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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
PUB00474	Question we've been asked	Do supplies of standing timber and other unsevered crops wholly or partly consist of land for the compulsory zero-rating rules?	19 July 2024
ED0256	Standard practice statement	Extension of time applications from customers without tax agents	22 July 2024

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NEW LEGISLATION

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

Deemed Rate of Return for Attributing Interest on Foreign Investment Funds 2023-24 Income Tax Year

Section EX 55 of the Income Tax Act 2007

Order (SL 2024/119)

The deemed rate of return for attributing interest on foreign investment funds has been set at 8.63% by Order in Council for the 2023-24 income year.

Background

The deemed rate of return is set annually and is one of the methods that can be used to calculate income from foreign investment fund interests. The rate is calculated by taking an average of the five-year Government bond rate at the end of each quarter, plus a margin of four percent.

Key features

The deemed rate of return for taxing interests in foreign investment funds is 8.63% for the 2023–24 income year, an increase of 0.48% from the previous income year.

Effective date

The new rate was set by Order in Council on 4 June 2024 and came into force on 6 June 2024.

Further information

The new regulations can be found at:
https://legislation.govt.nz/regulation/public/2024/0119/latest/LMS963892.html

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 PUB 24/01 – 24/03: GST – Supplies of properties used for transitional housing

Issued | Tukuna: 7 June 2024

These Public Rulings consider the GST treatment of supplies of properties by landlords to organisations for use in the Ministry of Housing and Urban Development's (HUD's) Transitional Housing Programme. These rulings apply where the organisations have entered into a Transitional Housing Services Agreement with HUD from 1 July 2023.

BR Pub 24/01 applies to an exempt supply of a property that will be used for the principal purpose of accommodation in a dwelling.

BR Pub 24/02 and BR Pub 24/03 apply to supplies of a property that will not be exempt supplies.

The Rulings only apply to supplies of properties made by landlords to organisations for use in HUD's transitional housing programme, due to the particular agreements that are entered into by HUD and the organisations. These rulings do not apply to other landlords, but they may gain some assistance in determining their GST treatment from the commentary.

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

START DATE – END DATE | RĀ TĪMATA – RĀ MUTUNGA
7 June 2024 – 6 June 2027

Public Ruling BR Pub 24/01: GST – Exempt supplies of properties used for transitional housing

This is a public ruling made under s 91D of the Tax Administration Act 1994.

Taxation Laws | Ture Tāke

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

This Ruling applies in respect of ss 8(1) and 14(1)(cb).

The Arrangement to which this Ruling applies | Te Whakaritenga i pāngia e tēnei Whakataunga

The Arrangement is the lease (the head-lease) of a property by a property owner (the landlord) to an organisation, with the following features:

- The property is a self-contained house, unit or apartment with few or no communal facilities.
- The organisation will use the property for providing accommodation and wrap-around support services to a transitional housing Household (ie, a single tenant or family).
- The organisation provides transitional housing services in accordance with a Transitional Housing Service Agreement entered into with HUD from 1 July 2023.
- The organisation provides the Households with a Housing Agreement that contains a right to quiet enjoyment (as that term is used in s 38 of the Residential Tenancies Act 1986).
- The landlord receives market rent from the organisation for the supply of the head-lease.

How the Taxation Laws apply to the Arrangement | Ko te pānga o ngā Ture Tāke ki te Whakaritenga

The Taxation Laws apply to the Arrangement as follows:

- The supply of the head-lease is an exempt supply, being a supply of a property by way of lease, that is to be used for the principal purpose of accommodation in a dwelling by any person: s 14(1)(cb). Accordingly, the supply of the head-lease is not a taxable supply under s 8(1).

The period for which this Ruling applies | Ko te wā i pāngia e tēnei Whakataunga

This Ruling will apply for the period beginning 7 June 2024 and ending on 6 June 2027.

This Ruling is signed by me on 7 June 2024.

Susan Price
Group Leader, Public Advice and Guidance,
Tax Counsel Office | Rōia Kaihautū ā-ropu Taake,
Te Tari Tohutohu Tāke

BINDING RULINGS

Public Ruling BR Pub 24/02: GST – Taxable supplies of properties used for transitional housing (no quiet enjoyment)

This is a public ruling made under s 91D of the Tax Administration Act 1994.

Taxation laws | Ture tāke

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

This Ruling applies in respect of ss 8(1), 10(6) and 14(1)(cb).

The Arrangement to which this Ruling applies | Te Whakaritenga i pāngia e tēnei Whakataunga

The Arrangement is the lease (the head-lease) of a property by a property owner (the landlord) to an organisation, with the following features:

- The landlord is, or is required to be, a registered person (as that term is defined in s 2).
- The property is a self-contained house, unit or apartment with few or no communal facilities.
- The organisation will use the property for providing accommodation and wrap-around support services to a transitional housing Household (ie, a single tenant or family).
- The organisation provides transitional housing services in accordance with a Transitional Housing Service Agreement entered into with HUD from 1 July 2023.
- The organisation does not provide the Households with a right to quiet enjoyment (as that term is used in s 38 of the Residential Tenancies Act 1986) in their Housing Agreements.
- The landlord receives market rent from the organisation for the supply of the head-lease.

How the Taxation Laws apply to the Arrangement | Ko te pānga o ngā ture tāke ki te Whakaritenga

The Taxation Laws apply to the Arrangement as follows:

- The supply of the head-lease is a taxable supply under s 8(1).
- The value of the supply of the head-lease cannot be reduced under s 10(6).

The period for which this Ruling applies | Ko te wā i pāngia e tēnei Whakataunga

This Ruling will apply for the period beginning 7 June 2024 and ending on 6 June 2027.

This Ruling is signed by me on 7 June 2024.

Susan Price
Group Leader, Public Advice and Guidance,
Tax Counsel Office | Rōia Kaihautū ā-ropu Taake,
Te Tari Tohutohu Tāke

Public Ruling BR Pub 24/03: GST – Taxable supplies of properties used for transitional housing (commercial dwelling)

This is a public ruling made under s 91D of the Tax Administration Act 1994.

Taxation Laws | Ture Tāke

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

This Ruling applies in respect of ss 8(1), 10(6) and 14(1)(cb).

The Arrangement to which this Ruling applies | Te Whakaritenga i pāngia e tēnei Whakataunga

The Arrangement is the lease (the head-lease) of a property by a property owner (the landlord) to an organisation, with the following features:

- The landlord is, or is required to be, a registered person (as that term is defined in s 2).
- The property is a:
  - complex that contains units or separate rooms with a private bathroom, kitchenette or both, but otherwise has communal kitchen, lounge, and common area facilities; or
  - complex that contains rooms with communal bathroom, kitchen, lounge and common area facilities; or
  - unit within an ordinary, commercially operated motel.
- The organisation will use the property for providing accommodation and wrap-around support services to a transitional housing household (ie, a single tenant or family).
- The organisation provides transitional housing services in accordance with a Transitional Housing Service Agreement entered into with HUD from 1 July 2023.
- The landlord receives market rent from the organisation for the supply of the head-lease.

How the Taxation Laws apply to the Arrangement | Ko te pānga o ngā Ture Tāke ki te Whakaritenga

The Taxation Laws apply to the Arrangement as follows:

- The property is a "commercial dwelling" as defined in s 2.
- The supply of the head-lease is a taxable supply under s 8(1).
- The value of the supply of the head-lease cannot be reduced under s 10(6).

The period for which this Ruling applies | Ko te wā i pāngia e tēnei Whakataunga

This Ruling will apply for the period beginning 7 June 2024 and ending on 6 June 2027.

This Ruling is signed by me on 7 June 2024.

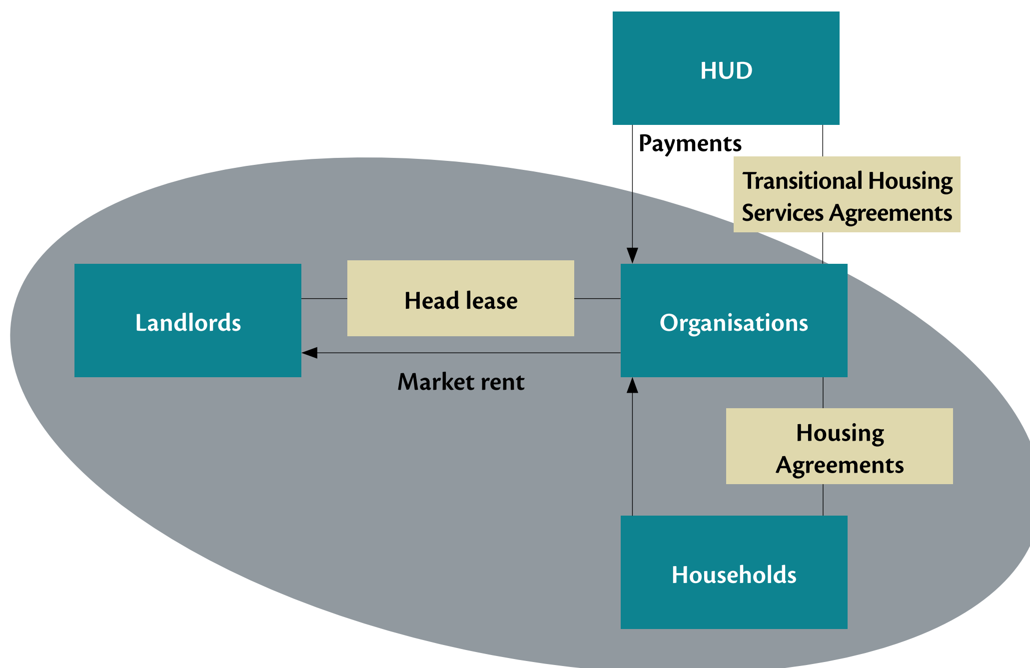
Susan Price
Group Leader, Public Advice and Guidance,
Tax Counsel Office | Rōia Kaihautū ā-ropu Taake,
Te Tari Tohutohu Tāke

Commentary on Public Ruling | Takinga kōrero o ngā Whakatau Tūmatanui BR Pub 24/01 – 24/03

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Rulings BR Pub 24/01, 24/02, and 24/03 ("the Rulings").

Summary | Whakarāpopoto

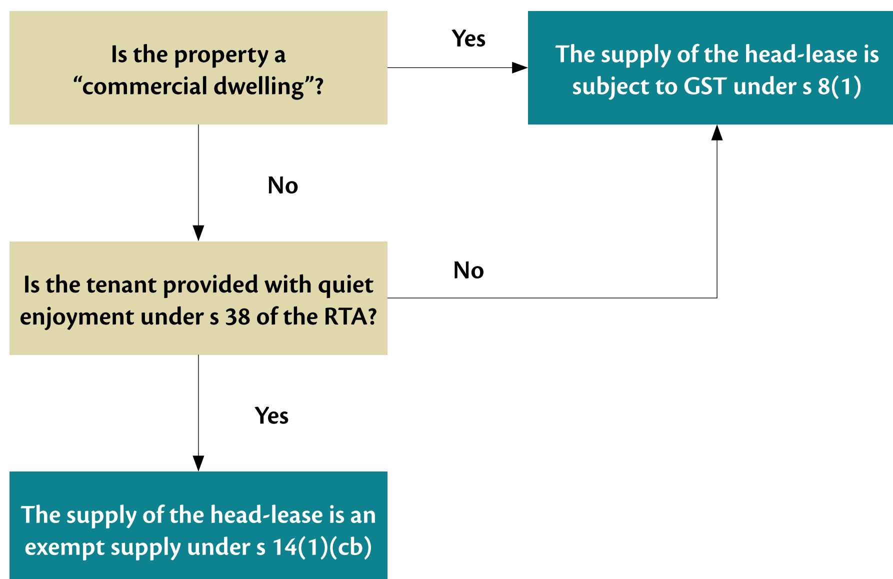
1. Organisations that provide transitional housing services on behalf of the Ministry of Housing and Urban Development (HUD) generally lease the properties used to provide the services from various landlords under a head-lease. The organisations then enter into Housing Agreements with the transitional housing tenants (Households). These arrangements are shown in the following diagram:



2. These Rulings consider when the head-lease between the landlord and the organisation is subject to GST. This generally depends on the terms of the Housing Agreements that are entered into between organisations and Households.
3. GST is usually charged on the supply of goods and services at 15%. However, the supply by way of lease of a property (a head-lease) that is to be used for the principal purpose of accommodation in a dwelling by any person (such as the Households under the Housing Agreements) is an exempt supply for GST purposes under s 14(1)(cb).
4. In determining whether the supply of the head-lease is an exempt or taxable supply, a landlord needs to determine whether the organisation will use the property to provide accommodation in a dwelling to Households under the Housing Agreements.
5. Properties leased to organisations that provide transitional housing services will be used to provide "accommodation". The more complicated question is whether each particular property satisfies the definition of a "dwelling" in the GSTA. This requires the landlord to consider:
   - whether the property is a "commercial dwelling"; and
   - if not, whether the Household's use of the property will satisfy the other requirements of the definition of a dwelling.
6. The Commissioner considers that the following types of properties used by organisations to provide transitional housing services in accordance with HUD's Transitional Housing Services Agreements will be "commercial dwellings" under s 2:
   - complexes that contain units or separate rooms with private bathrooms, kitchenettes or both (each provided to a single Household), but otherwise have communal kitchen, lounge and common area facilities;
   - complexes that contain separate rooms (each provided to a single Household), with communal bathroom, kitchen, lounge and common area facilities; and
   - units (leased to a single Household) within an ordinary, commercially operated motel.

BINDING RULINGS

7. The above types of properties are ones where, in accordance with the Transitional Housing Services Agreements, there is a high level of management and control over the properties.
8. Self-contained houses, units and apartments that are provided to a single Household are not commercial dwellings because they do not contain the required features.
9. If the property is a commercial dwelling, the supply of the head-lease by the landlord to the organisation will not be an exempt supply under s 14(1)(cb). Instead, the supply of the head-lease will be subject to GST under s 8(1).
10. If the property is not a commercial dwelling it is necessary to consider whether the use of the property under the Housing Agreements entered into by the organisation and Households satisfies the other features of a dwelling. These other features are that:
    - the properties are "premises", as defined in s 2 of the Residential Tenancies Act 1986 (RTA);
    - a person occupies, or it can reasonably be foreseen that a person will occupy, the premises as their principal place of residence; and
    - the person has quiet enjoyment, as that term is used in s 38 of the RTA.
11. The Commissioner considers that properties used to provide transitional housing services will be premises that are used as the Household's principal place of residence during the period of the Housing Agreement.
12. Whether the Household is provided with quiet enjoyment, as that term is used in s 38 of the RTA, depends on the terms of the Housing Agreement that the organisations enter into with the Households. Organisations may decide to provide this right in their Housing Agreements by expressly referring to s 38 of the RTA or including wording that has the same effect as s 38 of the RTA. If there is no specific reference or wording, the Housing Agreements will not be subject to the relevant quiet enjoyment right.
13. To determine whether the relevant quiet enjoyment right is being provided to the Households, landlords will need to ask the organisation whether their Housing Agreements for that property will refer to s 38 of the RTA or otherwise provide the right to quiet enjoyment as that term is used in s 38 of the RTA.
14. If that quiet enjoyment right is provided, the supply of the head-lease will be an exempt supply under s 14(1)(cb) (where the property is not a commercial dwelling).
15. Use the following flowchart to determine whether the supply is subject to GST or is exempt:



16. Supplies to an individual of domestic goods and services in a commercial dwelling can be accounted for at a reduced value once stays in the commercial dwelling exceed four weeks (s 10(6)). However, this provision applies only if the supplies are made to a natural person, and where there is a commercial dwelling. As the landlord does not supply the head-lease to a natural person, this provision cannot be applied to the supply of the head-lease.

Background | Horopaki

17. Under HUD's Transitional Housing Programme, short-term accommodation (generally for a period of 12 weeks) is supplied to individuals or families (Households) who have no other housing available to them, along with the supply of wrap-around support services. The organisations that provide transitional housing services on behalf of HUD generally lease the properties used to provide the services (under either a residential or commercial lease) from developers, investors, private landlords, motels or hostels (referred to as landlords for ease of reference in this commentary). The organisations then enter into Housing Agreements with the Households.
18. Landlords provide different types of properties for transitional housing purposes. Generally, the types of properties supplied can be categorised as:
    - stand-alone, self-contained houses (leased to a single Household);
    - self-contained units or apartments within a larger complex (each leased to a single Household);
    - complexes that contain units or separate rooms with private bathrooms, kitchenettes or both (each leased to a single Household), but otherwise have communal kitchen, lounge and common area facilities;
    - complexes that contain separate rooms (each leased to a single Household), with communal bathroom, kitchen, lounge and common area facilities; and
    - units (leased to a single Household) within an ordinary, commercially operated motel.
19. These Rulings consider when the head-lease between the landlord and the organisation is subject to GST. This broadly depends on the:
    - nature of the property; and
    - way that the Household uses the property.
20. Inland Revenue is aware some landlords supplying properties for use in transitional housing are finding GST hard to understand. These Rulings aim to clarify the GST consequences for landlords.

Exempt supplies of accommodation in a dwelling

21. GST applies to the supply of goods or services by a registered person in the course or furtherance of a taxable activity carried on by them (s 8(1)). However, GST does not apply to exempt supplies.
22. If a person is making exempt supplies, they do not have to account for any GST. They are also not able to claim input tax deductions on costs they incur in making those exempt supplies.
23. Exempt supplies include certain supplies of accommodation (ss 14(1)(c) to (cb)), including the supply of:
    - accommodation in a dwelling (s 14(1)(c)); and
    - a property by way of lease (a head-lease) that is to be used for the principal purpose of accommodation in a dwelling by any person (s 14(1)(cb)).
24. Therefore, in determining whether a head-lease is an exempt supply, the landlord needs to find out whether the organisation will use the property to provide accommodation in a dwelling to transitional housing Households.
25. "Accommodation" is not defined in the GSTA. It is relevantly defined in the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York (2011)) as "a room, building, or space in which someone may live or stay". Organisations that provide transitional housing must provide a temporary space for tenants to live in until they can find more sustainable housing. Therefore, the properties are used to provide accommodation.
26. The more complicated question is whether the property satisfies the definition of a dwelling in the GSTA. Dwelling is relevantly defined (in s 2) as:
    - premises, as defined in s 2 of the RTA;
    - that a person occupies or it can reasonably be foreseen that a person will occupy as their principal place of residence; and
    - in relation to which the person has quiet enjoyment, as that term is used in s 38 of the RTA; but
    - excludes a commercial dwelling.
27. If the property is a commercial dwelling, then it does not matter whether the remaining requirements are satisfied. In that case, the supply of the head-lease will not be an exempt supply under s 14(1)(cb), and will instead be subject to GST under s 8(1).

28. This commentary first considers when a property is a commercial dwelling, then goes on to consider the other features of a dwelling.

Whether there is a commercial dwelling

29. The following types of premises are commercial dwellings (s 2):
    - a hotel, motel, homestay, farmstay, bed and breakfast establishment, inn, hostel, or boardinghouse;
    - a serviced apartment managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment, as that term is used in s 38 of the RTA;
    - a convalescent home, nursing home, rest home, or hospice;
    - a camping ground; and
    - premises of a similar kind to those referred to above.
30. In *Case L75* (1989) 11 NZTC 1,435 the Taxation Review Authority (Judge Keane) stated (at 1,437) that whether premises fall within the definition of "commercial dwelling" must be approached in a broad and common-sense way. Generally, a dwelling is distinguished from a commercial dwelling by the scale of accommodation provided, whether there are communal facilities and the level of control the owner exercises.
31. To determine whether premises are commercial dwellings, it is necessary to consider the nature of each type of establishment listed in the definition of commercial dwelling, and then consider whether the properties leased for the purposes of transitional housing are or are similar to any of those establishments.
32. Having regard to the types of properties used for transitional housing (as set out at [18]), this commentary discusses only motels, boardinghouses, hostels and serviced apartments. The properties do not appear to fall into any of the other categories of establishments that are commercial dwellings.

Motel

33. The term "motel" is not defined in the GSTA. The *Concise Oxford English Dictionary* relevantly defines the term as follows:

    motel ê **n.** a roadside hotel designed primarily for motorists, typically having the rooms arranged in low blocks with parking directly outside.
34. Case law indicates that a motel will generally have:[1]
    - a place where guests can obtain meals;
    - furnished rooms with an en suite, linen and towels;
    - rooms that are cleaned and serviced as part of the price of letting;
    - a reception desk, and often offer concierge services.

Boardinghouse

35. The term "boardinghouse" is not defined in the GSTA.[2] The *Concise Oxford English Dictionary* relevantly defines the term as follows:

    boarding house n. private house providing food and lodging for paying guests.
36. Case law indicates that a boardinghouse will generally have:[3]
    - shared accommodation for a number of separate occupants;
    - a high level of management control exercised over the property, including cleaning and maintenance;
    - facilities that include separate rooms, with shared communal areas such as a kitchen, bathroom and lounge; and
    - occupants who usually remain in the property for short periods.

[1] *ECC Southbank Pty Ltd as Trustee for Nest Southbank Unit Trust v FCT* 2012 ATC 20-336 (FCA).

[2] "Boarding house" is defined in the RTA, and "boarding establishment" is defined in the Income Tax Act 2007, but neither definition applies for these purposes.

[3] *Case L75* and *Case Q46* (1993) 15 NZTC 5,227.

Hostel

37. The term "hostel" is not defined in the GSTA. The *Concise Oxford English Dictionary* relevantly defines the term as follows:

    hostel n. 1 an establishment which provides cheap food and lodging for students, workers, etc. 2 archaic an inn providing accommodation.

38. Case law indicates that a hostel will generally:[4]
    - provide accommodation at relatively low cost to a number of occupants;
    - have communal facilities, such as kitchens, living areas and bathrooms rather than being self-contained; and
    - have on-site management and supervision.

Serviced apartments

39. The definition of commercial dwelling refers to serviced apartments that a third party manages and operates and for which services (in addition to the supply of accommodation) are provided and in relation to which a resident does not have quiet enjoyment.
40. The legislation does not indicate the type of services contemplated. However, the Commissioner considers the services contemplated are similar to those provided in a hotel or motel, such as cleaning, the provision of linen, the provision of meals, and reception and concierge services.

Conclusion on commercial dwelling

41. As discussed above, if the properties are commercial dwellings, then the landlords will not be supplying a property that is to be used for the principal purpose of accommodation in a dwelling by any person, and their supplies of transitional housing accommodation will not be exempt supplies. The supplies will be taxable supplies.
42. The features of each type of establishment are discussed above. If the property the landlord leases to the organisation for use in providing transitional housing services falls into any of those categories, the property will be a commercial dwelling.
43. However, a property will also be a commercial dwelling if it is premises of a similar kind to those referred to. Therefore, it is useful to consider the features that the establishments listed above have in common. Essentially, those features are:
    - the property offers shared accommodation for a number of separate occupants;
    - the rooms are furnished and may contain an en suite and kitchenette, with shared communal areas such as kitchen, bathroom and living areas; and
    - a high level of management and control is exercised over the property, including a reception, security or on-site management.
44. Based on this, the Commissioner considers the following types of properties used to provide transitional housing services in accordance with Transitional Housing Services Agreements that the organisations enter with HUD, will be commercial dwellings:
    - complexes that contain units or separate rooms with private bathrooms, kitchenettes or both (each leased to a single Household), but otherwise have communal kitchen, lounge, and common area facilities;
    - complexes that contain separate rooms (each leased to a single Household), with communal bathroom, kitchen, lounge and common area facilities; and
    - units (leased to a single Household) within an ordinary, commercially operated motel.
45. The above types of properties are ones where there is a high level of management and control over the property.
46. Self-contained houses, units and apartments that are provided to a single Household are not commercial dwellings because these types of properties do not contain the required features.
47. The Commissioner considers that self-contained apartments used to provide transitional housing services are not "serviced apartments" as that term is used in the definition of commercial dwelling. While the organisations involved in transitional housing provide wrap-around support services, those are not the types of services envisaged by the description "serviced apartment".

[4] *Adams v Massey University* (DC Palmerston North TT 43/94, 10 October 1994), *Wigram Accommodation Ltd v Kelly* (DC Christchurch MA153/99, 1 February 2000), *McKenzie v Unilodge Management* (Tenancy Tribunal Auckland TT No. 1239/02, 18 July 2002), *Weidtmann v 139 Property Management Ltd* (Tenancy Tribunal Auckland TT No. 2421/02, 19 December 2002) and *ECC* Southbank.

Other features of a dwelling

48. If a property is not a commercial dwelling, it is necessary to consider whether the use of the property under the Housing Agreements satisfies the other features of a dwelling. As noted above, these other features are that:
    - there are premises, as defined in s 2 of the RTA;
    - a person occupies or it can reasonably be foreseen that a person will occupy the premises as their principal place of residence; and
    - the person has quiet enjoyment, as that term is used in s 38 of the RTA.

Premises

49. The definition of dwelling refers to "premises" as defined in s 2 of the RTA.
50. Section 2 of the RTA defines premises widely as including any means of shelter placed or erected on any land and intended for occupation on that land, including appurtenances (other than facilities).
51. This definition will be satisfied by all properties used for transitional housing.

Used as a principal place of residence

52. The next requirement is that the premises are occupied by the Households as their "principal place of residence".
53. Principal place of residence is defined as a place that a person occupies as their main residence for the period to which the agreement for the supply of accommodation relates (s 2).
54. In determining whether s 14(1)(cb) applies, the person needing to occupy the place as their main residence for the period is the transitional housing tenant.
55. "Residence" is relevantly defined in the *Concise Oxford English Dictionary* as "a person's home". A "main residence" is the person's home at the relevant time. The relevant time is the period of the Housing Agreement (in the context of transitional housing usually a 12-week period).
56. Transitional housing is a temporary form of accommodation. However, this is not relevant to determining whether the property is the tenant's main residence at the time of the Housing Agreement. The question that needs to be considered is whether the Households will use the property as their "main residence" during that time.
57. Eligibility criteria for transitional housing suggests it will be extremely unlikely the Household will have another place that would be considered their home or main residence. If they did have another residence, it would need to be one that is not able to be occupied (for instance it is unsafe), in which case that place could not reasonably be considered to be their "main" residence at that time. On that basis, the Commissioner considers that the property will be the Household's main residence for the period to which their Housing Agreement relates, so is their principal place of residence.

Quiet enjoyment as that term is used in s 38 of the RTA

58. The final requirement in the definition of dwelling is that the person must have quiet enjoyment in relation to the premises, as that term is used in s 38 of the RTA. As with the previous issue, the relevant person here is the transitional housing Household.
59. In summary, s 38 of the RTA provides that the tenant is entitled to quiet enjoyment of the premises without interruption and that the landlord must not cause or permit any interference with the tenant's reasonable peace, comfort or privacy.
60. The RTA does not automatically apply to premises used to provide transitional housing (s 5(1)(y) of the RTA). However, the parties to a Housing Agreement can agree in writing that any or all of the provisions of the RTA will apply (s 8 of the RTA).
61. Organisations may decide to provide the right to quiet enjoyment (as that term is used in s 38 of the RTA) in their Housing Agreements by expressly referring to s 38 of the RTA or including wording that has the same effect as s 38 of the RTA. If there is no specific reference or wording, the Housing Agreements will not be subject to the relevant quiet enjoyment right.
62. This means that, to ensure they have the correct GST treatment, landlords will need to ask organisations whether their Housing Agreements for that property will refer to s 38 of the RTA or otherwise provide the right to quiet enjoyment as that term is used in s 38 of the RTA. The terms of the head-lease with the organisations (including whether the head-lease is a commercial or residential lease) are not relevant. What is relevant are the rights ultimately provided by the organisation to the transitional housing Households under the Housing Agreements.
63. Whether the Housing Agreement provides quiet enjoyment is a matter of law and depends on what is written in the Housing Agreement. The GST classification of the leasing arrangement does not change if the landlord breaches the tenant's quiet enjoyment rights in a particular case.

64. In addition, the Commissioner does not consider the fact that wrap around support services might be provided on the premises means that there cannot have been a right to quiet enjoyment if that right was specifically provided. The RTA authorises the landlord (in the case of the Housing Agreement, the organisation) to enter the premises if that is agreed to by the tenant (s 48 of the RTA). This qualifies the tenant's right to quiet enjoyment under s 38 of the RTA.

Conclusion on "accommodation in a dwelling"

65. In determining whether the supply of a head-lease is an exempt supply, or is subject to GST, a landlord needs to determine whether the organisation will use the property to provide accommodation in a dwelling to the transitional housing Households under Housing Agreements.

66. Properties leased by landlords to organisations that provide transitional housing services will be used to provide "accommodation". The more complicated question is whether each particular property satisfies the definition of a dwelling in the GSTA. This requires the landlord to consider:
    - whether the property is a commercial dwelling; and
    - if not, whether the transitional housing Household's use of the property satisfies the other requirements of the definition of a dwelling.

67. The Commissioner considers that the following types of properties used to provide transitional housing services are commercial dwellings:
    - complexes that contain units or separate rooms with private bathrooms, kitchenettes or both (each leased to a single Household), but otherwise have communal kitchen, lounge and common area facilities;
    - complexes that contain separate rooms (each leased to a single Household), with communal bathroom, kitchen, lounge and common area facilities; and
    - units (leased to a single Household) within an ordinary, commercially operated motel.

68. The above types of properties are ones where there is a high level of management and control over the property.

69. Self-contained houses, units and apartments provided to a single Household will not be commercial dwellings because these types of properties do not contain the required features.

70. If the property is a commercial dwelling, the supply of the head-lease will not be an exempt supply under s 14(1)(cb). Instead, the supply of the head-lease will be subject to GST under s 8(1).

71. If the property is not a commercial dwelling, it is necessary to consider whether the use of the property under the Housing Agreement will satisfy the other features of a dwelling. These other features are that:
    - the properties are premises, as defined in s 2 of the RTA;
    - the person occupies, or it can reasonably be foreseen that the person will occupy, the premises as their principal place of residence; and
    - the person has quiet enjoyment, as that term is used in s 38 of the RTA.

72. The Commissioner considers properties used to provide transitional housing services will be premises that are used as the transitional housing Household's principal place of residence during the period of the Housing Agreement.

73. Whether the Household is provided with quiet enjoyment, as that term is used in s 38 of the RTA depends on the terms of the Housing Agreement. To determine whether the relevant type of quiet enjoyment is being provided under the Housing Agreement, landlords will need to ask the organisation the property is leased to whether their Housing Agreements for that property will refer to s 38 of the RTA or otherwise provide the right to quiet enjoyment as that term is used in s 38 of the RTA.

74. If quiet enjoyment is provided, the supply of the head-lease will be an exempt supply under s 14(1)(cb).

Landlords cannot reduce the value of the supply under s 10(6)

75. Supplies to an individual of domestic goods and services in a commercial dwelling can be accounted for at a reduced value in some situations (s 10(6)).

76. "Domestic goods and services" are defined as the supply of the right to occupy a commercial dwelling including the supply of any cleaning, maintenance and utilities (s 2).

77. Section 10(6) applies only where the supply is provided to an individual, and where there is a commercial dwelling. The term "individual" is not defined in the GSTA but is referred to in other sections with reference to natural persons. Section 10(6) does not look through to what is supplied to the ultimate tenant in the same way as s 14(1)(cb).
78. The supplies the landlord makes under the head-lease are supplied to the organisation. The landlord is not supplying domestic goods and services to the transitional housing Households. Therefore, s 10(6) cannot be applied to the supply of the head-lease.

Examples

Example | Tauira 1 – Apartment complex with shared facilities developed for use in transitional housing

Megan is a housing developer and decides to develop a new apartment complex for the provision of transitional housing. Each apartment will contain one or two bedrooms, an en suite bathroom, a small lounge and kitchenette (with a hot plate, microwave and sink). The wider complex will contain communal spaces including fully equipped kitchens, dining areas, television rooms, lounge rooms and games rooms, and will have 24/7 on-site reception and security staffed by the organisation providing transitional housing services.

Megan enters into a commercial lease with a transitional housing organisation for a four-year period.

The complex is a commercial dwelling as it is similar to a hostel, boardinghouse or motel. There are communal facilities and a high level of management over the property.

GST output tax is chargeable on the rental income received from the transitional housing organisation. Megan is not able to use the reduced rate in s 10(6) as she is supplying the complex to an organisation.

As the complex is being used to make taxable supplies, Megan can claim GST input tax deductions on development and running costs.

Example | Tauira 2 – Apartment complex without shared facilities used for transitional housing

Manu is an investor and owns a small apartment complex that she had been renting to a mix of students and families. Manu decides to rent the apartments to an organisation that provides transitional housing services.

The complex has 10 three-bedroom apartments. Each apartment will be provided to a single Household. The apartments each have a kitchen, bathroom and living area. There are no communal areas. A laundromat is down the street.

Manu checks with the organisation, which confirms that it does not provide the Household with a Housing Agreement that refers to, or adopts the words of, s 38 of the RTA.

Because there is no quiet enjoyment (as that term is used in s 38 of the RTA) provided by the organisation to the Households, Manu's supply of the properties is not the supply of accommodation in a dwelling. This means that the supply will be a taxable supply for GST purposes.

Example | Tauira 3 – Houses used for transitional housing

Maia is a property investor who owns 15 houses throughout the lower North Island. She was struggling to find long-term tenants for some of her larger properties so decided to lease 10 of the properties to a transitional housing organisation for four years for some income stability.

Eight of the properties are self-contained houses the organisation provides to single families. The Housing Agreements for these properties are subject to a right to quiet enjoyment under s 38 of the RTA. The supply of these properties by Maia to the organisation is a supply of property by way of lease that is to be used for the principal purpose of accommodation in a dwelling by a person and is exempt.

The other two properties are 10-bedroom boarding houses. The organisation rents the rooms to individual tenants who share bathrooms and other living areas. The organisation kept one room for a staff member to remain on-site. The two boarding houses are commercial dwellings. Therefore, Maia's supply of a head-lease in relation to these properties is not an exempt supply and is subject to GST.

References

Case References

Adams v Massey University (DC Palmerston North TT 43/94, 10 October 1994)

Case L75 (1989) 11 NZTC 1,435 (TRA)

Case Q46 (1993) 15 NZTC 5,227 (TRA)

ECC Southbank Pty Ltd as Trustee for Nest Southbank Unit Trust v FCT 2012 ATC 20-336 (FCA)

McKenzie v Unilodge Management (Tenancy Tribunal Auckland TT No. 1239/02, 18 July 2002)

Weidtmann v 139 Property Management Ltd (Tenancy Tribunal Auckland TT No. 2421/02, 19 December 2002)

Wigram Accommodation Ltd v Kelly (DC Christchurch MA153/99, 1 February 2000)

Legislative References

Goods and Services Tax Act 1985, ss 2 (definitions of "commercial dwelling", "domestic goods and services", "dwelling" and "principal place of residence"), 8(1), 10(6), 14(1)(c) and 14(1)(cb)

Residential Tenancies Act 1986, ss 2 (definition of "premises"), 5(1)(y), 8, 38 and 48.

Other

Concise Oxford English Dictionary (12th ed, Oxford University Press, New York (2011))

About this document | Mō tēnei tuhinga

Public rulings are issued by the Tax Counsel Office. Public rulings set out the Commissioner's view on how tax laws apply to a specific set of facts – called an arrangement. Taxpayers whose circumstances match the arrangement described in a public ruling may apply the ruling but are not obliged to do so. Public rulings are binding on the Commissioner. This means that if you are entitled to apply a public ruling and you have calculated your tax liability in accordance with the ruling, the Commissioner must accept that assessment. A public ruling applies only to the taxation laws and arrangement set out in the ruling, and only for the period specified in the ruling. It is important to note that a general similarity between a taxpayer's circumstances and the arrangement covered by a public ruling will not necessarily lead to the same tax result.

Appendix – legislation

79. The relevant provisions in the GSTA are as follows:

2 Interpretation

…

commercial dwelling—

(a) means—

(i) a hotel, motel, homestay, farmstay, bed and breakfast establishment, inn, hostel, or boardinghouse:

(ii) a serviced apartment managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986:

(iii) a convalescent home, nursing home, rest home, or hospice:

(iv) a camping ground:

(v) premises of a similar kind to those referred to in subparagraphs (i) to (iv); and

(b) excludes—

(i) a hospital except to the extent to which the hospital is a residential establishment:

(ii) a dwelling referred to in paragraph (b)(iii) of the definition of **dwelling**

…

domestic goods and services means the right to occupy the whole or part of any commercial dwelling, including, where it is provided as part of the right to so occupy, the supply of—

(a) cleaning and maintenance:

(b) electricity, gas, air-conditioning, or heating:

(c) telephone, television, radio, or any other similar chattel

…

dwelling, for a person,—

(a) means premises, as defined in section 2 of the Residential Tenancies Act 1986,—

(i) that the person occupies, or that it can reasonably be foreseen that the person will occupy, as their principal place of residence; and

(ii) in relation to which the person has quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986; and

(b) includes—

(i) accommodation provided to a person who is occupying the same premises, or part of the same premises, as the supplier of the accommodation and who meets the requirements of paragraph (a)(i):

(ii) any appurtenances belonging to or used with the premises:

(iii) despite paragraph (a)(ii), a residential unit in a retirement village or rest home when the consideration paid or payable for the supply of accommodation in the unit is for the right to occupy the unit; and

(c) excludes a commercial dwelling

…

principal place of residence, in the definition of dwelling means a place that a person occupies as their main residence for the period to which the agreement for the supply of accommodation relates

…

8 Imposition of goods and services tax on supply

(1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15% on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after 1 October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

…

10 Value of supply of goods and services

…

(6) Where and to the extent that any supply of goods and services consists of the supply, to any individual, of domestic goods and services in a commercial dwelling, the value attributable to that part of that supply of domestic goods and services that is for a period in excess of 4 weeks shall be deemed to be reduced to an amount equal to 60% of the amount that would, if that part of that supply were chargeable with tax at the rate of 9%, be the value of that part of that supply of domestic goods and services:

provided that to the extent that any supply is a supply of domestic goods and services, and where that commercial dwelling is a residential establishment, and where the supplier and the recipient have agreed that that supply shall be for a period of or in excess of 4 weeks, or for a number of periods which in the aggregate will exceed 4 weeks, the value attributable to that supply of domestic goods and services shall, from the commencement of that supply, be deemed to be reduced to an amount equal to 60% of the amount that would, if that supply were chargeable with tax at the rate of 9%, be the value of that supply of domestic goods and services.

…

14 Exempt supplies

(1) The following supplies of goods and services shall be exempt from tax:

…

(c) the supply of accommodation in any dwelling by way of—

(i) hire; or

(ii) a service occupancy agreement; or

(iii) a licence to occupy:

…

(cb) the supply of property by way of lease that is to be used for the principal purpose of accommodation in a dwelling by any person, other than a registered person in the course or furtherance of a taxable activity:

…

80. The relevant provisions in the RTA are as follows:

2 Interpretation

…

premises includes (other than in relation to a boarding house tenancy, in which case the definition in section 66B applies)—

(a) any part of any premises; and

(b) any land and appurtenances, other than facilities; and

(c) any mobile home, caravan, or other means of shelter placed or erected upon any land and intended for occupation on that land

…

5 Act excluded in certain cases

(1) This Act shall not apply in the following cases:

…

(y) if the premises are used to provide emergency or transitional accommodation and—

(i) the provision of the accommodation is funded wholly or partly by—

(A) emergency housing assistance paid to or for the credit of a person under the Special Needs Grants Programme; or

(B) any other payment made by a government department for the provision of emergency or transitional accommodation to people in need of housing; or

(ii) the provider of the accommodation is a person, or class of person, prescribed by regulations for the purposes of this paragraph.

8 Parties to excluded tenancies may agree that Act shall apply

(1) Nothing in any of sections 5 to 7 shall prevent the parties to a tenancy that would otherwise be excluded from this Act by virtue of any of the provisions of those sections, being a tenancy of any premises used or intended to be used for residential premises, from agreeing in writing that all or any of the provisions of this Act shall apply in respect of the tenancy, either without modification or with such modifications as they may so agree.

(2) Without limiting subsection (1), any such agreement may confer upon the Tribunal, in respect of the tenancy, all or any of the jurisdiction conferred on the Tribunal by this Act in respect of tenancies to which this Act applies.

38 Quiet enjoyment

(1) The tenant shall be entitled to have quiet enjoyment of the premises without interruption by the landlord or any person claiming by, through, or under the landlord or having superior title to that of the landlord.

(2) The landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant.

(3) Contravention of subsection (2) in circumstances that amount to harassment of the tenant is hereby declared to be an unlawful act.

(3A) Without limiting the generality of subsection (3), the landlord commits an unlawful act under that subsection if the landlord enters the premises purportedly under section 48(2B) without any reasonable cause to believe that the tenant has abandoned the premises.

(4) In this section premises includes facilities.

48 Landlord's right of entry

…

(2) The landlord may enter the premises—

…

(da) for the purpose of providing services agreed to under the tenancy agreement, but only if the entry complies with any conditions specified in the tenancy agreement; …

BINDING RULINGS

LEGISLATION AND DETERMINATIONS

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

NAMV 2024: National Average Market Values of Specified Livestock Determination 2024

Issued: 24 May 2024

Note to this determination

This note does not form part of the national average market values of specified livestock determination 2024 (the determination) but is produced to aid Inland Revenue staff, taxpayers and their agents in their understanding of how the values contained in the determination are arrived at and how they should be used.

Section EC 15 of the Income Tax Act 2007 (the Act) requires that the Commissioner of Inland Revenue (the Commissioner) make a determination declaring the national average market values (NAMV) for an income year for each class of specified livestock set out in Schedule 17 of the Act. Historically, this determination has been published in May each year.

NAMVs are declared for an income year and used by taxpayers, that are in the business of livestock farming, to value any specified livestock that they have on hand where the taxpayer has elected to use the herd scheme to value that livestock in the income year.

As the name of this determination suggests, NAMVs provide the **national average** market value for the specified livestock classes. They may therefore not always reflect the market value of the livestock of a particular taxpayer, or even of a particular region. Because of this, the values are not intended to be used for any other purpose than that for which they are produced; valuing livestock of taxpayers who have elected to value their livestock under the herd scheme in the income year for which the determination relates.

To ascertain the national average **market value** of the various classes of livestock the Commissioner contracts with highly experienced livestock valuers situated throughout the country.[1] Each valuer is asked to provide the market value of the various specified livestock classes located in a specified region. There is generally more than one valuer contracted for each region. The market valuations required are for "good quality on-farm animals (capital stock) on 30th April".

From these values the CIR then calculates the **national average market value** for each livestock class. In the case of the sheep, beef, dairy cattle and deer (red, wapiti and elk) classes a weighted average is used against the values produced by each valuer. weighted average is calculated based on total livestock numbers for a type of livestock in a particular region compared to the national herd numbers for that type of livestock.[2] Because of their comparatively low numbers, a straight average is used for the remaining livestock types (except "other deer"). The value of "other deer" is taken as the mid-point between the "trophy market" values and the "meat market" values.

National Average Market Values of Specified Livestock Determination 2024

This determination may be cited as "The National Average Market Values of Specified Livestock Determination, 2024".

This determination is made in terms of section EC 15 of the Income Tax Act 2007 and shall apply to specified livestock on hand at the end of the 2023-2024 income year.

For the purposes of section EC 15 of the Income Tax Act 2007 the national average market values of specified livestock, for the 2023-2024 income year, are as set out in the following table.

[1] Thirty-eight valuations were obtained for the 2024 determination.

[2] Numbers are based on data collated by Statistics New Zealand.

National Average Market Values of Specified Livestock

Type of Livestock	Classes of Livestock	Average Market Value per Head $
Sheep	Ewe hoggets	101.00
	Ram and wether hoggets	101.00
	Two-tooth ewes	159.00
	Mixed-age ewes (rising three-year and four-year old ewes)	134.00
	Rising five-year and older ewes	106.00
	Mixed-age wethers	79.00
	Breeding rams	309.00
Beef cattle	*Beef breeds and beef crosses:*	
	Rising one-year heifers	671.00
	Rising two-year heifers	1,145.00
	Mixed-age cows	1,304.00
	Rising one-year steers and bulls	855.00
	Rising two-year steers and bulls	1,292.00
	Rising three-year and older steers and bulls	1,633.00
	Breeding bulls	2,878.00
Dairy cattle	*Friesian and related breeds, Jersey and other dairy breeds:*	
	Rising one-year heifers	676.00
	Rising two-year heifers	1,433.00
	Mixed-age cows	1,609.00
	Rising one-year steers and bulls	585.00
	Rising two-year steers and bulls	1,017.00
	Rising three-year and older steers and bulls	1,321.00
	Breeding bulls	1,813.00
Deer	*Red deer, wapiti, elk, and related crossbreeds:*	
	Rising one-year hinds	282.00
	Rising two-year hinds	454.00
	Mixed-age hinds	510.00
	Rising one-year stags	302.00
	Rising two-year and older stags (non-breeding)	697.00
	Breeding stags	2,588.00
	Other breeds:	
	Rising one-year hinds	226.00
	Rising two-year hinds	295.00
	Mixed-age hinds	325.00
	Rising one-year stags	228.00
	Rising two-year and older stags (non-breeding)	416.00
	Breeding stags	1,115.00
Goats	*Angora and angora crosses (mohair producing):*	
	Rising one-year does	153.00
	Mixed-age does	213.00
	Rising one-year bucks (non-breeding)/wethers	77.00
	Bucks (non-breeding)/wethers over one year	84.00
	Breeding bucks	418.00

	Other fibre and meat producing goats (Cashmere or Cashgora producing):	
	Rising one-year does	112.00
	Mixed-age does	160.00
	Rising one-year bucks (non-breeding)/wethers	69.00
	Bucks (non-breeding)/wethers over one year	77.00
	Breeding bucks	322.00
	Milking (dairy) goats:	
	Rising one-year does	162.00
	Does over one year	233.00
	Breeding bucks	417.00
	Other dairy goats (culls)	73.00
Pigs	Breeding sows less than one year of age	266.00
	Breeding sows over one year	315.00
	Breeding boars	371.00
	Weaners less than 10 weeks of age (excluding sucklings)	111.00
	Growing pigs 10 to 17 weeks of age (porkers and baconers)	180.00
	Growing pigs over 17 weeks of age (baconers)	252.00

This determination was signed by me on the 24th day of May 2024.

Matthew Evans
Technical Lead, Technical Standards, Legal Services
Inland Revenue

References

Legislative References

Income Tax Act 2007: s EC 15, Schedule 17

OS 19/04 (KM2024) Kilometre rates for the business use of vehicles for the 2024 income year

In accordance with s DE 12(4) the Commissioner is, from time-to-time, required to set and publish kilometre rates for business customers. This is done at least once per year and the rates are set retrospectively to reflect vehicle operating costs likely incurred for the previous income year (i.e. in this item, the year ended 31 March 2024). Alternatively, business customers may choose to keep records of actual vehicle expenditure to calculate expenditure claims for the business use of a motor vehicle.

It is accepted that these rates may also be used by employers as a reasonable estimate for reimbursement of expenditure incurred by employees for the use of a private motor vehicle for business purposes in a current income year (1 April onwards), as provided in s CW 17(3)(a). However, employers are reminded that these rates are set retrospectively and may not reflect actual day-to-day motor vehicle running costs.

More information is available on the Inland Revenue website www.ird.govt.nz/ (search keywords "claiming vehicle expenses").

The rates set out below apply for the 2023/2024 income year for business motor vehicle expenditure claims. The Tier one rates reflect an overall increase in vehicle running costs largely due to fuel costs, insurance and interest rates.

The Tier two rate is for running costs only. Use the Tier two rate for the business portion of any travel over 14,000 kms in a year.

The table of rates for the 2024 income year:

Vehicle Type	Tier one rate	Tier two rate
Petrol or Diesel	$1.04	35 cents
Petrol Hybrid	$1.04	21 cents
Electric	$1.04	12 cents

Operational Statements OS 19/04A: *Commissioner's statement on using a kilometre rate for business running of a motor vehicle – deductions* and *OS 19/04B: Commissioner's statement on using a kilometre rate for employee reimbursement of a motor vehicle* provide further information on the use of the kilometre rates.

2024 Consumers Price Index Adjustment to standard-cost amounts for household services (childcare, boarding services, or short-stay accommodation)

In accordance with Section 91AA of the Tax Administration Act 1994, the Commissioner advises adjustments have been made to the standard-cost amounts for the 2024 income year (1 April 2023 to 31 March 2024), as follows:

Determination DET 09/02 (CPI 2024) Childcare household service

- Hourly standard-cost (per child) $4.45
- Annual fixed administration and record keeping standard-cost $435.00

Determination DET 19/01 (CPI 2024) Household boarding service providers

- Weekly standard-cost (per boarder) $231.00

Determination DET 19/02 (CPI 2024) Short-stay accommodation

- daily standard-cost (for each guest)
  - Owned dwelling $61.00
  - Rented dwelling $55.00

These amounts reflect the annual movement of the Consumers Price Index for the twelve months to March 2024, which showed an increase of 4.0%.

2024 Adjustment to the Square Metre Rate amount

In accordance with Section DB 18AA of the Income Tax Act 2007, the Commissioner advises that the square metre rate for the 2024 income year (1 April 2023 to 31 March 2024) is set at $53.10. The amount reflects the June 2019 Household Economic Survey utility costs information sourced from Statistics New Zealand (adjusted for inflation) and the annual movement of the Consumers Price Index for the twelve months to March 2024, which showed an increase of 4.0%.

Operational Statement 19/03 provides further information on the use of the square metre rate.

DET 24/02: GST on accommodation supplied through electronic marketplaces – opt-out agreement criteria

Issued: 21 May 2024

Application

This determination sets criteria for when a person who supplies accommodation through an electronic marketplace (an underlying supplier) can enter into an opt-out agreement with the operator of an electronic marketplace. The determination is made under section 60C(2BC) of the Goods and Services Tax Act 1985.

The determination applies to hostels and motels that were registered for GST on or before 1 April 2024 and exceed the GST registration threshold (making supplies of more than $60,000 for the last 12-months or expecting to make supplies of more than $60,000 for the next 12-months), where they make supplies both through an electronic marketplace and directly to recipients of accommodation services. It applies for hostels and motels that would otherwise be unable to opt-out of the electronic marketplace rules as they do not satisfy the statutory opt-out thresholds (i.e., because they make taxable supplies of $500,000 or less in a 12-month period and do not have 2,000 nights of accommodation listed as available on one electronic marketplace for a 12-month period).

The determination applies on and from 21 May 2024 for taxable periods starting on or after 1 April 2024 and ending on or before 31 March 2025.

Determination

Pursuant to section 60C(2BC) of the Goods and Services Tax Act 1985 (the Act), the Commissioner of Inland Revenue has determined that a person who is an underlying supplier may enter into an opt-out agreement with an operator of an electronic marketplace, if:

- (a) they were registered under the Act on or before 1 April 2024 and their registration has not subsequently been cancelled under section 52 of the Act; and
- (b) they are required to be registered as a result of section 51(1) of the Act; and
- (c) they do not meet the requirements of section 60C(2BE) or section 60C(2BF) of the Act; and
- (d) they supply accommodation services referred to in section 8C(2)(a) of the Act in a hostel or motel; and
- (e) the accommodation includes both:
  - (i) accommodation that is listed as available on 1 or more electronic marketplace; and
  - (ii) accommodation that can be booked directly with the underlying supplier.

Interpretation

In this determination words and expressions have the same meaning as in the Goods and Services Tax Act 1985.

This determination was signed by me on 21 May 2024.

Matthew Evans
Technical Lead, Technical Standards, Legal Services
Inland Revenue

Commentary on DET 24/02

This commentary does not form part of the determination. It is intended to help in the understanding and application of the determination.

All section references are to the Goods and Services Tax Act 1985 (the Act).

Background

The Act includes rules relating to the application of goods and services tax (GST) to listed services supplied through an electronic marketplace (the marketplace rules) which apply from 1 April 2024. Listed services include the supply of taxable accommodation services in New Zealand (section 8C(2)(a)). Taxable accommodation services include short-term rentals and visitor accommodation that is not an exempt supply under section 14(1)(c).

Under the marketplace rules, when taxable accommodation services are supplied through an electronic marketplace by a person (an underlying supplier) to another person (the recipient of the services), the operator of the electronic marketplace is usually treated as making the supply to the recipient of the services and will be responsible for collecting and returning GST on these supplies. This means the underlying supplier will not be responsible for collecting and returning GST and will instead include sales they make through the electronic marketplace in their GST returns as zero-rated supplies.

For more information on the marketplace rules, see **GST on accommodation and transportation services supplied through online marketplaces** (special report, Inland Revenue, updated 2 April 2024).

Ability to opt-out of the marketplace rules

In certain circumstances, underlying suppliers can opt-out of the marketplace rules, which means they will remain responsible for their own GST obligations. Underlying suppliers that opt-out of the marketplace rules would include supplies of listed services made through an electronic marketplace in their GST returns as standard-rated supplies.

Under the Act an underlying supplier can opt-out of the marketplace rules where:

- The underlying supplier (or a group of companies they are part of) has 2,000 nights of accommodation available on one electronic marketplace in a 12-month period or a reasonable expectation they can meet this threshold for any 12-month period (section 60C(2BE)). An underlying supplier that meets this criterion must enter into an opt-out agreement with the operator of the electronic marketplace to opt-out of the marketplace rules.
- The underlying supplier is required to maintain a monthly or two-monthly taxable period (i.e., they make taxable supplies of more than $500,000 in a 12-month period) and is not a natural person (section 60C(2BF)). To opt-out of the marketplace rules, an underlying supplier that meets this criterion must notify the operator of the electronic marketplace that they will continue to remain responsible for their own GST obligations.

The Commissioner of Inland Revenue (the Commissioner) also has the power, under section 60C(2BC), to make a determination setting out circumstances and criteria a person must meet to enter into an opt-out agreement. That is, the Commissioner can make a determination that would enable certain underlying suppliers that do not meet the statutory thresholds in section 60C(2BE) or section 60C(2BF) to opt-out of the marketplace rules.

In making a determination under section 60C(2BC), the Commissioner must have regard to the following factors set out in section 60C(2BD)):

- the compliance costs that would arise for underlying suppliers in making changes to their accounting systems and practices; and
- the size, scale, and nature of the services and activities undertaken by underlying suppliers.

DET 24/02

The determination enables a person that is an underlying supplier to enter into an opt-out agreement with an operator of an electronic marketplace if:

- they were registered for GST on or before 1 April 2024 and their registration has not subsequently been cancelled;
- they exceed the $60,000 GST registration threshold in section 51(1) (i.e., they are required to be registered for GST because they made supplies of more than $60,000 for the last 12-months, or they expect to make supplies of more than $60,000 for the next 12-months);
- they do not satisfy the statutory opt-out thresholds in section 60C(2BE) or section 60C(2BF) (i.e., they do not meet the 2,000 nights or $500,000 of taxable supplies thresholds);
- they supply taxable accommodation services in a hostel or a motel ("hostel" and "motel" are not defined in the Act so have their ordinary meanings); and
- the accommodation includes both accommodation that can be booked through an electronic marketplace and accommodation that can be booked directly with the underlying supplier (this means an underlying supplier that only makes supplies through an electronic marketplace will not be eligible to enter into an opt-out agreement in reliance on the determination).

In addition to satisfying the criteria in the determination set out above, for an underlying supplier to be able to opt-out of the marketplace rules and remain responsible for their own GST obligations they must also meet other requirements in section 60C(2BB). These requirements are:

- The documentation provided to the recipient of the services identifies the supply as being made by the underlying supplier and not the operator of the electronic marketplace (section 60C(2BB)(b)).
- The underlying supplier and the operator of the electronic marketplace have agreed, recording their agreement in a document, that the underlying supplier is liable for the payment of GST in relation to the supplies made through the electronic marketplace, and will continue to remain responsible for their tax obligations under the Act (section 60C(2BB)(c)). This includes providing the recipient of the services with taxable supply information, if required, and providing GST returns and paying GST to Inland Revenue.

If an underlying supplier stops meeting the criteria in DET 24/02

If an underlying supplier stops meeting the criteria set out in the determination the Commissioner expects the underlying supplier to withdraw their agreement with the electronic marketplace operator.

Relevant factors when making a determination

In making the determination the Commissioner has had regard to the factors in section 60C(2BD).

The Commissioner considers that, compared to other providers of taxable accommodation that are unable to opt-out of the marketplace rules, the size, scale, and nature of the services and activities undertaken by hostels and motels that satisfy the determination criteria have a sufficient degree of commerciality for it to be appropriate for them to continue to be responsible for their own GST obligations.

The Commissioner also recognises that many hostels and motels will meet the statutory thresholds for opting out of the marketplace rules in section 60C(2BE) or section 60C(2BF).

The determination enables those hostels and motels who do not meet the statutory thresholds (for example, because they close during certain seasons of the year) to continue with existing accounting systems and practices they had in place before the introduction of the marketplace rules on 1 April 2024 for a 12-month period.

The Commissioner accepts that in their current situation, if they were unable to opt-out of the marketplace rules, underlying suppliers described in the determination would face increased compliance costs associated with making changes to their existing accounting systems and practices. For example, because they would need mechanisms in place to ensure the correct GST treatment of both supplies made through electronic marketplaces (zero-rated) and supplies made directly to recipients (standard-rated). Improvements to accounting systems and practices may reduce the impact of compliance costs in future years. The Commissioner will consider this factor when reviewing the determination.

Application

The determination has been issued for a 12-month period (for taxable periods starting on or after 1 April 2024 and ending on or before 31 March 2025) and will be reviewed before its expiry.

S64: Spreading method to be used for some electricity price contracts for difference

Issued: 23 May 2024

This determination relates to the financial arrangement spreading method to be used by a company (Company A) to return income and expenditure in relation to certain off-market contracts for difference (CFDs) in respect of the wholesale price of electricity.

Determination

This determination may be cited as *Special Determination S64: Spreading method to be used for some electricity price contracts for difference.*

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

1. This determination relates to the financial arrangement spreading method to be used by a company (Company A) to return income and expenditure in relation to certain off-market contracts for difference (CFDs) in respect of the wholesale price of electricity.
2. Company A entered into an off-market CFD (CFD 1) to manage its electricity pricing risk as a result of the sale of its retail electricity business. The intention behind CFD 1 was to give Company A a level of price certainty over its future electricity generation (ie, a hedge against future fluctuations in the spot price of electricity) as a result of becoming a generator without a customer base.
3. Under CFD 1 (which has a 10-year term), Company A pays the counterparty (Company B) a floating price for electricity (based on 30-minute intervals) and Company B pays Company A a fixed price for electricity (all electricity is submitted to the wholesale market and receives spot prices, which are set half-hourly).
4. This determination also applies to other CFDs that Company A enters into in future that are off-market and have a term that exceeds the electricity price path data that is sourced from the Australian Securities Exchange (ASX) New Zealand Electricity Futures market, or that are off-market and have a non-zero day 1 fair market value and an absolute value greater than NZ$10 million. It is not possible to use the expected value spreading method in s EW 15F for CFD 1 and other CFDs that are in scope of this determination due to the long terms of the instruments, the lack of pricing data and non-zero day 1 values.
5. Company A has adopted International Financial Reporting Standards (IFRS) to prepare its financial statements and to report for financial arrangements.
6. CFD 1 is the subject of private ruling BR Prv 24/32 issued on 23 May 2024 and is fully described in that ruling.

2. Reference

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

3. Scope of determination

1. This determination applies to Company A in respect of some of the off-market CFDs it enters into in relation to electricity pricing. Specifically, it applies to Company A in relation to CFD 1, entered into on 1 May 2022. It is not possible to use the expected value spreading method for CFD 1, and for other future CFDs described below as being in scope of this determination, due to the long terms of the instruments, the lack of pricing data and non-zero day 1 values.
2. CFD 1 was entered into at the time Company A sold its retail electricity business. It was entered into "off-market" – that is, on day 1, the fair value of CFD 1 to Company A was less than zero. To calculate the initial fair value of CFD 1, Company A compared the agreed electricity price with the electricity forward price path. This data was sourced from the ASX New Zealand Electricity Futures Contracts. The ASX data generally only extends for 3 years. After this point, data was sourced from Energy Link, an electricity consulting firm.
3. There are 960 transactions in total between the parties under CFD 1, with 24 transactions for each of the 40 calendar quarters set out in the terms. The transactions are to be cash settled in accordance with the Master Agreement between Company A and Company B. The prices are fixed for the first 12 months. Following that, prices increase in line with the Consumer Price Index.

4. For the first 5 years, the fixed rate paid by Company B will be set against a historical baseload price (which can be adjusted for location / profile). This fixed rate was set at an off-market rate (ie, set for the first 5 years at a lower average baseload price than the market price of electricity in the spot or forward market at the time CFD 1 was entered into). At the end of the first 5-year period, the rate will be reset closer to the market rate, using an average settlement price (adjusted for location / profile factors) and therefore it is expected that the future fixed rates will not impact the initial day 1 value.
5. This determination also applies to Company A in relation to off-market CFDs with terms that are the same as or similar to CFD 1 and:
   a) have a term that exceeds the electricity forward price path data that is sourced from the ASX New Zealand Electricity Futures market; or
   b) have a non-zero day 1 fair market value, and the absolute value is greater than $10 million.
6. Under IFRS 9, eligible CFDs are designated as hedging instruments. This means the fair value is measured at each balance date and recorded in the balance sheet, with the movement in fair value recorded through the cashflow hedge reserve in equity (for the effective portion of the hedge) and the balance recorded through the income statement (for the ineffective portion). The total fair value movement for CFDs ineligible for hedge accounting is recorded in the income statement.
7. For both CFD 1 and other CFDs entered into by the Company "off-market", the non-zero day 1 fair value is calculated by reference to the expected cashflows over the term of the CFD with regard to the electricity forward price path and applying a cost of funds discount factor. Where there is a difference between the contract price and day 1 fair value, IFRS 9 requires the deferral of the difference. This is achieved by calculating a "calibrated CFD" with a zero day 1 value by using an adjustment factor to adjust the agreed prices uniformly.
8. This determination does not apply to the counterparty to any of the above CFDs.
9. This determination is made subject to the continued application of private ruling BR Prv 24/32 (including any ruling issued to replace that ruling, provided that any changes to that ruling do not affect the application of this determination).
10. This determination is also made subject to the following conditions:
    - The IFRS accounting treatment of Company A's off-market CFDs does not materially alter.
    - Company A will continue to treat its on-market CFDs as subject to the modified fair value method.

4. Principle

1. The CFD is a financial arrangement under s EW 3 and is not an excepted financial arrangement under s EW 5.
2. Under s EW 15C(1), a person who uses IFRS to prepare financial statements and to report for financial arrangements must use one of four methods for the financial arrangement, including a determination alternative under s EW 15E. Under s EW 15E(2)(d), the Commissioner may determine the spreading method to be applied.
3. Under s EW 29, Company A is required to calculate a base price adjustment (BPA) in the income year that the CFD matures or is terminated. The BPA will take into account all consideration received by Company A and all amounts paid by Company A under the CFD.
4. This determination specifies the spreading method that must be applied by Company A to allocate income and expenditure in respect of CFDs that are within scope of this determination.

5. Interpretation

In this determination, all legislative references are to the Income Tax Act 2007, unless otherwise stated.

6. Method

1. Income or expenditure for an income year from the CFD is the total of:
   a) the amount calculated in accordance with [2] below; and
   b) the amount described at [3] below.
2. The day 1 fair value calculated by reference to the expected cashflows over the term of the CFD or other term (pursuant to IFRS 9) is adjusted by comparing the payments expected under the CFD with the payments that would be expected under the calibrated CFD and discounting to present value to spread the day 1 fair value over either the term of the CFD or the term to which the day 1 fair value amount relates.
3. At the end of each income year, any amounts that arise due to differences between the calibrated CFD prices and actual electricity prices in the income year as actual payments are made between Company A and the CFD counterparty.

4. IFRS 9 also requires remeasurement of the calibrated CFD at each balance date based on the latest forward electricity prices. Any gains or losses resulting from remeasurement of the calibrated CFD at each balance date based on the latest forward electricity prices under IFRS 9 are not allocated as income or expenditure in the relevant income year.

7. Example

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

The figures and values used in this example are indicative only and cannot be relied on as an indication of the expected cashflows under a CFD.

Example

Company A and Customer have agreed to enter into a CFD on the following terms:

- term of CFD: 5 years;
- annual quantum of electricity to be supplied: 100 kWh (20 kWh per year);
- fixed price per kWh of electricity: $1; and
- agreed price to enter into the CFD: $0.

To calculate the initial fair value of this CFD, the agreed electricity price (of $1 per kWh) is compared with an electricity forward price path.

The calculated day 1 fair value of the CFD is a loss of $45 (because the electricity price path expects the average price of electricity to exceed $1 per kWh). Pursuant to IFRS 9, a calibrated CFD with prices increased by an adjustment factor of 1.7 results in a zero day 1 value. By the end of year 5, the CFD has matured and has a fair value of 0.

The expected cashflows under the “calibrated CFD” are compared with the expected cashflows under the CFD and then discounted to present value.

These amounts are then allocated to accounting periods to achieve the expected spread of the day 1 negative fair value of $45 as in row 3 of the table below.

From the beginning of year 1 (when the CFD was entered into) until the end of year 1, Company A was required to pay Customer $25 based on the electricity spot price over that period (ie, $1.25 per kWh). Over the same period, Customer was required to pay Company A $20 based on the agreed fixed price – a net loss of $5 (refer year 1, rows 1 and 2 of the table).

This effectively comprises the deferred expected loss for year 1 of $15 as calculated on day 1, offset by favourable unexpected differences in the electricity spot price, which reduced this loss by $10 for the year (refer year 1, rows 4 and 5 of the table).

At the end of year 1, IFRS 9 also requires remeasurement of the fair value of the “calibrated CFD” based on the forward electricity prices at balance date. This resulted in a positive fair value of $8 (refer year 1, row 6 of the table). This gain was split between the income statement and the cashflow hedge reserve based on the hedge effectiveness as follows:

- income statement: $4 gain; and
- cashflow hedge reserve: $4 gain.

None of the gain is included as income under the spreading method.

The table below illustrates how the spreading method applies for the remaining term of the CFD and the amounts Company A will have to allocate as income or expenditure over the term of the CFD:

		Year 1	Year 2	Year 3	Year 4	Year 5
1.	Payment by Company A under CFD	$25	$18	$15	$30	$25
2.	Payment by counterparty under CFD	$20	$20	$20	$20	$20
3.	*Net amount*	*($5)*	*$2*	*$5*	*($10)*	*($5)*
4.	Day 1 fair value amount spread	($15)	($12)	($8)	($6)	($4)
5.	Difference between calibrated CFD price and actual electricity price	$10	$14	$13	($4)	($1)
6.	Gain or loss from remeasurement at balance date	$8	($6)	$2	$4	$0
	Income/(expenditure)	**($5)**	**$2**	**$5**	**($10)**	**($5)**

This Determination is signed by me on the 23rd day of May 2024.

Howard Davis
Group Leader

About this document

Special Financial Arrangements Determinations are issued by the Tax Counsel Office. These Determinations set out how the Commissioner will apply the financial arrangements rules to a particular financial arrangement. These determinations apply only to the particular financial arrangements and taxpayers to which they relate and will often be published in anonymous form. Special Financial Arrangements Determinations are binding on the Commissioner. This means that if the parties to the financial arrangement have calculated their tax liabilities in accordance with the determination, the Commissioner must accept that assessment. A Special Financial Arrangement Determination applies only to the taxation laws and the particular financial arrangement set out in the determination. It is important to note that a general similarity to a financial arrangement covered by a Special Financial Arrangement Determination will not necessarily lead to the same tax result.

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 24/01: Exemption from electronic filing

Issued: 06 June 2024

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.

REPLACES

- **OS 19/01**: Exemption from electronic filing – the operational position remains unchanged from OS 19/01, but legislative references have been updated.

Introduction

All legislative references in this Statement are to the Tax Administration Act 1994, unless specified otherwise.

This Statement replaces OS 19/01. The operational position is unchanged but legislative references and the format of the Statement has been updated. This Statement sets out the criteria for a person to be granted an exemption from the requirement to file returns/information electronically in relation to:

- an employer who is included in the online group of employers;
- a GST registered person who exceeds the statutory threshold for filing returns electronically;
- a person who makes a payment of investment income.

Application of the statement

1. This Operational Statement applies to the exemptions from electronic filing that the Commissioner may grant under sections 23G, 25P and 36BD(3). It does not apply to requests for variations from the requirement of the Act under sections 23Q and 25R. If a person has concerns with complying with the legislation outside the matters covered by this Statement, they should contact Inland Revenue immediately to discuss their situation.
2. The Taxation (Annual Rates for 2017-2018, Employment and Investment Income, and Remedial Matters) Act 2018 contained, amongst other measures, changes to improve the administration of the PAYE rules and to improve the collection of investment income information and the provision of GST information.
3. Employers that are included in the online group of employers are required to supply their employment income information electronically to Inland Revenue. An employer is in the online group if their gross amounts of tax payable for the preceding tax year exceeds $50,000 or the amount set by Order in Council.
4. Payers of investment income are required to supply their investment income information electronically.
5. Currently there is no threshold set for GST registered persons to be required to file electronically. Thresholds are set and amended by Order in Council and may be amended at any time.
6. An exemption from the requirement to file/supply information electronically will be available for those who are unable to comply due to the lack, or inadequacy, of digital services.

Legislation

The relevant provisions of the Tax Administration Act 1994 are:

23G Exemption for certain employers in online group

(1) The Commissioner may exempt an employer in the online group from the online group requirements if it is reasonable in the circumstances, taking into account-

(a) the nature and availability of digital services to the employer, including the reliability of those services for the purposes of the employer; and

(b) the capability of the employer relating to the use of computers; and

(c) the costs that the employer would incur in complying with the requirements if those costs would be unreasonable in the circumstances.

(2) The Commissioner must provide a statement of reasons for the exemption.

(3) Subject to subsection (4), an exemption under this section remains valid until the Commissioner notifies the employer that the exemption is to be cancelled. The exemption expires on the date that is 6 months after that given in the Commissioner's notice.

(4) In making an exemption under this section, the Commissioner may set a time limit on the exemption, stating a start date and an end date, as applicable, for the exemption and the reason for setting the limit.

25P Non-electronic filing of investment income information

(1) Despite sections 25F to 25N, the Commissioner may exempt a payer from the requirement to deliver their investment income information in electronic form and by means of an electronic communication. The Commissioner must provide a statement of reasons for the exemption.

(2) In determining whether to exempt a payer under subsection (1), the Commissioner must have regard to—

(a) the nature and availability of digital services to the payer, including the reliability of those services for the purposes of the payer; and

(b) the capability of the payer relating to the use of computers; and

(c) the costs that the payer would incur in complying with the requirements if those costs would be unreasonable in the circumstances.

(3) Subject to subsection (4), an exemption under this section remains valid until the Commissioner notifies the payer that the exemption is to be cancelled. The exemption expires on the date that is 6 months after that given in the Commissioner's notice.

(4) In making an exemption under this section, the Commissioner may set a time limit on the exemption, stating a start date and an end date, as applicable, for the exemption and the reason for setting the limit.

36BD Electronic filing requirements for registered persons

(1) The Commissioner must prescribe 1 or more electronic forms or means of electronic communication that-

(d) a registered person may use to file a return required under the Goods and Services Tax Act 1985; or

(e) a registered person whose taxable supplies exceed the threshold set out in subsection (2) must use to file a return under the Act.

(2) The Governor-General may, on the recommendation of the Minister of Revenue, make an Order in Council setting a threshold for the value of taxable supplies of a registered person that means the person is required to use an electronic form or means of electronic communication for filing a return under that Act. Before making the recommendation, the Minister must undertake consultation on the proposed threshold that is appropriate and reasonable for the purposes of this section.

(3) The Commissioner may exempt a registered person, or a class of registered persons, whose taxable supplies exceed the threshold from the requirement to file in the prescribed electronic form or by the prescribed means of electronic communication. The Commissioner must provide a statement of reasons for the exemption.

(4) In determining under subsection (3) whether to exempt the person or class of persons, the Commissioner must have regard to—

(f) the nature and availability of digital services to the person or persons in the class, including the reliability of those services for the purposes of the person or persons; and

(g) the capability of the person or persons in the class relating to the use of computers; and

(h) the costs that the person or persons in the class would incur in complying with the requirements if those costs would be unreasonable in the circumstances.

(5) Subject to subsection (6), an exemption under this section remains valid until the Commissioner notifies the registered person that the exemption is to be cancelled. The exemption expires on the date that is 6 months after that given in the Commissioner's notice.

(6) In making an exemption under this section, the Commissioner may set a time limit on the exemption, stating a start date and an end date, as applicable, for the exemption and the reason for setting the limit.

(7) The following are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements):

(i) an order under subsection (2):

(j) an exemption under subsection (3), unless it applies only to 1 or more named persons.

Discussion

7. In relation to an employer, a payer of investment income or a GST registered person who must provide information to the Commissioner in electronic form and by an electronic means of communication (the use of digital services), the legislation grants the Commissioner the power to exempt a person from this obligation. The exemption provisions for an employer, a payer of investment income or a registered person are the same and can be considered together.

8. In deciding whether to grant a person an exemption, the Commissioner must consider:
   - the nature and availability of digital services to the person, including the reliability of those services for the purposes of the person; and
   - the capability of the person relating to the use of computers; and
   - whether the costs that would be incurred by the person in complying with the requirement of the legislation would be unreasonable.

Nature, availability and reliability of digital services

9. The term "digital services" refers to the delivery, processing, recording, generating and the displaying of information electronically. It includes but is not limited to, interestenabled systems, email, text, and apps. For a person to send information electronically to Inland Revenue they will require at least a computer, tablet or similar device that is able to connect to the internet. No specific or special software will be required as a person will be able to file electronically through the MyIR portal on Inland Revenue's website.

10. In regards, to the nature and availability of digital services to a person, the Commissioner will take into account the availability of connection to the internet and type of connection. Some rural areas of New Zealand do not have any access to the internet. Without the ability to connect to the internet, a person is not going to be able to comply with the legislation. The Commissioner accepts that a person will need at least a broadband internet connection to be able to supply information electronically.

11. The Commissioner will also consider the reliability of the internet connection that the person has access to. If the connection is prone to frequent disconnections or slow speeds, these may be a factor in the Commissioner granting an exemption. An unreliable internet connection will be a significant factor in granting an exemption from the requirement to file returns/information electronically.

Capability

12. The Commissioner will consider whether the person has the necessary computer skills to be able to use the digital technology. If not, do they have an employee, or can they engage the services of someone, who is able to use digital services?

13. If a person uses a computer with an internet connection in their business or as part of their everyday affairs, it is reasonable to expect that they will have little difficulty in sending the necessary returns/information electronically to Inland Revenue.

Are the costs in complying unreasonable?

14. As well as considering the nature and availably of digital services, the Commissioner must also take into account whether the costs that would be incurred by the person in complying with the legislation would be unreasonable.
15. This is a question of what is unreasonable in the circumstances of the person. The use of computers and other digital devices is now common in New Zealand. Typically, an employer or a registered person would use a computer as part of their business and in all likelihood that computer will be connected to the internet (if access is available). The Commissioner expects that where a person is connected to the internet and uses digital services as part of their everyday business, e.g., email, internet banking, electronic invoicing for instance, there will be no impediment for the person meeting the requirements of the legislation and to file returns/information electronically. No material compliance costs will necessarily result as the person can use the MyIR portal on Inland Revenue's website to provide the information electronically.
16. The Commissioner will consider whether the costs that would be incurred by the person are materially more than would be expected to be borne by a person in similar circumstances. For instance, a high-country farmer without access to the internet through the copper wire network or fibre may be faced with a substantial cost to connect via satellite (installation of equipment and ongoing subscription costs) compared to a farmer in another area of the country who has ready access to broadband.
17. It is accepted that the circumstances for some payers of investment income may be different to that of an employer or a registered person in that they may not necessarily be in business and are perhaps less likely to have a computer or any means to connect to the internet. It is the Commissioner's view that it would be unreasonable to expect such a person to incur the cost of buying a computer and connecting to the internet for the sole purpose of meeting the requirements of the legislation. An exemption would appear appropriate in such circumstances.

Applying for an exemption

18. The following information is to be provided when applying for an exemption from electronic filing:
    - name;
    - IRD/GST Number;
    - the exemption that is being applied for, i.e., employer, registered person or investment income payer;
    - whether the person owns or has access to a computer, smart phone, tablet or similar device that is capable of connecting to the internet;
    - a detailed reason for requiring an exemption. Specifically, what issues are faced in filing returns or providing information electronically that would impose unreasonable compliance costs on the person.
19. The above information can be provided in MyIR or via a tax agent. Alternatively, at one of Inland Revenue's front of house customer sites or via post.
20. Where the Commissioner decides to allow an exemption to the person, he will provide reasons for the exemption being granted.
21. When granting an exemption, the Commissioner may set a start date and an end date on the exemption. In such a case the Commissioner will provide the reason for setting the time limit.
22. Where no time limit is set, the exemption will apply until the person is notified by the Commissioner that it is to be cancelled. In this case the exemption will expire on the date that is 6 months after the date given in the notification. The Commissioner reserves the right to revoke a person's exemption at any time it is determined that the person's circumstances have changed and now must file electronically.

This Statement was signed on 06 June 2024.

Matthew Evans
Technical Lead, Technical Standards, Legal Services

OPERATIONAL POSITION

The purpose of an operational position is to outline the legal position that the Commissioner considers is correct for an issue identified and the approach the Commissioner will be taking to applying that position in practice.

OP 24/01: Commissioner's operational position on the GST treatment of landlords supplying properties for use as transitional housing

Summary

The Commissioner has released three public rulings on the GST treatment of supplies of properties by landlords to organisations for use in the Transitional Housing Programme of the Ministry of Housing and Urban Development (HUD): BR Pub 24/01, 24/02 and 24/03 (the Rulings).

This Operational Position gives guidance on how the Commissioner will apply the technical view set out in the commentary to the Rulings where landlords have taken incorrect tax positions in previous GST periods.

In brief:

- Where previous supplies made by landlords were incorrectly treated as taxable supplies (but were exempt supplies), the Commissioner does not expect assessments to be corrected to reverse input tax deductions if the landlord is subsequently making taxable supplies because of the organisation's new arrangements. Doing so would only result in input tax deductions in a later period because under the arrangements covered by the Rulings there will have been a permanent change in use from making exempt supplies to making taxable supplies.
- In other situations, landlords should consider how the GST legislation applies to their individual circumstances and contact Inland Revenue (by sending a message in MyIR with "transitional housing" in the subject line) or their tax advisor to determine if they may have taken incorrect tax positions. Depending on the situation, several provisions of the GST legislation could be relevant, as referred to below.

The Rulings and Commentary on the Rulings

The Rulings concern the GST treatment of supplies made by landlords to organisations who have entered a Transitional Housing Services Agreement with HUD from 1 July 2023 (the new THS Agreement). These supplies may or may not be exempt supplies depending on the type of property and what is offered to occupiers of the properties.

The commentary to the Rulings also discusses matters that will be relevant to determining whether the supply by landlords will be an exempt or taxable supply generally, not just for arrangements involving the new THS Agreement. The commentary is therefore relevant to other situations. It is possible that the supplies of properties to organisations for use in providing transitional housing may be either taxable or exempt. The exemption is for supplies of leasing for the purpose of accommodation in a dwelling (under s 14(1)(cb) of the Goods and Services Tax Act 1985 (the GST Act)). It will sometimes be difficult to determine whether something amounts to a "dwelling" and what the purpose of the leasing was.

Possible incorrect tax positions include landlords deducting input tax for acquisition or development costs for buildings that are dwellings. In this situation, leasing the building to organisations should have been treated as an exempt supply. Another possibility is landlords may have acquired buildings in transactions which were incorrectly zero-rated as the buildings were not intended to be used to make taxable supplies.

The Commissioner's operational approach

Following publication of the Rulings, the Commissioner expects landlords to comply with the Commissioner's view of the law as set out in the commentary when taking tax positions. This will mean where BR Pub 24/02 and 24/03 apply (ie there is no exempt supply involved), supplies of properties by landlords to organisations should be treated as taxable supplies (where the organisation has not chosen to provide the Household with the relevant quiet enjoyment rights in their Housing Agreement).

Output tax and input tax should be accounted for on that basis going forward.

Some landlords may have taken incorrect positions in previous periods on whether or not supplies were exempt under s 14(1)(cb) of the GST Act.

One thing that many will need to consider is the application of s 21FB. This would apply where use of the building has changed completely from making exempt supplies to making taxable supplies (or from making taxable supplies to making exempt supplies). Amending assessments to correct tax positions taken in earlier periods may not result in material change for landlords who are making taxable supplies rather than exempt supplies. This means that, for example, where landlords have completed GST returns on the basis that they were making taxable supplies of property when in fact they were making exempt supplies but they make taxable supplies going forward, reversing input tax deductions for property acquired would be followed by the need to make adjustments for a permanent change of use of the property in the first GST adjustment period in which the property is used for making taxable supplies. This is the effect of s 21FB.

In those circumstances, taking action to reverse input tax deductions would result in similar amounts of input tax deductions being allowed in a subsequent period. Therefore, although the assessments for prior GST periods might not be correct technically, the Commissioner will not be devoting resources to identifying incorrect returns and amending such assessments for previous GST periods to correct input tax deductions or incorrectly returned output tax.

For other similar arrangements, not covered by the Rulings, landlords should discuss the situation with Inland Revenue or their tax advisor to determine if they may have taken incorrect tax positions. To contact Inland Revenue, send a message in MyIR putting "transitional housing" in the subject line so that it will be answered by the personnel familiar with the issues in this area.

For some situations, a voluntary disclosure may be a suitable option to reduce the risk of penalties. This would include where landlords have not returned output tax on what should have been treated as taxable supplies (including disposals of property) because they assumed the supplies to have been exempt.

Relevant GST Act sections

How the GST Act applies to individual circumstances will vary. The following provisions may be especially relevant where landlords have taken incorrect input tax deductions for acquisition or development costs for a building:

- s 21FB – where the use of a building in making taxable supplies, as a percentage of total use, permanently changes, an adjustment according to a formula should be made. This can result in an adjustment equal to 100% of the total input tax for the building.
- s 5(23B) – if a building was acquired in a zero-rated transaction, and after applying the guidance in BR Pub 24/01 the landlord becomes aware that the transaction should not have been zero-rated, the landlord may be deemed to make a taxable supply of the building (for market value consideration) on the date when this error was discovered.
- ss 5(16), 5(16B) and 5(16C) – the sale of a building may be treated as a taxable supply if input tax was deducted on acquisition or its acquisition was treated as zero-rated, and it is not being used in a taxable activity when it is sold, or its non-taxable use has increased and s 21FB has been applied in contemplation of sale.
- S 91 – an election made before 1 April 2025 to pay output tax equal to inputs incorrectly deducted will mean the sale of a building will not be a taxable supply if the building was not acquired for the principal purpose of making taxable supplies and has not actually been used for making taxable supplies.

QUESTIONS 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 24/01: If a person has two or more homes, which home is their main home for the purpose of the main home exclusion to the bright-line test?

Issued | Tukuna: 31 May 2024

This Question We've Been Asked explains how to determine a person's main home for the purpose of the main home exclusion to the bright-line test where the person uses two or more homes as a residence.

Key provisions | Whakaratonga tāpua

Income Tax Act 2007 – ss CB 6A, CB 16A, and YA 1 ("main home")

Question | Pātai

If a person has two or more homes that they use as a residence, which home is their main home for the purpose of the main home exclusion to the bright-line test?

Answer | Whakautu

A person can have only one main home. If a person has two or more homes that they use as a residence, their main home is the one home with which they have the greatest connection. This means the one home with which the person has the most significant or important bond. This is an objective test and requires an overall assessment of the person's circumstances.

The following factors may be relevant for determining which home the person has the greatest connection with:

- the time the person has occupied the home;
- where the person's immediate family lives;
- where the person's social ties are strongest;
- where the person's employment, business interests and economic ties are located; and
- where the person's personal property is located.

If a person has a home that they use as a residence and a home that they use as a holiday home, the greatest connection test does not apply. This is because the holiday home is not used as a residence. The person's main home will be the home that they use as a residence.

Explanation | Whakamāramatanga

Introduction

1. From 1 July 2024, the bright-line test taxes residential land sold within two years (s CB 6A). Generally, the bright-line test does not apply when the land was used predominantly for a dwelling that was the person's main home. This is known as the main home exclusion (s CB 16A).
2. The Commissioner has been asked how the main home exclusion applies when a person has two or more homes that they use as a residence. This is an issue because under the bright-line test, a person can have only one main home.
3. This Question We've Been Asked explains how to determine which of the person's homes is their main home. Three examples at [24] illustrate the concepts discussed.
4. All legislative references are to the Income Tax Act 2007 unless otherwise stated.

Bright-line test

5. From 1 July 2024, the bright-line test taxes residential land sold within two years. The two-year period starts from the "bright-line start date". Generally, this is the date the transfer of land is registered to the person under the Land Transfer Act 2017. However, there are different start dates for particular circumstances, for example, where property is acquired off the plans.
6. The bright-line test will apply[1] if a contract to sell the land is entered into within two years of the bright-line start date. This is known as the "bright-line end date".
7. The bright-line test applies only where none of the other land taxing rules in ss CB 6 to CB 12 apply (for example, s CB 6, which applies to the sale of land acquired for the purpose or with the intention of disposal).

Main home exclusion

8. The sale of residential land within two years of the bright-line start date is not subject to tax if the main home exclusion applies (s CB 16A). The main home exclusion applies if the land is used "predominantly,[2] for most of the bright-line period, for a dwelling that was the main home of…" the person.[3] The bright-line period is the period beginning on the bright-line start date and ending on the bright-line end date.
9. The Commissioner considers that the words "for most of the bright-line period" require a comparison between the length of time the land was used by the person as a residence and the length of the bright-line period. "Most" means more than 50%. If the length of time the land was used as a residence is 50% or less, the main home exclusion does not apply.
10. "Main home" is defined in s YA 1:

> **main home** means, for a person, the 1 dwelling—
>
> (a) that is mainly used as a residence by the person (a **home**); and
>
> (b) with which the person has the greatest connection, if they have more than 1 home

11. The definition of "main home" explains that a person can have only one main home. That home is the one dwelling that is "mainly used as a residence" by the person. If a person has more than one home that they use as a residence, their main home is the home with which they have the "greatest connection". It is the place where a person is settled and where they live.
12. There is no case law that considers the meaning of "used" in the context of the main home exclusion. However, Judge Bathgate in *Case H21* (1986) 8 NZTC 218 considered the meaning of used in the context of the Land Tax Act 1976. Judge Bathgate concluded that used relates to what physically occurred on the land. This view is consistent with the United Kingdom case *Brake v Inland Revenue Commissioners* [1915] 1 KB 731 (UKHC) which was applied by the High Court in *Thornton Estates Ltd v CIR* (1998) 18 NZTC 13,577 (HC).
13. Based on the ordinary meaning and case law, the Commissioner considers that "used as a residence" requires actual physical use of the dwelling and not intended use. The use must be consistent with the typical use of a dwelling as a residence. "Residence" means a place where a person has a fixed presence and a degree of permanence. It is a place where a person has settled, where they ordinarily eat, live and sleep. It is a place the person uses as a base for their daily activities and is the seat of their domestic life and interests. Therefore, a dwelling is used as a residence when it is customarily or repeatedly used for this purpose.

Meaning of "greatest connection"

14. Paragraph (b) of the definition of "main home" states that if a person has two or more homes (being dwellings that are used as a residence), their main home is the one with which they have the "greatest connection". Paragraph (b) applies only in relatively rare circumstances where a person has two or more homes that they use as a residence. For example, if a person has a home that they use as a residence and a home that they use as a holiday home, they are not covered by para (b) because they are not using the holiday home as a residence. Example | Tauira 1 illustrates this situation.
15. It should also be noted that the person does not need to own both homes for para (b) to apply. A person's main home can be a home they rent. Example | Tauira 1 also illustrates this point.

[1] Unless an exclusion or roll-over relief is available.

[2] Land is used predominantly for a dwelling where the physical area of the land used for a dwelling is more than 50% of the total land area.

[3] Or it was the main home of a beneficiary of a trust, if the person is a trustee of the trust and a principal settlor does not have a main home; or the principal settlor has a main home and it is that main home the person is disposing of (s CB 16A(1)(b)).

16. "Greatest connection" is not defined in the Act. Based on definitions in the *Oxford English Dictionary* (online ed, Oxford University Press, New York, accessed 9 August 2022), the ordinary meaning of "greatest connection" suggests the home with which the person has the greatest connection is the one with which the person has the most significant or important bond.

17. This is an objective test and requires an overall assessment of the person's circumstances. The Commissioner considers that the following factors may be relevant in determining with which home the person has the most significant or important bond:
    - the time the person has occupied the home;
    - where the person's immediate family lives;
    - where the person's social ties are strongest;
    - where the person's employment, business interests and economic ties are located; and
    - where the person's personal property is located.

The time the person has occupied the home

18. The time the person has occupied the home may be a relevant factor, although it is unlikely to be determinative. This is because para (a) of the definition of main home has already established that the homes have been used as a place of residence. This means the person's use of both homes has a degree of permanence; it is where they are settled, where they ordinarily eat, live and sleep, and where their domestic life is based.

Where the person's immediate family lives

19. Where the person's immediate family lives may be a relevant factor and is likely to carry substantial weight. If immediate family members live in one of the homes, this factor is likely to be significant. This is because it is unlikely that a person would have a more significant or important bond with a home that their immediate family does not live in. Example | Tauira 2 illustrates this point.

20. However, if a person lives in one dwelling and their estranged family lives in another, the dwelling the estranged family lives in is unlikely to be the person's home as they are not using it as a residence. In this scenario, para (b) of the definition of main home does not apply.

Where the person's social ties are strongest

21. The location of a person's social ties (such as sporting or cultural memberships) may be a relevant factor, although this depends on the facts. For example, a person's sporting or cultural membership might be located where they spend their working week (say, an apartment in the city) and not where their immediate family and personal possessions are located (say, a home in the country). This scenario tends to indicate that the home in the country is likely to be the person's main home.

Where the person's employment, business interests and economic ties are located

22. The location of a person's employment, business interests and economic ties may be a relevant factor, but, as with social ties, it depends on the facts. This factor is likely to be of greater relevance if the second home is located overseas. This is because business interests and economic ties often exist at a national level. For example, if a person has two homes in New Zealand, holding a New Zealand life insurance policy or having an interest in a New Zealand superannuation fund would be unlikely to indicate a greater connection with either home. However, if one of the homes is overseas, those interests could indicate that the person has a greater connection with the New Zealand home. Example | Tauira 3 illustrates this point.

Where the person's personal property is located

23. The location of a person's personal property (for example, furniture or personal belongings) may be a relevant factor. If a person uses both homes as a residence, it is likely they will have personal property in both places. However, if most of a person's personal property is kept at one home, this tends to indicate that this home is likely to be the one with which they have the greatest connection.

Examples | Tauira

24. The following three examples illustrate the application of the law. The examples assume that none of the other land taxing rules in ss CB 6 to CB 12 apply.

Example | Tauira 1 – Person has an apartment and a holiday home

Anka rents an apartment in Auckland where she lives with her two children. The apartment is close to her work and the children's preschool.

Anka also owns a house at Omaha beach that she purchased on 4 July 2024. She spends five or six weeks of the year at the Omaha house. She visits the Omaha house during the Christmas and New Year period and in the school holidays.

If Anka decides to sell her Omaha house within two years of her bright-line start date, she cannot rely on the main home exclusion. This is because she has not used the Omaha house as a residence; she has used it as a holiday house.

Anka's Auckland apartment is her main home. It is the place where she has a fixed presence and a degree of permanence. It is where she eats, lives and sleeps and she uses it as a base for her daily activities.

Example | Tauira 2 – Person has an apartment in the city and a house in the country

On 1 August 2016, Sandra and Dave purchase a four-bedroom house in the Wairarapa. They live there with their adult daughter Lily.

In early 2024, Sandra gets a job in Wellington. She commutes for a few months, but soon gets tired of going back and forth each day. On 4 August 2024, Sandra and Dave purchase a one-bedroom apartment in Wellington for Sandra to use during the week. She drives to Wellington in her car on Monday mornings, spends the week at the Wellington apartment, and then returns to the Wairarapa on Friday evenings to spend the weekend in the Wairarapa house. Most of her personal property is kept at the Wairarapa house.

When in Wellington, Sandra attends a local gym. She also joins a Wellington toastmasters club. Sandra's sister and parents live in Wellington, and she has good friends in both Wellington and the Wairarapa. In the Wairarapa, she belongs to a tennis club and a weekend tramping group.

On 3 April 2026, Sandra and Dave decide to sell the Wellington apartment. As they have owned the apartment for less than two years, the bright-line test applies. Sandra and Dave want to know whether they can rely on the main home exclusion, so they do not have to account for tax on the sale of the apartment.

The issue is whether the Wellington apartment is Sandra's main home. It is clearly not Dave's main home, as he has used the apartment only a handful of times. This means Dave will have to pay tax on his share of the profits from the sale of the apartment.

In Sandra's case, she has used both properties as a place of residence, so she must determine which of the two is her main home. Paragraph (b) of the definition of main home states that her main home is the home with which she has the greatest connection. This means, the home with which Sandra has the most significant or important bond. This is an objective test and requires an overall assessment of Sandra's circumstances.

The time Sandra occupies the home

Based on days of use, Sandra spends more time at the Wellington apartment (four nights a week) than at the Wairarapa house (three nights a week). However, when holidays are considered, the time difference between the two homes is not significant.

Where Sandra's immediate family lives

The Wairarapa house is where Sandra's immediate family (her husband and adult daughter) live. She also has family in Wellington, but they do not live with her. This suggests the Wairarapa house is Sandra's main home.

Where Sandra's social ties are strongest

Sandra has social ties in Wellington and in the Wairarapa. This factor is neutral.

Where Sandra's employment, business interests and economic ties are located

Sandra owns an apartment in Wellington and is employed in Wellington, suggesting that her Wellington apartment is the home with which she has the greatest connection. However, she also owns land in the Wairarapa, which could indicate the Wairarapa house is her main home.

Where Sandra's personal property is located

Most of Sandra's personal property is in the Wairarapa house. This suggests the Wairarapa house is her main home.

Conclusion

On an overall assessment of Sandra's circumstances, her main home is the Wairarapa house and not the Wellington apartment. Factors such as the location of her immediate family and her personal possessions carry more weight than the time she spends at each home. This means she cannot rely on the main home exclusion and will have to pay tax on her share of the profits from the sale of the apartment.

Example | Tauira 3 – Retired couple with a house in Auckland and an apartment in Australia

Tom and Gerry recently retired. On 30 September 2024, they sell their house, which they have owned for 20 years, and purchase a smaller three-bedroom house in Auckland. Tom and Gerry also purchase an apartment on the Gold Coast around the same time. The couple spend seven months of the year in Auckland and the five winter months in their apartment on the Gold Coast. Tom and Gerry intend to eventually move to the Gold Coast permanently.

Tom and Gerry have busy social lives in both locations. They have gym and golf club memberships on the Gold Coast and in Auckland. They have no immediate family, but their extended family is in Invercargill and the United States.

The couple have commercial and residential property investments in Auckland. They receive superannuation from New Zealand. They have bank accounts in Australia and New Zealand and their personal property is split evenly between the two locations.

In February 2026, Tom gets sick and needs to spend more time in Auckland where his doctor is based. They decide to sell the Gold Coast apartment as Tom will not be able to travel for some time. As they have owned the apartment for less than 2 years, the bright-line test applies.

As New Zealand tax residents, Tom and Gerry are taxed in New Zealand on their worldwide income. They want to know whether the profits from the sale of their Gold Coast apartment can be excluded from the bright-line test on the basis that it was their main home.

Tom and Gerry have used both homes as a place of residence, so the issue is which of the two is their main home. Paragraph (b) of the definition of main home states that their main home is the home with which they have the greatest connection. This means, the home with which Tom and Gerry have the most significant or important bond. This is an objective test and requires an overall assessment of Tom and Gerry's circumstances.

The time Tom and Gerry occupy the home

Based on days of use, Tom and Gerry spent more time in their Auckland house than their Gold Coast apartment. This suggests the Auckland house may be their main home, although this factor does not carry significant weight on its own.

Where Tom and Gerry's immediate family lives

Tom and Gerry do not have immediate family living with them in either property. They have extended family in Invercargill and the United States, but this is not relevant for this assessment as these locations do not relate to either property.

Where Tom and Gerry's social ties are the strongest

Tom and Gerry have sporting and social ties in both locations. This factor is neutral and does not point to either property as being the main home.

Where Tom and Gerry's employment, business interests and economic ties are located

While Tom and Gerry are retired, they do have significant business interests and economic ties in Auckland. They own residential and commercial property in Auckland. They also receive superannuation from New Zealand. These factors suggest Tom and Gerry have the most significant or important bond with their Auckland house.

Where Tom and Gerry's personal property is located

Tom and Gerry's personal property is evenly split between the two locations. This factor is neutral and does not point to either property as being the main home.

Conclusion

On an overall assessment of Tom and Gerry's circumstances, their main home is the Auckland house. This means they cannot rely on the main home exclusion and must account for tax on the profits realised on the sale of the Gold Coast apartment. Factors such as the location of their investments and the time spent in each location helped to confirm that their main home was their Auckland house. Their intention to move permanently to the Gold Coast is not relevant.

Tom and Gerry's profits from the sale of the Gold Coast property may also be taxable in Australia. If this occurs, relief may be available under the Double Taxation Relief (Australia) Order 2010.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Double Taxation Relief (Australia) Order 2010

Income Tax Act 2007, ss CB 6A, CB 16A and YA 1 ("main home")

Other references | Tohutoro anō

Oxford English Dictionary (online ed, Oxford University Press, New York, accessed 9 August 2022).

QB 18/16: Income tax – bright-line test – main home exclusion – sale of subdivided section *Tax Information Bulletin* Vol 31, No 1 (February 2019): 43

taxtechnical.ird.govt.nz/tib/volume-31---2019/tib-vol31-no1

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About this document | Mō tēnei tuhinga

Questions We've Been Asked (QWBAs) are issued by the Tax Counsel Office. QWBAs answer specific tax questions we have been asked that may be of general interest to taxpayers. While they set out the Commissioner's considered views, QWBAs are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further Status of Commissioner's advice (Commissioner's Statement, Inland Revenue, December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in a QWBA will not necessarily lead to the same tax result. Each case must be considered on its own facts.

QB 24/02: Income tax – bright-line test – main home exclusion – renting to flatmates

Issued | Tukuna: 31 May 2024

This Question We've Been Asked explains how the main home exclusion to the bright-line test applies where a person rents out a room in their home to a flatmate.

Key provisions | Whakaratonga tāpua

Income Tax Act 2007 – ss CB 6A, CB 16A and YA 1 "main home"

Question | Pātai

If a person lives in their home and rents out a room to a flatmate and then sells the land within two years of when they bought it, can they qualify for the main home exclusion to the bright-line test?

Answer | Whakautu

Yes, a person can qualify for the main home exclusion if they live in their home and rent out a room in their home to a flatmate.

For land sold on or after 1 July 2024, the main home exclusion applies if more than 50% of the land is used, for most of the bright-line period, for a dwelling that is the person's main home.

Whether the dwelling is the person's "main home" is a matter of fact and depends on where a person resides and has a fixed presence. The fact a person rents out a room in their home to a flatmate does not stop the home being the person's main home.

In most situations where the person rents out a room in their home to a flatmate, the home will be mainly used as a residence by the person. However, there may be situations where the person's residence in their home is incidental to their main purpose of carrying on a rental activity.

Explanation | Whakamāramatanga

Introduction

1. From 1 July 2024, the bright-line test taxes residential land sold within two years of the bright-line start date (s CB 6A).
2. Generally, the bright-line start date will be the date the transfer of land is registered to the person under the Land Transfer Act 2017. However, there are different start dates for particular circumstances, for example, where property is acquired off the plans.
3. The bright-line test will apply[1] if a contract to sell the land is entered into within two years of the bright-line start date. This is known as the "bright-line end date".
4. The bright-line test does not apply when the land was used predominantly for a dwelling that was the person's main home for most of the bright-line period (the period beginning on the bright-line start date and ending on the bright-line end date). This is known as the main home exclusion.
5. This Question We've Been Asked (QWBA) explains how the main home exclusion to the bright-line test applies where the owner rents out a room in their home to a flatmate.
6. We have been asked to consider:
   - whether a home is a person's "main home" if the person shares their home with one or more flatmates; and
   - how to apply the main home exclusion where the person rents out space in their home to one or more flatmates.

[1] Unless an exclusion or rollover relief is available

7. This item assumes the:
   - renting activities do not constitute the carrying on of a business;[2]
   - person disposing of the land is not the trustee of a trust; and
   - land has an existing single dwelling constructed on it.[3]
8. While this item assumes the person disposing of the land is not a trustee of a trust, the principles set out in this item also apply if:
   - the property is owned by a trust; and
   - the property is occupied by a beneficiary of the trust as their main home; and
   - either the principal settlor of the trust does not have a main home or, if they do, the subject property is their main home; and
   - the beneficiary (as licensee) rents out one or more rooms to flatmates.
9. If a person has more than one home, the greatest connection test determines which one is eligible to be considered as their main home – see **QB 24/01 If a person has two or more homes, which home is their main home for the purpose of the main home exclusion to the bright-line test?.**
10. All legislative references are to the Income Tax Act 2007 unless otherwise stated.

Bright-line test

11. The bright-line test taxes residential land sold on or after 1 July 2024 where the person's bright-line end date is within two years of their bright-line start date. If a person disposed of land prior to 1 July 2024, they would need to consider whether the previous 5 year or 10 year bright-line tests and the relevant main home exclusions would apply.
12. The bright-line test applies only where none of the other land taxing rules in ss CB 6 to CB 12 apply (for example, s CB 6, which applies to the sale of land acquired for the purpose or with the intention of resale).

Main home exclusion

13. The bright-line test for land (s CB 6A) does not apply if the land is used predominantly, for most of the bright-line period, for a dwelling that was the person's main home (s CB 16A).
14. To determine whether the main home exclusion applies, a person needs to consider two elements – whether the:
   - land was used predominantly for a dwelling (space threshold); and
   - dwelling was used as the owner's "main home" for most of the bright-line period (time threshold).
15. If the person acquired the land from an associated party, the person should consider whether any of the rollover relief rules may apply (s FD 1(4)). Further, a person should ensure the exceptions to the main home exclusion do not apply (see [29] for details).

Land was used predominantly for a dwelling

16. For the main home exclusion to apply, the first element is that the land must have been "used predominantly" for a "dwelling".
17. A "dwelling" includes any place configured as a residence or abode.
18. In the phrase "used predominantly … for a dwelling", the word "predominantly" qualifies the extent to which the residential land must be used for a dwelling for the exclusion to apply. Predominantly in this context means more than 50%. Land will have been used predominantly for a dwelling where the physical area of the land used for a dwelling is more than 50% of the total land area.
19. The Commissioner has concluded that land that is "used … for a dwelling" is not limited to the land on which the dwelling is situated or to the surrounding curtilage (such as a yard or garden). Land used for a dwelling can also include other areas the person uses frequently, repeatedly or customarily in connection with or for the benefit of the dwelling: **QB18/17: Income tax – bright-line test – farmland and main home exclusions – sale of lifestyle blocks**.[4]

[2] See Rental Income – IR264 for guidance on the tax treatment of rental income

[3] Different issues will need to be considered where there is more than one dwelling situated on the land

[4] QB 18/17: Income tax – bright-line test – farmland and main home exclusions – sale of lifestyle blocks, *Tax Information Bulletin* Vol 31, No 1 (February 2019): 48 at 52

20. Where there is only one dwelling on the land and the land is not used for any other purpose, it is likely the land is used predominantly for a dwelling. This is illustrated in the Example | Tauira (at [31]).

Dwelling was used as a "main home" for most of the time

21. The second element is whether the dwelling is used as the person's main home for most of the bright-line period.

22. "Main home" is defined in s YA 1 as:

> **main home** means, for a person, the 1 dwelling—
>
> (a) that is mainly used as a residence by the person (a **home**); and
>
> (b) with which the person has the greatest connection, if they have more than 1 home

23. The definition provides that for a person the main home is the one dwelling they mainly use as a residence. If a person has more than one home, the greatest connection test determines which one is eligible to be considered as their main home. The focus of the main home definition is on the nature of the place and the relationship between the person and that place.

"Mainly used as a residence"

24. The Commissioner has concluded that "residence" means a place where a person has a fixed presence and a degree of permanence. It is a place the person uses as a base for their daily activities and the seat of their domestic life and interests. "Used" means actual physical use of the dwelling as a residence and not intended use. Therefore, a dwelling is used as a residence when it is customarily or repeatedly physically used for this purpose.[5]

25. A dwelling will be "mainly" used as a residence where it is principally used by the owner as their residence and not for any other more significant purposes. That is, the person's occupation of the house cannot be incidental to another more significant purpose.

26. In most situations involving renting to flatmates this test will be satisfied. The definition of main home does not contain any restrictions that preclude a dwelling being a person's main home due to the presence of flatmates.

27. However, there may be situations where the person's residence is incidental to their primary purpose of deriving rental income. The following factors may be of relevance in determining whether the dwelling is "mainly used as a residence":
    - the person's purpose in renting rooms to flatmates – renting rooms to flatmates to help defray the costs of home ownership may suggest that the dwelling is mainly used as a residence. This is in contrast, to situations where a person rents rooms to flatmates with the purpose of deriving a profit from rental activities.
    - the proportion of the dwelling that is for the person's use – if the person is able to use a significant area of the dwelling (either exclusively or as common use), this may suggest that the dwelling is mainly used as a residence.
    - the scale of the person's rental activity – a large number of flatmates may suggest that the person's rental activity is significant. In some cases, this may be similar in nature to a "boarding establishment" and the dwelling is not mainly used as their residence. (That said, if the person's rental activity is of a nature and scale that it is a "boarding establishment", the house will not be a dwelling and the property will not be subject to the bright-line test.)[6]

28. While the above factors may be of relevance in considering whether a person's home is "mainly used as a residence", none of the factors are by themselves determinative. Each person's situation should be considered in determining whether they have used their dwelling mainly as a residence.

Exceptions to the main home exclusion

29. Two exceptions that may prevent the main home exclusion applying are if the:
    - person has used the main home exclusion twice within the two years immediately preceding the bright-line end date (s CB 16A(3)(a)); and
    - person or a group of persons has engaged in a regular pattern of acquiring and disposing of their main home (s CB 16A(3)(b) and (4)).[7]

QUESTIONS WE'VE BEEN ASKED

[5] QB 24/01 If a person has two or more homes, which home is their main home for the purpose of the main home exclusion to the bright-line test?

[6] s CB 6A(2) and s YA 1 definitions of "dwelling" and "residential land"

[7] QB16/07: Income Tax – Land Sale Rules – Main Home and Residential Exclusions – Regular Pattern of Acquiring and Disposing, or Building and Disposing, *Tax Information Bulletin* Vol 28 No 9 (October 2016): 4

30. A "group of persons" means two or more people when they occupy or have occupied the residential land together as their main home. It also includes a non-natural person (such as a trustee of a trust or another entity) if at least one of the people who occupies the main home has significant involvement in or control of the activities of the non-natural person (s CB 16A(5)).

Example | Tauira

31. The following example shows how the law applies. In the example:
    - the person is assumed to have only one home;
    - any exclusions or exceptions referred to above do not apply; and
    - none of ss CB 6 and CB 12 applies.

Example | Tauira – sharing home with a flatmate – main home

Seilala purchased a four-bedroom apartment, with the sale being settled on 16 February 2023. The apartment is in a unit title complex. Seilala owns the apartment and has shared ownership in the common areas (e.g., lifts, lobby and driveway).

Seilala lives in the apartment and rents out three bedrooms to flatmates. Seilala occupies the largest of the four bedrooms and his flatmates each occupy a standard double room. The apartment has a large open plan living and dining space that is used by all the occupants.

Seilala continues to live in the apartment with his flatmates until he sells it on 11 July 2024.

The bright-line test applies as the apartment was sold after 1 July 2024 and the sale was less than two years after Seilala's bright-line start date (16 February 2023).

The main home exclusion applies to Seilala if:

- more than 50% of the land was used for a dwelling that was Seilala's main home; and
- the dwelling was used as Seilala's main home for more than 50% of the bright-line period.

As the apartment consists of a single dwelling Seilala's land has been used predominantly for a dwelling.

Seilala has use of most of the apartment and decided to share with flatmates to reduce some of the cost of home ownership. As the apartment has been mainly used as Seilala's residence, the property is Seilala's main home.

As the land was used by Seilala as his main home for most of the days in the bright-line period (in fact, all the days in the bright-line period), Seilala qualifies for the main home exclusion. Any gain on the sale of the property is not taxable under the bright-line test.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Income Tax Act 2007, ss CB 6A, CB 6 to CB 12, CB 16A, YA 1 ("main home")

Other references | Tohutoro anō

QB 24/01: If a person uses two or more homes, which home is their main home for the purpose of the main home exclusion to the bright-line test?

https://www.taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2024/qb-24-01

QB 18/17: Income tax – bright-line test – farmland and main home exclusions – sale of lifestyle blocks, *Tax Information Bulletin* Vol 31, No 1 (February 2019): 48. www.taxtechnical.ird.govt.nz/tib/volume-31---2019/tib-vol31-no1

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About this document | Mō tēnei tuhinga

Questions We've Been Asked (QWBAs) are issued by the Tax Counsel Office. QWBAs answer specific tax questions we have been asked that may be of general interest to taxpayers. While they set out the Commissioner's considered views, QWBAs are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further Status of Commissioner's advice (December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in a QWBA will not necessarily lead to the same tax result. Each case must be considered on its own facts.

TECHNICAL DECISION SUMMARIES

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

TDS 24/09: Transfer of property and whether income arises

Decision date | Rā o te Whakatau: 1 November 2023

Issue date | Rā Tuku: 13 May 2024

Subjects | Kaupapa

Income tax: Disposal of personal property, income vs capital; tax avoidance

Taxation laws | Ture tāke

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

Facts | Meka

1. This was an application for a private ruling.
2. The non-resident Applicant is in business and proposes it will transfer shares in company A (A) to limited partnership B (B) as a capital contribution (the First Transfer).
3. At the same time the Applicant will transfer a percentage of its interest in B to two limited partnerships (the LPs) equally as a capital contribution (the Second Transfer).
4. The transfers are to be undertaken due to regulatory requirements of a foreign jurisdiction.
5. The Applicant holds its interests in A for long-term investment.

Issues | Take

6. The main issues considered in this ruling were:
   - Whether the transfer of the interests in A by the Applicant to B gives rise to income.
   - Whether the transfer of the interests in B by the Applicant to the LPs gives rise to income.
   - Whether the arrangement constitutes tax avoidance under s BG 1.

Decisions | Whakatau

7. The Tax Counsel Office (TCO) concluded:
   - The transfer of the interests in A by the Applicant to B does not give rise to income of the Applicant under ss CA 1, CB 1, CB 3, CB 4 or CB 5.
   - The transfer of the interests in B by the Applicant to the LPs gives rise to income to the Applicant under s CB 4 equal to the value of the interests in A on the day of the transfer.
   - The Applicant is allowed a deduction equal to the value of the interests in A on the day it acquires the interests in B under s DB 23.
   - The general limitations in ss DA 2(3), DA 2(4), DA 2(5) and DA 2(6) do not apply to deny the deduction.

- The deduction is allocated to the income year in which the Applicant disposes of the interests in A under s EA 2(2).
- The transfer of the interests in B by the Applicant to the LPs does not give rise to "net income" or "net loss" (as calculated under s BC 4) of the Applicant in the year of the transfer.
- Section BG 1 does not apply to the arrangement.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Transfer of interests in A to B

Section CA 1(2) – Income under ordinary concepts

8. TCO first considered whether the transfer of the Applicant's interests in A to B resulted in income under ordinary concepts (s CA 1(2)).
9. For an amount to be "income under ordinary concepts", the amount must be something that "comes in" to a person and is in money or money's worth.[1]
10. If payments have a quality of regularity or recurrence, then they become part of the receipts upon which the recipient may depend for their living expenses. However, that factor would not be enough on its own. Consideration must also be given to the relationship between payer and payee, and to the purpose of the payment. It is the quality of the payment in the hands of the recipient which is important.[2]
11. Receipts that are on capital account are not income according to ordinary concepts.[3]
12. The Applicant will receive 100% of B's interests in consideration for the disposal of its interests in A. The interests are money's worth as they are valuable and can be converted into money if sold.
13. However, this receipt could not be said to have a quality of regularity or recurrence or form part of the receipts that the Applicant would depend on.
14. In addition, if the receipt is capital, then s CA 1(2) will not apply. TCO concluded that the proceeds of A's interests are capital in nature and not income under s CB 1 (see below). Therefore, the transfer of A's interests by the Applicant to B does not give rise to income of the Applicant under s CA 1(2).

Section CB 1

15. Under s CB 1(1), an amount derived from a business is income of a person. The term "business" is defined in s YA 1 as including any profession, trade, or undertaking carried on for profit.
16. The mere fact that a business is being carried on does not mean that all amounts derived by the Applicant are income under s CB 1. The essential question in determining whether an amount is income from a business is whether the amount was derived from the current operations of the business, and not merely connected to the fact that the business existed.[4]
17. TCO considered the relevant case law and applied the following factors to assist in determining whether an investment is part of the taxpayer's business or on capital account:
    - Whether the investment was intended to be held long-term, including the reasons for the original acquisition and the reasons for disposal. In some circumstances, the reason for the sale may support a contention that the shares were otherwise intended to be held long-term. For example, where the investment is sold because of reasons outside the taxpayer's control;[5] due to unanticipated changes in circumstances;[6] or following an unsolicited offer.[7]
    - The scale of operations and the volume of similar transactions by the company, including the type of company the shares are held in. The greater the number of share sales and the larger the amounts involved, the more likely it is that the shares will be considered to be held on revenue account with trading being an ordinary incident of the taxpayer's business. In this regard, investment in sound well performing companies may be considered to support a holding as a capital investment.[8]

[1] *Tennant v Smith* [1892] AC 150, *CIR v Parson (No. 2)* [1968] NZLR 574

[2] *Reid v CIR* (1985) 7 NZTC 5,176

[3] *Case S86* (1996) 17 NZTC 7,538

[4] *CIR v City Motor Service Ltd; CIR v Napier Motors Ltd* [1969] NZLR 1010

[5] *State Insurance Office v CIR* (1990) 12 NZTC 7,035 (HC)

[6] *Rangatira Ltd v Commissioner of Inland Revenue* (1994) NZTC 11,197 (HC), (1995) 17 NZTC 12,182 (CA), (1996) 17 NZTC 12,727 (PC); *National Insurance Company of New Zealand v CIR* (1997) 18 NZTC 13,489 (HC); (1999) 19 NZTC 15,135 (CA)

[7] *Waylee Investments Ltd v CIR* [1990] STC 780

[8] *Rangatira Ltd v Commissioner of Inland Revenue* n 6

- The degree of involvement of the taxpayer in actively monitoring the investment. Frequent and active monitoring of the portfolio may suggest that the shares are held on revenue account with trading being an ordinary incident of the business.
- The degree of separation between the investment in question and other, business, investments of the taxpayer. Although a separate portfolio is not necessary[9], at a minimum, it must be objectively possible to differentiate between the investments that are asserted to be held on capital account and other trading investments.
- The source of the funds used to acquire the investment.
- Whether the investments are treated as part of the taxpayer's business or are available to meet claims of the business.
- How the investments are treated for accounting purposes.

18. These factors are not an exhaustive list and anything that indicates one way or the other whether the shares were a part of the taxpayer's business, in the circumstances, could potentially be relevant. Importantly, not all of the factors will necessarily be relevant to any given situation.
19. After consideration of these factors TCO concluded that the interests that the Applicant held in A were capital in nature because:
    - The Applicant intends to hold the interests in A long term. There have not been any disposals of shares since the first tranche was acquired before 2010. The Applicant derives significant annual dividend income from the interests in A.
    - The disposal arises from a one-off event for a foreign countries' regulatory purposes. There are no similar transactions to compare this disposal against. The Applicant derives no economic gain from the disposal unlike other cases where a certain yield was required, or the disposal gains were used for the general business.
    - The Applicant has representatives on the board of A through an associate.
    - The interests in A are treated differently from short term securities for accounting purposes.
    - It is extremely unlikely that recourse would need to be made to the interests in A to meet claims made against the Applicant in relation to its business obligations (because of more liquid investments available).
    - Although the interests in A were acquired using general short-term funding, this itself is not determinative, and does not outweigh the capital factors discussed above. In particular, the interests in A are not readily realisable assets, which are available to meet the needs of the Applicant's business.
20. In line with case law which discusses the difference between merely realising investments compared with realising an investment in the course of a business, TCO considered that the disposal of the interests in A was not a realisation made in the course of a business. The interests in A were long term investments held by the Applicant on capital account in which the Applicant derived dividend income. The disposal of the interests in A was a one-off event and the fact that the Applicant had not disposed of any of A's shares since the acquisition of the first tranche before 2010 also indicated the receipt was capital in nature.
21. Therefore, the transfer of the interests in A to B did not give rise to income of the Applicant under s CB 1.
22. TCO also considered whether income arose under ss CB 3, CB 4, or CB 5.

Section CB 3

23. An amount that a person makes in conducting an undertaking or scheme for the purpose of making a profit is income of the person under s CB 3. TCO concluded that an undertaking or scheme involves a programme of action devised in order to attain some end. The relevant purpose must be formulated at the time the property is acquired. For s CB 3 to apply, the acquisition and sale must exhibit features that give it the character of a business deal. If a receipt is capital in nature, it will not be income under s CB 3. As it had already been ascertained that the disposal of the interests in A will be on capital account, then no income to the Applicant arises under s CB 3.

Section CB 4

24. Section CB 4 applies where a person disposes of personal property, and that property was acquired for the purpose of disposing of it. "Property" is something that is capable of being owned and being transferred. Shares in a company are capable of being owned and being transferred. "Personal property" in s CB 4 does not include land and the fact that shares are personal property is consistent with s 35 of the Companies Act 1993.

[9] *State Insurance Office v CIR* n 5

25. The test for determining a taxpayer's purpose in the context of s CB 4 is subjective, requiring consideration of the taxpayer's state of mind at the time of acquisition. For s CB 4 to apply, disposal must be the taxpayer's dominant purpose. The taxpayer's stated purpose is objectively assessed, and the length of time for which the property is held is of particular importance.[10]
26. The Applicant first acquired interests in A before 2010 and has not disposed of any shares since then. The Applicant's stated intention is to hold the interests in A long term and receive dividend income. The disposal only arises because of foreign jurisdiction regulatory purposes – otherwise the Applicant would continue to own the interests in A directly.
27. Accordingly, TCO considered that the interests in A were not acquired for the purpose of disposal and therefore did not give rise to income of the Applicant under s CB 4.

Section CB 5

28. Section CB 5 applies where a person is in the business of dealing in personal property. An amount derived by a person from disposing of personal property is income of the person if their business is dealing in property of that kind.
29. TCO concluded that while the Applicant may undertake some share buying and selling as part of its day-to-day business, and, therefore, could be a share dealer, the interests in A are held on capital account and do not form part of the business of the Applicant.
30. Therefore, the disposal of the interests in A would be outside the ordinary course of that business and do not give rise to income of the Applicant under s CB 5.

Overall Conclusion

31. TCO concluded that the transfer of the interests in A by the Applicant to B did not give rise to income of the Applicant under ss CA 1(2), CB 1, CB 3, CB 4, or CB 5.

Issue 2 | Take tuarua: Transfer of interests from B to the LPs

32. This issue concerned whether the Second Transfer gave rise to income of the Applicant.
33. In deciding this issue, TCO considered the following questions:
    - Are the LPs tax transparent under the rule in s HG 2?
    - Does the contribution of the interests in B, give rise to a disposal of the underlying assets held indirectly by the Applicant through B?
    - What is the nature the underlying assets being disposed of?
    - Does the income have a source in New Zealand?
    - Is there a deduction for the cost of property?

Tax transparency

34. The tax transparency was relevant because if the LPs are tax transparent, the Applicant is treated as owning the interests in A under s HG 2 in its capacity as a partner of the LPs.
35. The arrangement stated that both B and the LPs will meet the definition of a "partnership" under s YA 1.
36. Therefore, both B and the LPs are tax transparent under s HG 2.

Disposal if partnership interest

37. The effect of s HG 2(1) is to treat the partnership as look through, with each partner being treated as holding the property of the partnership in proportion to their partnership share. It followed that where partners transfer their partnership interest to another person, they are treated as disposing of a share of the partnership property to the purchaser.
38. Therefore, if the Applicant disposed of its interests in B to the LPs, it would be treated as disposing of the underlying partnership property under s HG 2, being the interests in A.

Meaning of dispose

39. TCO concluded that the s YA 1 definition of "dispose" did not assist for the Second Transfer, and it was necessary to consider the ordinary meaning of "dispose".
40. At the most fundamental level a disposition i.e., the action of disposing, involves complete alienation from the disposer of the thing being disposed of. That thing is "got rid of" – being no longer in the control, or possession of the disposer in any capacity.

[10] *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA).

41. TCO considered that there is a disposal of the interests in A by the Applicant under the Second Transfer for the following reasons:
    - The Applicant is "getting rid of" its interests in B in exchange for limited partnership interests in each of the LPs. It has "disposed" of the interests in B.
    - The Applicant will cease to be a partner of B. Under s HG 2(1)(b), the Applicant will no longer hold the property of B (being the interests in A) in the capacity as a partner of B. Therefore, the Applicant has disposed of the interests in A.
    - Each of the LPs, as the new partners of B, will be treated as holding the property of B (being the interests in A) under s HG 2(1)(b).
    - Concurrently, the Applicant becomes a partner of the LPs, and will be treated as holding the property of the LPs (being the interests in A) under s HG 2(1)(b).
    - Overall, the Applicant (as a partner of B) will dispose of the interests in A to itself (as a partner of the LPs).
    - The Applicant does not have the same legal rights in respect of the interests in A after the Second Transfer, because it is no longer a partner of B. It has a different set of legal rights in its capacity as a partner of the LPs – despite it continuing to be treated as holding the same proportion of ownership in A for tax purposes.

Can a person hold property in different capacities?

42. The question is whether, under the Act, a disposal could arise from a transfer of partnership property where s HG 2(1) treats the person as holding the property before and after the transfer. That is, the transferor and the transferee are treated as the owner under s HG 2(1).
43. Under s HG 2(1)(b), partnership property is treated as being held by the partners in proportion to their interest in the partnership for the purpose of determining the partners' income tax liability "in their capacity as partners" of the partnership.
44. The ordinary words of s HG 2 limit the application of s HG 2 to "their capacity as partners". Therefore, if the Applicant is a partner of two different partnerships, it owns the interests in A in different capacities under s HG 2, and s HG 2 does not prevent a disposal from one capacity to another.
45. TCO noted that the different capacities approach is consistent with QB 17/09.[11] Although QB 17/09 discusses s HG 2 in the context of a transfer of property from a personal capacity to a partnership capacity, the same principle applies if the person is transferring property from one partnership capacity to another (because in both cases the person is the owner of the property for tax purposes before and after the transfer).
46. Although s HG 2(1) prescribes a look through treatment for partnership property, there is a distinction between a partner's capacity as a partner of the partnership and their other capacities, be it their personal capacity or, if relevant, their capacity as a partner in another partnership.

Conclusion on "disposal"

47. TCO concluded that the Applicant does not have the same legal rights in respect of the interests in A after the Second Transfer, because it is no longer a partner of B. It has a different set of legal rights in its capacity as a partner of the LPs – despite the Applicant remaining the owner of the interests in A for tax purposes.
48. The Applicant (as a partner of B) will dispose the interests in A to itself (as a partner of the LPs) under the Second Transfer.

Does s CB 4 apply to the Second Transfer?

49. Section CB 4 applies to personal property acquired for the purpose of disposal. The following factors must be present in order for s CB 4 to apply:
    - there is an "amount";
    - the amount is derived from disposing of "personal property"; and
    - the person acquired the relevant personal property for the purpose of disposal.

Is there an amount?

50. TCO concluded that the Applicant derived an amount from the Second Transfer based on the following reasoning:
    - Before the Second Transfer, the LPs did not own any assets, and they had no value.

[11] QB 17/09 – Is there a full or partial disposal when an asset is contributed to a partnership as a capital contribution [15] *Tax Information Bulletin* Vol 30, No 1 (February 2018).

- On the Second Transfer, the Applicant will contribute its interests in B to the LPs.
- It followed that the value of the interests in the LPs will equal the interests in B (as the LPs will have no other assets). This was similar to a company issuing shares to a person in consideration for the person transferring assets into the company. The issue price of the shares is equal to the assets contributed.
- The value of the interests in B and the interests in the LPs will equal the interests in A, as they are the underlying assets of B and the LPs.
- As the interests in A consist of shares, the interests in the LPs are capable to being valued and convertible in money.
- The Applicant will receive "money's worth" (being the increase in value of the interests in the LPs due to the underlying interests in A) in consideration of making the capital contribution to the LPs.
- The Applicant will derive "an amount" from disposing of its interests in B equal to the value of the interests in A under s CB 4.

Are the interests in B "personal property"?

51. The interests in A consist of shares. The definition of personal property in s CB 4 does not include land.
52. "Property" is something that is capable of being owned and being transferred.
53. Shares in a company are considered to be "property" as they are capable of being owned and being transferred. As shares in a company are clearly not land or interests in land, they should also be considered "personal property". This is consistent with the legal nature of shares under section 35 the Companies Act 1993.
54. Therefore, the interests in A are "personal property".

Purpose

55. TCO considered that it was clear the Applicant will acquire its interests in B (and the underlying interests in A under s HG 2) for the purpose of disposal. This was because both the acquisition and the disposal of the partnership interests form part of a restructuring plan that occur concurrently. Under that plan, the Applicant will acquire the partnership interests and immediately contribute the interests into the LPs. The purpose of disposal was inherently evident in the plan.
56. In summary, TCO concluded the contribution of the Applicant's interests in B to the LPs will give rise to income of the Applicant under s CB 4. The Applicant will derive an amount equal to the value of the interests in A, for the disposal of personal property. The Applicant acquired the partnership interests for the purpose of disposal as it is planning to acquire the interests and immediately contribute them into the LPs. This means the interests in A are also acquired for the purpose of disposal.

Source of income

57. It needed to be determined whether the income received by the Applicant is non-residents' foreign-sourced income as defined in s BD 1(4). If so, it would not constitute assessable income of the Applicant under s BD 1(5). The Applicant is a non-resident, so it needed to be determined whether the income received is foreign-source amount under the source rules in s YD 4.
58. Under s YD 4(12), income derived from the disposal of property in New Zealand has a source in New Zealand. Shares are generally located where the share register is kept. A is a company registered in New Zealand and the share registry is required to be kept in New Zealand.
59. Therefore, TCO concluded that the income under s CB 4 from the Second Transfer will be treated as having a source in New Zealand under s YD 4(12).

Deduction for the cost of the interest in B

60. TCO considered whether a deduction arises under s DB 23 (revenue account property) for the Applicant when it disposes of the interests in B and derives s CB 4 income under the Second Transfer.
61. The requirements for a deduction under s DB 23 can be summarised as:
    - there must be "expenditure incurred";
    - as a "cost" for "revenue account property"; and
    - the exclusions denying a deduction for portfolio investment income and life insurers do not apply.
62. The disposal of the interests in B and the underlying interests in A meets the definition of "revenue account property" as it produces income under s CB 4.

63. The following is relevant to the concept of "expenditure":
    - It can encompass money or money's worth.
    - Something is money's worth when it is convertible into cash directly or indirectly.
    - It must be something that is "handed over".
64. Therefore, the amount of expenditure incurred by the Applicant in acquiring the interests in B is the value of the interests in A at the time of the First Transfer. The interests in A comprise shares (which are all convertible into cash so are "money's worth").
65. The Applicant will incur the expenditure on the date it transfers the interests in A to B, as that is the date it gives up, or pays away, its direct ownership and acquires a partnership interest in A.

Cost

66. "Cost" is that which must be given to acquire something, or the price paid for a thing – the money or money's worth given up by someone to get something but can be considered in its commercial reality.
67. The Applicant has given up its direct ownership of the interests in A to obtain the interests in B. That is, it's "cost" and its expenditure.

Limitations and timing of deduction

68. Section DB 23 overrides the capital and private limitations in s DA 2(1) – (2). None of the other limitations in s DA 2(3) – (6) apply to deny the Applicant a deduction.
69. Under s EA 2 the deduction for revenue account property is generally allocated to the income year of disposal. None of the exceptions in s EA 2(1) apply, therefore the Applicant is allowed a deduction for the cost of the interests in B in the income year of disposal.

Net income or net loss

70. As the First and Second Transfers occur concurrently, the Applicant does not derive net income or net loss under s BC 4 from the Second Transfer, as its income and deduction are the same (being the value of the interests in A on that day).

Conclusion

71. TCO concluded that:
    - The transfer of the interests in B by the Applicant to the LPs gave rise to income of the Applicant under s CB 4, and assessable income of the Applicant under s BD 1(5), equal to the value of the interests in A on the day of the transfer.
    - The Applicant is allowed a deduction equal to the value of the interests in A on the day it acquires the interests in B under s DB 23.
    - The general limitations in ss DA 2(3), DA 2(4), DA 2(5) and DA 2(6) do not apply to deny the deduction.
    - The deduction is allocated to the income year in which the Applicant disposes of the interests in A under s EA 2(2).
    - The transfer of the interests in B by the Applicant to the LPs does not give rise to "net income" or "net loss" (as calculated under s BC 4) of the Applicant in the year of the transfer.

Issue 3 | Take tuatoru: Whether s BG 1 applies

72. Section BG 1(1) provides that a "tax avoidance arrangement" is void as against the Commissioner. The approach to s BG 1 was settled by the Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289, which has been followed in subsequent judicial decisions.
73. TCO's approach in making this decision is consistent with Interpretation Statement: IS 23/01 Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007 (3 February 2023) (IS 23/01). IS 23/01 will not be replicated in this TDS but in summary the steps are as follows:
    - Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement's tax effects.
    - Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
        - Identifying and understanding Parliament's purpose for the specific provisions that are used or circumvented by the arrangement.

  - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts.
  - Considering the implications of the preceding two steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
- If the arrangement does have a tax avoidance purpose or effect, consider the merely incidental test.

74. Taking into account all of the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) the TCO concluded as follows:

The arrangement

75. TCO considered that the arrangement for s BG 1 purposes is that:
    - The Applicant will establish three limited partnerships (B and the 2 LPs) under the law of a foreign jurisdiction.
    - The Applicant will hold 100% of the limited partnership interests in each of the three limited partnerships upon establishment.
    - The general partner of the three limited partnerships will be D, an overseas company which is an indirect wholly owned subsidiary of the Applicant.
    - The Applicant will transfer the interests in A to B, as a capital contribution to B.
    - At the same time, the Applicant will transfer a 50% limited partnership interest in B to each of the LPs, as capital contributions to the LPs.

The commercial purposes of the arrangement

76. The Applicant states that the commercial or private purposes of the Arrangement are:
    - The transactions are to comply with the regulatory requirements of an overseas country.
    - Under the foreign jurisdiction it is not permitted to control or have a substantial investment in A. Currently, A is a non-permitted investment of the Applicant.
    - However, the Applicant is permitted to indirectly own non-permitted investments under the Arrangement.

The tax effects of the arrangement

77. TCO considered that the arrangement will give rise to the following tax effects:
    - The transfer of the interests in A by the Applicant to B, as a capital contribution to B, will be a capital transaction. Any gain on the transfer will be a non-taxable capital gain.
    - The transfer of the interests in B by the Applicant to each of the LPs gives rise to income of the Applicant under s CB 4, and assessable income of the Applicant under s BD 1(5), equal to the value of the interests in A on the day of the transfer.
    - The Applicant is allowed a deduction equal to the value of the interests in A on the day it acquires the interests in B under s DB 23.
    - The transfer of the interests in B by the Applicant to each of the LPs will not create net income or net loss under s BC 4. There is no gain to the Applicant because its income and deductions will be the same, as the Second Transfer occurs concurrently with the First Transfer.
    - For income tax purposes, the Applicant continues to hold the interests in A directly under s HG 2. The only difference after the two transfers is that there will be a step up in the cost base of the interests in A from that previously held by the Applicant. However, this is merely crystallising an unrealised non-taxable capital gain. In other words, no tax advantage is gained from the transfers.

Parliamentary contemplation

78. The above tax effects did not cause concerns from a s BG 1 perspective. This is because the legislation is working as intended, and there is no "tax avoidance" (as defined), because there is no avoidance, postponement, or reduction of a liability to tax.

79. Capital receipts are not normally brought into the tax net, unless specific provision is made under the Act (for example, in accordance with the financial arrangements rules or certain land taxing provisions).

80. Over the years, a number of tests have been developed by the courts to assist in distinguishing between income and capital receipts. The well-known metaphor likens income to fruit from the tree of capital assets.[12] Where a receipt is from the realisation of a capital asset, then the receipt is unlikely to be an income amount.[13]
81. Parliament's purpose demonstrated throughout the provisions of the Act reflects the above – i.e. that taxpayers are taxed on income but not on capital receipts (subject to statutory changes to the general rule). This is set out most clearly in s CB 1 which states that an amount that a person derives from a business is income of the person, but that this does not apply to an amount that is of a capital nature.
82. Where income does arise, then as intended by the Act, it is offset by an equal and offsetting deduction being revenue account property that is concurrently disposed of.

Conclusion

83. Accordingly, TCO considered the provisions of the Act were being used and had the effect that Parliament intended. The above analysis indicated that Parliament would consider that the Arrangement makes use of the relevant provisions in a manner that is consistent with Parliament's purpose for those provisions. Therefore, the Arrangement did not have a tax avoidance purpose or effect.

[12] *Eisner v Macomber* (1919) 252 U.S. 189

[13] *Californian Copper Syndicate v Harris* [1905] 5 TC 159.

TDS 24/10: GST registration date

Decision date | Rā o te Whakatau: 16 January 2024

Issue date | Rā Tuku: 28 May 2024

Subjects | Kaupapa

Commissioner's discretion; GST: voluntary registration, backdating registration

Taxation laws | Ture tāke

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

Facts | Meka

1. This dispute involved an attempt by the Taxpayer to register for GST with a backdated date of registration.
2. The Taxpayer had been registered for GST from its incorporation in early 2021 (first application for GST registration). However, the Taxpayer was deregistered in mid-2021 at the request of the Taxpayer's first agent. The Taxpayer argues that this was a mistake.
3. The first agent was eventually replaced in June 2022, and the new agent, on realising the Taxpayer was not registered for GST, requested the Taxpayer be re-registered with effect from the original date of registration (second application for GST registration). This application was denied as the agent failed to respond to a request for information from Customer and Compliance Services, Inland Revenue (CCS) to support the application.
4. The agent applied for GST registration again in March 2023 (third application of GST registration). This time CCS approved the registration application but refused to backdate the registration as requested by the agent.
5. The Taxpayer had purchased two properties:
    - The Taxpayer had signed a sale and purchase agreement to purchase the properties in October 2021 with settlement in February 2022.
    - The properties had existing residential houses which were rented out.
    - The Taxpayer had plans drawn up to develop these properties with the removal of the existing houses and a subdivision into several lots with new units on each.

Issues | Take

6. In relation to the effective date of registration, the main issues considered in this dispute were whether:
    - the Taxpayer's application for registration was a voluntary registration or whether the Taxpayer was liable to register for GST;
    - if the application was voluntary, whether CCS's decision not to backdate the registration was a valid exercise of the Commissioner's discretion under s 51(4)(a).

Decisions | Whakatau

7. TCO decided:
    - The Taxpayer's application for registration was a voluntary application because the Taxpayer was not liable to be registered. This meant that under s 51(4)(a), CCS had a discretion to determine the effective date of registration.
    - CCS's decision not to backdate the effective date of registration was the correct decision based on the facts of this dispute.

Reasons for decisions | Pūnga o ngā whakatau

Voluntary and mandatory GST registration

8. Whether a person is liable to register or voluntarily registers can affect the effective date of registration.
9. A person may voluntarily register for GST (subject to some conditions), or they may be required to register for GST. Where a person registers voluntarily, the Commissioner may determine the date of registration (s 51(3) and (4)(a)). Where a person becomes liable to be registered, the person must apply for registration within 21 days of becoming liable. If they are liable for registration and make an application within 21 days, again, the Commissioner may determine the date of registration. If a person does not apply for registration within the time frame, then the effective date of application is the date the person first became liable to be registered. This last point is subject to the proviso that the Commissioner may, having regard to the circumstances of the case, determine that person to be a registered person from such later date as the Commissioner considers equitable (CCS did not rely on this proviso).

Whether the Taxpayer was liable to be registered

10. To be liable to be registered for GST, a taxpayer must have reasonable grounds for believing that their taxable supplies made in that month and the following eleven months would exceed the $60,000 threshold (threshold). The onus is on a taxpayer to prove these grounds. Whether there are reasonable grounds is an objective test;[1] a taxpayer's subjective belief is irrelevant.
11. For the following reasons, TCO concluded the Taxpayer did not have reasonable grounds to believe they would exceed the threshold:
    - Exempt supplies do not count towards the threshold (ss 6(3)(d), 14(1)(c)). The supply of residential accommodation is an exempt supply. Therefore, the supplies of residential accommodation made by the Taxpayer do not count towards the threshold.
    - The threshold relates to supplies made by the person not those received by the person. Therefore, the expenses incurred by the Taxpayer (which the Taxpayer argued were well in excess of the threshold) on supplies received do not count towards the threshold.
    - The evidence supplied by the Taxpayer did not demonstrate they would have had reasonable grounds to believe they would exceed the threshold. As late as January 2023 consents had not been obtained and plans were still a work in progress and yet to be finalised. There was no evidence of any marketing activity or any sales of the units off the plans.
12. The Taxpayer did not satisfy the onus of proving it was liable to be registered. Therefore, the registration was voluntary and CCS was able to determine the date of registration.

Exercise of discretion

13. As the application was voluntary, the question became whether CCS's decision not to backdate the registration was a valid exercise of the Commissioner's discretion under s 51(4)(a).
14. For the following reasons, TCO concluded that the decision by CCS not to backdate the registration was correct on the facts of this dispute.
15. Section 51(4)(a) gives the Commissioner a wide discretion to determine the effective date of registration.
16. TCO decided that the fact that the Taxpayer was registered for GST from incorporation before being deregistered provided little support for backdating registration. The taxpayer argued the deregistration by the first agent was an error. The second agent stated that the first agent had disregarded the Taxpayer's requirement and wrongly represented they were not engaged in a taxable activity. Whether an error or misrepresentation, the Taxpayer did not provide evidence to support these assertions. TCO also considered that a failure by an agent to consider the clients requirements, a misunderstanding by an agent about whether the client is carrying on a taxable activity, or professional negligence, are not strong reasons for the Commissioner to backdate a GST registration.
17. TCO noted that an earlier attempt to register for GST could be a relevant factor in considering a request to backdate registration. However, TCO decided that the weight that could be placed on the Taxpayer's earlier attempt to re-register for GST in June 2022 (the second application for GST registration) was reduced due to the Taxpayer's failure to respond to a request by CCS for information. Without the information requested, CCS could not have been satisfied whether the Taxpayer was undertaking a taxable activity from that date.

[1] See, for example, *Goatlands Ltd (liq) v Borrell* (2007) NZTC 21,107.

18. TCO also decided that the delay between the second and third applications for GST registration supported CCS's decision not to backdate the registration.
19. TCO decided that the additional administrative costs of backdating (including the processing of multiple GST returns) supported CCS's decision not to backdate registration.
20. TCO decided that the lack of any apparent benefit to the Taxpayer for backdating the registration supported CCS's decision not to backdate registration. If backdated, input tax deductions could be claimed by the Taxpayer in the relevant taxable periods. However, the same input tax deductions could have been claimed, without backdating, in the first adjustment period (s 21B). Either way, it appeared that the same refund would arise for the Taxpayer.

TDS 24/11: Permanent establishment

Decision date | Rā o te Whakatau: 22 September 2023

Issue date | Rā Tuku: 29 May 2024

Subjects | Kaupapa

The use of a New Zealand subsidiary to provide services to an overseas parent company. Whether the overseas parent company had a permanent establishment in New Zealand.

Taxation laws | Ture tāke

All legislative references in this summary are to the Income Tax Act 2007 (Act) unless otherwise stated.

Facts | Meka

1. The Arrangement was that an overseas resident company (OS Co) had established a wholly-owned New Zealand resident company (NZ Co) to undertake work in New Zealand. Some of OS Co's employees would:
   - take a leave of absence from OS Co;
   - temporarily move to New Zealand; and
   - be employed directly by NZ Co on fixed term contracts.
2. OS Co would pay NZ Co a fee on a costs plus basis for the services NZ Co provided to OS Co. The terms of the contract (including the service fee) would be on an arm's length basis.
3. OS Co did not have:
   - its head office in New Zealand;
   - its centre of management in New Zealand; or
   - its directors, in their capacity as directors, exercising control of OS Co in New Zealand.
4. Unless they were on a leave of absence from OS Co, none of OS Co's employees would be present in New Zealand performing services for OS Co under the Arrangement.
5. OS Co provided services to three main customers (two companies incorporated overseas and one overseas individual). None of the customers:
   - had its head office in New Zealand;
   - had its centre of management in New Zealand;
   - had its directors, in their capacity as directors, exercising control the relevant business activities in New Zealand; or
   - was an individual that was present in New Zealand for the purposes of the Arrangement.
6. OS Co and its main customers would not:
   - have any use, access, or authority over, NZ Co's premises;
   - be using or carrying on business through NZ Co's premises; and
   - have a place of management or branch in New Zealand at NZ Co's premises.
7. NZ Co would have a fixed place of business in New Zealand (office premises). As noted above, NZ Co's initial employees would be staff who temporarily moved to New Zealand and who entered into fixed term employment contracts with NZ Co. NZ Co and its employees would have no authority to enter into contracts on behalf of OS Co or its main customers.

Issues | Take

8. The main issues considered in this ruling were whether entering and performing the Arrangement:
    - resulted in OS Co or any of its main customers being "resident in New Zealand" as defined in s YA 1;
    - created a "permanent establishment" for OS Co or any of its main customers as that term is defined in s YD 4B;
    - resulted in s GB 54 applying to OS Co or any of its main customers;
    - resulted in OS Co or any of its main customers having income that was treated as having a source in New Zealand under s YD 4;
    - gave rise to "assessable income" for OS Co or any of its main customers for the purposes of s BD 1(5).
9. In addition, the Tax Counsel Office (TCO) considered whether the Arrangement was a "tax avoidance arrangement" under s BG 1.

Decisions | Whakatau

10. TCO decided that entering and performing the Arrangement did not:
    - result in OS Co or any of its main customers being "resident in New Zealand" as defined in s YA 1;
    - create a "permanent establishment" as defined in s YD 4B for OS Co or any of its main customers;
    - result in s GB 54 applying to OS Co or any of its main customers;
    - result in OS Co or any of its main customers having income that was treated as having a source in New Zealand under s YD 4;
    - give rise to "assessable income" for OS Co or any of its main customers under s BD 1(5).
11. TCO also decided that s BG 1 did not apply to the Arrangement.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Residence

12. The issue was whether entering into and performing the Arrangement resulted in OS Co or any of its main customers being "resident in New Zealand" as defined in s YA 1.
13. Section YA 1 relevantly states that "New Zealand resident" means a person resident in New Zealand under sections YD 1 to YD 3B.

Companies

14. Section YD 2(1) provides that a company is a New Zealand resident for the purposes of the Act if one of the following four elements is satisfied:
    - it is incorporated in New Zealand;
    - its head office is in New Zealand;
    - its centre of management is in New Zealand;
    - its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.
15. TCO considered the description of the Arrangement (see above at [5]-[6]) and concluded that OS Co and its main company customers were not New Zealand resident under s YD 2 because, in each case, none of the four elements was satisfied.

Individuals

16. Section YD 1 contains the rules for determining when a natural person (individual) is a New Zealand resident. Broadly speaking, residence is determined with reference to the individual's permanent place of abode and/or personal presence in New Zealand.
17. TCO concluded that it could rule that entering and performing the Arrangement, by itself, did not result in the individual main customer being treated as resident in New Zealand.

Issue 2 | Take tuarua: Permanent establishment

18. The issue was whether entering and performing the Arrangement created a "permanent establishment" for OS Co or any of its main customers as that term is defined in s YD 4B.
19. Section YD 4B(2)(a) relevantly states that "permanent establishment", for an enterprise that is resident in a country or territory with which New Zealand has a double tax agreement (DTA) that includes a definition of permanent establishment, has the meaning given by the DTA. TCO noted that there was a DTA between New Zealand and the country where OS Co was resident.
20. TCO considered the OECD Model Commentary when interpreting article 5 of the DTA:[1]
    - *Article 5(1) – general definition of permanent establishment*: Means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
    - *Article 5(2) – examples of permanent establishments such an office or branch*: This paragraph contains an inclusive list of examples of places of business, each of which could be regarded as constituting a permanent establishment under paragraph 1.

      The facts show that NZ Co established an office in New Zealand. However, OS Co and its main customers would not:
      - have any use, access, or authority over, NZ Co's premises;
      - be using or carrying on its business through NZ Co's premises; and
      - have a place of management or branch at NZ Co's premises.

      Therefore, OS Co and its main customers would not have a permanent establishment under art 5(2).
    - *Article 5(3) – building sites, construction or installation project:* This provision did not apply to OS Co and its main customers.
    - *Article 5(4) – exclusions from permanent establishment:* The exclusion did not apply to OS Co and its main customers.
    - *Article 5(5) – authority to conclude contracts:* Article 5(5) deems a permanent establishment to exist if a dependent agent has the authority to conclude contracts on behalf of the non-resident.
    - NZ Co did not have the authority to conclude contracts on behalf of OS Co. Also, NZ Co had no contractual relationship with OS Co's main customers and had no authority to enter into contracts on their behalf.
    - *Article 5(6) – independent agent:* This provision did not apply to OS Co and its main customers.
    - *Article 5(7) – subsidiary:* The mere fact that NZ Co was a subsidiary of OS Co did not mean that NZ Co was a permanent establishment of OS Co. The OECD Model Commentary on art 5 states:

      > 115. It is generally accepted that the existence of a subsidiary company does not, of itself, constitute that subsidiary company a permanent establishment of its parent company. This follows from the principle that, for the purpose of taxation, such a subsidiary company constitutes an independent legal entity…

21. Accordingly, TCO concluded that OS Co and its main customers would not have a permanent establishment under the DTA. Therefore, OS Co or any of its main customers would not have a permanent establishment under s YD 4B(2)(a).

Issue 3 | Take tuatoru: Section GB 54

22. The issue was whether entering and performing the Arrangement resulted in s GB 54 applying to OS Co or any of its main customers.
23. The Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018 (BEPS Act 2018) introduced s GB 54, a permanent establishment specific anti-avoidance rule for large multinational groups supplying goods or services into New Zealand. If s GB 54 applied (and in very broad terms), a non-resident supplier of goods or services to a person in New Zealand would be deemed to have a permanent establishment in New Zealand.
24. TCO observed that the provisions operated in the following way:
    - Section GB 54 deems a permanent establishment to exist under the Act.
    - The non-resident person is deemed to have a permanent establishment for the purposes of any applicable double tax agreement.
    - If there is an applicable double tax agreement, the business profits article of the double tax agreement will allow New Zealand to tax the profits attributable to that permanent establishment.
    - Different rules apply if there is no double tax agreement with New Zealand.

[1] *CIR v JFP Energy Inc* [1990] 3 NZLR 536.

25. TCO summarised that s GB 54 requires all the following requirements to be met before deeming a permanent establishment to exist:
    - The non-resident makes a supply of goods or services to a person in New Zealand either directly or through an intermediary.
    - A person (the "facilitator") carries out an activity in New Zealand for the purpose of bringing about that particular supply.
    - The facilitator is associated with the non-resident, is an employee of the nonresident, or is commercially dependent on the non-resident.
    - The facilitator's activities are more than preparatory or auxiliary to the nonresident's supply.
    - The non-resident's income from the supply is subject to a double tax agreement that does not include the OECD's latest permanent establishment article.
    - A more than merely incidental purpose or effect of the arrangement is to avoid New Zealand tax, or a combination of New Zealand tax and foreign tax.
    - The non-resident is part of a large multinational group. The OECD has defined a "large multinational group" as a group with at least €750m of consolidated global turnover for the purpose of filing Country-by-Country reports. The same revenue threshold is used for s GB 54.
26. TCO noted that, on the face of it, OS Co was not intentionally making any supplies to a New Zealand recipient. The services OS Co supplied to its main customers occurred in the overseas jurisdiction. However, unknown to OS Co, the OS Co individual customer could potentially be in New Zealand when OS Co made supplies under the first requirement of s GB 54.
27. In addition, TCO considered that NZ Co did not carry out an activity in New Zealand for the purpose of bringing about a particular supply under the second requirement of s GB 54, including because NZ Co did not induce the main customers to enter into an agreement with OS Co (as those agreements already existed). TCO concluded that s GB 54 would not apply to OS Co or to the main customers.

Issue 4 | Take tuawhā: Source under s YD 4

28. The issue was whether entering and performing the Arrangement resulted in OS Co having income that was treated as having a source in New Zealand under s YD 4.
29. In reaching its conclusion TCO considered the following elements of s YD 4:
    - Whether OS Co (or its main customers) were carrying on a business in New Zealand (s YD 4(2)).
    - Whether contracts were made or performed by OS Co (or its main customers) in New Zealand (s YD 4(3)).
    - Whether OS Co (or its main customers) had income through a permanent establishment (s YD 4(17C)).
    - Whether OS Co (or its main customers) had income under a double tax agreement (s YD 4(17D)).
    - Whether OS Co (or its main customers) were deriving income from any other source in New Zealand (s YD 4(18)).
30. TCO noted that:
    - OS Co carried on a business in an overseas jurisdiction.
    - OS Co's only connection to New Zealand was that it had subcontracted NZ Co to perform services for it.
    - This in turn enabled OS Co to perform services for its main customers.
    - OS Co did not receive or earn any payments from New Zealand under the Arrangement, nor did any of its employees perform services in New Zealand while on OS Co's payroll.
    - OS Co was paying NZ Co under the Arrangement and incurring an expense, not deriving income.
31. Therefore, TCO concluded OS Co did not derive any income from the Arrangement in New Zealand, as it was paying NZ Co to perform services for it (rather than receiving income). There was no income with a source in New Zealand for OS Co or its main customers under section YD 4.

Issue 5 | Take tuarima: Assessable income under s BD 1(5)

32. The issue was whether entering and performing the Arrangement gave rise to "assessable income" for OS Co or its main customers for the purposes of s BD 1(5).

33. An amount of income will not be assessable income if it is "non-residents' foreign sourced income".[2] "Non-residents' foreign sourced income" is an amount that:
    - is foreign-sourced (it does not have a New Zealand source);
    - is derived by a non-resident; and
    - is not income of a trustee to which s HC 25(2) applies.[3]
34. OS Co and its main customers derive "non-residents' foreign sourced income", because:
    - OS Co and its main customers were non-residents of New Zealand.
    - OS Co and its main customers did not derive any New Zealand sourced income under the Arrangement.
    - There was no income of a trustee to which s HC 25(2) applies. Section HC 25(2) applies to trusts with a New Zealand settlor and a non-resident trustee.
35. Therefore, TCO considered that OS Co and its main customers would not have "assessable income" under s BD 1(5). Entering and performing the Arrangement did not give rise to "assessable income" for OS Co or its main customers under s BD 1(5).

Issue 6 | Take tuaono: Section BG 1

36. The issue was whether s BG 1 applied to the Arrangement.
37. Section BG 1(1) provides that a "tax avoidance arrangement" is void as against the Commissioner. The approach to s BG 1 was settled by the Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289, which has been followed in subsequent judicial decisions.
38. TCO's approach in making this decision is consistent with Interpretation Statement: *IS 23/01 Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007* (3 February 2023) (IS 23/01). IS 23/01 is not replicated in this TDS but in summary the steps are as follows:
    - Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement's tax effects.
    - Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
        - Identifying and understanding Parliament's purpose for the specific provisions that are used or circumvented by the arrangement.
        - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts.
        - Considering the implications of the preceding two steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
    - If the arrangement does have a tax avoidance purpose or effect, consider the merely incidental test.
39. Taking into account all of the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) TCO concluded as follows.

The "arrangement"

40. An arrangement is defined widely and includes enforceable contracts, unenforceable understandings, and all steps and transactions carrying the arrangement into effect.[4] TCO considered this involved the steps outlined above at [1]-[2], which include:
    - OS Co establishing NZ Co to undertake work in New Zealand.
    - Some of OS Co's employees taking leave of absence from OS Co, temporarily moving to New Zealand, and being employed directly by NZ Co on fixed term contracts.
    - OS Co paying NZ Co a fee on a costs plus basis for services.
    - The terms of the contract (including the service fee) being on an arm's length basis.

[2] Section BD 1(5).

[3] Section BD 1(4).

[4] Section YA 1 of the Act.

Tax Effects

41. TCO considered that the Arrangement would give rise to the following tax effects:
    - NZ Co was taxable in New Zealand on its profit from the Arrangement.
    - Entering and performing the Arrangement would not result in OS Co and its main customers deriving any assessable income in New Zealand. This was because OS Co and its main customers did not have a permanent establishment in New Zealand, were not resident in New Zealand and did not derive any New Zealand sourced income.

Whether the arrangement has a tax avoidance purpose or effect

42. TCO concluded that s BG 1 did not apply to the Arrangement because the Arrangement did not have a tax avoidance purpose or effect. This was because:
    - the legislation was working as intended (ie, the establishment of a New Zealand company to carry out activities in New Zealand was within Parliament's purpose), and
    - New Zealand was receiving an appropriate amount of tax under the Arrangement from NZ Co because the terms of the contract were at arm's length.
43. Therefore, it was not necessary for TCO to consider the merely incidental test.

TDS 24/12: Compensation – capital or revenue nature

Decision date | Rā o te Whakatau: 26 February 2024

Issue date | Rā Tuku: 7 June 2024

Subjects | Kaupapa

Income tax: business income, capital nature, compensation, income under ordinary concepts, lump-sum payment, settlement payment

Taxation laws | Ture tāke

All legislative references are to the Income Tax Act 2007.

Facts | Meka

1. Company A and Company B are both New Zealand incorporated and tax resident companies. An unrelated third party's unlawful action caused damage to the companies' intellectual property (IP).
2. The companies claimed compensation for the damaged IP. Following an independent review, an appropriate amount was recommended. The companies each received a lump sum Settlement Payment equal to the recommended amount.
3. The IP was represented in the contractual rights held under licences to commercialise certain products. The Settlement Payment was made for the damage to these rights. The IP was not destroyed but suffered significant and permanent damage.
4. The amount of the Settlement Payment was based on the value of the licences. This was determined on discounted future cash flows from income streams over a number of years that were expected to arise from the licences had the damage not been done.

Issues | Take

5. The main issues considered in this ruling were whether the Settlement Payment was income from:
   - a business under s CB 1(1) or under ordinary concepts under s CA 1(2); or
   - compensation for interruption or impairment of business activities under s CG 5B; or
   - compensation for trading stock under s CG 6.

Decisions | Whakatau

6. The Tax Counsel Office (TCO) decided that the Settlement Payment was not income under ss CB 1(1), CA 1(2), CG 5B or CG 6. It was an amount of a capital nature.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Did ss CB 1 or CA 1(2) apply?

7. An amount is income of a person under s CB 1 if it is from a business and is not an amount of a capital nature.
8. An amount is income under s CA 1(2) if it is the person's income under ordinary concepts. An amount that is capital in nature will not constitute income under ordinary concepts.[1]
9. To determine whether a business receipt is capital or revenue in nature, the important consideration is the character of the receipt in the hands of the recipient. A close examination of the facts of the particular case and the character of the payment is required and, in particular, considering:
   - The scope of the recipient's business;[2]

[1] *Case S86* (1996) 17 NZTC 7,538.

[2] *CIR v City Motor Service Ltd* [1969] NZLR 1,010; *FCT v Myer Emporium* 87 ATC 4363; *AA Finance Ltd v CIR* (1994) 16 NZTC 11,383.

- The periodicity, recurrence or regularity of the receipts;[3]
- The consideration provided for the receipts;[4] and
- The purpose and reason for which the money is received.[5]

Compensation payments

10. With reference to a compensation payment specifically, the main question determining whether it is capital or revenue in nature is what the compensation was paid for,[6] and – related to this – the character of the payment in the hands of the recipient.[7] Legal documents help determine this.[8]
11. Characterising a compensation payment requires determining whether the function of the payment was to compensate for an asset or for the revenue that would have been derived from the asset.[9]
12. The following elements generally indicate that a compensation payment is revenue in nature:
    - Compensation payments that are received to "fill the hole of" (ie, replace) lost business profits or revenue that would have been received.[10]
    - The sum resulted from an ordinary incident of carrying on business.[11]
    - Mere restriction of trading opportunities, "temporary setback".[12]
    - Consequential damage to capital asset resulting in loss of use.[13]
    - Partial injury as opposed to total loss.[14]
13. These factors point towards the sum being capital in nature:
    - Total loss of an asset.[15]
    - Sums received for what is not in the ordinary run of business.[16]
    - Sums received for destruction, deprivation or sterilisation of a capital asset.[17]
    - Sums received for cancellation of arrangements that still had a long time to run.[18]
    - Sums received for damage to structural aspects of the business (agreements can be part of the structure).[19]
    - Damages for an injury to business reputation can be compensation for lost earning capacity resulting from damage to a capital asset.[20]
14. For the compensation payment to be on capital account, it is not necessary that there is a complete destruction of the asset so that it produces no revenue.[21] Significant damage to the asset that affects its earning capacity will also suffice.

TECHNICAL DECISION SUMMARIES

[3] *Reid v CIR* (1985) 7 NZTC 5,176; *MIM Holdings Ltd v FCT* 97 ATC 4,420; *Scott v FCT* (1966) 117 CLR 514; *FCT v Hyteco Hiring Pty Limited* 92 ATC 4,694; *Birkdale Service Station Ltd v CIR* [2001] 1 NZLR 293.

[4] *MIM Holdings; The Federal Coke Company Ltd v FCT* 77 ATC 4255; *Birkdale Service Station; GP International Pipecoaters Pty Ltd v FCT* 90 ATC 4,413.

[5] *McLaurin v FCT* (1961) 104 CLR 381; *Case V8* (2001) 20 NZTC 10,092; *Reid; The Federal Coke Company; Riches v Westminster Bank Ltd* [1947] AC 390; *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271; *GP International Pipecoaters; City Motor Service.*

[6] *London and Thames Haven Oil Wharves Ltd v Attwooll* [1967] 2 All ER 124.

[7] *Sydney Refractive Surgery Centre Pty Ltd v FC of T* 2008 ATC ¶20-081.

[8] *Sayer v CIR* (1999) 19 NZTC 15, 249; *Case V8.*

[9] *Egmont Cooperative Dairies Ltd (in liq) v CIR* (1996) 17 NZTC 12,536.

[10] *Burmah Steam Ship Co Ltd v CIR* (1930) 16 TC 67; *Omihi Lime Co Lt v CIR* [1964] NZLR 731; *Case S104* (1996) 17 NZTC 7,662; *Heavy Minerals Pty Ltd v FCT* (1966) 115 CLR 512.

[11] *Higgs v Olivier* [1952] Ch 311.

[12] *Burmah Steam Ship; Case V8.*

[13] *London and Thames Haven Oil Wharves.*

[14] *London and Thames Haven Oil Wharves.*

[15] *London and Thames Haven Oil Wharves.*

[16] *Cox v C of IR* (1992) 14 NZTC 9,164.

[17] *Burmah Steam Ship; Glenboig Union Fireclay Co Ltd v IR Commrs* (1922) 12 TC 427; 1922 SC 112; *Case L94* (1989) 11 NZTC 1,542.

[18] *Van den Berghs Ltd v Clark* [1935] AC 431; *Barr, Crombie & Co Ltd v IR Commrs* (1945) 26 TC 406.

[19] *Van den Berghs; Barr, Crombie & Co.*

[20] *Sydney Refractive Surgery.*

[21] *Van den Berghs; Barr, Crombie & Co.*

15. In terms of the measure (quantum) adopted to arrive at the compensation amount, the courts have said:
    - The method of measuring depends on the circumstances.[22]
    - The measure by which the amount of damages or compensation is ascertainable is no criterion of the capital or revenue character of the sum – some said there is no relation at all.[23]
    - The mere use of the anticipated profits as a measure did not make the sum paid revenue in nature.[24]
    - Sometimes, measuring the sum by lost revenue is the only and the best way to measure it.[25]

TCO's conclusion

16. TCO concluded that the Settlement Payment was of a capital, not revenue nature, for the following reasons:
    - On the documents provided, TCO ascertained that the companies' business structure was complex with many elements present, licencing being one and an essential part of it. The disruption of one stage of the production process had flow-on effects on subsequent stages.
    - The companies received the Settlement Payment for the damage to their IP rights. This is expressly what the companies and the third party agreed to in the key document.
    - The damage to the IP rights was measured by reference to lost future profits, with discounts to adjust for the uncertainties of commercial life. However, TCO concluded that the fact the Settlement Payment was calculated on lost future revenues did not determine the nature of the Settlement Payment.
    - The IP rights were part of the "structure" of the companies' business. Without the IP rights, the business could not exist, or the structure would be very different. The IP rights themselves were a capital asset from which the companies expected to receive income.
    - The companies' IP rights had been permanently damaged, and that the damage could be classified as significant or substantial. This was because the third-party actions which had caused the damage and for which the Settlement Payment was received had significantly reduced the companies' ability to participate in the market in which they would otherwise have been able to participate. TCO considered that the companies had effectively lost earning capacity from the only asset they held.
    - The nature of the compensatory payment was one-off rather than regular or recurrent.
17. Therefore, TCO concluded that the Settlement Payment was not income under ordinary concepts under s CA 1(2) and was not business income under s CB 1(1).

Issue 2 | Take tuarua: Did s CG 5B apply?

18. An amount that results from an event and is compensation for interruption or impairment of business activities will be income under s CG 5B to the extent that it is attributable to income that the person would have derived had it not been for the event.[26]
19. TCO concluded that the Settlement Payment was not income under s CG 5B as it was not for an interruption or impairment of the companies' business activities. Rather, it was to compensate for the damage to the IP. It was also not attributable to income but was capital in nature.

Issue 3 | Take tuatoru: Did s CG 6 apply?

20. Section CG 6 applies to the payment of compensation for loss, destruction or damage to trading stock or anything acquired, manufactured or produced ancillary to a business of manufacturing or producing goods for sale or exchange.[27] The part of the payment attributable to the asset is income if the person is allowed a deduction for the cost of the asset, and the deduction is not for an amount of depreciation loss.
21. "Trading stock" in s YA 1 includes anything "produced" or manufactured; anything acquired for the purposes of manufacture or disposal; and anything for which expenditure is incurred and which would be trading stock if possession were taken.

[22] *Sydney Refractive Surgery.*

[23] *Glenboig Union Fireclay; Burmah Steam Ship; Sydney Refractive Surgery.*

[24] *Barr, Crombie & Co.*

[25] *Sydney Refractive Surgery.*

[26] Section CG 5B also applies to receipts from insurance, and indemnity.

[27] Section GC 6 also applies to receipts from insurance, and indemnity.

22. TCO decided that the companies did not acquire their IP rights for the purposes of manufacture or disposal (ie, the IP rights were not trading stock). TCO also decided the companies were not in the business of manufacturing or producing goods for sale or exchange. For these reasons, TCO concluded that s CG 6 did not apply.

REGULAR CONTRIBUTORS TO THE TIB

Tax Counsel Office

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

Legal Services

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

Technical Standards

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

Policy and Regulatory Stewardship

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