Vol 36 No 9 October 2024

TAX INFORMATION Bulletin

CONTENTS

2 **New legislation**
LI 2024/189 Tax Administration (GST Adjustment Rules) Modification Order 2024

5 **Rulings**
BR Prd 24/02 and BR Prd 24/03: WorkRide Limited

12 **Interpretation statement**
IS 24/07: Deductions for parties to employee share schemes

27 **Commissioner's statement**
CS 24/02: Withholding obligations arising in relation to transfer pricing arrangements

30 **Question we've been asked**
QB 24/5: Do supplies of standing timber and other unsevered crops wholly or partly consist of land for the compulsory zero-rating rules?

35 **Technical decision summary**
TDS 24/17: Deductibility of bonus payments

40 **Case summary**
CSUM 24/06: High Court issues a 28-day temporary halt of Commissioner's bankruptcy proceedings pending payment of sum

Inland Revenue
Te Tari Taake

ISSN 1177-620X (Online)

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 **ird.govt.nz/subscription-service/subscription-form** to receive regular email updates when we publish new draft items for comment.

Ref	Draft type	Title	Comment deadline
PUB00452	Interpretation statement	Income Tax and GST – forestry activities registered in the Emissions Trading Scheme	8 October 2024
ED0258	Operational statement	The Commissioner of Inland Revenue's search powers	18 October 2024
ED0260	Operational statement	Section 17B Notices	18 October 2024
PUB00487	Question we've been asked	Income tax – short-stay accommodation	25 October 2024
PUB00486	Interpretation statement	GST treatment of fees paid in relation to managed funds	25 October 2024
PUB00461	Interpretation statement	Income tax – arrangements involving tax losses carried forward under the business continuity rules	1 November 2024
PUB00457	Interpretation statements (2) and Question we've been asked (1)	INC - Company amalgamation rules	1 November 2024

GET YOUR TAX INFORMATION BULLETIN ONLINE

The Tax Information Bulletin (TIB) is available online as a PDF at **taxtechnical.ird.govt.nz** (search keywords: Tax Information Bulletin). You can subscribe to receive an email alert when each issue is published. Simply go to **ird.govt.nz/subscription-service/ subscription-form** and complete the subscription form.

IN SUMMARY

New legislation

LI 2024/189 Tax Administration (GST Adjustment Rules) Modification Order 2024 2

This Order in Council incorporates a modification made to the GST adjustment rules. This Order in Council comes into force on 10 September 2024.

Rulings

BR Prd 24/02 and BR Prd 24/03: WorkRide Limited 5

The Arrangement is WorkRide's provision of self-powered or low-powered commuting vehicles (Equipment) to the employees of WorkRide's customers, where the employees agree to a temporary reduction in salary in return for the temporary lease of Equipment and the opportunity to own the Equipment at the end of the lease period. The Arrangement allows for an optional instalment-based payment structure for certain Employers. Examples of Equipment are bicycles, electric bicycles, scooters and electric scooters.

Interpretation statement

IS 24/07: Deductions for parties to employee share schemes 12

This interpretation statement considers what deductions employers can claim for income tax in relation to employee share schemes. It explains the need to satisfy the general permission and when the capital limitation might apply.

Commissioner's statement

CS 24/02: Withholding obligations arising in relation to transfer pricing arrangements 27

This Commissioner's statement sets out the Commissioner's position and operational approach in relation to the withholding obligations that may arise in relation to transfer pricing arrangements.

Question we've been asked

QB 24/5: Do supplies of standing timber and other unsevered crops wholly or partly consist of land for the compulsory zero-rating rules? 30

This question we've been asked (QWBA) provides further guidance on the meaning of "land". It supplements an earlier QWBA, QB 20/04, and interpretation statement IS 17/08.

Technical decision summary

TDS 24/17: Deductibility of bonus payments 35

Income tax: deductibility of bonuses; whether issue of shares to fund bonuses are income; tax avoidance.

Case summary

CSUM 24/06: High Court issues a 28-day temporary halt of Commissioner's bankruptcy proceedings pending payment of sum 40

This was an application by the judgment debtor to halt bankruptcy proceedings brought by the Commissioner of Inland Revenue on 1 March 2023.

NEW LEGISLATION

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

Tax Administration (GST Adjustment Rules) Modification Order 2024

Section 143(3) of the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023

Order (LI 2024/189)

This Order in Council modifies the effect of an application provision in the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 to resolve a legislative error that prevents GST-registered taxpayers from being able to make one adjustment for some goods and services acquired before 1 April 2023 that had a permanent change of use on or after 1 April 2023.

Background

In 2023, changes were made to simplify the GST apportionment and adjustment rules. These changes were given effect by amendments made to the Goods and Services Tax Act 1985 (GSTA) by the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Act 2023 (PERM Act), which came into force on 31 March 2023.

One of the changes made was intended to reduce the number of GST adjustments required for goods or services (an asset) that had a permanent change of use. An asset will have a permanent change of use when it stops being used for non-taxable purposes (for example, private purposes) and permanently switches to being used for taxable purposes (for example, business purposes). Under the old rules, taxpayers who wanted to make a GST adjustment for assets that had a permanent change of use needed to do so across two adjustment periods. This meant they needed to do two calculations across two years.

The amendments in the PERM Act reduced the number of adjustment periods and calculations required in these circumstances to one. This was to simplify the rules and reduce compliance costs.

Since the changes came into force, Inland Revenue identified a legislative error that denied taxpayers access to the single adjustment when the asset in question was acquired by taxpayers before 1 April 2023. The error was included in the application provision (section 143(3) of the PERM Act) for the provision that includes the calculation method (section 21FB of the GSTA). The application provision set out that the simplified calculation could only be applied for a GST-registered person's "adjustment period" beginning on or after 1 April 2023. This meant that it was not available in circumstances where an asset was acquired before 1 April 2023 because the acquisition date marks the start date of the adjustment period.[1] The policy intent was that the calculation be available for taxpayers to apply in GST returns for taxable periods beginning on or after 1 April 2023. This coincided with when the PERM Act came into force.

The Minister of Revenue agreed to include retrospective remedial amendments to address the issue in the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill. These amendments are expected to come into force before 31 March 2025. In the meantime, Inland Revenue must apply the current law, which would delay taxpayers' entitlements to GST input tax deductions until March 2025.

In anticipation of permanent remedial amendments coming into force, and to allow the law to apply as intended, the Minister of Revenue has exercised the remedial power available in the Tax Administration Act 1994 (TAA), recommending an Order in Council to modify the application of the law to address the legislative error. The modification in the Order in Council is time limited and optional for affected taxpayers to apply.

The Minister's reasons for recommending the modification and an explanation of the way in which it complies with the requirements of the TAA are published in the Order in Council.

1 Unless the start date for the adjustment period is the day after the last day of the preceding adjustment period. For this reason, if a taxpayer has already had an adjustment period for the relevant asset, the law operates as intended and no modification is necessary.

Key features

- A time-limited modification that is optional for affected taxpayers to apply has been made by Order in Council on the recommendation of the Minister of Revenue.
- The modification resolves a legislative error that prevents GST-registered taxpayers from being able to make one adjustment for some goods and services acquired before 1 April 2023 that had a permanent change of use on or after 1 April 2023.
- The modification sets out how affected taxpayers can choose for it to apply (or not apply) in their circumstances.

Effective date

The Tax Administration (GST Adjustment Rules) Modification Order 2024 came into force on 10 September 2024. It has retrospective effect, meaning it can be applied by taxpayers for the purposes of their GST returns for taxable periods beginning on or after 1 April 2023.

The Order is revoked on 31 March 2025. After this date, permanent legislative amendments included in the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill are expected to be in force. These proposed amendments would have retrospective effect and would apply from 1 April 2023.

Detailed analysis

Issue requiring modification

Section 21FB of the GSTA applies for the purposes of making an adjustment for an asset that has a permanent change of use. Before amendments were made to section 21FB in 2023, when an asset had a permanent change of use, two adjustments across two adjustment periods (and therefore, two income years) were required.

The PERM Act amended section 21FB of the GSTA on 31 March 2023.The amended section:

- allows one adjustment to be made (instead of two) for an asset that has a permanent change of use, and
- is available from a registered person's "adjustment period" starting on or after 1 April 2023.

The problem with the legislation as it came into force is that the application provision (in section 143(3) of the PERM Act) has the effect of denying access to the calculation for some taxpayers when they acquired an asset before 1 April 2023 and that asset has a permanent change of use on or after 1 April 2023. This is because for these taxpayers, their adjustment period began on the date they acquired the asset, and this was before 1 April 2023. The issue affects taxpayers who have not previously made an adjustment for these assets before 1 April 2023.

Modification

The modification set out in the Order in Council ensures taxpayers can make one adjustment for assets that have a permanent change of use in GST returns for taxable periods that start on or after 1 April 2023. It achieves this by modifying the effect of the application provision in section 143(3) of the PERM Act by allowing it to apply in the intended way.

The modification is expressed as being available to all taxpayers. In practice, the modification will be relevant to GST-registered persons who:

- acquired goods or services (an asset) before 1 April 2023
- had not made an adjustment for that asset before 1 April 2023,[2] and
- permanently changed their use of the asset from private (for example) or non-taxable use to business (for example) or taxable use on or after 1 April 2023.

The modification is available to apply up until 31 March 2025 when the Order in Council is revoked. This is because modifications by Order in Council can only be in force for a limited time, and it is expected permanent legislative amendments addressing the error will be in force by then.

2 Taxpayers who acquired an asset before 1 April 2023 may have already had an adjustment period and made an adjustment in a GST return before 1 April 2023. These taxpayers are unaffected by the issue that gave rise to the need for the modification because their second adjustment period would start on or after 1 April 2023.

Applying the modification

The following table sets out how taxpayers can choose to apply (or not apply) the modification, depending on their circumstances:

Table 1: How to choose to apply the modification

Taxpayer…	…wants to apply modification	…does not want to apply modification
…has taken a tax position in a GST return that is consistent with the modification.	The modification will apply automatically. No action is required by the taxpayer.	The taxpayer can ask the Commissioner to amend their assessment under section 113 of the TAA.
… has taken a tax position in a GST return that is inconsistent with the modification.	The taxpayer can ask the Commissioner to amend their assessment under section 113 of the TAA.	The modification will not be applied. No action is required by the taxpayer.
…has not yet provided a GST return.	The taxpayer can apply the modification by taking a tax position consistent with the modification in their GST return.	The taxpayer can choose for the modification not to apply by taking a tax position consistent with the effect of the unmodified law in their GST return.

The Commissioner will amend assessments to be consistent with the modification (or not) in accordance with the process set out in standard practice statement SPS 20/03: *Requests to amend assessments*. Taxpayers who want to request an amendment to their assessment will need to provide the Commissioner with sufficient information to enable an amendment request to be made.

If a taxpayer has taken a position in a GST return consistent with the modification and asks the Commissioner to amend their assessment to be inconsistent with the modification, the taxpayer may have to account for the difference between the two assessments by making a payment to the Commissioner.

Effect of law with and without the modification

Example: Asset acquired before 1 April 2023 that has a permanent change of use on or after 1 April 2023

A taxpayer with a standard balance date acquires an asset for private purposes (non-taxable use) on 1 January 2023 for $1,150,000 including GST.

The taxpayer registered for GST and started using the asset exclusively for business purposes (taxable use) on 1 November 2023.

Under the law without effect of modification

The taxpayer would make two adjustments to deduct GST input tax of $150,000 across two adjustment periods. $50,000 would be deductible in the GST return that corresponds to 31 March 2024. The balance of $100,000 would be deductible in the GST return for the taxable period that corresponds to 31 March 2025.

Under the law with effect of modification

The taxpayer would make one adjustment of $150,000 in their GST return for the taxable period that corresponds to 31 March 2024.

Further information

The Order in Council can be found at:

https://www.legislation.govt.nz/regulation/public/2024/0189/latest/LMS985077.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**

Product Ruling – BR Prd 24/02

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

Name of person who applied for the Ruling

This Ruling has been applied for by WorkRide Limited (WorkRide).

Taxation Laws

All legislative references are to the Income Tax Act 2007 (ITA) or the Goods and Services Tax Act 1985 (GSTA) unless otherwise stated.

This Ruling applies in respect of ss BG 1, CX 2, CX 19D, RD 2 and RD 3 of the ITA and ss 6, 8, 10(2), 20 and 76 of the GSTA.

The Arrangement to which this Ruling applies

The Arrangement is WorkRide's provision of self-powered or low-powered commuting vehicles (Equipment) to the employees of WorkRide's customers, where the employees agree to a temporary reduction in salary in return for the temporary lease of Equipment and the opportunity to own the Equipment at the end of the lease period. The Arrangement allows for an optional instalment-based payment structure for certain Employers. Examples of Equipment are bicycles, electric bicycles, scooters and electric scooters.

The paragraphs below set out further details of the Arrangement.

The parties to the Arrangement

1. The parties to the Arrangement are as follows:
   - WorkRide is a New Zealand resident (by incorporation) that facilitates the provision of the Equipment to the Employee (the Services), in consideration for the payment of a service fee (Service Fee) by the Employer. WorkRide is GST registered.
   - Employer is a New Zealand resident employer that has contracted with WorkRide to facilitate the provision of Equipment to Employees who participate in the Arrangement.
   - Employee is a New Zealand resident employee of the Employer who participates in the Arrangement and reduces their gross annual earnings under a Salary Sacrifice Agreement.
   - Retail Partner is a GST-registered, third-party retail partner that has contracted with WorkRide to sell Equipment to WorkRide for use in the Arrangement.
   - Third-Party Financier is an independent third-party lender that may enter into a financing contract with the Employer to fund the Service Fee payable by the Employer to WorkRide under the terms of the Customer Master Services Agreement.

Relevant agreements

2. The following agreements form part of the Arrangement:
   - Customer Master Services Agreement (MSA) is an agreement between WorkRide and the Employer about the Services (version 2.3, dated 6 May 2024 and provided to Inland Revenue on 23 May 2024).
   - WorkRide Lease Agreement (Lease Agreement) is a service-level lease agreement between WorkRide and the Employee specifying the parties' obligations concerning the lease of the Equipment over the term of the Lease Agreement (version 2.2 provided to Inland Revenue on 16 November 2023).
   - WorkRide Salary Sacrifice Agreement is an agreement between the Employer and Employee under which the Employee's annualised salary or wages are reduced for the term of the salary sacrifice which is not longer than the period of the Lease Agreement (except in instances where the term is extended due to Employee absence or where an Employee's salary falls below the minimum wage) (version 2.2, dated 10 May 2024 and provided to Inland Revenue on 19 June 2024).
   - Next Steps Deed is an agreement between WorkRide and the Employee to transfer the ownership of the Equipment at the end of the Lease Agreement (version 2.2 provided to Inland Revenue on 16 November 2023).

Employee benefit scheme

3. WorkRide will contract with Retail Partners to supply Equipment on an 'as required' basis. An Employer will engage with WorkRide by entering into the MSA. In consideration for the Services, the Employer (or a Third-Party Financier on behalf of the Employer) will pay a Service Fee to WorkRide. The Service Fee that the Employer (or Third-Party Financier) pays to WorkRide for the Services is calculated with reference to the total cost of the Equipment to WorkRide. The Employer will usually inform Employees of the opportunity to participate in the Arrangement.
4. An Employee who wishes to participate in the Arrangement will raise a request for WorkRide to provide the Equipment to the Employee. After WorkRide and the Employer approve the Employee's request, the Employee will enter into the Lease Agreement with WorkRide. Under the Lease Agreement, the Employee:
   a) may not profit from, transfer, sell or otherwise dispose of the Equipment;
   b) agrees to retain possession of the Equipment for the term of the lease;
   c) acknowledges to WorkRide that they will use the Equipment mainly for commuting to and from, or between the Employer's workplace; and
   d) agrees to use the Equipment mainly for commuting to and from, or between the Employer's workplace.
5. The Service Fee that the Employer must pay is equivalent to or less than the cost of the Equipment to WorkRide. The Employer pays the entire Service Fee at the outset or through instalments as agreed between WorkRide and the Employer. Once the Employer and WorkRide agree on the Service Fee payment method, WorkRide will acquire legal ownership of the Equipment from the Retail Partner and enable the Employee to collect the Equipment.
6. To participate in the Arrangement, the Employer and Employee agree to reduce the Employee's annualised gross salary or wages for a period of time under a Salary Sacrifice Agreement.
7. The Salary Sacrifice Agreement forms part of the Employee's employment agreement and is entered into prior to the provision of the Equipment and before the income that is to be sacrificed is earned. Under the Salary Sacrifice Agreement:
   a) the Employer and the Employee together agree on the amount of the reduction in the Employee's annualised gross salary or wages, which will not exceed the amount of the Service Fee;
   b) the Employee acknowledges that the reduction in salary or wages may affect their KiwiSaver contributions, student loan deductions and other employment benefits;
   c) the salary sacrifice will be renegotiated or suspended should an Employee's salary or wages fall below the minimum wage;
   d) the salary sacrifice may be suspended if an Employee is absent from work for reasons such as maternity leave, unpaid leave, extended holiday or sick leave;
   e) the salary sacrifice will not be initiated if the Employee cancels their participation in the WorkRide scheme before collecting the Equipment;

f) the Employee's obligations continue even if the Equipment is lost, stolen or damaged during the period of the Lease;

g) should an Employee leave the Employer's employment before the salary sacrifice period has ended, they must repay the Employer the outstanding cost to the Employer of providing the Equipment.

8. Once the Employee has collected the Equipment from the Retail Partner, the Lease Agreement begins. If the Employee's employment with the Employer ends while the Lease Agreement is in force, the Lease Agreement will terminate with immediate effect when the employment ends.

9. Towards the end of the Lease Agreement, WorkRide will contact the Employee to discuss the Employee's options for ownership of the Equipment after the Lease Agreement ends. The Employee may (but is not required to) execute a Next Steps Deed to keep the Equipment for no consideration. Under the Next Steps Deed:

   a) WorkRide gifts the Equipment to the Employee; and

   b) the Employee acknowledges, represents and warrants that the gifted Equipment will be used for the main purpose of commuting to and from, or between the Employee's workplace.

   Alternatively, the Employee can return the Equipment to WorkRide and then full legal title remains with WorkRide.

10. Where the Employee executes the Next Steps Deed, the parties will not enter into the Arrangement more than once over the estimated useful life of the Equipment (as determined by the Commissioner's Table of Depreciation Rates), as measured from the day the Lease Agreement takes effect, unless there are justified reasons for early replacement. Such reasons may include but are not limited to:

   - theft or destruction of the Equipment;
   - excessive wear and tear – the Employee has used the Equipment more intensively than typical use, resulting in wear and tear that affects the Equipment's functionality or safety;
   - change in user needs – the Employee's needs change because their commute changes, with the result that they need different Equipment;
   - accidental damage – the Employee damages the Equipment in a way that affects its functionality or safety and repair is impractical;
   - health or physical considerations – the Equipment no longer suits the Employee's physical needs or health conditions; or
   - regulatory compliance – local regulations or laws change with the result that the Employee needs different Equipment to comply with safety or other legal requirements.

11. For the avoidance of doubt, this Ruling does not apply to Employers:

   - to the extent they have provided self-powered or low-powered commuting vehicles to employees under the arrangement described in BR Prd 23/06 (which is based on an earlier version of the MSA):
   - to whom BR Prd 24/03 applies because they do not use the Salary Sacrifice Agreement described in paragraph 2.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) The cost of the Equipment will not exceed the maximum allowable cost specified in any regulations the Governor-General makes under s CX 19D(3) of the ITA.

(b) The Equipment will meet any requirements for vehicles specified in any regulations the Governor-General makes under s CX 19D(3) of the ITA.

(c) The Employer is GST registered.

(d) The Employer must use version 2.2 of the WorkRide Salary Sacrifice Agreement as described in paragraph 2.

(e) Any MSA, Lease Agreement and Next Steps Deed (if applicable) entered into by the parties will be materially the same as the versions provided to Inland Revenue on 16 November 2023 and 23 May 2024 as set out in paragraph 2.

How the Taxation Laws apply to the Arrangement

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

(a) The provision of the Equipment to the Employee under the Lease Agreement and, if applicable, the Next Steps Deed, is excluded from being a fringe benefit under s CX 19D of the ITA and is therefore not a fringe benefit under s CX 2 of the ITA.

(b) The WorkRide Salary Sacrifice Agreement is a valid salary sacrifice and an amount of sacrificed salary is not a PAYE income payment under s RD 3 or the PAYE rules (as defined in s RD 2).

(c) Section BG 1 of the ITA does not apply to the Arrangement.

(d) The Employer can claim the GST charged on the supply of the Services by WorkRide (being the facilitation of the Arrangement) as input tax (as defined under s 3A(1)(a) of the GSTA) under s 20(3) and 20(3C) of the GSTA to the extent to which the Services are used for making taxable supplies.

(e) The sacrifice of salary under the WorkRide Salary Sacrifice Agreement is consideration for a taxable supply by the Employer to the Employee under s 8 of the GSTA of procuring the provision of the Equipment to the Employee. The value of the supply for the purposes of s 10(2) of the GSTA is the amount of the salary sacrificed.

(f) Section 76 of the GSTA does not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 27 June 2024 and ending on 26 June 2027.

This Ruling is signed by me on the 27th day of June 2024.

James McKeown
Tax Counsel, Tax Counsel Office

Product Ruling – BR Prd 24/03

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

Name of person who applied for the Ruling

This Ruling has been applied for by WorkRide Limited (WorkRide).

Taxation Laws

All legislative references are to the Income Tax Act 2007 (ITA) or the Goods and Services Tax Act 1985 (GSTA) unless otherwise stated.

This Ruling applies in respect of ss BG 1, CX 2 and CX 19D of the ITA and ss 6, 8, 10(2), 20 and 76 of the GSTA.

The Arrangement to which this Ruling applies

The Arrangement is WorkRide's provision of self-powered or low-powered commuting vehicles (Equipment) to the employees of WorkRide's customers, where the employees agree to a temporary reduction in salary in return for the temporary lease of Equipment and the opportunity to own the Equipment at the end of the lease period. The Arrangement allows for an optional instalment-based payment structure for certain Employers. Examples of Equipment are bicycles, electric bicycles, scooters and electric scooters.

The paragraphs below set out further details of the Arrangement.

The parties to the Arrangement

1. The parties to the Arrangement are as follows:
   - WorkRide is a New Zealand resident (by incorporation) that facilitates the provision of the Equipment to the Employee (the Services), in consideration for the payment of a service fee (Service Fee) by the Employer. WorkRide is GST registered.
   - Employer is a New Zealand resident employer that has contracted with WorkRide to facilitate the provision of Equipment to Employees who participate in the Arrangement.
   - Employee is a New Zealand resident employee of the Employer who participates in the Arrangement and reduces their gross annual earnings under a Salary Sacrifice Agreement.
   - Retail Partner is a GST-registered, third-party retail partner that has contracted with WorkRide to sell Equipment to WorkRide for use in the Arrangement.
   - Third-Party Financier is an independent third-party lender that may enter into a financing contract with the Employer to fund the Service Fee payable by the Employer to WorkRide under the terms of the Customer Master Services Agreement.

Relevant agreements

2. The following agreements form part of the Arrangement:
   - Customer Master Services Agreement (MSA) is an agreement between WorkRide and the Employer about the Services (version 2.3, dated 6 May 2024 and provided to Inland Revenue on 23 May 2024).
   - WorkRide Lease Agreement (Lease Agreement) is a service-level lease agreement between WorkRide and the Employee specifying the parties' obligations concerning the lease of the Equipment over the term of the Lease Agreement (version 2.2 provided to Inland Revenue on 16 November 2023).
   - Salary Sacrifice Agreement is an agreement between the Employer and Employee under which the Employee's annualised salary or wages are reduced for the term of the salary sacrifice.
   - Next Steps Deed is an agreement between WorkRide and the Employee to transfer the ownership of the Equipment at the end of the Lease Agreement (version 2.2 provided to Inland Revenue on 16 November 2023).

Employee benefit scheme

3. WorkRide will contract with Retail Partners to supply Equipment on an 'as required' basis. An Employer will engage with WorkRide by entering into the MSA. In consideration for the Services, the Employer (or a Third-Party Financier on behalf of the Employer) will pay a Service Fee to WorkRide. The Service Fee that the Employer (or Third-Party Financier) pays to WorkRide for the Services is calculated with reference to the total cost of the Equipment to WorkRide. The Employer will usually inform Employees of the opportunity to participate in the Arrangement.
4. An Employee who wishes to participate in the Arrangement will raise a request for WorkRide to provide the Equipment to the Employee. After WorkRide and the Employer approve the Employee's request, the Employee will enter into the Lease Agreement with WorkRide. Under the Lease Agreement, the Employee:
   a) may not profit from, transfer, sell or otherwise dispose of the Equipment;
   b) agrees to retain possession of the Equipment for the term of the lease;
   c) acknowledges to WorkRide that they will use the Equipment mainly for commuting to and from, or between the Employer's workplace; and
   d) agrees to use the Equipment mainly for commuting to and from, or between the Employer's workplace.
5. The Service Fee that the Employer must pay is equivalent to or less than the cost of the Equipment to WorkRide. The Employer pays the entire Service Fee at the outset or through instalments as agreed between WorkRide and the Employer. Once the Employer and WorkRide agree on the Service Fee payment method, WorkRide will acquire legal ownership of the Equipment from the Retail Partner and enable the Employee to collect the Equipment.
6. To participate in the Arrangement, the Employer and Employee agree to reduce the Employee's annualised gross salary or wages for a period of time under a Salary Sacrifice Agreement. The Employer and the Employee will together agree on the amount of the reduction in the Employee's annualised gross salary or wages. The amount of the salary sacrificed will not exceed the amount of the Service Fee.
7. Once the Employee has collected the Equipment from the Retail Partner, the Lease Agreement begins. If the Employee's employment with the Employer ends while the Lease Agreement is in force, the Lease Agreement will terminate with immediate effect when the employment ends.
8. Towards the end of the Lease Agreement, WorkRide will contact the Employee to discuss the Employee's options for ownership of the Equipment after the Lease Agreement ends. The Employee may (but is not required to) execute a Next Steps Deed to keep the Equipment for no consideration. Under the Next Steps Deed:
   a) WorkRide gifts the Equipment to the Employee; and
   b) the Employee acknowledges, represents and warrants that the gifted Equipment will be used for the main purpose of commuting to and from, or between the Employee's workplace.

   Alternatively, the Employee can return the Equipment to WorkRide and then full legal title remains with WorkRide.
9. Where the Employee executes the Next Steps Deed, the parties will not enter into the Arrangement more than once over the estimated useful life of the Equipment (as determined by the Commissioner's Table of Depreciation Rates), as measured from the day the Lease Agreement takes effect, unless there are justified reasons for early replacement. Such reasons may include but are not limited to:
   - theft or destruction of the Equipment;
   - excessive wear and tear – the Employee has used the Equipment more intensively than typical use, resulting in wear and tear that affects the Equipment's functionality or safety;
   - change in user needs – the Employee's needs change because their commute changes, with the result that they need different Equipment;
   - accidental damage – the Employee damages the Equipment in a way that affects its functionality or safety and repair is impractical;
   - health or physical considerations – the Equipment no longer suits the Employee's physical needs or health conditions; or
   - regulatory compliance – local regulations or laws change with the result that the Employee needs different Equipment to comply with safety or other legal requirements.

10. For the avoidance of doubt, this Ruling does not apply to Employers:
    - to the extent they have provided self-powered or low-powered commuting vehicles to employees under the arrangement described in BR Prd 23/06 (which is based on an earlier version of the MSA):
    - who use the WorkRide template salary sacrifice agreement described in BR Prd 24/02.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) The cost of the Equipment will not exceed the maximum allowable cost specified in any regulations the Governor-General makes under s CX 19D(3) of the ITA.

(b) The Equipment will meet any requirements for vehicles specified in any regulations the Governor-General makes under s CX 19D(3) of the ITA.

(c) The Employer is GST registered.

(d) The Salary Sacrifice Agreement that an Employer and Employee enter into is a valid salary sacrifice under relevant law.

(e) Any MSA, Lease Agreement and Next Steps Deed (if applicable) entered into by the parties will be materially the same as the versions provided to Inland Revenue on 16 November 2023 and 23 May 2024 as set out in paragraph 2.

How the Taxation Laws apply to the Arrangement

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

(a) The provision of the Equipment to the Employee under the Lease Agreement and, if applicable, the Next Steps Deed, is excluded from being a fringe benefit under s CX 19D of the ITA and is therefore not a fringe benefit under s CX 2 of the ITA.

(b) Section BG 1 of the ITA does not apply to the Arrangement.

(c) The Employer can claim the GST charged on the supply of the Services by WorkRide (being the facilitation of the Arrangement) as input tax (as defined under s 3A(1)(a) of the GSTA) under s 20(3) and 20(3C) of the GSTA to the extent to which the Services are used for making taxable supplies.

(d) The sacrifice of salary under a Salary Sacrifice Agreement is consideration for a taxable supply by the Employer to the Employee under s 8 of the GSTA of procuring the provision of the Equipment to the Employee. The value of the supply for the purposes of s 10(2) of the GSTA is the amount of the salary sacrificed.

(e) Section 76 of the GSTA does not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 27 June 2024 and ending on 26 June 2027.

This Ruling is signed by me on the 27th day of June 2024.

James McKeown
Tax Counsel Office

INTERPRETATION STATEMENT

This section of the *TIB* contains interpretation statements issued by the Commissioner of Inland Revenue.

These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

Some interpretation statements may be accompanied by a fact sheet summarising and explaining the main points. Any fact sheet should be read alongside its corresponding interpretation statement to completely understand the guidance. Fact sheets are not binding on the Commissioner. Check **taxtechnical.ird.govt.nz/publications** for any fact sheets accompanying an interpretation statement.

IS 24/07: Deductions for parties to employee share schemes

Issued | Tukuna: 22 August 2024

This interpretation statement considers what deductions employers can claim for income tax in relation to employee share schemes. It explains the need to satisfy the general permission and when the capital limitation might apply.

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

Introduction | Whakataki

1. The employee share scheme (ESS) tax regime changed in 2018. The objective of the changed rules is to treat ESS benefits neutrally so that, to the extent possible, whether remuneration for labour is paid in cash or shares the tax position does not change for either the employer or the employee.
2. Following the changes to the rules, we have received various questions about how the law applies in certain scenarios. This statement addresses some of those questions by explaining the rules for employer deductions and providing examples to illustrate how those rules apply.
3. This interpretation statement does not consider the implications of any anti-avoidance provisions and the outcomes set out may not apply where the general anti-avoidance provision (s BG 1) or the specific ESS anti-avoidance provision (s GB 49B) applies.

What is an employee share scheme?

4. Section CE 7 defines an ESS as follows:

> **CE 7 Meaning of employee share scheme**
>
> **Employee share scheme** means—
>
> (a) an arrangement with a purpose or effect of issuing or transferring shares in a company (**company A**) to a person—
>
> (i) who will be, is, or has been an employee of company A or of another company that is a member of the same group of companies as company A, if the arrangement is connected to the person's employment or service:
>
> (ii) who will be, is, or has been a shareholder-employee in relation to company A or in relation to another company that is a member of the same group of companies as company A, if the arrangement is connected to the person's employment or service:
>
> (iii) who is an associate of a person described in subparagraph (i) or (ii) (**person A**), if the arrangement is connected to person A's employment or service; but
>
> (b) does not include an arrangement that—
>
> (i) is an exempt ESS:
>
> (ii) requires market value consideration to be paid by a person described in paragraph (a) for the transfer of shares in the company on the share scheme taxing date:
>
> (iii) requires a person described in paragraph (a) to put shares, acquired by them for market value consideration, at risk, if the arrangement provides no protection against a fall in the value of the shares and none of the consideration for acquiring the shares is provided to the person under an agreement that it is used for acquiring the shares.

5. Broadly, an ESS is an arrangement:
   - with a purpose or effect of issuing or transferring shares in a company to a person who will be, is, or has been an employee (or shareholder-employee) of that company or another company in the same group; and
   - that is connected to the employee's (or shareholder-employee's) employment or service.
6. An employee and shareholder–employee are persons described in s CE 7(a)(i) and (ii) and are both referred to as the "employee" in this interpretation statement for ease of reference.
7. For the purposes of the Income Tax Act 2007 (Act), an "employee" is defined to include a person who receives or is entitled to receive a "PAYE income payment". This includes a payment of "salary or wages", "extra pay" or a "schedular payment". A "schedular payment" is a payment of a class set out in sch 4 of the Act, that in turn lists payments made to a wide variety of workers. Accordingly, the term "employee" for income tax purposes (and therefore the ESS rules) includes persons that are employees under common law (ie under a contract of service) and, if they receive schedular payments, also persons that may be independent contractors under common law (ie under a contract for service). For more information on what constitutes an "employee" for tax purposes see IG 16/01: **Determining employment status for tax purposes (employee or independent contractor?**).
8. A common example of a person that might be an independent contractor at common law but an employee for income tax purposes because they receive schedular payments, and therefore are subject to the ESS rules, is a company director. For more discussion of when fees paid to directors are schedular payments, see IS 17/06: **Application of schedular payment rules to directors' fees** and IS 19/01: **Income tax – application of schedular payment rules to non-resident directors' fees**.
9. An ESS also includes providing shares to an associate of an employee (being a person described in s CE 7(a)(iii)) if the arrangement is in connection with the employee's employment or service. Accordingly, the person who might receive shares under an ESS could be either the employee or an associate. This interpretation statement refers to such a person as the "ESS beneficiary" (as also defined in s CE 7C).
10. An "arrangement" is defined in s YA 1 to mean "an agreement, contract, plan, or understanding, whether enforceable or unenforceable, including all steps and transactions by which it is carried into effect". It includes all aspects of a scheme, such as direct transfers of shares, loans to buy shares, bonuses, put and call options and transfers to trusts.
11. There are several potential parties to an ESS such as the employer, the ESS beneficiaries, the company issuing the shares (if different to the employer) and the trustee facilitating the scheme (if there is one). A person can be a party to an arrangement that is an ESS without necessarily being a signatory of the scheme's documents.
12. An amount derived by a person in connection with their employment or service is income under s CE 1(1)(d) if it is a benefit the person received under an ESS. The amount of the benefit is calculated on the share scheme taxing date (SSTD) using the formula in s CE 2(1). Regardless of whether the employee or an associate receives the shares or related rights, it is the employee that receives any employment income from the ESS as set out in s CE 1(1)(d) and s CE 2. This is because s CE 2(1) provides that a person who is described in s CE 7(a)(i) or (ii) (being the employee or the shareholder-employee) receives the benefit calculated under s CE 2 and therefore the income under s CE 1(1)(d).
13. Section CE 2 states:

> **CE 2 Benefits under employee share schemes**
>
> *Benefit*
>
> (1) A person who is an employee share scheme beneficiary described in section CE 7(a)(i) or (ii) receives a benefit for the purposes of section CE 1(1)(d) in relation to shares or related rights under the employee share scheme equal to the positive amount calculated on the share scheme taxing date using the formula—
>
> share value − consideration paid + consideration received − previous income.

INTERPRETATION STATEMENT

Definition of items in formula

(2) In the formula in subsection (1),—

(a) **share value** is the market value of the shares or related rights owned by an employee share scheme beneficiary on the share scheme taxing date, if the share scheme taxing date is not triggered by a transfer or cancellation of the shares or related rights:

(b) **consideration paid** is the amount of consideration paid or payable by an employee share scheme beneficiary in relation to the transfer of the shares or related rights under the employee share scheme:

(c) **consideration received** is the amount of consideration paid or payable to an employee share scheme beneficiary in relation to a transfer or cancellation of the shares or related rights under the employee share scheme, not including relevant shares or related rights under a replacement employee share scheme:

(d) **previous income** is the total amount of income under section CE 1(1)(d) that the employee share scheme beneficiary has in relation to the shares or related rights before the date that is 6 months after the date of Royal assent for the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act 2018 [Being 29 September 2018].

…

14. Broadly, the amount of the employee's benefit under s CE 2(1) is the market value of the shares or related rights that an ESS beneficiary owns on the SSTD (or the amount of consideration paid or payable to an ESS beneficiary in relation to a transfer or cancellation of the shares or related rights) less any consideration provided by an ESS beneficiary. The SSTD, which is defined in s CE 7B, is essentially the date when:

- the shares are held by or for the benefit of an ESS beneficiary and there are no conditions or protections under the ESS that defer the date under s CE 7B(1)(a); or
- if the ESS beneficiary's rights are cancelled or transferred to a non-associate prior to this time, the date when that occurs under s CE 7B(1)(b).

Deductions for parties to an employee share scheme

15. Section DV 27 governs what deductions persons who are party to an ESS may take. The parties could potentially include, for example, the employer, the employees and (if different from the employer) the company issuing the shares. A trustee could also be facilitating the ESS, however a trustee is generally treated as nominee for the employer or company issuing the shares under s CE 6 (for more information regarding trustees of an ESS, see IS 24/04: **Trustee of employee share scheme trust treated as nominee**).

16. Section DV 27 states:

DV 27 Employee share schemes

When this section applies

(1) This section applies when a person is party to an employee share scheme.

No deduction except as provided by this section

(2) Except as provided by this section, the person is denied a deduction for an amount of expenditure or loss for an income year incurred in relation to the employee share scheme.

Interest, establishment and management

(3) Subsection (2) does not apply to an amount of expenditure or loss to the extent to which the amount relates to—

(a) a loan or interest:

(b) establishing or managing the employee share scheme.

Deduction under section CE 2(3)

(4) The person is allowed a deduction for the amount of the deduction they are allowed under section CE 2(3) (Benefits under employee share schemes) for the income year.

Employment income

(5) The person is allowed a deduction for an amount of expenditure or loss incurred on employment income other than under section CE 1(1)(d) (Amounts derived in connection with employment).

> *Deduction for benefit*
>
> (6) If the person is the employing or contracting company for an employee share scheme beneficiary described in section CE 7(a)(i) or (ii) (Meaning of employee share scheme) (the **employee**), the person has an amount of expenditure or loss calculated using the formula in subsection (7).
>
> *Formula*
>
> (7) For the purposes of subsection (6), the amount of the expenditure or loss is the positive amount calculated using the formula—
>
> employee amount − previous deductions.
>
> *Definition of items in formula*
>
> (8) In the formula,—
>
> (a) **employee amount** is the amount for the employee calculated under the formula in section CE 2(1):
>
> (b) **previous deductions** is the total amount of deductions that have been allowed to a party to the employee share scheme or an associate for expenditure or loss incurred—
>
> (i) in relation to the employee amount; and
>
> (ii) before the date that is 6 months after the date of Royal assent for the Taxation (Annual Rates for 2017–18, Employment and Investment Income, and Remedial Matters) Act 2018.
>
> *Income*
>
> (9) A negative amount calculated using the formula in subsection (7) is an amount of income of the person.
>
> *Link with subpart DA*
>
> (10) Subsection (4) supplements the general permission. Subsection (4) overrides the employment limitation.

17. As set out in s DV 27(2), a party to an ESS is denied a deduction for any expenditure relating to ESS except as provided for by s DV 27. For example, expenditure to acquire shares (including related legal and brokerage fees) for the purposes of the ESS is not deductible as it is not provided for in s DV 27.
18. Section DV 27(3) provides that subs (2) does not apply to an amount of expenditure to the extent that it relates to a loan or interest, or establishing or managing the ESS. This means deductions for that expenditure may still be available in accordance with ordinary principles.
19. An employer is also allowed a deduction under s DV 27(5) for expenditure on employment income that is not a benefit under an ESS. For example, this might include the payment of a bonus that is used by the employee to subscribe for shares.
20. Section DV 27(6) provides that an employer has an amount of expenditure or loss for an employee as calculated under s DV 27(7). Under s DV 27(7), the amount of the "expenditure" is calculated by reference to the employee's benefit and does not involve an outlay by the employer in the normal sense. This subsection only applies to the employer and not to any other party involved in the ESS. For example, it does not apply to a group company issuing the shares under the ESS if that company is not the employer. Expenditure or loss under s DV 27(6) is explained further from [26].
21. Section DV 27 also addresses where a deduction might be available for the employee as a party to an ESS. An employee may have a deduction under s DV 27(4) where an ESS beneficiary has paid more than the market value of the shares on the SSTD.
22. Usually, a person is allowed a deduction for an amount of expenditure or loss to the extent that it meets the general permission in s DA 1. The six general limitations set out in s DA 2 override the general permission and the result can be that expenditure that meets the general permission is not deductible.
23. However, some provisions in the Act supplement the general permission or override a general limitation. Section DA 3 describes how specific rules in Part D affect the general rules. In summary, a provision in Part D may supplement the general permission, meaning that it is not necessary to satisfy the general permission, by expressly stating that it is supplementing the general permission. However, the general limitations may still apply unless the provision expressly overrides them. If a provision in Part D is to override the general permission and/or any one or more of the general limitations, the provision must expressly state that it does so.
24. For items of expenditure or loss referred to in s DV 27, only the potential deduction for employees under s DV 27(4) supplements the general permission and overrides one of the general limitations (the employment limitation). This is expressly provided for in s DV 27(10). None of the other items of expenditure or loss referred to in s DV 27 supplements the general permission or overrides any general limitations.
25. See [32] to [47] for more information on the general permission and general limitations.

Employer treated as having expenditure or loss under s DV 27(6)

26. Section DV 27(6) provides that the "employing or contracting company" in respect of the employee has an amount of expenditure or loss as calculated under s DV 27(7). As set out in [7] above, the term "employee" for income tax purposes (and therefore the ESS rules) includes persons that are employees under common law and, if they receive schedular payments, also persons that may be independent contractors under common law. The reference to the employing or contracting company in s DV 27(6) ensures that regardless of the person's employment status at common law, if they are an "employee" for tax purposes, the employing company (for an employee at common law) or contracting company (for an independent contractor at common law) has expenditure or loss under the ESS rules. For ease of reference, this interpretation statement generally refers to the employing or contracting company as the employer.
27. The amount of expenditure or loss under s DV 27(6) is equal to the positive amount calculated in accordance with the following formula in s DV 27(7):

employee amount – previous deductions

28. The terms used in the formula are defined in s DV 27(8) as follows:
    - "Employee amount" is the amount for the ESS beneficiary calculated under the formula in s CE 2(1). Section CE 2(1) (ie calculation of the employee's benefit) is set out and discussed from [12] to [14].
    - "Previous deductions" is the total amount of deductions that have been allowed to a party to the ESS or an associate for expenditure or loss incurred in relation to the employee amount on or before 29 September 2018 (which is the date that is 6 months after the amending legislation was enacted). This element of the formula will become less relevant over time.
29. Accordingly, an employer's expenditure or loss under s DV 27(6) is linked to the amount of the employee's benefit as both use the formula in s CE 2(1) as an element in their respective calculations.
30. The result of s DV 27(6) and (7) is that an employer is treated as incurring an amount of expenditure that is generally equal to the amount of the employee's benefit. The formula provided in s DV 27(7) is not dependent on the employer incurring any expenditure in the ordinary sense. Accordingly, the employer does not incur any expenditure in the way it does when it pays salaries and wages. The amount of expenditure or loss may arise for the employer even when a different member of the group is the one issuing shares under the ESS.
31. Example | Tauira 1 illustrates the situation where a New Zealand parent issues shares to employees of a foreign subsidiary. Example | Tauira 2 illustrates the situation where a foreign parent issues shares to employees of a New Zealand-resident employer.

Example | Tauira 1 – New Zealand parent issues shares to employees of foreign subsidiary

Parent Co is a New Zealand resident company that makes widgets. It has a wholly owned subsidiary in the Philippines which operates a call centre. The employees of the subsidiary can qualify for shares in Parent Co under the group's ESS. No consideration is paid by the employees when shares are issued.

Parent Co is a party to an ESS and therefore its deductions in respect of the ESS are subject to s DV 27. While Parent Co issues shares under the terms of the ESS, it does not have an amount of expenditure or loss under s DV 27(6) for the benefits provided to the employees in the offshore subsidiary as it is not the employer. If it has expenditure or loss relating to a loan or interest or establishing or managing the ESS, it may have deductions under ordinary principles.

As the employer, the subsidiary in the Philippines could have an amount of expenditure or loss under s DV 27(6). However, as the benefits are not provided to the employees in the course of the subsidiary deriving assessable or excluded income in New Zealand, s DA 1 would not be satisfied and the amount would not be deductible.

Example | Tauira 2 – New Zealand employees receive shares in foreign parent

Employer Co is a wholly owned New Zealand subsidiary of Parent Co, a company resident in the United Kingdom. Employer Co sells mulching machines and gutter guards in New Zealand.

The group has an ESS where the New Zealand resident employees of Employer Co are issued shares in Parent Co when they meet certain conditions, such as continued employment with Employer Co for 3 years.

Employer Co is a party to an ESS and is the employer. While Employer Co does not issue shares or make any payments under the terms of the ESS, it has expenditure or loss under s DV 27(6) calculated under s DV 27(7) when its employees receive shares from Parent Co. That amount will be deductible under s DA 1 as Employer Co incurs it in carrying on its business to derive assessable income and none of the general limitations in s DA 2 applies. If the New Zealand employees performed services for Parent Co, Employer Co will need to consider whether any transfer pricing adjustments are required.

Amount must be deductible under ordinary principles

32. As explained from [22] to [24], s DV 27(6) does not supplement the general permission or override any general limitations for employers. Accordingly, while s DV 27(6) deems the employer to have an amount of expenditure or loss as calculated under the formula in subs (7), the employer must still satisfy the general permission in s DA 1 and not be subject to the general limitations in s DA 2 to obtain a deduction for that deemed expenditure or loss.
33. Section DA 1 states:

> **DA 1 General permission**
>
> *Nexus with income*
>
> (1) A person is allowed a deduction for an amount of expenditure or loss, including an amount of depreciation loss, to the extent to which the expenditure or loss is—
>
> (a) incurred by them in deriving—
>
> (i) their assessable income; or
>
> (ii) their excluded income; or
>
> (iii) a combination of their assessable income and excluded income; or
>
> (b) incurred by them in the course of carrying on a business for the purpose of deriving—
>
> (i) their assessable income; or
>
> (ii) their excluded income; or
>
> (iii) a combination of their assessable income and excluded income.
>
> *General permission*
>
> (1) Subsection (2) is called the general permission.

34. Section DA 1(1)(a) provides for the deductibility of expenditure that is incurred in deriving assessable income (or excluded income, or a combination of the two). Section DA 1(1)(b) provides for the deductibility of expenditure incurred in the course of carrying on a business for the purpose of deriving assessable income (or excluded income, or a combination of the two).
35. The first limb therefore requires a nexus with the deriving of assessable or excluded income, and the second requires a nexus with the carrying on of a business. The nexus, or degree of connection, required to satisfy each of the two limbs of deductibility is the same, although it is measured in different contexts, namely non-business and business (*NRS Media Holdings v C* of IR (2018) 28 NZTC 30,328).
36. It is a matter of degree, and so is a question of fact, to determine whether a sufficient relationship exists between the expenditure and the derivation of income, or the carrying on of a business for the purpose of deriving income. The phrase "the occasion of the loss or outgoing should be found in whatever is productive of the assessable income" is helpful in both characterising the factual inquiry that the application of the statutory language requires and describing the nexus that is the focus of that inquiry (*CIR v Banks* (1978) 3 NZTC 61,236 (CA), *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA), *NRS Media Holdings*, *Ronpibon Tin NL v FCT* (1949) 78 CLR 47).
37. In the context of expenditure or loss that s DV 27(6) effectively deems to be incurred for an amount calculated under s DV 27(7), there is no item of expenditure that can be examined in the way a usual outlay can. We consider that it must be determined whether a sufficient relationship exists between the provision of the benefit to the employee under the ESS (which is what gives rise to the deemed expenditure) and the derivation of the employer's income.

38. Example | Tauira 3 illustrates how the relationship between the provision of the benefit to the employee and the derivation of the employer's income might be considered in the context of a secondment.

Example | Tauira 3 – Employee seconded to group company

Base facts

A company incorporated in New Zealand (NZ Co) manufactures and sells widgets in New Zealand. It also exports widgets to Australia. NZ Co's sister company incorporated in Australia (Aus Co) imports the widgets and sells them in the Australian market. The group is ultimately owned by a company incorporated in the United Kingdom (Parent Co). The group has an employee share scheme that employees of the group are eligible to participate in to acquire shares in Parent Co. A trustee of the group's employee share scheme trust facilitates the transfers of the shares.

On 15 June 2021, the trustee acquires 1,000 shares in Parent Co worth $1,000 to hold on trust for an employee of the group. If the employee leaves the group for any reason during the next 3 years (the performance period), the shares are forfeited for no consideration. If the employee is still employed by the group on 15 June 2024, the shares are transferred to them. The shares are worth $3 per share on 15 June 2024. The employee does not provide any consideration for the shares.

Scenario 1

The employee lives and works in New Zealand and is employed by NZ Co in the New Zealand sales force. An opportunity arises to be seconded to Aus Co to work in the Australian sales force to learn and share different sales techniques. On 15 June 2023, the employee is seconded to Aus Co for a 3-month period. The employee continues to be employed, paid and managed by NZ Co. Aus Co pays NZ Co an appropriate fee for the services of the employee over the secondment, which is returned as income by NZ Co for New Zealand tax purposes.

The employee's ESS benefit for the year ending 31 March 2025 is $3,000 (being 1,000 shares in Parent Co with a market value of $3 per share).

As the employer, NZ Co has expenditure or loss under s DV 27(6) in the year ending 31 March 2025 of $3,000. NZ Co is allowed a deduction for this expenditure because the employment has a sufficient nexus with NZ Co's income over the 3-year performance period – mostly in deriving income from the business of New Zealand widget sales and a small portion in the third year in deriving income from providing its employee's services. In this respect, where transactions are taking place cross-border between group companies, transfer pricing adjustments may be relevant.

Scenario 2

The employee lives and works in Australia and is employed by Aus Co in the Australian sales force. An opportunity arises to be seconded to NZ Co to work in the New Zealand sales force to learn and share different sales techniques. On 15 June 2023, the employee is seconded to NZ Co for a 3-month period. The employee continues to be employed, paid and managed by Aus Co. NZ Co pays Aus Co an appropriate fee for the services of the employee over the secondment, which is deductible by NZ Co for New Zealand tax purposes as it is incurred in the course of its New Zealand sales activity.

The employee's ESS benefit for the year ending 31 March 2025 is $3,000 (being 1,000 shares in Parent Co with a market value of $3 per share).

As the employer, Aus Co has expenditure or loss under s DV 27(6) in the year ending 31 March 2025 of $3,000. However, as Aus Co does not derive assessable or excluded income in New Zealand, the provision of the benefit to the employee does not have any nexus to the derivation of Aus Co's income in New Zealand, meaning s DA 1 would not be satisfied and the amount would not be deductible to Aus Co in New Zealand.

NZ Co is not the employer. Instead, it is paying Aus Co for the services of the employee for the 3-month period of the secondment (and is deducting that expenditure for New Zealand tax purposes). Accordingly, NZ Co is not a person that has any additional expenditure or loss under s DV 27(6) for the benefit provided to Aus Co's employee.

Alternative scenarios

The above scenarios involve facts where the employer does not change because of the secondment. In some situations, a secondment may result in there being a different employer, or perhaps more than one employer, during the term of secondment. In such situations, s DV 27(6) may apply differently to what is set out above. The facts of each case must be considered.

39. If an amount of expenditure or loss satisfies the general permission, in order to be deductible it must also not be subject to any of the general limitations in s DA 2 because they override the general permission. Section DA 2 states:

> **DA 2 General limitations**
>
> *Capital limitation*
>
> (1) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is of a capital nature. This rule is called the capital limitation.
>
> *Private limitation*
>
> (2) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is of a private or domestic nature. This rule is called the private limitation.
>
> *Exempt income limitation*
>
> (3) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is incurred in deriving exempt income. This rule is called the exempt income limitation.
>
> *Employment limitation*
>
> (4) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is incurred in deriving income from employment. This rule is called the employment limitation.
>
> *Withholding tax limitation*
>
> (5) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is incurred in deriving non-resident passive income of the kind referred to in section RF 2(3) (Non-resident passive income). This rule is called the withholding tax limitation.
>
> *Non-residents' foreign-sourced income limitation*
>
> (6) A person is denied a deduction for an amount of expenditure or loss to the extent to which it is incurred in deriving non-residents' foreign-sourced income. This rule is called the non-residents' foreign-sourced income limitation.
>
> *Relationship of general limitations to general permission*
>
> (7) Each of the general limitations in this section overrides the general permission.

40. In the context of an ESS, the "capital limitation" set out in s DA 2(1) that denies a deduction to the extent the expenditure or loss is of a capital nature may be the most relevant general limitation. We discuss the capital limitation in more detail from [41].

The distinction between capital and revenue expenditure

41. Two general principles form the basis for the distinction between capital and revenue expenditure. Dixon J formulated these principles in *Hallstroms Pty Ltd v FCT* (1946) 72 CLR 634 (HCA) at 647 and 648:

> ... the contrast between the two forms of expenditure corresponds to the distinction between the acquisition of the means of production and the use of them; between establishing or extending a business organization and carrying on the business; between the implements employed in work and the regular performance of the work in which they are employed; between an enterprise itself and the sustained effort of those engaged in it.
>
> ....
>
> What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical or business point of view rather than on the juristic classification of any legal rights secured, employed or exhausted in the process.

42. In *Commissioner of Taxes v Nchanga Consolidated Copper Mines* [1964] AC 948, the Privy Council applied the distinction between capital and revenue drawn in *Hallstroms*. Viscount Radcliffe stated at 960:

> Again courts have stressed the importance of observing a demarcation between the cost of creating, acquiring or enlarging the permanent (which does not mean perpetual) structure of which the income is to be the produce or fruit and the cost of earning that income itself or performing the income earning operations. Probably this is as illuminating a line of distinction as the law by itself is likely to achieve ...

43. Various cases have considered whether employee-related costs are of a revenue or capital nature. For example, in *Christchurch Press Co Ltd v C of IR* (1993) 15 NZTC 10,206, wages paid to electricians and engineers for installing a printing press were held to be capital in nature and non-deductible. This case shows there is no presumption of symmetry between income and deductions.

44. More recently, in *Clough Ltd v FC* of T (No 2) 2021 ATC 24,801, the Full Federal Court of Australia held that payments to cancel share entitlements of employees arising from a takeover were of a capital nature. This was because, after applying conventional capital / revenue principles, the Court found the occasion of the payments lay in the takeover and the object behind making the payments was the bringing to an end of the employees' rights to facilitate the takeover.
45. It is uncertain if a New Zealand court would follow the *Clough* decision for the following reasons:
    - New Zealand's ESS tax rules are different to Australia. Australia does not have an equivalent to s DV 27(6). In Australia, if an employer issues shares to an employee no expenditure arises because the employer does not incur any cost – only its share capital is diluted (as noted in *Clough*). In New Zealand, the employer is treated as incurring an amount of expenditure that is generally equal to the amount of the employee's benefit under s DV 27(6).
    - The underlying purpose of the ESS rules in New Zealand is that employers and employees should be neutral as far as possible regardless of whether the remuneration is in the form of cash or shares. In New Zealand, if an employer is entitled to deduct the cost of shares issued on an early vesting event (such as a share sale), a cash equivalent payment in lieu of the shares should also be deductible.
    - *Clough* was decided on its specific factual circumstances. The Full Federal Court found there was no evidence that the cancellation payments were to reward employees.
46. As a general principle, if there is evidence that an ESS cancellation payment is to meet an existing obligation owed to employees for past employment services (that are revenue in nature), the payment is revenue in nature. This is the case even if the event crystallising the payment arises from a capital transaction, such as a sale of shares or a business where the terms of the ESS provide for an accelerated vesting on a liquidity event (such as a change of control). However, the revenue outcome is less certain if the terms of the ESS do not provide for a liquidity event, as the employer is not obliged to make the cancellation payment. Case law that demonstrates this general principle (including that set out above) is discussed in more detail in the Appendix.
47. Example | Tauira 4, Example | Tauira 5 and Example | Tauira 6 illustrate how the capital limitation might (or might not) apply in certain scenarios. In any case, the answer will depend on a close examination of the facts and the character of the particular benefit or payment to establish the nature and purpose or effect of the relevant expenditure. Variations or additions to the facts in the examples may give rise to a different answer.

Example | Tauira 4 – Share sale – accelerated vesting and issue of shares

Base facts

On 1 May 2023, Employer Co issues 5 employees 1,000 share options each under an ESS option plan as part of a long-term incentive scheme implemented for retention purposes.

The options may be exercised at the earlier of 1 May 2026 (after 3 years of employment) and the date of a liquidity event, if the employees remain employed by Employer Co at that date (vesting date).

A liquidity event includes a change of control such as a sale of Employer Co's business or a sale by the shareholders of all the shares in Employer Co.

On the vesting date, the employees can each exercise the 1,000 options and buy 1,000 of Employer Co shares for $1 per share.

The options will lapse if they are not exercised by the employees.

The option plan does not contain a cash-out mechanism.

A share sale requiring an option plan to be wound up

On 1 May 2024, the shareholders of Employer Co agree to sell 100% of their shares to the third-party buyer on 2 April 2025. The sale and purchase agreement provides that any unvested options of employees must be cancelled before settlement.

The sale triggers a liquidity event and the options vest. The 5 employees exercise the options on 1 April 2025 and each acquires 1,000 shares at $1 each. Their shares are sold to the buyer on 2 April 2025.

The share price of Employer Co is $3 per share on 1 April 2025.

The ESS income arising to each employee on exercise of the options is $2,000 each ($3,000 share value less $1,000 cost). The total ESS income to 5 employees is $10,000.

Employer Co has $10,000 of deemed expenditure (s DV 27(6)).

The capital limitation in s DA 2(1) is unlikely to apply to Employer Co for the $10,000 expenditure for the following reasons:

- Although the sale of the shares triggers an early vesting of the options, Employer Co's obligation to issue shares to the employees for $1 each arises by reason of employment of the employees until the liquidity event, and the delivery of the shares in fulfilment of that obligation will be revenue in character.
- That obligation existed before the sale of Employer Co's shares, and the option plan incentivises employees to stay employed with Employer Co for at least 3 years (or until a liquidity event occurs).

Example | Tauira 5 – Share sale – cancellation payment

The same **base facts** as set out in Example | Tauira 4 apply. However, instead of an early vesting and issue of shares, a cancellation payment is made.

On 1 May 2024, the shareholders of Employer Co agree to sell 100% of their shares to a third-party buyer. The sale will settle on 2 April 2025. The sale and purchase agreement requires the shareholders to procure Employer Co to cancel the 5 employees' share options on 1 April 2025.

One of the employees assists with the sale process by compiling financial information in response to due diligence requests in addition to their normal employment duties.

The share price of Employer Co is $3 per share on 1 April 2025.

Employer Co offers to cancel the employees' options for a cash payment of $2,000 to each of them ($10,000 in total) on 1 April 2025.

The offer letter states that the cash payment is to meet the Employer Co's obligations under the option plan and is in recognition of past normal employment duties.

The employees accept the offer, Employer Co pays them $10,000 on 1 April 2025 and the options are cancelled.

The capital limitation in s DA 2(1) is unlikely to apply to Employer Co for the $10,000 payment for the following reasons:

- Although the sale and purchase agreement requires cancellation of the option plan and the sale of the shares triggers the cancellation payment, Employer Co's obligation to make the payment arises by reason of employment of the employees until the liquidity event.
- The cancellation payment is in recognition of past normal employment duties.
- The employee's involvement in the sale process does not change the nature of the cancellation payment. This is because the cancellation payment is not paid for assisting with the sale process. The employee is receiving the same ESS benefit as employees who do not assist with the sale process. However, if the employee received an additional amount for assisting with the sale process the additional amount may be capital in nature.

The same outcome should arise if a cancellation payment arises from an asset sale in similar circumstances.

Example | Tauira 6 – Options issued for capital project

On 1 May 2023, Employer Co issues 2 employees 1,000 share options each under an ESS option plan to incentivise them while working on an internal capital project for three years.

The options may be exercised at the earlier of 1 May 2026 (after 3 years of employment) and the date of a liquidity event, if the employees remain employed by Employer Co at that date (vesting date).

On the vesting date, the employees can each exercise the 1,000 options and buy 1,000 of Employer Co shares for $1 per share.

The capital project finishes on 1 May 2026. The employees exercise their options on 1 May 2026 and acquire shares on the same day.

The share price of Employer Co is $3 per share on 1 May 2026.

For the period 1 May 2023 to 1 May 2026, Employer Co has capitalised the cost of the 2 employees' salaries to the capital project and has not claimed an income tax deduction for the salaries (other than as part of the cost base for the capital project).

The ESS income arising to each employee on exercise of the options is $2,000 each ($3,000 share value less $1,000 cost). The total ESS income to 2 employees is $4,000.

Employer Co has $4,000 of deemed expenditure (s DV 27(6)).

The capital limitation in s DA 2(1) is likely to apply to Employer Co for the $4,000 deemed expenditure for the following reasons:

- The options were granted to employees for working on a capital project.
- The employment services performed by the employees during the vesting period related to a capital project.
- The outcome is similar to *Christchurch Press Co Ltd v C of IR* (1993) 15 NZTC 10,206.

Relationship between employer's expenditure and employee's benefit

48. As set out from [26] to [30], the employer's expenditure or loss calculated under s DV 27(6) to (8) is linked to the amount of the employee's benefit. This is because the formula for calculating the amount of expenditure or loss is the employee amount (being the benefit calculated under the formula in s CE 2(1)) less previous deductions (being deductions allowed for expenditure or loss incurred in relation to the employee's benefit before the reformed rules came into force – ie 29 September 2018). Deductions under the former rules will over time be used up, such that the employer's expenditure or loss under s DV 27(6) will equal the employee's benefit under s CE 2(1) in amount.

49. While the amount of the employer's expenditure or loss under s DV 27(6) is obviously linked to the amount of the employee's benefit under s CE 2(1), whether the expenditure or loss is deductible to the employer is not linked to whether the benefit is assessable to the employee.

50. The amount of the employer's deduction may be different to the amount of the employee's assessable income because the employer's expenditure or loss under s DV 27(6) is subject to the general permission and general limitations. This may result in apportionment or denial of a deduction. What is relevant to the employer's deduction is the nexus the provision of the benefit has with the employer's assessable or excluded income (as discussed from [32] to [40]).

51. In contrast, the employee's benefit calculated in s CE 2(1) is income under s CE 1(1)(d), and subject to the usual criteria to determine whether it is assessable income under s BD 1. For instance, if it is non-residents' foreign-sourced income, it will not be assessable income under s BD 1(5)(c). This is demonstrated by s CE 2(5), which applies to apportion some or all of the benefit to non-residents' foreign-sourced income where the employee has been non-resident while earning the benefit.

52. This treatment is consistent with the underlying policy of the ESS rules that employers and employees should be neutral as far as possible regardless of whether the remuneration is in the form of cash or shares. If an employer paid cash to a non-resident employee, the expense would be deductible (subject to the general permission and general limitations) even though the amount may not be taxable to the employee in New Zealand. Example | Tauira 7 illustrates situations where a company has a non-resident employee.

Example | Tauira 7 – Employer deduction does not depend on whether the employee benefit is assessable

Base facts

Employer Co is a New Zealand resident. It exports to Japan and has an employee to provide after-sales assistance to customers.

On 15 June 2021, Employer Co transfers 1,000 shares worth $1,000 to a trustee on trust for the employee. If the employee leaves Employer Co for any reason during the next 3 years, the shares are forfeited for no consideration. If the employee is still employed by Employer Co on 15 June 2024, the shares are transferred to them. The shares are worth $3 per share on 15 June 2024. The employee does not provide any consideration for the shares.

Scenario 1

The employee lives in Osaka and is not tax resident in New Zealand. They provide the after-sales assistance from their home in Japan.

The employee's income in the year ending 31 March 2025 is $3,000 (being 1,000 shares with a market value of $3 per share). However, as the employee is not tax resident in New Zealand and performs their services outside of New Zealand, all the income is non-residents' foreign-sourced income and is not taxed in New Zealand.

As the employer, Employer Co has expenditure or loss under s DV 27(6) in the year ending 31 March 2025 of $3,000. Employer Co is allowed a deduction in respect of this expenditure because the employment has a sufficient nexus with Employer Co's export business, which satisfies the general permission. This is the case even though the employee has no income tax liability in New Zealand.

Scenario 2

The employee is resident in New Zealand and provides the after-sales assistance from Employer Co's office in Auckland. On 15 June 2023, the employee moves to Japan and ceases to be tax resident in New Zealand. The employee continues providing after-sales assistance to customers from their residence in Japan. This means that the employee is New Zealand resident for 2 of the 3 years of service, and then non-resident for the last year.

The employee's income in the year ending 31 March 2025 is $3,000 (being 1,000 shares with a market value of $3 per share). However, only $1,000 of the employee's income is non-residents' foreign-sourced income and is not taxed in New Zealand. The employee will be taxable on the remaining $2,000 of ESS benefits subject to the terms of the tax treaty between Japan and New Zealand.

As the employer, Employer Co has expenditure or loss under s DV 27(6) in the year ending 31 March 2025 of $3,000. Employer Co is allowed a deduction for this expenditure because the employment has a sufficient nexus with Employer Co's export business, which satisfies the general permission. This is the case even though only a portion of the benefit is taxable in New Zealand to the employee.

Negative amount income for the employer

53. If the result of the formula in s DV 27(7) is negative, income arises for the employer under s DV 27(9). Section CV 20 affirms that income under s DV 27(9) is income of the employer. The result of the formula may be negative if, for example:
    - the employee provides more consideration for the shares than their market value on the SSTD; or
    - the employer has deducted more than the employee amount in respect of the benefit on or before 29 September 2018.

Timing of an employer's expenditure or loss under s DV 27(6), or income under s DV 27(9)

54. The timing of an employer's expenditure or loss under s DV 27(6) or income under s DV 27(9), and whether it arises on the SSTD or 20 days later on the "ESS deferral date", is considered in QB 21/04: **When an employer is party to an employee share scheme, when does an employer's expenditure or loss under s DV 27(6) or income under s DV 27(9) arise?**

References | Tohutoro

Legislative references | Tohutoro whakatureture

Income Tax Act 2007, ss BD 1, BG 1, CE 1, CE 2, CE 7 ("employee share scheme"), CE 7B, CE 7C ("employee share scheme beneficiary"), CV 20, DA 1, DA 2, DA 3, DV 27, GB 49B, YA 1 ("arrangement")

Case references | Tohutoro kēhi

Amalgamated Zinc (de Bavay's) Ltd v FC of T (1935) 54 CLR 295

Buckley & Young Ltd v CIR (1978) 3 NZTC 61,271 (CA)

Christchurch Press Co Ltd v C of IR (1993) 15 NZTC 10,206

CIR (Hong Kong) v Cosmotron Manufacturing Co Ltd [1997] STC 1,134 (Privy Council)

CIR v Banks (1978) 3 NZTC 61,236 (CA)

CIR v New Zealand Forest Research Institute Limited (2000) 19 NZTC 15,690 (Privy Council)

Clough Ltd v FC of T (No 2) 2021 ATC 24,801

Commissioner of Taxes v Nchanga Consolidated Copper Mines [1964] AC 948

Commrs of IR v Anglo Brewing Co Ltd (1925) 12 TC 803

FC of T v Foxwood (Tolga) Pty Ltd (1981) 35 ALR 1 (High Court of Australia)

Hallstroms Pty Ltd v FCT (1946) 72 CLR 634 (HCA)

Heather (I of T) v PE Consulting Ltd (1972) 48 TC 293

Maryborough Newspaper Co Ltd v FC of T (1929) 43 CLR 450

NRS Media Holdings v C of IR (2018) 28 NZTC 30,328

Ronpibon Tin NL v FCT (1949) 78 CLR 47

Smith v Incorporated Council of Law Reporting for England and Wales (1914) 6 TC 477

Other references | Tohutoro anō

IG 16/01: Determining employment status for tax purposes (employee or independent contractor?) (Inland Revenue, 2016)
taxtechnical.ird.govt.nz/interpretation-guidelines/ig-1601-determining-employment-status-for-tax-purposes-employee-or-independent-contractor-

IS 17/06: Income tax – application of schedular payment rules to directors' fees *Tax Information Bulletin* Vol 29, No 8 (September 2017): 7
taxtechnical.ird.govt.nz/tib/volume-29---2017/tib-vol29-no8

taxtechnical.ird.govt.nz/interpretation-statements/is-1706-income-tax-application-of-schedular-payment-rules-to-directors-fees

IS 19/01: Income tax – application of schedular payment rules to non-resident directors' fees *Tax Information Bulletin* Vol 31, No 3 (April 2019): 136

taxtechnical.ird.govt.nz/tib/volume-31---2019/tib-vol31-no3
taxtechnical.ird.govt.nz/interpretation-statements/is-19/01-income-tax-application-of-schedular-payment-rules-to-non-resident-directors-fees

IS 24/04: Trustee of employee share scheme trust treated as nominee Trustee of employee share scheme trust treated as nominee (Inland Revenue, 2024)
taxtechnical.ird.govt.nz/interpretation-statements/2024/is-24-04

QB 21/04: When an employer is party to an employee share scheme, when does an employer's expenditure or loss under s DV 27(6) or income under s DV 27(9) arise? *Tax Information Bulletin* Vol 30, No 6 (July 2021): 136
taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2021/qb-21-04

taxtechnical.ird.govt.nz/tib/volume-33---2021/tib-vol-33-no6

Appendix

55. As noted at [46], the Commissioner's view is that a payment to meet an existing obligation owed to employees for past employment services (that are revenue in nature) is revenue in nature even if the event crystallising the payment arises from a capital transaction. This appendix provides further analysis of the cases that are discussed in determining when the capital limitation might apply to prevent the deductibility of payments made under an ESS. The analysis first considers the Australian decision in Clough and then explores other case law in more detail.

Clough

56. In Clough, the Full Federal Court of Australia held that payments to terminate existing share entitlements (shares and options) of employees to facilitate a takeover of Clough were capital in nature and not deductible by the employer. There was no evidence that the payments were to reward employees.
57. To attract and retain employees, Clough implemented an option plan and an incentive scheme. If employees met certain performance criteria, the option plan entitled them to receive shares. The incentive scheme entitled employees to receive shares or cash at Clough's discretion after 3 years.
58. Clough was listed on the Australian stock exchange. Murray and Roberts (M&R), the majority shareholder in Clough, wanted to acquire all the shares in Clough through a scheme implementation agreement (SIA). The proposed acquisition meant that the rights in the option plan and incentive scheme had to end. Employees could not hold shares in Clough if M&R's objective was to own 100% of Clough.
59. Under the option plan, a change of control event (such as M&R's acquisition of the Clough shares from the minority shareholders) allowed the board to declare that the options could vest immediately even if the performance criteria were not met. Under the incentive scheme, the employees' rights to receive shares or cash would vest automatically under the change of control event (even if the employees did not meet the 3-year vesting period).
60. Both Clough and M&R assumed there was an obligation to pay employees for the accrued entitlements they held in the option plan and incentive scheme. The SIA required Clough to use its best endeavours to cancel options and rights held by employees. (The alternative to cancelling was to allow the options and rights to vest early under the option plan and incentive scheme, enabling employees to acquire shares for sale to M&R under the SIA.)
61. Clough made offers to all its employees (outside of the terms of the option plan and incentive scheme) to cancel their options and rights based on a calculation of what their options and rights would be if they vested immediately under the prevailing share price. The offers were conditional on the SIA becoming effective. The employees accepted the offer.
62. The SIA was implemented on 11 December 2013. The options and rights were cancelled on that day, payments totalling approximately A$15 million were made to employees, M&R acquired the minority shareholding in Clough, and Clough was delisted from the Australian stock exchange.
63. The Full Federal Court of Australia held the payments were capital in nature, and not incurred in gaining or producing assessable income (nor in carrying on a business for the purpose of doing so) under the general deductibility provisions of the Australian Income Tax Assessment Act 1997 (Cth). This was because the occasion for the expenditure lay in the corporate takeover and not in gaining or producing assessable income and were not in the nature of a working expense in the carrying on of the taxpayer's business. The payments were made to facilitate a takeover to secure 100% ownership by M&R, and were not directed to retaining or incentivising employees. Thawley J stated at [18]:

> 18. Questions of characterisation are ones about which minds often differ. The difficulty this case presents is that the payments were made both to facilitate a change in control of Clough and also to honour legal or commercial obligations to employees arising out of the fact that Clough had granted options and rights to its employees in the course of running its business and for the purpose of rewarding and incentivising those employees. For the reasons which follow, in a practical business sense, the payments are better characterised as payments made pursuant to an agreement to secure a change in control rather than as meeting employee entitlements on a change of control … The rights were granted to the employees in gaining or producing assessable income. However, the occasion of the outgoings lay in the takeover and the object behind making the payments was the bringing to an end of the employees' rights, at the one time, to facilitate the takeover by Murray & Roberts and the delisting of Clough.

64. From [87] to [92], Thawley J concluded the payments were capital in nature for the following reasons:
    - The immediate advantage that Clough sought by making the payments was to bring the various options and rights to an end permanently. The object in making payments was to complete M&R's takeover of the minority shareholding in Clough.
    - The bringing of the options and rights to an end had an effect on the capital structure of Clough by removing the options and rights as securities on issue.

- Clough cancelled the obligations and rights in performance of its obligations under the SIA.
- As far as Clough was concerned, the payments were all made at once to secure one enduring change: namely, Clough would become wholly owned by M&R.
- The payments were calculated by reference to the share price, not by reference to time that particular employees had served or by reference to performance criteria they had achieved. The payments were unusual and not in the nature of an ordinary working expense.

Other case law on employee-related costs

65. The cases below are relevant to the deductibility of employee-related costs. Some of the foreign cases relating to the transfer of employee leave is specifically overridden by New Zealand statute (eg s DC 10). However, the cases demonstrate general principles such as payments to meet existing obligations owned to employees are generally revenue in nature (if the services provided by employees are revenue in nature).
66. In *Heather (I of T) v PE Consulting Ltd* (1972) 48 TC 293, an employer paid contributions into an employee share trust. The court held the payments were revenue in nature because the scheme provided an incentive for staff to remain employed and it helped recruit new staff. This helped the business run more efficiently.
67. Both *CIR (Hong Kong) v Cosmotron Manufacturing Co Ltd* [1997] STC 1,134 (Privy Council) and *FC of T v Foxwood (Tolga) Pty Ltd* (1981) 35 ALR 1 (High Court of Australia) support the principle that expenditure incurred to meet existing obligations owed to employees is revenue in nature, even if the event crystallising the payment occurs after the business has ceased, or arises from the sale of a business. This is relevant for an ESS if a change of control event (such as a share or asset sale) triggers an accelerated vesting of the ESS benefits.
68. In *Cosmotron*, the Privy Council held that the employer always had an obligation to make severance payments to staff. It did not matter that the payment was triggered by the closure of the business. The purpose of the payment was to employ staff because severance benefits were a necessary condition of inducing staff to work for the taxpayer. Therefore, it was revenue in nature.
69. In *Foxwood*, the High Court of Australia held that a payment by the vendor (taxpayer) of a business to the purchaser to take on accrued holiday pay of employees was deductible by the taxpayer, as the taxpayer was liable for the employees' holiday pay at the time the business was sold. However, the taxpayer could not deduct a payment for accrued long-service leave, as it was not liable to the employees for that amount.
70. A discretionary bonus paid on the retirement of a reporter was held to be revenue in nature and deductible in *Smith v Incorporated Council of Law Reporting for England and Wales* (1914) 6 TC 477. There was an expectation the bonus would be paid, and it meant the employer could pay the reporter a smaller salary during their working life.
71. *Maryborough Newspaper Co Ltd v FC of T* (1929) 43 CLR 450 involved the taxpayer paying a 10-year annual pension to induce an editor of a newspaper to resign. The payment was held to be deductible as a revenue expense. Such payments ensured loyalty and efficiency in the newspaper business. The taxpayer realised that treating the editor unfairly could cause newspaper circulation to drop and discourage others from applying for the editor's job.
72. The following are examples of non-deductible expenditure:
    - In *Christchurch Press Co Ltd v C of IR* (1993) 15 NZTC 10,206, wages paid to electricians and engineers for installing a printing press were held to be capital in nature and non-deductible. This case shows there is no presumption of symmetry between income and deductions.
    - In *CIR v New Zealand Forest Research Institute Limited* (2000) 19 NZTC 15,690 (Privy Council), the taxpayer purchased a business and agreed to assume accrued annual leave entitlements of employees transferred as a reduction in the purchase price of the business. The subsequent payment of the leave by the taxpayer to employees was held to be non-deductible capital expenditure. There are now specific rules on the deductibility of accrued leave.
    - In *Commrs of IR v Anglo Brewing Co Ltd* (1925) 12 TC 803, ex gratia sums paid to employees on closure of a business were held to be non-deductible, because the purpose of the payments was to terminate the employment and wind up the business.
    - In *Amalgamated Zinc (de Bavay's) Ltd v FC of T* (1935) 54 CLR 295, the taxpayer contributed to a pension scheme for miners after the company ceased production of zinc concentrate. The payment was held to be non-deductible as the business had ceased.

COMMISSIONER'S STATEMENT

The purpose of a Commissioner's Statement is to inform taxpayers of the Commissioner's position and the operational approach being adopted on a particular matter. A Commissioner's Statement is not a consultative document.

CS 24/02: Withholding obligations arising in relation to transfer pricing arrangements

Issued: 30 August 2024

This Commissioner's statement sets out the Commissioner's position and operational approach in relation to the withholding obligations that may arise in relation to transfer pricing arrangements.

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

Introduction

1. This Commissioner's Statement sets out the Commissioner's position in relation to the withholding obligations that may arise from transactions that constitute a transfer pricing arrangement, and confirms that the Commissioner's position and operational approach remains unchanged from his current practice.
2. This statement also confirms how the transfer pricing rules in Subpart GC of the Act interact with the dividend rules in Subpart CD when determining the withholding obligations that arise under Part R for payments made under a transfer pricing arrangement.

Discussion

3. The transfer pricing rules operate to substitute an arm's length consideration in the calculation of a person's net income if the person's net income is reduced by the terms of a cross-border arrangement with an associated person. This may occur where the amount paid by the person under the transaction is more than an arm's length amount, or where the amount received by the person under the transaction is less than an arm's length amount.
4. Under the dividend rules, a transfer of value from a company to a person that has been caused by a shareholding will be treated as a dividend and taxed accordingly.
5. In many cases, a transfer pricing arrangement where an amount paid (or received) is more than (or less than) the arm's length amount will give rise to a transfer of value from a company that constitutes a deemed dividend as determined pursuant to Subpart CD.[1]
6. This deemed dividend arises at the time of the transfer of value and will generally be subject to non-resident withholding tax (NRWT). Currently, the dividend NRWT rate is 30%, although this rate may be reduced pursuant to a relevant double tax agreement (DTA).
7. Whether or not an application for matching treatment is made pursuant to section GC 11 does not affect whether or not there is a deemed dividend subject to dividend NRWT.
8. Section GC 12 provides that transfer pricing adjustments do not have an effect on an obligation of a taxpayer to withhold under Part R of the Act. Part R provides for a dividend withholding obligation in these circumstances.
9. Where NRWT has previously been withheld and paid on the basis that the excess amount had been treated as interest or a royalty, that interest NRWT or royalty NRWT could be refunded or potentially offset against the dividend NRWT obligation provided the applicable provisions in the Act are satisfied.

1 A downward transfer of value would not give rise to a deemed dividend if the conditions of s CD 27(3) are satisfied.

10. Where deemed dividends arise in relation to a transfer pricing arrangement, those dividends will generally constitute non-cash dividends,[2] and relief may be available, for example:
    a) Imputation credits may be retrospectively attached to transfer pricing arrangement dividends, pursuant to section OB 62.
    b) A fully imputed non-cash dividend is subject to 0% NRWT pursuant to section RF 10(5B).
    c) The dividend NRWT liability may also be reduced or removed by applying section CD 42, which allows for dividends to be repaid in certain circumstances if certain requirements are met.
11. Whilst a dividend withholding obligation arises automatically in these circumstances, it would be desirable for the legislation to be clearer on the point. To this end, an amendment is included in the Taxation (Annual Rates for 2024-24, Emergency Response and Remedial Measures) Bill introduced on 26 August 2024 which seeks to clarify the position.

Interest limitation rules

12. An amount of interest paid by a New Zealand borrower in excess of the amount determined under New Zealand's interest limitation rules, known as the restricted transfer pricing (RTP) rules will also give rise to a transfer of value and a deemed dividend.[3] This dividend is also subject to NRWT withholding obligations.

Examples

Example 1 – interest payments

13. A New Zealand subsidiary enters into an agreement to borrow an amount from its non-resident parent. For the year in question, the New Zealand subsidiary pays interest of $1.5m to the non-resident parent. The arm's length amount is $1m, and an adjustment would be made under the transfer pricing rules treating this amount as the amount payable for the purposes of calculating the New Zealand subsidiary's income tax liability.
14. The excess $0.5m is a transfer of value from the New Zealand subsidiary to the non-resident parent, resulting in a deemed dividend subject to NRWT. Interest NRWT previously paid in relation to this excess amount could be refunded or offset against the dividend NRWT liability provided the applicable provisions in the Act are satisfied.

Example 2 – royalty payments

15. A New Zealand company pays a royalty of $1.5m to a non-resident Group Intellectual Property Holding Entity in relation to a trademark licence, but the arm's length amount is $1m.[4] An adjustment would be made under the transfer pricing rules treating the arm's length amount as the amount payable for the purposes of calculating the New Zealand company's income tax liability.
16. The excess $0.5m is a transfer of value from the New Zealand company to the Group Intellectual Property Holding Entity, resulting in a deemed dividend subject to NRWT. Royalty NRWT previously paid in relation to this excess amount could be refunded or offset against the dividend NRWT liability provided the applicable provisions in the Act are satisfied.

Example 3 – purchase of goods

17. A New Zealand company purchases trading stock from a non-resident parent for $1.5m, but the arm's length amount is $1m. An adjustment would be made under the transfer pricing rules treating the arm's length amount as the amount payable for the purposes of calculating the New Zealand company's income tax liability.
18. The excess $0.5m is a transfer of value from the New Zealand company to the non-resident parent, resulting in a deemed dividend subject to NRWT.

2 Section YA 1 defines a "non-cash dividend" as "a dividend to the extent to which it does not consist of an unconditional payment in money". An excess amount paid under a transfer pricing arrangement will generally be a non-cash dividend as it is a conditional payment, in the sense that it was made in relation to a transaction for the provision of something by the other party. This can be contrasted with a normal dividend, which is not conditional or paid in relation to any transaction.

3 An amendment was made to section CD 38(2)(b)(i) by the Taxation (Annual Rates for 2021-22, GST, and Remedial Matters) Act 2022 with effect from 1 April 2022 to confirm that the deemed dividend arising when interest is disallowed under the interest limitation rules is calculated based on the amount disallowed under those rules.

4 The non-resident is an upstream associated person, so s CD 27(3) does not have application.

Example 4 – sale of goods

19. A New Zealand company sells goods to a non-resident parent for $1m, but the arm's length value of the goods is $1.5m. An adjustment would be made under the transfer pricing rules treating this $1.5m amount as the amount receivable for the purposes of calculating the New Zealand company's income tax liability.
20. The $0.5m difference is a transfer of value from the New Zealand company to the non-resident parent, resulting in a deemed dividend subject to NRWT.

Example 5 – provision of services

21. A New Zealand company provides management services to its non-resident parent. The management fee charged for the year is $1.5m, but the arm's length value of the management services is $2m. An adjustment would be made under the transfer pricing rules treating the arm's length amount as the amount receivable for the purposes of calculating the New Zealand company's income tax liability.
22. The $0.5m difference does not result in a deemed dividend subject to NRWT pursuant to the application of section CD 5(3), unless the close company exception in section CD 5(4) applies. This is because section CD 5(3) provides that a transfer of company value does not occur to the extent to which the money's worth provided by the company is only the provision of services.

Example 6 – interest limitation

23. A New Zealand subsidiary enters into an agreement to borrow $15m from its non-resident parent. For the year in question, the New Zealand subsidiary pays interest of $1.2m to the non-resident parent. Following the application of the interest limitation rules, the appropriate amount of interest is limited to $0.9m. An adjustment would be made treating this amount as the amount payable for the purposes of calculating the New Zealand subsidiary's income tax liability.
24. Section CD 38(2) provides that the $0.3m difference is a transfer of value from the New Zealand subsidiary to its non-resident parent, resulting in a deemed dividend subject to NRWT. Interest NRWT previously paid in relation to this excess amount could be refunded or offset against the dividend NRWT liability provided the applicable provisions in the Act are satisfied.

Application

25. This Statement sets out the Commissioner's position and operational approach in relation to withholding obligations arising from transfer pricing arrangements. The Commissioner will continue to apply this position to all cases.
26. If you have concerns about your compliance with the position set out in this Commissioner's Statement, you should discuss this matter with your tax advisor or contact Inland Revenue to make a voluntary disclosure.

Maria Szymanik
Technical Lead, Legal Services

Date of Issue: 30 August 2024

QUESTION WE'VE BEEN ASKED

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

QB 24/5: Do supplies of standing timber and other unsevered crops wholly or partly consist of land for the compulsory zero-rating rules?

Issued | Tukuna: 15 August 2024

This question we've been asked (QWBA) provides further guidance on the meaning of "land". It supplements an earlier QWBA, QB 20/04, and interpretation statement IS 17/08.

Key provisions | Whakaratonga tāpua

Goods and Services Tax Act 1985 – sections 2 (definition of "land"), 11(1)(mb)

Question | Pātai

Do supplies of standing timber and other unsevered crops wholly or partly consist of land for the purposes of the compulsory zero-rating (CZR) rules?

Answer | Whakautu

Supplies that wholly or partly consist of land must be zero-rated for GST purposes (pursuant to section 11(1)(mb)[1]). Therefore it is important to understand what a supply consists of so that the correct GST treatment is applied.

Supplies of standing timber and other unsevered crops do not wholly or partly consist of land (and will not be zero-rated) in the following circumstances:

- **The agreement is for the sale and purchase of an annual crop produced by the labour of the cultivator (*fructus industriales*,[2] eg grain, seed, and vegetable crops).**
- **The agreement is for the sale and purchase of a crop that is produced by the land each year after an initial productive act (*fructus naturales*,[3] eg timber,[4] pip fruit, stone fruit and grapes) *and* the purchaser does not derive a benefit from the further growth of the crop sold. A purchaser does not derive a benefit from the further growth of a crop if, when the contract is made:**
  - **the process of growth is complete;**
  - **broadly speaking, the crop is removed within a short time frame (eg 12 months); or**
  - **the crop might have to remain in the ground for some time, but the purchaser has nothing to do with it until the vendor severs and delivers it.**

Supplies of standing timber and other unsevered crops wholly or partly consist of land when the agreement is for the sale and purchase of *fructus naturales* if, when the agreement is entered into, it is contemplated that the purchaser will derive a benefit from the further growth of the crop sold. For example, a contract for young, rapidly growing timber that is not to be cut down until it has substantially changed and derived benefit from the land is likely to be a contract involving an interest in land. If the supply satisfies all the requirements under section 11(1)(mb) then the supply must be zero-rated.

1 Assuming the other requirements of section 11(1)((mb) are also met.

2 *Fructus industriales* is the technical legal term for this kind of crop. It refers to the crops of the soil that are produced by the labour of the cultivator each year; *Saunders v Pilcher* [1949] 2 All ER 1097 (CA) at 1104.

3 *Fructus naturales* is the technical legal term for this kind of crop. It refers to the natural produce of the soil, such as grass and timber; these are crops that result from an initial productive act (eg planting a tree); *Saunders* at 1104.

4 For timber, the annual "crop" would be the increase in timber in the tree over the course of the year.

Key terms | Kīanga tau tāpua

Fructus industriales means the crops of the soil that are produced by the labour of the cultivator each year.

Fructus naturales means the natural produce of the soil, such as grass and timber; these are crops that result from an initial productive act.

Profit à prendre is the right to take something off another person's land. It is the right to enter another's land and take some profit from the land, or a portion of the land, for the use of the owner of the right.

Explanation | Whakamāramatanga

1. In this QWBA, all legislative references are to the Goods and Services Tax Act 1985.
2. This QWBA follows on from the earlier QWBA, **QB 20/04: Do certain supplies wholly or partly consist of land for the compulsory zero-rating (CZR) rules?**. QB 20/04 itself followed on from the earlier interpretation statement **IS 17/08: GST – Compulsory zero-rating of land rules (general application)**.

What "land" is for CZR purposes

3. A supply that wholly or partly consists of land must be zero-rated for GST purposes under section 11(1)(mb), as long as three other requirements are met:[5]
   - The supply is made by a registered person to a recipient who is also a registered person;
   - The recipient of the supply acquires the land with the intention of using it for making taxable supplies; and
   - The land is not intended to be used as a principal place of residence of the recipient of the supply or a person associated with them under section 2A(1)(c).
4. Section 11(1)(mb) is intended to prevent "phoenix" fraud schemes. Under these schemes, Inland Revenue refunds GST to a purchaser of land while the vendor makes no corresponding payments because the supplying company deliberately winds up before making payment (Taxation (GST and Remedial Matters) Commentary on the Bill (Policy Advice Division, Inland Revenue, August 2010)).
5. Section 2(1) provides:

   land, in the zero-rating of land rules,—

   (a) includes—

   (i) an estate or interest in land:

   (ii) a right that gives rise to an interest in land:

   …
6. A wide definition of land was included in the CZR rules to ensure the CZR rules apply broadly and to prevent opportunities for avoidance.
7. For more on the meaning of "land", see [7] to [14] of QB 20/04.

Do supplies of standing timber and other unsevered crops wholly or partly consist of land?

8. This item is concerned with the sale of standing timber or other unsevered crops. It does not concern the harvesting of timber or picking of other crops where ownership of the timber or crop remains with the landowner or orchardist or farmer.
9. A supply of standing timber or other unsevered crops could involve a supply of a *profit à prendre* (an interest in land) or it could involve a supply of a licence to remove timber or other crops (a supply of goods). The supply of timber or other crops could also be simply the vendor's supply of goods already severed from the land to the purchaser (ie the purchaser has no right to enter the land to remove the timber or other crops).

Fructus industriales: crops cultivated on an annual basis

10. Case law categorises the produce of land as either *fructus industriales* or *fructus naturales*. *Fructus industriales* refers to the annual crops of the soil, produced by the labour of the cultivator in that year, such as grain, seed, and vegetable crops.

5 For the purposes of this QWBA it is assumed these other requirements are met.

11. An agreement for the sale and purchase of an unsevered crop classified as *fructus industriales* is an agreement for the supply of goods and **not** land) (*Marshall v Green* [1874-80] All ER Rep Ext 2198; *Kauri Timber Co v Commissioner of Taxes* [1913] AC 771 (PC)).[6] That is, an agreement in relation to such a crop does not involve a *profit à prendre.*
12. Such an agreement will be standard-rated for GST purposes if the supplier is GST registered[7].

Example | Tauira 1 – Supply of vegetable crop not a supply wholly or partly consisting of land

Ms Potatohead is a potato grower who produces a significant crop of potatoes every year. She has entered an agreement with Mr Wholesaler to sell her entire crop to Mr Wholesaler for the next 10 years.

For GST purposes the supply is not a zero-rated supply of land. The agreement does not give rise to an interest in land to Mr Wholesaler. The potatoes are *fructus industriales* and as such the agreement cannot give rise to a *profit à prendre* and an interest in land, and the supply is a supply of goods and standard-rated for GST.

Fructus naturales: the produce of land arising from an initial productive act

13. *Fructus naturales* is the natural produce of the soil, such as grass and timber, which results from an initial productive act that does not need to be repeated each year, such as planting a tree or vine, or sowing a paddock in grass.[8] Other examples in this category include grape vines, kiwifruit vines, pip fruit trees and stone fruit trees.
14. An agreement for the sale and purchase of standing timber or other unsevered crops classified as *fructus naturales* may be either a sale of an interest in land (a *profit à prendre)* or a sale of goods depending on the terms of the agreement.

Supplies that wholly or partly consist of land

15. Supplies of standing timber and other unsevered crops wholly or partly consist of land when the agreement is for the sale and purchase of *fructus naturales* if, when the agreement is entered into, it is contemplated that the purchaser will derive a benefit from the further growth of the crop sold. Such arrangements will involve a *profit à prendre.* For example, a contract for young, rapidly growing timber that is not to be cut down until it has substantially changed and derived benefit from the land is likely to be a contract involving an interest in land (*Marshall* at 2202 and 2204; *Kauri Timber* at 779).
16. Such an agreement will be zero-rated for GST purposes under section 11(1)(mb).

Example | Tauira 2 – Supply of right to standing timber a supply wholly or partly consisting of land

Mr Landowner enters into a 30-year agreement with Ms Sawmiller that grants Ms Sawmiller the exclusive right to remove the timber from certain specified blocks of land. The trees are of varied maturity, but many of them will not be ready for harvest until well into the term of the agreement. Ms Sawmiller has the right to choose when to harvest and which trees to remove at any given time.

For GST purposes, the supply is a zero-rated supply of land under section 11(1)(mb). The right granted to Ms Sawmiller is a *profit à prendre* and so it is an interest in land. The supply relates to *fructus naturales* and the recipient of the supply (Ms Sawmiller) is receiving a benefit from the future growth of the timber on the basis that it will remain in the soil for a number of years to come.

6 This item does not concern the situation where a crop is sold as part of the sale of the underlying land (see *Paisley v CIR* [1958] NZLR 332).

7 In some circumstances the supplier may not be registered or liable to be registered. For example, an unregistered owner of a lifestyle block selling grass that will immediately be harvested for hay or silage.

8 Planting grasses each year for grass seed production would be *fructus industriales*. In the context of *fructus naturales*, we are referring to "permanent" paddocks, which may be used, for example, for hay production.

Example | Tauira 3 – Supply of right to harvest fruit a supply wholly or partly consisting of land

Mr Vinegrower has a block of land on which he has planted kiwifruit vines. After a few years of tending the vines and harvesting the fruit he realises he has no interest in the agricultural life and prefers to spend his time pursuing gains through sports betting. However, he loves living on the land and does not intend to sell or lease the land. Instead, Mr Vinegrower enters into a 10-year agreement with Ms Fruitlover by which Ms Fruitlover is obliged to maintain the kiwifruit vines and has the right to enter the land to maintain the vines, harvest the fruit and sell it. (Ms Fruitlover is not providing a service of picking the kiwifruit for Mr Vinegrower and then subsequently buying the kiwifruit from Mr Vinegrower. She is buying the kiwifruit on the vine and having to arrange to pick them herself.)

For GST purposes the supply is a zero-rated supply of land under section 11(1)(mb). The right granted to Ms Fruitlover relates to *fructus naturales* and she will benefit from the future growth of the annual crop of kiwifruit.

17. Supplies of forestry rights (as defined in and subject to the Forestry Rights Registration Act 1983) are also supplies of an interest in land as section 3(1) of that Act deems such forestry rights to be profits à prendre. A profit à prendre is an interest in land. Therefore a supply of a forestry right will be zero-rated for GST purposes under section 11(1)(mb). (See further the Commentary to public ruling BR Pub 07/01 *Forestry rights—secondhand goods GST input tax deduction* at page 4.)

Supplies that do not wholly or partly consist of land

18. Supplies of standing timber and other unsevered crops **do not** wholly or partly consist of land when the agreement is for the sale and purchase of *fructus naturales* **and** the purchaser does not derive a benefit from the further growth of the timber or crop sold. Such arrangements will not involve a *profit à prendre.* A purchaser does not derive a benefit from the further growth of the timber or crop if, when the contract is made:
    - the process of growth is complete (*Marshall* at 2202 and 2204);
    - the contract creates an obligation (on either the vendor or the purchaser) to immediately sever the timber or crop from the land (*Marshall* at 2202 and 2204), or the contract requires the removal of the timber or crop within a short timeframe (eg 12 months; *McCauley v FCT* (1944) 69 CLR 235 (HCA)), or the contract does not create an obligation to sever the timber or crop within a specified period but the purchaser begins to remove it immediately (*Ashgrove Pty Ltd and others v DFCT* (1994) 124 ALR 315); or
    - the timber or crop might have to remain in the ground or on the tree or vine for some time, but the purchaser has no property right in the timber or crop until the vendor severs and delivers it (*Marshall* at 2203). (This would include the situation where the purchaser has no right of entry to the land to tend the timber or other crop.)
19. Such an agreement will be standard-rated for GST purposes.

Example | Tauira 4 – Supply of right to standing timber not a supply wholly or partly consisting of land

Ms Farmer enters into an agreement with Mr Logseller to remove a stand of mature pine trees from a specified area of land on the farm. The agreement requires that the timber be removed as soon as possible but at the latest within 6 months of signing the agreement.

For GST purposes, the supply is not a zero-rated supply of land under section11(1)(mb). The right does not give rise to an interest in land for Mr Logseller. Although the timber is *fructus naturales,* the right to remove it is not an interest in land because the process of growth is complete, and in addition the contract creates an obligation to promptly sever the crop from the land (*McCauley*).

Example | Tauira 5 – Supply of right to standing timber not a supply wholly or partly consisting of land

As a variation on Example | Tauira 4, assume that Ms Farmer enters into an agreement with Mr Logseller for the sale of timber that is in a specified area of the farm. The agreement gives Mr Logseller the right to purchase all the timber on that land over a period of 5 years, **but** Ms Farmer is to cut and deliver the timber.

For GST purposes the supply is not a zero-rated supply of land. The agreement does not give rise to an interest in land to Mr Logseller. Although the timber is *fructus naturales*, the right to it is not an interest in land because Mr Logseller has to wait for Ms Farmer to sever the timber and deliver it to him.

Example | Tauira 6 – Supply of right to harvest fruit not a supply wholly or partly consisting of land

Ms Landowner has an apple orchard that is comprised of mature apple trees. The apples are ready to be harvested and Ms Landowner enters an agreement with Mr Fruitseller for Mr Fruitseller to harvest and sell the apples. The terms of the agreement are that Mr Fruitseller agrees to buy the apples and he is then obliged to pick them himself before packing and selling them. (As with Example 4, Mr Fruitseller is not providing a service of picking the apples for Ms Landowner and then subsequently buying the apples from Ms Landowner. He is buying the apples on the tree and having to arrange to pick them himself.)

For GST purposes the supply is a standard-rated supply of goods and not a zero-rated supply of land. The agreement does not give a right to an interest in land. Although the apples are *fructus naturales*, the right to remove them does not give rise to an interest in land because the process of growth is complete, and the crop will need to be promptly harvested and removed from the land.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Forestry Rights Registration Act 1983, section 3(1)

Goods and Services Tax Act 1985, sections 2(1) (definition of "land"), 11(1)(mb)

Case references | Tohutoro kēhi

Ashgrove Pty Ltd and others v DFCT (1994) 124 ALR 315

Kauri Timber Co v Commissioner of Taxes [1913] AC 771 (PC)

Marshall v Green [1874-80] All ER Rep Ext 2198

McCauley v FCT (1944) 69 CLR 235 (HCA)

Paisley v CIR [1958] NZLR 332

Saunders v Pilcher [1949] 2 All ER 1097 (CA)

Other references | Tohutoro anō

PUB 07/01: Forestry rights—secondhand goods GST input tax deduction *Tax Information Bulletin* Vol 19, No 3 (April 2007)
taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/tib/volume-19---2007/tib-vol19-no3.pdf?modified=20200329214313&modified=20200329214313
taxtechnical.ird.govt.nz/rulings/public/br-pub-0701-forestry-rights-secondhand-goods-gst-input-tax-deduction

IS 17/08: GST – Compulsory zero-rating of land rules (general application) *Tax Information Bulletin* Vol 29, No 10 (November 2017)
taxtechnical.ird.govt.nz/tib/volume-29---2017/tib-vol29-no10
taxtechnical.ird.govt.nz/interpretation-statements/is-1708-gst-compulsory-zero-rating-of-land-rules-general-application-

QB 20/04: Do certain supplies wholly or partly consist of land for the compulsory zero-rating (CZR) rules? *Tax Information Bulletin* Vol 33, No 1 (February 2021): 61
taxtechnical.ird.govt.nz/tib/volume-33---2021/tib-vol-33-no1
taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2020/qb-20-04

Taxation (GST and Remedial Matters) Commentary on the Bill (Policy Advice Division, Inland Revenue, August 2010)
taxpolicy.ird.govt.nz/publications/2010/2010-commentary-gstrm

TECHNICAL DECISION SUMMARY

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 24/17: Deductibility of bonus payments

Decision date | Rā o te Whakatau: 12 March 2024

Issue date | Rā Tuku: 14 August 2024

Subjects | Kaupapa

Income tax: deductibility of bonuses; whether issue of shares to fund bonuses are income; tax avoidance

Taxation laws | Ture tāke

All legislative references are to the Income Tax Act 2007.

Facts | Meka

1. The Arrangement was that Company A and Company B (associated companies) engaged a number of people (a mixture of independent contractors and employees (the Workers)) to provide services to each company. After the sale of a portion of Company A shares , both companies paid bonuses to the Workers, funded by the issue of shares to shareholders. If gross bonuses were deductible to the company for income tax purposes, additional bonus payments were to be made to selected Workers (equal to the tax benefit from deductions).
2. PAYE was deducted from the bonus payments that were made to employees of the two companies.
3. The bonus payments made by Company A and Company B to the Workers were not any of the following:
    - of a private or domestic nature;
    - incurred in deriving exempt income;
    - incurred in deriving employment income;
    - incurred in deriving non-resident passive income of the kind referred to in s RF 2(3);
    - incurred in deriving non-residents' foreign-sourced income;
    - related to establishing, acquiring, or enlarging the permanent structure of businesses of Company A and Company B; or
    - required to be paid as an obligation under the Share Agreement.
4. The bonus payments to the Workers:
    - recognised the effort of Workers for their services;
    - encouraged ongoing strong performance in the future; and
    - were intended to incentivise the Workers ongoing participation in the company.
5. After the sale of Company A shares, Company A and Company B received an injection of funds from their shareholders through the issue of shares. This helped meet the cost of the bonuses.

Issues | Take

6. The main issues considered in this ruling were:
    - Whether the bonus payments that Company A and Company B made to the Workers were deductible under s DA 1.
    - Whether s DA 2 applied to the bonus payments Company A and Company B made to the Workers.
    - Whether s CG 4 applied to the Arrangement.
    - Whether s BG 1 applied to the Arrangement.

Decisions | Whakatau

7. It was concluded;
    - The bonus payments Company A and Company B made to the Workers were deductible under s DA 1 at the time the expenditure was incurred.
    - Section DA 2 did not apply to the bonus payments Company A and Company B made to the Workers.
    - Section CG 4 did not apply to the Arrangement.
    - Section BG 1 did not apply to the Arrangement.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Deduction under s DA 1

8. A person is allowed a deduction for an amount of expenditure or loss to the extent that they incur it in deriving their income, or to the extent that they incur it in the course of carrying on a business for the purpose of deriving their income. These are referred to as the first and second limbs of s DA 1.
9. As both companies were carrying on a business, the second limb was considered in detail.
10. Under the second limb, the expenditure or loss must be "incurred in the course of carrying on" a business. A sufficient relationship (or nexus) must exist between the expenditure and the business that is being carried on.[1]
11. The following general principles are drawn from case law on s DA 1:
    - For a cost to be deductible, a relationship (or nexus) must exist between the cost and the person's income-earning process. It is a question of fact and degree in each case.
    - The true character of the cost and its relevance to the taxpayer's income-earning process are relevant for deciding whether that relationship exists. This includes looking at the scope of the taxpayer's income-earning process (that is, how their income is earned) and the factual situation at the time the cost is incurred.
    - For a cost to be deductible, it does not need to be linked to a particular item of income. Also, income does not need to be produced in the same year the cost was incurred.
    - The business must incur the cost as part of its operations to earn its income. Whether a business incurs a cost as part of its operations to earn income is usually determined objectively. However, subjective matters may be relevant where the cost was incurred by choice and the relationship between the cost and the business operations is more indirect and remote.
    - Longer-term objectives can be considered. In relation to expenditure incurred in carrying on a business, a deduction may be available for costs incurred to protect or advance a business, or to avoid or reduce expenditure.

Bonus payments by Company A and Company B to the Workers

12. To determine whether there was a sufficient nexus between the bonuses and the income-earning process, it was necessary to identify the advantage the taxpayer was seeking to gain from the expenditure.
13. The Agent stated that both Company A and Company B sought to make the discretionary payments to recognise the effort of specific individuals during their growth phases. These individuals were instrumental in growing each of the companies and the companies wanted to ensure that they retained these Workers going forward. Company A and Company B were also commercially motivated to encourage ongoing strong employee performance to support future business performance.

1 *CIR v Banks* (1978) 3 NZTC 61,236 (CA) and *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA).

14. TCO concluded that there was sufficient nexus between the bonus payments made by Company A and Company B to the Workers for both companies to take a deduction under s DA 1 at the time they incurred the expenditure.

Issue 2 | Take tuarua: General limitations (s DA 2)

15. An amount will be deductible where none of the limitations in s DA 2 apply. TCO concluded that, based on the Arrangement description, the only limitation that could apply was the capital limitation.
16. There are a number of cases that have considered whether payments made to employees were capital or revenue in nature. The principles extracted from these cases include:
    - Expenditure incurred to provide an incentive to employees in order to motivate, retain or recruit staff is ordinarily deductible.
    - Expenditure connected to the sale of a business will ordinarily be capital and non-deductible. Where employee expenditure is incurred in the context of a sale of a business, the facts must be carefully considered to determine whether there is a connection to the sale of the business.
17. The bonus payments were stated in the Arrangement description to be made in respect of services provided by the Workers, and to encourage them to stay with the companies in the future. Such services were directly related to Company A's and Company B's income earning process.
18. The payments were not related to establishing, acquiring or enlarging the permanent structure of the business (as recorded in the Arrangement description).
19. Both Company A and Company B's businesses continued after the Share Sale, with engagement of the Workers in the business continuing after this time. The payments were not made in connection with the cessation of a business.
20. TCO concluded that s DA 2 did not apply to the bonus payments Company A and Company B made to the Workers.

Issue 3 | Take tuatoru: Does s CG 4 apply to the Arrangement

21. Section CG 4 provides that when a person is allowed a deduction for expenditure or loss, and then derives an amount by way of insurance, indemnity or other payment relating to the expenditure or loss, the amount derived is income to the extent of the deduction.
22. For s CG 4 to apply to the Arrangement, all of the following must be met:
    - The person must be allowed a deduction.
    - The person derives an amount relating to the expenditure or loss, whether through insurance, indemnity or otherwise. This can be split into three parts:
        - The person derives an amount.
        - The amount is relating to the expenditure or loss.
        - The amount is derived through insurance, indemnity or otherwise.
    - The amount is not income under another part of the Act.
23. The question was whether the amount received by the company from shareholders by way of consideration for the issue of shares was income under this provision.
24. TCO concluded that s CG 4 did not apply to the Arrangement as the amount received for the issue of shares was not "relating to the expenditure" on the bonuses.
25. The causal connection between the receipt of share issue proceeds and the payment of the bonuses was not sufficiently strong on the facts of this case. This included because Company A and Company B were not legally obligated to apply the share issue proceeds to pay the bonuses.
26. Therefore, s CG 4 could not apply to the Arrangement, because the "relating to" requirement was not met.

Issue 4 | Take tuawhā: Whether s BG 1 applies

27. Section BG 1(1) provides that a "tax avoidance arrangement" is void as against the Commissioner. Section GA 1 enables the Commissioner to make an adjustment to counteract a tax advantage obtained from or under a tax avoidance arrangement.
28. The Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289 considered it desirable to settle the approach to applying s BG 1. This approach is referred to as the Parliamentary contemplation test, which is an intensely fact-based inquiry. *Ben Nevis* has been followed in subsequent judicial decisions.

29. The Tax Counsel Office'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. Artificiality and contrivance are significant factors.
        - Considering the implications of the preceding 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 has a tax avoidance purpose or effect that is not the sole purpose or effect of the arrangement, consider the merely incidental test. The merely incidental test considers many of the same matters that are considered under the Parliamentary contemplation test.
30. 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 steps and transactions that make up the "arrangement"

31. TCO considered that the "arrangement" for s BG 1 purposes comprised of the following steps:
    - Company A's shareholders sold a portion of their shares.
    - Company A and Company B also issued new shares to its shareholders. Both companies used the proceeds from the share issue to pay discretionary bonus payments to the Workers.
    - Further bonuses were payable to selected Workers if their gross bonuses were deductible by Company A and Company B for income tax purposes.
32. The Applicant stated that the commercial or private purposes of the Arrangement were:
    - That both Company A and Company B made the discretionary payments to recognise the effort of specific individuals during their growth phases. These individuals were instrumental in growing each of the companies and the companies wanted to ensure that they retained these Workers going forward.
    - Company A and Company B were also commercially motivated to encourage ongoing strong performance in the future.

The tax effects of the arrangement

33. TCO considered that the Arrangement would give rise to the following tax effects:
    - A deduction for the amount of bonus expenditure incurred by Company A and Company B under s DA 1.
    - Section DA 2 did not apply to the bonus payments.
    - Income did not arise to Company A or Company B under s CG 4.
    - PAYE was payable by Company A and Company B on PAYE income payments (as defined in s RD 3).
    - Timing provisions in s EA 4 and s DB 51 may apply to offset the deduction under s DA 1 (for employees).
    - The bonus payments were income of Workers (if they were New Zealand resident, or non-resident and subject to New Zealand income tax because the services were performed in New Zealand).
    - For any of the Workers where the payment was for services performed outside New Zealand by a non-resident, these would not be subject to non-resident contractors' tax.
34. TCO was only ruling on ss DA 1, DA 2 and CG 4 under black letter law.
35. TCO noted the above tax effects were not controversial and consistent with Parliament's purpose on how the black letter law provisions should operate.

36. In regard to the deductibility provisions, the Courts have held that Parliament's purpose for those provisions is that deductions can be claimed where:
    - the taxpayer incurs the real economic consequences of the payment;
    - the expenditure is incurred as a matter of commercial reality;
    - the expenditure is not a contrivance or artificial; and
    - the taxpayer is engaged in business activities for the purposes of deriving income.
37. In relation to the above principles, and understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts:
    - Company A and Company B bore the economic consequence of the payment of the bonuses. There was a real outflow of the funds when the bonuses were paid.
    - It was within regular commercial reality of the operation of a company that to the extent that current year profits or retained earnings were insufficient to meet anticipated expenditure, debt or equity sources may be used to meet this expense.
    - There were no indications from the documentation or surrounding circumstances that the expenditure was contrived or artificial. The circumstances suggested that the transactions took place with a view to carrying out the regular objectives of a bonus – to incentivise and/or retain employees.
    - Company A and Company B were engaged in business to derive income.
38. Based on the above, TCO considered the Arrangement, when viewed in a commercially and economically realistic way, made use of the specific provisions in a manner consistent with Parliament's purpose. Therefore, the Arrangement did not have a tax avoidance or effect, and s BG 1 would not apply to the Arrangement.
39. It was not necessary for TCO to consider the merely incidental test under the third step of the s BG 1 approach.

LEGAL DECISION – CASE SUMMARY

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

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

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

CSUM 24/06: High Court issues a 28-day temporary halt of Commissioner's bankruptcy proceedings pending payment of sum

Decision date: 26 August 2024

Case

***The Commissioner of Inland Revenue v McGuire* [2024] NZHC 2404**

Legislative References

Insolvency Act 2006, s 38

Case law refeeences

Commissioner of Inland Revenue v McGuire [2022] NZDC 12179

McGuire v The Commissioner of Inland Revenue [2024] NZHC 883.

Re Koroniadis ex parte Bank of New Zealand [2013] NZHC 2865 at [11]

RPW v H [2022] NZHC 2344

The Commissioner of Inland Revenue v McGuire [2023] NZHC 1314

Waimauri Ltd v Mahon [2022] NZHC 1622 at [40]

Waitomo Adventures Ltd v O'Hagan [2014] NZHC 2477

Summary

This was an application by Mr McGuire, the judgment debtor, to halt bankruptcy proceedings against him, brought by the Commissioner of Inland Revenue (the Commissioner) on 1 March 2023.

Mr McGuire has judicially reviewed the District Court judgment which underlies the Commissioner's application for bankruptcy. On 22 April 2024, Justice Johnstone dismissed Mr McGuire's claim for Judicial Review by way of a strike-out judgment.[1] Mr McGuire has filed a notice of appeal to the Court of Appeal in respect of Justice Johnston's decision. The current proceeding is an application to halt the bankruptcy proceedings pending the Court of Appeal decision.

After consideration, Associate Judge Skelton was not satisfied that it was appropriate to grant a halt of the Commissioner's application for adjudication pending the outcome of the appeal to the Court of the Appeal.

However, his Honour granted a temporary halt of the bankruptcy proceedings for 28 calendar days from the date of this judgment to allow Mr McGuire to pay the sum of $92,858.67 which covers the remaining debt and interest, unpaid costs awards and the indemnity costs sought in judicial review proceedings. If the sum is not paid, then the bankruptcy proceedings will continue.

1 *McGuire v The Commissioner of Inland Revenue* [2024] NZHC 883.

Impact

The decision reaffirms the discretion given to the Court under s 38 of the Insolvency Act to consider factors which must evidence an appropriate case to halt an application for adjudication.[2]

Facts

On 7 March 2024, a part-hearing of Mr McGuire's application to halt bankruptcy proceedings was heard. The basis for the application is that Mr McGuire has applied for judicial review of the District Court judgment underlying the Commissioner's application for bankruptcy. At the time of the hearing on 7 March 2024, an application by the Commissioner for strike out of the judicial review hearing had been heard but not determined. Associate Judge Skelton adjourned the halt application pending the determination of the strike out application.

On 22 April 2024, the decision was issued by Justice Johnstone in favour of the Commissioner, dismissing Mr McGuire's claim for judicial review.

Mr McGuire has since filed a notice of appeal to the Court of Appeal in respect of Johnston J's decision to strike out his judicial review claim. The current proceeding is an application to halt the bankruptcy proceedings pending the Court of Appeal decision.

Issues

The issue for consideration is whether to halt the Commissioner's application for adjudication pursuant to s 38 of the Insolvency Act pending the outcome of the appeal to the Court of Appeal.

Decision

The legal principle governing applications to halt bankruptcy proceedings is s 38 of the Insolvency Act, which provides that the court may at any time halt the creditor's application for adjudication on the terms and conditions for the period that the court thinks is appropriate. Section 38 does not set out the matters the court must consider; the rule provides flexible discretion.[3] Associate Judge Skelton set out the considerations that are invariably brought into account.

The considerations include the history of the litigation and the conduct of the parties, the impression that the court can gain of the merits of the appeal, the stage reached in the appeal and any information to hand as to when it may be disposed, of the relative consequences for both parties of making or refusing the order sought and any known consequences for third parties.

Associate Judge Skelton considered that the history of the proceedings, including the fact that Mr McGuire has only sought to challenge the underlying judgment after enforcement action was taken, and the further delay are factors against halting the Commissioners application for adjudication.

The merits of Mr McGuire's challenge to the underlying judgment debt have already been tested in the strike out application, which was found to have no reasonably arguable cause of action. This was a further factor against halting the Commissioner's application for adjudication.

Associate Judge Skelton dismissed counsel for McGuire's argument that bankruptcy would have implications for Mr McGuire's professional career and the opportunity for appeal will be rendered nugatory. Associate Judge Skelton noted that Mr McGuire's evidence is that he is a primary beneficiary of a trust which has sufficient assets. Furthermore, Associate Judge Skelton considered that the Commissioner will be further delayed from collecting the debt, in circumstances where the Commissioner has had to oppose several applications made by Mr McGuire at a significant cost.

Associate Judge Skelton was not satisfied that it was appropriate to grant a halt of the Commissioner's application for adjudication pending the outcome of the appeal to the Court of the Appeal.

However, his Honour granted a temporary halt of the bankruptcy proceedings for 28 calendar days from the date of this judgment to allow Mr McGuire to pay the sum of $92,858.67 which covers the remaining debt and interest, unpaid costs awards and the indemnity costs sought in judicial review proceedings. If the sum is not paid, then the bankruptcy proceedings will continue.

2 Section 38(2).

3 *Waimauri Ltd v Mahon* [2022] NZHC 1622 at [40] citing *Michael Wilson & Partners Ltd v Sinclair* [2020] NZHC 2546 at [9].

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

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.