Contents

Practitioner's viewpoint: NZ Tax Planning Reports, 30 November 2017 [¶17-501] Practitioner’s viewpoint: Side effects and solutions for Compulsory Zero-Rating of land transactions for GST

Practitioner's viewpoint: NZ Tax Planning Reports, 25 July 2017 [¶17-301] Practitioner’s viewpoint: Inland Revenue pursues directors over unpaid tax

[¶17-501] Practitioner's viewpoint: Side effects and solutions for Compulsory Zero-Rating of land transactions for GST, 30 November 2017

Click to open document in a browser

Paul Smith

Mark Keating

The compulsory zero-rating ("CZR") rules for land in the Goods and Services Tax Act 1985 came into effect on 1 April 2011. Despite the intended simplicity of their application and after more than six years the rules continue to cause problems for both vendors and purchasers. Inland Revenue has taken steps to publicise the intended operation of the regime and highlight its potential pitfalls but taxpayers continue to be caught out. This paper by Paul Smith, GST Partner at EY and Mark Keating, Senior Lecturer in Tax at the University of Auckland Business School considers a range of issues that continue to arise with respect to the CZR rules.

Unique nature of the CZR rules

Prior to 2011 the GST Act treated the supply of land much the same as any other supply of goods.[1.] A registered person selling land generally paid output tax[2] and a registered person purchasing land claimed an input tax credit.[3] While there was nothing unusual in that GST treatment the quantum paid for land transactions created a fiscal risk to the Revenue. Inland Revenue was obliged to refund input tax to the purchaser of land regardless of whether the vendor accounted for output tax on that supply — even when those parties were associated, in what became known as "Phoenix schemes".[4] This was described as "a structural imperfection under the GST regime." [5]

The Commissioner addressed the problem in the discussion document, *GST: Accounting for land and other high-value assets*, released in November 2009. That document considered a range of possible fixes to prevent the revenue leakage but eventually it was resolved to treat all sales of land[6] between registered persons as zero-rated for GST purposes. Interestingly, while the focus was on preventing Phoenix schemes, the solution applied more widely to all land transactions or any transaction that includes the sale of land between registered persons regardless of the parties' financial risk or compliance history.[7] The definition of "land" was itself expanded to ensure the CZR applied widely.[8] New rules were introduced to catch "commercial leases" to ensure that, while periodic payments of rent are still standard rated, assignments and surrenders of leases fall under the CZR rules.[9]

Section 11(1)(mb) requires zero-rating of all such transactions where two criteria are met:

- The transaction is between two GST-registered taxpayers, and
- The purchaser confirms it will use the land for the purposes of its taxable activity and not as a dwelling for itself or any associated person.

As a result, sales of land as second-hand goods and sales to consumers continue to enjoy the previous GST treatment.

Interpretation statement IS 17/08 states: "The CZR rules effectively streamline the GST cash flow for transactions involving land and, in so doing, are intended to protect the tax base from phoenix schemes."[10]

The streamlining of GST cash flow for transactions involving land through the CZR rules is very apparent as it is no longer necessary to request GST offsets for land transactions between GST registered taxpayers. Previously, it had been common for the parties to separately agree that a purchaser's input tax was to be offset by Inland Revenue against a vendor's output tax liability.[11] The CZR rules make such off-set agreements unnecessary, although they are still occasionally used for significant transactions that do not have a land component, such as a sale of business assets.

Unfortunately, the CZR approach has yet to be extended to other transactions whereby the streamlining of GST is overdue. For example, the need for the streamlining of the administration of GST on imports of goods by GST registered persons has only recently been acknowledged through a review of the Customs & Excise Act 1996[12] . The extension of CZR for imports of goods made by GST-registered persons would be an effective way of achieving this streamlining.[13]

Documentation

To prevent disputes between parties over the GST treatment of transactions (as had been experienced by Inland Revenue when parties to the zero-rated sale of a "going concern" treated that transaction inconsistently[14]) the CZR rules for land took a unique approach:

- First, the zero-rating of land transaction is compulsory, and therefore the lack of any written agreement as to that treatment by the parties themselves does not affect the GST treatment (otherwise most compliant taxpayers would adopt the zero-rating treatment while Phoenix scheme participants would simply decline to do so, which would defeat the primary purpose of the new rules), and
- Second, the vendor is entitled to rely upon the written confirmation of the purchaser regarding its GST registration status and intended use of the property, even if that statement is accidentally or

© CCH

intentionally incorrect.[15] This treatment is contrary to the "going concern" rules whereby the Act takes a substance approach and even mutual agreement between the parties will not displace the correct GST treatment if that transaction is not, in fact, the supply of a going concern.[16]
• Finally, provided the vendor obtains the purchaser's written confirmation, the liability for any error in the GST treatment passes to the purchaser.[17] Unlike all other types of zero-rated supplies, whereby the vendor remains responsible for ensuring the requirements for zero-rating are satisfied, and bears the risk if they are not, the GST liability for incorrectly zero-rated land transactions passes to the purchaser. In effect, the GST liability "follows the land" presumably on the assumption that the Commissioner will still have access to that asset to recover the outstanding GST.[18]

In that regard the CZR rules are unique in both applying a zero-rated treatment even when the substance of the transaction does not satisfy the statutory requirements and in passing the resulting GST liability to the purchaser. In a practical sense this means that the GST treatment may be determined by the confirmation provided by the purchaser rather than the reality of the transaction itself.

ADLS standard agreement for sale of land

Given the importance of the documentation, it made practical sense to incorporate that into the standard Sale and Purchase agreement itself. The standard Auckland District Law Society agreement ("ASP")[19] was therefore amended in 2012 to encompass the statutory requirements.[20] The effect of those changes was to incorporate the CZR rules and terminology from the GST Act into the parties' bargain.[21]

First, on the cover page the vendor is required to stipulate if it is (or is deemed to be)[22] GST-registered with respect to the land being sold.

Second, Schedule 2 requires the purchaser to stipulate (with respect to itself or any subsequent nominee) both:

• whether it is (or will be at the time of settlement) GST-registered and, if so
• whether the land being purchased will be used for the purpose of its taxable activity or as a domestic dwelling for the purchaser or an associated person.

Receipt of that written statement allows the vendor to be satisfied the land can be zero-rated, even if the vendor is aware that the statement is accidentally or deliberately incorrect.[23]

Third, cl 15 was inserted into the ASP to record the GST consequences for the parties upon settlement. This clause also provides for changes to either party's GST status prior to settlement and for nomination or assignment of the purchaser's rights under that agreement.

In particular, cl 15 requires the purchaser to notify the vendor of any nomination or change in particulars in Schedule 2 at least two working days before settlement. If that change alters the GST position, the agreement provides for an amended settlement statement, and a credit or debit note may be issued by vendor. Accordingly, the ASP provides for the possibility of changes to the GST treatment between contracting and settlement.

The obvious intention of those changes was to provide for all eventualities. As recognised by the High Court in *YL NZ Investment*:[24]

> "the intention of the [ADLS] agreement is clear. Those who prepared the agreement, knowing it was going to be used widely throughout New Zealand for any number of real estate transactions for a wide variety of properties, could not have made themselves clearer …."

However, while the ASP proves adequate for most land transactions, the operation of those clauses sometimes causes problems. As explained by one commentator in 2012:[25]

> "GST is a transaction-based, value added tax. The GST impost should be clear for every transaction from the outset. The lack of clarity at this crucial junction can cause considerable cost…. It may be

© CCH

that simplicity in this complex area is just too much to ask. However, the level of complexity and the number of fish hooks currently inherent in the legislation and the application of the ADLS clauses are excessive."

That commentator proposed a number of reforms both to the GST Act itself and the ASP to simplify and clarify the application of the CZR rules. None of those recommendations have been taken up and, as set out below, a number of significant problems remain.

Pricing

The ASP provides two alternative and mutually exclusive formulations of the contract price:

- "plus GST" (if any), or
- "inclusive of GST" (if any).

The "plus GST" price generally protects vendors; any GST imposed on the transaction may be added to the sale price thereby increasing the proceeds from which they can account for GST output tax.

The "inclusive of GST" price can benefit a purchaser because they cannot be asked to pay an additional amount towards the vendor's potential GST liability. This pricing will be especially beneficial if that purchaser is subsequently able to make a GST input tax claim based on that agreed price.

However, it must be noted that the reference to GST in the price does not determine that GST does (or does not) apply.[26] The parties cannot by contract agree to a GST treatment that is incorrect. For example, an agreement that a particular sale price is "GST inclusive" does not determine that GST is actually payable on that price. In the alternative, an agreement that the price is "zero-rated" will not mandate that treatment applies if the transaction should actually be standard-rated — and the vendor is generally not entitled to increase the sale price to recover that GST from the purchaser.[27] So the GST Act provides little relief to the parties when the agreed pricing is inconsistent with the actual GST treatment of the transaction.[28]

Unresolved issues

From the time the CZR rules came into effect, commentators feared they would cause new and unexpected issues. Explaining those rules in 2011 one commentator concluded:[29]

> Their significance can be gauged by the fact that all parties to land transactions that are within the GST net are affected by them and by their consequences for mortgagees and agents. Regarding the uncertainties, it is hoped that Inland Revenue guidelines will for the most part resolve them.

Unfortunately, the predicted uncertainties have become apparent and little guidance has been provided by Inland Revenue. Those unresolved issues, and some suggested solutions, are set out below.

Problem 1 — Change in GST treatment by purchaser

As the ASP provides for changes in GST status prior to settlement, it is possible that a GST registered purchaser who has completed Schedule 2 may advise that it has changed its mind and now plans to either not use the property for its taxable activity or plans to use it as a domestic dwelling. In effect, the purchaser has unilaterally changed the GST treatment of the transaction.

For example, a GST-registered vendor sells land to a GST-registered purchaser. The transaction must be zero-rated and therefore the $500,000 sale price will be the GST-exclusive amount, with the vendor not liable to return output tax and the purchaser unable to claim input tax. However, prior to settlement the GST-registered purchaser changes its intended use so that the CZR rules can no longer apply. Depending on whether the price has been plus GST or GST-inclusive, the vendor may have to return unexpected output tax out of its sale proceeds — and the purchaser may eventually claim an equivalent input tax credit under s 21G if in future it again changes its mind to apply that property to its taxable activity.

Solution 1 — This problem can be overcome if the correct pricing is chosen by the parties under the ASP. If the parties contract on a "plus GST (if any)" basis, then any change in the purchaser's GST status will result in an increase in the GST price to ensure the vendor is not out of pocket.

Solution 2 — Unfortunately the use of "inclusive of GST (if any)" in the pricing of what are prima facie CZR transactions is common.[30] Given the obvious potential for purchasers to seek to gain an effective 15% reduction in the purchase price, the authors are aware of instances where unscrupulous purchasers have taken advantage of unwitting vendors to "change their mind" prior to settlement only to immediately "change it back again" after settlement in order to claim an input tax credit on what would otherwise have been a zero-rated sale. While Inland Revenue has commonly refused to become involved in such disputes and simply expected the parties to comply with the pricing stipulated in their agreements, presumably this practice should cause the Commissioner concern as it would return that transaction to the standard GST treatment that applied prior to the introduction of the CZR rules.

Problem 2 — "C" is for compulsory

A related problem has arisen when the parties (sometimes associated persons or related parties) simply have not adequately completed the necessary documentation required under the CZR regime. In those instances there appeared to be initial confusion within Inland Revenue as to the correct treatment. For instance, if the purchaser has provided none of the necessary written statements regarding its GST status or intent regarding the property in Schedule 2 of the ASP (but in fact is GST-registered and intends the property for a taxable use), is the transaction zero-rated? Or should the vendor be subject to output tax?

The authors are aware of Inland Revenue investigators taking the position that the absence of the correct documentation altered the GST treatment and therefore the standard pre-2011 GST treatment applies. Inland Revenue proposed to not apply the CZR rules but instead impose output tax on the vendor — which presumably would have given rise to an entitlement to input tax by the purchaser.

That approach cannot be correct. The very "compulsory" nature of the CZR rules was intended to prevent land transactions (particularly between associated persons) from giving rise to output liability and input claims, to prevent Phoenix schemes. The opening words of s 11(1) provide that a supply coming with the situations described in that subsection "*must* be charged at the rate of zero per cent". The wording is in a mandatory form.

If the CZR regime could be circumvented by the simple expediency of a purchaser (possibly falsely) asserting that its purpose for that property was not a taxable use, then the door would be ajar for parties to knowingly ensure their documentation failed to satisfy the CZR requirements and thereby return to the standard pre-2011 GST treatment, with all its fiscal risk for the Commissioner.

Solution — The solution to this problem lies solely with the Commissioner. Unfortunately, the policy issued at the time the CZR rules came into effect advised vendors in doubt to standard-rate transactions:[31]

> If the purchaser either refuses or for any other reason has not provided a written statement regarding their GST registration status and intentions in respect of land, the supplier should standard-rate the transaction ….

The Commissioner's interpretation statement on the operation of the CZR rules,[32] referred to above, does little to resolve the confusion. While that policy sets out in detail how errors in the correct GST treatment should be resolved, it repeatedly advises vendors to standard rate a land transaction in the absence of the necessary purchaser declarations. For instance:[33]

> "A vendor should consider standard-rating a supply involving land if the purchaser fails to notify them about their GST-registration status and their intentions for the land, unless the vendor is confident at settlement the CZR rules will apply to the supply. … Of course, in so doing, there is a risk a vendor may wrongly decide to standard-rate the supply and corrections will be needed."

Later it concludes more firmly:[34]

> "If the purchaser refuses to or does not provide the required information about their GST-registration status and their intention for the goods acquired (including land), it is recommended the vendor standard-rates the transaction."

© CCH

Based on the experience of the authors, this is clearly the approach most likely to be adopted by investigators of Inland Revenue. Strangely, many investigators seem reluctant to actively enforce the purchaser's GST obligations for GST on the purchase of land that was wrongly zero-rated. .[35] However, as the information disclosure requirements in s 78F apply to both GST-registered taxpayers and taxpayers who are not registered for GST, this is unlikely to be an easy task for Inland Revenue. It should also be noted that deliberate non-compliance or making false statements under s 78F may potentially expose purchasers to both shortfall penalties[36] and criminal penalties[37] .

Despite the above, the interpretation statement confirms that the application of the CZR rules "is an objective test"[38] and therefore not simply dependent upon the written statements made by the purchaser (or absence thereof).[39] Rather, the written statement merely provides comfort for the vendor (by passing any potential GST liability on to the purchaser)[40] but is not a prerequisite for the CZR rules to apply; and a supply that factually meets the statutory criteria should not become standard-rated simply by the parties innocently or deliberately failing to complete the necessary documentation. On that basis the Commissioner's recommendation that vendors standard-rate the transaction appears questionable.

That conclusion is supported by the Court of Appeal in *Y& P NZ Ltd v Wang*. In that instance the purchaser had declared in Schedule 2 that it was not GST-registered and therefore the parties treated the transaction as standard-rated. Immediately prior to settlement the purchaser's solicitors revealed that their client had changed its GST status and therefore required the transaction to be zero-rated. The vendor refused to accept that change (due to a lack of adequate notice) and insisted upon continuing to treat the transaction as standard-rated.

In the subsequent dispute the Court of Appeal noted:[41]

> "The Attorney-General, who was joined to this appeal as intervener, supports the appellant's submission that the requirement for notice of the s 78(2) matters cannot be waived. He submits s 78F exists primarily for the benefit of the tax base and to enable the efficient functioning of the GST system. As such, its requirements cannot be waived by a vendor. He also submits that s 11(1)(mb) has mandatory effect. Regardless of what the vendor knows at settlement, GST is zero-rated if the criteria in s 11(1)(mb) are met. Where the wrong rate of GST is applied at settlement, there are provisions to correct the position. … we consider there is force in the Attorney-General's submission that the provision is for the benefit of the tax base and not for the sole benefit of the vendor."

This reasoning confirms that it is the GST status of the parties that determines the correct GST treatment and not the documentation (or lack thereof) or formal notice requirements for any change of that status stipulated in their agreement. This raises the possibility that if a purchaser has actually changed its status then the GST treatment must change accordingly — even if inadequate notice of that change is given to the vendor or it is entirely unaware of that change.

Problem 3 — Nominee transactions

Another common difficulty faced by vendors is the ability of purchasers to nominate an alternative buyer under the agreement. Again, such a nomination causes difficulties when the original purchaser and the nominee have a different GST status or different intended use for the property.

As with the example above for Problem 1, if the GST-registered parties agree the price is to be "GST-inclusive (if any)" but the purchaser then nominates an unregistered person to take over the contract, the CZR rules can no longer apply. The vendor must then return unexpected output tax from its sale proceeds — and presumably the purchaser may eventually claim an equivalent input tax credit under s 21G if in future it again changes its mind to apply that property to its taxable activity. Crucially, IS 17/08 confirms that:[42]

> "A vendor cannot rely on a purchaser's statement where a nomination occurred, unless the purchaser's statement is about the nominee's position. Ultimately, it is the GST-registration status and intentions of the recipient of the supply that must be communicated in writing to the vendor before or at settlement."

© CCH

Again, the risk of nomination creates the opportunity for unscrupulous purchasers to take advantage of unwitting vendors by nominating an unregistered purchaser, only for that entity to immediately commence its taxable activity after settlement in order to claim an input tax credit on what would otherwise have been a zero-rated sale. The Documents and Precedents Committee of the ADLS has warned practitioners a number of times to watch out for instances where purchasers have either changed their status prior to settlement from being registered to unregistered for GST purposes or have nominated an unregistered entity.[43]

Solution 1 — The vendor should always ensure the nomination satisfies the requirements under the agreement. The ASP recognises and permits the purchaser to nominate another buyer — and that the nominated person's GST status need not be the same as the original purchaser, and therefore may alter that zero-rated GST treatment, as provided in Clause 15.5.

However, cl 15.5 also stipulates the time-period within which the purchaser must advise the vendor of any such nomination that *"altered particulars and of any other relevant particulars in Schedule 2"*. That clause provides that the purchaser *"shall notify"* any such alteration of the GST treatment provided in Schedule 2 *"as soon as practicable and in any event no later than two working days before settlement."*

That time limit is stipulated so the vendor can know the correct GST treatment at least two days prior to settlement when preparing the required GST invoice and other settlement documents. It sensibly prevents last-minute changes of GST treatment that would require those documents to be redrafted. The time limit in cl 15.5 is presumably included for the benefit of the vendor, not the purchaser.

Accordingly, vendors should ensure the purchaser does, in fact, comply with the requirement for two working days notice as an absolute minimum.[44] Problems arose in *Y&P NZ Ltd v Wang* when the vendor appeared to have waived the notice period. There the vendor's solicitor's issued settlement statements to the purchaser on the basis it was not GST-registered so the transaction was standard-rated, based on the information contained in Schedule 2. However, the day before settlement the purchaser advised the vendor of a change in GST status such that the transaction should now be zero-rated. The vendor's solicitors amended and re-issued the settlement statements accordingly — but then refused to complete settlement on the basis it had not received sufficient notice of that change as required under the ASP.

Both the High Court[45] and Court of Appeal[46] accepted the purchaser's allegation that it was arguable the vendor had waived the two-day notice requirement by issuing the revised settlement statements and therefore could not now refuse to accept notice of the purchaser's changed GST status.

Despite that decision, the authors are aware of at least one instance in which an unwitting vendor was "saved" by the purchaser's nomination being received too late to be effective under that agreement. It is therefore crucial that vendors strictly enforce (and do not waive) the notice requirements under the agreement.

Solution 2 — Again, this problem can be solved by the vendor ensuring the price is recorded as "plus GST (if any)" rather than "inclusive of GST" (discussed above). But we also recommend the ASP be amended to explicitly prevent the purchaser from unilaterally changing its declared GST status (whether because of changes to its particulars in Schedule 2 or resulting from a nomination). The agreement should require that the purchaser or any nominee maintain the original GST treatment of the transaction as recorded in the agreement as it was first signed. In the absence of any amendment to the ASP, we recommend the parties include a special condition to that effect.

Solution 3 — The vendor may need to involve Inland Revenue. In many of these instances the unregistered status of the purchaser is, at best, temporary and may be illusory. The land being sold may be such that any purchaser is bound to be GST-registered because the turnover arising from the land would exceed the mandatory registration threshold.[47] While some properties possibly have a non-taxable use, others are clearly for a taxable purpose. Anything done by the purchaser to commence that taxable activity (presumably including purchase of the land) may therefore be included within that taxable activity.[48] In those circumstances, the purchaser may be liable to be registered for GST (and therefore the CZR rules would apply to that transaction) regardless of any contrary statements by the purchaser at the time of settlement.

© CCH

Inland Revenue recognize this potential in interpretation statement IS 17/08:[49]

> "… a purchaser's circumstances might change and they fail to notify the vendor of the change before settlement, or a purchaser might enter into an agreement on the basis they will not be GST-registered, but it transpires that, in fact, they will be or should have been GST-registered at or before the settlement date. Sometimes, the Commissioner will back-date a person's GST registration."

While this solution is dependent upon the assistance of Inland Revenue, in the authors' experience any claim for input tax by a purchaser of land normally generates a risk review or an audit and the correct GST status of that transaction is therefore subject to scrutiny.[50] Given the obvious financial risk faced by Inland Revenue from standard-rated transactions, it has an inherent bias in favour of CZR treatment. As a result, it is not uncommon for Inland Revenue to apply the involuntary registration provision[51] to the parties to land transactions to ensure the correct CZR treatment.[52]

Problem 4 — Time of supply

The standard time of supply rules in s 9 continue to apply to the sale of land, including transactions subject to the CZR rules. Accordingly, where that transaction occurs across different GST periods, the GST-registered vendor is required to determine the GST treatment of the transaction as at the time of supply (often upon receipt of the deposit). That vendor must therefore either return output tax on that transaction or not depending upon the information provided by the purchaser in Schedule 2 of the agreement.

Unfortunately, the GST treatment of that transaction under the CZR rules is not determined until the time of settlement.[53] As one commentator notes:[54]

> "It is important to test the GST position at time of supply **and** again at settlement in relation to CZR transactions. This area represents an area of commercial risk and gives rise to a state of CZR flux."
>
> [original emphasis]

The ASP contemplates that GST treatment may change during that period. As one commentator has noted:[55]

> "There is no explanation as to why … s 11(8B) should be subject to the time of supply provisions."

This inconsistency between the standard time of supply rules and the CZR requirements obviously raises the possibility that the GST treatment of that transaction originally returned by the taxpayer on one basis subsequently changes by the time of settlement. That previous return is now incorrect, thereby potentially giving rise to a GST shortfall, with the consequent imposition of use of money interest on any underpayment by the vendor or improper input tax refund issued to the purchaser. Given that uncertainty, the authors are aware of instances when Inland Revenue appears to deliberately withhold the issue of a claimed refund pending correct application of the CZR rules.[56] This practice is implicitly acknowledged by the Commissioner in IS 17/08 which confirms that:[57]

> "Payment of any resulting refund may be withheld pending any review of the transaction by Inland Revenue."

The many problems caused by this timing inconsistency are recognized and explained in IS 17/08[58] — but few practical solutions are offered, other than the necessity for the parties to invoke the credit and debit note provisions to retrospectively remedy any error in previous returns.[59]

From a practical perspective, the problems are exacerbated in situations where the vendor is registered for GST and files returns on a monthly basis.[60] Such a vendor may have sold multiple lots over prior taxable periods, each with a different time of supply or settlement date. The possibility that the GST registration status of each of those purchasers may change at any time prior to settlement causes needless uncertainty.

Given Inland Revenue actively monitors the transfer of land,[61] the authors recognize the practical difficulty that property developers experience in responding to queries by Inland Revenue regarding their GST compliance for the sale of land both at the time of supply and upon settlement.

Solution — the most obvious solution would be to make the time of supply rules for land apply at the time of settlement, bringing them into line with the CZR rules. This change would ensure the necessary documentation (and any subsequent notification of a change in GST treatment) is determined at settlement, as required under both the ASP and the CZR rules. That change would ensure the correct tax treatment of the transaction is included in that single GST period without the need for the parties (and Inland Revenue) to correct that treatment by way of subsequent debit or credit notes.

An alternative solution would be to extend the GST return filing period for all taxpayers who deal in land. Currently, a GST-registered taxpayer may file GST returns on a monthly, two-monthly, quarterly[62] or six-monthly basis depending on the taxpayer's circumstances. A longer GST return period for such taxpayers to reflect the standard delay between agreement and settlement (eg two-monthly or quarterly) may assist in addressing the inconsistency highlighted above.

Problem 5 — Wrongly unregistered vendor

Obviously, the CZR rules are premised on the assumption the vendor is GST-registered; sales of land by unregistered persons are outside the scope of the Act. The front page of the ASP therefore requires the vendor to declare their GST registration status with respect to that land.[63] If the vendor declares it is not GST-registered, then the transaction will be treated as a private sale, and the GST-registered purchaser may claim a second-hand goods input tax credit.[64] But the purchaser's input tax credit is reliant upon the correctness of the vendor's declaration. If that declaration is incorrect (and the vendor either is GST-registered with respect to that land or is not but should have been), then the transaction will be subject to the CZR rules — and the purchaser will not be entitled to its input tax credit.

An example of this problem arose in *YL NZ Investment Ltd v Ling*[65]. There the vendor declared it was not registered for GST and the purchaser therefore claimed an input tax credit for the purchase. Following an investigation Inland Revenue concluded that the vendor should have been GST-registered and backdated her registration to a date before the transaction so that the CZR rules applied. Unfortunately, the consequences were that the unwitting purchaser was denied its input tax credit — and therefore sued the vendor for breach of its warranty.

The High Court ruled in favour of the purchaser and awarded damages reflecting the quantum of the expected GST input tax credit plus the adviser fees for dealings with Inland Revenue to correct the GST treatment. The Court rejected the vendor's argument that its declaration was technically correct regarding its actual GST status when made. The High Court explained:[66]

> "When entering into the agreement, the purchaser needs to know the GST implications of the transaction. It is no good for the purchaser to be told that the vendor is not registered if in fact the transaction turns out to be compulsory zero-rated because the Inland Revenue determines that the vendor was carrying on taxable activities in respect of the property the subject of the supply so as to bring her within the GST Act."

That decision is based partly on the inability of purchasers to accurately determine the GST status of a vendor and the ASP requirement that vendors declare their correct GST status, otherwise "it is hard to see how the purchaser could avoid the risk".[67] Somewhat unhelpfully, Inland Revenue has taken the approach that its secrecy obligations[68] prevent it from disclosing information about the GST registration status of counterparties or details of any investigation that concludes a vendor should have been registered and therefore a purchaser cannot claim input tax on the purchase.

Given the Commissioner's Interpretation statement IS 17/08 is largely devoted to correcting mistakes in the GST treatment of land transactions, it is disappointing that Inland Revenue refuses to cooperate with parties by providing accurate and timely information to ensure the GST treatment of their land transactions is correct in the first instance. Presumably, the general exception within the secrecy rules permitting disclosure of information *"for the purpose of carrying into effect the Revenue Acts"* would permit such disclosure.[69]

Solution — While the result in *YL NZ Investment* is helpful, it still exposes purchasers to expensive litigation and the possible insolvency of the vendor. As a practical solution, the authors recommend that if purchasers

© CCH

of land suspect that their transaction *might* be subject to GST at the standard rate, they should take steps to protect themselves against the risk the vendor is mistaken regarding its proper GST status. For instance, purchasers may require 15% of the purchase price be retained separately by the vendor's solicitor pending release of their input tax claim by Inland Revenue, and for the return of those funds if that input tax is refused due to an error in the vendor's GST declaration. This requirement will be only a temporary inconvenience for a vendor confident in its GST status — but create an effective self-help remedy for a purchaser against any mistake by a vendor regarding that status.

Problem 6 — Wrongly registered vendor

An alternative problem arises when a vendor mistakenly declares its GST-registered status on the ASP and the transaction is therefore (wrongly) zero-rated. This may occur if the Commissioner exercises her power to retrospectively cancel the vendor's GST registration.[70] In that instance the vendor becomes liable to pay output tax on the value of that land at the (retrospective) date of its de-registration.[71] The land transaction should have been treated as a private sale with the purchaser entitled to claim a second-hand goods input tax credit for the purchase.

That problem arose in *Jackson Surridge Property Group Ltd v Eastern Star Group Ltd*[72] where the parties entered into an agreement to sell land valued at $1m, inclusive of GST. The parties then obtained accounting advice and identified that, as they were both GST-registered, the transaction was subject to the CZR rules. Accordingly, they amended the sale price to $870,000 plus GST.

Before the transaction settled the Commissioner retrospectively de-registered the vendor, with the result that it was obliged to pay GST output tax of $130,000. The vendor could not recover that liability by increasing the purchase price since it was now not GST-registered and the "plus GST (if any)" pricing did not technically apply.

The vendor claimed the price should be altered under the Contractual Mistakes Act 1977 on the grounds either both parties were mutually mistaken over the GST treatment and/or that the vendor was mistaken and the purchaser was aware of that mistake. The High Court rejected that claim and ordered the vendor to complete the sale at the agreed price of $870,000. It concluded the financial loss arose from its own GST dealings with Inland Revenue and not due to any fault or advantage obtained by the purchaser. The Court concluded that, as the vendor had correctly declared its GST status at the time the agreement was entered into, any subsequent change could not be taken into account under the Contractual Mistakes Act.

This decision sits uneasily with the subsequent result in *YL NZ Investment* whereby the parties are expected to declare not only their current registration status but the correct position, and subsequent changes will amount to a breach of warranty under the agreement. Obviously, that argument was not available to the vendor in *Jackson Surridge* as it was in breach of its own warranty and was the architect of its own misfortune. But it is unsatisfactory that the vendor unwittingly suffered a significant loss (and the fortunate purchaser an unwitting benefit) because of difficulties with the CZR rules.

Solution — Again we suggest the ASP be amended to ensure the CZR rules apply only when both parties are properly registered. If the parties are mistaken about that crucial status and therefore the transaction properly has a different GST treatment to that agreed by the parties, then the price should automatically be adjusted to reflect the correct GST treatment.

Problem 7 — Mortgagee sales

The CZR rules cause unique problems when land is sold by a secured creditor using its power of sale.[73] The CZR rules require that the supply of land must be *"a supply made by a registered person"* — but does that refer to the lender (who may not be GST-registered) or the borrower (who is GST-registered)?

It is generally accepted that the CZR rules refer to the GST status of the borrower and not the lender. This is because s 5(2) stipulates that the mortgagee sale is deemed to have been made by the lender in the course of the borrower's GST-registered activity, even though the resulting GST liability falls on the lender.[74] Inland Revenue explains:[75]

> If a supply of land is made by a lender to whom section 5(2) applies, the purchaser must provide the information required by section 78F to the lender rather than the borrower, for example, the mortgagee under a mortgagee sale.

However, even accepting the application of the CZR rules when the borrower is GST registered, the conduct of the mortgagee sale may itself cause difficulty. A sale by the lender to a registered person will be zero-rated while the sale to a consumer will not. However, the majority of mortgagee sales of dwellings are conducted by auction, with the sale price stipulated to be "inclusive of GST (if any)". This means for a property that may have both taxable and non-taxable use, bidders are not competing on an equal footing — and the actual GST treatment of the transaction with the highest bidder will not become known until after the hammer has fallen.

This risk exists to a lesser extent in relation to mortgagee sales of commercial properties with the sale price typically stipulated to be "plus GST (if any)". Also, there is a greater proportion of sales made by a tender process rather than by auction.

Solution — Sadly IS 17/08 gives no guidance at all regarding mortgagee sales. Accordingly, we recommend excluding mortgagee sales of dwellings from the scope of the CZR rules. The fiscal risk of the CZR rules was of vendors not accounting for output tax; but that risk does not exist for mortgagee sales whereby the creditor assumes direct liability for GST output tax on the sale.[76] Absent that fiscal risk, and given the practical difficulties it caused, there is no justification for including mortgagee sales of dwellings within the CZR rules. Given the greater certainty regarding the use of commercial properties (including commercial dwellings) these mortgagee sales should remain within the scope of the CZR rules).

Problem 8 — Unscrupulous vendor and naïve purchaser

Section 78F permits a vendor to rely upon the written declaration of the purchaser regarding its GST status and intended use of the property. The vendor is therefore not responsible for any errors or omissions in that declaration affecting the GST treatment; instead the resulting GST liability passes to the purchaser.[77] Inland Revenue confirms no duty is imposed on the vendor to determine the accuracy of the purchaser's declaration:[78]

> In some circumstances, the vendor may believe that the information provided by the purchaser is not accurate. In these situations, the legislation provides flexibility for the vendor to adopt the GST treatment that they consider to be correct. For example, if, in contrast to the purchaser's claims the vendor is aware that the purchaser will use the property in question as their principal place of residence, they may but are not obliged to choose to standard-rate the supply. [But …] Once a written statement is provided, the supplier is not required to make any further enquiries regarding the purchaser's circumstances.

Prima facie that treatment is reasonable as it provides comfort to vendors and passes the potential GST liability to the errant purchaser. It is normally appropriate that the defaulting party bears the GST risk. Furthermore, that purchaser will have enjoyed the benefit of a reduced price that does not have a GST component added.

However, the authors are aware of instances where unscrupulous vendors exploit this protection to deliberately pass the potential GST liability to unwitting private consumers who do not understand the GST implications of completing Schedule 2. Such purchasers are advised that providing their IRD number is a standard requirement to complete the ASP, particularly since tax information is now required of all purchasers. Many purchasers are also persuaded to acknowledge they plan to establish a "home office" to superficially satisfy the other requirement for CZR to apply. For example, a naive purchaser may be offered a small discount in return for agreeing to complete Schedule 2 — not realising that by doing so they will assume the full GST liability.

Solution — Obviously *caveat emptor* applies and purchasers should seek independent advice. In reality many do not and are thereby caught out by the unique CZR rules for land. To protect taxpayers from unscrupulous vendors we suggest limits on the application of s 78F similar to those imposed on lenders with respect to returning GST on mortgagee sales under s 5(2). That section allows creditors to *"determine,*

in relation to any reasonable information held" whether the debtor was GST registered with respect to the secured asset. Factors such as the nature of the asset, information known about the debtor and other relevant details must be weighed to ensure the correct GST treatment of mortgagee sales on the best understanding available.[79]

We recommend a similar requirement be imposed on vendors to ensure they may not rely solely upon the deeming effect of s 78F regarding the sale to naïve or unwitting purchasers of what are obviously domestic dwellings. Alternatively, the ASP could be amended to require the contract price be stipulated in both the GST-inclusive and -exclusive formulation, and require that purchasers who complete Schedule 2 are liable only for the GST-exclusive price (with the GST amount clearly stated as being payable to the Inland Revenue if that zero-rating is found to be incorrect).

Problem 9 — Mixed use land

A long-standing problem with the GST treatment of land is its possible mixed use. Even prior to the introduction of the CZR rules the GST treatment of land used partly for business and partly for non-taxable or residential use created difficulties.[80] As a result, various statutory amendments were required to separate the elements of the supply to differentiate the taxable and non-taxable portions.[81] The outcome was that the (generally) non-taxable supply of a domestic residence was deemed to be separate from the remaining taxable supply.

But those existing rules focus upon the nature of what is being supplied by the vendor to determine its output tax liability (ie how much of that supply of land is subject to output tax and how should it be apportioned).

By contrast, the CZR rules focus upon the use to which the purchaser intends to apply the land, and passes the output tax liability to the purchaser for any portion of the land it does not use for making taxable supplies.[82] However, the interface between the vendor's and purchaser's obligations with respect to the sale of mixed use land is complex. Clauses 15.6 and 15.7 of the ASP now provide for the apportionment of the single supply between its different elements. Unfortunately this necessitates a different GST treatment of each element, which can cause difficulties over the pricing agreed between the parties (some parts of the supply may be plus GST while others are inclusive of GST). This results in increased complexity whereby a single transaction may give rise to both CZR and taxable treatment for both the vendor and purchaser. It can also give rise to significant uncertainty as to whether a second-hand goods input tax credit is available for the non-taxable component of a single supply of land that will be used by the purchaser in making taxable supplies.

Solution — given that the different elements of the mixed supply of land may be treated differently, the parties should allocate their agreed purchase price between the respective parts of that supply. In the event of any uncertainty, vendors are only protected if they ensure all elements of the transaction are priced as "plus GST (if any)". While the traditional problems with the GST treatment of mixed-use land remain, unfortunately the enactment of the CZR rules have simply added a new layer of complexity.

Conclusion

While the CZR rules have solved the fiscal risk to Inland Revenue posed by Phoenix schemes, that solution has largely been achieved by passing the risks to the contracting parties. None of the problems identified above existed under the previous standard-rated GST treatment. It is the attempt to treat some land transactions (but not others) as zero-rated that has created a difficult boundary issue for taxpayers to navigate.

Getting the GST treatment wrong can be expensive for GST-registered taxpayers. First, mistakes may expose taxpayers to shortfall penalties. Given the quantum of GST involved in major land transactions, taxpayers should not assume Inland Revenue will restrict itself to the lower categories of penalties (ie tax shortfall penalties for "not taking reasonable care"). Sometimes Inland Revenue may conclude the defaulting party has been guilty of "gross carelessness"[83] or worse.

Perhaps a better overall solution would be to treat all land transactions as zero-rated (thereby also removing the entitlement to input tax for second-hand purchasers and output tax liability for sales to consumers).

© CCH

This would again ensure a consistent GST treatment that will apply in all circumstances. Instead, Inland Revenue's response in most instances is simply caveat emptor and recommending the parties obtain independent advice. If that advice is wrong, then it considers taxpayers should seek redress from the adviser. If advice is not taken, then the taxpayer has no one else to blame. But the extension of the CZR rules intended to prevent Phoenix schemes so as to catch all registered taxpayers has drawn honest and unwitting vendors and purchasers into its net, and now individual taxpayers are paying the price.

Footnotes

1. For an explanation to the background and scope of the then-newly enacted CZR regime, see P Speakman, "The Compulsory Zero-rating (CZR) rules", *CCH New Zealand Tax Planning Report*, 24 August 2011.
2 Output tax was payable under s 8(1) unless that sale was treated as part of the sale of a going concern under s 11(1)(m).
3 Either under s 3A(1) if purchased from another registered person or under s 3A(2) if it constituted a purchase of second-hand goods from an unregistered supplier.
4 See TIB, Vol 23, No 1, Feb 2011, at p 30.
5 *YL NZ Investment Ltd v Ling* (2017) 28 NZTC ¶23-026, citing "GST in New Zealand" 2017, Thomson Reuters, at 26.1.
6 If the sale of land includes the supply of services then s 5(24) deems those services to be a supply of goods subject to the CZR rules. See Inland Revenue "Questions we've been asked QB 12/07: Goods and services tax — treatment of transitional services supplied as part of the sale of a business (that includes the supply of land)"; TIB Vol 24, No 6, July 2012 at p 65 that holds "transitional services" supplied as part of that transaction involving land should also fall under the CZR rules.
7 See the Taxation (GST and Remedial Matters) Bill 2010 (182-2), p 2.
8 See the inclusion of "commercial leases", a "licence to occupy" and a share within a "flat-owning or office-owning company" within the definition of "land" in s 2(1). Only a mortgage or the lease of a dwelling are excluded.
9 See s 11(8D).
10 Interpretation statement: IS 17/08, Goods and services tax — compulsory zero-rating of land rules (general application), 15 September 2017 at [10] (see *Tax Information Bulletin* Vol 29 No 10, November 2017 at 17).
11 Such requests for a GST offset were typically made by reference to s 173M of the Tax Administration Act 1994.
12 See Customs & Excise Act 1996 Review, Summary of Submissions, March 2015, p 84.
13 Acknowledging that imports by private consumers would need to be excluded from the scope of a CZR regime for imported goods, just as they are from the current CZR rules for land.
14 Under s 11(1)(m); see examples where the parties adopted inconsistent GST treatment of a transaction, which was eventually resolved from 2000 by the requirement that the parties recorded their agreement to the GST treatment in writing.
15 See s 78F Good & Services Tax Act 1985.
16 See *Fatac Ltd (in liq) v CIR* (2002) 20 NZTC 17,902, [2002] 3 NZLR 648 (CA) and *Starrenberg v Mortre Holdings Ltd* (2004) 21 NZTC 18,696, (2004) NZCPR 193 (CA).
17 See s 5(23) and 51B(4)–(6).
18 See s 78E Goods and Services Tax Act 1985 which provides limited relief to vendors who incorrectly zero-rate a going concern, but only where the relevant contract does not contemplate that consequence.
19 Auckland District Law Society Inc "Agreement for Sale and Purchase of Real Estate" (9th Edition); see also schedule 3 to the Auckland District Law Society Inc "Agreement for Sale and Purchase of a Business" (2008).

© CCH

20 For a fuller discussion of those changes see *S van Schalkwyk*, "GST zero-rating of land — a critical evaluation of the law and the ADLS standard agreement GST clauses", *CCH New Zealand Tax Planning Report* 20 November 2012.

21 See *YL NZ Investment Ltd* v *Ling*, above n 5.

22 See the outcome in *YL NZ Investment Ltd* v *Ling*, above n 5.

23 See s 78F Goods and Services Tax Act 1985.

24 *YL NZ Investment Ltd* v *Ling*, above n 5 at [32].

25 See *S van Schalkwyk*, above n 20.

26 See *Newman* v *CIR* (1994) 16 NZTC 11,229 (HC).

27 See *Chesham Investment Ltd* v *Robertson* (1992) 14 NZTC 9,105 (HC).

28 There is no equivalent, for the mistaken zero-rating of land transactions, to the limited relief provided with respect to mistaken zero-rating of "going concerns" in s 78E Goods & Services Tax Act 1985.

29 For an explanation to the background and scope of the then-newly enacted CZR regime, see P Speakman, *"The Compulsory Zero-rating (CZR) rules"*, *CCH New Zealand Tax Planning Report*, 24 August 2011.

30 For example see *Wyatt* v *Real Estate Agents Authority* (2012) 25 NZTC ¶20-152 (HC) where the vendor of land's claim against the real estate agent for using the "GST inclusive" pricing formulation failed. The previously unregistered vendor had been indifferent to the pricing clause but could not recover the additional GST when it was subsequently registered for GST by the Commissioner with respect to that sale.

31 See TIB Vol 23, No 1, Feb 2011, at p 30.

32 Interpretation Statement IS 17/08 "Goods and services tax — compulsory zero-rating of land rules (general application)", above n 10.

33 IS 17/X08, above n 10, at [23].

34 IS 17/08, above n 10, at [59].

35 Under ss 78F and 5(23) Goods & Services Tax Act 1985.

36 For example, the penalty for failing to take reasonable care under s 141A Tax Administration Act 1994.

37 For example, s 143(1)(b) Tax Administration Act 1994.

38 S 17/08, above n 10, at [55].

39 See Inland Revenue "Large Enterprises Update — Number 18", February 2012.

40 Under s 5(23), pursuant to s 78E.

41 *Y&P NZ Ltd* v *Wang* (2017) 28 NZTC ¶23-021 at [22] and [25].

42 IS 17/08, above n 10, at [24].

43 See ADLS *Law News* Issue 30, 27 June 2014.

44 Note cl 1.3(5) expressly excludes the day of notification from the calculation of the required notice period.

45 *Wang v Y&P NZ Ltd* (2016) 28 NZTC ¶23-004 (HC).

46 *Y&P NZ Ltd v Wang* (2017) 28 NZTC ¶23-021 (CA).

47 Presently $60,000 in any 12-month period, under s 51 Goods & Services Tax Act 1985.

48 Under s 6(2) Goods & Services Tax Act 1985.

49 See IS 17/08, above n 10, at [62].

50 As explained in IS 17/08, at [71] which explains that "What happens if the supply was incorrectly standard-rated". It also advises [at 77] that "Depending upon the circumstances giving rise to the error the purchaser may be liable for shortfall penalties."

51 See s 51(4) Goods & Services Tax Act 1985.

52 For example, see *YLNZ Investment Ltd* v *Ling*, above n 5 where Inland Revenue compulsorily registered for GST a taxpayer who purchased and quickly on-sold a large block of development land,

thereby ensuring that at least the on-sale transaction was subject to the CZR rules. See also *Jackson Surridge Property Group Ltd* v *Eastern Star Group Ltd* (2015) 27 NZTC ¶22-019 where the GST registration of the vendor was retrospectively cancelled between the date of the zero-rated transaction and the date of settlement.

53 Under s 11(8B) Goods & Services Tax Act 1985.

54 E Trombitas, "GST and Land Transactions", NZJTLP Vol 23, No 1, March 2007.

55 GST in New Zealand, 2017, Thomson Reuters, at 15.6.5.

56 Inland Revenue has 15 working days within which to release the GST refund, pursuant to s 46(1) Goods & Services Tax Act 1985, unless *"the Commissioner is not satisfied with a return made by a registered person"* in which case it may withhold the refunding pending any request for additional information or investigation.

57 IS 17/08, above n 10, at [71].

58 IS 17/08, above n 10, at [63]–[83].

59 Under s 25 Goods & Services Tax Act 1985.

60 Under s 15(4) Goods & Services Tax Act 1985.

61 See www.linz.govt.nz.

62 Currently limited to non-resident suppliers of remote services.

63 This question was included in 9th edition of the ASP from November 2013.

64 Pursuant to s 3A(2) Goods & Services Tax Act 1985.

65 *YL NZ Investment Ltd* v *Ling*, above n 5.

66 *YL NZ Investment Ltd* , above n 5, at [31]–[32].

67 *YL NZ Investment*, at [33].

68 Under s 81 Tax Administration Act 1994.

69 See M Keating, "Can you keep a secret? The obligation of secrecy and right to disclose taxpayer information", ATR Vol 38, No 3, 2009.

70 Presumably on the grounds they are not properly conducting a taxable activity under s 51 Goods & Services Tax Act 1985.

71 Under s 5(3) Goods & Services Tax Act 1985.

72 *Jackson Surridge Property Group Ltd* v *Eastern Star Group Ltd* (2015) 27 NZTC ¶22-019.

73 Under s 5(2) Goods & Services Tax Act 1985.

74 Who is required to file a special return under s 17 Goods & Services Tax Act 1985.

75 TIB Vol 23, No 1, February 2011 at p 30.

76 See *Edgewater Motel Ltd v CIR* (2004) 21 NZTC 18,664 (PC) and *Simpson and Downes v CIR* (2011) 25 NZTC ¶20-047.

77 Under s 5(23).

78 TIB Vol 23, No 1, February 2011, at p 30.

79 See TIB Vol 1, No 8, February 1990, at p 30.

80 For example, see *CIR v Smith City Group Ltd* (1992) 14 NZTC 9,140 (HC) and *CIR v Coveney* (1995) 17 NZTC 12,193 (CA).

81 See s 5(15)–(19) Goods and Services Tax Act 1985.

82 By virtue of s 5(23) and s 20(3J) Goods and Services Tax Act 1985.

83 Under s 141C Tax Administration Act 1994. Disappointingly, IS 17/08 does not address the potential application of shortfall penalties arising from errors in the application of the CZR rules.

© CCH

[¶17-301] Practitioner's viewpoint: Inland Revenue pursues directors over unpaid tax, 25 July 2017

Click to open document in a browser

An insolvent company with unpaid tax can be problematic for Inland Revenue, because the company is an empty shell. However, the Commissioner has another string to her bow; she may issue proceedings against directors of a company for outstanding tax when statutory duties owed to the company have been breached. In this article Mark Keating, Senior Lecturer in Tax, University of Auckland, discusses recent cases arising from this developing area.

Inland Revenue has reported a significant amount of overdue tax debt.[1]

In the years between 2007 and 2014, the total outstanding tax debt almost doubled, from $3.6 billion up to $6.2 billion. The sheer quantum of unpaid tax has forced Inland Revenue to adopt smarter and more aggressive methods of debt collection — and the subsequent drop in overall tax debt subsequently reported by Inland Revenue (down to $6b and $5.7b in 2016) is a signal that its tactics are working.[2]

Obviously due to their separate legal personality, recovery of tax from companies is more difficult. However, it appears that after exhausting its rights of recovery against a delinquent company itself as debtor,[3] Inland Revenue also appears to have adopted new tactics to pursue directors personally for a company's unpaid tax. Those tactics take two forms:

- Invoking s HD15 Income Tax Act 2007 (or s 61 Goods & Services Tax Act 1985) to determine individual directors to be liable for unpaid income tax and GST as "agent" of the company, and
- resorting to remedies under the Companies Act 1993 against the individual director/s it holds responsible for the company's default.

Faced with those companies' limited liability status that would normally prevent recovery from shareholders or directors, Inland Revenue has begun to hold directors personally liable for unpaid tax. These remedies have allowed Inland Revenue to recover tax from the individuals behind those insolvent companies.

Role of Inland Revenue in liquidations

It is widely reported that Inland Revenue continues to be the most prolific petitioning creditor for both personal bankruptcies and company liquidations. For example, the Companies Office statistics record that in the 2015 year some 2,337 companies were placed into voluntary or involuntary liquidation.[4]

© CCH

The corresponding data-set released by Inland Revenue regarding "*the total number of small to medium enterprises (SME's) liquidated by Inland Revenue*" — by which it presumably means company liquidations in which it was the petitioning (or co-petitioning) creditor in the 2015 year — was 1621.[5]

Comparing these figures shows that Inland Revenue was at least partly responsible as creditor for 69.3% of all company liquidations.

The explanation for Inland Revenue's prominent role as petitioning creditor is obvious. While other creditors often conclude the cost of pursuing outstanding debts or taking recovery action against an obviously insolvent company is uneconomic, Inland Revenue must take a wider consideration regarding the integrity of the tax system.[6]

This role for care and management of the tax regime generally was recognised by the High Court in *Raynel* v *C of IR*:[7]

> "*Sections 6 and 6A(3)(b) emphasise that there is a broader public interest in the integrity of the tax system and in ensuring that taxpayers meet their obligations. Taxpayers who comply with the requirements of the Inland Revenue Acts are entitled to expect that appropriate and (where necessary) firm action is taken against taxpayers who shirk their obligations. If not, complying taxpayers will justifiably perceive there is a lack of integrity in the system and an unfair burden is cast on those who conscientiously comply with their obligations. … the voluntary compliance scheme which is central to the proper functioning of the Inland Revenue Acts will be placed in jeopardy unless all taxpayers know that the Commissioner will act firmly and resolutely with those who do not meet their obligations and have no reasonable excuse for doing so.*"

Accordingly, while other creditors can limit their exposure by simply refusing to extend further credit or ceasing to trade with the defaulting debtor, the Commissioner has no such choice. Each year a taxpayer derives income or makes new taxable supplies it establishes a fresh debt to Inland Revenue. In most instances, Inland Revenue is therefore an involuntary and often unwitting creditor.[8]

Furthermore, defaulting taxpayers often continue to accrue increasing tax liabilities as a result of the accumulation of late payment penalties[9] and use of money interest[10] — and Inland Revenue is obliged to continue to manage that growing debt. As a result, when the quantum of that debt becomes overwhelming, Inland Revenue obviously has an administrative interest in resolving the matter by forcing tax defaulters into bankruptcy or liquidation.

Section s 176(1) Tax Administration Act 1994 provides that the Commissioner "*must maximise the recovery of outstanding tax from a taxpayer*". In doing so, subs (2) specifically provides she "*may take steps preparatory to, or necessary to, bankrupt the taxpayer, including debt proceedings in the District Court or the High Court.*"[11]

Inland Revenue will then make whatever recovery of outstanding tax is provided by law — and then must write off the rest, pursuant to s 177C(2) Tax Administration Act 1994. As a result, the limitation in tax recovery, particularly by insolvent companies, is obvious. But it has become apparent recently that Inland Revenue's recovery action extends beyond simply liquidating a company and recovering unpaid tax from its available assets — as the Commissioner is often also seeking recovery from the directors she holds responsible for the company's default.

Interestingly, the compulsion required of the Commissioner under s 177C(2) (ie that she "*must write off outstanding tax that cannot be recovered*") must be interpreted narrowly as applying only to recovery against the company itself, and not to recovery of the company's tax from its directors. Presumably, that section does not mandate that unpaid tax be written off because it is irrecoverable from the company in circumstances when it may still be recoverable from a director or third party.

Directors' taxation obligations under Companies Act 1993

A feature of the Companies Act 1993 (in contrast to its predecessor Companies Act 1955) is the expansion and enforcement of a range of "directors' duties"[12] . In particular, breaches of those duties expose directors

© CCH

to a range of civil liabilities owed to the company, its shareholders or creditors. Those duties include the obligation:

- to act in good faith, under s 131 Companies Act 1993
- not to trade recklessly, under s 135 Companies Act 1993, and
- not to allow the company to incur financial obligations it cannot meet, under s 136 Companies Act 1993.

As set out in s 169(3) of the Companies Act 1993, those particular duties "*are … owed to the company and not to shareholders*". As a result, it is the company that must enforce any breach of those duties by directors. If the company goes into liquidation, that right passes to the liquidator appointed to manage and wind up the company's affairs.[13]

Crucially, s 301 of the Companies Act 1993 empowers that liquidator to seek to recover funds from directors (or others) for negligence, misappropriation of property or alleged breaches of their duties that gave rise to the company's liquidation. That provision empowers the court to order directors to repay funds or otherwise contribute to the company assets for the benefit of its creditors.[14]

Note, the definition of a director includes a deemed director (de facto director or shadow director) so any person with control over the company's activities would also be potentially liable for a company's unpaid tax if they defaulted in their duty. For example, in *C of IR v Jackson Property Group Ltd*[15] a de facto director was held responsible for mis-management of the company's affairs and therefore the potential losses caused to creditors. The court ruled the company's deemed directors have the same duties, and therefore face the same consequences, as de jure directors.

Importantly, the power under s 301 is not automatic but discretionary and allows the court to order reimbursement to the company "*as the court thinks just*", which allows for a consideration of the individual director's degree of culpability and the surrounding circumstances.[16]

As a result, Inland Revenue has begun directing (and presumably funding) liquidators to bring actions against directors of failed companies that have tax shortfalls claiming those individuals breached these duties. Liquidators therefore ask the court to require directors to pay compensation to or reimburse the company for the benefit of its creditors (most notably Inland Revenue). In doing so, the Commissioner is using the Companies Act to extend her power of recovery for unpaid tax from the company itself to the directors she holds responsible for its failure.

Commissioner's role as creditor in company liquidation

The Commissioner is provided with the status of priority creditor with respect to some (but not all) taxes owed by a company in liquidation[17] . The order of that priority is set out in sch 7 of the Companies Act 1993. Liquidators will therefore distribute company assets (including funds recovered by a liquidator under s 301 Companies Act) in accordance with the statutory scheme. Unfortunately for the Commissioner, there are nine other creditors who have a higher priority to those funds[18] . The Commissioner's first priority for unpaid Child Support and Student Loan Deductions ranks tenth down the payment waterfall[19] . The Commissioner then has the thirteenth priority for unpaid KiwiSaver Employee Deductions[20] and finally an eighteenth priority for unpaid core PAYE and GST. Unsecured tax debts (including income tax itself, as well as accumulated use of money interest and penalties) are payable only after all preferential claims are met.

As a result of this lack of priority, it is common for the Commissioner to seek to achieve a greater recovery for unpaid taxes using the mechanism provided in the 7th Schedule whereby the creditor who bears the cost of any recovery action gains a higher priority[21] . This mechanism is available to all creditors — but it is obviously the Commissioner who has the deepest pockets and often the most debt to recover.

Under this mechanism the Commissioner funds the cost of recovery action taken by the liquidator and thereby obtains a higher priority ranking (up to fifth)[22] . That is apparently why most of the cases involving allegations of breach of directors' duties and claims for recovery under s 301 Companies Act 1993 involve

the Commissioner. Accordingly, the discussion of the cases below often refer to the Commissioner as the claimant, as in most instances it was the Commissioner funding the recovery action brought by the liquidator.

The importance to the Commissioner of ensuring the liquidator acts diligently on its behalf is also reflected in a number of other cases. The Commissioner is vigilant to ensure "friendly liquidators" are not appointed by company directors or shareholders[23] to delay or prevent full recovery of all company assets for the benefit of creditors, particularly Inland Revenue.

For instance, in *C of IR* v *Revo Industries Ltd*[24] the Commissioner succeeded in having an uncooperative liquidator removed to ensure his replacement would diligently pursue recovery of potential funds that would be available to creditors.

Likewise, in *CIR* v *Kamal*[25] the Commissioner attempted (unsuccessfully) to have a person who had previously been guilty of tax evasion excluded as being unfit to act as a liquidator. The basis of the Commissioner's claim was that the liquidator's former criminal convictions should have made him ineligible to act as liquidator. The High Court rejected that allegation on the grounds the Companies Act does not impose any overarching general requirement of fitness or propriety on liquidators,[26] only that they perform their individual duties properly. Nevertheless, it is apparent the Commissioner is prepared to move against liquidators she feels are not sufficiently diligent in their duty of pursuing maximum recovery for creditors against the directors believed to be responsibility for the company's default.

Early tentative steps against defaulting directors

As early as 1986 the Commissioner had benefited as creditor from the attempt by a liquidator under the Companies Act 1995 to recover funds from the director of a company guilty of trading while insolvent.[27] In *Re Petherick*[28] the High Court ordered a director who continued to draw a large salary while PAYE and other debts remained unpaid to refund a portion of that salary and repay the priority PAYE to the company for the benefit of its creditors. However, following that initial success there is no record of any further such actions for almost two decades.

The first recently reported case in which the Commissioner sought recovery against a defaulting director under the Companies Act 1993 occurred in 2007. In *Goatlands*[29] the directors arranged for the company to register for GST and claim an input tax credit on the purchase of land intended to be used for a proposed development.[30] The company then used that GST refund to pay the deposit to the vendor and other company expenses. Unfortunately, the company was then unable to obtain satisfactory finance for the project and was forced to default on that purchase, thereby forfeiting its deposit. This left the company liable for output tax on the cancelled transaction[31] but with no funds to repay Inland Revenue.

The Commissioner appointed a liquidator to bring proceedings against both directors. In what would become a common claim the liquidator alleged the directors had breached their duty by:

- engaging in reckless trading (entering into the project without the reasonable prospect of obtaining the necessary finance — s 135), and/or
- causing the company to enter into an obligation that it could not reasonably meet (being the contingent obligation to repay the input tax credit in the event the land transaction was cancelled — s 136).

The liquidator claimed the directors were personally liable for the company's insolvency and therefore should be obliged to reimburse the company for its (and therefore the Commissioner's) losses, under s 301 Companies Act 1993.

The High Court rejected the Commissioner's first argument that the directors had allowed the company to trade while insolvent because they ceased all business activity once the land transaction was cancelled and therefore had not breached s 135. But the court found they had allowed the company to incur the contingent obligation to repay the GST refund that they could not believe on reasonable grounds the company would be able to meet, and therefore had breached s 136.

Following that finding the High Court directed that both directors must contribute to the assets of the company under s 301. However, perhaps because of its rather precedential nature, the court did not order the directors to make full reparation towards the company's GST debt. Of the total $111,509 GST refund lost, the directors were required to repay only $34,500. The Court ruled that:

> "*It was just and equitable that Mr and Mrs B should be required to make a contribution that represented the extent to which they took an illegitimate risk in deciding to use the GST refund before they knew whether the company would be able to complete the purchase. As this risk was assessed as being 25%, Mr and Mrs B were required to contribute, by way of compensation, approximately 25% of the company's indebtedness.*"

After that partial success it took a further two years before the Commissioner as creditor was involved in another similar case against directors for recovery of unpaid tax under the Companies Act — but this time the Commissioner's claim was less successful.

Peace and Glory Society Limited[32] involved the sale of property by an insolvent company to a related party at market value. The company was registered for GST and therefore incurred a GST output tax liability upon that sale. However, the effect of that transaction was that the company was unable to pay that GST liability. The bank, holding a registered mortgage over the property, took all available proceeds; leaving the company insolvent and the Commissioner unable to recover the GST.

Other GST cases decided around the same time had established that in those circumstances the secured creditor had priority over the Commissioner, who was obliged to seek recovery against the company for the unpaid output tax.[33] While the Commissioner could achieve full recovery if the property was sold by the secured lender under a mortgagee sale,[34] she ranked behind that same creditor if that sale was effected by the company. So the method by which the property was sold was all-important in determining the Commissioner's recovery.

As the company in *Peace and Glory* had made the sale itself and it was insolvent following that transaction, the Commissioner stood to make no recovery of GST. Instead, Inland Revenue attempted to recovery the unpaid GST from the director using the Companies Act remedies for alleged breach of his director's duties.

The High Court rejected Inland Revenue's claim in its entirety,[35] so the Commissioner appealed. In reconsidering the matter the Court of Appeal rejected both the Commissioner's allegations of wrongdoing by the directors and the quantum of her claim under s 301.

First, the court accepted the director had not failed in his duties because the company's insolvency resulted from an unforeseen loss in property values and not from any default on his part. Furthermore, when his predicament had been made apparent by the bank he took immediate steps to sell the property to satisfy creditors. It was not his fault the sale of those assets did not produce sufficient funds to repay both the bank and the Commissioner. The court also rejected Inland Revenue's claim to recover any use of money interest or penalties accrued on the unpaid GST (discussed further below).

Perhaps because of this set-back the Commissioner did not attempt to invoke the Companies Act remedies against directors again for a number of years.

A rush of cases brought by Commissioner under s 301

In 2013 Inland Revenue found another case so similar to that of the earlier *Goatlands* decision that it presumably felt obliged to act.

Rowmata Holdings[36] involved a company incorporated to undertake a commercial land development. The company entered into the agreement to purchase the land and obtained an input tax credit of $720,000 (being the GST component of the purchase price). That refund was paid to the vendor as the deposit.

Unfortunately, the company was unable to obtain external financing for the project so could not settle the purchase. It eventually defaulted on the transaction and the vendor retained the deposit. Following cancellation of that transaction, the taxpayer was obliged to return the original input tax claim[37] but had insufficient funds to do so.

The Commissioner alleged the company's default arose from breaches of various duties by the directors. The High Court upheld each of the Commissioner's allegations on the basis that:

> "*diligent directors exercising reasonable skill and care would have chosen to retain the GST refund in order to be sure that it could be repaid on failure of the transaction. Diligent directors would have either found another source of funds from which to pay the deposits or not bought the property in the first place.*"

Likewise, their conduct "*exposed RHL to liability it could not meet*."

Accordingly, the court ordered the directors to make reparation to the company under s 301. While the Commissioner had sought full recovery against the directors, the court discounted that recovery to take account of their naïve but honest belief in the potential of the project. Accordingly, the court found it just and equitable that they refund 70% of the lost GST.

That success was quickly followed by a number of other cases.

In *Vance* v *Jefferys* (2015) 27 NZTC ¶22-008, a company was incorporated to take over a failing property development in return for assuming the existing mortgage liability over that project. The company completed the project and sold the properties but due to cost over-runs it realised sufficient funds to repay only the mortgage, leaving no funds available to pay GST on those sales.

The liquidators alleged the sole director was responsible for the conduct of the company's business and had breached his duty under s 136 by not making provision for the expected GST liability arising from the projected sales. The liquidators first sought summary judgment but this was declined because the question of the director's culpability (and therefore the quantum of any award for recovery against him) could not be determined without further evidence.[38]

Following the full hearing the court found the director liable for breaching s 136, Dobson J concluding:

> [48] I am satisfied that Mr Jefferys' mode of operating Brooklyn Rise is a direct cause of the loss suffered by the petitioning creditor in the company's liquidation. … the operation has the hallmarks of a cavalier and somewhat irresponsible attitude.

However, the court declined to ordered full recovery of the unpaid GST under s 301. It explained:

> [49] Had sales been concluded on better terms, or had [the mortgagee] been persuaded to defer some part of the repayment of its principal or interest, then [the company] may have been in a position to pay at least part of the GST.

Accordingly, the director was obliged to repay $165,000, representing 80% of the unpaid GST on the sales effected by the company under the project.

The next instance arose shortly after in *Alpha Box Property Holdings Ltd (in Liq)* v *Weikart* [2015] NZHC 1257. In that case Alpha Box was a member of a group of inter-related companies. When faced with financial difficulties within the group the director had arranged for Alpha Box to make undocumented, unsecured (and obviously unwise) advances totalling more than $1m to other group companies. At the same time the company repeatedly failed to account for $108,947 of outstanding GST.

When proceedings were commenced by the liquidator acting for IR the director made an attempt to settle the company's GST debt by making an upfront payment of $38,000 and further instalments over time — but the Commissioner rejected this.

At trial the Court readily found that making the inter-company loans was not in the best interest of Alpha Box and the failure to document or secure those loans was negligent. It concluded:

> [40] Mr Wiekart must have known that Alpha Box was accruing a liability to pay GST on some or all of the proceeds of sale that it received. It would have been a straightforward matter to calculate or estimate the gross liability for GST by reference to Alpha Box's receipts, and to ensure that sufficient funds were retained to meet the sum expected to be due. … [41] Despite this, Alpha Box paid away all of its funds [to group companies].

In that instance the court ordered the director to fully reimburse the company for all funds wrongfully advanced within the group, which was ample to ensure the Commissioner recovered the full amount of the unpaid GST.

The next instance was *MJ Pidgeon Builder Limited (in liq)* v *Pidgeon* (2016) 27 NZTC ¶22-066 (HC). In that case the company had continued to trade for more than three years and pay director's fees despite its repeated failure to account for PAYE and other taxes. It was eventually forced into liquidation by the Commissioner owing $194,855 in unpaid taxes.

The liquidator alleged the sole director had breached almost all his duties under the Companies Act and sought recovery under s 301 for the full tax liability. The Court found multiple breaches of duty and concluded:

> [39] From the date the company became insolvent … there were no reasonable grounds for Mr Pidgeon to believe the company would be able to meet its further ongoing tax liabilities by the company continuing to trade. The company's existing and overdue debts represented an insurmountable obstacle to its ability to meet its ongoing obligations to Inland Revenue.

As a result the court found that the director bore sole responsibility for the persistent and continued breach of duties which directly contributed to the creditors' (most particularly the Commissioner's) losses. Accordingly, he was ordered to repay the full amount of the core tax liability.

Most recently, the Commissioner was again successful in *Kiwi Best Realty Ltd (in Liq)* v *Kashkari* (unrep HC Auck, CIV 2015-404-864, Muir J, 15 Nov 2016). The company traded for approximately six years but over that time regularly failed to meet its tax liabilities. In 2014 it went into liquidation owing creditors a total of $664,504.74, of which $620,210.99 was owed to Inland Revenue for arrears of GST, PAYE, student loan deductions and income tax, together with associated penalties and interest.

The court found the sole director liable for breach of his duties. It stated:

> [28] … the course he chartered meant that the company was always going to be dependent on the largesse of probably its most important creditor [Inland Revenue] when any good will the company had with that creditor had been significantly eroded by persistent non-adherence to instalment payment arrangements and a serial failure to file returns and accounts. No reasonable director could have considered that appropriate.

Later the court ruled:

> [29] In continuing to trade the business as he did he created a substantial risk that the IRD would suffer serious loss.

The Court therefore accepted he was obliged to contribute to the company's loss under s 301 — but reconsidered the quantum of that contribution, in light of earlier decisions. It explained:

> [34] The approach to the assessment of compensation is now well established. It starts by establishing a date from which inadequate corporate governance has become evident. … It then focuses on three factors — causation, culpability and the duration of trading as relevant to the exercise of the Court's discretion. Finally, it recognises that claims of this character necessarily have to be dealt with in a relatively broad brush way, given that the jurisdiction to order recompense is of an "equitable" character.

The court ruled any contribution must be discounted by 25% to reflect the director's honest, if mistaken, belief he could have met the company's accumulated core tax liability (if not the accumulating interest and penalties) by immediately repaying $120,000 to settle his current account deficit.

Questions of quantum

The cases discussed above show that the Commissioner is generally successful in asserting liability against the defaulting director under the Companies Act. Likewise, the courts appear willing to order contribution under s 301 against directors to make good the Commissioner's loss.

© CCH

However, it is also apparent that the Courts are often reluctant to allow the Commissioner to make a complete recovery, preferring to discount any contribution awarded under s 301. A significant factor often referred to by the court to justify this discount is the combined effect of:

- delays by Inland Revenue to take steps against the company despite often significant and prolonged failure to meet its tax liabilities, and
- the "ballooning"[39] of the tax debt by the compounding effect of interest and penalties.

The failure by the insolvent company to pay the core tax by the due date obviously exposes it to both use of money interest[40] and late payment penalties.[41] Once imposed, those amounts are deemed to constitute tax owing by virtue of s 156A Tax Administration Act 1994. It is widely recognised that the combined and compounding effect of those additional taxes can exponentially increase the outstanding liability.[42]

As a result, the amount of Inland Revenue's claim in a company's liquidation is often many times the quantum of the unpaid core tax. Those familiar with the tax regime recognise that as an automatic consequence of failing to pay the required tax by the due date. But perhaps because these claims are brought before High Court judges who have not previously been exposed to the severest effects of this regime, some appear reluctant or down-right hostile to forcing a defaulting director to shoulder liability for this additional tax.

In both *Pigeon* and *Alpha Box* the court ordered repayment of the full tax liability without considering whether the Commissioner had truly "lost" recovery of accumulated penalties and interest (which presumably would never have arisen had the core tax been paid as required). Nor did those cases directly address whether the imposition of those additional amounts of tax is fair and equitable for the Commissioner over other creditors.

By contrast, both issues were raised in *Peace & Glory* and *Kiwi Best Realty*. In *Peace & Glory* the Court of Appeal rejected Inland Revenue's claim to recover accrued use of money interests and penalties owing on the unpaid GST. It explained:[43]

> [75] As a final point, we note that s 301 refers to a contribution by the director by way of compensation. This means that any contribution has to be equated with what was lost. If Mr Samsa had done what Mr Dickey submits he should have done (ie liquidated the company or asked the ASB to enforce its security), GST output tax on the sale would have been paid. No question of penalties or late payment interest would have arisen. Thus the loss from the wrongful act could not, it seems to us, extend to other than the actual GST amount (and not to penalties or use of money interest), although possibly interest at an appropriate rate could have been awarded pursuant to s 301(1)(c).

The court in *Kiwi Best Realty* went even further and questioned whether Inland Revenue was itself at fault for not recognising and acting sooner to prevent the company's growing default. Muir J explained:

> [44] Mr Kashyup's principal argument (albeit one which he fairly recognised undermined his defence of the breach of duty arguments) is that the company's defaults in its obligations to the IRD were so egregious and longstanding that the IRD should have much sooner liquidated the company, with the result that liability for the compound interest and penalties now faced by Mr Kashkari would be significantly less. He says that by indulging the company for so long IRD gave oxygen to Mr Kashkari's belief that a deal might be done and that therefore in equity an adjustment should be made to the compensation payable.
>
> [45] I have some sympathies for this argument at a factual level. … it was not until almost two years later that it brought liquidation proceedings.

While case law under s 301 generally has repeatedly confirmed that "*it is not the creditor but the directors whom the law expects to be the company's keeper*"[44] the courts have in some cases recognised that the creditor's conduct could be taken into account when setting the quantum of any contribution order under s 301. For instance, in the similar context of a debt owed to the Customs Department for unpaid duty, the court in *Walker* v *Allen* was critical that a core debt of $1,400,000 had been allowed to "balloon" up to more than $8.5m.[45]

Muir J adopted a similar criticism, especially in instances where the Commissioner is the company's largest or sole creditor. Accordingly, he concluded:

> [51] In the present case (more so even than in *Walker* v *Allen*) one creditor (IRD) dominates the liquidation [comprising 93.3% of all creditors] and the consequences for other creditors of any reasonable reduction in an award of compensation on account of IRD delay is modest, particularly having regard to its (in part) preferential status.

Likewise, the court was reluctant to permit full recovery of what amounted to penalties and interest accumulated on tax that would now be paid in full. Muir J stated:

> [54] I am, to a lesser extent, also influenced by the wide disparity between the core debt owed to IRD and the total debt, including compound penalties and interest, in circumstances where I find it inexplicable the company was not wound up sooner.

There is obviously room for defaulting directors who cannot escape liability for the company's core tax defaults to nevertheless attempt to shift some of the responsibility for the quantum of that loss onto Inland Revenue's shoulders for its delay in taking prompt debt recovery action and/or the effect that delay had on the accrual of interest and penalties. No other creditors are able to automatically increase their core debt in that fashion and the courts seem willing to find it neither just nor equitable to sheet home the full amount of that added tax to the director personally.

Perhaps because of that risk of delay it is apparent the Commissioner is becoming more proactive in pursuing defaulting companies and their directors. For instance in *CIR* v *Jackson Property Group Ltd*[46] the Commissioner took the unusual step of seeking the immediate liquidation of a company that was still contesting the tax assessment through the statutory disputes procedure (making the Commissioner only a contingent creditor). Despite that live dispute, the Court recognised the risk to the Commissioner from the company's poor record keeping and inadequate administration, and therefore placed the company into liquidation. This step gave the liquidator appointed by the Commissioner control over the company's assets to prevent any future loss. Accordingly, it seems the Commissioner is no longer only seeking recovery from the directors of failed companies but will take steps to prevent those losses from arising in the first instance.

Conclusion

It is apparent that Inland Revenue is increasingly utilising every available legal remedy to recover unpaid tax from companies. The increasing number of decisions under the Companies Act against directors that Inland Revenue holds responsible for that default should serve as a warning to all directors. Faced with more aggressive debt recovery techniques by the Commissioner, tax advisers will now be obliged to familiarise themselves with their client's potential personal liability as a director as well as the tax position of the company itself.

Footnotes

1 www.ird.govt.nz/aboutir/external-stats/debt/

2 Although it may also reflect an increase in the amount of tax remitted or written off by the Commissioner under Part XI Tax Administration Act 1994. See also the revised policy statement on the remission of UOMI and penalties introduced in November 2015: *SPS 15/02 — Remission of penalties and use-of-money interest*.

3 The Commissioner's right to sue for recovery of unpaid tax arises under s 156 Tax Administration Act 1994.

4 see www.companiesoffice.govt.nz/companies/about-us/statistics.

5 see www.ird.govt.nz/resources/7/a/7af6a117-8d67-4d3d-873f-269e57fa56cc/download-unpaid-taxes-small-business-liquidation.pdf.

6 Under s 6A Tax Administration Act 1994.

7 (2004) 21 NZTC 18,583 at para [54].

8 Ironically, Inland Revenue now has the ability to disclose details of taxpayers' unpaid tax to debt collection agencies for amounts exceeding $150,000; see s 85N of the Tax Administration Act 1994.

9 Under Part IX Tax Administration Act 1994.

10 Under Part VII Tax Administration Act 1994.

11 Interestingly, s 176(2)(a) also provides that recovery is not required to the extent that "recovery is an inefficient use of the Commissioner's resources ……" — but clearly Inland Revenue take its responsibility for administration of the tax system as its primary function so this exception appears seldom relied upon: see SPS 06/02, "Writing off outstanding tax".

12 Found in Pt 8, ss 131–138A Companies Act 1993.

13 Under s 248 Companies Act 1993.

14 See *Lower* v *Traveller* (2005) 9 NZCLC 263,889 (CA).

15 [2017] NZHC 1014 (17 May 2017).

16 See *Mason and Meltzer (as Liquidators of Global Print Strategies Ltd (in Liq)* v *Lewis* (2006) 9 NZCLC 264,024 (CA); upheld by Supreme Court at [2009] NZSC 103.

17 See ss 312 and 313 Companies Act 1993.

18 See cls 1(1)(a) to 1(2)(a)–(c), 7th Schedule, Companies Act 1993.

19 See cl 1(2)(d)), 7th Schedule, Companies Act 1993.

20 See cl 1(2)(g), Companies Act 1993.

21 See cl 1(1)(e).

22 See cl 1(1)(e).

23 See s 241AA Companies Act 1993.

24 (2009) 24 NZTC 23,797.

25 (2016) 27 NZTC ¶22-050.

26 See s 280 Companies Act 1993.

27 That claim was brought under the narrower provisions of former s 321 Companies Act 1955, the predecessor provision to s 301 Companies Act 1993.

28 *Re Petherick Exclusive Fashions Ltd (in Liq)* (1987) 3 NZCLC 99,946.

29 *Goatlands Ltd (in liq)* v *Borrell* (2007) 23 NZTC 21,107 (HC).

30 This case pre-dates the compulsory zero-rating of land rules in s 11(1)(mb) Goods & Services Tax Act 1985.

31 Under s 25(1)(a) Goods & Services Tax Act 1985. See also *TIB* Vol 17, No 4, May 2005 at p 26.

32 *Peace and Glory Society Limited (in liq) & Anor* v *Samsa* (2009) 24 NZTC 23,775.

33 *See CIR* v *Edgewater Motel Ltd* (2002) 20 NZTC 17,984, and *Christchurch Readymix Concrete Ltd* v *CIR* (2003) 21 NZTC 18,033.

34 Under ss 5(2) and 17 Goods & Services Tax Act 1985.

35 [2008] NZHC 1898 (2 December 2008).

36 *Rowmata Holdings Limited (in liq)* v *Hildred* (2013) 26 NZTC ¶21-039.

37 See s 25(1)(a) Goods & Services Tax Act 1985.

38 See *Vance* v *Jefferys* [2014] NZHC 1932.

39 See Muir J in *Kiwi Best Realty* at [49].

40 Under Pt VII Tax Administration Act 1994.

41 Under Pt IX Tax Administration Act 1994.

42 Keating, M, "Tax Penalties & UOMI: The straws that break the camel's back?", *CCH Tax Planning Report*, 2014, Vol 4, Dec 2014.

43 *Peace and Glory Society* Limited, at [75].

44 See *Nippon Express New Zealand Ltd* v *Woodward* (1998) 8 NZCLC 261,765 at 261,778 (HC).

© CCH

45 *Re Cellar House*; *Walker* v *Allan HC Nelson* CP13/00, 18 March 2004.

46 [2017] NZHC 1014.