be accepted as an "exceptional circumstance" to justify an extension of time.

Impact

This decision is confined to the facts of its case. Despite the finding at [53] "I do not accept that the ground argued by the Commissioner, that the need to delay the progression of the civil dispute to protect the taxpayer's fair trial rights, amounted to a qualifying event or circumstance in the context of s 89L(3)", it seems the Judge made that finding on the facts of the case and is not saying that it could never amount to a qualifying circumstance.

Facts

Mr Parore is a real estate agent. He was adjudicated bankrupt in 2009 and discharged in 2014. During (and after) his bankruptcy, he continued to work as a real estate agent. For the years 2012 to 2017, the Commissioner contended that Mr Parore failed to pay GST and had not filed income tax returns. Mr Parore took the view that the returns during the period of his bankruptcy were the responsibility of the Official Assignee.

In 2018, the Commissioner commenced a civil tax dispute procedure against Mr Parore. The proceedings were deferred in June 2018 when the Commissioner advised Mr Parore that he would also be subject to criminal prosecution. Charges were formally laid some 14 months later. The criminal proceedings were unsuccessful as the District Court found that Mr Parore's fair trial rights had been compromised irreparably. This was due to the Commissioner commencing civil proceedings concurrently and compelling Mr Parore to disclose information during the civil proceeding; and then deferring those proceedings to commence a criminal case against him in reliance on that disclosed information. The Commissioner subsequently appealed that decision and it was dismissed in December 2021.

The Commissioner sought an order, in accordance with s 89L(2B), for an extension of time for issuing a challenge notice to Mr Parore, on the basis that the deferral of the civil procedure (due to the criminal proceedings) was an "exceptional circumstance" which prevented her from issuing challenges to Mr Parore within the four year time limit in s 89P.

Issues

The principal issue for consideration before Justice Harvey was:

- Whether the application for an extension of time for issuing a challenge notice, essentially in order to enable the Commissioner to recommence the civil tax dispute process, should be granted.

The determine the above issue, the Court had to take into account whether an "exceptional circumstance" under s 89L(1B) existed that prevented the Commissioner from issuing a challenge notice within the four-year prescribed time frame.

As a procedural issue, Justice Harvey also considered whether it was appropriate to commence the proceedings by way of originating application.

Decision

Mode of application – Originating application

Leave was granted for the proceedings to be brought by way of originating application. Rule 19.5 of the High Court Rules 2016 sets out that the Court may, in the interests of justice, permit any proceeding not mentioned in rr 19.2 to 19.4 to be commenced by originating application. As there was no prescribed form for the application in either the TAA or the High Court Rules, it was accepted that an originating application was the appropriate procedure for "just, speedy, and inexpensive determination" of the issues.

Whether the application for an extension of time for issuing a challenge notice should be granted?

In order to determine whether or not an "exceptional circumstance" existed in order for the extension of time to be granted, Justice Harvey broke the issue down in to three questions:

Was there a qualifying event or circumstance?

Does the qualifying event or circumstance provide a reasonable justification for the delay?

Should the Court exercise its residual discretion?

On the first question, Justice Harvey found that "the situation that has unfolded in this case could not properly be described as a qualifying event or circumstance to provide the relief that the Commissioner is seeking". On the contrary, Harvey J found that the delays in the matter were largely a consequence of the Commissioner's own actions and that she had breached Mr Parore's fair trial rights "from the outset" at [62]. In short, Harvey J was of the view that the need to delay the progression of the civil dispute to protect Mr Parore's fair trial rights, did not amount to a qualifying event or circumstance in the context of s 89L(3) of the TAA.

On the second question, Justice Harvey emphasised that the 14 month delay in advising Mr Parore that he would be subject to criminal prosecution and formally laying the charges was a decision by the Commissioner that contributed to the delay. Harvey J noted that even if he accepted that the "parking" of the civil proceedings while the criminal proceedings advanced was a qualifying circumstance, once the stay of the proceedings concluded on 13 December 2021, there was no justification for the Commissioner not having concluded matters within the four-year time frame. He found that:

> *"This is a situation where, if the Commissioner had acted promptly following Wylie J's decision in December 2021, a disclosure notice could have been issue prior to 2022 and Mr Parore compelled to respond by February 2022 pursuant to the two-month statutory timeframe. This would have provided the Commissioner with enough time, acting promptly, to issue a statement of position and a challenge notice before 1 March 2022. I find little attraction to the submission that this was not done because the Commissioner does not take steps during December, the start of the holiday period." at [68].*

Finally, on the third question, Justice Harvey found that he did not need to exercise his residual discretion as he was not satisfied that the Commissioner identified qualifying exceptional circumstances; and even if the circumstances the Commissioner identified did qualify, he did not accept that they constituted a reasonable justification. He said:

> *"The remedy is disproportionate at this late stage of a lengthy process. I also consider that little would be gained by allowing the extension of time, and in any event, doing so would further penalise Mr Parore for the Commissioner's apparent ill-handling of this case. As has been said, it would be inappropriate for the Commissioner's own prosecutorial misconduct – regardless of fault – to now be accepted as an "exceptional circumstance" justifying an extension of time."*

As such, the Commissioner's application under s 89L(1B) of the TAA for an extension of time was declined.

About this document

These are brief case summaries, prepared by Inland Revenue, of decisions made by the Taxation Review Authority, the District Court, the High Court, the Court of Appeal or the Supreme Court in matters involving the Revenue Acts. For Taxation Review Authority matters, names have been anonymized. The findings of the court described in a case summary will no longer represent current law where the matter has been successfully appealed or subsequent amended legislation has been enacted.

Case summary

High Court confirms that forfeiture of criminal proceeds is not 'payment in lieu' of tax

Decision date: 18 March 2022

CSUM 22/02

Case

Li and AA Taxation & Accounting Service Ltd v CoP & CIR [2022] NZHC 514

Legislative References

Criminal Proceeds (Recovery) Act 2009, ss 21(1)(a), 28(1)(c), 33(1), 35, 59(1)(b), 95

High Court Rules 2016, r 4.4(1)(c)

Tax Administration Act 1994, ss 6, 6A, 89AB(4)(a), 89C(c), 89D(1B)(b), 109, 143B

Legal terms

Criminal proceeds forfeiture and the Inland Revenue Acts

Summary

Mr Li and his company, AA Taxation & Accounting Service Ltd ("**AA Taxation**") applied for three declaratory orders under Declaratory Judgment Act 1908 to vindicate their contention that the forfeiture of assets by Mr Li and his wife under the Criminal Proceeds (Recovery) Act 2009 ("**CPRA**") may be treated as 'payment in lieu' of tax.

Wylie J declined to grant each of the three declarations sought by Mr Li and AA Taxation.

By way of counterclaim, the CIR sought five declarations on various grounds. Of these:

- Wylie J declined to grant two declarations in relation to whether any assets of AA Taxation were restrained or forfeited in the CPRA proceeding because that issue was not determined in the CPRA proceeding.
- Wylie J granted three declarations sought by the CIR, and emphasised that the relevant restraining orders and asset forfeiture orders did not represent the payment of tax; and the CIR was/is not prevented from collecting the tax owed by Mr Li and/or AA Taxation.

Impact

This case determined an issue which had not previously been before the courts in New Zealand; and therefore, the decision of Wylie J is likely to provide significant guidance for issues at the intersection of criminal proceeds forfeiture and tax liabilities.

In particular, this decision confirms that assets vested in the Crown pursuant to assets forfeiture orders made under the CPRA, where the alleged predicate offending was tax evasion, does not amount to 'payment in lieu' of tax.

In the context of proceedings brought under the CPRA, tax liabilities may only be satisfied through one of the express statutory mechanisms set out in the CPRA.

Facts

In 2008, Mr Li sold a false university qualification to an undercover journalist for $12,000, of which Mr Li retained $3,000. This led to Mr Li being convicted of obtaining by deception, in April 2015.

Because of his involvement in the false diploma scheme, Mr Li drew the attention of the Commissioner of Police ("the **Police**") and its Asset Recovery Unit. In September and October 2015, the Police obtained restraining orders under the CPRA in respect of assets owned by Mr Li and his wife.

The restraining orders were obtained by Police on the basis of their allegations that Mr Li had benefitted from his significant criminal activity in the sum of $1.8m. The Police alleged primarily that these funds were the proceeds of fraud offending; and a related allegation was tax evasion. The Police alleged Mr Li (and his wife, by virtue of being married to Mr Li) had unlawfully benefitted from significant criminal activity.

The hearing of the CPRA proceeding was set down for July 2017; however, a settlement was reached on the eve of trial. Under the terms of the settlement agreement reached with the Police, Mr Li and his wife forfeited $575,000 of their assets, but otherwise retained their family home. The settlement agreement was approved by the High Court under s 95 of the CPRA on 12 July 2017 (the "**Settlement Agreement**").

The CIR was not party to the Settlement Agreement and was not involved in any settlement negotiations. The Settlement Agreement expressly said it had *"no bearing on any action that may be taken by the [CIR] in the future, and how [the IRD] may treat the present settlement, if approved, would ultimately be a matter for it.* (Paragraph 2.10 of the Settlement Agreement – reproduced at [66] of decision of Wylie J).

Approximately 12 months after the Settlement Agreement, the CIR reached agreements with each of Mr Li and AA Taxation to amend various tax assessments filed by each taxpayer (the **Amended Assessments**). The Amended Assessments recognised the previously-unreported income derived by Mr Li and AA Taxation, and their resulting liabilities for income tax and GST (plus penalties and interest).

In January 2019, the CIR issued a statutory demand to AA Taxation to collect the tax assessed as owing under the Amended Assessments. AA Taxation accepted that the tax it owes had been properly assessed; however, AA Taxation asserted the tax owing under the Amended Assessments had already been paid when Mr Li and his wife forfeited their assets under the Settlement Agreement.

In September 2019, Associate Judge Smith set aside the CIR's statutory demand, on the condition that Mr Li seek declaratory orders to *"vindicate its contention that the amount claimed [by the CIR] in the statutory demand should be deemed to have been paid"* by the assets forfeited under the Settlement Agreement. (*AA Taxation & Accounting Service Limited v Commissioner of Inland Revenue* [2019] NZHC 2301 at [83]).

This proceeding arose accordingly, to answer the question of whether the assets forfeited by Mr Li and his wife satisfied the tax liabilities of Mr Li and AA Taxation.

Issues

The first issue was whether to grant the three declarations sought by Mr Li and AA Taxation.

The second issue was whether to grant the five declarations sought by the CIR by way of counterclaim.

(The respective declarations sought are set out below.)

Decision

Statutory framework

Wylie J first considered the statutory framework under the CPRA. The statutory purpose of the CPRA was "clearly expressed"; it seeks to discharge ill-gotten gains and in so doing, "deter significant criminal activity", (Criminal Proceeds (Recovery) Act 2009, s 3.)

To give effect to its purpose, the CPRA established a regime for the restraint and forfeiture of property derived as a result of "significant criminal activity". (Criminal Proceeds (Recovery) Act 2009, s 6.)

After noting the various orders able to be made under the CPRA (and the statutory criteria for making those orders), Wylie J noted that it was only the Police who had the responsibility for invoking the CPRA – and, only the Police were empowered to enter into settlements of CPRA proceedings which provided for the forfeiture of assets to the Crown.

There is no express interface between the CPRA and the Inland Revenue Acts, other than s 98 of the CPRA (which permits the CIR to disclose certain information to the Police).

Wylie J noted there was nothing in the CPRA which empowered the Police to collect tax; and, only the CIR was responsible for collecting the taxes committed to her charge. The CIR also has sole responsibility for the care and management of the taxes covered by the Inland Revenue Acts, although it is the Acts themselves which create the liability for tax.

Finally, Wylie J noted there was nothing in the CPRA which suggested that a forfeiture order amounts to a "tax", or in any way operates to discharge a tax liability. When seen against its statutory purpose, *"Clearly [the CPRA] is not a tax collection statute."* at [83]. If the CPRA was simply a means of collecting lawful tax debts, it would leave no room for its purpose of deterrence.

The intersection of the CPRA and Inland Revenue Acts

Wylie J noted there were five discrete *"pathways which can lead to the CIR becoming involved in proceedings under the CPRA and which can result in tax being paid or compromised in the course of such proceedings"*, namely: at [78].

Under ss 21 and 45 of the CPRA, the Police must serve applications for restraint or forfeiture on any person with an "interest" in the subject property. Wylie J considered it is doubtful whether the CIR (as unsecured creditor) would have a recognised "interest" in restrained property requiring that she be served; however, under ss 21 and 45, the Court can nevertheless order service on other persons if it considers it appropriate to do so. Wylie J took the view that in any case where the Police allege tax evasion, *"service on the CIR might well be wise. Directions as to service can be sought. It would avoid the problems which have arisen in this case."*

As CPRA proceedings are civil proceedings, the High Court Rules allow the CIR to be joined *"if the CIR's presence before the Court is thought to be necessary to fully determine the issues likely to arise, and she ought to be bound by any orders made"*.

Under s 28(1)(c) of the CPRA, the Court can make restraining orders subject to a condition that the restrained property be used to meet the payment of *"any specified debt incurred by the respondent in good faith"*. Wylie J noted this pathway was utilised in two earlier proceedings, (*Commissioner of Police v Dotcom* [2012] NZHC 2190) and (*Commissioner of Police v Dotcom* [2012] NZHC 2190).

Under ss 33 and 35 of the CPRA, parties to a settlement may specifically provide for the payment of tax debts out of the proceeds of settlement. Wylie J noted this pathway was utilised in two other, earlier proceedings, *Commissioner of Police v Gong* [2018] NZHC 1859, and *Commissioner of Police v McCarthy* [2013] NZHC 3257.

Finally, s 59(1)(b) of the CPRA allows the Court to give directions that may be necessary or convenient to give effect to forfeiture orders. Wylie J considered it arguable that the Court has implied powers to direct the manner in which the Official Assignee must dispose of forfeited property.

Wylie J noted that none of these five pathways were utilised by Mr Li in the CPRA proceeding, despite Mr Li being represented by solicitors at the time at [79]. Therefore:

> *[80] In my judgment, the [Police], Mr Li and Ms Wang, as the parties to the settlement recorded in the settlement memorandum did not, at the time, intend that the funds they proposed should be forfeited were to be attributed to offset Mr Li's and AA Taxation's tax liabilities, once those liabilities were finally determined by the CIR.*

On that basis, Wylie J turned to consider the declarations sought.

Declarations sought by Mr Li and AA Taxation

1. *… that the funds paid in the Settlement Agreement and identified as tax are to be attributed to the tax assessments finalised for the plaintiffs;*

Wylie J noted the declaration sought was poorly framed as it assumed the Settlement Agreement identified a portion of the funds forfeited were on account of tax. While the Settlement Agreement referred to the parties' competing contentions as to the possible tax liability for Mr Li, no portion of the forfeited sum were identified as tax or stated that they should be attributed to any tax liabilities.

The declaration sought also assumed AA Taxation was entitled to the benefit of settlement. It was not: it was not a party to the CPRA proceeding or the Settlement Agreement.

Finally, Wylie J noted the declaration sought is inconsistent with the purpose of the CPRA. Any property forfeited pursuant to an assets forfeiture order vests in the Crown absolutely; it is a "one-way" transaction. By contrast, in making a tax payment, nothing is forfeited. Rather, a person who pays tax engages in a "two-way" transaction which satisfies a debt owed by that person to the Crown in accordance with his or her statutorily assessed liability under the Inland Revenue Acts.

Wylie J declined to grant the first declaration sought by Mr Li and AA Taxation.

2. *… that the funds paid to the Official Assignee under the Settlement Agreement, and identified as tax, are held by the Official Assignee on trust for the [CIR];*

Wylie J noted there were similar problems with the second declaration sought. Again it assumed part of the funds paid to the OA as part of the Settlement Agreement were identified as tax (they were not). And, it assumed AA Taxation had some rights arising out of settlement, but Wylie J found it had no such rights.

It was also noted that the declaration ignores the provisions of the CPRA, which expressly directs the OA to deal with forfeited assets in accordance with the 'payment waterfall' specified in s 82(1) of the CPRA (first to recover the Assignee's costs, then to repay any costs for legal aid, then towards any reparation or offender levies or fines, and then finally to pay any surplus to the Crown). The payment of tax is not one of the specified priority payments in s 82 of the CPRA and there is simply no basis to assert the OA holds property on trust for anybody other than the Crown.

Wylie J declined to grant the second declaration sought by Mr Li and AA Taxation.

3. *…that the funds paid, and identified as tax under the Settlement Agreement [were] not entitled to be collected by the [Police and that] the Settlement Agreement is therefore void.*

Wylie J repeated that no funds were identified as tax. It was noted that the Police have no authority to collect tax, and the Police did not purport to do so. The Police acted in accordance with the CPRA, and there was no irregularity in the process followed by the Police and there was nothing to impugn the validity of the Settlement Agreement. The Settlement Agreement was approved by the Court and there was no appeal against that decision.

Wylie J declined to grant the third declaration sought by Mr Li and AA Taxation.

Declarations sought by the CIR by way of counterclaim

1. *…that no assets of AA Taxation were subject to the restraining orders made in the CPRA proceedings;*

Wylie J noted AA Taxation did not take any steps to lodge an interest in the restrained property, and none of its interests/assets were restrained or referred to in the Settlement Agreement.

Against that background, however, Wylie J noted Mr Li's case was that he intermingled funds belonging to AA Taxation with his and his wife's funds. Although the Police had its own competing assertions, the ownership of the assets were not determined by the Court. Wylie J noted the competing assertions as to ownership were not necessary for the Court to make restraining orders: part of the funds in Mr Li's bank account were tainted as a result of his fraud offending – and that alone was sufficient to taint the whole of the funds in the account.

Somewhat less clear was the degree of 'tainting' in respect of the family home or the cash seized by Police; however, the extent to which (if at all) AA Taxation owned any restrained assets was never determined in the CPRA proceeding – and so therefore, Wylie J declined to grant the first declaration sought by the CIR by way of counterclaim.

2. *…that the on-notice restraining orders in the CPRA proceedings were not intended to meet the tax debts of Mr Li and Ms Wang or the tax debts of AA Taxation*

Wylie J noted there was no provision made for the payment of tax debts in the restraining orders or Settlement Agreement (or in any other document put before Wylie J). At the time of the restraining orders, Mr Li had not taken any steps in relation to (or even acknowledged) his tax liability. Similarly, there was no evidential foundation for the contention that the restrained property was to be used to meet Mr Li's, his wife's or AA Taxation's tax debts.

Wylie J granted the second declaration sought by the CIR by way of counterclaim.

3. *…that no assets of AA Taxation form part of the assets forfeiture orders in the CPRA proceedings;*

Wylie J noted that for the same reasons as the first declaration, he declined to grant the third declaration sought by the CIR by way of counterclaim.

4. *…that the assets forfeiture orders in the CPRA proceedings do not represent the payment of tax or alternatively, if they do represent the payment of tax, that they only represent the payment of the tax liabilities of the respondents to the CPRA proceedings;*

Wylie J examined the Settlement Agreement – and in particular, paragraph 2.10 of that Agreement (which expressly said it did

not bind the CIR). The Settlement Agreement did not provide that the forfeited assets were to be used to discharge the tax liabilities of Mr Li, his wife, and/or AA Taxation.

In granting the fourth declaration sought by the CIR, Wylie J commented at para [101], "That is not however to say that the CIR should ignore the circumstances which had arisen when she is exercising her discretion whether or not to seek to recover the tax assessments made."

5. *…that the effect of the settlement memorandum was not to prohibit the CIR from collecting the tax that was owed by Mr Li and/or AA Taxation or alternatively, if the effect of the settlement memorandum is to prohibit the CIR from collecting any tax, that it is only the tax owed by Mr Li and not by AA Taxation.*

Wylie J confirmed the CIR was not so prohibited. The Settlement Agreement expressly recorded it had no bearing on the CIR – and so it does not prohibit the CIR from collecting the tax owed by Mr Li and/or AA Taxation.

"Double recovery"

The final part of the judgment addresses concerns raised by counsel assisting the Court as to the appearance of "double recovery". Wylie J discussed these concerns in the context of a recent decision by Duffy J (*Commissioner of Police v Nabawi* [2021] NZHC 2413), which dealt with an application by Police for restraining orders which relied solely on tax evasion as the predicate offending.

In *Nabawi*, Duffy J found any 'benefits' derived through tax evasion may be "cancelled out" by recovery action taken by the CIR under the TAA.

The primary point from Nabawi is that tax evasion does not extinguish an evader's tax liability; tax evasion merely (temporarily) avoids that liability. Thus, if or once the CIR quantifies the liability and seeks to recover (collect) that liability, a respondent to a CPRA proceeding will have derived less of a benefit from their tax evasion than if they had not been caught (unless *"the additional disposable income derived from tax evasion is used to acquire assets that rapidly inflate in value, [then] the resulting profits may survive the effect of any tax recovery by the IRD").*

While Duffy J was prepared to restrain Mr Nabawi's property (pending a full hearing for the forfeiture of that property), her Honour signalled to Police that before forfeiture orders could be made, evidence would be required from IRD as to the amount of Mr Nabawi's tax liability. The reason is that any "benefit" the Police asserted Mr Nabawi had unlawfully derived from tax evasion would be reduced by any present tax liability faced by Mr Nabawi.

Wylie J was careful to note that *Nabawi* can be distinguished from the present case: in *Nabawi*, the Police relied solely on tax evasion as the predicate offending, whereas in Mr Li's case, tax evasion was incidental to his primary (fraud) offending. Nevertheless, Wylie J agreed with the observations of Duffy J at [53] and [54] of *Nabawi*, the essence of which said the Police should obtain evidence from the CIR if or when allegations of tax evasion are made in a proceeding brought by Police under the CPRA.

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