Vol 37 No 1 February 2025

TAX INFORMATION Bulletin

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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
PUB00519	Question we've been asked	Can section CB 3 apply to amounts derived from the disposal of land?	14 February 2025
PUB00493	Interpretation statement	Income tax and GST – industries other than forestry registered in the Emissions Trading Scheme	27 February 2025
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IN SUMMARY

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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.

NOTICE OF WITHDRAWAL

29 November 2024

Commissioner's policy statement on the income tax treatment of computer software developed for lease or licence

Clarification of the income tax treatment of software development expenditure has been included in the Integrity of the tax system workstream of the Government tax and social policy work programme announced on 13 November 2024.

In 1993 the Commissioner published a policy statement on this topic entitled "Taxpayers who develop software for lease or licence" published in Section 3 of the Appendix to Tax Information Bulletin Vol 4, No 10 (May 1993) (the Appendix).

Technology and the way software is commercially exploited has changed considerably in the more than 30 years since the Appendix was published. For instance, the Appendix does not consider cloud based computing, including the provision of software as a service (SaaS), which has evolved more recently. Given the changes, the Appendix has limited application and where it could apply it is incorrect when software is developed for licensing. This was indicated in Issues Paper IRRUIP 10 "Income tax treatment of software development expenditure" released by Inland Revenue's Public Rulings Unit in August 2016.

The Appendix was partially replaced by "IS 16/01: Income tax – Computer software acquired for use in a tax taxpayer's business" Tax Information Bulletin Vol 28, No 6 (July 2016):69.*

In light of the above, the Commissioner considers it is appropriate to withdraw the remainder of the guidance in the Appendix. This means the Appendix does not represent the Commissioner's view of the income tax treatment of software development expenditure.

Any taxpayers who consider that the withdrawal of the guidance in the Appendix adversely affects their tax affairs should contact the Commissioner to discuss their individual circumstances.

* IS 16/01 has since been replaced by "IS 17/04: Income tax – computer software acquired for use in a taxpayer's business" published in Tax Information Bulletin Vol 29, No 5 (June 2017): 173

LEGISLATION AND DETERMINATIONS

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

DET 24/04: Amortisation Rates for Listed Horticultural Plants

Note to Determination DET 24/04

The Commissioner acknowledges Mānuka as a listed horticultural plant, further to Determination DET 24/01: Amortisation Rates for Listed Horticultural Plants issued 3 April 2024.

What is a listed horticultural plant?

Section YA 1 of the Income Tax Act 2007 defines a "listed horticultural plant" as a plant, tree, vine, bush, cane, or similar plant that is cultivated on the land i.e. farming and production of a product for market consumption. As it relates to plants, generally, to *cultivate* means, the preparation of the land; the planting and ongoing farm management of plant health, together with pest and weed control.

Section 91AAB of the Tax Administration Act 1994 enables the Commissioner to determine that some types of horticultural plants are "listed horticultural plants" for tax purposes and determine different amortisation rates for different plants to reflect the estimated useful life for each plant type. This amortisation of listed horticultural recognises that these plants have a life of greater than seasonal farm crops that may be harvested annually (or less) as part of a farming business.

The Commissioner acknowledges that some business operations have planted mānuka plantations that are managed as a farming activity to promote that business' production of honey and/or other mānuka products. In addition to the cultivation of mānuka seedlings through to their development as mature trees, these plantations continue to be cultivated and managed throughout their useful life. This management and cultivation includes activities such as monitoring and maintenance of plant health, weed/pest control, suppression of the competitive flowering of other flora, which is undertaken to ensure plant health that maximises mānuka flower production.

The determination does not apply to wild mānuka bush that arises naturally through bush regeneration, usually on remote areas of farmland, that are not cultivated and managed specifically for the production of honey or another mānuka product, as part of a farming or horticulture business.

Please refer to the commentary on **Determination DET 24/01** Determination DET 24/01: Amortisation rates for listed horticultural plants, for further information on the process applied by the Commissioner when consideration is given to whether a plant is recognised as a listed horticultural plant.

How the amortisation rate works

A timing rule requires that land development and planting costs be capitalised until such time as the listed horticultural plant has become of benefit to the business.

The amortisation rate is available to claim listed horticultural plant land development and cultivation expenditure, to align with the income years of productivity and will cease when the business disposes of the land or the related business activity has ceased.

DET 24/04: Amortisation rates for listed horticultural plants

This supplementary determination may be cited as "Determination DET 24/04: Amortisation rate for cultivated Mānuka".

Application

This determination applies to taxpayers who cultivate and manage Mānuka as a farming operation to promote the production of honey or another mānuka product (not being timber). This determination sets an amortisation rate (based on diminishing value) for Mānuka as a listed horticultural plant.

This determination applies for the 2024 and subsequent income years.

Discussion

In this Determination, unless the context otherwise requires, expressions used have the same meanings as those in ss DO 5 to DO 9, Schedule 20 of the Income Tax Act 2007 and s 91AAB of the Tax Administration Act 1994 in respect of an income year starting on or after 1 April 2023 and subsequent income years.

The amortisation rate only applies to an income year in which the planting benefits the business i.e. when the cultivated Mānuka is actively used for the production of honey or another mānuka product.

Determination

Pursuant to section 91AAB of the Tax Administration Act 1994:

(a) For the purposes of section 91AAB(1)(a), the types of horticultural plant, tree, vine, bush, cane, or similar plant, as set out in the schedule of listed horticultural plants attached to DET 24/01: Amortisation rates for listed horticultural plants shall include "Mānuka (cultivated and managed for the production of honey or other mānuka product)" in the category for "Other" plants;

Amortisation rates for listed horticultural plants

Listed horticultural plant	Diminishing value amortisation rate (%)	Estimated useful life of horticultural plant (years)
"Mānuka (cultivated and managed for the production of honey or other mānuka product)".	9.5	15

(b) For the purposes of section 91AAB(1)(b), for the 2024 income year and subsequent income years, a banded rate set out in Schedule 12, Column 1 of the Income Tax Act 2007 is to be used to calculate the diminishing value for Mānuka, as a listed horticultural plant, and shall be at the election of the taxpayer either:

i. The amortisation rate as set out in column 2 of the schedule to this Determination (rate shown above); or

ii. 10%.

Interpretation

In this determination, unless the context otherwise requires, words and terms have the same meaning as in the Income Tax Act 2007 and the Tax Administration Act 1994.

This determination was signed by on 19 December 2024

Stephen Donaldson

Technical Lead
Technical Standards, Legal Services
Inland Revenue

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 | Whakataunga Whakaputanga – BR Prd 24/04

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

Name of person who applied for the Ruling | Ingoa o te tangata i tono i te Whakatau

This Ruling has been applied for by Kiwibank Limited and Kiwibank Consolidated Tax Group.

Taxation Laws | Ture Tāke

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

This Ruling applies in respect of ss BG 1 and GB 35(2) and (3).

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

The Arrangement is the issue by Kiwibank Limited (Kiwibank) of perpetual preference shares (PPS) of up to $275 million in October 2024 (with the ability to accept unlimited oversubscriptions at Kiwibank's discretion). The PPS will be issued directly to investors by way of a public offer, such that they are recognised as Additional Tier 1 capital in accordance with the relevant requirements of the Reserve Bank of New Zealand's BPR110 *Capital Definitions*, first issued on 1 July 2021 and most recently revised on 1 October 2023. The proceeds of the public offer of the PPS will be used for Kiwibank's general banking purposes.

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

Terms on which the PPS will be issued

1. Under clause 4.1 of Kiwibank's constitution (provided to Inland Revenue on 31 July 2024) Kiwibank's board of directors may issue equity securities of any class, including redeemable shares, at any time, to any person and in such numbers and on such terms as the board of directors thinks fit, subject to the Companies Act 1993, Kiwibank's constitution and the terms of issue of any existing equity securities.
2. The terms on which the PPS will be issued are:
   a) set out in a document entitled *Kiwibank Limited 2024 Perpetual Preference Share Terms* provided to Inland Revenue on 8 October 2024 (the 2024 PPS Terms); and
   b) summarised and explained in a document entitled *Limited Disclosure Document for an Offer of Perpetual Preference Shares by Kiwibank Limited* dated 11 October 2024, provided to Inland Revenue on 10 October 2024.
3. Except for the term "2024 PPS Terms" (defined in [2)a)]), all capitalised terms and phrases referred to in the remainder of this Ruling have the meaning defined in the 2024 PPS Terms.
4. The key 2024 PPS Terms are summarised below. All clause references in the remainder of the Ruling are to the clauses of the 2024 PPS Terms.

Voting rights

5. The PPS confer no rights on a Holder to attend or vote at any meeting of holders of Ordinary Shares or to participate in any other decision or resolution of holders of Ordinary Shares or any other class of shares in Kiwibank (other than the PPS) (clause 1.8(a)).

6. Holders of the PPS have the protective voting rights conferred by s 117 of the Companies Act 1993 (clause 1.9).
7. Except as provided in clause 6.3(b) and 6.3(c), Kiwibank may not amend the 2024 PPS Terms while any PPS remain on issue. Clause 6.3(b) sets out the instances in which Kiwibank is entitled to amend the 2024 PPS Terms without authority, assent or approval of Holders. Without limiting clause 6.3(b), Kiwibank may amend the 2024 PPS Terms if the amendment is approved by a special resolution of Holders (clause 6.3(c)).
8. At the time of issue of the PPS, it is not expected that any protective voting rights conferred by s 117 of the Companies Act 1993 or under clause 6.3(c) will arise.

Issue price

9. The Issue Price of each PPS is NZ$1.00 (clause 1.3).

Distributions

10. Each PPS entitles the Holder to receive a Distribution payable in arrear on each Distribution Payment Date (clause 2.1(a)).
11. Kiwibank has full discretion at all times to cancel Distributions on the PPS (although Kiwibank expects to pay regular dividends where possible). In addition, the payment of any Distribution on any Distribution Payment Date is subject to certain conditions being satisfied (clause 2.6).
12. Under clause 2.7, Distributions are non-cumulative. If payment of any Distribution is not made for any reason, Kiwibank has no liability to pay that unpaid Distribution to the Holder. No interest accrues on any unpaid Distributions and a Holder has no claim or entitlement in respect of such non-payment.
13. Clause 2.10 contains restrictions on Kiwibank in the case of non-payment of Distributions. If for any reason a Distribution is not paid in full on a Distribution Payment Date, Kiwibank must not authorise or pay a dividend on its Ordinary Shares or acquire its Ordinary Shares or otherwise undertake a capital reduction in respect of its Ordinary Shares unless and until:
    a) Kiwibank pays a Distribution in full on a subsequent Scheduled Distribution Payment Date; or
    b) there are no PPS outstanding.
14. Distributions in relation to the PPS are calculated in accordance with clauses 2.3 and 2.5 (clause 2.1(a)). Payment of the Distribution on each PPS is subject to clauses 2.6, 2.7 and 5 (clause 2.1(b)).
15. The Distribution Rate (expressed as a percentage per annum) to be used for calculating Distributions in accordance with clause 2.3(a) or (b) for each Distribution Payment Date on or before the First Optional Redemption Date, is equal to the Swap Rate plus the Margin (clause 2.2(a)).
16. The Distribution Rate (expressed as a percentage per annum) to be used for calculating Distributions in accordance with clause 2.3(c) for each Distribution Payment Date after the First Optional Redemption Date is equal to the Base Rate plus the Margin, provided that, if the rate so determined is less than 0% per annum, the Distribution Rate will be deemed to be 0% per annum (clause 2.2(b)).
17. The Margin will be announced on or about the Rate Set Date and will apply for the duration of the PPS.
18. Kiwibank is required to attach Imputation Credits to each Distribution at the rate necessary for the Distribution to be Fully Credited (clause 2.4). However, if any Distribution is not Fully Credited in accordance with clause 2.4, the Distribution will be increased by an amount in New Zealand dollars equal to the shortfall in Imputation Credits that would otherwise have been attached to the Distribution had the Distribution been Fully Credited (clause 2.5).
19. The Applicants state that while the PPS are on issue, it is anticipated that dividends paid by any members of the Kiwibank Consolidated Tax Group (including Kiwibank) will apply the same imputation credit ratio (that is, be fully imputed), provided sufficient imputation credits are available.

Redemption

20. The PPS are perpetual, so have no fixed maturity date.
21. Holders do not have a right to require Redemption of their PPS at any time (clause 3.6).
22. Subject to the provisions of clause 3, Kiwibank may at its option Redeem all (but not some) of the PPS for an amount in cash equal to their Issue Price:
    a) on an Optional Redemption Date; or
    b) following the occurrence of a Tax Event or Regulatory Event.

23. Under clause 3.3, Kiwibank may only Redeem the PPS if:
    a) either:
        i) prior to, or concurrent with, Redemption, Kiwibank replaces the PPS with a paid-up capital instrument:
            - of the same, or better, quality and contributing at least the same regulatory capital amount (for the purposes of the RBNZ's capital adequacy requirements applying to Kiwibank at the time); and
            - the terms and conditions of which are sustainable for the income capacity of the Kiwibank Group; or
        ii) if Kiwibank does not intend to replace the PPS, it has demonstrated to the RBNZ's satisfaction that, after the Redemption, the Kiwibank Group's:
            - capital ratios would be sufficiently above their respective minimums; and
            - prudential capital buffer ratio would be sufficiently above its buffer trigger ratio;
    b) Kiwibank has provided to the RBNZ any information and supporting documentation required by the RBNZ's prudential regulatory requirements;
    c) the RBNZ has given its prior written approval to the Redemption; and
    d) Kiwibank is Solvent on the Redemption Date and will remain Solvent immediately after the Redemption of the PPS.
24. The First Optional Redemption Date in relation to the PPS is the date that is the five-and-a-half-year anniversary of the Issue Date.

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

The Taxation Laws apply to the Arrangement as follows:

(a) Section GB 35(2) and (3) will not apply to the Arrangement.

(b) Section BG 1 will not apply to the Arrangement.

The period or income year for which this Ruling applies | Te wā, te tau moni whiwhi rānei i pāngia ai e tēnei Whakataunga

This Ruling will apply for the period beginning on 18 October 2024 and ending on 30 April 2030.

This Ruling is signed by me on the 18th day of October 2024.

Raymond Yee
Senior Tax Counsel | Rōia Tāke
Tax Counsel Office | Te Tari Tohutohu Tāke

Product Ruling | Whakataunga Whakaputanga – BR Prd 24/05

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

Name of person who applied for the Ruling | Ingoa o te tangata i tono i te Whakatau

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

Taxation Laws | Ture Tāke

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

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

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

The Arrangement is the receipt of Airpoints Dollars by members (Members) of Air New Zealand's Airpoints customer loyalty and marketing programme (Airpoints Programme) in respect of work-related travel paid for, or the expenditure for which is reimbursed, by the employers of Members and the redemption of the Airpoints Dollars by Members for air travel and other rewards.

The Arrangement does not include the redemption of Airpoints Dollars by an employee from a Shairpoints Account if their employer is also a member of that Shairpoints Account, the receipt of Airpoints Dollars by a "business owner" who receives Airpoints Dollars in relation to work-related travel paid for by the business, or to any aspect of the Airpoints for Business Programme. In this Ruling, the term "business owner" means a person who carries on, or is treated under the Act as carrying on, a business and includes (but is not limited to) a sole trader, a shareholder-employee, a partner of a partnership that carries on a business, and a person with an effective look-through interest in a look-through company that carries on a business.

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

Airpoints Programme

1. Air New Zealand is a New Zealand airline company providing international and domestic air travel. Air New Zealand is a member of the Star Alliance network.
2. Under the Airpoints Programme, Members may earn points (Airpoints) through qualifying flights and qualifying purchases, eligible financial products. Airpoints have a value equivalent to New Zealand dollars and can be redeemed by Members for air travel and rewards.

Terms and Conditions

3. The terms and conditions of the Airpoints Programme are available on Air New Zealand's website (Airpoints Terms and Conditions) and include the following obligation on Members:

> You must not sell, assign or transfer Airpoints Dollars, Status Points or Any Airpoints Member Benefit to any other person for Cash or any other form of consideration.

Membership

4. Individuals may sign up to the Airpoints Programme for free on Air New Zealand's website. On joining Airpoints Programme, Air New Zealand establishes an account for the Member and records the Airpoints Dollars earned by the Member through qualifying flights and qualifying purchases.
5. Membership of the Airpoints Programme is personal to the Member and is not transferable to any other person.
6. Membership cannot be entered into by an employer on behalf of an employee.
7. Members cannot transfer Airpoints Dollars to another airline's frequent flyer programme.

8. Members include employees of Air New Zealand's business customers, who may earn Airpoints Dollars on travel undertaken for work purposes that is paid for, or the expenditure for which is reimbursed, by their employer. For an employee of a business customer to earn Airpoints Dollars, the employee must first become a Member of the Airpoints Programme.
9. Airpoints membership automatically ends on the death of the Member and the deceased Member's Airpoints Account, Shairpoints Account, Status Points, all other benefits are cancelled and become invalid. On written request by the executor of the deceased Member's estate to transfer the deceased Member's Airpoints Dollars balance (but not their Status Points) to the Airpoints accounts of beneficiaries, Air New Zealand will do so if satisfied the request is valid, lawful, and is made within 2 years of the death of the Member.

Shairpoints

10. Under Shairpoints, Members can come together in groups. A Member, called an Owner, can create a Shairpoints Account and can invite up to four other Members to join the Owner's Shairpoints Account. The Owner may nominate one or more members of their Shairpoints Account to be Spenders. The remaining members of the Shairpoints Account are Non-Spenders. The Owner and a Spender can redeem Airpoints Dollars from the Shairpoints Account. A Non-Spender contributes Airpoints Dollars to the Shairpoints Account but is unable to redeem Airpoints Dollars from the account.
11. Employer members and their employee Members can be part of the same Shairpoints Account. Employee Members, however, cannot access Airpoints Dollars under the Airpoints for Business Programme if they are assigned a Non-Spender role by the Owner of the Shairpoints Account.

Airpoints Dollars

12. Every Airpoints Dollar earned is equivalent to NZD $1.
13. Airpoints Dollars are not convertible into cash in any circumstances. And cannot be redeemed, sold, assigned or otherwise transferred by a Member for cash or any other form of consideration.
14. Where Airpoints Dollars are used to purchase a flight/reward which is then cancelled/returned, the Airpoints Dollars are required to be re-credited to the Member's account - cash refunds are not provided. Where a mixture of cash and Airpoints Dollars has been used to acquire a reward that is subsequently cancelled or returned the refund will be made by the re-crediting of Airpoints Dollars and cash in the same proportion as the original purchase.
15. Airpoints Dollars, if not used, expire four years after they accrue to the Member's account, at the end of the month of the anniversary of the day the Member joined the Airpoints Programme unless the Member has points protection.
16. Air New Zealand does not provide discounts to business customers who request Airpoints Dollars not be issued to their employees in respect of work-related travel. Business customers are unable to influence the number of Airpoints Dollars granted to their employees in respect of either work related or private travel. Employers pay the same price for flights for their employees irrespective of whether employees are, or are not, Members. Airpoints Dollars accrue and are redeemed for rewards on the same basis for any Member of the Airpoints Programme, irrespective of the Member's employer.

How Airpoints Dollars are earned

17. Members may earn Airpoints Dollars on qualifying flights, qualifying purchases and through direct earn financial Products. For example, Members may be eligible to earn Airpoints Dollars on:
    - Expenditure on Air New Zealand qualifying flights and qualifying purchases (such as additional baggage allowance).
    - Expenditure on a partner Airline qualifying flight.
    - Expenditure on qualifying purchases with participating retailers such as retail, hotel operators or hire car companies.
    - Use of an eligible direct earn financial product from participating financial institutions.
    - Purchasing Airpoints Dollars to 'top up' the Airpoints Dollars in the Member's account or another Airpoints Member's Account (subject to a fee).
    - Transfer of Airpoints Dollars to the Member from an individual, third party or employer (through either 'Shairpoints' or 'Airpoints for Business').
18. Certain credit or charge cards allow card holders to convert their credit or charge card reward points into Airpoints Dollars, in accordance with the relevant credit or charge card terms and conditions.

19. Airpoints Dollars earned by a Member as an employee under the Airpoints for Business Programme accrue to the Airpoints for Business Account of their employer, and are in addition to the Airpoints Dollars earned and accrued to the Member's account.

Redemption of Airpoints Dollars

20. Airpoints Dollars may be redeemed by the Member for any of the following rewards:
    - Air New Zealand flights.
    - Onboard goods and services such as upgrades, extra baggage, seating products, movie upgrades, food and beverages and wine or merchandise offered by Air New Zealand on Air New Zealand flights and Air New Zealand Koru membership.
    - Goods, services and vouchers on the (online) Airpoints Store.
    - Partner airline flights booked directly on the Air New Zealand website where Air New Zealand acts as agent, collects the Airpoints Dollars, and then makes payment to the partner airline for the flight based on an agreed rate dependent on mileage and class of flight.

Airpoints for Business Programme

21. Air New Zealand operates an Airpoints for Business Programme which allows business entities, including partnerships and sole traders, (Business Members) with one or more employees to accrue Airpoints Dollars for the entity.
22. A Business Member may register linked employees (Linked Employees) to its Airpoints for Business Account. The default maximum number of Linked Employees is 21 but additional members can be added on request. Linked Employees must be Members of the Airpoints Programme, employed by the Business Member, resident in New Zealand, and aged 18 years or older. The Business Member's Airpoints for Business Account links with the Linked Employees' individual Airpoints account.
23. When a Linked Employee travels on an eligible flight with Air New Zealand for business related-purposes, Airpoints Dollars accrue (for no additional payment) to the Business Member's Airpoints for Business Account, in addition to any Airpoints Dollars credited to the Linked Employee's personal Airpoints Account.
24. A Business Member may:
    - transfer Airpoints Dollars to any Linked Employee's personal Airpoints Account (such transfers cannot be made for cash); and / or
    - redeem Airpoints Dollars for air travel and the other rewards available under the Airpoints Programme.

Conditions stipulated by the Commissioner | Here i āta whakaritea e te Kaikōmihana

This Ruling is made subject to the following conditions:

(a) The Airpoints Terms and Conditions must not allow Members to sell, assign or transfer Airpoints Dollars or any Airpoints Member Benefit to any other person for cash or any other form of consideration.

(b) Members must comply with the Airpoints Terms and Conditions, including (without limitation) the condition that Members must not sell, assign or transfer Airpoints Dollars or any Airpoints Member Benefit to any other person for cash or any other form of consideration.

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

Application

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

(a) Members do not have income under any of sections CE 1, CB 1, CB 3, CB 4, CB 5, or CA 1(2) when they receive Airpoints Dollars or rewards, on the redemption of Airpoints Dollars, arising from work related travel paid for, or reimbursed, by their employers.

(b) The receipt by Members of Airport Dollars and rewards under the Airpoints Programme from work related travel paid for, or reimbursed, by their employers is not a fringe benefit as defined in s CX 2(1) and employers of Members are not liable to pay FBT under s RD 26.

Exclusions

This Ruling does not rule on:

Shairpoints Accounts

(a) If an employee Member is in the same Shairpoints Account as their employer:

  (i) whether the FBT rules (as defined in the Act) apply to the redemption by employee Members, as Spenders, of Airpoints Dollars in the Shairpoints Accounts:

  (ii) whether rewards received by employee Members, as Spenders, on the redemption of Airpoints Dollars in the Shairpoints Accounts are income, under Part C of the Act, of employee Members.

Business owners

(b) Whether the receipt of Airpoints Dollars by business owners under the Airpoints Programme from work related-related travel related to, and paid for or reimbursed by the business, are income, under Part C of the Act, of the business owners.

Airpoints for Business Programme

(c) Whether the FBT rules in the Act apply to the transfer of Airpoints Dollars to employee Members by their employers under the Airpoints for Business Programme.

(d) Whether the following are income, under Part C of the Act, of business Members under the Airpoints for Business Programme:

  (i) the receipt of Airpoints Dollars:

  (ii) rewards received on the redemption of Airpoints Dollars.

The period or income year for which this Ruling applies | Te wā, te tau moni whiwhi rānei i pāngia ai e tēnei Whakataunga

This Ruling will apply for the period beginning on 1 October 2024 and ending on 30 September 2028.

This Ruling is signed by me on the 6th day of November 2024.

Fiona Wellgreen
Senior Tax Counsel
Tax Counsel Office | Te Tari Tohutohu Tāke

INTERPRETATION STATEMENTS

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.

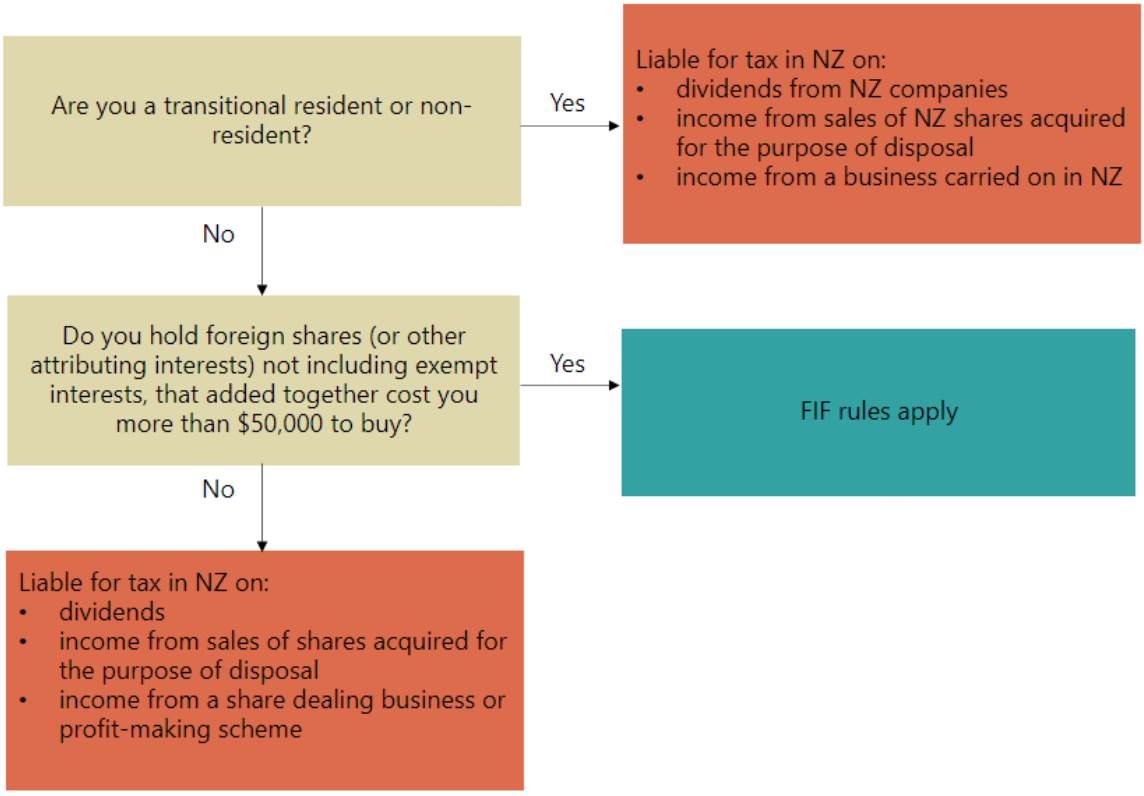
Some interpretation statements may be accompanied by a fact sheet summarising and explaining the main points. Any fact sheet should be read alongside its corresponding interpretation statement to completely understand the guidance. Fact sheets are not binding on the Commissioner. Check **taxtechnical.ird.govt.nz/publications**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

IS 24/10: Income tax – Share investments

Summary | Whakarāpopoto

1. This interpretation statement applies to New Zealand tax resident individuals who invest in shares. The statement does not apply to investors who acquire interests in managed funds, KiwiSaver or portfolio investment entities (PIEs). Those investors will generally not have further tax liabilities, provided they have given correct information to the provider (such as their prescribed investor rate (PIR)). This statement also does not apply to investments in controlled foreign companies or illiquid investments in closely held companies. Unless otherwise stated, all monetary amounts and thresholds referred to in this statement are in New Zealand dollars.
2. This statement explains when individual share investors are subject to:
   - the ordinary tax rules, including when they have to return income from dividends and taxable share sales;[1] or
   - the Foreign Investment Fund (FIF) rules and must (or choose to) apply those rules instead of the ordinary tax rules.
3. Use the following diagram to decide which rules apply:

1 In this statement, a reference to "ordinary tax rules" is a reference to the provisions in the Act other than the foreign investment fund rules in ss CQ 4 to CQ 6 and ss EX 28 to EX 73.



Part one – Application of the ordinary tax rules to share investments

4. The ordinary tax rules apply to individual share investors who hold shares in:
   - New Zealand companies;
   - Australian companies that are exempt from the FIF rules; or
   - foreign companies (that are not exempt from the FIF rules) that added together with all the investor's other attributing interests cost $50,000 or less to buy.[2]
5. These investors have a tax liability in New Zealand when they receive:
   - dividends paid by New Zealand or foreign companies, to the extent that tax has not been withheld on their behalf in New Zealand by a New Zealand company or custodian; or
   - amounts from selling shares, where the shares were acquired for the dominant purpose of disposal or were part of a share dealing business or profit-making undertaking or scheme.
6. However, investors only have to include the above amounts in an IR 3 individual income tax return if the total amount of all their income that is not reportable income is more than $200 in an income year.[3]
7. There may be other tax consequences relating to investing in shares that fall outside the scope of this statement. For example, investors who participate in share lending have a tax liability for any fees earned and may have further tax liabilities for other amounts if the share lending rules do not apply. Investors may also need to account for foreign exchange gains or losses on foreign currency accounts where the total amount of all their variable principal debt instruments exceeds $50,000.[4]

2 Although these investors may choose to apply the FIF rules instead.

3 Reportable income is defined in s 22D of the Tax Administration Act 1994. Essentially, it is income where tax is withheld by the payer, such as PAYE income payments and a payment of resident passive income (eg, interest or dividends).

4 These include credit cards, bank accounts, revolving credit facilities and foreign exchange accounts.

Dividend income

8. A dividend received by an investor is taxable income in New Zealand. This includes dividends from both New Zealand and foreign companies (including where the investor uses an offshore platform to buy foreign shares).
9. Where a New Zealand resident company pays a dividend, tax will generally have been withheld and paid on behalf of investors. Investors need to check that the amounts pre-populated in their individual income tax assessments or IR 3 individual income tax returns are correct. They will need to include any missing amounts or pay an additional amount if their marginal tax rate is higher than the rate at which RWT was withheld.
10. Where a foreign company pays a dividend, tax will not have been withheld in New Zealand unless the shares are held by a New Zealand resident custodian on behalf of investors. Investors need to check whether tax has been withheld and paid in New Zealand. The investor needs to include the New Zealand dollar value of the dividend in an IR 3 individual income tax return. Investors with foreign dividends need to file an IR 1261 overseas income summary which assists with claiming any available foreign tax credits.

Income from taxable share sales

11. Amounts received from the sale of shares are taxable when an investor acquired the shares for the dominant purpose of disposal, has a share dealing business or the shares are part of a profit-making undertaking or scheme.
12. An investor who acquires shares for the dominant purpose of disposal is subject to tax when the shares are sold. For sales to be taxable, disposal must be the investor's dominant purpose at the time the shares were bought. There are two steps for applying this test:
    - consider what the investor says their dominant purpose was for buying shares; and
    - test that statement against objective factors identified by the courts. This includes the nature of the asset (that is, the type of shares purchased and what rights they give the holder), the length of time the shares were held, the circumstances of the purchase and disposal of the shares, and whether there is a pattern of purchases and sales suggesting there was a dominant purpose of sale.
13. An investor may have one purpose, more than one purpose, or no particular purpose for buying shares. The onus is on the investor to prove whether their dominant purpose for buying shares was to dispose of them. An investor only has to prove that disposal was not their dominant purpose; they do not have to prove an alternative dominant purpose. However, share sales will not be taxable if an investor can show (both through their stated purpose and tested objectively) that shares were bought for the dominant purpose of:
    - receiving dividend income;
    - receiving voting interests or other rights provided by shares; or
    - a long-term investment, growth in assets or portfolio diversification (other than situations where, at the time of acquisition, this is planned to be achieved through sale).
14. There is no bright-line test for share sales, so there is no set amount of time shares are held or number of trades required for sales to be taxable. It is advisable for investors to keep records to support their stated purpose at the time they bought shares. Types of records that may support a stated purpose at the time of acquisition may include:
    - information obtained from companies, platforms or brokers when deciding what shares to buy;
    - a record of their purpose at the time of acquisition (eg, contemporaneous file notes or emails);
    - where applicable, their investment plan and any notes from financial advisors;
    - where relevant, information on expected dividend yields; and
    - lending records if funds were borrowed to invest.
15. Also, records of reasons for sales may help show that sales are consistent with the stated purpose, for example:
    - where sales are made as part of rebalancing a portfolio, an explanation of what the rebalancing is achieving and how this relates to their investment plan; or
    - where there is a change of circumstances (such as the investor's personal or financial circumstances, they no longer support the company's policies, or the investment is not performing to their expectation).

16. Contemporaneous records as set out above can be helpful but not determinative, and the particular circumstances still need to be tested objectively. For more information on when there is a purpose of disposal, see from [51] and the appendix from [133].
17. An investor may also have taxable income from share sales if they have a business of share dealing. An investor will be in business if the scale of their buying and selling activity is large, with regular trading activity, there is a significant amount of time and money invested, and they have an intention to make a profit. They may also have a share dealing business which is usually demonstrated through a large scale of activity, even if they do not have an intention to make a profit. Finally, an investor may also potentially have income from share sales if this is done in the course of carrying on a profit-making undertaking or scheme.

Expenses

18. Where shares are bought for sale or as part of a share dealing business, expenses incurred in acquiring, holding and selling the shares are generally deductible. This includes the cost of the shares, transaction or advisory fees and any interest on borrowed funds. If the shares are sold for less than the expenses, the investor can claim this as a loss.
19. Where shares are not bought for sale or as part of a business or share trading activity, but there is a reasonable expectation of dividends, deductions can be claimed for interest on borrowed funds and potentially some financial planning fees.
20. Where shares are not bought for sale or as part of a business or share trading activity, and there is not a reasonable expectation of dividends, no expenses are deductible.

Part two – Application of the foreign investment fund rules to share investments

21. Individual investors are subject to the FIF rules where, at any time during the income year, they hold foreign shares and other attributing interests (other than exempt interests) that added together cost the investor more than $50,000 to buy.
22. The FIF rules do not apply to transitional residents or non-residents. Investors who hold attributing interests (other than exempt interests) that added together cost $50,000 or less to buy may choose to apply these rules.
23. Investors subject to the FIF rules must apply the FIF rules and not the ordinary tax rules in relation to their attributing interests. This means they do not apply the rules discussed above for dividends and taxable share sales. However, if investors hold some shares that are subject to the FIF rules and some that are not (because the shares are exempt from the rules), they still apply the ordinary tax rules to the exempt shares.
24. Individual investors may choose a FIF method to calculate their income in each year, but they must use the same method for all their FIF interests. Depending on the FIF method used, investors who are subject to the FIF rules may be deemed to derive a return in each year (that may be more or less than any returns actually received). See from [105] for more information.
25. Applying the FIF rules can be complex, and it is recommended that investors who are subject to the FIF rules seek advice. Inland Revenue also has resources available on its website to assist with calculations.

Guidance for applying the FIF rules can be found in the following resources:

Inland Revenue's Guide to Foreign Investment Funds (IR 461) - **Foreign investment funds (FIFs)**

To work out whether interests in Australian shares are exempt, use Inland Revenue's FIF exemption tool **Foreign Investment Fund Australian listed share exemption tool**

To work out FDR and CV income, use Inland Revenue's FIF calculation tool **Calculate my foreign investment fund income**

For information on filing an IR1261 overseas income summary see **Reporting your overseas income (ird.govt.nz).**

To find out what to do if you didn't return FIF income when you should have, see **QB 23/10 Foreign investment fund (FIF) calculation methods in cases of non-compliance**

For information on claiming foreign tax credits, see **IS 21/09 - Income tax – foreign tax credits – how to calculate a foreign tax credit.**

Introduction | Whakataki

26. This interpretation statement provides guidance for individuals who invest in shares, so they are aware of their tax obligations. The statement focuses on the income tax consequences of individuals using online investment platforms (whether the platforms are based in New Zealand or offshore). The principles in the statement also apply more widely to other forms of direct share investment by individuals (such as using brokers or financial advisors).
27. Different rules may apply to investments made using other entities such as companies and trusts, which are outside the scope of this statement. Also, different rules may apply to investments in other assets, managed funds and PIEs. For information on how PIE investments are taxed, see Inland Revenue's website: **Portfolio investment entities (PIEs) for New Zealand residents**.
28. Part one of this statement applies to investors who hold:
    - shares in New Zealand companies;
    - shares in Australian companies that are exempt from the FIF rules; or
    - foreign shares that are not subject to the FIF rules (because when added together all the investor's attributing interests cost $50,000 or less to buy).[5]
29. The FIF rules in part two apply to investors when at any time in an income year they hold foreign shares (and other attributing interests) that:
    - are not exempt from the FIF rules; and
    - when added together, cost the investor more than $50,000 to buy. This cost is calculated in New Zealand dollars at the time the shares and other attributing interests are purchased.
30. Investors who meet the above criteria (or who choose to apply the FIF rules) do not apply the ordinary tax rules in part one to their FIF interests. However, if these investors also hold New Zealand shares or shares that are exempt from the FIF rules, they apply the ordinary tax rules in part one to those shares.
31. An investor who is a transitional tax resident pays tax in New Zealand only on their New Zealand sourced income and does not have FIF income. Those investors should go to [102] to see which rules apply to them.

Part one – Application of the ordinary tax rules to share investments

32. This part explains when investors will have a tax liability under ordinary tax rules from investing in shares. This part considers when an investor will have a tax liability for dividend income and from taxable share sales.

Dividend income

33. A dividend is any transfer of value from a company to a shareholder. Usually, this is a cash payment (but not always). A dividend received by an investor is taxable income, including when dividends are received from foreign companies.[6]
34. The way in which investors hold shares using online investment platforms or brokers may differ. In many cases the platform or a custodian may hold the shares on behalf of investors as a bare trustee or nominee. New Zealand custodians that hold investments as a bare trustee must ensure resident withholding tax (RWT) has been deducted when it receives investment income that is passed on to an investor. However, the investor still has income tax obligations, as explained below.

Dividends received from a New Zealand company

35. When an investor receives a dividend from a New Zealand resident company, an amount of RWT should be withheld and paid to Inland Revenue on the investor's behalf. A dividend paid by a New Zealand company may include imputation credits, which are credits for tax the company has already paid in New Zealand. These credits are taken into account when RWT is being withheld and paid to Inland Revenue.
36. Where investors have provided their IRD number, the relevant information will be pre-populated in the investor's automatic income tax assessment or IR 3 individual income tax return.

5 Although an investor in this situation may choose to use the FIF rules (discussed in part two).

6 The dividend tax rules are contained in subpart CD, in particular see ss CD 1, CD 3 and CD 4.

37. Investors will need to check that pre-populated amounts are correct (and if not, they will need to self-report any dividends that have been omitted). Investors may also need to pay an additional amount if their marginal tax rate is higher than the rate at which RWT was withheld. The withholding of dividend income on an investor's behalf is illustrated in Example | Tauira 1.

Example | Tauira 1 – Dividends from a New Zealand company

Ari uses a New Zealand based online investment platform to buy shares in NZ Co. In the 2024 income year, Ari was entitled to a gross dividend of $100 which included an imputation credit. The platform sent Ari a tax statement showing the following information:

Tax statement 31 March 2024

NZ Co dividend	$72
Imputation credit	$28
Taxable gross dividend	$100
RWT	$5
Net dividend	$67

Scenario one

If Ari has a 33% marginal tax rate, Ari's tax liability for the dividend is $33, satisfied through a combination of the imputation credit and RWT withheld. This information is pre-populated in Ari's automatic income tax assessment for the year. Ari's other income in the 2024 income year was salary and interest from bank deposits (all of which have also had tax withheld and were pre-populated). Ari checks that the amounts are correct and does not need to amend the assessment or file an IR 3 individual income tax return for the 2024 income year.

Scenario two

Ari recently moved to the 39% marginal tax rate, but RWT was still withheld at 33%. Ari's tax liability for the dividend is $39, but this is only partially satisfied through the imputation credit and RWT withheld which total $33. Ari will need to pay the difference of $6.

Dividends received from a foreign company

38. Dividends received from a foreign company are usually taxable in that other country and in New Zealand. However, the investor may be able to claim a foreign tax credit in New Zealand for tax paid overseas, so they are not taxed twice on that income.

Tax paid overseas and foreign tax credits

39. When an investor receives a dividend from a foreign company, it is likely that tax will have been withheld in that other country. Platforms or custodians may apply a lower withholding tax rate if a double tax agreement (DTA) applies. For a DTA rate to be available, investors need to provide the platforms or custodians with the relevant information they require to show entitlement to the DTA rate, which may include details such as their IRD number and tax residence status.
40. For example, if a New Zealand tax resident earns a dividend from a United States company, they would be entitled to the DTA tax rate of 15% in the United States. If the platform or custodian does not have the relevant information, then tax may be incorrectly withheld at the United States' higher domestic withholding rate instead. However, even if the higher rate is incorrectly withheld, the amount of foreign tax credit available to the investor is limited to the DTA amount.[7]
41. For information on claiming foreign tax credits, see **IS 21/09 - Income tax – foreign tax credits – how to calculate a foreign tax credit.**
42. Therefore, investors should make sure their platforms or custodians have the information they require to be able to correctly apply the DTA rate. Otherwise, the investor will end up paying more tax overseas than they need to, and they cannot claim that back against their New Zealand tax liability.

7 The amount of foreign tax credit available is also generally limited to the amount of New Zealand tax payable on that income.

New Zealand tax obligations

43. Platforms deal with New Zealand tax obligations for foreign dividends in different ways:
    - Where a New Zealand resident custodian holds shares, the custodian withholds and pays RWT in New Zealand on the investor's behalf and that information is pre-populated into the investor's IR 3 individual income tax return.
    - Where a non-resident custodian holds shares, they do not withhold and pay New Zealand tax. Investors need to self-report this information in an IR 3 individual income tax return.
44. Investors with foreign dividends need to file an IR 1261 overseas income summary to declare their overseas income sources and claim foreign tax credits. Information on the IR1261 overseas income summary can be found here: **Reporting your overseas income**.
45. When required to self-report dividend income in a return, investors need to include the New Zealand dollar value of the dividends received, calculated at the time they received the dividend. Assistance for finding out the New Zealand dollar amount is on Inland Revenue's website, see **Overseas currency - conversion to NZ dollars.**
46. Investors cannot usually claim credits similar to imputation credits from a foreign company (such as franking credits paid by an Australian company) against their New Zealand income, but as noted above they can claim a foreign tax credit for foreign withholding tax that was paid.
47. An investor does not need to file an IR 3 individual income tax return if the total amount of their income (other than reportable income) is less than $200. Essentially, reportable income is where tax is withheld by the payer, such as PAYE income payments and a payment of resident passive income (for example, interest or dividends from New Zealand companies).[8] The $200 threshold includes all amounts that are not reportable income (such as from any taxable share sales), not just income from foreign dividends.
48. In summary, investors who receive dividends from foreign companies need to:
    - ensure they have provided platforms and custodians with the information required to qualify for DTA tax rates, such as their IRD number and tax residency status;
    - find out whether they need to file an IR 3 individual income tax return for the dividend income in New Zealand;
    - carefully check any amounts of tax that have been withheld on their behalf; and
    - include any missing amounts, pay any additional tax required and file an IR 1261 overseas income summary to claim their foreign tax credits.
49. The requirement to return a foreign dividend in New Zealand is illustrated in Example | Tauira 2.

8 Section 22D of the Tax Administration Act 1994

Example | Tauira 2 - Dividends from a foreign company

Bob uses an online investment platform to buy shares in US Co. Bob provided his IRD number and tax residency information to the platform to make sure he qualifies for the DTA withholding rate. The platform uses US Broker, a United States based custodian service.

In March 2023 Bob was entitled to a dividend of US$100. US Broker withheld tax in the United States at the DTA rate of 15%. The platform provided Bob with the following information:

US dividends	**31 March 2023**
US Co gross dividend	US$100
US withholding tax paid	US$15
US net dividend received	US$85

The platform is not a New Zealand custodian. Bob uses an approved foreign exchange source and works out he has a gross dividend of NZ$160.51 and a foreign tax credit of NZ$24.08.

In the 2023 income year, Bob also earned $5,000 from taxable sales of New Zealand shares and Bitcoin. Bob needs to file an IR 3 individual income tax return and include the dividend in his total overseas income (as well as the Bitcoin and share sale income as other income). Bob needs to file an IR 1261 overseas income summary to account for his foreign dividend and claim the foreign tax credit.

If the platform was a New Zealand custodian, it must withhold RWT on Bob's behalf. The dividend information is pre-populated in Bob's IR 3 individual income tax return, and Bob needs to file an IR 1261 overseas income summary to claim the foreign tax credit.

Income from taxable share sales

50. Amounts an investor receives from selling shares are taxable where the shares were:
    - acquired for the dominant purpose of disposal;
    - part of a business of share dealing; or
    - part of a profit-making undertaking or scheme.

Shares acquired for the purpose of disposal

51. An amount a person receives from selling assets such as shares is their income if they acquired the shares for the purpose of disposal.[9]
52. The leading case is *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA). That case established that the purpose of sale needs to be the person's dominant purpose. What is relevant is what was most important to the person at the time of acquisition.
53. An investor may have one purpose, several purposes, or no particular purpose for buying shares. The onus is on the investor to show whether or not they had a dominant purpose of disposal. An investor only has to prove that disposal was not their dominant purpose; they do not have to prove an alternative dominant purpose.
54. The first step that Inland Revenue takes is to consider what the person says their purpose was for acquiring shares. Then, that statement is tested against the following objective factors identified by the courts:
    - the nature of the asset;
    - the length of time the shares are held;
    - circumstances of the purchase, use and disposal of shares; and
    - the number of similar transactions.

9 Section CB 4.

55. The nature of the asset refers to the particular assets that were acquired.[10] This could involve considering the type of asset and what rights the asset confers on the holders. For example, this may include whether shares pay or are expected to pay dividends or whether the person receives voting interests. Whether or not shares pay dividends (or are expected to pay future dividends) is one factor to consider, but it is not determinative and is to be weighed against the person's stated purpose and the other objective factors.
56. The length of time shares are held is also important. As was stated in *National Distributors*, if shares are held for only a few months, then in the absence of any special reasons for the sale, they are likely to be viewed as being purchased for resale and taxable. If shares are held for several years, during which time the market moves upwards and downwards, then it is more likely the dominant purpose is not one of resale. However, there is no particular time period that applies to determine whether shares were acquired for disposal or not. The answer depends on the particular facts of each case.
57. The circumstances of purchase, use and disposal of shares and the number of similar transactions involves considering what the person actually did, why the shares were sold, and whether there is a pattern of activity. There is no particular number of trades required for share sales to be taxable, and as above, the answer depends on the particular facts of each case.
58. There is no requirement that the person be in business or have a purpose of making a profit. One-off sales are still taxable if the shares were bought for the dominant purpose of disposal.
59. A situation where the objective factors indicate there is a purpose of disposal is illustrated in Example | Tauira 3.

Example | Tauira 3 – Shares bought for profit on sale

In early 2024, Charlie used an online investment platform regularly. Charlie bought and sold a few shares in New Zealand companies every now and again with an eye on sales profits. He didn't consider dividend policies, and preferred shares in companies that reinvested profits. Charlie was prepared to take risks and searched for companies on the platform by applying a "highest price change" filter. Charlie would sell shares when he considered the price was high.

The nature of the shares acquired, the length of time held, and the pattern of activity indicate that Charlie acquired shares for the dominant purpose of disposal. Charlie did not have any evidence to show that he did not have a dominant purpose of selling these shares, and he also did not have any other explanations for the sales. The amounts Charlie receives from these sales will be taxable.

Change of purpose

60. It is relevant that it is the person's purpose at the time of acquiring the shares that is important. If a person acquired shares for the dominant purpose of selling them, then later changes their mind, any subsequent sale will still be taxable.
61. Similarly, a person who acquires shares for a different dominant purpose (such as receiving dividends or a long-term investment) will not be subject to tax if they later change their mind and sell those shares. For example, an investor may no longer support a company's policies, may sell shares due to a change in their circumstances, or may sell shares to assist a family member. An investor in this situation would need to have records of what their original purpose was for buying the shares, and an explanation of why the shares were sold (which is supported by the objective factors discussed above).
62. Changes of purpose are illustrated in Example | Tauira 4 and Example | Tauira 5.

Example | Tauira 4 – Change of purpose from sale to long-term investment

In 2021, Olive started using an online investment platform. She used a filter to sort various New Zealand companies by the highest price change, as she was looking to earn extra money by selling shares for profit.

After a few months Olive changed her mind and decided to hold on to her shares for a long-term investment.

Two years later, Olive had a change of circumstances and had to sell the shares. Because Olive bought her shares for the purpose of selling them, the amount she receives from the later sale of the shares is taxable. It is Olive's purpose at the time she bought the shares that determines whether sales are taxable.

10 The Commissioner considers that generally shares differ in nature to other investment assets (such as gold bullion and cryptoassets). While the same general principles apply, the nature of the asset is given particular weight.

Example | Tauira 5 – Change of purpose from long-term investment to sale

In 2023, Jin bought shares in a tech company because he was interested in the products the company made, and also thought the shares would be a good long-term investment to add to his portfolio. Jin had discussed this with his financial advisor, and Jin's advisor had kept notes of Jin's investment plan, including for the tech company shares.

The following year the tech company's leadership changed, and Jin did not support the direction the company was moving in. Jin decided to sell his shares and invest his funds elsewhere.

The amount Jin receives from selling these shares is not taxable. Jin's purpose at the time he bought the shares determines whether the share sales are taxable. Jin's investment plan, recorded reasons discussed with his investment advisor for the initial purchase, and reasons for the sale of these shares support his position.

Several purposes for acquiring shares

63. A person may have one purpose for acquiring shares, several purposes for acquiring shares, or they may acquire shares without any particular purpose in mind (eg, they have a general hope that the shares will be a good investment in some way). For sales to be taxable, sale must have been the dominant purpose for acquiring the shares.

64. If a person receives shares passively, such as from a gift or inheritance, they will not have a purpose for that acquisition (so will not have a purpose of disposal). However, the tax treatment may sometimes depend on the purpose of the original holder. If shares were acquired by the original holder for the purpose of disposal or as part of a business of share dealing, but they transfer, gift or bequeath the shares, there may be tax consequences under subpart FB (which applies to transfers of relationship property) and subpart FC (which applies to gifts and transfers on death).

65. A person who acquired shares for several purposes, where disposal is not the dominant purpose, is illustrated in Example | Tauira 6.

Example | Tauira 6 – Sale not dominant purpose

Steve started using an online investment platform to invest in shares. He wanted to invest in ethical companies to support those companies, but also still provide a good return in some way.

He undertakes research before purchasing shares, focusing on the companies' ethical and sustainability policies as well as dividend history and the growth in share prices over the last few years. Steve keeps records of this research.

At the time of purchase, Steve is not certain about how long he will hold the shares for. Two years later, he decides to sell his portfolio and sells the shares for a profit.

The sale of these shares is not taxable. While two years is not a long-term investment, Steve had several purposes for buying the shares, including that he wanted to support an ethical and sustainable company, was seeking dividends and also growth in value of the shares. While sale was a possibility, his dominant purpose at the time he bought the shares was not to sell them. Steve can show this through his research and his stated purpose is consistent with the shares that he bought.

66. An investor may also have different purposes for different types of shares that they acquire. Different purposes can be attributed to different acquisitions of shares, although the investor will need to be able to show this. For example, if possible (such as where brokers or financial advisors are used), it would be advisable for investors to hold shares acquired for long-term investment and shares acquired for sale in separate accounts. Different purposes for different shares is illustrated in Example | Tauira 7.

Example | Tauira 7 – Different purposes for different shares

Megan started buying shares using an online investment platform during lockdown in 2020. In April 2020, Megan purchased:

$1,000 shares in A Co; and

$1,000 shares in B Co

Megan bought the shares in A Co because they paid a dividend yield of 6.5%. She wanted an investment that earned a regular income. Megan bought the shares in B Co, a pharmaceutical company, because she heard from her neighbour (a fund manager) that pharmaceutical companies would be good short-term investments. When she bought them, Megan recorded her research and reasons for purchasing each type of share.

In March 2021, Megan's neighbour thought the market was close to peak and Megan sold the shares in B Co for $1,800 - a gain of $800. Later that month, Megan decided to invest into a managed fund instead, so she sold her remaining shares (A Co) for $1,100 and made a gain of $100. Megan invested all proceeds into a managed fund.

Megan made an overall gain of $900 from share sales in A Co and B Co (the amount received less the cost of the shares sold). However, she needs to return income only on the gain of $800 from selling the shares in B Co. The amount she received from the sale of shares in A Co is not taxable because she acquired those shares for the purpose of earning dividends (even though she later changed her mind). Megan's research of companies with high dividend yields is supported by the type of shares in A Co she acquired.

Other purposes for buying shares

67. A person can acquire shares for the dominant purpose of disposal, even if they have a wider aim in mind. As Richardson J said in *National Distributors*, if resale is proposed it does not matter that it is only the means to an end. For example, an investor may claim that shares are acquired as a store of value outside the monetary system, as a hedge against inflation, or for portfolio diversification. This explanation does not by itself answer the question of whether the investor had a dominant purpose of disposal. There may be situations where these explanations still involve a dominant purpose of disposal that means s CB 4 applies. For more information, see the appendix from [153].
68. Also, if shares were bought for the dominant purpose of funding or achieving something through a future sale, then they were acquired for the dominant purpose of disposal. This is illustrated in Example | Tauira 8.

Example | Tauira 8 – Purpose of sale to achieve a particular goal

Sally had funds in a term deposit that paid a low interest rate and was looking to increase the value of her investment to help fund a house deposit. She discussed her financial situation with her bank and was told the amount of deposit she would need for the home loan she required.

Sally was concerned that high inflation and low interest rates would mean she would be worse off once she was ready to purchase a house. When her term deposit matured, despite realising the risks involved in share investment, Sally decided to invest her deposit with an online investment platform in a combination of high growth and high dividend earning shares.

Two years later, the value of Sally's investment was sufficient for a house deposit, and Sally sold all her shares.

Sally's dominant purpose for buying the shares was to raise funds to increase the value of her house deposit. She could achieve that only by selling the shares. Therefore, selling the shares is her dominant purpose. The gains made on the share sales are taxable.

69. Share sales will not be taxable if an investor can show that shares were bought not for sale, but for the dominant purpose of:
    - receiving dividend income;
    - receiving voting interests or other rights provided by shares; or
    - a long-term investment, growth in assets or portfolio diversification (other than situations where, at the time of acquisition, this is planned to be achieved through sale).

70. Where an investor has acquired shares as a long-term investment, they will not have a dominant purpose of disposal if they only have a vague or general hope that the shares will increase in value and there is a possibility the shares may be sold in the future. These concepts are illustrated in Example | Tauira 9.

Example | Tauira 9 - Shares acquired for long-term investment

Logan owned a large share portfolio that he had been adding to over the years. Some shares paid regular dividends that were re-invested, but most investments were in high growth shares that had not paid dividends. He had recently retired and was living off superannuation and the occasional maturity of term deposits. He thought he may also sell some investments depending on his financial needs. However, ultimately Logan wanted to build up his asset profile so he would have an inheritance he could eventually pass on to his children and grandchildren.

Logan did not think of his share portfolio as something he would necessarily sell, but he thought sale may be needed in the future depending on his financial position.

Logan had unexpected medical issues and sold some of his shares to fund expenses. The sale of those shares is not taxable. Logan bought the shares with the purpose of building up a portfolio that may, but would not necessarily, be sold. His change of circumstances does not alter that purpose on acquisition. The possibility that shares will be sold does not mean he has a dominant purpose of disposal.

Rebalancing portfolios

71. Investors may have investment plans. These may be prepared by the investor or a financial advisor. Such investment plans will generally be based on the investor's profile and requirements such as their investment objectives, risk appetite, types of investments and gains sought. The investment plan may include target asset allocations for each asset class (as a percentage of the overall portfolio), and risk limits. The plan may anticipate the ongoing assessment of the relative value of asset classes, or of securities within an asset class, with a view to reallocating investments from time to time.
72. If an investor has a long-term investment plan, this plan would be able to help show that shares were generally acquired for a purpose of long-term investment. However, the tax rules do not apply to a portfolio, but to each acquisition and disposal of shares. If any particular shares within the portfolio are acquired for a purpose of sale, such as to realise some short-term gains as part of the investment plan, then those shares need to be treated differently.
73. Where there is an investment portfolio that is being managed and reviewed in accordance with a long-term investment plan, sales of shares made to rebalance the portfolio to ensure it is consistent with that long-term investment plan will generally not be taxable. However, whether any particular sales are taxable will be fact specific, as there could be shares within a portfolio that were acquired for a short-term gain. Relevant factors that would assist showing that rebalancing is part of a long-term investment plan include that the reasons given for the rebalancing or a sale of a particular holding are consistent with the investment plan, long-term investment and risk management objectives.
74. Portfolio rebalancing is illustrated in Example | Tauira 10 and Example | Tauira 11. Example | Tauira 11 provides an example of an investor who uses an investment advisor. The same conclusion would be reached in that example whether the investor prepared their own investment plan or used an advisor or discretionary investment management service.

Example | Tauira 10 – Sales to ensure high dividend yield

Frankie holds a portfolio of shares on an online investment platform, with dividend yields ranging from 4 to 6%. She wants to maintain a steady income from her portfolio.

Frankie researched shares with high dividend yields on the platform she uses. Frankie discovered A Co which paid regular dividends of 6.5%.

Frankie sold shares in Y Co, which had paid dividends at the lower end of her target range. She used the funds from that sale to buy the shares in A Co.

Frankie said she originally acquired the shares in Y Co for the dominant purpose of receiving dividends, without planning to sell those shares. Her actions in selling shares in Y Co to buy shares in A Co with a higher dividend yield support that purpose. The amount she receives from the sale of Y Co shares is not taxable.

If Frankie later sells the shares in A Co, the amount she receives from this sale will also not be taxable as she bought those shares for the dominant purpose of deriving dividend income.

Example | Tauira 11 – Sales to rebalance portfolio

Marama's financial advisor manages her investment portfolio according to an investment plan. Marama's plan aims to build a long-term investment portfolio, allowing her to draw down funds if required. She has a moderate risk appetite, with a smaller portion of her investment being in US and Australian stocks and the balance spread across fixed interest, property, cash and New Zealand dividend shares.

As part of this portfolio, Marama held shares in Aus Co. Aus Co significantly out-performed expectations, and Marama's portfolio became more heavily weighted toward US and Australian stocks, increasing the risk beyond what the investment plan specified. To bring the portfolio back within target ranges, Marama's advisor sold 25% of the shares in Aus Co. The proceeds were reinvested into lower risk investment assets, aligning with her long-term investment plan.

The sales of shares in Aus Co are not taxable because they were acquired as part of a long-term investment portfolio. The sales were made to adhere to the investment plan, and to maintain required levels of risk and asset allocations. This remains the case even if sales of investment assets occur regularly as part of the overall management and review of Marama's portfolio.

However, if some shares within Marama's portfolio were acquired for the dominant purpose of disposal, such as for a quick gain for reinvestment into other assets, sales of those shares would be taxable.

Record keeping

75. It can be difficult for investors to prove what their purpose was at the time they acquired assets such as shares. As noted earlier, a combination of factors is considered (including the type of asset, the investor's other activities, and how long shares are held), that can support or not support what the investor says their purpose is.
76. Where an investor says that disposal was not their dominant purpose for buying shares (for example, their dominant purpose was to receive dividends or to hold the shares for a long-term investment), they need to be able to support this. It is advisable for investors to keep records to support their stated purpose for buying particular shares, such as:
    - information obtained from companies, platforms or brokers when deciding what shares to buy;
    - a record of their purpose at the time of acquisition (eg, contemporaneous file notes or emails);
    - where applicable, an investment plan and any notes from financial advisors if they have one;
    - where relevant, information on expected dividend yields; and
    - lending records if funds were borrowed to invest.

77. Recording reasons for sales can also help explain whether sales are consistent with the investor's stated purpose, for example:
    - where sales are made as part of rebalancing a portfolio, an explanation of what the rebalancing is achieving and how this relates to their investment plan; or
    - where there is a change of circumstances (such as the investor's personal or financial circumstances, they no longer support the company's policies, or the investment is not performing to their expectation).
78. As noted above, any record of purpose is not determinative; this still needs to be objectively tested against the factors set out by the courts.

To obtain certainty about the tax treatment of particular sales where there is a large amount of tax at stake, investors may want to consider applying for a short-process ruling. For information on this process and to find out whether the process applies to a particular situation, see **Short-process rulings**.

Summary

79. In summary, the Commissioner considers that the following principles apply when determining whether sales of shares will be taxable:
    - The person needs to have the dominant purpose of disposal at the time shares are acquired.
    - A person's stated purpose for acquiring shares is relevant, but it will be weighed against objective factors to determine the dominant purpose of acquiring the shares.
    - The objective factors considered are the nature of the asset, the length of time the shares are held, reasons why the shares were sold and other activities undertaken by the person (such as whether there is a pattern of buying and selling activity).
    - Where these factors indicate that a person acquired shares with the dominant purpose of disposing of them, then those sales will be taxable. This includes a person looking for a short-term gain and also a person who bought shares with the dominant purpose of sale where the sale is planned in the longer term.
    - Where shares are acquired for no particular purpose or a dominant purpose other than sale (for example, receiving dividends, a long-term investment or receiving voting interests) the sale of those shares is not taxable.
    - Where a person has acquired shares as a long-term investment, they will not have a dominant purpose of disposal if they have only a vague or general hope that the shares will increase in value and there is a possibility they may be sold in the future.
    - Where a person acquired shares for more than one purpose (for example, dividends and gains on sale), the objective factors can be applied to determine which purpose is dominant (see [54] to [57]).
80. For more information, including a detailed discussion of the relevant case law, see the Appendix from [132].

Business of share dealing

81. An investor who buys and sells shares is in a business of share dealing for the purposes of s CB 1 where there is a combination (or all) of the following factors:
    - a high scale of regular activity (buying and selling);
    - an intention to profit from share sales;
    - regular or continuous monitoring of the share portfolio;
    - a system according to which shares are bought and sold;
    - frequent sales which are part of the person's normal operations in the course of making profits;
    - large amounts are invested; and
    - a significant amount of time is spent in the dealing activity.
82. The courts have noted that there is a high bar to be in a business of share dealing – there needs to be a sufficient amount of activity, time and money invested and the requisite intention to profit. The courts have also considered that a person in full time employment is unlikely to have a business of share dealing.

83. To summarise, the following factors have been relevant to a finding by the courts that there was a business of share dealing:
    - share sales were an integral part of the business, and part of the normal operations of the business;
    - there was regular or continuous monitoring of the share portfolio, and a system according to which shares were sold;
    - sales were frequent, and both sales and purchases are made on a large scale; and
    - a large amount of money was invested.
84. More information on whether an investor has a share dealing business is from [170].
85. An investor with a large-scale dealing activity may alternatively have a share dealing business for the purposes of s CB 5. Under this provision, the main difference is that the person does not need to have a profit-making intention. They still need a large scale of buying and selling activity and a significant amount of time and money invested.
86. Where sales are made to rebalance an individual investor's long-term investment portfolio in accordance with an investment plan, this is unlikely to comprise the carrying on of a business of share dealing. The courts have said this is a matter of fact and degree, looked at in the context of the particular taxpayer. It is a combination of factors that are relevant for determining when a share dealing business exists, including that the scale of the buying and selling activity generally needs to be large but also taking into account the reasons for sales and the relativities between the size of the investment and turnover.

Profit-making undertaking or scheme

87. Share dealing activity that is part of an organised plan to derive profit from a scheme of dealing in shares may be a profit-making undertaking or scheme for the purposes of s CB 3. There must be a sufficiently formulated plan in existence. Although potentially applicable to investments in widely held shares acquired through platforms or brokers, this would be unusual. However, if applicable, any profits are only taxable from the time of entering the scheme.
88. Relevantly, and as previously discussed, even if there is not a business or a profit-making scheme in existence, investors will be taxable on their share sales when they are undertaking dealing activities, where the shares were acquired for the purpose of disposal.
89. Example | Tauira 12 illustrates a situation where an investor is not in a share dealing business but has the relevant purpose of disposal.

Example | Tauira 12 – Insufficient scale to be a business but dominant purpose of disposal

Hone started using an online investment platform in November 2020. Over the next few months he enjoyed making trades and started investing more time and money into buying shares.

Hone was employed for 30 hours a week and spent his free time making trades. Hone had invested around $20,000 in the share market and used the profits from sales to supplement his living costs and re-invest in more shares.

Hone typically didn't hold shares for more than a few months, unless he thought that they would peak in value at a later time. He didn't plan to hold any shares long-term and didn't consider dividends when purchasing shares.

Hone has an intention to profit from share sales, but his level of activity, and amount of time and money spent on the share market does not indicate that he is in a business of share dealing. His level of activity does not indicate that he has an organised plan that amounts to a profit-making undertaking or scheme.

While he may not be in a business of share dealing, the amounts Hone receives from his share sales are still taxable because the facts indicate that he acquired shares for the dominant purpose of disposal.

Expenses

90. There are various expenses that may be incurred when a person invests in shares:
    - the cost of acquiring the shares (ie, the purchase price and transaction fees);
    - fees charged by platforms, brokers or financial advisors; and
    - interest on funds borrowed to buy shares.
91. Deductibility of these expenses depends on whether there is a relevant nexus with income and also whether the expenses are capital in nature.

92. If an investor with a large portfolio cannot trace the cost of specific shares sold, they can apply either the first in first out or weighted average cost methods for determining cost (s ED 1(5)). They cannot use other methods for determining the cost of shares.
93. Where an investor has taxable share sales, the investor can claim a deduction for the cost of acquiring the shares (including transaction fees for the acquisition), as the cost of revenue account property. This deduction is available in the income year in which the shares are sold.
94. If share sales are not taxable (for example, the shares are acquired for dividends or a long-term investment) then the cost of acquiring the shares is not deductible (even if the shares pay dividends) as the shares are held on capital account.
95. Investors may be able to claim some fees such as for financial planning services. There are a range of circumstances in which financial planning fees are or are not deductible (although the shares need to be income earning either by way of being purchased for sale, or for obtaining dividends). For more information, see **IS0044 Financial planning fees – income tax deductibility.**[11]
96. There are different rules for interest. Interest incurred on funds borrowed to buy shares is deductible to an investor provided that there is a nexus with income (that is, the capital limitation does not apply). Interest is deductible on borrowed funds where the funds are used to purchase:
    - shares acquired for the purpose of sale, a share dealing business, or a profit-making undertaking or scheme; or
    - shares that earn income through dividends. Dividends do not have to be earned every year that interest is payable, but there must be a reasonable expectation that the shares will pay dividends.
97. The investor will need to keep records to show that the borrowed funds were used to purchase the shares. This could include a contemporaneous bank statement showing the funds leaving the loan account and a buy order for shares of the same amount. The investor will also need to be able to show that the shares are held on revenue account or there is an expectation of dividends.
98. Investors who use the same facility for buying shares and for other investments or expenses need to be able to prove the amount of interest that relates to the shares. This can be difficult where a facility is used for multiple uses and where there are repayments and new drawdowns. The onus is on investors to prove their interest is deductible. To ensure investors can prove that interest is deductible, if possible, it would be advisable to keep borrowings for shares and for other investments or expenses separate.

Losses

99. Where share sales are taxable but the shares are sold for less than what they cost, the investor can claim that loss. However, the amount of loss relates to the difference between the sale price and the cost of the shares. It does not apply to any unrealised losses (for example, if the shares had gone down in value but the investor still owns the shares).
100. In some cases, where an investor has claimed a loss relating to share sales, the Commissioner may seek information to show that shares were held on revenue account. Depending on the circumstances, this could include ensuring investors had consistently treated any profitable sales as being taxable.
101. Example | Tauira 13 explains when losses are available.

11 Although note that the table in the summary of IS0044 is overly simplified and does not take into account the deferral of deductions for the cost of shares until disposal.

Example | Tauira 13 – Realised and unrealised losses

In November 2021, Jimi bought $1,000 of shares in B Co using an online investment platform. He bought the B Co shares hoping to make a quick profit and kept records of this purpose.

However, by the time Jimi bought the shares the market had turned. In January 2022 the shares were worth $800.

Scenario one

Jimi sold the shares to limit the loss. Because Jimi had bought the shares in B Co for the purpose of sale, the amount received of $800 is income. However, this is offset by the deduction he receives for the cost of the shares and transaction fees totalling $1,020. Therefore, Jimi made a $220 loss. He can claim this loss against his other income.

Scenario two

Jimi holds onto his shares in B Co. By 31 March 2022, the share value had decreased further to $700. Jimi was calculating his taxable income for the year ended 31 March 2022. However, in doing so, Jimi cannot claim the unrealised loss for the cost of the shares in B Co because he still has them. He can claim a loss only if he sold (or otherwise disposed of) his shares.

Transitional residents

102. Special rules apply to transitional residents. These are people who have moved to New Zealand for the first time or who have returned after being resident elsewhere for 10 years or more and were not previously a transitional resident. There are some exceptions, for example a person who applies for Working for Families tax credits ceases eligibility for being a transitional resident.[12]

103. The period that a person is a transitional resident is essentially four years from when they become resident in New Zealand. During that time, transitional residents are generally liable for tax in New Zealand only on their income that is sourced here. Income that would be sourced in New Zealand in relation to share investments using online investment platforms could include:
    - dividend income from shares in New Zealand companies;
    - income from taxable sales of shares in New Zealand companies; and
    - income from a business of share dealing carried on in New Zealand.

104. This means transitional residents have no tax liability in New Zealand for any dividend income received from a foreign company, or sales of shares in foreign companies (unless the person is carrying on a business in New Zealand). This is illustrated in Example | Tauira 14.

Example | Tauira 14 – Transitional resident

Mikah moved to New Zealand three years ago and is a transitional resident for tax purposes. Mikah had a United States share portfolio worth NZ$60,000. He also used an online investment platform to buy shares in NZCo and earned regular dividends.

During his transitional residency period, Mikah is subject to tax in New Zealand on the dividends received from NZCo, as dividends from a New Zealand resident company are sourced here. Mikah is not subject to tax in New Zealand on any dividends received from foreign shares. He also does not have FIF income (as the FIF rules do not apply to transitional residents until their transitional residency period ends).

Before he reaches the end of his transitional residency period, Mikah should discuss the implications of his share portfolio with a tax advisor. In particular, he will need to consider the application of the FIF rules to his portfolio, as discussed next.

12 A person can also choose to opt out of the transitional resident rules.

Part two – Application of the foreign investment fund rules to share investments

105. This part applies to New Zealand resident individual investors that are subject to the FIF rules. This part does not apply to transitional tax residents (who do not have FIF income during their transitional tax residency period).

106. The discussion in part one about the ordinary tax rules does not apply to an investor if their share investments are subject to the FIF rules. This means that, when the FIF rules apply, an investor does not have a tax liability for dividends or taxable share sales. Instead, they apply the calculations set out in the FIF rules.

107. The FIF rules are a special set of rules that apply to particular investment interests, including foreign shares.[13] It is important for investors to be aware that this regime exists. It is also important to note that the FIF rules apply across all relevant investments that are subject to the FIF rules and not just to foreign shares, so investors will need to consider all their interests that are subject to these rules (and across all platforms or brokers that they use).

108. If an investor holds foreign shares that are subject to the FIF rules as well as foreign shares that are exempt from the FIF rules, the exempt foreign shares are still subject to the ordinary rules in part one of this statement.

109. The FIF rules can be complex and applying them is fact specific. This statement provides a summary of when the FIF rules apply where the investment is in foreign shares. If an investor thinks they may fall within these rules, more information on applying the FIF rules can be found in the resources at [25].

When the FIF rules apply to investors who hold foreign shares

110. The FIF rules apply where a person holds an attributing interest in a FIF that is not exempt. An attributing interest in a FIF is an investment that includes:
    - direct income interests in a foreign company;
    - an interest in a foreign superannuation scheme (other than Australian regulated superannuation schemes as explained in s EX 33); and
    - rights to benefit under a life insurance policy issued by a FIF.

111. A person has a direct income interest in a foreign company if they hold:
    - shares in a foreign company;
    - shareholder decision-making rights for a foreign company;
    - a right to receive or apply a foreign company's income for the relevant period; or
    - a right to receive or apply any of the value of a foreign company's net assets if they are distributed.

112. However, the FIF rules do not apply to interests that are exempt. Exempt interests relevantly include shares in New Zealand companies and in certain Australian ASX listed companies and Australian unit trusts.[14] To find out if an Australian company is exempt from the FIF rules, see Inland Revenue's FIF exemption tool at [25]. There are also other exemptions listed in ss EX 31 to EX 43.

113. Exempt interests are **not** included as attributing interests in a FIF. The ordinary tax rules discussed in part one of this statement would apply to shares that are exempt from the FIF rules. To find out more about exempt interests see the table at page 6 of Inland Revenue's Guide to FIFs.

114. Therefore, when an investor buys shares in foreign companies (other than exempt interests), they will hold a direct income interest in a foreign company. This means that they hold an attributing interest in a FIF.

115. An individual has FIF income in a year if the total cost of all their attributing interests in FIFs (that are not exempt) that they hold at any time during the year when added together, is more than $50,000. An investor who holds attributing interests (other than exempt interests) that cost them $50,000 or less to buy may still choose to opt in to the FIF rules.

13 See ss CQ 4 to CQ 6 and ss EX 28 to EX 73.

14 A share in an Australian company is exempt if it is not stapled to another share, the company is Australian resident and is not also resident in another country, is included on the official list of ASX Limited, and maintains a franking account. An Australian unit trust is exempt if it is an Australian resident and not also resident in another country, has a RWT proxy and the trust meets a certain amount of share turnover and distributions. Where these requirements are not met, the relevant company or unit trust will be a FIF. See ss EX 31 and EX 32 for more information.

116. The test for this threshold to apply is generally the New Zealand dollar amount of what the shares cost the investor to buy, not their market value on any day.

> For example, an investor buys US$100 on 1 April, uses those funds to buy US$100 of shares on 1 May, and on 31 March the value of the shares is US$200. The investor needs to work out what the New Zealand dollar cost of those shares was on 1 May (using an applicable foreign exchange conversion rate at that time), **not** the New Zealand dollar cost when they bought US$100, and **not** the value of the shares on 31 March.

117. If an investor jointly owns attributing interests with a partner or spouse, their share of the cost of those interests is included in the calculation. The cost of the investor's share of the joint holdings is added to the cost of any attributing interests they may separately hold.

118. An investor who is in the FIF rules will need to include FIF income in their IR 3 individual income tax return and file an IR 1261 overseas income summary to declare their overseas income sources and claim any available foreign tax credits. For information on claiming foreign tax credits, see IS 21/09.

119. In some situations, investors need to file a FIF disclosure. However, generally, individuals who hold less than 10% of the interests in a foreign company that is incorporated in a country that has a double tax agreement with New Zealand (for example, the United States) and who use the FDR or CV methods (discussed below) are exempt from needing to file a FIF disclosure.[15] This would apply to the majority of investors who use online investment platforms.

How tax is calculated when the FIF rules apply

120. The FIF rules apply to attribute income to an investor – so even if an investor has not received any returns or gains, they may be treated as if they had. Also, foreign currency changes may potentially result in the investor being treated as if they had a gain. Similarly, any actual returns or gains the investor received may be ignored, depending on the FIF method applied.

121. FIF income for an investment is calculated using one of five methods chosen by the investor (subject to some limitations). These methods are the:

- fair dividend rate (FDR) method;
- comparative value (CV) method;
- cost method;
- attributable FIF income method; or
- the deemed rate of return method.

122. A method is chosen by the investor returning in their tax return a relevant amount of income using one of the methods. Each year the investor may choose a different applicable FIF method, but they must consistently use the same FIF method across all their attributing interests for that year.

123. There are restrictions on the method that can be chosen in certain situations. For an explanation of the methods that may be used and how to calculate an investor's FIF income, see the table at page 11 of Inland Revenue's Guide to FIFs and the explanation from page 14 (as referred to at [25]).

124. In brief summary, the method most commonly used is the FDR method. A person who uses the FDR method is generally taxed on 5% of the opening market value of their shares (or other attributing interests). The opening market value is the value on 1 April of each year. Dividends and gains from the sales of shares are usually not taxed under this method. However, when there is a "quick sale" (that is, shares are bought and sold within a year) then a quick sale adjustment is required. This is explained in more detail in Inland Revenue's Guide to FIFs at page 15.

125. Another option for an individual investing in ordinary shares is the CV method. Under this method, the investor calculates the closing market value of the shares plus any gains (including dividends and gains from sales) and subtracts the opening market value plus costs.

126. Individuals can do the calculations under either of these methods and choose which one they would prefer to use, in each income year. A calculation tool is provided on Inland Revenue's website to do this.

15 See the relevant International Tax Disclosure Exemptions issued for each income year.

127. The application of the FIF rules to an investor using an online investment platform is illustrated in Example | Tauira 15.

Example | Tauira 15 – FIF attributing interests' cost value exceeds $50,000 in a year

Jax came into a windfall when their uncle left them $55,000 in a will. On 31 March 2022, Jax decided to invest this amount in ordinary shares in a variety of United States companies using an online investment platform.

2022 income year

Jax will be subject to the FIF rules because at a point in time in the 2022 income year Jax held attributing interests that added together cost over $50,000 to buy. However, under the FDR method no income will arise as the opening value on 1 April 2021 was zero and there were no quick sales.

2023 income year

For the 2023 income year, Jax had not sold any shares, and uses Inland Revenue's calculation tool to work out their FIF income. Jax works out that under the FDR method they have deemed income of $2,750 (opening market value of $55,000 multiplied by 5% with no quick sale adjustments).

As a natural person, Jax can compare the result under the FDR method with the CV method and choose which method to use.

As at 31 March 2023, the value of Jax's shares had increased to NZ$59,125. Jax had received no dividends and made no sales. Under the CV method, Jax's FIF income would be $4,125 ($59,125 - $55,000). Jax chooses to use the FDR method (and must use the same method across all FIF investments).

Jax will need to complete the IR 1261 overseas income summary but does not need to file a FIF disclosure.

2024 income year

In January 2024, the shares had increased in value further to $64,300 and Jax decided to sell half the interests and invest those funds into exempt Australian shares. Jax is still subject to the FIF rules in the 2024 income year because at a point in time, they held attributing interests that cost more than $50,000.

Jax will need to undertake the same calculations as for the previous year and complete the IR 1261 overseas income summary.

2025 income year

If Jax did not acquire any further attributing interests, the FIF rules do not apply.

Expenses related to attributing interests in FIFs

128. As noted at [90] there are various expenses that may be incurred when a person invests in shares, such as the cost of acquiring the shares, fees and interest on funds borrowed to buy shares. Deductibility of these expenses depends on whether there is a relevant nexus with income and also whether the expenses are capital in nature.

129. Where an investor is subject to the FIF rules, they derive FIF income. This means that expenses related to their attributing interests will have the relevant nexus with income. However, deductions for the cost of shares, including brokerage or platform fees incurred to acquire the shares, cannot be claimed when the FIF rules apply (except where the amount is taken into account in the relevant FIF calculation method).[16]

130. As with shares subject to the ordinary rules, investors can claim fees such as for financial planning services, as explained in **IS0044**. They will also be able to deduct interest on borrowed funds used to acquire FIF interests.

131. The investor will need to keep records to show that the borrowed funds were used to purchase the shares. This could include a contemporaneous bank statement showing the funds leaving the loan account and a buy order for shares of the same amount. Investors who use the same facility for buying shares and for other investments or expenses need to be able to prove the amount of interest that relates to the shares. This can be difficult where a facility is used for multiple uses and where there are repayments and new drawdowns. The onus is on investors to prove their interest is deductible. To ensure investors can prove that interest is deductible, if possible, it would be advisable to keep borrowings for shares and for other investments or expenses separate.

16 Section EX 59(3).

Appendix – Further analysis and case law

132. This appendix provides further analysis and case law that explains why the Commissioner has reached the views expressed in part one. The following analysis provides a detailed explanation of the case law on when an investor has:
    - acquired shares for the purpose of disposal; and
    - a share dealing business or profit-making scheme.

Shares acquired for the purpose of disposal

133. As noted in part one, the leading case on when shares are acquired for the purpose of disposal is *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA). In that case, Richardson J said at 6,350:

> ... It is well settled that the test of purpose is subjective requiring consideration of the state of mind of the purchaser as at the time of acquisition of the property. ... Where there is more than one purpose present taxability turns on whether the dominant purpose was one of sale or other disposition... The analysis may become more complicated where different purposes may be more significant depending on whether the focus is on the short term, the medium term or the ultimate object. Adoption of a dominant purpose test in relation to the particular property purchased allows a sensible focus as a practical matter on what was truly important to the taxpayer at the time of acquisition.

134. What is relevant is what was truly important to the taxpayer at the time of acquisition.

135. Richardson J referred to investment assets (such as shares) and said that generally speaking, a person buying such an asset does so either with a view to investment for the income it will return or with a view to realising a profit on disposal. He noted that although these purposes are not mutually exclusive "it will generally be possible to say that the one or the other is predominant at the time when the purchase is made". His Honour went on to say at 6,352:

> If the investment policy is to provide and enlarge the dividend income and to buy (and sell) with that as the dominant consideration, there can be no basis for invoking [s CB 4]. It is proper then to distinguish between sales made in the course of the review of an investment portfolio held primarily for its potential income yield on the one hand, and sales of shares acquired primarily with the object of eventually realising gains on resale on the other. Many ordinary investors acquire shares for the purpose of securing not only income from dividends, but also growth in the value of the shares. In those cases where there is not a clear dominant purpose of resale at the time of purchase, any profits on the ultimate sale of the shares are not within [s CB 4].

136. However, where property is acquired with no particular purpose, but the taxpayer has a vague or general hope that the property will increase in value, that does not amount to a purpose of disposal. Richardson J stated at 6,352:

> Up to this point I have been discussing the identification of the purpose or purposes of the purchase. However assets may be acquired by a taxpayer who has no clear purpose in mind. There may be no more than an intention to buy with the expectation of benefiting the taxpayer's financial position in some unformulated way, and without any clear consideration of the advantages of either retention or resale sooner or later. If that state of affairs is established the statutory onus on the taxpayer to prove that the shares were not purchased for the dominant purpose of sale will have been satisfied. To put it another way, to discharge the onus it is not necessary to establish some other specific purpose.

137. Similarly, Casey J stated at 6,355:

> The taxpayer will also succeed if property is acquired without any definite purpose in view at all, or merely in a vague general hope that it would be a good investment — see *Williams Property Developments* at NZTC pp 61,541-61,542; NZLR pp 283-284.

138. Similar comments were also made in *G Williams v FCT* 74 ATC 4237 and *Case V3* (2001) 20 NZTC 10,021.

139. Dobson J in *CIR v Boanas* (2008) 23 NZTC 22,046 (HC) draws a distinction between a formulated purpose to do something at a future time, and a mere prospect, option or aspiration regarding something that may happen in the future (which is not enough to amount to a purpose of disposal). This decision concerned the land provisions rather than s CB 4 (which has a different test for when a person has a purpose of disposal) but highlights that for a person to have a "purpose", it must be sufficiently formulated.

140. The above comments indicate that a person may acquire property without any particular purpose in mind. In such a case, the person will still need to be able to show that disposal was not their dominant purpose (and, for instance, the objective factors referred to in part one may support their statement or indicate otherwise).

141. The above comments also show that a person may have a dominant purpose of disposal if it is sufficiently formulated, even if that purpose will not be actioned until a future time.

142. In *National Distributors*, the taxpayer made eight purchases and sales of shares over a two-year period. The shares were held between eight months and three years, with an average of 19 months before sale. The dividend yields were inconsistent and ranged from less than 3% to over 11% per year depending on the shares. Overall, the dividend yield was 6.5% per year compared with 25% per year from gains on sale.

143. Richardson J found the shares fell into two categories. Some were purchased for family or other reasons and not the usual commercial reasons of obtaining a return from dividends or proceeds of sale. However, Richardson J found the taxpayer did not establish that the shares in the second category "were not acquired for the dominant purpose of sooner or later reselling them". Richardson J's reasons on the facts of that case were:

- Despite the taxpayer contending that its dominant purpose was dividend yield, no consideration was given to the dividend potential at the time of purchase and there was no policy for a particular level of dividend return.
- The shareholdings could not fairly be described as being held long term (between 8 months and 3 years).
- The taxpayer's practice was to sell shares when it appeared they had reached their peak prices (which was indicative of a focus on achieving the maximum market price rather than on enlarging the dividend potential).
- While there may have been a purpose of obtaining a dividend return, the dominant purpose was to realise a profit on disposal sooner or later when the shares reached their full market potential.

144. The objective factors discussed in part one at [50] can be applied in the context of the above facts the court referred to when concluding the dominant purpose of acquiring the shares was disposal:

- the nature of the asset – there was no consideration of dividend yield when acquiring shares;
- the length of time the shares were held – could not be described as long term (being 8 months to 3 years);
- the circumstances of sale - the taxpayer sold shares when they appeared to reach peak prices; and
- the number of transactions - there was a pattern of activity of selling shares when they were judged to have met their full market potential.

Purpose means the object the person has in mind

145. Several cases have considered the difference between a person's purpose (which is relevant for s CB 4) or their motive or intention (which is not relevant).

146. In *Plimmer v CIR* [1958] NZLR 147 (SC) Barrowclough CJ said a person's purpose is usually the object that they have in mind. In *Plimmer,* the taxpayer sought to acquire control of a company, by purchasing all of the company's issued ordinary shares. A condition of the purchase was that they had to buy all the company's preference shares. The unwanted preference shares were purchased, and the taxpayer then on-sold the preference shares, making a profit. This sale was found not to be taxable because the purpose or object of acquiring the preference shares was to acquire the ordinary shares (and control of the company).

147. In *CIR v Walker* [1963] NZLR 339 (CA) the taxpayer purchased land adjacent to his farm. At the time of purchase the taxpayer did not want three acres of the land that had a long road frontage and wanted to subdivide those three acres off while adding the rest of the land to his farm. Although the taxpayer wanted to sell three acres of the acquired land, the Court accepted that the dominant purpose had been to purchase the 60 acres to increase the size of farmland.[17]

148. *In CIR v Hunter* [1970] NZLR 116 and *Holden v CIR; Menneer v CIR* [1974] 1 NZTC 61,146 (PC), the taxpayers received United Kingdom currency and wanted to convert it into New Zealand dollars. The taxpayers purchased shares and sold the shares for New Zealand dollars. This way, the taxpayers received more New Zealand dollars than they would have received through transfers in the banking system. The courts held the taxpayers' dominant purpose in acquiring the shares was to immediately sell them (even though there was a reason for doing this – to receive more New Zealand dollars than through the banking system).

17 This case concerned a legislative provision that had previously included land and personal property in the same provision. These are now separate provisions with different tests, and so cases on land are now of less relevance to s CB 4.

149. In relation to this issue, Richardson J in *National Distributors* said at 6,351:

> **In short, if resale is proposed it matters not that it is only the means to an end**. ... To describe a purchase as a hedge against inflation or as providing an accretion in capital value, or as a good investment, is not a substitute for embarking on the enquiry required under ... [s CB 4]. Such expressions do not provide a cloak of tax immunity. In its ordinary meaning to make an investment is to outlay money in the purchase of anything from which profit is expected, whatever form it takes; and to provide a hedge against inflation or an accretion in capital value are the underlying motives for engaging in transactions. **It is still necessary to determine whether the dominant purpose of the taxpayer in acquiring the property was to sell it at a future date.** As *Holden* and *Hunter* demonstrate, the reason why the taxpayer decided to buy with a view to selling in due course is not relevant to the statutory enquiry. If the taxpayer's dominant purpose in acquiring the property is to sell it in the future at a price which, allowing for inflation, corresponds with or is better than its price at the time of purchase, his statutory purpose is to sell the property even though his motive is to protect his savings from inflation. [Emphasis added]

150. Specifically, Richardson J commented that it did not matter whether resale is only the means to some wider aim. Richardson J commented that reasons for purchasing shares such as hedging against inflation, or being a good investment, are not relevant to the enquiry into a person's purpose. These are broad expressions and do not reflect the underlying purpose of the person in acquiring those assets. What is relevant is whether the property had to be sold to give effect to the relevant aim. The reasons why that may occur are not relevant.

151. Where a person passively acquires something (for example, by inheritance or gift), they will not have a purpose for that acquisition. In *McClelland v FCT* (1970) 120 CLR 487 the Privy Council held that a taxpayer who had acquired property under a will had not acquired the property for the purpose of profit making by sale. Rather, the taxpayer had merely acquired the land through the bounty of the testator. *McClelland* was followed in *FCT v NF Williams* (1972) 3 ATR 283 (HCA) where the High Court of Australia held that the equivalent to s CB 4 could not apply where property was obtained as an unsolicited gift. However, where the initial holder had acquired the property for the purpose of disposal and subsequently gifts it, subparts FB and FC may apply.

Examples of reasons investors may have for buying shares

152. A person may acquire shares for a variety of reasons, such as:

- dividend income;
- a long-term investment;
- a hedge against inflation;
- a store of value outside the banking system;
- portfolio diversification;
- to obtain voting interests or other rights arising from being a shareholder; or
- other reasons (eg, family reasons or for no particular purpose).

Long-term investment, hedge against inflation and portfolio diversification

153. As is noted above in *National Distributors*, many of the motives that an investor may have for buying shares do not explain whether their dominant purpose is to dispose of them. Richardson J noted there may be cases where a person's purpose is the retention of an asset for reasons such as building up a large estate or securing the real value of the person's money for the long term. What is relevant is whether their motive is given effect by disposing of the shares. Richardson J indicated that descriptions such as acquiring property as a long-term investment or hedge against inflation will not negate a dominant purpose of disposal if disposing of the property is required to give effect to that motive. As noted above he said:

> **To describe a purchase as a hedge against inflation or as providing an accretion in capital value, or as a good investment, is not a substitute for embarking on the enquiry required** under ... [s CB 4]. **Such expressions do not provide a cloak of tax immunity.** In its ordinary meaning to make an investment is to outlay money in the purchase of anything from which profit is expected, whatever form it takes; and to provide a hedge against inflation or an accretion in capital value are the underlying motives for engaging in transactions. [Emphasis added]

154. Therefore, where an investor says they bought shares because it was a good investment, a hedge against inflation or for portfolio diversification, it is still necessary to determine whether their dominant purpose was to sell at a future date (and the reasons for such a sale are not relevant).

155. As *Holden* and *Hunter* demonstrate, the reason the taxpayer decided to buy with a view to selling in due course is not relevant. If a person's dominant purpose in acquiring shares is to sell them in the future at a price that, allowing for inflation, corresponds with or is better than the price at the time of purchase, the purpose is still to sell the shares even though the motive might be to protect savings from inflation.

156. Several Australian cases have looked at whether property purchased as a hedge against inflation was purchased for a purpose of profit-making by sale. It is important to note that many of these cases turn on whether the taxpayer had a profit-making purpose, which is relevant to the Australian test that applied at the time. A profit-making purpose is not needed for s CB 4 to apply.

157. In *FCT v Firstenberg* 76 ATC 4141 (SC of Vic) the court considered that investing in an appreciating asset does not of itself mean it was acquired for the purpose of profit-making by sale. For instance, the taxpayer could acquire an appreciating asset to secure the value of their money so as to have that asset fall part of their estate.

158. *Firstenberg* highlights that merely describing property as being acquired as a hedge against inflation does not determine what the person's purpose was. The purpose may be to retain an asset for a long-term investment or to pass on to heirs, or it may be to sell the asset.

159. In another Australian case, *Case P27* 82 ATC 117 the Board of Review held that while the taxpayer's motive in acquiring bullion was a hedge against inflation, his dominant purpose was to sell it at a profit when he reached age 55. Member Harrowell stated at 122:

> ... It seems to me that where the property was acquired "for the purpose of profit-making by sale" that fact cannot be obscured by a throw-away phrase such as "a hedge against inflation". In fact I believe that that phrase is actually detrimental to this taxpayer's case as it clearly indicates an intention or purpose to make a profit. Such a phrase may not be detrimental where a taxpayer can show that when he purchased the property he had no intention of later reselling it at a profit. Naturally to become involved with sec. 26(a) he must later sell that property or part of it so that the facts surrounding the sale will become most relevant to his case. This situation can also arise where a taxpayer claims that the sale is part of a transposition of investments. The word "transposition" is no tax cure-all and if called upon, the taxpayer must show in terms of sec. 190(b) that the investments were not acquired for the purpose of profit-making by sale or from the carrying out of any profit-making undertaking or scheme. *London Australia Investment Co. Ltd. v. F.C. of T.* 77 ATC 4398.

160. Therefore, there may be circumstances where assets acquired as a hedge against inflation are not purchased with the dominant purpose of disposal. However merely describing property as being acquired as a hedge against inflation is not sufficient to negate a dominant purpose of disposal.

161. Similar arguments to the above may also be made that shares are acquired as a store of value outside the monetary system or for portfolio diversification. Again, as with the above discussion, there may be situations where this stated reason involves no dominant purpose of disposal. But there may also be situations where there is still a dominant purpose of disposal that means s CB 4 applies.

Other reasons for buying shares

162. People may buy shares for other reasons. For example, there may be private or family reasons for a purchase, shares may be acquired for voting rights, or a person may not have any particular reason in mind.

163. *Rangatira Ltd v CIR* (1994) 16 NZTC 11,197 (HC) involved an investment company that administered the assets of charitable trusts. The taxpayer's investment policy involved considering capital maintenance and regular dividends and, from time to time, investments changed in accordance with that policy. During the relevant years substantial gains were made on the sale of shares. The higher court decisions concerned whether sales were income from a business, but the High Court decision touched on whether the equivalent to s CB 4 applied.

164. The High Court noted there was no purpose of disposal where shares were acquired:

- because of an association with another company (the taxpayer had been a long-term shareholder of such a company and acquired further shares during a rights issue);
- because a member of the taxpayer had joined the board of the company;
- for long-term holding consistent with the taxpayer's investment pattern (eg, shares in particular industries were acquired in line with the investment policy); or
- with evidence the taxpayer had obtained advice about long-term investments.

165. In *CIR v National Insurance Company of New Zealand Ltd* (1999) 19 NZTC 15,135 the Court of Appeal noted the fact that at the time of purchase a taxpayer did not expect to hold the property forever and contemplated the possibility of sale is not enough to fall within s CB 4. The Commissioner had submitted that because the known dividend yield was small, resale to reap the true benefits of the purchase must have been intended. Although this was a factor to be given weight, the court considered this was not enough of itself. The shares in question were a large shareholding in a company with only one other shareholder, so gave the taxpayer representation on the board. Nothing indicated that sale was a predominant consideration in acquiring those shares.

166. Shares may be acquired for the dominant purpose of receiving voting rights. Where shares are bought using platforms, the scale of investment may generally be too low or relevant voting rights may not pass through to the investors. However, an investor may be able to show otherwise.

167. A person may also have no dominant purpose in mind for buying shares. This was seen in *Case P24* (1992) 14 NZTC 4,174 (TRA) where the taxpayer owned a portfolio of shares and made profits from the sale of some of the shares. The taxpayer stated the shares were a form of investment for her retirement, to make provision for her grandchildren, and to hedge against inflation which had been eroding the value of her savings. When she sold shares, this was generally to meet expenditure as it arose. Judge Willy noted that she had disparate and competing purposes. They included, on the evidence, that she was investing for the future; that she wished to conserve the value of her money; that she was saving for her retirement in the expectation of receiving a small income; and that she wanted security for her future, for example, for emergencies around the house or the possibility of an overseas trip. Judge Willy was satisfied on the totality of the evidence that she had no single dominant purpose and in particular no dominant purpose of sale.

168. It is relevant that the treatment of investment assets such as shares differs to other assets that a person can use and enjoy, such as land, fine art or collectors' pieces. Land is subject to different provisions, which do not require disposal to be the dominant purpose. However, the test for land sales being taxable under s CB 6 can be difficult to apply as land can have many uses and purposes to which it may be put by an owner. For example, land can be lived on, farmed, rented, leased, or used for a business or other activity. In comparison, as Richardson J noted in *National Distributors*, investment assets (such as shares) generally have two purposes - gain on sale or income from dividends (although other purposes may also exist).

169. For completeness, a purpose of disposal requires a purpose by way of sale or similar and does not include a purpose of gifting (for example by way of inheritance).[18]

Business of dealing in shares

170. Section CB 1 provides that an amount that a person derives from a business is their income. Section YA 1 defines a business as including any profession, trade, or undertaking carried on for profit.

171. The leading New Zealand case on whether a business is being carried on is *Grieve v CIR* (1984) 6 NZTC 61,682 (CA). In *Grieve*, Richardson J concluded that both the nature of the activities and the intention of the person in engaging in these activities are important in determining whether they are carrying on a business. Richardson J set out matters that are relevant for deciding whether a business is being carried on:

- whether the person has a profit-making intention;
- the nature of the activity;
- the period over which the activity is carried on;
- the scale of the operations;
- the volume of transactions;
- the commitment of time, money and effort;
- the pattern of activity;
- financial results; and
- whether the activities are carried on in a similar manner to other similar businesses.

172. There is a difference between carrying on a business and simply realising an investment (*Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)* (1904) 5 TC 159).

18 See **QB17/08 Are proceeds from the sale of gold bullion taxable?**

173. Several cases specifically consider whether investors who are buying and selling shares are carrying on a business of dealing in shares. In *National Distributors Ltd v CIR* (1987) 9 NZTC 6,135 the High Court considered the taxpayer was not in a share dealing business (this issue was not challenged on appeal, and the Court of Appeal decision is discussed in relation to s CB 4 above). Relevant factors included whether:
    - share sales were an integral part of the business;
    - there was regular or continuous monitoring of the share portfolio;
    - there was any system according to which shares were sold;
    - sales were frequent and part of the person's normal operations in the course of making profits; and
    - the sales and purchases were made on a large scale.

174. In *National Distributors*, the share sales were intermittent, unsystematic and made in relation to inflationary trends. However, most of the share sales still ended up being taxable for a different reason (as discussed in relation to s CB 4 above).

175. In *Estate of King v CIR* [2007] NZCA 474, a New Zealand resident family used an agent in England to manage their share portfolio. The agent was tasked with earning a specific income on the portfolio each month. The Court of Appeal found the taxpayers were not carrying on a business of trading in shares because:
    - the nature of the activity was investment;
    - the scale of the activity was not large enough (131 transactions made during a three-year period);
    - specific reasons were provided for some transactions, which suggested they were not part of a plan or a regular pattern of share trading; and
    - the intention was not to conduct a business.

176. In *Rangatira Ltd v CIR* [1997] 1 NZLR 129 (PC) a company invested on a long-term basis in shares in established well performing companies. Over time, shares were sold and often profits were made on the sales. The Privy Council decided sales were not carried out in the ordinary course of the taxpayer's business. The number and frequency of the transactions (41 sales) during a seven-year period were not, by themselves, sufficient to conclude the company was a share trader.

177. *CIR v Stockwell* (1992) 14 NZTC 9,190 (CA) concerned the deductibility of losses made on share sales. The court agreed with submissions that there is likely a business where a person:
    - spends a significant part of each day pursuing share trading activities;
    - has some tens of thousands of dollars at risk; and
    - engages in around 10 transactions per month.

178. Similarly, the court thought there is likely not a business where a person invested a significant amount (for the time) in the shares of only two or three companies and did not engage in active trading.

179. The taxpayer in *Stockwell* had spent $70,000 on the shares of six companies. Thirteen parcels of shares were purchased, and nine parcels were sold over nine months. This was considered to be a borderline fact situation. The court leaned against finding a business. Cooke P said at 9,194:

> When a taxpayer has a full-time occupation and devotes some of his spare time to stock exchange speculation, one should be slow, I think, to find that he has gone as far as to embark on a business. Usually it would be an artificial use of language. The same applies to a retired or unemployed person who engages in a modest amount of buying and selling shares. In such cases the presumption should be against a business.

180. Hardie Boys J similarly said at 9,194:

> The buying and selling of shares is typical of many activities that may or may not be a business according to the individual circumstances. Carried on merely to supplement an adequate income from other sources or to provide interest or excitement, it is unlikely to be a business. That the person may regard himself as a "trader" is of little assistance. One would **normally expect to find a considerable number of purchases and sales over an appreciable period of time before he could be regarded as dealing in shares and a substantial capital investment before one would take the next step of regarding him as in the business of dealing in shares.** [Emphasis added]

181. In *London Australia Investment Company Ltd v FCT* (1974) 4 ALR 44 (HCA) a company invested in shares for the purpose of earning dividend income and had a specific policy of maintaining a consistent dividend yield. It regularly reviewed the portfolio and sold shares that were not paying sufficient dividends, and then reinvested the sale proceeds. These sales would often produce a profit.

182. In the High Court of Australia, Gibbs and Jacobs JJ found the income was taxable as it resulted from carrying on a business. This was because:
    - during the three years in question, it was considered an integral part of the taxpayer's business to deal in shares;
    - switching investments was desirable to produce the best dividend returns and was necessary if the taxpayer's policy of investing in shares with growth potential was to be adhered to;
    - the share portfolio was given regular consideration; and
    - the taxpayer systematically sold its shares at a profit for the purpose of increasing the dividend yield of its investments.
183. The cases considered above provide guidance for determining whether an investor's share sales could be considered part of a business of share dealing.
184. To summarise, the following factors were relevant to a finding by the courts that there was a business of share dealing:
    - share sales were an integral part of the business, and part of the normal operations of the business;
    - there was regular or continuous monitoring of the share portfolio, and a system according to which shares were sold;
    - sales were frequent, and both sales and purchases are made on a large scale; and
    - a large amount of money was invested.

A business of share dealing

185. Section CB 5 also applies to tax income from a share dealing business. This section appears similar to s CB 1 because it taxes sales of personal property (such as shares) when that person's "business" is to deal in property of that kind. However, distinctions exist between the provisions.
186. In *Piers v CIR* (1995) 17 NZTC 12,283 (HC) the trustees of a pension fund held investments that were managed by a financial institution. The institution operated a computer model that prescribed certain ratios of different risk weightings for share investments. As the values of shares changed, so did the required ratios and weightings. This meant shares had to be bought and sold to remain within the limits of the model.
187. Temm J held that the trustees were not in business under s CB 1 because they were merely discharging their statutory and fiduciary obligations as trustees of the fund. There was no profit-making intention underlying the share sales. However, Temm J observed that the frequency of share dealing transactions is often decisive in deciding whether profits are taxable under s CB 5, and that the purpose or motive of the business enterprise is of less relevance than the extent of it. Temm J held that the fund was dealing in shares within the meaning of s CB 5.
188. In *Estate of King*, the Court of Appeal referred to case authorities on when a share dealing business exists and said at [42]:

> The issue grappled with in these authorities is as to which side of the line a particular set of transactions falls. The essence of the test is as set out in *Californian Copper*. Where the line is to be drawn can be a difficult question and it is ultimately one of fact and degree. The matter must be looked at in context and so, while the frequency of transactions and continuity of effort are primary considerations, those matters cannot be viewed in isolation. Relevant contextual matters may include the taxpayer's circumstances, for example, the extent of the taxpayer's investment, the relativities between the size of the investment and the turnover, and the circumstances in which the transactions take place. Any explanations as to particular transactions will also be pertinent and whether or not dealings involved rights and bonus issues or matters of that kind will be part of the assessment.

189. There is a distinction between a business under s CB 1 and a business of dealing under s CB 5. While they will often coincide, it is possible that a business of dealing may exist where there is no business for the purpose of s CB 1. The frequency of transactions is a key determinant in this respect, and a person's subjective intention is less important.

Profit-making undertaking or scheme

190. Section CB 3 provides that an amount is income if it is derived from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit.
191. The undertaking or scheme must be carried on or carried out. The Australian equivalent of s CB 3 was considered in *Premier Automatic Ticket Issuers Ltd v FCT* (1933) 50 CLR 268 (HCA). Dixon J observed that the terms carried on or carried out cover both the habitual pursuit of a course of conduct, as well as the execution of a plan or venture that does not involve repetition or a system. This was cited with approval in New Zealand in *Duff v CIR* (1982) 5 TRNZ 343 (CA).

192. Several cases have considered what is an undertaking or scheme under s CB 3. Essentially:
    - a scheme involves a series of steps directed to an end result;
    - an undertaking is an enterprise directed to an end result;
    - there needs to be a plan or purpose that is coherent and has some unity of conception, but does not need to be precise;
    - the assessment of any profit-making purpose is made at the time the scheme is entered into;
    - property that is already held can become part of a later formulated scheme;
    - the profit-making purpose must be the person's dominant purpose;
    - a nexus (or connection) must exist between the undertaking or scheme and any gain derived; and
    - the scheme must produce a revenue gain - capital gains are not included.

193. For completeness, if a person acquired shares as part of a share dealing profit making scheme involving sales, it is likely that the person acquired shares for the purpose of disposal and s CB 4 would apply to the sales of those shares in any event. The Commissioner accepts it would be unusual for s CB 3 to apply to investments in widely held shares acquired through a platform or broker.

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Legislative references | Tohutoro whakatureture

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IS 25/01: Income tax – deducting costs of travel by motor vehicle between home and work

Summary | Whakarāpopoto

1. This item discusses the specific deduction for motor vehicle expenditure in subpart DE. Subpart DE is intended to limit deductions for motor vehicle expenditure to the "business proportion" of the expenditure for self-employed taxpayers and partners in partnerships. Some close companies can also choose to use subpart DE instead of applying the FBT rules. These taxpayers are collectively referred to as "relevant taxpayers" in this item.
2. For most companies, the ability to deduct motor vehicle expenditure is decided under the general permission and general limitations. There is no requirement to consider specific deductions under subpart DE (although travel between home and work does have FBT implications for company employees). The employment limitation prevents most employees from claiming deductions for motor vehicle expenditure altogether.
3. Unlike the general permission, the specific deduction for motor vehicle expenditure in subpart DE does not allow expenditure on a journey to be apportioned. A journey is treated as a "business journey" making up part of the "business proportion" under subpart DE only if the whole journey is "business use", that is, a journey undertaken "wholly" in deriving the person's income.
4. As a rule, the courts have viewed travel between home and work as private use. However, the courts have (so far) recognised four exceptions to this general rule.
5. Where the case law exceptions apply, journeys leaving from home and arriving at home are regarded as business journeys, rather than as private journeys to and from work. The case law exceptions apply to situations where the need for the travel arises from the nature of the work, and the travel is "on work".
6. In some cases, an overall journey can be broken into two journeys, with one being a business journey (making up part of the business proportion) and the other being a private or mixed-use journey (not part of the business proportion).
7. Incidental private use (use that confers an incidental private benefit on the taxpayer but does not add to the overall distance travelled) does not prevent a journey from being a business journey.
8. Relevant taxpayers may disregard minor or insignificant private use (*de minimis* private use) when deciding whether a journey is a business journey. The Commissioner's view on what can be regarded as minor or insignificant in the home to work travel context is set out later in this item.
9. All legislative references are to the Income Tax Act 2007, unless otherwise stated.

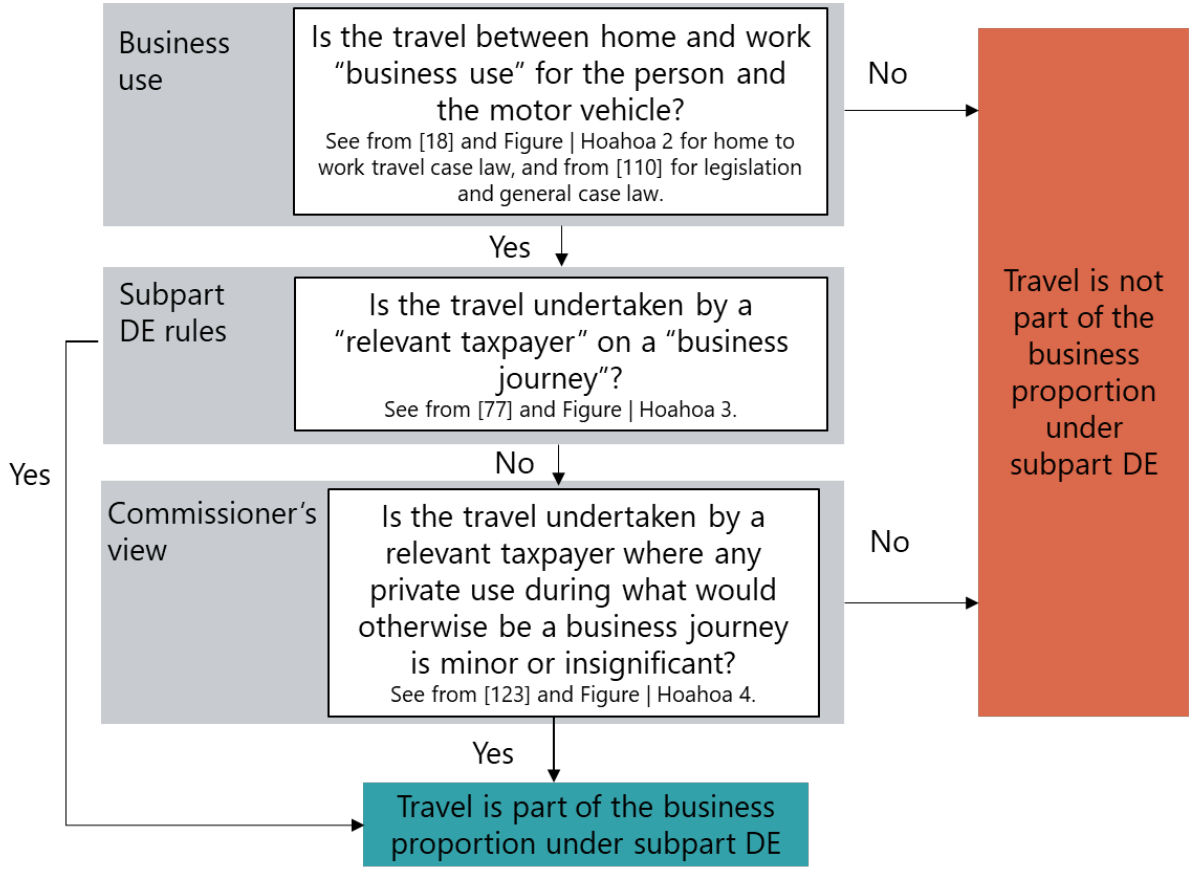
Who this interpretation statement is relevant to

10. This interpretation statement is relevant to self-employed taxpayers, partners in partnerships, and close companies that both qualify to and have elected to apply subpart DE to their motor vehicle expenditure (defined at [1] as relevant taxpayers).
11. Except where otherwise stated, this interpretation statement is **not** relevant to:
    - companies other than close companies that both qualify to and have elected to apply the specific deductibility rules for motor vehicle expenditure (see the discussion from [79], which sets out which close companies qualify);
    - employees, other than shareholder-employees of a close company considering which of their journeys can be treated as business journeys for the purposes of their close company's income tax return (see the discussion from [79], which sets out when journeys by shareholder-employees of close companies can be treated as journeys of the close company);
    - employers (including companies) considering whether they have a FBT liability in relation to an employee's home to work travel (see the companion item **IS 25/02** for information on FBT and home to work travel); and
    - landowners who rent out residential property or holiday homes and incur travel expenditure on journeys between home and their rental properties in doing so; in this case, travel to the rental properties or holiday homes to carry out inspections or maintenance is generally deductible (see **IR264**, at 7–9).

Analysis | Tātari

12. This analysis is divided into four sections:
    - business use (from [18]);
    - subpart DE rules (from [77]);
    - minor or insignificant private use (from [123]); and
    - vehicles taken home for secure storage or for charging (from [132]).
13. Figure | Hoahoa 1 provides an overview of the analysis in this item.
14. For those who are already familiar with subpart DE, the first section covers the case law on the meaning of "business use" that has been decided in the home to work travel context. Subpart DE allows a relevant taxpayer to claim a deduction for their "business use" of a motor vehicle. Business use is defined as "travel undertaken by the vehicle wholly in deriving the person's income". The deduction for business use is calculated by multiplying the relevant taxpayer's motor vehicle expenditure by the "business proportion". The business proportion is found by working out the total distance of the "business journeys" undertaken by the taxpayer in the vehicle as a proportion of the total distance of all journeys undertaken by the taxpayer in the vehicle. "Business journeys" are journeys by a motor vehicle for business purposes (the term business journeys is not defined in the Act, but ss DE 5 and DE 7 indicate this is the case). The case law on the meaning of "business use" is of interest only to relevant taxpayers seeking a deduction for motor vehicle expenditure under subpart DE. It is not relevant to companies seeking a deduction for travel expenditure under the general permission.
15. The second section covers subpart DE – the specific deduction for motor vehicle expenditure and at a high level how it is calculated (this section covers both the legislation and the general case law on words and phrases used in subpart DE). **We suggest readers who are not familiar with the specific deduction and subpart DE's other requirements read this section first**.
16. The third section covers the Commissioner's view on minor or insignificant private use (*de minimis* private use) in the context of travel by motor vehicle (mentioned at [8]).
17. The final section covers the Commissioner's position on vehicles taken home for secure storage or electric vehicles (EVs) taken home for charging. (This analysis stands on its own so is not covered in Figure | Hoahoa 1.)

Figure | Hoahoa 1: Travel by motor vehicle – whether part of business proportion deductible under subpart DE



Business use

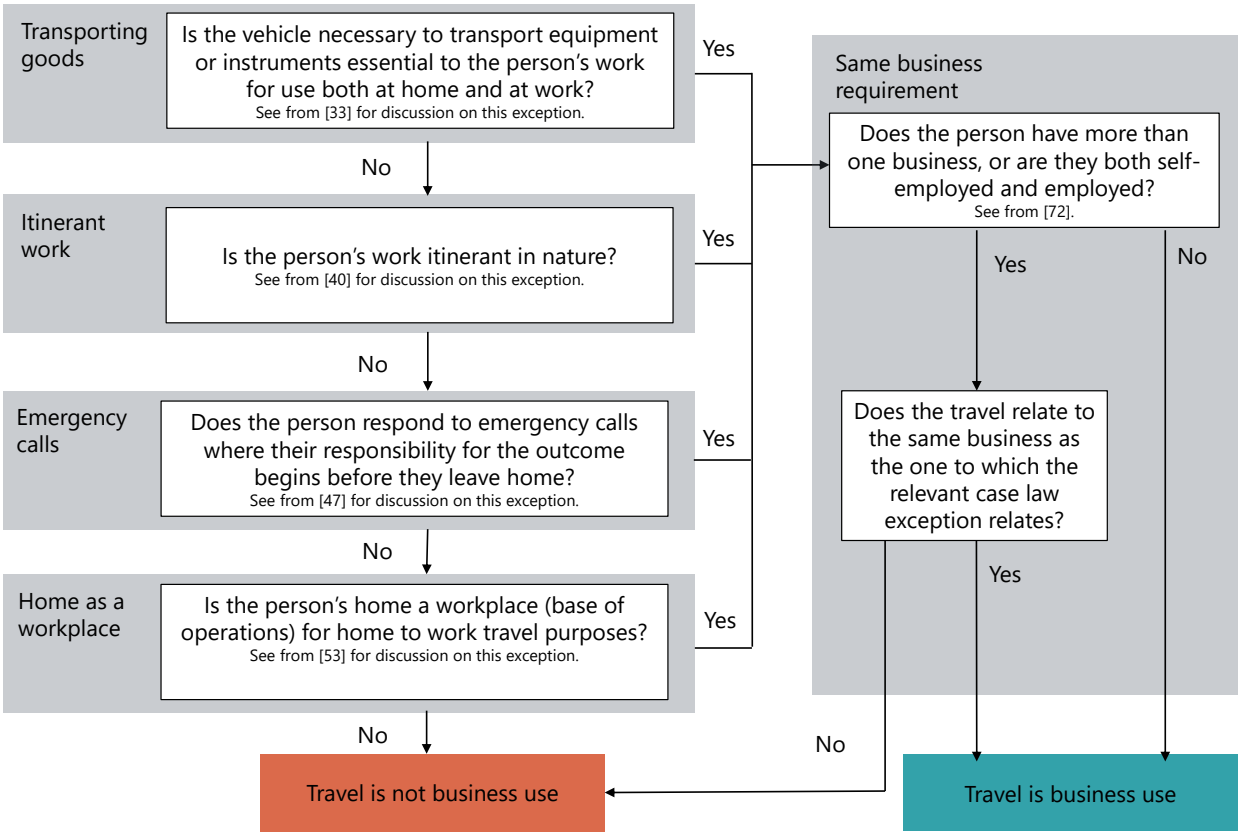
18. Business use is a key concept relevant to claiming motor vehicle expenditure deductions under subpart DE. Therefore, it is discussed first in this item. **People who are not familiar with subpart DE may wish to read the next section (subpart DE rules) before reading this section**.

19. This section is structured as follows:
    - general rule for home to work travel expenditure (from [22]);
    - four case law exceptions (from [30]):
        - necessary to transport essential equipment or instruments;
        - taxpayer's work is itinerant;
        - emergency calls (case law exception); and
        - home as a workplace;
    - same business requirement (from [72]); and
    - summary of case law principles (from [74]).

20. As a rule, travel between home and work is private use. However, in four recognised situations this travel is business use (the four case law exceptions). The case law exceptions apply where the need for the travel arises from the nature of the work, and the travel is on work. They only apply to travel between home and work undertaken for the same business as the one to which the case law exception applies.

21. Figure | Hoahoa 2 provides an overview of this section.

Figure | Hoahoa 2: Travel by motor vehicle – business use



General rule for home to work travel expenditure

22. For relevant taxpayers, travel must be undertaken wholly for business purposes for the travel expenditure to be deductible under subpart DE. If all or part of the travel's purpose is private, the travel expenditure is not deductible. Broadly, this means travel **to** work is not deductible but travel **on** work is deductible.

23. The case law on travel between home and work has concluded, as a rule, that expenditure on travel between home and work is private expenditure: *Ricketts v Colquhoun* [1926] AC 1 (HL). Case law exceptions to the general rule are discussed from [30].

24. The general rule has stood in the United Kingdom (UK) for over 100 years.[1] Previous New Zealand decisions on travel between home and work have upheld it. Although no cases have been decided in New Zealand on travel between home and work since 1998, recent case law decided in overseas jurisdictions such as Australia and the UK has continued to uphold the general rule. The New Zealand courts have had regard to cases decided in these jurisdictions in earlier New Zealand home to work travel cases.

Rationale for the general rule

25. Lord Denning explained the reasons behind the general rule in *Newsom v Robertson* [1952] 2 All ER 728 (CA). *Newsom v Robertson* involved a barrister who worked at his chambers or in court during the day but often took papers home and continued to work there for several hours. Lord Denning explained that when income tax was introduced, most people lived and worked in the same place. Therefore, the court considered that the need for travel between a taxpayer's home and workplace arose from the taxpayer's choice to live away from their work.

1 Before *Ricketts v Colquhoun*, see *Cook v Knott* (1887) 2 TC 246 (QB).

26. In *Lunney v FCT* (1958) 11 ATD 404 (HCA), the taxpayer worked partly at home and argued that in travelling between his home and workplace he was travelling between two places of work. In their joint judgment Williams, Kitto and Taylor JJ referred to *Newsom v Robertson* and commented that, while few taxpayers can choose whether to live at their workplace, the purpose of the taxpayer's journeys was at least as much to enable the taxpayer to live at his home as to get to his place of work (at 413):

> None of the members of the [Court of Appeal] were prepared to assent to the proposition that the taxpayer's journeys were for the "purpose" of his profession; in the language of Romer LJ:
>
> > "The object of the journeys between his home and place of work, both morning and evening, is not to enable the man to do his work but to live away from it" (1953) 1 Ch, at p 17.
>
> The fact that few taxpayers are free to choose whether they will live at their place of work or away from it may appear to invest this statement with a degree of artificiality. But, even in these modern times, they still have, within limits, the right to choose where their homes shall be so that a taxpayer's daily journeys between his home and place of work are rendered necessary as much by his choice of a locality for his residence as by his choice of employment or occupation. And indeed the purpose of such journey [sic] is, at least, as much to enable him to reside at his home as to attend his place of work or business.

27. In *FCT v Collings* (1976) 76 ATC 4,254 (NSWSC), Rath J also noted that the decision in *Ricketts v Colquhoun* was based on ways of living that were no longer prevalent. However, changes in the way people live and work have not resulted in the general rule being overturned. In *Lunney v FCT*, Dixon CJ commented (at 405) that the rule was well established and if it were to be changed, the legislature, not the court, should change it.

28. For more recent decisions upholding the general rule in the Australian and UK courts, see the decisions of the Federal Court of Australia (Full Court) in *Bechtel Australia Pty Ltd v Commissioner of Taxation* [2024] FCAFC 33 and *John Holland Group Pty Ltd v FCT* [2015] FCAFC 82 and of the UK High Court, Chancery Division in *Jackman v Powell* [2004] EWHC 550. Recent tribunal decisions have also upheld the general rule.[2]

Temporary workplaces

29. In New Zealand, the general rule applies to relevant taxpayers regardless of whether the travel is to a temporary workplace: *Kirkwood v Evans* [2002] EWHC 30.[3] The approach in **OS 19/05** for travel to a distant but temporary workplace applies only to employees.

Four case law exceptions

30. Four case law exceptions can apply to make expenditure on home to work travel deductible where subpart DE applies.

31. The four exceptions are as follows (*FCT v Genys* (1987) 77 ALR 527 (FCA) at 531):

- A vehicle is necessary to **transport equipment or instruments** that are essential to the taxpayer's work between their home and workplace.
- The taxpayer's work is **itinerant**.
- The taxpayer responds to **emergency calls** at home and their responsibility for the outcome begins before they leave home.
- The taxpayer's **home is a workplace** (or base of operations). To satisfy this exception, the taxpayer must meet specific criteria. It is not sufficient that work is carried on at home.

32. The four exceptions can overlap: *Garrett v FCT* (1982) 82 ATC 4,060 (NSWSC).

2 See also, decisions of the Australian Administrative Appeals Tribunal in *London v FCT* (2022) 2022 ATC 10-625, *Mfula v FCT* (2021) 2021 ATC 10-588, *Masters v FCT* (2017) 2017 ATC 10-460, *Vakiloroaya v FCT* (2017) 2017 ATC 10-446, *Hill v FCT* (2016) 2016 ATC 10-430, *Kaley v FCT* (2011) 2011 ATC 10-193 and *Brandon v FCT* (2010) 2010 ATC 10-143; and of the UK First-tier Tribunal (Tax Chamber) in *Daniels v Revenue and Customs Commissioners* [2018] UKFTT 462, *White v Revenue and Customs Commissioners* [2014] UKFTT 214, *Meynell-Smith v Revenue and Customs Commissioners* [2013] UKFTT 113 and *Kenyon v Revenue and Customs Commissioners* [2011] UKFTT 91; of the UK Upper Tribunal (Tax and Chancery Chamber) in *Samadian v Revenue and Customs Commissioners* [2014] UKUT 13; and of the UK Special Commissioners in *Lewis v Revenue and Customs Commissioners* [2008] STC (SCD) 895 and *Warner v Prior* (2003) Sp C 353.

3 Note that, although the principle is drawn from UK case law, the legislation has been amended in the UK to allow a deduction for travel to a temporary workplace.

Necessary to transport essential equipment or instruments

33. The first case law exception applies where a vehicle is necessary to transport equipment, instruments or other items (goods) that are essential to performing the taxpayer's income-earning activities, both at the taxpayer's home and at their workplace. In those circumstances, the vehicle is regarded as used to transport the goods. The transport of the taxpayer is regarded as incidental or ancillary to the transport of the goods. The taxpayer can include the journey in business journeys when calculating the business proportion as the transport of the goods makes the use "business use" and the journey a "business journey".
34. For this exception to apply:
    - it must be necessary (because of the nature of the income-earning activity) to transport the goods between the taxpayer's workplace and their home to enable them to carry out the income-earning activity partly at their home; and
    - a vehicle must be required to transport the goods, which may be because of their bulk or because their value, sensitivity or other special characteristics make it impractical to transport them without the use of a vehicle: *FCT v Vogt* (1975) 75 ATC 4,073 (NSWSC); *Scott v FCT (No 3)* (2002) 2002 ATC 2,243 (AATA).
35. "Bulky" in this context means "cumbersome": *Re Crestani & FCT* (1998) 98 ATC 2,219 (AATA). Whether goods are "bulky" generally depends on their weight and the relative ease of transporting them: *Re Gaydon & DFC of T* (1998) 98 ATC 2,328 (AATA).
36. A requirement to transport sensitive work-related information is not, on its own, sufficient to bring a taxpayer within the exception: *Vakiloroaya v FCT* (2017) 2017 ATC 10-446 (AATA).
37. In *Case S26* (1995) 17 NZTC 7,182 (TRA) and *Case Q25* (1993) 15 NZTC 5,124 (TRA) (both clothing manufacturer cases) one of the factors considered in reaching the conclusion that travel between home and work was not private use was that in each case a vehicle was used for transporting garments between the factory and the shareholder-employees' home for work to be performed on the garments there.
38. See also *Brandon v FCT* (2010) 2010 ATC 10-143 (AATA) in which case the taxpayer, a bombardier who transported his deployment kit between his home and the barracks in his car, was unable to prove he had met the requirements to qualify for the exception.
39. Examples might include musicians who transport musical instruments and equipment to and from their homes to be used for practice between performances, and clothing manufacturers who transport garments between their factories and homes to carry out part of the manufacturing process (such as finishing work or test washing) there. See examples from [76].

Taxpayer's work is itinerant

40. The second case law exception applies where the taxpayer's work is itinerant.
41. A taxpayer's work is itinerant if the:
    - taxpayer's **home is their base of operations**;
    - **nature of the taxpayer's income-earning activity is such that travel is essential** to carrying on the activity;
    - taxpayer **undertakes work at various workplaces during the day, or the sequence of workplaces and the periods spent by the taxpayer at each workplace vary and are unpredictable** so it is impractical for the taxpayer to carry out the income-earning activity without the use of a car; and
    - taxpayer can be regarded as **travelling in the performance of their work from the time of leaving home**.
42. See *Horton v Young* [1971] 3 All ER 412 (CA), *Re Gaydon*, *FCT v Wiener* (1978) 78 ATC 4,006 (WASC) and *FCT v Genys*. *Horton v Young* involved a labour-only subcontractor who worked for one main contractor at a variety of worksites. Although he worked for only one contractor, it was held that his home was his workplace, rather than the sites at which he sequentially performed his work. Two more recent cases confirmed that subcontractors can fall into the exception for itinerant work: *Mellor v Revenue and Customs Commissioners* [2011] UKFTT 29 (TC) and *Reed* v *Revenue and Customs Commissioners* [2011] UKFTT 92 (TC). In each case, the taxpayer's home was held to be their base of operations and their travel expenses were found to be deductible. *Gaydon* involved a shearer who travelled between his home and various shearing sheds to perform work at the sheds. *Wiener* and *Genys* involved employees, but the principle applied in the cases was the same as that in *Horton*.

43. Note the conditions at [41] must be met by the individual taxpayer – the exception does not apply to occupations (although some occupations will have more taxpayers working in them whose work is itinerant than others).
44. A taxpayer who chooses to move from place to place and take up several different jobs sequentially as a contractor is not regarded as itinerant in this context: *Hill v FCT* (2016) 2016 ATC 10-430 (AATA).
45. Travel to the first job of the day and travel home from the last job of the day is income-earning (business) travel for relevant taxpayers whose work is itinerant. The journeys are classed as business journeys and make up part of the business proportion for the purposes of calculating the relevant taxpayer's deduction for motor vehicle expenditure.
46. Examples include self-employed tradespeople and subcontractors (where the conditions listed at [41] are met). See examples from [76].

Emergency calls – case law exception

47. The third case law exception applies where the taxpayer is required to travel in response to emergency calls they receive at their home. For the exception to apply, the nature of the work must require that part of the taxpayer's work is carried out at home and the taxpayer's responsibility for completing the task to which the call relates must begin while the taxpayer is still at home: *Owen v Pook* [1970] AC 244 (HL).
48. This case law exception for emergency calls differs from the statutory exclusion from FBT for emergency calls relating to health, life, and the operation of essential machinery or services. For information on the statutory exclusion, see the companion item, IS 25/02 at [154].
49. The exception does not extend to ordinary travel to and from work undertaken by these taxpayers. It applies only to the travel they undertake in response to an emergency call (including the trip home afterwards): *FCT v Collings*.
50. Taxpayers who are called in at short notice to cover for someone who is unwell (such as a pilot or healthcare professional) are not covered by this exception: *Nolder v Walters* (1980) 15 TC 380 (KB), *FCT v Genys* and *Pitcher v DFC of T* (1998) 98 ATC 2,190 (AATA).
51. Similarly, a taxpayer whose work requires them to return to the office in the evenings or at the weekend to carry out a particular task (eg, to ensure the success of a scientific experiment) are not covered by this exception: *Case M99* (1980) 80 ATC 691 (CTBR).
52. Examples include doctors and computer consultants who give advice over the telephone from their home but who must travel to their workplace to resolve the issue if it cannot be resolved over the telephone. See examples from [76].

Home as a workplace

53. The fourth case law exception applies where a taxpayer's home is a workplace (or base of operations) for home to work travel purposes. This exception requires more than that part of the taxpayer's work is carried out at home.
54. Recently, working from home has become increasingly common due to changes in technology and social changes brought about by the COVID-19 pandemic. However, choosing to work from home does not (of itself) affect whether a person's home is their workplace (or base of operations) for home to work travel purposes.
55. Personal choice alone has never been a basis for creating a home workplace (or a base of operations at home). While relevant taxpayers will often make personal choices about whether to work from home part of the time (and it is not for the Commissioner to comment on such choices), other factors must be present for a relevant taxpayer's home to be a workplace (or base of operations). The case law has always confirmed that, for relevant taxpayers (or their equivalents in other jurisdictions), a home workplace or base of operations at home will exist only in exceptional circumstances. The most recent UK and Australian cases involving the self-employed (decided in 2020 and 2021 respectively) have done so – see [70]. Where a client or customer imposes an obligation on a relevant taxpayer to work in one place part of the time but requires additional work to be carried out elsewhere, this does not mean that the person's home has become a workplace or that the person has no choice but to carry out the additional work at home. The person still has a choice between carrying out the additional work at home, establishing their own business premises elsewhere, or carrying out the additional work in a public place (eg, a public library, hotel, café or restaurant).

56. The home as a workplace exception is best understood as a variation on the second case law exception for itinerant work. The person must be required, **by the nature of the work itself**, to do the work in two (or more) places. This was discussed in *Taylor v Provan* [1974] 1 All ER 1,201 (HL), per Lord Wilberforce at 1,213:

> To do any job, it is necessary to get there: but it is settled law that expenses of travelling to work cannot be deducted against the emoluments of the employment. It is only if the job requires a man to travel that his expenses of that travel can be deducted, ie if he is travelling on his work, as distinct from travelling to his work. The most obvious category of jobs of this kind is that of itinerant jobs, such as a commercial traveller. **It is as a variant on this that the concept of two places of work has been introduced: if a man has to travel from one place of work to another place of work, he may deduct the travelling expenses of this travel, because he is travelling on his work, but not those of travelling from either place of work to his home or vice versa. But for this doctrine to apply, he must be required by the nature of the job itself to do the work of the job in two places: the mere fact that he may choose to do part of it in a place separate from that where the job is objectively located is not enough**. [Emphasis added.]

57. Although *Taylor v Provan* involved a director (and directors are dealt with under the UK statutory provisions for employees), the concept that a taxpayer's home may be a workplace or base of operations if their work shares some characteristics of itinerant work can also be seen in the case law for the self-employed. See *Kenyon v Revenue and Customs Commissioners* [2011] UKFTT 91 (TC), discussed at [70].

Determining whether home is a workplace

58. The factors relevant to whether a taxpayer's home is their workplace (base of operations) for home to work travel purposes are whether:

    1. a **significant amount of work** is carried out at home;
    2. there is **significant storage of business goods or equipment** at home;
    3. **significant space is set aside and used** for work activities at home; and
    4. the activities carried out at home are **closely integrated with the business**.[4]

59. Subject to the following paragraphs, it is necessary to consider all the factors listed at [58] and weigh them to get an overall picture of whether a taxpayer's home is a workplace (or base of operations). Different factors may carry different weight depending on the nature of the business.

60. For example, where a business needs substantial tangible assets to be run (eg, a manufacturing business) there may be a home workplace if some or all of the tangible assets are located at the relevant taxpayer's home, they take up a significant amount of space there, and they are regularly used there in carrying on the business (see [64] and [66]-[68]). However, where a business does not need substantial tangible assets to be run, it is more useful to move directly to considering whether the taxpayer's home is their base of operations (see [65] and [69]-[70]). (Note the base of operations approach can also be applied to a manufacturing-type business.)

61. Significant storage of business goods and equipment at home and setting aside significant space at home for business use do not of themselves make a home a place of work or business. Whether these factors are relevant depends on:

    - the nature of the taxpayer's work;
    - whether the goods and equipment stored at home are necessary for the performance of the work; and
    - the space requirements of the activity.

62. Changes in technology mean significant space or significant storage of tangible goods may no longer be necessary for carrying on a business activity at a home. Technology has also made it easier for taxpayers to carry out some of their work outside the office or factory environment. This does not mean that setting aside a desk and chair in a room (or even a small room) at home to be used solely for work purposes is now considered to amount to setting aside "significant space".

63. Instead, for these reasons, the Commissioner considers that the presence or absence of the first three factors listed at [58] do not necessarily determine whether travel between home and work is private travel. A home still retains the characteristics of a home, even though some business goods may be kept there, some space may be set aside for carrying on business activities there, and some work may be performed there.

4 See companion item IS 25/02 at [69] for the factors relevant to employees, as set out in *CIR v Schick* (1998) 18 NZTC 13,738 (HC). The sound business reasons factor is relevant to only employees and FBT. It is not relevant to relevant taxpayers claiming motor vehicle expenditure deductions under subpart DE. This is because the sound business reasons factor stems from the "necessarily incurred" requirement, which is not a feature of the "business use" test.

64. Setting aside significant space for carrying out business activities at home or storing a significant quantity of business goods at home and performing work at home will make the taxpayer's home a workplace (or base of operations) for home to work travel purposes only if the work requires the space and the goods stored at home are necessary for and used in performing the work. Even then, if the space set aside or goods stored at home are used only rarely, travel between home and work may be private travel.

65. If a business does not require significant tangible assets to run, whether there is significant storage of business goods and equipment at home and significant space is set aside at home for business use will be less important in deciding whether a taxpayer's home is a workplace (or base of operations). Although choosing to work partly at home does not make a home a workplace, choosing to establish a facility at home (with significant space set aside for carrying on particular work, and/or significant space set aside for storage of work items) is different to choosing to work at home where no significant space is required at home by the work activity (either for carrying on the activity or for storage). Once a facility has been established at home, the taxpayer may have no choice but to carry out part of their work at home (because they do not have access to such a facility elsewhere).

Manufacturing businesses

66. In *Case R37* (1994) 16 NZTC 6,208 (TRA), it was held that travel between the shareholder-employees' home and the factory was travel between workplaces. The company carried on the business of screen-printing. The actual printing and screening work was carried out at the company's factory. Test washing of sample garments (to check for the adherence of inks and dyes) was carried out at the shareholder-employees' home on most days as the factory had no washing facility. Preparation of artwork and clerical work was also carried out at the shareholder-employees' home.[5]

67. In *Case S26*, the shareholder-employees' home was also considered to be a workplace. The company's clothing manufacturing business was initially conducted from home then later expanded to the factory. Although much of the manufacturing was carried out at the factory, finishing work continued to be done at home.

68. In *Case Q25*, also, garments manufactured at the company's factory were taken to the shareholder-employees' home for finishing-off work to be carried out on the garments. It was held that the vehicles were used for travel between home and work for income-earning (business) purposes.

Base of operations approach

69. The home workplace is referred to as a base of operations in some case law. The relevant cases take the approach that, usually, when considering whether expenditure on travel between home and work is business use, the first step is to identify the taxpayer's base (or bases) of operations. If the base of operations is not at the taxpayer's home, travel between the taxpayer's home and their base of operations is private use. This is because the taxpayer has incurred the expenditure (at least in part) for the private purpose of maintaining their home at a distance from their base of operations. Therefore, the expenditure is not "wholly and exclusively" (solely) incurred in deriving income. The approach is based on Lord Denning's judgment in *Newsom v Robertson*.[6]

70. The UK case law on the base of operations approach illustrates the following:

- A base of operations need not be at a single address. It can be an area, such as a network of streets, if the taxpayer's work requires them to move from place to place as part of their daily work, for example, a milk delivery person: *Jackman v Powell*.
- A relevant taxpayer who travels between home and only one other place at which significant work is carried out is unlikely to have a base of operations at home, particularly if the work carried out at home is preparatory in nature or could be done anywhere: *Meynell-Smith v Revenue and Customs Commissioners* [2013] UKFTT 113 (TC); *Daniels v Revenue and Customs Commissioners* [2018] UKFTT 462 (TC).

5 In *Case R37*, because it could not be shown that the vehicle was not available for private use or enjoyment, the company was ultimately liable for FBT.

6 The words "and exclusively" were removed from the New Zealand legislation during the 2004 rewrite of the Income Tax Act. However, sch 22A of the Income Tax Act 2004 does not show an identified policy change in relation to the removal of the words. Therefore, the case law on the meaning of "wholly and exclusively" is still relevant to the interpretation of "business use" in s YA 1. See also the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill, cls 105(7) and (37) and 200.

- A relevant taxpayer may have two bases of operations, both of which are not at home (even though some or all of the administrative work relating to their business is done at home), for example, a consultant doctor who runs their private practice from rooms at two private hospitals or a flying instructor who runs their instructor business from two airfields: *Samadian v Revenue and Customs Commissioners* [2014] UKUT 13 (TCC); *White v Revenue and Customs Commissioners* [2014] UKFTT 214 (TC). (The same decision was reached in relation to a doctor who provided assistant surgeon services at different hospitals as a sole trader in an Australian case: *Mfula v FCT* (2021) 2021 ATC 10-588 (AATA).)
- A relevant taxpayer who decides to base themselves temporarily in an area to carry out several different contracts (eg, a subcontractor to an engineering business) does not have their base of operations at home. Travel between their home and the base from which they carry out the contracts is not deductible, even if the base is only temporary: *Taylor v Revenue and Customs Commissioners* [2020] UKFTT 416 (TC).
- A taxpayer who works at various customer sites as well as working at home will have their base of operations at home if the taxpayer does not work at any of the sites for a sufficient duration or with a sufficient degree of consistency and predictability to make any of them a base of operations for the taxpayer: *Kenyon v Revenue and Customs Commissioners*.

71. See examples from [76].

Same business requirement

72. Travel between a home workplace and another workplace is work-related travel only where the two workplaces relate to the same business: *FCT v Payne* (2001) 2001 ATC 4,027 (HCA).
73. Travel between the workplaces of two different businesses or between the workplace of a business and a place of employment is private travel. Therefore, if a taxpayer:
    - has two businesses, even if their home is a workplace in relation to their first business, travel between their home and a workplace relating to their second business is private travel; or
    - carries on a business at their home and is also employed to work at a workplace away from their home, travel between the taxpayer's home and the workplace that relates to their employment is private travel.

Summary of case law principles

74. For deductions to be claimed for expenditure on travel between home and work under subpart DE the following must be the case:
    - It is not enough that a taxpayer performs part of their work at home. The need for the work to be performed partly at home (and, therefore, the need for the travel) must arise from **the nature of the work**. Travel between home and work is private travel if a taxpayer chooses to work partly at home. This includes situations where there are inadequate facilities at the client's or customer's premises to perform the additional work that the taxpayer chooses to perform at home, if that additional work is of a type that could be performed anywhere. This also includes situations where the taxpayer's client or customer requires the taxpayer to work at the client or customer's premises while they are open, but to perform additional work elsewhere while the premises are closed, if that additional work is of a type that could be performed anywhere.

      In such cases, the taxpayer still chooses to perform the additional work at home. The taxpayer will undertake the travel between home and work partly because they have chosen to live at a distance from their workplace (or base of operations). This prevents the travel from being undertaken wholly for business purposes.

      However, choosing to establish a facility at home (with significant space set aside for carrying on particular work, and/or significant space set aside for storage of work items), is different to choosing to work at home where no significant space is required by the work activity (either for carrying on the activity or for storage). Once such a facility has been established at home, the taxpayer may have no choice but to work partly at home.
    - A distinction exists between travel to work or home from work and travel that is "**on work**". The four case law exceptions are recognised situations where the travel is on work, rather than travel to or home from work (and where the need for the travel arises from the nature of the work). When a taxpayer travels in the situations covered by the four case law exceptions, the travel is for business purposes. The journeys are "business journeys" and the use of the vehicle is "business use" (and the journeys are part of the "business proportion" that determines the amount of the motor vehicle expenditure deduction for income tax purposes).

75. Based on the factors from the case law the principles can be summarised as follows:

A journey that consists of home to work travel is a business journey for a relevant taxpayer and the use is business use if the:

- need for the work to be performed partly at home (and therefore the need for the travel) arises from the **nature of the work**; and
- travel is in the course of performing work (**on work**).

Examples of general rule, case law exceptions and same business requirement

76. Example | Tauira 1 to Example | Tauira 8 illustrate the general rule, case law exceptions and same business requirement.

Necessary to transport equipment or instruments

Example | Tauira 1 – Taxpayer transports equipment between home and work that they use both at home and at work

The taxpayer runs a deli from which they sell jams, pickles and chutneys, as well as other food (such as baked goods, quiches and sandwiches) prepared in the deli's commercial kitchen. They also sell some luxury foods that they buy in. The deli is open from Tuesday to Sunday.

The fruit and vegetables for the jams, pickles and chutneys are delivered to the taxpayer's home in boxes on a Monday (Monday is delivery day for the fruit and vegetable supplier). The taxpayer carries out some initial preparation of the fruit and vegetables in their home kitchen on Mondays (removing outer leaves and stems, halving or quartering the larger vegetables, then rinsing, drying, and putting the fruit and vegetables into purpose-bought storage containers). The taxpayer refrigerates the fruit and vegetables overnight in a large refrigerator they have in their home scullery specifically for this purpose.

On Tuesday mornings, the taxpayer drives the fruit and vegetable containers to the deli in their car, triple washes the fruit and vegetables, and makes preserves from them in the deli's commercial kitchen. On Sunday evenings, the taxpayer transports the clean containers home in their car to be used on Mondays at their home.

Travel between the taxpayer's home and the deli on a Tuesday morning and between the deli and the taxpayer's home on a Sunday evening is business travel for the taxpayer. The fruit and vegetable containers are, together, cumbersome to transport. The transport of the taxpayer between home and work in their motor vehicle on a Tuesday morning and on a Sunday evening is incidental to the transport of the fruit and vegetable containers. The need for the travel arises from the nature of the taxpayer's work, and the travel is "on work". Because the transport of the taxpayer can be regarded on these particular journeys as incidental to the transport of the fruit and vegetable containers, the travel is regarded as undertaken wholly in deriving the taxpayer's income. Travel between the taxpayer's home and work at other times is private travel.

Itinerant work

Example | Tauira 2 – Taxpayer's work is itinerant (tradesperson)

The taxpayer is an electrician who operates as a sole trader. The taxpayer owns a van in which they store most of their tools and other equipment. They also have a workshop in their garage at home where they store additional equipment that they use less regularly. The taxpayer does not have business premises at a separate location. Each day the taxpayer travels from their home directly to the location of their first customer for the day, continuing from one location to another, and returns directly from the location of the last customer of the day to their home in the evening. The electrician's work list changes daily. The electrician visits electrical supply stores to pick up equipment as needed.

The taxpayer's travel is business travel, including the travel from their own home to the location of their first customer for the day and the travel from the location of their last customer of the day to their home. The taxpayer's home is their base of operations. Travel is essential to the taxpayer's work. The locations at which they perform work are varied and unpredictable and their work could not easily be performed without the use of a vehicle. The need for the taxpayer's travel arises from the nature of the work and the taxpayer is travelling "on work" from the time they leave home until the time they return home. Their travel is undertaken wholly in deriving their income.

Example | Tauira 3 – Taxpayer's work is itinerant (delivery person)

The taxpayer is a driver for a food ordering and delivery platform (the Service). The taxpayer works as an independent contractor. The taxpayer owns a car which they use to collect food orders and deliver them. The taxpayer uses the Service's hardware and software in their car to let them know when delivery jobs become available and to help them find their way to restaurants or supermarkets to collect customers' orders and deliver them to customers.

The taxpayer does not have business premises at a location separate from their home. The Service does not have business premises in New Zealand (and the taxpayer does not visit the Service's business premises outside New Zealand). Each day the taxpayer travels from their home, directly to the location where their first order for the day is to be collected, then on to their first delivery location. They continue from collection location to delivery location throughout their workday and return directly from the location of their last delivery for the day to their home when they have finished working. The taxpayer's work list changes daily.

The taxpayer's travel is business travel, including the travel from their own home to the location of their first food order collection for the day and the travel from the location of their last delivery of the day to their home. The taxpayer's home is their base of operations. Travel is essential to the taxpayer's work. The locations at which they perform work are varied and unpredictable and their work could not easily be performed without the use of a vehicle. The need for the taxpayer's travel arises from the nature of the work and the taxpayer is travelling "on work" from the time they leave home until the time they return home. Their travel is undertaken wholly in deriving their income.

Emergency calls

Example | Tauira 4 – Taxpayer responds to emergency calls and their responsibility for the outcome begins while at home

The taxpayer is a computer consultant. The taxpayer contracts to more than one company and performs work at different locations during the week. Under the taxpayer's contract with one company, the taxpayer has agreed to take emergency calls between 6 pm and 6 am on Fridays and Saturdays. The taxpayer receives telephone calls during these hours and talks to the client's on-site employees. If the taxpayer cannot resolve the issue over the telephone, the taxpayer travels to the client's premises to resolve it.

The taxpayer's travel to and from the client's premises in response to the calls is business travel, including the travel home from the client's premises after a call. The computer consultant is responding to an emergency call, the responsibility for which begins at the time the call is received (at home). The need for the travel arises from the nature of the taxpayer's work, and the taxpayer's travel is "on work" (the taxpayer having begun giving advice over the phone as soon as the call is answered). The travel that results from a call is undertaken wholly in deriving the taxpayer's income.

Home as a workplace (or base of operations)

Example | Tauira 5 – Taxpayer works from home part of the time

The taxpayer is a barrister. The taxpayer works completely from home some days, in a small room set up as a home office and used only for this purpose. On days when the taxpayer works at their chambers, they tend to work at home for the first and last parts of the workday, because they would otherwise spend long periods of time travelling due to traffic congestion.

Travel between the taxpayer's home and chambers is private travel. The taxpayer does not have significant space set aside at their home either for carrying out work or for the storage of goods related to their work. Although the taxpayer performs some work at home, and that work is integral to the taxpayer's business, the taxpayer could perform that work anywhere. The taxpayer chooses to perform some of their work at home for their own convenience. The need for the travel does not arise from the nature of the taxpayer's work, and the taxpayer's travel is not "on work", even though it is undertaken during the workday. Instead, the travel is necessary because the taxpayer lives at a distance from their work. The taxpayer does not undertake the travel wholly in deriving their income.

Example | Tauira 6 – Taxpayer works at home and in a variety of different locations

The taxpayer is a self-employed pipe-fitter whose clients include different breweries. The taxpayer travels from home to complete work at the breweries, which are located 100 km to 500 km from their home.

In one income year, the taxpayer's clients included five different breweries. The taxpayer spent about 60% of their time working away from home. Of the time spent away from home, around 60% was spent working for one brewery at one location. The other 40% of the taxpayer's time away from home was split between the remaining four breweries at six different locations.

When working at home, the taxpayer's time was spent arranging future pipe-fitting contracts and carrying out administrative tasks relating to their pipe-fitting business.

The taxpayer's home is their base of operations. The taxpayer regularly carries out work at home between attending the various brewery locations to perform work there. The work carried out at home is integral to the pipe-fitting business. Although the taxpayer does not have significant space set aside at home for carrying out work or for storing goods related to their work, the locations at which the taxpayer performs pipe-fitting work are varied and unpredictable. The taxpayer does not spend sufficient time at any of the seven brewery locations for any one of them to be regarded as the taxpayer's workplace or base of operations for home to work travel purposes. The need for the taxpayer's travel arises from the nature of their work, and the travel to and from the different brewery locations is "on work". The travel between the taxpayer's home and the seven brewery locations is undertaken wholly in deriving the taxpayer's income.

Example | Tauira 7 – Taxpayer works at home most of the time but occasionally at different locations

The taxpayer is a self-employed tutor for primary school children. The taxpayer is not affiliated with a tutoring organisation, instead developing their own tutoring sessions. The children and their parents come to the taxpayer's home for the tutoring sessions. However, sometimes the taxpayer travels to children's homes to carry out initial assessments. The taxpayer does not have any other business premises. The taxpayer holds the tutoring sessions at a desk in their living room, rather than setting aside an entire room for tutoring purposes.

In one income year, the taxpayer tutored ten children. Nine of the initial assessments were carried out at the children's homes. The tenth child came to the taxpayer's house for their initial assessment. The taxpayer taught each of the ten children for one hour per week during term time, in total, for 40 weeks. Therefore, of the 400 tutoring sessions, only 9 sessions took place outside the taxpayer's home, and they were in 9 different locations. Aside from tutoring, the taxpayer also works at home developing their programme and carrying out administrative work.

The taxpayer's home is their base of operations. The taxpayer regularly carries out work at home between attending the children's houses to carry out initial assessments. The work carried out at the taxpayer's home is integral to the taxpayer's business. Although the taxpayer does not have significant space set aside at home for carrying out work or for storing goods related to their work, the locations at which the taxpayer performs work outside their own home are varied and unpredictable. The taxpayer does not spend sufficient time at any of the nine children's homes for any one of them to be regarded as the taxpayer's workplace or base of operations for home to work travel purposes. The need for the taxpayer's travel to the children's homes to carry out initial assessments arises from the nature of their work, and the travel to and from the different houses is "on work". The travel between the taxpayer's home and the nine houses is undertaken wholly in deriving the taxpayer's income.

Travel must relate to same income-earning activity

Example | Tauira 8 – Taxpayer runs their own business from home and is also employed on a part-time basis

The taxpayer is a plumber. On Mondays to Fridays, the taxpayer runs their own plumbing firm. The taxpayer has a van in which they keep their tools and equipment. They also keep a small amount of extra equipment and some spare parts in their garage at home. They do not have any other business premises. The taxpayer receives customer calls on their mobile phone and travels directly to the first job of the day, then from one job to another throughout the day, and directly home at the end of the day.

On Saturdays, the plumber is employed to carry out plumbing and maintenance work at a private school. The plumber has entered into an employment contract with the school which states that the plumber must be present at the school between 8:30 am and 5:00 pm every Saturday, must use the tools and equipment that the school supplies, and must report to and work under the supervision of the school caretaker.

The plumber's home is their workplace (or base of operations) in relation to the plumbing firm that they run from Monday to Friday. This is because their work is itinerant in nature, and the travel they undertake on Mondays to Fridays falls within the second case law exception. However, the travel the plumber undertakes on Saturdays to and from the private school to perform employment duties there is private travel. This is because the case law exception for itinerant work that applies to make the plumber's home a workplace (or base of operations) applies only in relation to the work they undertake for their plumbing firm. The travel on Saturdays does not relate to work undertaken for the plumbing firm, but instead, relates to their employment with the private school.

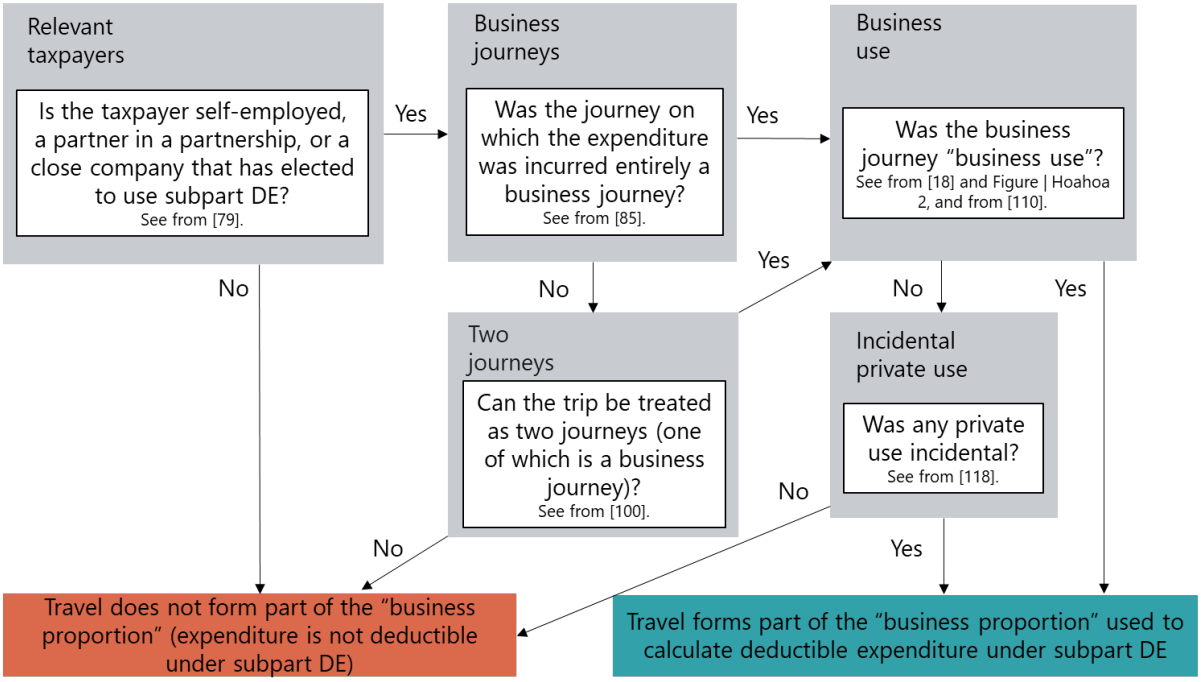
Subpart DE rules

77. Subpart DE contains the specific deduction for motor vehicle expenditure and covers related matters such as the requirement to keep a logbook. Subpart DE has its own methods for apportioning motor vehicle expenditure, which differ from the apportionment methods that can be used when deducting expenditure under the general permission.

78. Figure | Hoahoa 3 overviews the analysis in this section, which discusses:

- relevant taxpayers – which taxpayers must (or can choose to) apply subpart DE (from [79]);
- business journeys – which journeys make up the business proportion under subpart DE (from [85]);
- two journeys – when an overall journey may be treated as two journeys, one of which is a business journey (from [100]);
- business use – when travel is undertaken wholly and exclusively for business purposes (from [110]); and
- incidental private use – case law on this type of private use and that such use will not prevent use from being business use (from [118]).

Figure | Hoahoa 3: Travel by motor vehicle – subpart DE rules



Relevant taxpayers

79. Subpart DE applies to:
    - self-employed taxpayers;
    - partners in partnerships; and
    - close companies that elect to apply subpart DE for that motor vehicle and that shareholder-employee (defined at [1] as relevant taxpayers).[7]

80. To qualify, a close company must supply no more than two fringe benefits that consist of private use of a motor vehicle to shareholder-employees during the relevant income year (ie, motor vehicle benefits that would otherwise give rise to fringe benefits under s CX 6) and must not supply any other fringe benefits to employees during the relevant income year. When a close company elects to use subpart DE, the shareholder-employee's expenditure is treated as the close company's expenditure.

81. Subpart DE does not apply if:
    - the motor vehicle is not used for private travel; or
    - all private travel undertaken by the motor vehicle is a fringe benefit.

82. The legislation that supports [79] to [81] can be summarised as follows:
    - Subpart DE does not apply to a person whose only income is income from employment (s DE 1(2)(b)).
    - Partners in partnerships are taxed on a look-through basis (s HG 2). The partner is treated as carrying on the activities carried on by the partnership, and the partnership is treated as not carrying on its activities (s HG 2(1)(a)).
    - Subpart DE does not apply to most companies (s DE 1(2)(a)). However, subpart DE does apply to a close company that chooses to apply subpart DE for a motor vehicle and a shareholder-employee instead of applying the FBT rules (s CX 17(4B)(c)). The benefit must arise when the close company makes a motor vehicle available to a shareholder-employee for their private use, and when the benefit would, in the absence of s CX 17(4B)(a), be a fringe benefit arising under s CX 6 (s CX 17(4B)(a)). In addition, all benefits that the close company provides to employees in the income year must be one or two benefits that:
        - arise when a close company makes a motor vehicle available to a shareholder-employee for their private use; and
        - would, in the absence of s CX 17(4B)(a), be a fringe benefit arising under s CX 6 (s CX 17(4B)(b)).
    - Where subpart DE applies to a close company, the shareholder-employee's business use is treated as business use of the close company (s DE 1(3)).
    - Subpart DE does not apply to a motor vehicle that is used only for the purpose of deriving income or for a purpose that amounts to a fringe benefit (s DE 1(2)(c)).

83. Due to s DE 1(2)(c), there is no requirement to keep a logbook if a motor vehicle is used **only** for business purposes. (This is because it is subpart DE (which under s DE 1(2)(c) does not apply to a motor vehicle that is used only for business purposes) that mandates the use of logbooks.) However, the Tax Administration Act 1994 sets out record-keeping requirements for business taxpayers, including in relation to deductions claimed (s 22(1) and (2)(h)). It is prudent for relevant taxpayers to keep records to support their claims for motor vehicle expenditure deductions. Although a logbook is not required, there is still an evidential requirement and a need to show that there is only business use. Therefore, if a taxpayer does not keep appropriate records, they will have insufficient evidence to support the full amount of the deduction they claim.

84. For more information on close company elections to use subpart DE for a motor vehicle and a shareholder-employee instead of applying the FBT rules, see **IS 17/07: Fringe benefit tax – motor vehicles** from [278]. For the relevant legislation, see the Appendix to this statement.

7 "Close company" is defined in s YA 1 to mean a company that has five or fewer natural persons or trustees who either hold voting interests or hold market value interests of more than 50% in the company. Under this definition, all associated natural persons are treated as one natural person. See IS 17/07 at [189].

Business journeys

85. Travel that consists of a "business journey" in a "motor vehicle" forms part of the "business proportion" that is then used to calculate the amount of motor vehicle expenditure that is deductible under subpart DE. The business journey must consist of "use for business purposes". In subpart DE, a motor vehicle is a road vehicle (other than a trailer) that is ordinarily used to transport people, goods or animals. This is qualified by the following two points:
    - Under the case law, a journey is still a business journey if its purpose is a business purpose but there is some incidental private use. Incidental private use arises where the relevant taxpayer receives an incidental private benefit or advantage as a consequence or effect of undertaking the journey solely for a business purpose that does not increase the overall distance travelled. See from [118].
    - A journey is treated as a business journey if there is minor or insignificant private use under the *de minimis* principle.[8] The Commissioner takes the view that a private detour that does not exceed **both** approximately 5% of the journey and approximately 2 km will be considered minor or insignificant private use. See from [126].
86. A relevant taxpayer must keep actual records or a logbook to show the proportion of business use of a motor vehicle or elect to use the kilometre rate method for the motor vehicle. Otherwise, under the default method the deduction for motor vehicle expenditure is limited to the lesser of the proportion of actual business use of the vehicle, or 25% of the total use of the vehicle. Actual records can only be used during a logbook term if the taxpayer and the Commissioner agree.
87. The legislation that supports the above paragraphs can be summarised as follows:
    - Deductions for motor vehicle expenditure are allowed by s DE 2. Under that section, a person is allowed a deduction for expenditure that they incur for the "business use" of a "motor vehicle" (s DE 2(1)).
    - "Business use", for a motor vehicle and for a person, means travel undertaken by the vehicle wholly in deriving the person's income (s YA 1).
    - In subpart DE, "motor vehicle" means a road vehicle, whenever or however used, that is not a trailer and is of the kind ordinarily used for the carriage of people or the transport or delivery of goods or animals (s YA 1).
    - The amount of expenditure incurred for business use is calculated by using the formula in s DE 2(2). This requires the person to multiply their total motor vehicle expenditure for the income year by the business proportion (a decimal). The business proportion is the part of total use that represents the business use of the motor vehicle for the income year, calculated under ss DE 3 to DE 11 (s DE 2(3)).
    - The business proportion may be based on actual records or on a logbook kept for a 90-day test period (ss DE 3 and DE 7(1)).[9]
    - Where actual records are used, the records must show the reasons for and the distance of "journeys" travelled by a motor vehicle for business purposes (note actual records can only be used during a logbook term where the taxpayer and Commissioner agree) (s DE 5).
    - Where a logbook is used, it must represent, or likely represent, the average proportion of travel by the vehicle for business purposes (s DE 7(1)) and record, among other things, the length of each business journey, the date of each business journey and the reason for each business journey (s DE 7(2)).
    - When a person has not maintained actual records or a logbook to show the proportion of business use of a motor vehicle or elected to use the kilometre rate method for the motor vehicle, the default method applies. The deduction under s DE 2 is limited to the lesser of 25% of the total use of the vehicle, or the proportion of actual business use of the vehicle (s DE 4).

8 The principle based on the legal maxim *de minimis non curat lex* (the law does not concern itself with trifles).

9 A person may also choose to apply the kilometre rate method (s DE 2B).

88. The phrase "to the extent to which" does not appear in s DE 2 or in ss DE 5 and DE 7. This means no apportionment of a mixed-use journey is allowed (see further from [90]). A journey is either a business journey (and the distance of the journey is counted in calculating the business proportion) or it is not a business journey (and no part of the distance of the journey is counted in calculating the business proportion). The Commissioner acknowledges this means expenditure incurred for business purposes on a mixed-use journey is non-deductible. However, the case law allows what would otherwise be a single journey to be viewed as two journeys in some cases (see from [100]). The Commissioner also takes the view that certain minor or insignificant private use (*de minimis* private use) can be disregarded to lessen the effect of this (see from [126]).
89. For the relevant legislation, see the Appendix to this statement.

Understanding the difference between apportionment under the general permission and apportionment under subpart DE

90. Broadly, motor vehicle expenditure is deductible under subpart DE if it is incurred on a business journey and the journey is business use, that is, travel undertaken by the vehicle wholly in deriving the person's income. This is because the distance of business journeys is included in calculating the business proportion. (Incidental private use does not prevent use from being business use – see from [118].)
91. This differs from the approach to deducting expenditure under the Act generally. Under the Act, there is a general deductibility rule (the "general permission") and there are specific deductibility rules. There are also general limitations that apply to the general permission and to some of the specific deductibility rules.
92. Under the general permission, a person is allowed a deduction for an amount of expenditure, "to the extent to which" the expenditure is incurred by them:
    - in deriving their assessable or excluded income, or a combination of the two; or
    - in the course of carrying on a business for the purpose of deriving their assessable or excluded income, or a combination of the two (s DA 1).
93. Under the general limitations, no deduction is allowed for expenditure "to the extent to which" it is (among other things):
    - capital in nature (the capital limitation);
    - private in nature (the private limitation);
    - incurred in deriving exempt income (the exempt income limitation); or
    - incurred in deriving employment income (the employment limitation) (s DA 2).
94. The phrase "to the extent to which" appears in both the general permission and the general limitations. This means that under both the general permission and the general limitations it is possible to apportion expenditure into its, for example:
    - capital and revenue elements; or
    - income-earning (business) and private elements.
95. These are the deductibility rules that apply, for example, to motor vehicle expenditure incurred by companies (except for close companies that have elected to apply the specific deductibility rules for motor vehicle expenditure – see [80]).
96. By contrast, for motor vehicle expenditure deductions under subpart DE, s DE 2 supplements the general permission and overrides the private limitation. The other general limitations still apply (s DE 2(13)).
97. Subpart DE supplements the general permission because it is necessary to consider **all** motor vehicle expenditure (including private expenditure) before apportioning the expenditure using one of the methods outlined in subpart DE.
98. Subpart DE needs to override the private limitation because it has its own methods of apportioning motor vehicle expenditure. Two of these methods (actual records and logbooks) involve a two-step approach as follows:
    - First, record the distance of all business journeys undertaken by the relevant taxpayer in the motor vehicle during the relevant period **and** the total distance travelled by the relevant taxpayer in the motor vehicle during the relevant period.
    - Secondly, calculate the combined distance of all business journeys as a proportion of the total distance travelled by the relevant taxpayer in the motor vehicle during the relevant period.

99. The actual records and logbook methods under subpart DE have the effect of averaging the fluctuations in the running costs of the motor vehicle (such as petrol, diesel, or electricity for EVs) across the relevant period. The taxpayer does not obtain a deduction for the actual expenditure they incur on each business journey – the deduction is based on the total distance travelled on business journeys as a proportion of the total distance travelled on all journeys. This is then used to calculate the proportion of the total expenditure that is deductible under subpart DE.

Two journeys

100. Sometimes, travel that involves an intermediate stop between two points is treated as two journeys rather than a single journey. Whether an overall journey can be treated as two journeys depends on whether the intermediate stop is incidental to the overall travel.

101. If the intermediate stop is incidental to the travel, the travel is a single journey. If the stop is **not** incidental to the travel, the travel is treated as two journeys. For example, if a taxpayer travels from their home to their office to carry out substantive work there and then travels on to another place for business purposes, there would be two journeys.

102. If there are two journeys, one of them may be a private journey and the other may be a business journey. If the journey cannot be treated as two journeys, the overall journey is a mixed-use journey and **none** of its distance is counted in calculating the business proportion. For example, for the taxpayer who travels to their office to carry out substantive work there and then travels on to another place for business purposes, only the distance of the first journey is excluded when calculating the business proportion (assuming none of the four case law exceptions apply to that taxpayer to make their home to work journeys business travel). The second journey is a business journey and its distance is counted in calculating the business proportion. This is illustrated by *Sargent v Barnes* [1978] STC 322 (Ch).

103. In *Sargent v Barnes*, the taxpayer was a dentist. He used a laboratory 1 mile from his home and 11 miles from his surgery where technicians repaired, altered and made dentures for his patients. Each morning on his way to the surgery, the taxpayer spent about 10 minutes at the laboratory collecting completed work. Each evening after closing his surgery the taxpayer called in at the laboratory to deliver dentures and other items to the technician working there. Sometimes the taxpayer stayed at the laboratory for up to an hour to help the technician.

104. Oliver J considered that the taxpayer's journey was essentially a private journey (travel between home and work). The intermediate stop at the laboratory did not alter the character of the travel. Therefore, expenditure on such travel was not incurred wholly and exclusively for business purposes (at 328):

> In seeking to assess, on the facts as found by the commissioners, the taxpayer's purpose in incurring the expenditure here in question, counsel for the taxpayer points to the fact that he paused in his progress to the surgery to discuss matters with the technician and that he sometimes spent up to an hour with him in the evening, even carrying out work on dentures himself. But the interruption of a journey, whether for five minutes or for a longer period, does not alter the quality of the journey, although it may add to its utility. At highest, as it seems to me, it merely furnishes an additional purpose.
>
> Of course, it is right to say that if I notionally interrupt the taxpayer's journey at an intermediate point between the laboratory and the surgery and ask myself the question 'Why is he on this particular road at this particular time?' I may come up with the answer that he is taking that particular route because it passes the laboratory. But, as counsel for the Crown points out, that is not the right question. **What the court is concerned with is not simply why he took a particular route (although that may be of the highest relevance in considering the deductibility of any additional expense caused by a deviation) but why the taxpayer incurred the expense of the petrol, oil, and wear and tear and depreciation in relation to this particular journey.** [Emphasis added]

105. In each case, the question is: what is the real purpose of the travel? Where travel between home and work is private travel for the taxpayer, the taxpayer might call in at a workplace to drop off or collect a work-related item while travelling elsewhere, even though the taxpayer has no substantive work to do at that workplace. In that case, the stop does not alter the overall nature of the travel.

106. In *Sargent v Barnes*, Oliver J disagreed with the taxpayer's argument that once it was shown that the laboratory was a place of business, a deduction was allowable for travel between the laboratory and the surgery (at 327):

> Now the assumption here is that the expense of travel between two places of business is always and inevitably allowable, and counsel for the taxpayer bases himself on this passage in the judging of Lord Denning MR in *Horton v Young* [1971] 3 All ER 412 at 415, [1972] Ch 157 at 168, 47 Tax Cas 60 at 71:

> "If the commissioners were right it would lead to some absurd results. Suppose that Mr Horton had a job at a site 200 yards away from his home, and another one at Reigate, 45 miles away. All he would have to do would be to go for five minutes to the site near home and then he would get his travelling expenses to and from Reigate. I can well see that he could so arrange his affairs that every morning he would have to call at a site near home. Instead of going to that absurdity, it is better to hold that his expenses to and from his home are all deductible."
>
> I question, however, whether, in that passage, Lord Denning MR intended to suggest that by deliberately planning your journey to your place of work so as to incorporate a deviation through another place of work where you actually have no business to do you alter the quality of the journey.

107. *Sargent v Barnes* was applied in *Meynell-Smith v Revenue and Customs Commissioners*. In that case, the taxpayer travelled from his home in Chirk, Wrexham, to his place of work in Birmingham and back again, an approximate round trip of 187 miles per day. The taxpayer stopped in at a unit near to his home on the way, where he stored his van and tools. The UK First-tier Tribunal held, consistent with *Sargent v Barnes*, that the unit was no more than a facility where the taxpayer called in to pick up his van and tools on his way to work and to drop them off again for storage on his way home from work. The taxpayer's base of operations was in Birmingham and the travel between his home in Wrexham and his workplace in Birmingham was private travel.
108. The onus is on the taxpayer to show that substantive work was undertaken during the stop. Therefore, it is prudent for relevant taxpayers to keep records sufficient to show that substantive work was undertaken during a stop, if counting the distance of one of the two journeys when calculating the business proportion.
109. See Example | Tauira 9 to Example | Tauira 11.

Note: Example | Tauira 9 to Example | Tauira 11 assume travel between home and work is private travel for the taxpayer (ie, none of the four case law exceptions applies).

Example | Tauira 9 – Single journey – taxpayer has two workplaces

A taxpayer has two workplaces. One workplace (A) is situated in another town, 20 km from the taxpayer's home. The other workplace (B) is only 2 km from the taxpayer's home.

Usually, the taxpayer works from A on Mondays to Thursdays and from B on Fridays. Sometimes, the taxpayer travels between A and B during the day. One Monday, the taxpayer stops in at B on the way to their usual workplace at A, because they had left their mobile phone at B on Sunday evening while printing some documents for a Monday morning meeting at A.

The travel between the taxpayer's home and A is a single journey (and is a private journey). The taxpayer cannot alter the character of the journey by detouring through B when the taxpayer has no substantive work to do at B.

Example | Tauira 10 – Two journeys – taxpayer has two workplaces

A taxpayer has two workplaces. One workplace (C) is situated 10 km from the taxpayer's home. The other workplace (D) is only 5 km from the taxpayer's home.

Usually, the taxpayer travels from their home to C each morning. Sometimes, the taxpayer travels from C to D during the day to meet with staff at D.

One day the taxpayer travels to C and completes a morning's work there. The taxpayer then travels to D and holds meetings with staff there in the afternoon. The taxpayer travels from D to their home at the end of the business day.

The travel from the taxpayer's home to C in the morning is a private journey for the taxpayer. The travel between C and the taxpayer's home can be split into two journeys, because the intermediate stop at D is not incidental to the overall journey from C to the taxpayer's home. The travel from C to D is a business journey, and the travel from D to the taxpayer's home is a private journey.

Example | Tauira 11 – Two journeys – substantive work is undertaken during a stop

A taxpayer has an office situated 10 km from the taxpayer's home. The taxpayer's client has an office situated 2 km from the taxpayer's office and 10 km from the taxpayer's home.

One day, the taxpayer travels to their office first thing in the morning and completes 7 hours' work there. The taxpayer then travels to the client's office and holds a one-hour business meeting there late in the afternoon. The taxpayer travels from the client's office to their home at the end of the business day.

The travel from the taxpayer's home to their office in the morning is a private journey for the taxpayer. The travel between the taxpayer's office and the taxpayer's home via the client's office is two journeys. The intermediate stop at the client's office is not incidental to the overall journey from the taxpayer's office to the taxpayer's home. The travel from the taxpayer's office to the client's office is a business journey, and the travel from the client's office to the taxpayer's home is a private journey.

Variation

A taxpayer has an office situated 10 km from the taxpayer's home. The taxpayer's client has an office situated 4 km from the taxpayer's office and 6 km from the taxpayer's home (ie, on the route that the taxpayer usually takes home from the office).

As before, one day the taxpayer travels to their office first thing in the morning and completes 7 hours' work there. The taxpayer then travels to the client's office and holds a one-hour business meeting there late in the afternoon. The taxpayer travels from the client's office to their home at the end of the business day.

The travel from the taxpayer's home to their office in the morning is a private journey for the taxpayer. The travel between the taxpayer's office and the taxpayer's home via the client's office is still two journeys. It does not matter that the client's office is on the route home for the taxpayer. The intermediate stop at the client's office is not incidental to the overall journey from the taxpayer's office to the taxpayer's home. The travel from the taxpayer's office to the client's office is a business journey, and the travel from the client's office to the taxpayer's home is a private journey. However, as noted at [108], the onus is on the taxpayer to show that a journey is a business journey when treating it as such in calculating the business proportion.

Business use

110. Under s DE 2, a person is allowed a deduction for expenditure that they incur for the business use of a motor vehicle. "Business use" means "travel undertaken by the vehicle wholly in deriving the person's income". As discussed from [22], use is business use if one of the four case law exceptions applies or if the need for the travel arises from the nature of the work and the travel is "on work". These are situations in which the travel is regarded as undertaken wholly in deriving the person's income.

111. However, more case law on the meaning of the words "wholly and exclusively" can be considered.[10] For example, the UK legislation that governs the deductibility of travel expenditure incurred by self-employed taxpayers (and which has a wholly and exclusively test) also governs the deductibility of other types of expenditure for self-employed taxpayers. Case law on this provision considers the meaning of the phrase in other contexts.

112. The rest of this section briefly discusses this other case law. It explains there are three alternative ways of deciding whether use is business use in the context of travel between home and work:

- Do any of the four case law exceptions apply to the travel?
- Did the need for the travel arise from the nature of the work, and was the travel on work?
- Was the travel undertaken by the vehicle wholly and exclusively (solely) in deriving the taxpayer's income?

Case law on the meaning of "wholly and exclusively"

113. A key UK case on the meaning of "wholly and exclusively" in the context of travel between home and work is *Newsom v Robertson*. Key non-travel cases on the meaning of wholly and exclusively are *Bentleys, Stokes and Lowless v Beeson* [1952] 2 All ER 82 (CA), *MacKinlay v Arthur Young McClelland Moores & Co* [1990] 1 All ER 45 (HL) and *Mallalieu v Drummond* [1983] 2 All ER 1,095 (HL).

10 The words "and exclusively" were removed when the legislation was rewritten in 2004. However, sch 22A of the Income Tax Act 2004 does not show an identified policy change in relation to the removal of the words. Therefore, case law on the meaning of "wholly and exclusively" is still relevant to the interpretation of "business use" in s YA 1. See also the Taxation (Annual Rates for 2024–25, Emergency Response, and Remedial Measures) Bill, cls 105(7) and (37) and 200.

114. The cases interpret wholly and exclusively to mean **solely** incurred for income-earning purposes. The expenditure must have no other purpose.

115. Travel between home and work is, as a rule, not "travel undertaken by the vehicle wholly in deriving the person's income" because it is not undertaken solely for that purpose. It is undertaken in part to enable the taxpayer to live their private and domestic life away from their place of work.

116. Similarly, a journey undertaken for a business purpose but that includes a material detour undertaken for a private purpose is not undertaken solely in deriving the person's income (eg, where a journey to a customer's site would be a 20 km "business journey", but the person makes a 10 km detour to their home for lunch on the way, making the total journey 30 km).

117. Other relevant observations from the case law are as follows:

- Except where a case law exception applies, expenditure on travel between home and work is at least partly incurred for the purposes of the taxpayer living at a distance from their work base. Therefore, it is not solely incurred for the purposes of the taxpayer's business: *Newsom v Robertson* per Denning LJ at 731.
- The sole question is: What was the object in mind of the taxpayer engaging in the activity in question? And the statute requires the purpose must be the sole purpose of incurring the expenditure. If the activity is engaged in with both that purpose and another purpose in mind, the statute is not satisfied, even if, in the mind of the taxpayer, the business purpose is the dominant purpose: *Bentleys, Stokes and Lowless v Beeson* per Romer LJ at 84–85.
- If the expenditure inherently serves the taxpayer's private purposes as well as the purposes of their business, regardless of whether the taxpayer consciously considered their private purposes at the time of incurring the expenditure, the expenditure does not meet the wholly and exclusively test: *Mallalieu v Drummond* (Lords Diplock, Keith of Kinkel, Roskill and Brightman, and Lord Elwyn-Jones dissenting) per Lord Brightman at 1,103–1,104.
- In the context of partners in partnerships, expenditure that serves, and is necessarily and inherently intended to serve, the personal interests of one or more partners in the partnership is not incurred wholly and exclusively for the purposes of the partnership practice: *MacKinlay v Arthur Young McClelland Moores & Co* (Lords Bridge of Harwich, Brandon of Oakbrook, Templeman, Oliver of Aylmerton and Goff of Chieveley) per Lord Oliver of Aylmerton at 51–52.
- Save in obvious cases, finding the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor. Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes. Subjective intentions are not limited to conscious motives, and motives are not necessarily the same as objects or purposes. Some results or consequences are so inevitably and inextricably involved in an activity that, unless they are merely incidental, they must be a purpose for it. It is for the fact-finding tribunal to decide the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker: *BlackRock HoldCo 5, LLC v Revenue and Customs Commissioners* [2024] EWCA Civ 330 (see also digest at [2024] All ER (D) 76 (Apr)) per Falk LJ at [124].

Incidental private use

118. This section discusses incidental private use – a further matter relevant to whether use is "business use" as defined (see Figure | Hoahoa 3 at [78]).

119. A private benefit that a taxpayer receives is disregarded where the relevant travel is undertaken solely to achieve a business purpose but the travel also gives rise to an incidental private benefit for the taxpayer.

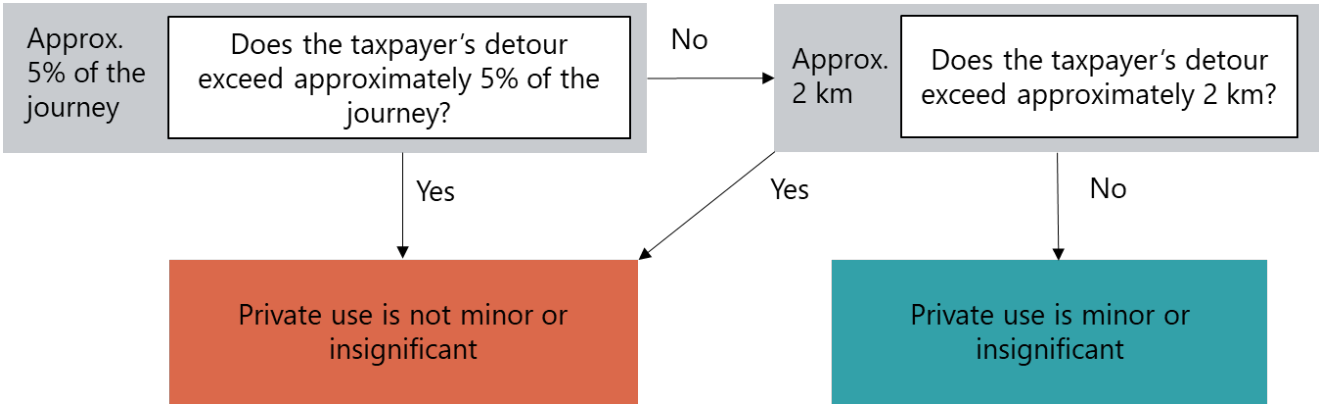
120. In *Bentleys, Stokes and Lowless*, under the relevant UK Act expenditure could only be deducted if it was "money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation". Romer LJ considered whether the receipt of an incidental private benefit from expenditure affected whether the expenditure was money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation. He concluded (at 85) that if the sole purpose of the expenditure was business promotion, the expenditure was not disqualified from deduction because the nature of the activity engaged in meant some other objective or result was achieved, if that other objective or result was inherent in the activity.

121. Therefore, an incidental private benefit arises where, objectively viewed, a person incurs expenditure solely to achieve a business objective or result, but the expenditure also inherently achieves some other non-business objective or result. In the home to work travel context, a taxpayer who is undertaking a work-related journey might stop and purchase something to be used for non-work purposes without travelling any added distance to do so. For example, a taxpayer who is travelling on work passes a café to reach their destination. The taxpayer stops at the café to buy a sandwich for lunch. The private benefit received in this situation (the travel to a location at which the taxpayer can buy their lunch) is incidental to the business use of the motor vehicle. The journey is still a business journey and forms part of the business proportion that is used to determine the amount that is deductible under subpart DE.
122. An incidental private benefit also arises where the transport of the taxpayer is incidental to (that is, a necessary consequence of) travel undertaken for business purposes. For example, if it is essential for a taxpayer to use a vehicle to transport business instruments or equipment (because of their bulk, weight or other special characteristics) between home and work while carrying out income-earning activities, the journey is business use, even though the taxpayer is also transported. See the discussion on the first case law exception for the transport of equipment or instruments that are essential to the taxpayer's work from [33].)

Minor or insignificant private use and the Commissioner's view

123. In the previous interpretation statement on travel by motor vehicle between home and work (**IS3448**), the Commissioner expressed a view on what constituted minor or insignificant private use (*de minimis* private use) in the travel between home and work context. The Commissioner continues to take the same view.
124. This section of the item considers:
    - what minor or insignificant private use is (the *de minimis* principle) (from [126]); and
    - what the Commissioner's view is, and how to apply it (from [128]).
125. Figure | Hoahoa 4 gives an overview of the Commissioner's view.

Figure | Hoahoa 4: Travel by motor vehicle – minor or insignificant private use



Note: The Commissioner considers private use is minor or insignificant (*de minimis*) if it does not exceed **both** approximately 5% of the journey and approximately 2 km.

Minor or insignificant private use

126. Minor or insignificant private use arises where a person makes a minor or insignificant detour for a private purpose during a journey that adds to the overall distance travelled (this differs from incidental private use which by its nature does not add to the overall distance travelled). Minor or insignificant private use can be disregarded under the *de minimis* principle.
127. The *de minimis* principle is based on the legal maxim *de minimis non curat lex* (the law does not concern itself with trifles). It has been applied in New Zealand by the Taxation Review Authority in several deductibility cases: for example, see *Case S7* (1995) 17 NZTC 7,055, *Case S75* (1996) 17 NZTC 7,469 and *Case T16* (1997) 18 NZTC 8,095.

Commissioner's view

128. The Commissioner accepts that where a journey that would otherwise be undertaken solely for business reasons involves a minor or insignificant detour for a private reason, the journey can be classified as a business journey under the *de minimis* principle.

129. Any added distance travelled for a private reason must be minor or insignificant both as a percentage of the total journey and in itself. This means **both** the percentage of the total journey that the added distance makes up **and** the added distance travelled must be considered to decide whether a private detour is minor or insignificant.

130. The Commissioner considers that private travel that does not exceed **both** the following would be minor or insignificant private travel:

- approximately 5% of the journey; and
- approximately 2 km.

131. See Example | Tauira 12.

Example | Tauira 12 – Minor or insignificant private use

A taxpayer is a self-employed plumber whose home is their base of operations. Their travel between home and work is not private travel because they are within the itinerant work case law exception.

The taxpayer goes to the gym on their way home at the end of the day. The stop at the gym involves the taxpayer travelling an alternative route from the last job of the day to their home workplace that adds 1 km to the journey. The total journey is 17 km.

In this case, the taxpayer's 1 km detour is 5.88% of the journey. The Commissioner considers this would meet the requirement that the taxpayer's private use does not exceed "approximately 5% of the journey". The detour to the gym also meets the requirement that it must not exceed "approximately 2 km". The detour to the gym is minor or insignificant private use and the journey is a business journey.

Vehicles taken home for secure storage or for charging

132. The Commissioner is aware some taxpayers have taken the view that taking a vehicle home for security reasons is sufficient to mean the travel is a business journey and the use is business use (travel undertaken wholly (solely) in deriving income). This has been argued on the following bases:

- The vehicle is essential business equipment and it is necessary for the taxpayer to take it home for security reasons. The transport of the taxpayer between home and work in the vehicle is merely an incidental flow-on consequence or effect of the requirement to take the vehicle home (so the first case law exception applies).
- The taxpayer's home is a workplace (or base of operations) for home to work travel purposes because the taxpayer stores significant business equipment (the vehicle) at home (so the fourth case law exception applies).

133. The Commissioner disagrees with this view (as he did in IS3448).

134. The Commissioner has also been asked to consider whether taking an EV home to recharge the battery is sufficient to mean the travel is undertaken wholly (solely) for business purposes.

135. For use to be business use under subpart DE, the travel must be undertaken by the vehicle wholly in deriving the taxpayer's income. The case law requires that the journey must be undertaken **solely** for business purposes for travel to be undertaken wholly in deriving income. Transport of the taxpayer must not make up **any** part of the journey's purpose but must instead be limited to an incidental flow-on consequence or effect of undertaking the journey.

136. For relevant taxpayers, when a vehicle is taken home for security purposes or charging, the transport of the taxpayer between home and work will, in all but perhaps a very few cases, still be one of the purposes of the journey. Transport of the taxpayer between home and work is a private purpose. This makes the journey a mixed-use journey. None of the journey is counted in calculating the business proportion.

137. Even if on the facts, the dominant purpose of the journey is the transport of the vehicle home for storage or charging, the journey is still a mixed-use journey. The transport of the taxpayer between home and work will still, except in perhaps a very few cases, be more than an incidental flow-on consequence or effect of the journey. The taxpayer saves time, receives shelter from inclement weather, can hold confidential conversations on private matters, and may have a greater degree of personal safety because of travelling by motor vehicle instead of walking or taking public transport. These are all private purposes for travelling by motor vehicle.

Case law exceptions

138. The following paragraphs consider whether the first or fourth case law exception applies (see [33] and [53]) when a vehicle is taken home for security reasons or for charging.

Necessary to transport essential equipment or instruments

139. The Commissioner considers the first case law exception will not usually apply where a vehicle alone (that is, a vehicle that is not carrying equipment or instruments essential to the taxpayer's work) is taken to the taxpayer's home to be stored there overnight for security purposes or for recharging the battery where the vehicle is an EV.

140. The first case law exception requires that the equipment or instruments are used both at home and at work, and this is why they are being transported back and forth – so the taxpayer can continue their work at home. A taxpayer who takes a vehicle home to store or charge it does not use it at home. The vehicle remains parked while it is stored or charged, and the taxpayer does not continue their work at home using the vehicle.

Home as a workplace

141. Whether significant space has been set aside for the storage of business goods at home is one of the factors to consider when determining whether a taxpayer's home is a workplace (or base of operations) for home to work travel purposes (see [58]). This factor is relevant to whether taking a vehicle home for security reasons or to charge the battery makes the taxpayer's home a workplace (or base of operations). None of the other factors listed at [58] are relevant to this question.

142. In *CIR v Schick* (1998) 18 NZTC 13,738 (HC) (a FBT case), it was decided that the storage of a vehicle at home should not be given too much weight in deciding whether the employees' homes were workplaces, given that the issue being considered was whether the travel between home and work was private travel.

143. In *Case Q25* (also a FBT case), the Taxation Review Authority appeared to give some weight to the evidence that the vehicle was taken home because it was unsafe to leave it at the factory. However, other factors were present in the case that led to the conclusion that travel between home and work was income-earning (business) travel and did not give rise to a private benefit to the employees. First, the vehicle was used to transport garments between the factory and the taxpayers' home so that further work could be carried out on the garments there and the garments could be stored there. (One room at the shareholders' home was set aside and used for pressing garments and for unpicking any defective sewing work and refinishing it. Two further rooms at the shareholders' home were set aside and used for storing garments. Up to 5,000 garments may have been stored there at any one time.) Secondly, the taxpayers had a further vehicle that they used purely for private purposes.

144. The Commissioner considers the same reasoning applies for relevant taxpayers and their ability to claim deductions for motor vehicle expenditure under subpart DE. Although *Schick* and *Case Q25* are both FBT cases, the question being answered is essentially the same – whether the travel is business use or private use.

145. The requirements that must be met for travel to be considered business use under subpart DE differ only subtly from the requirements that must be met for travel to be considered not private use for FBT purposes. The business use test for relevant taxpayers (that the travel was undertaken wholly in deriving the person's income) and the private use test for employees (that the travel expenditure, had it been incurred by the employee, would have been wholly, exclusively and necessarily incurred in the performance of the employee's employment duties) are sufficiently similar that they can be summarised in the same way (see [74] and companion item IS 25/02 at [100]).

146. No cases have decided that simply taking a vehicle home for security reasons or to charge the battery is sufficient to make the taxpayer's home (or employee's home, in the FBT context) a workplace or base of operations for home to work travel purposes. Simply storing or charging a vehicle at home does not mean the taxpayer necessarily has a significant amount of space set aside for the storage of business goods at home. It does not mean the taxpayer is carrying out a significant amount of work that is integral to their business at home or that the taxpayer has a significant amount of space set aside for carrying on business activities at home and uses that space for carrying on business activities at home.

147. Therefore, based on *Schick* and *Case Q25*, the Commissioner considers that taking a vehicle home for security reasons or to charge the battery is not of itself sufficient to make the taxpayer's home a workplace or base of operations for home to work travel purposes. If other factors listed at [58] are present, then the taxpayer's home may be a workplace or base of operations, depending on the taxpayer's particular fact situation.

Equivalent to stopping during a business journey to charge an EV

148. Some taxpayers have taken the view that charging an EV at home makes their journeys between home and work business use on the basis that if the taxpayer had instead driven their vehicle from their workplace to a rapid charging station during the workday, and then on to a customer's business premises, the trip to the rapid charging station would have been business use and the first part of a business journey. The Commissioner agrees that the part of the journey to the rapid charging station would have been business use and the first part of a business journey. Stopping during a business journey to charge an EV is incidental to the overall purpose of the journey from the taxpayer's business premises to the customer's business premises. However, that is not what the taxpayer has done if the EV is taken home. The taxpayer has driven the vehicle from work to home, charged it, and driven it from home to work again.

149. Assuming the taxpayer does not fall into any of the four case law exceptions, neither of the journeys (from work to home or home to work) is business use or a business journey. One of the taxpayer's purposes for making the journeys home and back to work again in the EV is still to transport themselves between home and work (ie, each journey has a private purpose). Although charging the EV is also a purpose of the journeys, it does not make the transportation of the taxpayer merely incidental to, or a mere flow-on consequence or effect of, undertaking the journeys.

150. The taxpayer's position is instead analogous to that of a taxpayer who stops on the way home to fill up with petrol. In that case, the stop is incidental to the purpose of the journey and does not affect the private nature of the journey.

Applying summary of case law principles

151. The above conclusions can be supported by applying the case law principles as summarised at [75].

152. First, driving a vehicle home to store or charge it does not mean the travel arises from the nature of the work. Driving a vehicle home to store or charge it differs from transporting goods that the taxpayer uses to perform work, both at work and at home. The first case law exception applies to taxpayers whose work by its very nature requires the taxpayer to have the goods at home with them, such as a musician who requires their instruments at home between performances so that they can be used for practice, or a dentist who takes dental moulds home so they can use them to make prosthetics in their home laboratory in the evenings. While a taxpayer who stores or charges a vehicle at home may carry out work at home in the evenings, this work is typically administrative in nature and the taxpayer does not typically use the **vehicle** to carry out such work. Taxpayers whose home is a workplace (or base of operations) are typically taxpayers who have varying places of work, even if not on a daily basis. No necessary connection exists between driving a vehicle home to securely store or charge it and shifting places of work.

153. Secondly, travel that is undertaken when a taxpayer takes a vehicle home to store or charge it is not typically undertaken "in deriving the person's income" (ie, it is not "on work"). The travel takes place after the end of or before the start of the workday. The travel is private travel between home and work, made necessary at least in part because the taxpayer lives at a distance from their workplace.

Appendix – Legislation

154. Sections DE 1, DE 2(1), (1B), (2), and (3), DE 3, DE 5, DE 7 and CX 17(4B) and related definitions in s YA 1 state:

DE 1 What this subpart does

Apportions motor vehicle expenditure

(1) This subpart sets out the rules for determining the proportion of business use of a motor vehicle to its total use when a person uses a motor vehicle partly for business purposes and partly for other purposes.

Exclusions

(2) This subpart does not apply—

(a) to a company, unless the company is a close company to which section CX 17(4B)(b) and (c) (Benefits provided to employees who are shareholders or investors) applies:

(b) to a person whose only income is income from employment:

(c) to a motor vehicle that is used only—

(i) for the purpose of deriving income; or

(ii) for a purpose that constitutes a fringe benefit.

Application of subpart to close companies

(3) When this subpart applies to a close company to which section CX 17(4B)(b) and (c) (Benefits provided to employees who are shareholders or investors) applies, business use of a motor vehicle by a shareholder-employee of the close company is treated as being business use by the close company.

DE 2 Deductions for business use

Deduction

(1) A person is allowed a deduction for—

(a) expenditure that they incur for the business use of a motor vehicle:

(ab) interest on amounts used to fund, directly or indirectly, expenditure the person incurs for the business use of a motor vehicle, if the person is a close company that has chosen to apply this subpart instead of the FBT rules, in accordance with section CX 17(4B)(c) (Benefits provided to employees who are shareholders or investors):

(b) an amount of depreciation loss for the business use of a motor vehicle.

Costs method or kilometre rate method

(1B) A person can choose under section DE 2B to calculate the total amount of the deduction described in subsection (1)—

(a) under subsections (2) and (4) (the **costs method**) by adding together—

(i) a deduction amount for expenditure, calculated under subsection (2); and

(ii) a deduction amount for depreciation loss, calculated as described in subsection (4); or

(b) by using the kilometre rate method described in section DE 12.

Amount, and timing, of deduction: expenditure

(2) The amount of the deduction allowed in an income year for the expenditure for the business use of the vehicle is calculated using the formula—

expenditure × business proportion.

Definition of item in formula

(3) In the formula in subsection (2), **business proportion** is the proportion of business use of the motor vehicle for the income year, expressed as a decimal, calculated under sections DE 3 to DE 11.

…

DE 3 Methods for calculating proportion of business use

The 2 methods that may be used to calculate the proportion of business use of a motor vehicle are—

(a) actual records, see section DE 5:

(b) a logbook, see sections DE 6 to DE 11.

DE 5 Actual records

To determine the proportion of business use of a motor vehicle, a person may use actual records showing the reasons for and the distance of journeys by a motor vehicle for business purposes. However, when the period covered falls within a logbook term, actual records may be used only if the person and the Commissioner agree.

DE 7 Logbook requirements

Test period

(1) When a logbook is used to establish the proportion of business use of a motor vehicle, a person must select a start date, and keep the logbook for at least 90 consecutive days at a time that represents, or is likely to represent, the average proportion of travel by the vehicle for business purposes during the logbook term.

Record of reasons for, and distance of, journeys

(2) The logbook must record—

(a) the start and end of the 90 day test period; and

(b) the vehicle's odometer readings at the start and end of the test period; and

(c) the distance of each business journey; and

(d) the date of each business journey; and

(e) the reason for each business journey; and

(f) any other detail that the Commissioner may require.

CX 17 Benefits provided to employees who are shareholders or investors

...

Exclusion: election by close company

(4B) Despite subsection (4), subsection (2) does not apply and the benefit is neither a fringe benefit nor a dividend in an income year if—

(a) the benefit—

(i) arises when a close company makes a motor vehicle available to a shareholder-employee for their private use; and

(ii) would, in the absence of this subsection, be a fringe benefit arising under section CX 6; and

(b) the total benefits the close company provides to all employees in the income year are 1 or 2 of the benefits described in paragraph (a); and

(c) the close company chooses to apply subpart DE (Motor vehicle expenditure) for the motor vehicle and the shareholder-employee instead of the FBT rules.

...

YA 1 Definitions

In this Act, unless the context requires otherwise,—

...

business use, for a motor vehicle and for a person, means travel undertaken by the vehicle wholly in deriving the person's income

...

motor vehicle,—

(a) in subpart DE (Motor vehicle expenditure), means a motor vehicle that—

(i) is a road vehicle, whenever or however used; and

(ii) is not a trailer; and

(iii) is of the kind ordinarily used for the carriage of persons or the transport or delivery of goods or animals:[11]

...

11 Note a different definition of "motor vehicle" applies for the purposes of the FBT rules. See the companion item IS 25/02 at [200].

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IS 25/02: FBT – travel by motor vehicle between home and work

Summary | Whakarāpopoto

1. Under the FBT rules, a fringe benefit arises where a motor vehicle is made available to an employee for their "private use". Private use includes travel between home and work and any "other" situation where a "private benefit" is supplied.
2. The courts have read the reference to "other" situations where a private benefit is supplied to mean travel between home and work will amount to private use only if a private benefit arises to the employee from that travel. A private benefit that is only incidental does not cause travel to be private use for the employee.
3. While the courts have viewed travel between home and work as private in nature, the courts have recognised four exceptions to this general rule.
4. Although not stated in the New Zealand legislation, the case law recognises that the four exceptions apply where the travel expenditure, had it been incurred by the employee, would have been incurred by them wholly, exclusively and necessarily in deriving their employment income. This will be the case where the need for the expenditure arises from the nature of the work, and the travel is "on work".
5. Where the case law exceptions apply, the employees are regarded as travelling on work as soon as they leave home and until they arrive home, rather than travelling to or from work. In such cases, the travel between home and work is not private use and is not subject to FBT.
6. Statutory exclusions from FBT may also apply to a home to work travel benefit. Although the legislation requires that a "private benefit" is conferred on the employee for there to be a motor vehicle fringe benefit, practically it can be useful to consider the statutory exclusions first, on the assumption that there is a "private benefit". This is particularly so if the vehicles are not cars, in which case they may qualify for the work-related vehicles exclusion. If none of the statutory exclusions applies, it is then necessary to consider whether there is in fact a private benefit by working through the four case law exceptions and cross-checking the answer against the summary of case law principles and the wholly, exclusively and necessarily incurred test. The statutory exclusions for motor vehicles are discussed from [149].
7. If the motor vehicle has been made available for other types of private use that do not involve travel between home and work on that day, FBT still applies (unless a statutory exclusion covers that use). In other words, if the motor vehicle has been made available for other private use, FBT will apply for the whole day. This is regardless of whether there was also business use on that day, and regardless of whether the employee's travel between home and work was business use. Therefore, the case law exceptions discussed in this item are most relevant where there is a general restriction in place on private use, but travel between home and work is specifically allowed and is not covered by a statutory exclusion.
8. Employers may disregard minor or insignificant private use (*de minimis* private use) when deciding whether travel is private use. The Commissioner's view on what can be regarded as minor or insignificant in the home to work travel context is set out in this item.
9. This item does not cover **pooled** motor vehicles made available to employees for travel between home and work. For more information, see [14], bullet 8.
10. Lastly, although the item's title refers to travel by motor vehicle between home and work, this item is concerned solely with travel between home and work where a motor vehicle has been made available to an employee. It does not consider the tax treatment that applies when an employer helps cover the cost of travel between home and work in the employee's privately owned motor vehicle. For cross references to information on employer allowances and employer-supplied fuel charge cards, see [14], bullet 5. For cross references to information on tax-free reimbursing allowances for travel to a temporary workplace in the employee's own motor vehicle, see [14], bullet 6.
11. All legislative references are to the Income Tax Act 2007, unless otherwise stated.

Who this interpretation statement is relevant to

12. This interpretation statement is most relevant to employers.
13. This statement is also relevant to IR56 taxpayers who are cross-border employees and who have agreed with their employer in a document that they will account for their own FBT liabilities as PAYE income payments.

14. Except where otherwise stated, this interpretation statement is **not** relevant to the following:
    - Self-employed taxpayers and partners in partnerships claiming deductions for motor vehicle expenditure under the specific deductibility provision for motor vehicle expenditure, and to close companies that elect to use the specific deductibility provision for motor vehicle expenditure. These taxpayers should see the companion item **IS 25/01**.
    - Employees considering what deductions to claim in their income tax return. Employees cannot claim deductions for travel expenditure (see from [117]).
    - Landowners who rent out residential property or holiday homes and incur travel expenditure on journeys between their home and the rental properties in doing so. In this case, travel to the rental properties or holiday homes to carry out inspections or maintenance is generally deductible. For more information, see **IR264**, at 7–9.
    - Where the distance travelled by an employee from home to work and back again is more than a reasonable daily travelling distance (ie, would usually take more than two hours). If the round trip is more than a reasonable daily travelling distance, see **OS 19/05**.
    - Employers who pay allowances to employees for private travel between home and work in the employees' own vehicles, or who provide fuel charge cards to employees to buy fuel for private travel between home and work in the employees' own vehicles. For information on taxable allowances (cash benefits) see **IR409** at 3. For information on fuel provided by way of a fuel charge card (free, subsidised or discounted goods and services) see IR409 at 16.
    - Where an employee is travelling to a temporary workplace, if the:
        - employer, instead of supplying a motor vehicle, pays the employee a reimbursing allowance for their additional transport costs;
        - employee will incur the expenditure travelling between home and work in connection with their employment and for the benefit of the employer; and
        - additional distance travelled, except in limited cases, is no more than 70 km per day.

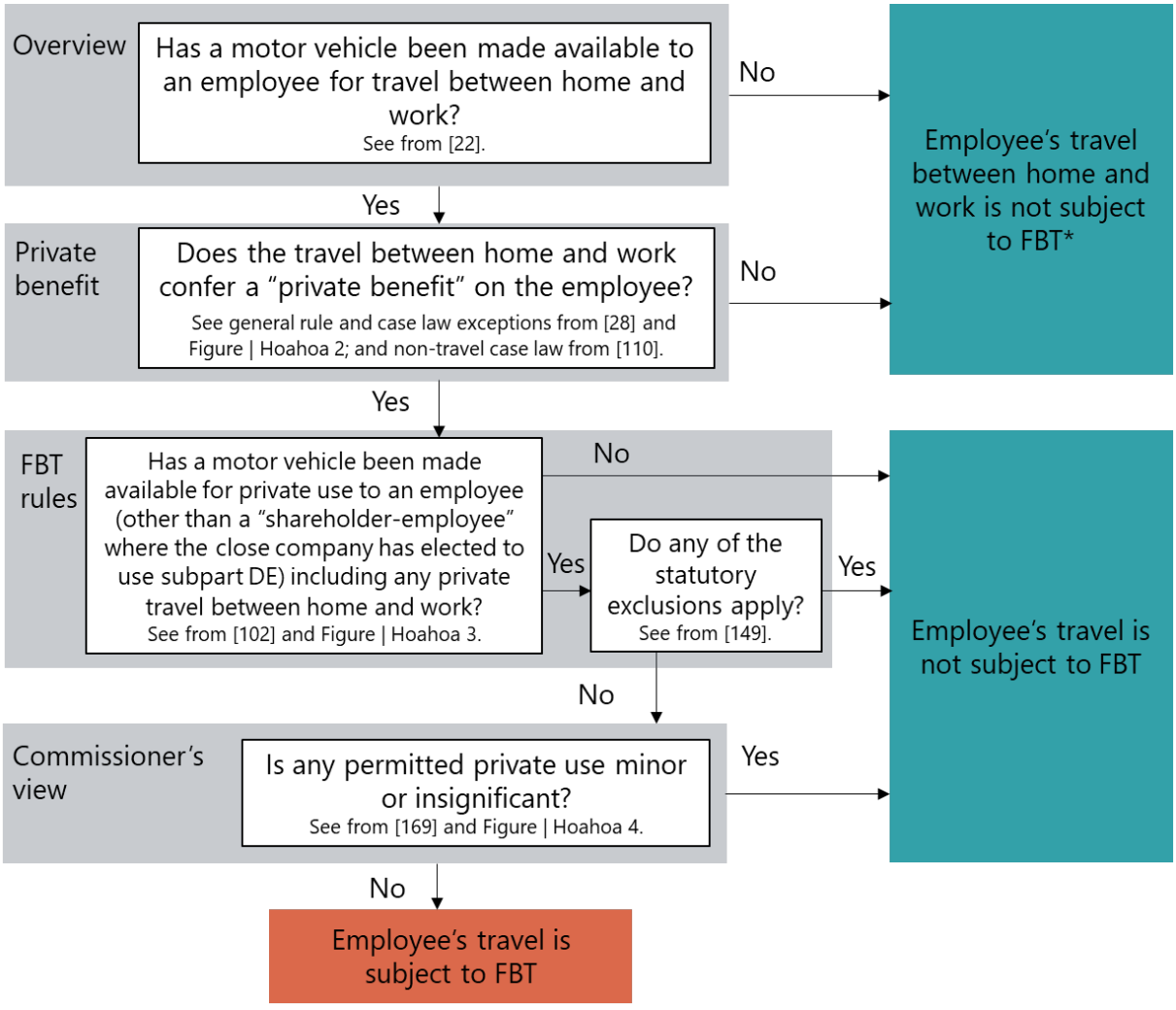
      See **OS 23/01** to determine whether a tax-free reimbursing allowance could be paid to the employee.
    - Employers who supply their employees with transport by heavy vehicle that is designed principally for the carriage of passengers such as a bus. Such travel may be an unclassified fringe benefit (ss CX 2(1)(b)(ii) and (c), CX 19B and CX 37). For information on transport by heavy vehicle, see **IS 17/07** from [60].
    - Employers who supply motor vehicle fringe benefits under pooled vehicle arrangements. Special rules apply to pooled vehicles for FBT purposes (s CX 8 and sch 5, cl 2). For general information on pooled vehicles, see **IS 17/07** at [242]. For pooled vehicles taken home only so they are available for out-of-hours business use, see IS 17/07 at 14.

Analysis | Tātari

15. This analysis is divided into five sections:
    - overview of the FBT rules relevant to travel between home and work (from [22]);
    - private benefit (from [28]);
    - FBT rules (from [102]);
    - minor or insignificant private use and the Commissioner's view (from [169]); and
    - vehicles taken home for storage or charging (from [179]).
16. The first section overviews the FBT rules relevant to travel between home and work.
17. For those familiar with the FBT rules, the second section covers the case law on the meaning of private benefit that has been decided specifically in the home to work travel context. (The FBT rules require an employer to pay FBT if they supply a fringe benefit to an employee. A fringe benefit arises where an employer makes a motor vehicle available to an employee for their private use. Private use includes travel between home and work and any other travel that gives rise to a private benefit to the employee. The courts have interpreted the reference to "any other travel" in the definition of private use to mean that travel between home and work is private use only if it confers a private benefit on the employee.)

18. The third section covers the FBT rules in more detail. The FBT rules are found mainly in subpart CX (see the definition of "FBT rules" in s YA 1, and s RD 25 for a list of the provisions that make up the rules). This section covers both the legislation and the case law on words and phrases used in the FBT rules. It covers the non-travel case law relevant to the meaning of private benefit, the concepts of availability for private use and incidental private use, the special rules for shareholder-employees, and the statutory exclusions (see Figure | Hoahoa 3 at [104]). **We suggest readers who are not familiar with the FBT rules read this section first.**
19. The fourth section covers the Commissioner's view on minor or insignificant private use (*de minimis* private use) in the context of travel by motor vehicle, mentioned at [8].
20. The final section covers the Commissioner's position on vehicles taken home for secure storage or electric vehicles (EVs) taken home for charging.
21. See Figure | Hoahoa 1 for an overview of the analysis. (The analysis on vehicles taken home for storage or charging stands on its own, so is not covered in the figure.)

Figure | Hoahoa 1: Travel by motor vehicle – subject to FBT



* However, the employee's travel will be subject to FBT for the day if the motor vehicle has been made available for other use that is private use on that day (unless a statutory exclusion covers that other use, or it is minor or insignificant private use).

Overview of the FBT rules relevant to travel between home and work

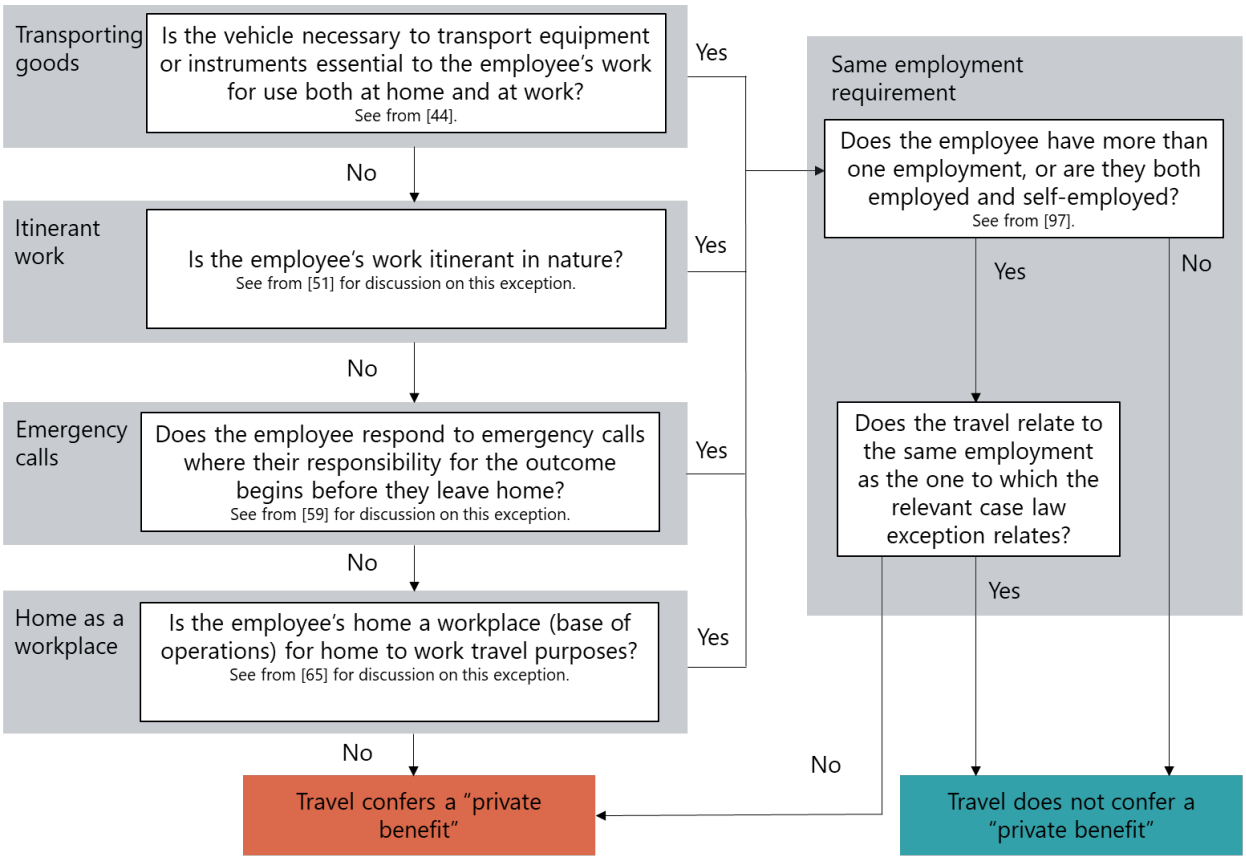
22. Under the FBT rules, an employer who supplies a "fringe benefit" to an employee is liable to pay FBT (s RD 26(1)).
23. In the home to work travel context, a fringe benefit is, broadly, a benefit that:
    - is supplied by an employer to an employee in connection with their employment;
    - arises when a motor vehicle is made available to an employee for their private use; and
    - is not a benefit that is excluded from being a fringe benefit (ss CX 2(1) and CX 6(1)).
24. In this context, private use includes:
    - the employee's use of the vehicle for travel between home and work; and
    - any other travel that confers a private benefit on the employee (s CX 36).
25. In the FBT rules, "motor vehicle" takes the definition in s 2(1) of the Land Transport Act 1998 and does not include a vehicle where its gross laden weight is more than 3,500 kg (s YA 1, "motor vehicle" para (b)). (Usually, a 12-seater minibus would be a motor vehicle under the FBT rules, but anything larger would not.)
26. The FBT rules cover arrangements to supply benefits (s CX 2(2) and (5)). They also cover past and future employment as well as present employment (s CX 2(3)).
27. For the legislation, see the Appendix to this statement.

Private benefit

28. The meaning of private benefit is key to whether an employer is supplying a fringe benefit subject to FBT when they supply a motor vehicle to an employee for travel between home and work. Therefore, the case law on the meaning of private benefit in the travel between home and work context is discussed first in this item. (There is further discussion on the meaning of private benefit more generally in the section covering the FBT rules in more detail.) **Readers not familiar with the FBT rules may wish to read about the FBT rules (from [102]) before reading this section.**
29. This section of the item covers:
    - the general rule for home to work travel expenditure (from [32]);
    - the four case law exceptions (from [40]):
        - necessary to transport essential equipment or instruments;
        - taxpayer's work is itinerant;
        - emergency calls (case law exception); and
        - home as a workplace;
    - same employment or income-earning activity requirement (from [97]); and
    - summary of case law principles (from [99]).
30. As a rule, employer-supplied travel between home and work confers a private benefit on an employee. However, in four recognised situations it does not (the four case law exceptions). The case law exceptions apply where the need for the travel arises from the nature of the work, and the travel is on work. They only apply to travel between home and work undertaken in performing employment duties for the same employment as the one to which the case law exception applies.

31. See Figure | Hoahoa 2 for an overview of this section.

Figure | Hoahoa 2: Travel by motor vehicle between home and work – private benefit



General rule for home to work travel benefits

32. Travel between home and work must give rise to a private benefit for an employee for the travel to result in a fringe benefit subject to FBT. If no private benefit exists, there is no private use and no fringe benefit.

33. The case law on travel between home and work has concluded, as a rule, that expenditure on travel between home and work is private expenditure: *Ricketts v Colquhoun* [1925] AC 1 (HL). Case law exceptions to the general rule are discussed from [40].

34. The general rule has stood in the United Kingdom (UK) for over 100 years.[1] New Zealand decisions on travel between home and work have upheld the general rule. Although there have not been any cases decided in New Zealand on travel between home and work since 1998, recent case law decided in overseas jurisdictions such as Australia and the UK continues to uphold the general rule. The New Zealand courts have had regard to cases decided in these jurisdictions in earlier New Zealand home to work travel cases.

Rationale for the general rule

35. Lord Denning explained the reasons behind the general rule in *Newsom v Robertson* [1952] 2 All ER 728 (CA). *Newsom v Robertson* involved a barrister who worked at his chambers or in court during the day but often took papers home and continued to work there for several hours. Lord Denning explained that when income tax was introduced, most people lived and worked in the same place. Therefore, the court considered that the need for travel between a taxpayer's home and workplace arose from the taxpayer's choice to live away from their work.

1 Before *Ricketts v Colquhoun*, see *Cook v Knott* (1887) 2 TC 246 (QB).

36. In *Lunney v FCT* 11 ATD 404 (HCA), the taxpayer worked partly at home and argued that in travelling between his home and workplace he was travelling between two places of work. In their joint judgment, Williams, Kitto and Taylor JJ referred to *Newsom v Robertson* and commented that, while few taxpayers can choose whether to live at their workplace, the purpose of the taxpayer's journeys was at least as much to enable the taxpayer to live at his home, as to get to his place of work (at 413):

> None of the members of the [Court of Appeal] were prepared to assent to the proposition that the taxpayer's journeys were for the "purpose" of his profession; in the language of Romer LJ:
>
> > "The object of the journeys between his home and place of work, both morning and evening, is not to enable the man to do his work but to live away from it" (1953) 1 Ch, at p 17.
>
> The fact that few taxpayers are free to choose whether they will live at their place of work or away from it may appear to invest this statement with a degree of artificiality. But, even in these modern times, they still have, within limits, the right to choose where their homes shall be so that a taxpayer's daily journeys between his home and place of work are rendered necessary as much by his choice of a locality for his residence as by his choice of employment or occupation. And indeed the purpose of such journey [sic] is, at least, as much to enable him to reside at his home as to attend his place of work or business.

37. In *FCT v Collings* (1976) 76 ATC 4,254 (NSWSC) Rath J also noted that the decision in *Ricketts v Colquhoun* was based on ways of living that are no longer prevalent. However, changes in the way people live and work have not resulted in the general rule being overturned. In *Lunney v FCT* Dixon CJ commented (at 405) that the rule was well established and if it were to be changed, the legislature, not the court, should change it.

38. For more recent decisions upholding the general rule in the Australian and UK courts, see the decisions of the Federal Court of Australia (Full Court) in *Bechtel Australia Pty Ltd v Commissioner of Taxation* [2024] FCAFC 33 and *John Holland Group Pty Ltd v FCT* [2015] FCAFC 82 and of the UK High Court, Chancery Division in *Jackman v Powell* [2004] EWHC 550.[2]

Temporary workplaces

39. In New Zealand, the general rule applies regardless of whether the travel is to a temporary workplace: *Kirkwood v Evans* [2002] EWHC 30.[3] However, the approach in OS 19/05 on employer-provided travel to a distant temporary workplace may apply. There is also the possibility of paying a tax-free allowance for additional transport costs in some cases. See [14].

Four case law exceptions

40. Four case law exceptions can apply to mean travel by an employee between home and work in a motor vehicle is not subject to FBT.

41. The four exceptions are as follows (*FCT v Genys* (1987) 77 ALR 527 (FCA) at 531):

- A vehicle is necessary to **transport equipment or instruments** that are essential to the employee's work between the employee's home and workplace.
- The employee's work is **itinerant**.
- The employee responds to **emergency calls** at home and their responsibility for the outcome begins before they leave home.
- The employee's **home is a workplace** (or base of operations). To satisfy this exception, the employee must meet specific criteria. It is not sufficient that work is carried on at home (even if it is a condition of the employee's employment contract).

42. The four exceptions apply to individual instances of travel by a person in a motor vehicle. They do not apply to 24-hour periods or to vehicle types, as the statutory FBT exclusions do (see from [148]).

43. The four exceptions can overlap: *Garrett v FCT* (1982) 82 ATC 4,060 (NSWSC).

2 See also, decisions of the Australian Administrative Appeals Tribunal in *London v FCT* (2022) 2022 ATC 10-625, *Mfula v FCT* (2021) 2021 ATC 10-588, *Masters v FCT* (2017) 2017 ATC 10-460, *Vakiloroaya v FCT* (2017) 2017 ATC 10-446, *Hill v FCT* (2016) 2016 ATC 10-430, *Kaley v FCT* (2011) 2011 ATC 10-193 and *Brandon v FCT* (2010) 2010 ATC 10-143 and of the UK First-tier Tribunal (Tax Chamber) in *Daniels v Revenue and Customs Commissioners* [2018] UKFTT 462, *White v Revenue and Customs Commissioners* [2014] UKFTT 214, *Meynell-Smith v Revenue and Customs Commissioners* [2013] UKFTT 113 and *Kenyon v Revenue and Customs Commissioners* [2011] UKFTT 91, of the UK Upper Tribunal (Tax and Chancery Chamber) in *Samadian v Revenue and Customs Commissioners* [2014] UKUT 13, and of the UK Special Commissioners in *Lewis v Revenue and Customs Commissioners* [2008] STC (SCD) 895 and *Warner v Prior* (2003) Sp C 353.

3 Note that, although the principle is drawn from UK case law, the legislation has been amended in the UK to allow a deduction for travel to a temporary workplace.

Necessary to transport essential equipment or instruments

44. The first case law exception applies where a vehicle is necessary to transport equipment, instruments or other items (goods) that are essential to performing the employee's employment activities, both at the employee's home and at their workplace. In those circumstances, the vehicle is regarded as used to transport the goods. The transport of the employee is regarded as incidental or ancillary to the transport of the goods. The travel between home and work is not regarded as private use for the employee.
45. For this exception to apply:
    - it must be necessary (because of the nature of the employment activity) to transport the goods between the employee's workplace and their home to enable them to carry out the employment activity partly at their home; and
    - a vehicle must be required to transport the goods, which may be because of their bulk or because their value, sensitivity or other special characteristics make it impractical to transport them without the use of a car: *FCT v Vogt* (1975) 75 ATC 4,073 (NSWSC); *Scott v FCT (No 3)* (2002) 2002 ATC 2,243 (AATA).
46. "Bulky" in this context means "cumbersome": *Re Crestani & FCT* (1998) 98 ATC 2,219 (AATA). Whether goods are bulky generally depends on their weight and the relative ease of transporting them: *Re Gaydon & DFC of T* (1998) 98 ATC 2,328 (AATA).
47. A requirement to transport sensitive work-related information is not, on its own, sufficient to bring an employee within the exception: *Vakiloroaya v FCT* (2017) 2017 ATC 10-446 (AATA).
48. In *Case S26* (1994) 17 NZTC 7,182 (TRA) and *Case Q25* (1993) 15 NZTC 5,124 (TRA) (both clothing manufacturer cases) one of the factors considered in reaching a conclusion that travel between home and work was not private use was that in each case a vehicle was used for transporting garments between the factory and the shareholder-employees' homes for work to be performed on them.
49. See also *Brandon v FCT* (2010) 2010 ATC 10-143 (AATA) in which case the taxpayer, a bombardier who transported his deployment kit between his home and the barracks in his car, was unable to prove that he had met the requirements to qualify for the exception.
50. Examples might include musicians who transport musical instruments and equipment to and from their homes to be used for practice between performances, and clothing manufacturers who transport garments between their factories and homes to carry out part of the manufacturing process (such as finishing work or test washing) there. See examples from [101].

Employee's work is itinerant

51. The second case law exception applies where the employee's work is itinerant.
52. An employee's work is itinerant if the:
    - employee's **home is their base of operations**;
    - **nature of the employee's employment is such that travel is essential** to performing their employment duties;
    - employee must **undertake work at various workplaces during the course of a day; or the sequence of workplaces and the periods of time spent by the employee at each workplace vary and are unpredictable** so it is impractical for the employee to perform their employment duties without the use of a car; and
    - employee can be regarded as **travelling in the performance of their work from the time of leaving home**.
53. See *Horton v Young* [1971] 3 All ER 412 (CA), *Re Gaydon, FCT v Wiener* (1978) 78 ATC 4,006 (WASC) and *FCT v Genys*.
54. *Wiener* involved a teacher who taught at five different schools from Monday to Thursday and on Fridays taught at one school and did the administrative work relating to the teaching programme. The court considered the employment was itinerant, as the nature of the job made travel in performing the duties essential. It was an implied term of the employment that the employee should provide her own means of transport. It was necessary for the employee to travel by car to follow her teaching timetable, and she could be regarded as travelling in the performance of her duties from the time she left home until the time she returned home. In contrast, *Genys* involved an agency nurse who worked at different hospitals. The court held that a lack of permanent employment at one hospital was not enough for the taxpayer's work to be itinerant. The court considered the taxpayer's duties did not begin until she arrived at the hospital. *Horton v Young* and *Re Gaydon* both involved self-employed taxpayers, but the principle applied in the cases was the same as in *Wiener* and *Genys*.

55. Note the conditions at [52] must be met by the individual employee – the exception does not apply to occupations (although some occupations will have more employees working in them whose work is itinerant than others).
56. An individual who chooses to move from place to place and take up several different jobs sequentially as an employee is not regarded as itinerant in this context: *Hill v FCT* (2016) 2016 ATC 10-430 (AATA).
57. Travel to the first job of the day and travel home from the last job of the day is not private use for employees whose work is itinerant. If an employer supplies a vehicle to an employee to undertake the travel, there is no fringe benefit for FBT purposes.
58. Examples include tradespeople, service engineers and salespeople, in all cases where the conditions listed at [52] are met. See examples from [101].

Emergency calls – case law exception

59. The case law exception for emergency calls differs from the statutory exclusion from FBT for emergency calls relating to health, life and the operation of essential machinery or services. For information on the statutory exclusion, see from [154].
60. The third case law exception applies where an employee is required to travel in response to emergency calls they receive at their home. For the exception to apply, the nature of the work must require that part of the employee's work is carried out at home and the employee's responsibility for completing the task to which the call relates must begin while the employee is still at home: *Owen v Pook* [1970] AC 244 (HL).
61. The exception does not extend to ordinary travel to and from work undertaken by these employees. It applies only to the travel they undertake in response to an emergency call (including the trip home afterwards): *FCT v Collings*.
62. Employees who are called in at short notice to cover a shift for an employee who is unwell (such as a pilot or health professional) are not covered by this exception: *Nolder v Walters* (1980) 15 TC 380 (KB), *FCT v Genys* and *Pitcher v DFC of T* (1998) 98 ATC 2,190 (AATA).
63. Similarly, employees whose work requires them to return to the office in the evenings or at the weekend to carry out a particular task (eg, to ensure the success of a scientific experiment) are not covered by this exception: *Case M99* (1980) 80 ATC 691 (CTBR).
64. Examples include doctors and computer consultants who give advice over the telephone from their home but who must travel to their workplace to resolve the issue if it cannot be resolved over the telephone. However, because of the statutory exclusion from FBT for emergency calls mentioned at [59] (which applies for a 24-hour period), reliance on this exception is expected to be rare in the New Zealand FBT context.

Home as a workplace

65. The fourth case law exception applies where an employee's home is a workplace for home to work travel purposes. This exception requires more than that some work is carried out at home.
66. Recently, working from home has become increasingly common due to both changes in technology and social changes brought about by the COVID-19 pandemic. However, choosing to work from home does not (of itself) affect whether a person's home is their workplace (or base of operations) for home to work travel purposes.
67. Personal choice alone has never been a basis for creating a home workplace (or a base of operations at home). While people will often make personal choices about whether to work from home part of the time (and it is not for the Commissioner to comment on such choices), other factors must be present for an employee's home to be a workplace (or base of operations) of the employer. The case law has always confirmed that, for employees, a home workplace or base of operations at home will exist in only exceptional circumstances. The most recent UK and Australian cases involving employees (decided in 2008 and 2024 respectively) have done so – see [80].

68. The home as a workplace exception is best understood as a variation on the second case law exception for itinerant work. The person must be required, **by the nature of the work itself**, to do the work in two (or more) places. This was discussed in *Taylor v Provan* [1974] 1 All ER 1,201 (HL), per Lord Wilberforce at 1,213:

> To do any job, it is necessary to get there: but it is settled law that expenses of travelling to work cannot be deducted against the emoluments of the employment. It is only if the job requires a man to travel that his expenses of that travel can be deducted, ie if he is travelling on his work, as distinct from travelling to his work. The most obvious category of jobs of this kind is that of itinerant jobs, such as a commercial traveller. **It is as a variant on this that the concept of two places of work has been introduced: if a man has to travel from one place of work to another place of work, he may deduct the travelling expenses of this travel, because he is travelling on his work, but not those of travelling from either place of work to his home or vice versa. But for this doctrine to apply, he must be required by the nature of the job itself to do the work of the job in two places: the mere fact that he may choose to do part of it in a place separate from that where the job is objectively located is not enough**. [Emphasis added.]

Determining whether home is a workplace

69. The factors relevant to whether an employee's home is their workplace are whether:

1. there are **sound business reasons** for the employee working from home (ie, whether the expenditure has been "necessarily incurred");
2. a **significant amount of work** is carried out at home;
3. there is **significant storage of business goods or equipment** at home;
4. **significant space is set aside and used** for work activities at home; and
5. the activities the employee carries out at home are **closely integrated with the business**. See *CIR v Schick* (1998) 18 NZTC 13,738 (HC).

70. Subject to the following paragraphs, it is necessary to consider all the factors listed at [69] and weigh them to get an overall picture of whether an employee's home is a workplace (or base of operations) for home to work travel purposes. Different factors may carry different weight depending on the nature of the business.

71. For example, where a business needs substantial tangible assets to be run (eg, a manufacturing business) there may be a home workplace if some or all of the tangible assets are located at the employee's home, they take up a significant amount of space there, and they are regularly used there in carrying on the business. (See, for example, the clothing manufacturer cases discussed from [93] involving shareholder-employees.) However, where a business does not need substantial tangible assets to be run, or the nature of the business means that the substantial assets move from location to location, it is more useful to consider whether the employer had sound business reasons for requiring the employee to work at home part of the time and whether the activities the employee carries out at home are closely integrated with the business.

72. The first factor, sound business reasons, is particular to the case law for employees. It relates to the requirement that, had the travel expenditure been incurred by the employee instead of the employer supplying the travel to the employee, it would have been "necessarily incurred" in deriving the employee's employment income. (See from [110] for discussion on why the necessarily incurred test is relevant in the New Zealand context.) The other four factors relate to both employees and the self-employed. They go to whether the expenditure is "wholly and exclusively" (solely) incurred in deriving income.

73. The home workplace is referred to as a base of operations in some case law. The relevant cases take the approach that usually, when considering whether expenditure on travel between home and work is private use, the first step is to identify the employee's base (or bases) of operations. If the base of operations is not at the employee's home, travel between the employee's home and their base of operations is private use. This is because the expenditure has been incurred at least partly for the private purpose of maintaining the employee's home at a distance from their base of operations.[4]

4 See *Jackman v Powell, Kenyon v Revenue and Customs Commissioners* [2011] UKFTT 91 (TC), *Meynell-Smith v Revenue and Customs Commissioners* [2013] UKFTT 113 (TC), *Samadian v Revenue and Customs Commissioners* [2014] UKUT 13 (TCC), *White v Revenue and Customs Commissioners* [2014] UKFTT 214 (TC), *Daniels v Revenue and Customs Commissioners* [2018] UKFTT 462 (TC) and *Taylor v Revenue and Customs Commissioners* [2020] UKFTT 416 (TC). These cases involve self-employed taxpayers and are discussed in the companion item IS 25/01 from [70].

74. For there to be **sound business reasons** for an employee working from home, it is not sufficient that a contractual term states an employee will work partly at home. The travel expenditure must be of a type that, if it had been incurred by the employee, would have been necessarily incurred in deriving their employment income. This means it must be a contractual requirement for **every person** performing the role in question that they will undertake that type of travel. It cannot be the employee's private circumstances that cause them to work partly from home, so that only they (or they and a few other employees in the same role who negotiate similar arrangements) undertake that type of travel. Further, the expenditure must be **necessary to the role** (ie, objectively viewed, the contractual term requiring the travel must be a requirement of the role).
75. Where one or some employees performing a role carry out more complex work at home due to distractions in the office (for efficiency purposes) this would be travel caused by the employee's private circumstances and choices and therefore, private travel.
76. However, for these purposes, an employee's private circumstances are different from their personal abilities. In exceptional cases, where an employee is uniquely qualified to perform a role, their personal abilities may mean sound business reasons exist for them working from home, and travel between home and work will not be private use. This is because, if the employee is the only person able to perform the role, their circumstances may shape the role's requirements. To decide whether a particular case is an exceptional case, it is necessary to consider the employee's role in the employer's business and why the employer agreed to the arrangement.
77. For example, in *Taylor v Provan* it was held that a director's two homes (in Canada and the Bahamas) were genuinely his workplaces (bases of operations). This was because it was a term of his appointment to the office (of special director of mergers and amalgamations) that he would carry out most of the required tasks from his two homes and would travel to London only from time to time to carry out work there as necessary. He was the only person who had the specialist skills, knowledge and business contacts needed to carry out the required tasks. This meant every person who held the office (in this case, only Mr Taylor) had to undertake the travel to and from London. The requirement to travel, viewed objectively, was a requirement of the office (because part of the work had to be carried out in London). It followed that the travel expenditure was necessarily incurred.
78. It would have cost the company far more to reimburse the director's accommodation and meal expenses in London for the duration of his directorship than to pay for his travel to London from Canada and the Bahamas. Therefore, the company had sound business reasons for requiring the travel. However, the sound business reasons factor is inextricably linked to the necessarily incurred requirement. While agreeing to allow some employees to work from home part of the time saves the employer rent, and so the employer might see this as a sound business reason for agreeing to allow some of their employees to work from home part of the time, the sound business reasons requirement is not met unless **every** employee performing the role in question has the same arrangement **and** the employees are a unique group of individuals whose skill set cannot be secured otherwise. It will be only then that, objectively viewed, the requirement to travel between home and work is one of the job requirements as a result of an employee's personal abilities.
79. More generally, travel expenditure will be a requirement of the role, objectively viewed, if the nature of the work requires the travel. For example, in *Schick*, the employees effectively ran the employers' earthmoving business from both their homes and the earthmoving sites, travelling between the two as needed (see from [90]). The employers did not require their employees to report to a business base. This was understandable because the earthmoving sites changed over time.
80. Other observations from the case law include the following:
    - A person who is on-call 24 hours a day, 7 days a week has a workplace at their home, as they would otherwise never be able to leave their workplace. However, the home workplace exists only in relation to their on-call work. Travel between home and work to carry out their everyday work (ordinary commuting) is private travel: *FCT v Collings*.
    - Where an employee performs work at home as a matter of personal preference, home is not a workplace for the employee: *Burton v FCT* 79 ATC 4,318 (WASC).
    - It is not enough that an employee is obliged to travel under their employment contract with the employer. If the travel is not integral to the employer's business, then the travel confers a private benefit on the employee and there is an FBT obligation for the employer: *Fitzpatrick v IRC (No 2)* [1994] SLT 836 (HL).
    - If there is nothing specific to the duties that requires them to be carried out at home, then employer-provided travel between home and work to carry out the duties confers a private benefit on the employee: *Miners v Atkinson* [1995] STC 58 (Ch).

- When an employee chooses to take up an opportunity offered by their employer to work part of the time from home, but is not uniquely qualified to perform their role, employer-provided travel between home and work confers a private benefit on the employee: *Kirkwood v Evans*.
- Employer-provided travel between home and work does not confer a private benefit on an employee if, objectively viewed, the employee's role requires the travel to be undertaken. However, it is not enough that the employee's employment contract requires the travel. In some cases, it is necessary to "wield a razor" to detach an obligation that is not, objectively viewed, one of the duties of the employment from all the other obligations imposed on the parties under the employment contract: *Hinsley v Revenue and Customs Commissioners* [2007] STC (SCD) 63.
- The requirement that the travel between home and work must, viewed objectively, be a requirement of the employee's role is not overridden by other factors. It applies, for example, regardless of whether the employee has had the right to work at home part of the time since their employment began, the employee can prove they would not have taken on the role at all if they had not been permitted to work at home part of the time, or the employer has supplied the office furniture and equipment for the employee's home office and pays the insurance premium for these or has paid for the power and telephone line connections at the home office. Nor is it possible for an employer to divide a role artificially into two roles, one of which is purely office-based and one of which allows both office-based and home-based working: *Lewis v Revenue and Customs Commissioners* [2008] STC (SCD) 895.
- If employees are travelling while "rostered on", so are being paid by and under the control of the employer while travelling, this will only affect the nature of the travel if the location of the workplace is "remote" (ie, remote from all places offering the services required to live an ordinary life, such as schools, hospitals, and shops, as well as remote from the employee's home): *John Holland Group Pty Ltd v FCT*. Employees who travel to remote workplaces while they are not rostered on are not travelling "on work": *Bechtel Australia Pty Ltd v Commissioner of Taxation*. However, see also, OS 19/05, which sets out the Commissioner's position on travel to a distant workplace. To the extent that OS 19/05 is inconsistent with the home to work travel case law, it overrides the case law.

81. Some taxpayers have argued the **sound business reasons** factor is met if their employees' employment contracts state they will work partly at home and partly at the employer's business premises (hybrid workplace approach) and will travel between home and work (or home and other locations for business reasons) as required. This saves the employer the cost of incurring rent on business premises that can accommodate all employees on every business day. However, as discussed above, it is not sufficient that an employee's employment contract states they will carry out some of the work at home and travel between home and work as required. The travel must be required by every person carrying out the role. It must also be a requirement of the role, objectively viewed. This means the need for the role to be performed in two locations must arise from the nature of the work. If the role could be performed just as easily full-time in the employer's office, the need for the travel does not arise from the nature of the work.

82. In summary, **sound business reasons** is a high threshold to meet. It brings with it a requirement to show that **every person who carries out that role must undertake the travel** and that, **objectively viewed, the travel is a requirement of the role**. The test is directed at whether the travel expenditure, had it been incurred by the employee, would have been necessarily incurred. It typically covers employees who are similar to itinerant workers but do not meet all the criteria to fall within the itinerant work exception, such as the employees in *Schick* (see from [90] below).

83. In rare cases, it will cover a unique employee or small group of employees who is or are the only people with the skills necessary to perform the role; and whose skills cannot be secured if all the work is to be performed at the employer's business premises, such as Mr Taylor in *Taylor v Provan*. Therefore, it becomes a requirement of the role that the work is performed in more than one location.

84. The third and fourth factors (**significant storage of business goods and equipment at home** and **setting aside significant space at home for business use**) do not of themselves make a home a place of work or business. Whether these factors are relevant depends on:
    - the nature of the employment duties;
    - whether the goods and equipment stored at home are necessary for the performance of the employment duties; and
    - the space requirements of the activity.

85. Changes in technology mean significant space or significant storage of tangible goods may no longer be necessary for carrying on an employer's business activity at a home. Technology has also made it easier for employees to carry out some of their work outside the office or factory environment. This does not mean that setting aside a desk and chair in a room (or even a small room) at home to be used solely for work purposes is now considered to amount to setting aside "significant space".

86. Instead, for these reasons, the Commissioner considers that the presence or absence of the second to fourth factors (the second factor is **whether a significant amount of work is carried out at home**) does not necessarily determine whether travel between home and work is private travel. A home still retains the characteristics of a home, even though some business goods may be kept there, some space may be set aside for carrying on business activities there, and some employment duties may be performed there.

87. Setting aside space for carrying out business activities at home or storing business goods at home and performing work at home will make the employee's home a workplace (or base of operations) for home to work travel purposes only if the space set aside for carrying out work or storing goods is significant, the employment duties require the space and if the goods stored at home are necessary for and used in performing the employment duties. Even then, if the space set aside or goods stored at home are used only rarely, travel between home and work may be private travel.

88. Although choosing to work partly at home does not make a home a workplace, choosing to establish a facility at home (with significant space set aside for carrying on particular work, and/or significant space set aside for storage of work items), is different to choosing to work at home where no significant space is required at home by the work activity (either for carrying on the activity or for storage). Once a facility has been established at home, the taxpayer may have no choice but to carry out part of their work at home (because they do not have access to such a facility elsewhere).

89. If a business does not require significant tangible assets to run, or the significant tangible assets shift from location to location, the second to fourth factors listed at [69] will be less important in deciding whether an employee's home is a workplace (or base of operations) than the first and fifth factors (**sound business reasons**, and whether the **activities the employee carries out at home are closely integrated with the business**).

90. For example, in *Schick*, one of the issues was whether it had been open to the Taxation Review Authority to conclude, on the facts, that the employees' homes were also workplaces. In *Schick*, the taxpayers carried on business as transport operators and earthmoving contractors. They supplied vehicles to their foremen. The foremen used the vehicles to transport themselves, fuel and grease, and other items necessary for the operation of earthmoving equipment to remote worksites where they and other employees operated the earthmoving equipment. The taxpayers had also supplied a mechanic they employed with a van that he used to service both the transport vehicles and the earthmoving equipment. The taxpayers' employees usually travelled direct from home to the worksites and were paid from the time they left home to the time they returned home. The foremen were paid for an extra half hour a day to do clerical work and had to keep their daily records at home. At times, the foremen kept oil or grease and a few tools at their homes. The taxpayers gave the foremen cards that allowed them to buy fuel, oil and grease. The taxpayers expected their foremen to keep stocks of oil and grease sufficient to ensure the smooth running of the earthmoving equipment. The foremen had discretion to discuss the progress of work with customers.

91. Applying the factors set out at [69], Gallen J concluded that the employees' homes were workplaces for FBT purposes. Gallen J noted three of the five factors had some application to the employees. He considered that these three factors taken together were sufficient for the employees' homes to be workplaces. Gallen J made the following comments in relation to the three factors:

    - There were **sound business reasons** for the employees working from home. The employees were required by their employers to keep their daily records at home. They had to be available there for consultation with clients and for emergency purposes.
    - The activities carried on at the employees' homes were **closely integrated with the taxpayers' business**. The employees effectively operated and managed the taxpayers' business from their homes to the work sites.
    - The storage of work vehicles at the employees' homes would go some way towards showing there was **significant storage of business goods and equipment** at the employees' homes. The court noted, however, that **this factor should not be given too much weight given the issues in the case**. In the context of the employers' business (which involved work carried out at remote work sites and required the employees to be available at their homes for consultation with clients or to respond to emergencies), the vehicles were taken to the employees' homes and kept there to be available for work-related travel.

92. Gallen J also approved Judge Willy's view in the Taxation Review Authority (see *Case T5* (1997) 18 NZTC 8,024) that a place would not be a "home" for FBT purposes if the home were also a workplace.

93. In *Case R37* (1994) 16 NZTC 6,208 (TRA), it was held that travel from and to the shareholder-employees' home was travel from and to a second workplace. The company carried on the business of screen-printing. The actual printing and screening work was carried out at the company's factory. Test washing of sample garments (to check for the adherence of inks and dyes) was carried out at the shareholder-employees' home on most days, as the factory had no washing facility. Preparation of artwork and clerical work was also carried out at the shareholder-employees' home.[5]

94. In *Case S26*, the shareholder-employees' home was also considered to be a workplace. The company's clothing manufacturing business had initially been conducted from home and was later expanded to the factory. Although much of the manufacturing was carried out at the factory, finishing work continued to be done at home.

95. In *Case Q25*, garments manufactured at the company's factory were taken to the shareholder-employees' home for finishing off work to be carried out on the garments. It was held that the vehicles were used for travel between home and work for income-earning purposes.

96. See examples from [101]. Further cases that consider whether a home is a workplace for the self-employed (taking a base of operations approach) are discussed in the companion item IS 25/01 from [70] (and listed in this item at [73], footnote 4).

Same employment requirement

97. Travel between a home workplace and another workplace is income-earning travel (and does not give rise to a private benefit) only where the two workplaces relate to the same employment or income-earning activity: *FCT v Payne* (2001) 2001 ATC 4,027 (HCA).

98. Travel between the workplaces of two different employments or of an employment and another income-earning activity is private travel. Therefore, if:

- an employee has two jobs, even if their home is a workplace in relation to their first job, travel between the employee's home and a workplace relating to their second job is private travel; or
- an individual is employed to work at a workplace away from their home and has a home workplace (base of operations) for a separate income-earning activity they carry on at their home, travel between the employee's home and their workplace to carry out the duties of their employment is private travel.

Summary of case law principles

99. For travel between home and work to be other than private use for FBT purposes (not subject to FBT) the following must be the case:

- It is not enough that an employee performs part of their work at home. The need for the travel must arise from the **nature of the work**. Travel between home and work is private use (subject to FBT) if an employee chooses to work partly at home. It is not sufficient that the employer and employee have contracted on the basis that duties will be performed partly at home. The travel must be a requirement for every employee doing the job and, objectively viewed, a requirement of the job, not of the employee.
- A distinction exists between travel undertaken to enable a person to begin work, and travel that is "**on work**". The four case law exceptions are situations where travel is on work rather than travel to or from work (and where the need for the travel arises from the nature of the work). When an employee travels in the situations covered by the four exceptions, the travel is for income-earning purposes. The travel is not private use so does not give rise to a fringe benefit for FBT purposes.

100. Based on the factors from the case law, the principles can be summarised as follows:

Home to work travel by motor vehicle supplied to an employee is not a fringe benefit if the:

- need for the work to be performed partly at home (and therefore the need for the travel) arises from the **nature of the work**; and
- travel is in the course of performing work (**on work**).

5 In *Case R37* because it could not be shown that the vehicle was not "available for private use or enjoyment", the company was ultimately liable for FBT.

Examples of general rule and case law exceptions

101. Example | Tauira 1 to Example | Tauira 7 illustrate the general rule and case law exceptions.

Necessary to transport equipment or instruments

Example | Tauira 1 – Employee transports equipment and instruments necessary to their work, used both at home and at work

An employee works as a musician and is employed by a hotel to provide entertainment. The musician performs with their band at the hotel's bar. As bandleader, the musician transports the band's musical instruments and other equipment to and from the venue for each performance. Between times, the band practises in the musician's garage. The hotel supplies the musician with a vehicle in which to transport the musical instruments and equipment. The vehicle cannot be used for any other purpose. The musician has their own car that they drive the rest of the time.

The musician's travel to and from the hotel is not private travel. The musical instruments and equipment are bulky and cannot be transported without the use of a vehicle. The musical instruments and equipment are used both at the hotel and at home. Transport of the musician to and from the hotel is incidental to the transport of the musical instruments and equipment and is not a purpose of the travel. The need for the travel arises from the nature of the musician's work and the travel to and from the hotel is "on work". The travel is necessary, both because it is a requirement of the musician's employment contract with the hotel and because, objectively viewed, it is a necessary requirement of the musician's job as bandleader. The travel is undertaken wholly (solely) in deriving the musician's employment income.

Itinerant work

Example | Tauira 2 – Employee's work is itinerant, and their home is their base of operations

An employee works as a community nurse covering a region in a rural area. Their employer supplies them with a car to carry out their role. Each day the regional community nurse travels from their home direct to their patients' homes, continuing from one patient's home to another, and then returning to their own home in the evening. The nurse's patient list changes as patients recover and no longer require care. The nurse visits the regional hospital only to pick up medical supplies as needed, about once a fortnight.

The nurse's travel described above is not private travel, including travel from their own home to the home of their first patient for the day, and travel from their last patient of the day's home to their own home. The nurse's shift begins from the time they leave home and ends at the time they return home. Every regional community nurse must undertake this type of travel. The travel, objectively viewed, is a requirement of the regional community nurse's job. The need for the nurse's travel arises from the nature of the work and the nurse is travelling on work from the time they leave home until the time they return home.

Home as a workplace (or base of operations)

Example | Tauira 3 – Employee chooses to work from home part of the time (traffic congestion)

An employee works as an administrator in a manufacturing business. The employee works at home some days because they would otherwise spend long periods travelling to and from work due to traffic congestion. The administrator's employer is considering supplying cars to employees and wants to know whether travel between home and work is private travel for the administrator.

On the days they choose to work from home, the employee attends meetings with their manager remotely using video conferencing technology. Once a week the employee is expected to attend a team meeting at the employer's premises in person, whether or not they choose to work the rest of the day there. The employee has a desk available to them in the office whenever they choose to work there.

Travel between the employee's home and the employer's premises is private travel. It is not a term of the administrator's employment contract that they work from home and, objectively viewed, is not a requirement of the administrator's job. Others doing the same job work in the office full time. Therefore, no sound business reasons exist for the employee working from home. The employee's job does not require that significant space is set aside at home for performing work duties or that the employee stores significant work-related equipment or other goods at home. Although the employee does carry out work at home and that work is integral to the employer's business, these two factors alone are not sufficient to make the employee's home a workplace (or base of operations) for the employer. The need for the employee's travel on the days they choose to work in the office and on the day they are required to attend their weekly meeting does not arise from the nature of the employee's work and the travel to and from the office is not "on work".

On the contrary, the employee performs work duties at home for the employee's own convenience. The travel is not necessary to the administrator's job and is not undertaken wholly (solely) in deriving their employment income.

Example | Tauira 4 – Employee chooses to work from home part of the time (disruptions in the office)

An employee works as a researcher in an open-plan environment at the employer's premises. Sometimes the researcher takes more complex work home because noise and interruptions from other employees at the employer's premises make it more efficient for them to work at home. The researcher's employer is considering supplying cars to employees and wants to know whether travel between home and work is private travel for the researcher.

Although the employee may consider there are sound business reasons for working from home (efficiency), this is to a large degree a personal choice. The travel between home and work is not a contractual requirement of the job and, objectively viewed, is not a requirement of the job (other employees carry out the more complex work in the office). The employee does not have significant space set aside at home for performing work or for storing goods or equipment relating to their work.

Of the five factors to consider, the only factors satisfied are that the employee carries out some work at home and the work carried out at home is integral to the employer's business. These factors alone are not sufficient to make the employee's home a workplace (or base of operations) of the employer.

Travel between home and work is still private travel where work is performed at home because of perceived problems with facilities at work. The need for the travel does not arise from the nature of the work, and the travel is not "on work". The travel is not necessary to the researcher's job and is not undertaken wholly (solely) in deriving the researcher's employment income.

Example | Tauira 5 – Employee travels between work and home because they deal with people in different time zones

An employee works as the manager of a foreign exchange dealing room of a bank with its head office is in Hong Kong. Many of the bank's clients are in different time zones from New Zealand. The manager often works at home in the evenings or on Saturday mornings (when the United States markets are still open) supplying market information, reporting to the bank's head office and carrying out currency dealing. The manager's employer is considering supplying cars to employees and wants to know whether travel between home and work is private travel for the manager.

The manager's travel to work in the morning and home in the evening does not cease to be private travel merely because the manager performs some of their employment duties at home in the evenings and on Saturday mornings. The sound business reasons test is not met. Although working with people in different time zones outside normal business hours is a requirement of the job, the work can be performed anywhere, meaning the travel is not, objectively viewed, a requirement of the job.

The employee does not have significant space set aside at home for carrying out work and does not have significant space set aside at home for storage of work-related goods or equipment.

Only two of the five factors are satisfied: some work is carried out at home and the work carried out at home is integral to the employer's business. These two factors alone are not sufficient to make the employee's home a workplace (or base of operations) for the employer.

An employee who performs work duties after normal working hours is not continuously engaged in employment duties while travelling home from work in the evenings. The need for the travel (rather than the need to work in the evenings) does not arise from the nature of the work, and the travel is not "on work". Travel by an employee in such circumstances is undertaken to enable the employee to live away from their workplace.

The manager's daily journeys between home and work are travel of a private nature.

Variation

The facts are as above but the manager travels back to the bank's premises for video conferences in the evenings because their home environment can be noisy at that time.

Again, there are no sound business reasons for the travel. The work the employee undertakes at home can be performed anywhere. The employee travels back to work for video conferences in the evenings only because their home environment can be noisy, which means the need for the travel relates to their personal circumstances or preferences. A second journey to and from work to take part in a video conference in the evening is no different from travel undertaken by an employee who chooses to travel home for lunch and back to work again. Travel by an employee in such circumstances is undertaken to enable the employee to live away from their workplace.

The employee does not have significant space set aside at home for carrying out work and does not have significant space set aside at home for storage of work-related goods or equipment.

As above, only two of the five factors are satisfied: some work is carried out at home and the work carried out at home is integral to the employer's business. These two factors alone are not sufficient to make the employee's home a workplace (or base of operations) for the employer.

An employee who returns to work in the evening to perform further work duties is not continuously engaged in employment duties while travelling between home and work in the evenings. The need for the travel (rather than the need to work in the evenings) does not arise from the nature of the work, and the travel is not "on work".

Both the manager's normal daily journeys between home and work and their evening journeys between home and work to attend video conferences are travel of a private nature.

Example | Tauira 6 – Most employees have chosen to work from home part of the time and as a result the employer has reduced their office space

An employee works as an accountant in a chartered accounting firm. Most of the firm's accountants (including the employee) have chosen to work from home part of the time on an ad hoc basis. (A few accountants have chosen to work in the office every day because they do not have a suitable space to work in at home. However, this is by far the less common choice.) As a result, the employer has reduced their office space.

The accountants' access cards still grant them access to the employer's office every day of the week and they may come in on the days they choose. Sometimes space is tight, but the employee has never had to return home because they could not find an unoccupied desk in the office. At home, the accountant works in a small room that is used only as an office.

The accountant's employer is considering supplying cars to their employees and wants to know whether travel between home and work is private travel for the accountant.

Travel between home and work is private travel for the accountant. Objectively viewed, working from home is not required to perform the accountant's job. The same job can be and is done by accountants who work full time in the employer's office. Therefore, although the employer saves money by reducing the office space they lease, the sound business reasons test is not met, because the travel expenditure, had it been incurred by the accountant, would not have been necessarily incurred in the performance of the accountant's duties. The accountant does not have significant space set aside at home for carrying out work duties or for storing work-related goods or equipment.

Although the accountant does carry out some of their work duties at home, and those duties are integral to the employer's business, these two factors alone are not sufficient to make the accountant's home a workplace (or base of operations) for the employer. The need for the travel to and from work on the days the accountant works in the office does not arise from the nature of the work, and the travel is not "on work". The travel is neither necessarily nor solely undertaken in deriving the accountant's employment income.

Variation 1

The facts are as above, but the firm begins to employ all its new accountants on the basis that they will work 2.5 days per week in the firm's offices, and 2.5 days at home (hybrid basis). There is some flexibility in which days are worked in the office and which days are worked at home, to cover variable business needs. Over time, all accountants employed on the old basis have resigned or retired and every accountant working for the firm is now employed on the hybrid basis.

Travel between home and work is still private travel for the accountants. Objectively viewed, working from home is not required to perform the accountants' job. The same job could (and has been) done by accountants who work full time in the employer's offices. The accountants are not sufficiently unique in their capabilities that working on a hybrid basis and travelling between home and work is, objectively viewed, a requirement of the role.

Therefore, although the employer saves money by reducing their office space, the sound business reasons test is not met, because the travel expenditure, had it been incurred by the accountants, would not have been necessarily incurred in the performance of the accountants' duties.

The accountants do not have significant space set aside at home for carrying out work or for storing work-related goods or equipment. Although the accountants do carry out some of their work duties at home, and those duties are integral to the employer's business, these two factors alone are not sufficient to make the accountants' homes a workplace (or base of operations).

The need for the travel to and from work on the days the accountants work in the office does not arise from the nature of the work, and the travel is not "on work". The travel is neither necessarily nor solely undertaken in deriving the accountants' employment income.

Variation 2

The facts are as in Variation 1, but each employee's employment contract states when they will work in the office and when they will work at home (fixed days hybrid basis). One half of the accountants' employment contracts state they will work Monday, Wednesday morning, and Friday in the office, and the remaining time at home. The other half of the accountants' employment contracts state they will work Tuesday, Wednesday afternoon, and Thursday in the office, and the remaining time at home.

Travel between home and work is still private travel for the accountants, for the reasons set out above at Variation 1.

Example | Tauira 7 – Employee is required to charge an employer's EV at home but can also choose to work at home on an ad hoc basis

An employee works as an architect for a firm of architects. The architects work in the firm's offices most days but can work from home for up to two days per week on an ad hoc basis. The architects are expected to drive their own cars to building sites as needed.

The firm owns a compact electric vehicle (EV). The firm provides the architect with physical access to the EV and a signed letter saying the architect is allowed to use the EV only for travel between the office and work sites, travel between home and work, and incidental or minor or insignificant private travel. The architect must ensure the EV is kept charged. The architect signs and returns the letter, and the firm keeps it on file. The architect's own car is also an EV so they can charge the EV at home on their fast charger in the evenings.

The architect's travel between home and work in the employer-provided EV is private travel. Although the firm may consider sound business reasons exist for supplying the EV to the architect (it removes the need for the firm to reimburse the architect for the cost of travel between the office and building sites in their own car at the kilometre rate), the sound business reasons requirement is directed at whether expenditure would have been "necessarily incurred" had the employee incurred it themselves. As there are other architects who do the same job and who do not undertake the travel between home and work to charge an EV, the requirement to undertake the travel is not, objectively viewed, a requirement of the architect's job. (Even if all the architects were provided with EVs, objectively viewed, it would still not be a requirement of the architects' jobs to undertake travel between home and work.) Therefore, the travel expenditure, had the architect incurred it themselves, would not have been necessarily incurred. The relevant case law (*Schick*) states that storing a car at home should not be given too much weight (in terms of the storage of significant business goods at home factor) when considering whether an employee's home is a workplace.

Although the architect does carry out some work at home, and that work is integral to the employer's business, these two factors alone are not sufficient to make the employee's home a workplace (or base of operations) for the employer.

Further, in this case, the travel between home and work is not undertaken wholly and exclusively (solely) in earning employment income. Although the requirement to charge the EV is one purpose of the travel between home and work, transport of the architect themselves between home and work is a second, and more than incidental, purpose of the travel. This second purpose is a private purpose. Being supplied with an EV gives rise to a private benefit to the employee that is more than incidental in nature.

In summary, the need for the architect's travel between home and work does not arise from the nature of the work, and the travel is not on work. The travel expenditure, had it been incurred by the architect, would not have been solely and necessarily incurred in performing the architect's duties. Therefore, a private benefit arises to the architect. FBT will apply in relation to every workday, as the employer has made the EV available for private use on any workday.

FBT rules

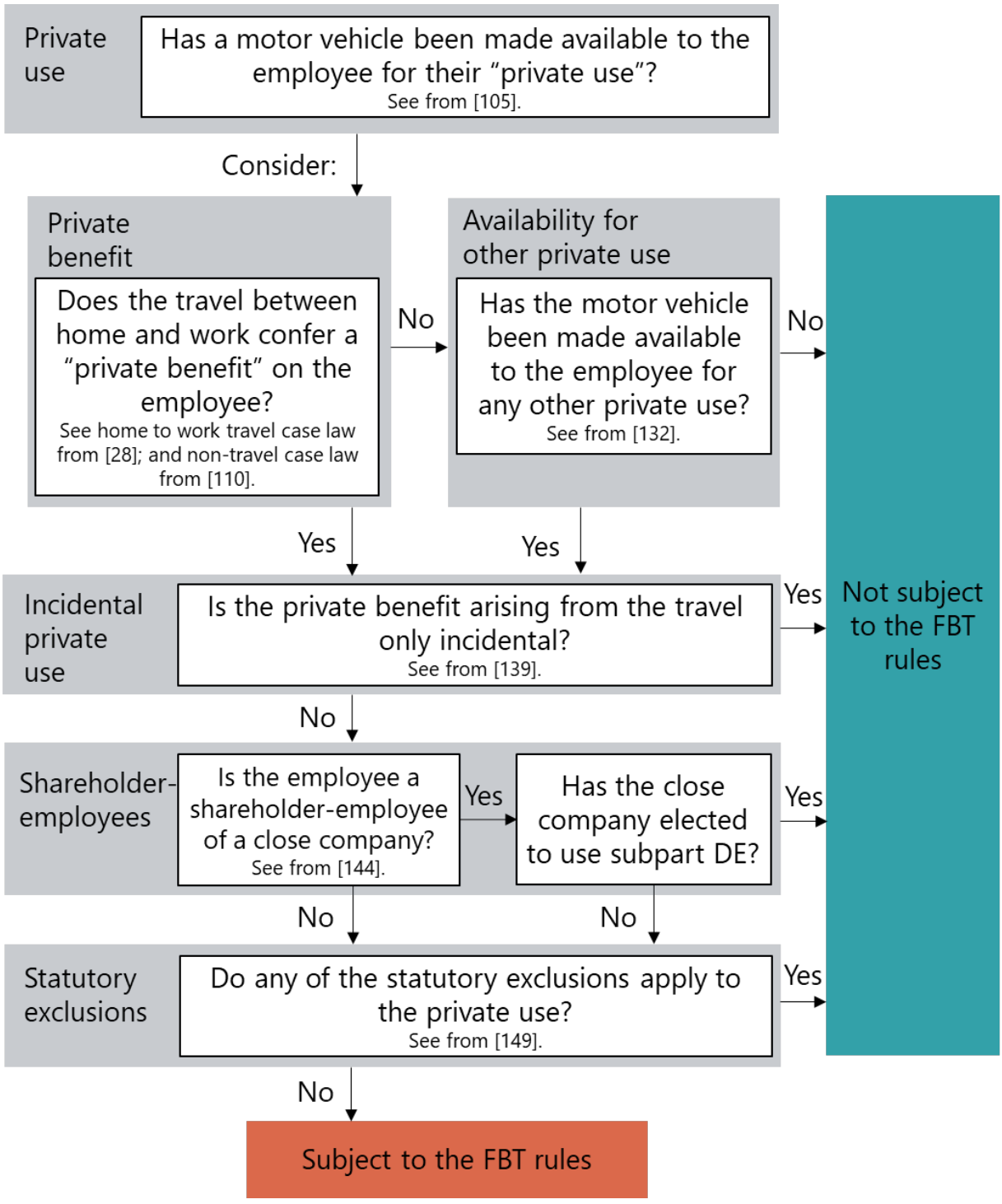
102. Subpart CX and related provisions contain the FBT rules (see the s YA 1 definition of "FBT rules", and s RD 25 for a full list of provisions). The FBT rules cover what a fringe benefit is and which types of benefits are excluded from being fringe benefits. (The FBT rules also cover how to calculate the value of fringe benefits, how to calculate the amount of FBT payable on fringe benefits, and how and when to return FBT. These aspects of the FBT rules are not covered in this item. For information on these other aspects of the FBT rules as they apply to motor vehicle fringe benefits, see **IS 17/07**.)

103. The analysis in this section covers:

- private use (from [105]) – the New Zealand statutory definition of private use and the New Zealand case law on the statutory definition:
  - private benefit – why the UK non-travel case law is relevant in New Zealand and an alternative test that can be derived from UK non-travel case law decided under the UK legislative provision that applies to travel expenditure (and to other expenditure);
  - availability for other private use – under the New Zealand FBT rules, availability for other private use (as well as availability for home to work travel that is private use) determines whether a motor vehicle fringe benefit exists; and
  - incidental private use – the case law on incidental private use (incidental private use will not confer a private benefit on an employee);
- shareholder-employees (from [144]) – when and how shareholder-employees of close companies can choose to use subpart DE instead of applying the FBT rules; and
- statutory exclusions from FBT (from [148]) – the statutory exclusions from FBT relevant to travel between home and work.

104. Figure | Hoahoa 3 provides an overview of the analysis in this part.

Figure | Hoahoa 3: Travel by motor vehicle – FBT rules



Private use

105. As stated at [24], private use for a motor vehicle includes:

- the employee's use of the motor vehicle for travel between home and work; and
- any other travel that confers a private benefit on the employee.

106. In *CIR v Schick*, the High Court considered the statutory definition of private use and whether that definition meant:

- **all** travel between an employee's home and work is private use for FBT purposes; or
- if the employee's home is also a workplace (or base of operations) for home to work travel purposes, the travel can be seen as travel between two workplaces for FBT purposes.

107. In *Schick*, vehicles had been made available to employees of an earthmoving and transport business for travel between their homes and various job sites. The vehicles were stored at the employees' homes when not in use.[6] The Commissioner argued that there was a fringe benefit under the first part of the definition because the employees used the vehicles to travel to and from their homes.

108. However, Gallen J held that the first part of the definition was qualified by the second part of the definition. His Honour stated (at 13,743):

> I agree with the Judge [Judge Willy in *Case T5* (1997) 18 NZTC 8,024 (TRA)] that **the word "travel" where used in the definition of private use or enjoyment, is to be regarded as qualified by that qualification which appears in the second part of the definition and means travel which confers a benefit of a private or domestic nature**. [Emphasis added]

109. The court explained that travel between home and work is not private use of a motor vehicle only because the travel starts or ends at the employee's home. Private use arises under the statutory definition only when travel between home and work confers a private benefit. If an employer supplies travel between home and work that does not confer a private benefit on an employee, the travel is not private use and there is no fringe benefit.

Private benefit

110. Some of the cases relied on in this statement to decide whether travel between home and work confers a private benefit and so is private use for New Zealand FBT purposes are Australian and UK deductibility cases and Australian FBT cases.

111. The pre-1998 Australian and UK cases are relevant because the New Zealand courts have applied them in New Zealand FBT cases (the most recent New Zealand FBT case on travel between home and work being *Schick*, decided in 1998). That is, the New Zealand courts have recognised the Australian and UK cases as authoritative in New Zealand on the meaning of the phrase "private in nature" (used in the New Zealand deductibility provisions) and, importantly, in the phrases "private benefit" and "private use" used in the New Zealand FBT rules.

112. The New Zealand courts have relied on the Australian and UK deductibility cases in New Zealand FBT cases because the same question is being asked: whether the expenditure or use is private.

113. Decisions dating from after 1998 from Australia and the UK (both deductibility and FBT cases) would also likely be applied by the New Zealand courts if they had to decide whether there had been private use in a New Zealand FBT case today. However, such cases would be applied only to the extent that they were relevant to the New Zealand legislation, rather than to provisions that are specific to the Australian or UK legislation.

114. The rest of this section outlines the similarities and differences between the legislative tests in New Zealand, Australia and the UK. Examining the differences shows us that the UK Act offers useful guidance because it defines, in more detail than the New Zealand or Australian Acts do, what **is not** private in nature. This gives a further test that can be used to consider whether use confers a private benefit and **is** private use.

115. As a result, there are three alternative ways to decide whether use confers a private benefit and is private use in the context of travel between home and work. The first two are case-law based and were discussed from [32]. The third is derived from reading the words of the UK Act as they applied when New Zealand FBT was introduced (the amending legislation was enacted on 23 March 1985 with effect from 1 April 1985). It can be useful in considering whether the fourth case law exception, home is a workplace, applies, because the case law on that exception is less well developed than the case law on the other three case law exceptions.

116. The three approaches are as follows:

- Do any of the four case law exceptions apply to the travel?
- Did the need for the travel arise from the nature of the work, and was the travel "on work"?
- If the employee had incurred the expenditure on the travel, would it have been wholly, exclusively and necessarily incurred in deriving their employment income?

New Zealand legislation

117. Under the Income Tax Act 2007 there is a general deductibility rule (the general permission). There are also general limitations that apply to the general permission.

6 Various issues were considered in *Schick*. The facts of the case are set out at [90], where *Schick* is considered in connection with the fourth case law exception (home as a workplace).

118. Under the general permission, a person is allowed a deduction for an amount of expenditure, to the extent to which the expenditure is incurred by them in deriving their assessable income (s DA 1(1)(a)).

119. Under the general limitations, no deduction is allowed for expenditure to the extent to which it is (among other things):

- private in nature (the private limitation);
- incurred in deriving exempt income (the exempt income limitation); or
- incurred in deriving employment income (the employment limitation) (s DA 2).

120. The above means that for most employees, expenditure on travel between home and work is non-deductible. The expenditure is non-deductible to the extent to which it is private in nature because the private limitation applies – and, even if the expenditure meets the general permission and is not private in nature, it is non-deductible because of the employment limitation. (Some shareholder-employees can claim deductions for motor vehicle expenditure through their close companies – see [144].)

121. As employees cannot usually claim deductions against employment income in New Zealand, there is no recent case law decided in New Zealand on the deductibility of expenditure on travel between home and work for employees.

Australian legislation

122. The relevant Australian legislation is like the New Zealand legislation in format (there is a general permission and a private limitation – see the Appendix to this statement). However, in Australia there is no employment limitation. Therefore, there are recent Australian cases involving employees that decide whether expenditure incurred by those employees on travel between home and work is private in nature.

123. The Australian Fringe Benefits Tax Assessment Act 1986 (Cth) specifically has an "otherwise deductible" rule. Under this Australian Act, a benefit is not a fringe benefit if the expenditure would have been deductible, had the employee incurred the expenditure themselves.

124. There is no otherwise deductible rule in the New Zealand FBT legislation. The New Zealand legislation relies only on there being private use. However, as discussed at [111], the New Zealand courts have considered the Australian deductibility cases when deciding whether home to work travel is private use for New Zealand FBT purposes. Therefore, the New Zealand courts would also likely consider the Australian FBT cases on home to work travel in deciding a New Zealand FBT case involving home to work travel today, even though there is no otherwise deductible rule in the New Zealand FBT rules.

United Kingdom legislation

125. The UK legislation does not have a private limitation (even though private expenditure is not deductible in the UK). Instead, the deductibility provisions stipulate, in more detail than the New Zealand and Australian provisions, which expenditure is deductible.

126. The UK has two general deductibility provisions: one for taxpayers who are self-employed, and one for employees and officeholders. The provision for self-employed taxpayers requires only that travel expenditure has been "wholly and exclusively" incurred for business purposes for it to be deductible. The UK provisions for employees and officeholders have the added requirement that the expenditure has been "necessarily incurred". That is, the expenditure must be "wholly, exclusively and necessarily" incurred in deriving the employee's income to be deductible (see the legislation in the Appendix). As discussed at [111], case law on the meaning of the phrase "wholly and exclusively" and on the meaning of the word "necessarily" has been applied in deciding New Zealand FBT cases, even though those words do not appear in the Income Tax Act 2007.[7]

127. A key UK case on the meaning of wholly and exclusively in the context of travel between home and work is *Newsom v Robertson* [1952] 2 All ER 728 (CA). Key non-travel cases on the meaning of wholly and exclusively are *Bentleys Stokes and Lowless v Beeson* [1952] All ER 82 (CA) and *Mallalieu v Drummond* [1983] 2 All ER 1,095 (HL). These cases interpret wholly and exclusively to mean **solely** incurred for income-earning purposes.

7 An intended policy change in the UK in 2003 means the only requirement now for travel expenditure to be deductible in the UK is that the expenditure was "necessarily incurred" by the employee. There is no longer a requirement in the UK that the employee's expenditure must have been wholly and exclusively incurred in deriving their income. However, since this policy change took place in 2003 (after 23 March 1985) and is not reflected in the New Zealand legislation, the test, when considering whether expenditure in New Zealand is private in nature and whether use is private use for New Zealand FBT purposes, remains a "wholly, exclusively and necessarily" test.

128. In *Newsom v Robertson,* the Court of Appeal held that expenses incurred by a barrister on travelling between his home and his chambers were not wholly and exclusively incurred for the purposes of his profession. Lord Denning said (at 731):

> In the case of a barrister [his base] is his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense.

129. Therefore, in *Newsom v Robertson*, the barrister's travel expenditure between his home and his chambers was non-deductible because it was at least partly incurred to enable him to live away from his work. For further (non-travel) case law on the meaning of wholly and exclusively, see the companion item IS 25/01 from [113].

130. A key UK case on the meaning of necessarily incurred in the travel between home and work context is the House of Lords decision *Taylor v Provan* (see discussion from [77]). In *Taylor v Provan,* the House of Lords held that travel expenditure is necessarily incurred if it is, objectively viewed, a requirement of the role to undertake the travel. Often it will be enough to look at an employment contract to see whether travel is a requirement of the role. However, in some cases, it will be necessary to "wield a razor" and detach one or more obligations in the employment contract because they are not, objectively viewed, requirements of the role. (In *Taylor v Provan,* the requirement to travel was considered, both contractually and objectively, to be a requirement of Mr Taylor's role. However, see *Fitzpatrick* and *Hinsley* (discussed from [80]) for two non-travel cases where the UK courts found that contractual obligations to incur expenditure could be detached as they were not, objectively viewed, requirements of the role).

131. To conclude, for FBT purposes, use is private use unless the expenditure would have been wholly, exclusively and necessarily incurred in deriving the employee's employment income, had the employee incurred the expenditure themselves. The four case law exceptions are situations in which expenditure would have been wholly, exclusively and necessarily incurred in deriving employment income, had the employee incurred the expenditure themselves. The four case law exceptions are also situations where the need for the travel arises from the nature of the work, and the travel is on work. Therefore, these are three alternative ways of considering the same question – whether travel between home and work confers a private benefit on an employee and so is private use.

Availability for other private use

132. A fringe benefit arises when "a motor vehicle is made available to an employee for their private use" (s CX 6(1)). Therefore, even if travel between home and work is not private use for an employee, the employer must be able to show that the vehicle has not been "made available" to the employee for other private use.

133. For a vehicle to have been made available for private use, the owner, lessor or hirer of the vehicle must have permitted the employee's private use of the vehicle: *CIR v Yes Accounting Services Ltd* (1999) 19 NZTC 15,296 (HC).

134. If an employer has physically made a vehicle available for use by an employee, the vehicle is considered to have been "made available for private use" unless the employer can show that the:

- employee is prohibited from using the vehicle for private purposes;
- prohibition on private use of the vehicle is a genuine one; and
- employer takes steps to ensure the prohibition is observed.

135. If the employer has prohibited private use of the vehicle, the employer has not made the vehicle available for private use, even though the vehicle may be physically available for private use: *CIR v Yes Accounting Services Ltd*. The prohibition may be general (contained in a human resource manual or similar document) or may be specific (eg, in an employee's employment contract).

136. In *Case R37* (1994) 16 NZTC 6,208 (TRA) letters had been written on behalf of the company by shareholder-employees to themselves in their capacity as employees of the company prohibiting private use of the vehicles. However, the Taxation Review Authority found that the letters were not really intended to prevent the vehicles from being available for private use.

137. Whether employees have private motor vehicles available for private use is also relevant in deciding whether the prohibition is genuinely observed: see, for example, *Case S26* (1994) 17 NZTC 7,182. In *Yes Accounting Services Ltd* it was considered relevant that the employer had carried out regular checks to enforce the prohibition.

138. Record keeping requirements to support a private use restriction are set out in IS 17/07 from [259] and in IR409 at 15. Record keeping requirements for shareholder-employees and other factors to consider where an employee is a shareholder-employee are set out in IS 17/07 from [261].

Incidental private use

139. This section discusses incidental private use - a further matter relevant to whether use is private use as defined (see Figure | Hoahoa 3 at [104]).

140. Case law provides that where a private benefit that an employee receives from incurring expenditure is only incidental, it does not make the expenditure private in nature. The Commissioner accepts this also means the receipt of an incidental private benefit from travel does not make the travel private use for New Zealand FBT purposes.

141. In *Bentleys, Stokes and Lowless,* under the relevant UK Act, expenditure could be deducted only if it was "money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation". Romer LJ considered the meaning of wholly and exclusively in this context, including whether the receipt of an incidental private benefit from the expenditure could impact on whether expenditure had been incurred wholly and exclusively for the purposes of the trade, profession or vocation. He said (at 84-85):

> The sole question is … What was the motive or object in mind of the two individuals responsible for the activities in question? …
>
> It is, as we have said, a question of fact. And it is quite clear that the purpose must be the sole purpose. The paragraph says so in clear terms. **If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. Per contra, if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act.** [Emphasis added]

142. Therefore, an incidental private benefit arises where, objectively viewed, the expenditure is incurred solely to achieve a business objective or result, but also achieves some other non-business objective or result. In the home to work travel context, this means an employee who is undertaking a work-related journey might stop and purchase something to be used for non-work purposes without travelling any added distance to do so. For example, an employee who is travelling on work passes a café to reach their destination. The employee stops at the café to buy a sandwich for lunch. The private benefit received in this situation (the travel to a location at which the taxpayer can buy their lunch) is incidental to the business use of the motor vehicle. There is no private use of the motor vehicle for FBT purposes.

143. An incidental private benefit also arises where transport of the employee is incidental to or a necessary consequence of travel undertaken for income-earning purposes. For example, if it is essential for an employee to use a vehicle to transport goods or equipment (because of their bulk, weight or other special characteristics) between home and work in the course of carrying out income-earning activities, there is no private benefit, even though the employee is also transported. See the discussion of the first case law exception for transport of essential equipment or instruments from [44].

Shareholder-employees

144. A close company may elect to use subpart DE for a motor vehicle and a shareholder-employee instead of applying the FBT rules if the company:

- supplies no more than two fringe benefits that consist of private use of a motor vehicle to shareholder-employees during the relevant income year; and
- does not supply any other fringe benefits to employees during the relevant income year (s CX 17(4B)).

145. Subpart DE provides methods for calculating the proportion of business use of a motor vehicle. This proportion forms the basis for the amount of motor vehicle expenditure that can be deducted. For information on claiming deductions for motor vehicle expenditure under subpart DE, see IS 25/01. For information on close company elections to use subpart DE for a motor vehicle and a shareholder-employee instead of applying the FBT rules, see IS 17/07 from [278].

146. A close company that elects to use subpart DE instead of the FBT rules for a motor vehicle and a shareholder-employee cannot rely on the Commissioner's position on distance travel set out in OS 19/05 in respect of that shareholder-employee and motor vehicle. OS 19/05 allows distance travel between home and work to be treated as business travel (not subject to FBT) in certain situations. Where shareholder-employees of a close company undertake distance travel in their motor vehicles, the close company should take this into account when considering whether to remain in the FBT rules or to use subpart DE.

147. For the legislation, see the Appendix to this statement.

Statutory exclusions from FBT

148. Three statutory exclusions from FBT can apply to motor vehicle benefits and two further exclusions from FBT can apply to home to work travel benefits.

Three statutory exclusions from FBT for motor vehicles

149. The three statutory exclusions from FBT that relate to motor vehicles are for:
    - work-related vehicles (from [150]);
    - emergency calls affecting health, life, or the operation of essential machinery or services (from [154]); and
    - business trips of more than 24 hours (from [159]).

Work-related vehicles exclusion

150. The work-related vehicles exclusion can apply to exclude the private use of a motor vehicle from being a fringe benefit. The exclusion applies to a "motor vehicle" (see [25]) that is sign-written with the employer's usual business name and logo (or for leased vehicles, with either the employer's or owner's usual business name and logo).
151. The work-related vehicles exclusion does not apply to a "car". A car is a motor vehicle designed exclusively or mainly to carry people. A car includes a motor vehicle that has rear doors or collapsible rear seats but does not include a minibus, moped, motorcycle, or small passenger service vehicle (eg, a shuttle service provided in a vehicle designed or adapted to carry 12 or fewer people including the driver).
152. The work-related vehicles exclusion does not generally apply on a day that the vehicle is available for private use. However, the vehicle may be available to the employee for the following types of private use, which do not prevent the exclusion from applying:
    - private travel between home and work that is both necessary and a condition of the employee's employment; and
    - private travel undertaken in the course of the employee's employment that is incidental to business use.
153. For more information on the work-related vehicles exclusion, see IS 17/07 at [66].

Emergency calls – statutory exclusion

154. As a starting point, it is important to note that this is a statutory exclusion for emergency calls that applies in defined circumstances. It differs from the emergency calls case law exception discussed from [59].
155. This exclusion applies to emergency calls made from the employee's home in the course of their employment to provide:
    - essential services for the operation of their employer's or their employer's client or customer's plant or machinery;
    - essential services for the maintenance of a local authority's or public authority's services;
    - essential services for the carrying on of a business that supplies energy or fuel to the public; or
    - emergency services relating to the health or safety of any person.
156. The services must be requested by the person's employer, the employer's client or customer, or a member of the public.
157. The services must be required to be performed outside business hours (that is, performed on a Saturday, a Sunday, a statutory public holiday, or from 6pm to 6am on a Monday to Friday), unless they relate to the health or safety of any person. The exclusion applies to the whole of the day on which the vehicle is used for an emergency call as defined.
158. For more information on the statutory emergency calls exclusion, see IS 17/07 at [116].

Business trips of at least 24 hours exclusion

159. This exclusion applies when an employee is absent from home with their employer-provided vehicle for a continuous period of at least 24 hours. It applies only to an employee whose job requires them to make regular business trips of this type. The exclusion applies to the whole day even if the vehicle is used for only part of a day on a business trip of this type. Therefore, it does not matter whether the employer has made the vehicle available to the employee for home to work travel on that day and the travel is private travel for the employee. The exclusion overrides the FBT liability that would otherwise arise for that day.
160. For more information on the business trips of at least 24 hours exclusion, see IS 17/07 at [144].

Two statutory exclusions from FBT for home to work travel

161. Two statutory exclusions from FBT relate to home to work travel. They are for employer-provided:
    - public transport; and
    - self-powered or low-powered vehicles.

Employer-provided public transport exclusion

162. This exclusion applies where an employer subsidises an employee's fare on public transport by bus, rail, ferry or cable car. If the travel is by bus, the bus service must not be a charter service or shuttle service.
163. The fare must be incurred mainly for the purposes of the employee travelling between their home and workplace.
164. For more information on this exclusion, see the section on the FBT exemption for certain public transport fares in **New legislation**: Taxation (Annual Rates for 2022-23, Platform Economy, and Remedial Matters) Act 2023 at 77.

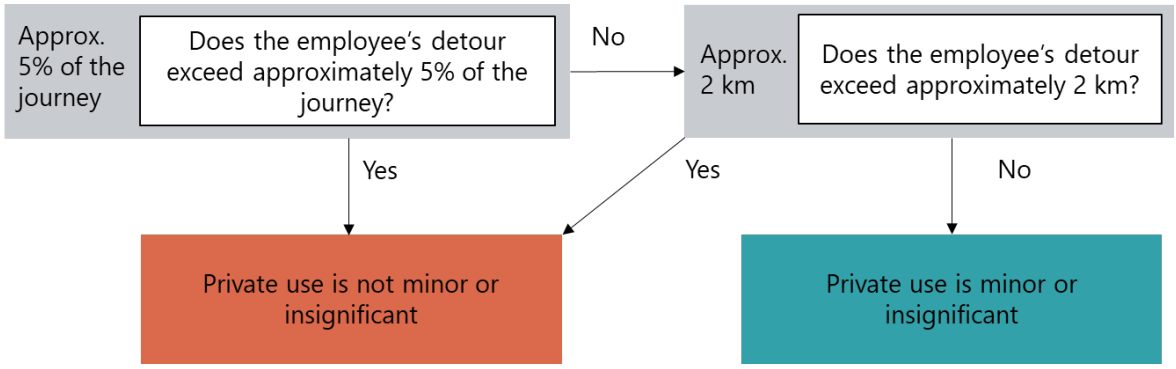
Employer-provided self-powered or low-powered vehicle exclusion

165. This exclusion applies when an employer provides an employee with a bicycle, electric bicycle, scooter or electric scooter. It also applies to other self-powered and low-powered vehicles that have been declared (under s 168A of the Land Transport Act 1998) to be a mobility device or not to be a motor vehicle.
166. This exclusion also applies when an employer helps an employee to meet the costs of using a vehicle-share service (a ride-share) for one of the self-powered or low-powered vehicle types referred to above.
167. The vehicle or the vehicle-share service must be used mainly for the purposes of the employee travelling between their home and workplace.
168. For more information on this exclusion, see the section on the FBT exemption for certain public transport fares in New legislation: Taxation (Annual Rates for 2022-23, Platform Economy, and Remedial Matters) Act 2023 at 77.

Minor or insignificant private use and the Commissioner's view

169. In the previous interpretation statement on travel by motor vehicle between home and work (**IS3448**), the Commissioner expressed a view on what constituted minor or insignificant private use (*de minimis* private use) in the travel between home and work context. The Commissioner continues to take the same view.
170. This section considers:
    - what minor or insignificant private use is (the *de minimis* principle) (from [172]); and
    - what the Commissioner's view is, and how to apply it (from [174]).
171. Figure | Hoahoa 4 summarises the Commissioner's view.

Figure | Hoahoa 4: Travel by motor vehicle – minor or insignificant private use



Note: The Commissioner considers private use is minor or insignificant (*de minimis*) if it does not exceed **both** approximately 5% of the journey and approximately 2 km.

Minor or insignificant private use

172. Minor or insignificant private use arises where a person makes a minor or insignificant detour for a private purpose during a journey that adds to the overall distance travelled (this differs from incidental private use, which by its nature does not add to the overall distance travelled – see [139]). Minor or insignificant private use can be disregarded under the *de minimis* principle.

173. The *de minimis* principle is based on the legal maxim *de minimis non curat lex* (the law does not concern itself with trifles). It has been applied in New Zealand by the Taxation Review Authority in deductibility cases: for example, see *Case S7* (1995) 17 NZTC 7,055, *Case S75* (1996) 17 NZTC 7,469 and *Case T16* (1997) 18 NZTC 8,095.

Commissioner's view

174. The Commissioner accepts that where travel that would otherwise be undertaken by an employee solely and necessarily for income-earning reasons involves a minor or insignificant detour for a private purpose, the *de minimis* principle applies so there is no private benefit to the employee and no private use for FBT purposes.

175. Any added distance travelled for a private reason must be minor or insignificant both as a percentage of the total journey and in itself. This means **both** the percentage of the total journey that the added distance makes up **and** the added distance travelled must be considered to decide whether a private detour is minor or insignificant.

176. The Commissioner considers that private travel that does not exceed **both** the following would be minor or insignificant private travel:

- approximately 5% of the journey; and
- approximately 2 km.

177. See Example | Tauira 8.

Example | Tauira 8 – Minor or insignificant private use

A is an employed plumber whose home is their base of operations. A's travel between home and work is not private travel because they are within the itinerant work case law exception. A's employer has written to A, saying that private use of their employer-provided motor vehicle (other than minor or insignificant private use) is prohibited.

A goes to the gym on their way home at the end of the day. The stop at the gym involves A travelling an alternative route from the last job of the day to their home workplace which adds 1 km to the journey. The total journey is 17 km.

In this case, A's detour is 5.88% of the journey (1 km). The Commissioner considers this would meet the requirement that A's private use does not exceed "approximately 5% of the journey". The detour to the gym also meets the requirement that it must not exceed "approximately 2 km". The detour to the gym is minor or insignificant, and there is no private use for FBT purposes.

178. Record keeping requirements to support a private use restriction are set out in IS 17/07 from [259]. See also IR409 at 15.

Vehicles taken home for security reasons or for charging

179. The Commissioner is aware that some employers have taken the view that taking a vehicle home for security reasons is sufficient to mean the travel does not confer a private benefit and the use is not private use for FBT purposes. This has been argued on the following bases:

- The vehicle is essential business equipment, and it is necessary for the employee to take it home for security reasons. The transport of the employee between home and work in the vehicle is merely an incidental flow-on consequence or effect of the requirement to take the vehicle home (and therefore the first case law exception applies).
- The employee's home is a workplace (or base of operations) for home to work travel purposes because the employer has sound business reasons for requiring the employee to take the vehicle home and because the employee stores significant business equipment (the vehicle) at home (and therefore the fourth case law exception applies).

180. The Commissioner disagrees with this view (as he did in IS3448).

181. The Commissioner has also been asked to consider whether taking an EV home to recharge the battery is sufficient to mean the travel is undertaken solely and necessarily in the performance of the employee's employment duties.

182. As a general principle, for use to be other than private use under the FBT rules, the travel must be undertaken solely and necessarily in the performance of the employee's employment duties. Transport of the employee must not make up **any** part of the journey's purpose but must instead be limited to an incidental flow-on consequence or effect of undertaking the journey.

183. When a vehicle is taken home for security purposes or for charging, the transport of the employee between home and work will, in all but perhaps a very few cases, still be one of the purposes of the journey. This means the journey will not be undertaken solely in the performance of the employee's duties.

184. Even if on the facts the dominant purpose of the journey is the transport of the vehicle home for storage or charging, the journey is still a mixed-use journey. The transport of the employee between home and work will still, except in perhaps a very few cases, be more than an incidental flow-on consequence or effect of the journey. The employee saves time, receives shelter from inclement weather, can hold confidential conversations on private matters, and may have a greater degree of personal safety because of travelling by motor vehicle instead of walking or taking public transport. These are all private purposes for travelling by motor vehicle.

Case law exceptions

185. The following paragraphs consider whether the first or fourth case law exception applies (see [44] and [65]) when a vehicle is taken home for security reasons or for charging.

Necessary to transport essential equipment or instruments

186. The Commissioner considers the first case law exception will not usually apply where a vehicle alone (that is, a vehicle that is not carrying equipment or instruments essential to the employee's work) is taken to the employee's home to be stored there overnight for security purposes or for recharging the battery where the vehicle is an EV.

187. The first case law exception requires that the equipment or instruments are used both at home and at work, and this is why they are being transported back and forth – so the employee can continue their work at home. An employee who takes a vehicle home to store or charge it does not use it at home. The vehicle remains parked while it is stored or charged, and the employee does not continue their work at home using the vehicle.

Home as a workplace

188. Whether sound business reasons exist for the travel and whether significant space has been set aside for the storage of business goods at home are two of the factors to consider when determining whether an employee's home is a workplace (or base of operations) for home to work travel purposes (see [69]). These factors are relevant to whether taking a vehicle home for security reasons or to charge the battery makes the taxpayer's home a workplace (or base of operations). None of the other factors listed at [69] are relevant to this question.

189. In *CIR v Schick*, it was decided that the storage of a vehicle at home should not be given too much weight in deciding whether the employees' homes were workplaces, given that the issue being considered was whether the travel between home and work was private travel.

190. In *Case Q25* (1993) 15 NZTC 5,124 the Taxation Review Authority appeared to give some weight to the evidence that the vehicle was taken home because it was unsafe to leave it at the factory. However, other factors were present in the case that led to the conclusion that travel between home and work did not confer a private benefit on the employees. First, the vehicle was used to transport garments between the factory and the shareholder-employees' home, so further work could be carried out on the garments there, and the garments could be stored there. (One room at the shareholder-employees' home was set aside and used for pressing garments and for unpicking any defective sewing work and refinishing it. Two further rooms at the shareholder-employees' home were set aside and used for storing garments. Up to 5,000 garments may have been stored there at any one time.) Secondly, the shareholder-employees had a further vehicle they used purely for private purposes.

191. No cases have decided that simply taking a vehicle home for security reasons or to charge the battery are sufficient to make the employee's home (or the taxpayer's home, in a self-employed context) a workplace or base of operations for home to work travel purposes. Although the employer may consider sound business reasons exist for requiring the employee to store or charge the vehicle at home (for example, it reduces the employer's insurance premiums or reduces the time the employee spends waiting for the vehicle to charge at EV charging stations during the day), the travel between home and work in the vehicle must, objectively viewed, be a requirement of the employee's role for the sound business reasons requirement to be met. This will not be the case if other employees performing the same role do not have work vehicles that they store or charge at home. Even if all employees performing the role have work vehicles that they store or charge at home, there are not sound business reasons for the travel between home and work unless the travel is, objectively viewed, a requirement of the role.

192. Simply storing or charging a vehicle at home does not mean the employee necessarily has a significant amount of space set aside for the storage of business goods at home. It does not mean the employee is carrying out a significant amount of work that is integral to the employer's business at home or that the employee has a significant amount of space set aside for carrying on the employer's business activity at home and uses that space for carrying on the employer's business activity at home.

193. Therefore, based on *Schick* and *Case Q25*, the Commissioner considers that taking a vehicle home for security reasons or to charge the battery is not of itself sufficient to make the taxpayer's home a workplace or base of operations for home to work travel purposes. If other factors listed at [69] are present, then the employee's home may be a workplace or base of operations, depending on the facts.

Equivalent to stopping during a business journey to charge an EV

194. Some employers have taken the view that if an employee charges an EV at home, the journeys between home and work do not confer a private benefit on the employee on the basis that if the employee had instead driven their vehicle from their employer's workplace to a rapid charging station during the workday, and then on to a customer's business premises, the trip to the rapid charging station would not have been private use. The Commissioner agrees that the part of the journey to the rapid charging station would not have been private use. However, that is not what the employee has done if the EV is taken home. The employee has driven the vehicle from work to home, charged it, and driven it from home to work again.

195. Assuming the employee does not fall into any of the four case law exceptions, both journeys (from work to home and home to work) confer a private benefit on the employee. One of the employee's purposes for making the journeys home and back to work again in the EV is still to transport themselves between home and work (ie, each journey has a private purpose). The journeys are not made in the performance of the employee's duties. Although charging the EV is also a purpose of the journeys, it does not make the transportation of the employee merely incidental to, or a mere flow-on consequence or effect of, undertaking the journeys.

196. The employee's position is instead analogous to that of an employee who stops on the way home to fill up with petrol. In that case, the stop is incidental to the purpose of the journey and does not affect the private nature of the journey.

Applying summary of case law principles

197. The above conclusions can be supported by applying the case law principles as summarised from [99].

198. First, driving a vehicle home to store or charge it does not mean the travel arises from the nature of the work. Driving a vehicle home to store or charge it differs from transporting goods that the employee uses to perform work, both at work and at home. The first case law exception applies to employees whose work by its very nature requires the employee to have the goods at home with them, such as a musician who requires their instruments at home between performances so they can be used for practice, or a dentist who takes dental moulds home so they can use them to make prosthetics in their home laboratory in the evenings. While an employee who stores or charges a vehicle at home may carry out work at home in the evenings, this work is typically administrative in nature and the employee does not typically use the vehicle to carry out such work. Employees whose home is a workplace (or base of operations) are typically taxpayers who have varying places of work, even if not on a daily basis. No necessary connection exists between driving a vehicle home to securely store or charge it and shifting places of work.

199. Secondly, travel that is undertaken when an employee takes a vehicle home to store or charge it is not typically undertaken in deriving the person's income or in the performance of their employment duties (ie, it is not "on work"). The travel takes place after the end of or before the start of the workday. The travel is private travel between home and work, made necessary at least in part because the employee lives at a distance from their workplace.

Appendix – Legislation

Income Tax Act 2007

200. Sections RD 26(1), CX 2, CX 6(1)(a), CX 17(4B), CX 19B, CX 36 and YA 1 (definition of "motor vehicle") state:

RD 26 Liability for FBT

Liability

(1) An employer who provides a fringe benefit to an employee is liable to pay FBT under sections RD 27 to RD 57, choosing a method of payment described in subsection (2).

...

CX 2 Meaning of fringe benefit

Meaning

(1) A **fringe benefit** is a benefit that—

(a) is provided by an employer to an employee in connection with their employment; and

(b) either—

(i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or

(ii) is an unclassified benefit; and

(c) is not a benefit excluded from being a fringe benefit by any provision of this subpart.

Arrangement to provide benefit

(2) A benefit that is provided to an employee through an arrangement made between their employer and another person for the benefit to be provided is treated as having been provided by the employer.

Past, present, or future employment

(3) It is not necessary to the existence of a fringe benefit that an employment relationship exists when the employee receives the benefit.

Relationship with subpart RD

(4) Sections RD 25 to RD 63 (which relate to fringe benefit tax) deal with the calculation of the taxable value of fringe benefits.

Arrangements

(5) A benefit may be treated for the purposes of the FBT rules as being provided by an employer to an employee under—

(a) section GB 31 (FBT arrangements: general):

(b) section GB 32 (Benefits provided to employee's associates).

CX 6 Private use of motor vehicle

When fringe benefit arises

(1) A fringe benefit arises when—

(a) a motor vehicle is made available to an employee for their private use; ...

CX 17 Benefits provided to employees who are shareholders or investors

…

Exclusion: election by close company

(4B) Despite subsection (4), subsection (2) does not apply and the benefit is neither a fringe benefit nor a dividend in an income year if—

(a) the benefit—

(i) arises when a close company makes a motor vehicle available to a shareholder-employee for their private use; and

(ii) would, in the absence of this subsection, be a fringe benefit arising under section CX 6; and

(b) the total benefits the close company provides to all employees in the income year are 1 or 2 of the benefits described in paragraph (a); and

(c) the close company chooses to apply subpart DE (Motor vehicle expenditure) for the motor vehicle and the shareholder-employee instead of the FBT rules.

…

CX 19B Transport in vehicle other than motor vehicle

A benefit that an employer provides to an employee in the form of transport of the employee in a vehicle is not a fringe benefit if the vehicle—

(a) is not a motor vehicle; and

(b) is not designed principally for the carriage of passengers.

CX 36 Meaning of private use

Private use, for a motor vehicle, includes—

(a) the employee's use of the vehicle for travel between home and work; and

(b) any other travel that confers a private benefit on the employee.

YA 1 Definitions

In this Act, unless the context requires otherwise,—

…

motor vehicle,—

(a) …

(b) in the FBT rules, and in the definition of **car**,—

(i) is defined in section 2(1) of the Land Transport Act 1998; and

(ii) does not include a vehicle the gross laden weight of which is more than 3500 kilograms

Land Transport Act 1988

201. The definition of "motor vehicle" in s 2 of the Land Transport Act 1988 states:

> **2 Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> …
>
> **motor vehicle**—
>
> (a) means a vehicle drawn or propelled by mechanical power; and
>
> (b) includes a trailer; but
>
> (c) does not include—
>
> (i) a vehicle running on rails; or
>
> (ii) *[Repealed]*
>
> (iii) a trailer (other than a trailer designed solely for the carriage of goods) that is designed and used exclusively as part of the armament of the New Zealand Defence Force; or
>
> (iv) a trailer running on 1 wheel and designed exclusively as a speed measuring device or for testing the wear of vehicle tyres; or
>
> (v) a vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles; or
>
> (vi) a pedestrian-controlled machine; or
>
> (vii) a vehicle that the Agency has declared under section 168A is not a motor vehicle; or
>
> (viii) a mobility device

Income Tax Assessment Act 1936 (Cth)

202. As at 23 March 1985, s 51(1) of the Income Tax Assessment Act 1936 (Cth) stated:

> **51 Losses and outgoings**
>
> (1) All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income.

Income and Corporation Taxes Act 1970 (UK)

203. As at 23 March 1985, s 189(1) of the Income and Corporation Taxes Act 1970 (UK) stated:

> **189 Relief for necessary expenses**
>
> (1) If the holder of an office or employment is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

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LEGAL DECISION – CASE SUMMARIES

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

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

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

CASE SUMMARY

High Court upholds TRA decision that proceedings a nullity and deemed withdrawn however finds right of appeal where challenge finally determined

Decision date: 2 December 2024

CSUM 25/01

CASE

Goodricke v Commissioner of Inland Revenue [2024] NZHC 3639

LEGISLATIVE REFERENCES

Tax Administration Act 1994, s120I, 138B and 138D

Taxation Review Authorities Act 1996, s 26A

Taxation Review Authorities Regulations 1998, regs 7, 8, 30(2) and 32

LEGAL TERMS

Final determination, jurisdiction, nullity, deemed withdrawn

Summary

The first claim related to the imposition of use of money interest (UOMI). However, s 120I of the Tax Administration Act 1994 (TAA) prohibits the imposition of UOMI being challenged.

The TRA determined that the proceedings relating to the second claim were a nullity and could not proceed. The High Court held that this is a final determination of the proceedings and accordingly, there is a right of appeal under s 26A of the Taxation Review Authorities Act 1996 (TRAA).

The High Court upheld that the proceedings were a nullity as the notice of claim was not a valid notice of claim. The High Court also upheld that the proceedings in the TRA were deemed withdrawn when the appellants (the Goodrickes) failed to attend the directions hearing. There was no good reason for their non-attendance nor were there exceptional circumstances.

Impact

The outcome of this case is that a determination by the TRA that proceedings are a nullity is a final determination of the proceeding and there will be a right of appeal under s 26A of the TRAA.

The case confirms that a notice of claim must meet the requirements in the Taxation Review Authorities Regulations 1998 (the Regulations) and the TAA for challenge proceedings to commence, and failure to attend a directions hearing will bring the proceedings to an end unless there is a good reason or exceptional circumstances. It also confirms that s120I prohibits UOMI from being challenged.

Facts

Mrs Goodricke was the sole director and shareholder of Safety Beacons Limited (SBL) until 22 May 2021 when Mr Goodricke also became a director.

In 2022 SBL began a disputes process under pt 4A of the TAA in relation to the imposition of UOMI in respect of certain PAYE periods. An adjudication report was issued on 13 May 2022 (First Adjudication Report) which determined that SBL could not dispute the imposition of UOMI because it is expressly prohibited by s 120I of the TAA. On 17 June 2022 the Goodrickes and SBL filed a notice of claim with the TRA (First Claim).

The Commissioner filed a notice of appearance under protest to jurisdiction and applied to strike out the proceeding.

A second disputes process had also been commenced and the adjudication report for the second dispute was issued on 1 December 2022 (Second Adjudication Report). The Second Adjudication Report determined that SBL's contracting income should be included in its income tax return for the 2019 year and adjustments be made to income and deductions as proposed by the Commissioner. It was also determined that the attribution rule applied to the contract income, which was to be attributed to Mrs Goodricke with SBL being entitled to a deduction for the attributed amount. The Commissioner accepted that the Second Adjudication Report made "disputable decisions" capable of being challenged by commencing proceedings under s 138B of the TAA.

On 21 January 2023 SBL and the Goodrickes filed a notice of claim (Second Claim) purportedly in relation to the proceedings initiated by the First Claim but in fact it related to the decision in the Second Adjudication Report.

A directions hearing was set down for 11 August 2023 to deal with both the First Claim and the Second Claim. Notification was emailed on 3 August 2023 and there was no reply by the appellants. A further email was sent on 10 August 2023 setting out reg 30(2) of the Regulations and stating that if a disputant fails to attend a directions hearing the challenge is deemed withdrawn and the disputant may not proceed with the challenge without the consent of the TRA. There was no response. The directions hearing proceeded on 11 August 2023 in the absence of the appellants.

On 12 August 2023 Mr Goodricke emailed the TRA stating he had been out of the country and requested the directions hearing be rescheduled. On 23 August 2023 Mr Goodricke sent another email to the TRA asking if the directions hearing had been rescheduled and suggesting the case manager at the TRA had deliberately excluded him from attending the directions hearing on 11 August 2023 by hanging up on him.

On 12 October 2023 the TRA issued a minute which noted that the failure by the Goodrickes to attend the directions hearing meant the challenge was deemed to have been withdrawn. The TRA treated Mr Goodricke's email of 12 August 2023 as an application under reg 32 of the Regulations to resume the proceeding and the allegation by Mr Goodricke that the case manager had deliberately excluded his participation as a ground on which that application was advanced. The TRA stated that the Goodrickes "should proceed on the basis that the grounds advanced at this point do not demonstrate a good reason for failing to attend the directions hearing, or exceptional circumstances" that would enable the matter to proceed. The TRA gave the Goodrickes an opportunity to provide further grounds that might establish a good reason that prevented them attending the directions hearing. The Goodrickes did not file any response with the TRA.

On 30 October 2023 the Commissioner requested the TRA to declare the proceedings at an end because the Goodrickes had not demonstrated a good reason for their non-attendance at the directions hearing, nor any exceptional circumstances.
On 17 and 18 December 2023 Mr Goodricke emailed the TRA repeating his allegation that the case manager had hung up on him. The TRA rejected this allegation.

The decision of the TRA was issued on 19 April 2024 and determined that:

- The TRA has no jurisdiction to hear the First Claim because it related to UOMI;
- The proceedings relating to the Second Claim were a nullity as there was no valid notice of claim. The purported notice of claim was not compliant and did not demonstrate a reasonably arguable case to show any disputable decision made by the Commissioner was wrong and there was no "evident path to rectification";
- If a challenge proceeding had commenced, it was deemed withdrawn under reg 30(2) of the Regulations and the proceedings were at an end. The Goodrickes failed to attend the directions hearing and there was not a good reason for their non-attendance or other exceptional circumstances.

The Goodrickes appealed to the High Court against the decision of the TRA.

Issues

1. Whether there is a decision by the TRA that is capable of appeal to the High Court under s 26A of the TRAA;
2. If so, whether the TRA erred in finding the proceedings were a nullity; and
3. Whether the TRA erred in finding that, if a challenge proceeding had been commenced, it was deemed to have been withdrawn such that the appellants could not proceed with their claim.

Decision

1. Is there a right of appeal?

   In relation to the First Claim there can be no further challenge as s 120I of the TAA provides a statutory bar to any challenge to the imposition of interest.

   In relation to the Second Claim, a determination that a challenge under the TAA cannot proceed has the same effect as a strike out – both result in a final determination of the proceeding. It is relevant that the merits (or purported lack thereof) of the notice of claim were considered by the TRA; that is the basis upon which the TRA ultimately held that the notice of claim was invalid, and the proceedings were a nullity, because they disclosed no reasonably arguable basis for the claims. Where there has been engagement with the merits of the taxpayer's challenge application, and the decision of the TRA has the effect of finally determining the proceedings, there is a right of appeal under s 26A of the TRAA.

2. Were the proceedings a nullity?

   In relation to the First Claim the TRA did not err in finding the proceedings were a nullity as UOMI cannot be challenged.

   In relation to the Second Claim the notice of claim did not follow the prescribed form. There were no specific references to any parts of the Second Adjudication Report or reasoning contained within it that are said to be incorrect. The notice of claim presents as a complaint narrative and puts forward baseless claims against the Commissioner. The TRA did not err in finding that the notice of claim was not capable of commencing a challenge proceeding and was therefore a nullity.

3. Could the challenge be deemed to have been withdrawn?

   The TRA was entitled to deem the challenge to be withdrawn under reg 30(2). Despite being given the opportunity the appellants did not provide the TRA with evidence that there was good reason or exceptional circumstances preventing them from attending the directions hearing. The suggestion that the case manager deliberately hung up on Mr Goodricke was untenable given the decision-maker's own knowledge that did not happen.

   The TRA made multiple attempts to connect with Mr Goodricke. Mr Goodricke did not engage with the TRA in a constructive way to explain the non-attendance. The TRA cannot be criticised for deeming the proceeding to have been withdrawn.

4. New Zealand Bill of Rights Act 1990 (NZBORA) and Crimes Act 1961

   There was no breach of s 27 of the NZBORA by the TRA. The procedural prerequisites to a challenge proceeding do not deprive a taxpayer of access to the TRA or the Courts. In this case it is only the appellants' failure to comply with the provisions of the TAA and the Regulations that has deprived them of their ability to bring a challenge.

   The allegation there was a breach of s 116 of the Crimes Act 1961 is not a matter that could be advanced in the appeal.

CASE SUMMARY

High Court awards costs on 2A basis – issues on appeal limited and procedural in nature

Decision date: 13 December 2024

CSUM 25/02

CASE

Goodricke v Commissioner of Inland Revenue [2024] NZHC 3818 (Costs)

LEGISLATIVE REFERENCES

High Court Rules 2016, rr 14.1, 14.5(2)(a), 14.10, 14.11

Evidence Act 2006, s 57

Taxation Review Authorities Regulations 1998, reg 36

LEGAL TERMS

Calderbank, without prejudice, privilege, costs, procedural in nature

Summary

The Commissioner was the successful party in *Goodricke v Commissioner of Inland Revenue* [2024] NZHC 3639 and entitled to costs.

The parties were unable to agree on the quantum to be paid. Mr Goodricke said no costs should be paid to the Commissioner because a Calderbank offer had been made. The Commissioner said the Calderbank principles do not apply and sought costs on a 2B basis.

The High Court awarded costs on a 2A basis on the basis that the issues on appeal were limited and procedural in nature.

Impact

The outcome of this case confirms costs are at the discretion of the court. Costs will be awarded based on what the court considers is appropriate in the case.

For an offer to be a Calderbank offer it needs to meet the requirements in r 14.10 of the High Court Rules 2016.

Facts

On 2 December 2024 the High Court dismissed the appeal by Wendy and Peter Goodricke of a decision of the Taxation Review Authority (TRA). As the successful party, the High Court found the Commissioner was entitled to claim costs.

The parties were unable to agree on the quantum to be paid. Mr Goodricke also said that no costs should be paid to the Commissioner because a Calderbank offer had been made.

On 4 September 2022 Mr Goodricke had sent an email to the Commissioner which read:

> Craig
>
> If we walk away from the business and Wendy pays $13,581.88 are we able to put this to an end not have anything more to do with IRD over this.
>
> Peter

The above offer was rejected by the Commissioner.

The Commissioner said Mr Goodricke's argument was misguided, and the Calderbank principles do not apply. The Commissioner sought costs on a 2B basis.

Issues

1. Is Mr Goodricke's email of 4 September 2022 a Calderbank offer; and
2. Should costs be awarded to the Commissioner on a 2B basis.

Decision

1. Calderbank offer

   Calderbank offers are provided for in rr 14.10 and 14.11 of the High Court Rules 2016.

   There are a number of reasons why the purported settlement offer made by Mr Goodricke (the email of 4 September 2022) is not a Calderbank offer for the purposes of rr 14.10 and 14.11.

   First, it is not clear that the offer is one intended to be "without prejudice except as to costs". Such an express statement is required by r 14.10(1)(a). While the offer appears to be an offer to settle if the outstanding tax liability is paid, Mr Goodricke does not communicate an intention to rely on the offer in relation to the issue of costs should it have been rejected. This means that the privilege to settlement communications in s 57 of the Evidence Act 2006 applies, and Mr Goodricke's offer is inadmissible.

   Second, the appeal that was determined did not actually concern Mr Goodricke's tax liability. It was, in a general sense, procedural. This meant that the offer to pay the outstanding tax liability did not actually relate to an issue in the proceeding before the court, which is required by r 14.10(1)(b).

   Further, Mr Goodricke's position misunderstands r 14.11(4)(b) which allows a party to rely on a Calderbank offer where the amount offered is "close to the value or benefit of the judgment obtained" by the other party. The "value of benefit of the judgment obtained" does not mean the value of costs a successful party would otherwise be entitled to receive.

2. Costs

   Costs are at the discretion of the Court. Despite the Commissioner seeking 2B costs, 2A scale costs are appropriate in this case.

   While the proceeding was of average complexity and would have required counsel of average skill and experience, responding to Mr Goodricke's claim would likely have taken such counsel a comparatively small amount of time. The issues on appeal were limited and procedural in nature.

3. Anonymisation

   The Commissioner raised an issue as to anonymisation in the substantive decision of the name of the company that was one of the disputants in the TRA (but not a party to the appeal) given that reg 36 of the Taxation Review Authorities Regulations 1998 (Regulations) provides that published reports of TRA decisions may not contain the name of the disputant.

   The Regulations are not applicable to the High Court, and it is relatively commonplace for disputants in TRA appeals to be named in appellate court decisions. In the absence of any special reason why the disputants in this case should not be named, the Court declined to make an order for anonymisation.

CASE SUMMARY

Official Assignee directed to comply with deduction notice issued by the Commissioner of Inland Revenue in the event that forfeiture orders are not made and restraint is lifted in proceeds of crime proceeding

Decision date: 4 November 2024

CSUM 25/03

CASE

Commissioner of Police v Cheng [2024] NZHC 3242

LEGISLATIVE REFERENCES

Criminal Proceeds (Recovery) Act 2009, ss 6, 25, 37, 38, 43, 52, 53, 55, 56 and 83

Tax Administration Act 1994, ss 6, 15B, 89AB, 89D, 106, 109, 113 and 157

Income Tax Act 2007, s CD1

Goods and Services Tax Act 1985, s 43

CASE LAW REFEERENCES

Commissioner of Police v Cheng [2023] NZHC 606

Commissioner of Police v Snook [2018] NZHC 2537

Westpac Securities NZ Ltd v Commissioner of Inland Revenue [2014] NZHC 3377

Arai Korp Ltd v Commissioner of Inland Revenue [2013] NZHC 958

Tannadyce Investments Limited v Commissioner of Inland Revenue [2011] NZSC 158; [2012] 2 NZLR 153

Commissioner of Inland Revenue v Wilson (1996) 17 NZTC 12,512 (CA)

O'Neil v Commissioner of Inland Revenue [2001] UKPC 16, [2001] 3 NZLR 316, (2001) 20 NZTC 17,051, [2001] WL 535706 (PC)

Miller v Commissioner of Inland Revenue; Managed Fashions Ltd v Commissioner of Inland Revenue (1998) 18 NZTC 13,961 (CA)

McIlraith v Commissioner of Inland Revenue (2007) 23 NZTC, 21,456, [2007] WL 2121918 (HC)

LEGAL TERMS

Restraint, forfeiture, deduction notice

Summary

The Commissioner of Inland Revenue (CIR) filed an interlocutory application in a proceeds of crime proceeding seeking orders that, in the event forfeiture orders are not made and restraint over restrained funds is lifted, the Official Assignee is to pay funds belonging to 11 respondents to the proceeding to the CIR to reduce the outstanding tax liabilities of those respondents.

The High Court granted the orders sought and directed the Official Assignee to pay the CIR the lesser of the amounts held on behalf of the 11 respondents or their outstanding tax liability as at the date restraint is lifted.

Impact

The judgment reiterates that tax assessments that have not been challenged using the statutory disputes process are deemed to be correct in all respects under s 109 of the Tax Administration Act 1994 (TAA).

While a taxpayer can request a s 113 assessment, there is no obligation on the CIR to reopen assessments where a taxpayer did not use the statutory disputes procedure in the first instance. The Court affirmed that an application under s 113 does not 'stay' the operation of s 109 nor does it mean that tax liability may not be enforced under that section. Section 113 is not intended to be used to circumvent the statutory disputes procedure.

Facts

In 2016 a restraining order was obtained by the Commissioner of Police (CoP) over properties and funds that were linked to the alleged methamphetamine dealing of Thomas Cheng (the First Respondent) and the alleged tax evasion and money laundering by William Cheng (the Eighteenth Respondent) (Mr Cheng) and Niyoh Chew Hong (the Nineteenth Respondent). Ultimately, the value of restrained assets included properties and bank accounts worth approximately $20 million.

The CIR had assessed income tax and GST liabilities for each of the 11 respondents on the basis of rental payments received from the properties owned by each respondent. Rental payments had gone into the bank accounts of Mr Cheng and Worldwide Models Limited (the Ninth Respondent). Mr Cheng is the authorised signatory on the company's account. None of the 11 respondents disputed the assessments of their tax liability which before interest and penalties amounted to $1,679,246.33.

In March 2023 Cooke J determined the CoP's application for profit forfeiture orders in relation to the total sum of $20,102,053.22. The application insofar as it related to Mr Cheng and Nyioh Chew Hong was founded on allegations of tax evasion and money laundering. It was not alleged that they were involved with the significant drug dealing in which Thomas Cheng had been engaged. Justice Cooke accepted the profit forfeiture claim relating to Thomas Cheng's drug dealing offending. In relation to the other respondents, the CoP had proven that there was significant criminal activity of tax evasion, but the allegations of money laundering were not accepted.

The tax liability by the time of the forfeiture hearing had increased to $11,443,457.36 due to penalty and interest provisions under the TAA. However, the benefit of the tax evasion in the proceeding was assessed at $1.6 million on the basis that the interest and penalties were not a benefit derived from the offending itself. Rather, they were penalties faced by the respondents for their tax evasion. To avoid double recovery, Cooke J declined to make a forfeiture order in relation to the $1.6 million, concluding that the best course of action was for the CIR to use his extensive powers to effectively call for the payment of those monies.

The CoP filed an appeal in relation to the core tax liability of $1,679,246.33. The appeal was heard in July 2024 and the decision is yet to be released.

Following Justice Cooke's decision, on 15 December 2023 the CIR issued a deduction notice to the Official Assignee under s 157 of the TAA and s 43 of the Goods and Services Tax Act 1985. The deduction notice related to rental payments into the bank accounts that the CIR said belonged to the 11 respondents who had tax debts.

Issues

The CIR's position was that should the restraint be lifted, the restrained funds that were identified as rental payments would be payable to the 11 respondents but should instead, under the deduction notice, be paid to the CIR and applied towards the payment of their tax debts.

The respondents did not deny that the funds belonged to the 11 respondents, but objected to the orders sought on the basis that:

a) the default assessments issued by the CIR are incorrect;

b) Mr Cheng is in a current tax dispute with the CIR for the same alleged tax debt; and

c) the CIR's failure to collect tax for more than six years calls into question the integrity of the tax system in circumstances in which the CIR is claiming penalty interest for the period during which he failed to act.

Decision

Alleged erroneous default assessments

The respondents alleged that the amount specified in the deduction notice and sought to be deducted from the funds held by the Official Assignee is incorrect. They said that accountants now engaged by the respondents had identified errors in the default assessments of Harvest Property LLP (the Sixth Respondent), the respondent with the largest outstanding tax liability. An application under s 113 of the TAA to amend the default assessments has been made in relation to Harvest Property LLP.

The Court noted that if the statutory disputes process is not used to challenge a tax assessment, the assessment is deemed to be correct under s 109 of the TAA. While a s 113 application is being considered in relation to Harvest Property LLP, the Court held that it does not affect the operation of s 109. The 11 respondents' income tax, GST and evasion shortfall penalty assessments were not disputed and pursuant to s 109 have crystallised. Justice Radich noted that the respondents do not dispute that, and held that they cannot now seek to challenge the correctness of the assessments in this forum.

The Judge said that if the s 113 application is successful, then any new assessment issued would be incorporated in the updated summaries of account to be provided to the Official Assignee. In the event that a new assessment was issued after restraint was lifted and funds had been paid to the CIR pursuant to the deduction notice, the CIR would treat any excess tax paid in the usual way. Justice Radich said:

> It is important that the system operates in this way. The administrative chaos … that would otherwise unfold would be significant. Inland Revenue receives vast numbers of tax returns continuously. In each case, the Commissioner has no knowledge of a taxpayer's affairs. The system would be unworkable if s 113 could be used to delay or avoid collection procedures where tax obligations have been ignored previously. The need for corrections could have been avoided if tax returns were filed on time or resolved through the statutory processes. Section 113 does provide a backstop means of protection but it cannot stop the operation of the time-sensitive mechanisms for the payment of tax in the first instance.

William Cheng dispute

Default assessments have been issued to Mr Cheng personally for the same debt as has been assessed for the 11 respondent companies. Mr Cheng issued a notice of proposed adjustment and the dispute is currently at the conference phase.

The Court agreed with the CIR that the two assessments are not necessarily inconsistent with each other. Any benefits received by the shareholder from a company can be regarded as being dividends in the circumstances and are taxable irrespective of whether the company has paid tax on the same income previously. In that case, the 11 respondents and Mr Cheng will have a tax liability. If Mr Cheng is not beneficially entitled to the funds then there will have been no transfer of value to him that could be taxed as a dividend. But, if the restrained funds do not belong to the 11 respondent companies, then the funds in Mr Cheng's account represent a transfer of value to him and the assessments to him and the companies can both stand. The Court said the tax liability will be met when someone pays it.

Justice Radich said that the Privy Council has found that the CIR may at any time amend inconsistent assessments to alleviate an inconsistency before proceedings objecting to or challenging assessments have run their course. The Court held that the CIR must be allowed some flexibility in the timing of adjustments to meet administrative demands and to enable him to await the outcome of objection or challenge proceedings.

Alleged inordinate delay and the integrity of the tax system

The respondents alleged that the CIR needed to act promptly and that through taking no action while the funds were restrained the tax debt has increased exponentially which is unfair to the respondents. They argued that for the CIR to take no action for six years and now to seek to recover penalty interest against the respondents is unduly burdensome and disproportionate.

The Court disagreed saying that cannot be so in circumstances in which the respondents have chosen not to meet, or to deal with, their tax liabilities until recently. The tax system is predicated on voluntary compliance by taxpayers. The Judge observed that the respondents could have paid their tax debt at any time, either through unrestrained funds or filing an application to the court to have the restraint varied to enable their tax obligations to be met. Justice Radich said it is apparent that it is only since the CIR has issued a deduction notice and become actively involved in these proceedings that the respondents have taken steps relating to their tax obligations, adding that they have not complied with their filing obligations since April 2017 (the 2016 financial year was the latest assessment issued by the CIR).

Conclusion

The Court accepted the CIR's point that once the appeal was determined the restraining order will be lifted and there was a need for certainty on to whom the restrained funds should be paid. Having concluded that none of the arguments advanced by the respondents would prevent the orders sought, the Court granted the CIR's application.

TECHNICAL DECISION SUMMARIES

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

TDS 24/21: Accommodation provided to an employee

Subjects | Kaupapa

GST, PAYE, whether accommodation provided to an employee

Taxation laws | Ture tāke

Legislative references are to the Income Tax Act 2007 (ITA), Goods and Services Tax Act 1985 (GSTA) and Tax Administration Act 1994 (TAA).

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer was a company that supplied accommodation to an Employee as part of meeting its health and safety obligations. This was an obligation imposed by the contract of employment between the Taxpayer and Employee.
2. The Taxpayer leased the accommodation from Company B. The Employee and their partner were directors of Company B. The Employee's partner owned 100% of Company B. The Employee owned the majority of the Taxpayer.
3. A portion of the accommodation was available to the Employee solely for personal use with the remainder used by the Taxpayer for business purposes and accommodation of other staff from time to time.
4. Customer and Compliance Services of Inland Revenue (CCS) considered the accommodation was provided free of charge to the Employee and PAYE should have been paid on the value of the accommodation. In addition, CCS said the accommodation was a commercial dwelling and GST output tax should have been returned by the Taxpayer.
5. The Taxpayer argued it did not provide accommodation to the Employee. The Taxpayer said that Company B allowed the Employee to reside at the Property and the lease was for other business purposes.
6. CCS considered the value of the accommodation for income tax and GST purposes should have been determined based on the rent the Taxpayer paid Company B under the lease. The Taxpayer argued that if it was found it had provided accommodation to the Employee, the value of the accommodation for income tax and GST purposes should be based on the market rental value (which was a lower figure).
7. Various disputes documents were issued by the Taxpayer and CCS with the matter eventually being referred to the Tax Counsel Office (TCO) for adjudication.

Issues | Take

8. The main issues considered in this dispute were:
   - whether the Taxpayer had provided the Employee with accommodation
   - whether the accommodation provided was "in relation to" and "in connection with" the Employee's employment
   - the value of accommodation for income tax purposes
   - the value of the supply of accommodation for GST purposes
9. There was also a preliminary issue on the onus and standard of proof.

Decisions | Whakatau

10. TCO concluded that:
    - The Taxpayer had provided accommodation to the Employee.
    - The accommodation provided was "in relation to" and "in connection with" the Employee's employment.
    - The value of the accommodation for income tax purposes was the market rental value, reduced to take account of the part used for work purposes.
    - The value of the accommodation for GST purposes was the market rental value, reduced to take account of the part used for work purposes.

Reasons for decisions | Pūnga o ngā whakatau

Preliminary issue | Take tōmua: Onus and standard of proof

11. Except for proceedings relating to evasion or similar act or obstruction, the onus of proof is on the taxpayer to show that an assessment is wrong, why it is wrong, and by how much it is wrong.[1] However, if the taxpayer proves, on the balance of probabilities, that the amount of an assessment is excessive by a specific amount, the taxpayer's assessment must be reduced by the specific amount.[2]
12. The standard of proof required is the balance of probabilities.[3]
13. It is appropriate that the same onus and standard of proof be applied in the disputes process as in challenge proceedings. TCO considered whether the Taxpayer has discharged the onus of proof in the context of the issues raised by the parties in the dispute, based on the documentary evidence put before it.

Issue 1 | Take tuatahi: Whether the Taxpayer supplied accommodation to the employee

14. CCS stated it was the lease agreement between the Taxpayer and Company B that had allowed the Employee to reside at the accommodation. The Taxpayer said that the lease was subject to an existing right of the Employee, granted by Company B, to occupy the accommodation.
15. TCO considered this was a matter of contractual interpretation:
    - The aim is to ascertain the meaning which the document would convey to a reasonable person having regard to the background knowledge available to the parties at the time of the contract.[4]
    - The contractual language must be interpreted within its overall context, broadly viewed.[5] While context is a necessary element of the interpretive process, the text remains centrally important. The ordinary and natural meaning of the language used will be a powerful indicator of what the parties meant.
    - Evidence of prior negotiations and subsequent conduct objectively proving what the parties intended the words to mean may be relevant.[6]
    - Caution must be taken when reading words as having an effect different from their literal meaning or being of no effect.
    - Depending on the nature, formality, and quality of the drafting of the contract, more or less weight can be given to wider context in interpreting the objective meaning of the language used.[7]
    - More weight can be given to the implications of rival constructions by reaching a view as to which is more consistent with business common sense. The possibility that one party had agreed to something that with hindsight did not serve their interest must also be considered.[8]

1 Section 149A(2) of the TAA. See also *Case V17* (2002) 20 NZTC 10,192, *Accent Management Ltd v CIR* (2005) 22 NZTC 19,027 (HC), and *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

2 Section 138P(1B) of the TAA.

3 *Yew v CIR* (1984) 6 NZTC 61,710 (CA), *Case Y3* (2007) 23 NZTC 13,028, and *Case X16* (2005) 22 NZTC 12,216.

4 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

5 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand & Anor* [2014] NZSC 147

6 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696

7 *Starrenburg & Anor v Mortre Holdings Ltd* (2004) 21 NZTC 18,696 (CA)

8 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1,173,

Application

16. The terms of the lease showed that the Taxpayer leased the entire accommodation and were consistent with the Taxpayer having provided the Employee with accommodation there during the period of the lease. Additionally, invoices that were issued by Company B to the Taxpayer included a description for the accommodation which were consistent with the Taxpayer having leased the entire house.
17. TCO noted that Company B may have previously allowed the Employee to use the accommodation. However, during the period of the lease, the accommodation was leased to the Taxpayer and was not available for Company B or the Employee to otherwise use.

Issue 2 | Take tuarua: Whether the accommodation was provided "in relation to" and "in connection with" employment

18. In s CE 1 of the ITA the value of accommodation provided to a person in relation to their employment is income of the person.
19. CCS argued that the accommodation had been provided "in relation to" and "in connection with" the Employee's employment. The Taxpayer argued that the accommodation was provided in relation to its health and safety obligations and not in relation to the employment status of the Employee and that the employment agreement did not provide for accommodation.
20. TCO noted that Commissioner's view was that "in relation to" and "in connection with" have similar meanings and the words can have a very wide meaning. In an employment context, the Commissioner considered a benefit is provided "in connection with" employment where the employment is a substantial reason for the provision of the benefit.[9]
21. TCO said that in providing the accommodation, the Taxpayer had been meeting its obligations ensuring the health and safety of its employees and providing a work environment without risk. This was something the Taxpayer was required to do under the Employee's employment contract.
22. TCO found that the Employee's employment was a substantial reason for providing accommodation during the period of the lease. This had been provided "in relation to" or "in connection with" their employment, so the value of accommodation was income of the employee.

Issue 3 | Take tuatoru: Value of the accommodation for income tax

23. As TCO found that the Taxpayer provided the Employee with accommodation, TCO had to determine the value of the accommodation.
24. CCS said that the value should be determined in reference to s CE 1B(3) of the ITA, being the amount of rent paid by the Taxpayer. The Taxpayer said this should be determined under s CE 1B(1) of the ITA, being the market rental value of that accommodation.
25. To support its argument the Taxpayer referred to the Commissioner's Statement **CS 16/02 Determining "Market Rental Value' of Employer-Provided Accommodation**. The Commissioner considers that:
    - The "market rental value" is the rental that would be paid if similar accommodation in a comparable location, subject to similar conditions, was rented on an arm's length basis between non-associated parties.
    - The amount actually paid to a third party as consideration under an arm's length rental arrangement is the "market rental value" of the accommodation.
    - It is open to the employer to adopt a reasonable valuation basis including a valuation from a registered valuer.
    - Apportionment may be appropriate where part of the accommodation is used "wholly or mainly" for work purposes related to the employee's employment.
26. TCO noted that s CE 1B(3) applied where an employer paid an employee's accommodation expenditure. Section CE 1B(3) did not apply where an employer provided accommodation directly to an employee.
27. TCO found that the Taxpayer had provided the accommodation directly to the Employee and s CE 1B(1) applied and that the value of the accommodation was determined based on the market rental value of the accommodation.

9 Binding Ruling BR Pub 09/02: Federal Insurance Contributions (FICA) – Fringe Benefit Tax (FBT) Liability, *Tax Information Bulletin* Vol 21, No 4 (June 2009): 2.

28. The Taxpayer had obtained a registered valuation to determine the market rental value of the accommodation, which was lower than the amount in the lease between the Taxpayer and Company B. This valuation used CS 16/02 as the basis for determining the market rental value. This included making adjustments, such as: disturbance caused by work around the accommodation, time movement and availability of rooms.
29. The Taxpayer said part of the accommodation was used for work purposes and proposed an adjustment be made for this. TCO accepted that, based on the evidence, an adjustment should be made.
30. TCO found that the value of the accommodation was the market rental value of the accommodation, calculated by the registered valuer and reduced to take account of the part of the accommodation used for work purposes.

Issue 4 | Take tuawhā: Value of the accommodation for GST

31. Like the valuation issue above, TCO had to determine the value of the supply of accommodation for GST purposes.
32. CCS argued that the value was based on the rent the Taxpayer paid to Company B (s 10(2)(a) of the GSTA). The Taxpayer argued that the value was based on the open market value of the supply (s 10(3) of the GSTA) as an associated supply.
33. Neither party disputed that the Employee was associated with the Taxpayer meaning that the definition of "associated supply" applied (s 2(1) of the GSTA), being "a supply for which the supplier and recipient are associated persons."
34. TCO determined that the relevant supply for GST purposes was the accommodation the Taxpayer provided to the Employee. Under s 10(2)(a) of the GSTA, to the extent the consideration for the supply is in money, the value of the supply is the amount of the money. As the Taxpayer supplied the accommodation to the Employee for no consideration (in money or otherwise) this provision did not apply.
35. TCO agreed with the Taxpayer that the value of the supply was determined under s 10(3) as the open market value of the accommodation calculated by the registered valuer. This was reduced to take account of the part of the accommodation used for work purposes.

TDS 24/22: Transitional residency and cryptoassets

Subjects | Kaupapa

Cryptoassets, transitional residency, source of income.

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer was a natural person who had previously been a New Zealand resident, (but not a transitional resident), had moved offshore for more than 10 years and was now looking to return to New Zealand.
2. The Taxpayer intended to purchase a property in New Zealand to be their permanent place of abode (PPOA) or would otherwise remain in New Zealand for a period greater than 183 days while looking for such a property.
3. The Taxpayer held cryptoassets in overseas centralised exchanges as well as decentralised exchanges (DEX). These assets were not intended to be a trading or business activity, being held long term, but may have been sold from time to time to rationalise the overall portfolio.
4. The Taxpayer had sought a ruling that they would be a transitional resident and that the sales of cryptoassets would be exempt income under these rules.
5. The Tax Counsel Office (TCO) were not asked to rule on whether the sales of the cryptoassets were income of the Taxpayer.

Issues | Take

6. The main issues considered in this ruling were:
    - Whether the Taxpayer would qualify to be a transitional resident.
    - Whether the amounts derived by the Taxpayer from the sale of cryptoassets through overseas centralised exchanges or DEXs have a source in New Zealand.

Decisions | Whakatau

7. TCO concluded that:
    - The Taxpayer would qualify to be a transitional resident (on the presumption certain conditions were met);
    - The amounts derived from the sale of cryptoassets did not have a source in New Zealand.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: hether the Taxpayer would qualify to be a transitional resident

8. Section HR 8 provides the rules for a person to be become a transitional resident. If a person is a transitional resident some of their income that would ordinarily be taxable in New Zealand will be exempt income so will not be taxable. To be a transitional resident the requirements of ss HR 8(2)(a)-(e) must be met including:
    - The person is a natural person;
    - The person is resident in New Zealand either through a PPOA (s YD 1(2)) or the 183 day rule (s YD 1(3));
    - The person did not, in the previous 10 years, meet the requirements of the preceding bullet point and was not a resident in New Zealand;
    - The person had not been a transitional resident preceding the 10 year non-resident period; and
    - The transitional period (48 months) has not ended.
9. TCO found that this was largely a factual enquiry and that the Taxpayer would meet all the elements of s HR 2.

10. To ensure that the requirements of s HR 2 would be met TCO included the requirements that the Taxpayer had not been a New Zealand resident at any time during the 10 year period they were offshore and had never been a transitional resident preceding that.

Issue 2 | Take tuarua: Application of the source rules

11. As TCO concluded that the requirements of s HR (8) would be met s CW 27 would then apply to treat foreign-sourced amounts as exempt income (excluding income from employment and supply of services), such amounts being amounts that are not treated as having a New Zealand source (s YA 1).
12. The issue was whether any income derived from the sale of cryptoassets held on overseas centralised exchanges or DEXs could be said to be sourced in New Zealand. TCO said that the potentially relevant source rules were those that dealt with: businesses carried on in New Zealand (s YD 4(2)), contracts made or performed in New Zealand (s YD 4(3)), property situated in New Zealand (s YD 4(12)), income from a trust fund that has a source in New Zealand (s YD 4(13)), or any other source in New Zealand (s YD 4(18)). TCO noted that key to this is understanding the ways in which cryptoassets can be acquired, held and traded.
13. The Taxpayer held their cryptoassets in two types of cryptoasset exchange namely overseas centralised exchanges and DEXs. To gain access and trade the cryptoasset both public and private keys are required. Centralised exchanges typically hold both keys, while with DEXs the owner holds the private key and the public key sits on various worldwide public nodes. The private key is held in a 'wallet' and is used to sign a transaction.
14. Centralised exchanges match buyers and sellers. When a seller places an order to sell cryptoassets there is no requirement that the purchaser communicates acceptance before paying for the cryptoassets. Instead, both parties submit their orders on the understanding the exchange would find a suitable counterparty and automatically complete the transaction between them, indicating a contract would be unilateral as acceptance was not required to be communicated.
15. For the DEX, where the Taxpayer held cryptoassets, the transactions occurred under a smart contract and via a liquidity pool[1] which did not require acceptance to be communicated. It is difficult to identify the counterparty in these circumstances.

Income from a business (s YD 4(2))

16. For s YD 4(2) to apply sales of cryptoassets must arise from and be wholly or partly carried out by a business carried on in New Zealand by the Taxpayer.
17. TCO noted that it is necessary to consider the nature of the activities carried on and the intention of a taxpayer. [2]
18. On the information provided TCO thought it likely that the Taxpayer had not acquired the cryptoassets for business purposes. The volume of trades over the intervening years supported this view.
19. To ensure that this view was reflected in the ruling TCO included a requirement that the Taxpayer would not conduct a business or trading activity that involved the sale of cryptoassets.

Contracts made or performed in New Zealand (s YD 4(3))

20. Section YD 4(3) provides that income derived by a person from a contract made in New Zealand or overseas has a New Zealand source to the extent it is performed here. A contract is made when and where acceptance of an offer has effect.[3] In the case of a unilateral contract the act of acceptance is the performance by the offeree of the act or acts required by the offeror.
21. TCO noted that sections 216 and 217 of the *Contracts and Commercial Law Act 2017* governs receipt of electronic communications and electronic acceptance and formation of a contract. Receipt occurs at the addressee's place of business and formation occurs at the time the communication enters the designated information system for electronic communications.
22. For a contract to be treated as sourced in New Zealand it also needs to be performed here. TCO noted that the performance of a contract implied physical acts that are performed here. [4]

1 A liquidity pool is very briefly a fund of cryptoassets deposited by users who receive a share of trading fees generated by the pool as consideration for making their deposits.

2 *Grieve v CIR* (1984) 6 NZTC 61, 682.

3 *Thomson v Burrows* [1916] NZLR 223; *Ayson v C of T* [1938] NZLR 282; *J A Redpath & Sons Ltd v Melville Ford & Co Ltd* [1950] NZLR 362).

4 Interpretation Statement: IS 19/01: *Income tax - application of schedular payment rules to non-resident directors' fees.*

23. In respect of the overseas centralised exchanges and DEXs TCO concluded that s YD 4(3) would not apply. For each type of exchange, the actions that constitute acceptance and performance will be carried out over the exchanges. As the overseas centralised exchanges are located outside New Zealand, the contracts will be made and performed outside New Zealand. As the DEX is decentralised, it is not practically possible to attribute a location to it and, as such, it will not be possible to conclude that the contract is made or performed in New Zealand.

Disposal of property situated In New Zealand (s YD 4(12))

24. TCO noted that s YD 4(12) would be the most likely source rule to apply. This section requires there to be income from the disposal of property that is situated in New Zealand[5]. TCO noted that cryptoassets were considered property[6]. The question then is whether these were located in New Zealand.

25. TCO considered whether any of the following factors could be used to attribute a location to the Applicant's cryptoassets:

- the location of an underlying asset such as gold. This was not applicable to the cryptoassets held by the Applicant.
- the location of any centralised organisation that controls a cryptoasset. This was not applicable to the cryptoassets held by the Applicant.
- the location of the exchange on which a trade takes place. This was not considered appropriate as in many cases exchanges hold cryptoassets on trust and in other cases they act as a broker and it is virtually impossible to determine a location for a decentralised exchange.
- where a cryptoasset is accessed and controlled (ie, where the wallet or private key is). This was not considered appropriate as wallets and private keys do not represent the cryptoasset itself but merely control access to it. Also, it is possible for private keys to be in more than one location at the same time.
- where the nodes that make up a blockchain are located. This was not considered appropriate as the nodes in a decentralised blockchain are located all over the world.
- where a cryptoasset was mined or a transaction validated. This was not considered appropriate as it is difficult if not impossible to determine these locations.
- where the counterparties to a transaction are located. This was not considered appropriate because in many cases a person will not know who the counterparty to a transaction is.

26. TCO noted that while there were some overseas authorities that may provide some basis for attributing the location of cryptoassets (such as residency of a person)[7] these were largely focussed on the jurisdiction of courts in a conflict of laws situation and not the source of income.

27. While determining an appropriate law to govern transactions and access to courts will be necessary where there are disputes, TCO noted this does not necessarily translate to always requiring a source or being taxed in a particular jurisdiction. That is, if a cryptoasset is not sourced or located in New Zealand, it is foreign sourced income in this particular context and it does not need to be determined exactly where that income is sourced.

28. TCO considered that intangible assets that operate over DEXs, and are not registered in any country, do not have a location. This position can be compared to other forms of intangible property where it has been held that they are located where they are registered (for example shares, debt, trademarks and intellectual property).[8]

29. TCO noted that, while not without doubt, the cryptoassets would not be situated in New Zealand merely because the Taxpayer would be resident here, therefore s YD 4(12) would not apply.

Beneficiary income (s YD 4(13))

30. Under s YD 4(13), income derived by a beneficiary from a trust will have a source in New Zealand to the extent to which the trust's income has a source in New Zealand. Beneficiary income is income that is derived by a trustee and paid to or vests absolutely in a beneficiary.

5 *CIR v NV Philips' Gloeilampenfabrieken* (CA)

6 *Ruscoe v Cryptopia Ltd* [2020] NZHC 728

7 *Fetch.ai Ltd v Persons unknown* [2021] EWHC 2254

8 *Brassard v Smith* (1925) AC 371, *R v Lovitt (Irvine)* [1912] AC 212, and *Lecouturier v Rey* [1910] AC 262.

31. For s YD 4(13) to apply to the Taxpayer the amounts from the sale of their cryptoassets, must be derived by a trustee before being paid or distributed to the Taxpayer. Section YB 21 (Transparency of nominee) provides that if a nominee holds or does something for another person that other person does that thing and the nominee is ignored.
32. TCO noted the overseas centralised exchanges may hold cryptoassets as bare trustees for the Taxpayer and in such cases will be treated as nominees.[9] This means the exchange is limited to acting on the Taxpayer's instruction.
33. As the nominee is ignored, TCO said that s YD 4(13) does not apply to the Taxpayer as the income is not derived by the trustee. If the overseas centralised exchanges act as bare trustee for the Taxpayer and contract as principal to sell the cryptoassets the exchange will be ignored and the Taxpayer is treated as deriving the sale proceeds.

Income from any other source in New Zealand (s YD 4(18))

34. Section YD 4(18) is a catch-all and provides for income being derived in New Zealand where the source of that income is in New Zealand.
35. TCO said that the following principles were important when considering this provision:[10]
    - The "source" of income is what a practical person would regard as the real source as a practical, hard matter of fact.
    - "Source" does not mean from where the money came, but the operating cause of the payment being made. It refers to the source or origin rather than the fund or place from which the income was taken.
    - The "source" of income is connected to the location where the services are rendered, the location of the property in respect of which the income is derived or the location of transaction which provides the income.
36. Additionally, TCO said that case law has expanded on these principles, including:
    - Identifying what the taxpayer has done to earn the profit. Profit was earned from the place in which the contracts of purchase were made.[11]
    - Profits do not simply accrue to where the taxpayer exercised their skill or judgement. What matters most is the place at which the result of the transaction occurs.[12]
37. TCO concluded that s YD 4(18) did not apply. While not free from doubt, there is no causative link between where cryptoassets are bought and sold (on overseas centralised exchanges and DEX) and that income and source being in New Zealand.

9 *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728.
10 *CIR v NV Philips' Gloeilampenfabrieken* (CA).
11 *CIR (Hong Kong) v Hang Seng Bank Limited* [1991] 1 AC 306 (PC)
12 *Commr of IT (Bombay and Aden) v Chunilal B Mehta*

TDS 24/23: Depreciation loss on asset no longer used

Subjects | Kaupapa

Depreciation loss, general permission, general limitation, asset no longer used

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer was a company that had shut down a part of their business. This was not a cessation of business activity, rather a change in business direction.
2. The change in direction meant an asset it had could no longer be used in that new business. The asset remained onsite. Neither the Taxpayer nor its associates could use it in their business given the nature of the asset.
3. The Taxpayer obtained an independent report on the costs to dispose of the asset. This report found that these costs would exceed any scrap value consideration that could be derived on disposal.
4. The Taxpayer sought a ruling from the Tax Counsel Office (TCO) that they had a depreciation loss for the income year under s EE 39 (items no longer used).

Issues | Take

5. The main issue considered in this ruling was:
   - Whether the Taxpayer had an amount of depreciation loss for the relevant income year under s EE 39.
6. This ruling did not consider or rule on the potential application of the disposal provisions in ss EE 44 – EE 52 for future income years.

Decisions | Whakatau

7. TCO concluded that under s EE 39, provided that no provision in subparts DB to DZ applied to modify or deny the depreciation deduction:
   - The Taxpayer had a depreciation loss for the income year equal to the adjusted tax value of the asset at the start of its income year per subs (5).
   - No other amount of depreciation loss arose under subpart EE in relation to the asset in the income year per subs (3).
   - The adjusted tax value of the asset in the Taxpayer's fixed asset register at the end of the income year is zero per subs (6).

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Depreciation loss on asset no longer used

8. Section EE 1 sets out the criteria for claiming a depreciation loss. TCO noted that the Taxpayer met the first three criteria in s EE 1 – the property was owned by them within the meaning of ss EE 2 to EE 5, the asset was depreciable property as defined in s EE 6 and it was available for use in the income year until the change in business direction occurred. TCO considered the general permission, general limitations and the calculation of that loss next.

General permission and general limitations

9. To claim a depreciation loss, TCO noted that the Taxpayer needed to have incurred the loss in the course of carrying on a business in deriving their income (s DA 1(1)(b), the second limb of the general permission). There must be a nexus between the expenditure and the business that is being carried on for the expenditure or loss to be deductible.[1] TCO considered the Taxpayer satisfied the general permission as it was in business throughout the relevant income year, and the depreciation loss was incurred in the course of its business as the asset was part of their business structure and income earning process until the change in direction.
10. Section DA 2 contains several general limitations that override s DA 1 (the general permission). TCO considered that none of these limitations applied to override the general permission, and more specifically the capital limitation in s DA 2(1) did not apply to an amount of depreciation loss merely because the item of property is itself of a capital nature (s DA 4).
11. Under s DA 3(6), no provision in Part E (Timing and quantifying rules) overrides the general permission or a general limitation, so no provision in subpart EE affects TCO's conclusion that the general permission is satisfied, and no general limitations apply.
12. TCO did not consider every provision of Part D so, out of caution, they included the proviso that subparts DB to DZ did not apply to modify the deduction for depreciation loss calculated under s EE 39.

Asset no longer used

13. Having concluded that the general requirements to claim a depreciation loss were satisfied, TCO turned their mind to the final requirement being the amount of depreciation loss to be calculated in accordance with s EE 9 (description of elements of calculation), which refers to the application of s EE 39 (items no longer used).
14. The Taxpayer needed to satisfy the following conditions for s EE 39 to apply:
    - The asset is no longer used in an income year.
    - The asset is not a building.
    - The asset has not been depreciated using the pool method.
    - The asset is no longer, nor is intended to be, used in deriving assessable income or carrying on a business by the Taxpayer or associated persons.
    - The cost of disposing of the asset would be more than any consideration the Taxpayer could get from disposing of it.
15. TCO considered the first four bullet points were met by the Taxpayer as they concerned factual matters or the Taxpayer's intention and were addressed by including conditions to the ruling.
16. TCO considered further whether the cost of disposal would be more than the consideration the Taxpayer could get from disposing of it (s EE 39(4)(c)). Particular to this inquiry was the meaning of "dispose", "consideration" and "could" in this context as follows:
    - "Dispose" means to "get rid of"[2], and includes destroying, withdrawing, or letting lapse (s YA 1), and in relation to ownership of an item, includes situations where a person who is the legal or equitable owner of an item of property deals with the property in such a way that the person is no longer that owner (which would include selling the property).[3]
    - Section EE 47 details a number of events similar to "disposal" such as where there is a change of use or location of use, loss or theft, irreparable damage to an item of property or a building, or permanent removal of the property from New Zealand.
    - Section EE 45 provides that "consideration" is the amount a person derives less (disposal) costs and may be a zero or negative amount, as modified by subss (3) to (11). As s EE 39(4)(c) refers to the comparison of "consideration" with the "costs of disposing", TCO said that "consideration" in s EE 39 did not include disposal costs as that would result in double counting. TCO concluded that "consideration" in this context is the amount a person derives on disposal as modified by ss EE 45(3) – EE 45(11) (if applicable).

1 *CIR v Banks* (1978) 3 NZTC 61,236 (CA) and *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA)), *NRS Media Holdings v C of IR* (2018) 28 NZTC 30,328).

2 *Concise Oxford English Dictionary* (12th Edition).

3 From the context of the meaning of "own" in s EE 2, and the reference to "disposed of" in s EE 1(3)(c).

- TCO noted that the ordinary meaning of "could" suggests that to satisfy s EE 39(4)(c), the costs to dispose of the asset needs to be more than any amount the Taxpayer has a hypothetical objective possibility or opportunity in the conditions of its case of deriving from disposing of the asset.[4]

17. Having considered the plain and ordinary meaning of the statutory text, TCO cross checked the ordinary meaning with the legislative purpose.[5]

18. TCO said that the predecessor legislation and extrinsic material supported the view that the criterion in s EE 39(4)(c) was intended to be assessed on an objective basis based on the best estimate of the costs of disposal and potential sale or disposal proceeds for the particular asset.[6] TCO stated for the Taxpayer to satisfy s EE 39(4)(c), the costs for them to destroy, sell, or get rid of the asset needs to be more than the amount that they had the objective possibility or opportunity of deriving from its disposal. It was also implicit from the legislative context that s EE 39 cannot apply if the asset had already been disposed of during the relevant income year. TCO was satisfied that the Taxpayer had not disposed of the asset in the relevant income year.

19. TCO found that the final requirement for s EE 39 to apply was satisfied, that is, the cost of disposal would exceed any consideration the Taxpayer could get from disposal as:

    - According to an independent report, the estimated cost to dispose of the asset was greater than the estimated scrap value that could be derived.
    - While the asset was considered marketable, due to the unique nature of the asset, there was an absence of buyers and lack of a market or opportunities for sale. The asset was marketed for sale and the Taxpayer did not receive any offers to purchase it. There were interested parties, but this did not progress beyond an initial inquiry. This supported an objective assessment that the best estimate of the consideration that could be received from disposing the asset was the scrap value, which per above, was less than the cost of disposal.

20. Having concluded that the Taxpayer satisfied all the requirements for s EE 39 to apply (as listed at [15]), TCO said that under s EE 39(5) the amount of the Taxpayer's depreciation loss was the adjusted tax value of the asset at the start of their income year as calculated by applying ss EE 55 to EE 60 and the adjusted tax value of the asset in the Taxpayer's fixed asset register at the end of the income year is zero per subs (6).

4 *Oxford English Dictionary* (online edition).

5 Section 10 of the Legislation Act 2019.

6 See, for example, section 108K(6) on the Income Tax Act 1976; section EG 12(6) of the Income Tax Act 1994; the Taxation (Annual Rates, Taxpayer Assessment and Miscellaneous Provisions) Act 2001 and its related Bill Commentary.

TDS 24/24: Share scheme taxing date

Subjects | Kaupapa

Income tax: Employee share scheme; vesting of shares to participants; share scheme taxing date

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Applicant was a group of companies (the Group) that operated an employee share scheme (the Plan).
2. The Arrangement was the vesting of awards and transfer of shares to participants in the Plan.
3. Company A, as the parent company of the Group, invited certain employees to participate in the Plan. The invitation letter specified the number of awards granted, the date granted and the vesting conditions. Employees that took part in the Plan and were granted awards are referred to in this summary as "Members".
4. Each award represented the right to receive one share in Company A for nil two years from the date of the grant, subject to meeting the vesting conditions. There were two categories of vesting conditions. One category required continued employment over the two years, the other only required the passage of two years' time. No Member was entitled to vote or attend a meeting of the shareholders of Company A or receive any dividends by virtue of holding an award.
5. The awards were deemed exercised on the date on which all the vesting conditions were satisfied or waived by the Board, and this is when the awards vested to the Members. As soon as practicable after the deemed exercise of an award, Company A arranged for the Member to receive the requisite number of shares (Resulting Shares). PAYE was deducted from taxable value of the awards vested.
6. The awards (and in some circumstances the Resulting Shares) were subject to forfeiture or clawback in special limited circumstances under the Plan. Such circumstances could include termination of employment due to serious misconduct or a material breach of the terms of employment.
7. The Group maintained an employee share schemes trust (X Trust) for the purposes of holding shares on behalf of the Group in respect of various share schemes offered to employees.
8. Prior to the introduction of the Plan, the X Trust was primarily used to hold shares under schemes that provided shares to employees with restrictions attached. A clause of the deed establishing the X Trust (Trust Deed) provided that shares held by the trustee that were not for the time being allocated by the trustee under a scheme (Surplus Shares) may be retained by the trustee and held on trust until allocated or reallocated under a scheme, or may be sold or otherwise disposed of or dealt with at the direction of Company A.
9. On the day the awards are deemed to be exercised by a Member under the Plan (ie, on the date on which all the vesting conditions are satisfied or waived by the Board), Company A instructs the trustee to deliver the Resulting Shares out of its stock of Surplus Shares to the Members. The trustee communicates with the share registry service provider to transfer the Resulting Shares to the Member's personal account.

Issues | Take

10. The main issue considered in this ruling was:
    - When did the share scheme taxing date arise under s CE 7B?

Decisions | Whakatau

11. TCO concluded that:
    - The share scheme taxing date for a Member in the Plan arose on the date the awards vested to the Member under s CE 7B(1)(a), provided the awards had not been forfeited under the Plan prior to this date.

Reasons for decisions | Pūnga o ngā whakatau

Issue | Take: When does the share scheme taxing date arise under s CE 7B?

12. Section CE 7 defines employee share scheme for the purposes of the Act. The Plan met this definition by offering awards (rights to shares in Company A) to employees of the Group that were invited into the Plan. None of the exclusions in s CE 7(b) applied.
13. Where there is an employee share scheme, the employee has employment income under s CE 1(1)(d) of an amount equal to a benefit received under an employee share scheme. The amount of the benefit is calculated on the share scheme taxing date applying the formula set out in s CE 2(1).
14. The issue at hand was when the share scheme taxing date arises. This was important as this was the time the shares in Company A must be valued to calculate the Member's benefit under s CE 2(1).
15. Section CE 7B(1) defines share scheme taxing date. In summary, it sets out that the share scheme taxing date will arise on the earlier of the following dates:
    - Under para (a) the first date when shares are held by or for the benefit of the employee, and there are no provisions in the scheme that affect the employee's rights to shares as set out in subparas (i) to (iii). Relevantly:
        - An example of a provision that might defer the share scheme taxing date under s CE 7(b)(1)(a) is if there is a material risk that a right or requirement in relation to a transfer or cancellation of the shares might operate (as per subpara (i)).
        - When determining whether any such deferral occurs, certain rights or requirements as set out in sub (2) can be ignored. An example is a right or requirement to transfer shares for market value consideration at the time of transfer (as per para (a)).
        - The examples illustrate when there is a "material risk" that a right or requirement in relation to a transfer of shares might operate. If an employee forfeits their shares by simply resigning and leaving employment there is a material risk of forfeiture (example 1). However, if an employee only forfeits their shares if dismissed for serious misconduct, that that is not a material risk of forfeiture (example 2).
    - Under para (b) the date when the shares or rights are cancelled or transferred to a non-associate.

When are shares held by or for the benefit of a Member

16. TCO first considered when shares were held by or for the benefit of a Member under the Plan for the purposes of s CE 7B(1)(a).
17. At issue was whether the Surplus Shares could be considered held for the benefit of a Member. Case law such as *Gillespie v City of Glasgow Bank* (1879) 4 App Cas 632 (HL) and *Case D27* (1980) 4 NZTC 60,621 support the following propositions:
    - "For the benefit of" has been said to mean "in trust for".
    - To hold shares for the benefit of someone means you are not beneficially the owner of the shares. The person for whose benefit you hold the shares is the beneficial owner.
18. Based on the Plan rules and the terms of X Trust, TCO did not consider the Surplus Shares were held for the benefit of any Members in the Plan prior to the awards vesting. This was primarily for the following reasons:
    - The terms of the Plan did not state that there are any shares held anywhere for the Member, and the Member did not have any interest in any shares under the Plan until the vesting conditions were met. The Plan rules specified that no Member was entitled to vote or attend a meeting of shareholders of Company A, or receive any dividends declared by Company A, by virtue of holding an award.
    - The X Trust did hold shares for employees under some of the Group's other plans. Where it did so, the Trust allocated the shares to the relevant employee and a sub-register of shares was maintained with the employee's name allocated to those shares. Under the Trust Deed, the employee would then have a beneficial interest in those shares that had been so allocated.
    - None of the shares in the X Trust were allocated to Members in the Plan in this manner and the Trust Deed did not apply to any Members with awards under the Plan.

- The Trust Deed recognised that the X Trust may hold Surplus Shares that are not allocated under the Trust Deed or a share plan at the particular time. The trustee was required to deal with those Surplus Shares at the direction of Company A. Dividends or distributions in respect of Surplus Shares were credited to the X Trust's cash fund (ie to be used for the purposes of the X Trust at Company A's direction).

19. In light of the above, a Member in the Plan could not be said to have any beneficial interest at all in the Surplus Shares held by the X Trust as they were not allocated to the Members under the Trust Deed or the Plan. The Plan itself specified that the Members had no rights to dividends or voting by virtue of holding an award. The Surplus Shares could be used for whatever purposes directed by Company A under the Trust Deed.
20. Accordingly, it was the view of TCO that the Surplus Shares were not held for the benefit of any Member in the Plan, at least prior to the vesting conditions being met.
21. TCO concluded that on the date the vesting conditions are met and the Member is deemed to exercise the awards, under the arrangement the trustee of X Trust will hold Surplus Shares at that point for the benefit of the Member. This is because Company A has directed the trustee to deliver the Resulting Shares to the Member and the trustee has requested the share registry provider do this. Accordingly, from the vesting date, the X Trust will not be able to deal with the Surplus Shares in a way that is inconsistent with them being transferred into the Member's name – they are simply in wait to be transferred as soon as practicable. It was TCO's view that, at this point, they will be at the very least held by the trustee for the benefit of the Member.

Risk of deferment

22. TCO then considered whether any of the circumstances set out in subparas (i) to (iii) in s CE 7B(1)(a) applied to defer the share scheme taxing date.
23. After considering the clauses of the Plan rules and the limited circumstances in which the Resulting Shares could be forfeited or clawed back, TCO concluded that there was no material risk of forfeiture of the shares and therefore they did not result in the share scheme taxing date being deferred under s CE 7B(1)(a)(i).

Overall conclusion

24. Overall for this issue TCO concluded that on the facts of the arrangement:
    - Prior to the date the awards vest to a Member under the Plan, the X Trust was not holding the Surplus Shares for the benefit of an employee share scheme beneficiary of the Plan under s CE 7B(1)(a).
    - The Surplus Shares were held by or for the benefit of an employee share scheme beneficiary in respect of the Plan when the awards vest to the Member for the purposes of s CE 7B(1)(a).
    - That none of the deferral provisions in s CE 7B(1)(a) applied and the share scheme taxing date for a Member in the Plan arose on the date the awards vested to the Member under s CE 7B(1)(a), provided the awards had not been forfeited under the Plan prior to this date.

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.