

de Newsletter

December 2011



Craig's Yarn

Here I am again wondering where the year has gone, as we lead up to Christmas. It has been a year of learning as we soak up the new challenges that have evolved through our participation in the Nixon Coaching Club. So it was

somewhat of a welcome change for me to spend a week recently as Bus Driver to a class of intermediate children on a visit to Wellington. You may well be thinking that this could be termed a busman's holiday – or not. It certainly had it's moments, not the least as I negotiated steep hills in Wellington that required a three point turn to even get around one particular corner. Then there was the infamous drive over the Rimutakas with some dubious navigating thrown in by the teacher. However, time passed quickly and it was a pleasure to be involved in such a trip as I was fortunate to have Jenny and all the family along as well.

I will be getting out and about as much as I can visiting clients in these last few weeks of 2011. I would like to take this opportunity to also invite you to come in for a free 2 hour Goal Setting session with me going forward. Those clients who have already participated in this have been very pleased with the outcome. These sessions are purely to develop and explore your thoughts and ideas of what you want for the future. I offer this service as a means to further assist you all, in whatever way we can, to help you achieve the goals in life you may well have longed for but never articulated.

Finally I wish you all a safe and very happy Christmas.

Our office will be open during the Christmas Season. The week between Christmas & New Year will have the lightest cover, but if you have anything URGENT, phone in to arrange a time to see someone, as we will have a skeleton crew on board.

Duty Free Gifting

The legislation is now in place. It abolishes gift duty for dispositions of property made on or after 1 October 2011.

Although gift statements will not be required for dispositions on or after that date we will still need to meet certain requirements to ensure the legal certainty of gifts, such as deeds of gift for Trusts etc.

Further there are ongoing income tax implications attaching to the dispositions or gifts of property. For example, a gift may be deemed to be part of a wider arrangement of tax avoidance under Section BG 1 of the Income Tax Act 2007.

An IRD report on Gift Duty Abolition also lists a range of provisions in the Act designed to directly ensure income tax integrity around arrangements involving gifts. These include

- Section HC 35 minor beneficiary income rule
- Section EW 38 rules for the disposal of financial arrangements for less than fully adequate consideration
- Section HD 15 joint and several liability of Company Directors and controlling or interested Shareholders where a Company enters into an arrangement that results in an inability to meet its tax liability;
- Sections CD 6 – CD 10 deemed dividends for transfers of value from a Company to an individual
- Section CX fringe benefit tax rules for gifts to employees
- Sections FC 1 and FC 2 treatment of distributions from Companies and Trusts, gifts, and transfers of assets and liabilities upon death as disposals and acquisitions at market value

We wish all our clients a well deserved break and wonderful Festive Season, and for 2012 to be a prosperous and exciting year!



- Section GC 1 rules for disposal of trading stock for less than fully adequate consideration
- Section 10(3) of the Goods and Services Tax Act 1985, which treats the associated supply of goods and services as if they were for market value where there is no fully adequate consideration.

That's just the tax considerations. We also need to be aware of some of the other implications of gifting

- first, is it a good idea for Dad and Mum to give away all of their assets, and end up being reliant on the goodwill of the children or the Trustees for their future welfare?
- there are provisions in the Insolvency Act 2006 under which gifts may be clawed back.
- there are limited specific legislative provisions in respect of rest home fee subsidies, and we have to rely on some regulations or "standard practice" arrangements which are subject to change from time to time.
- There may be other areas of social assistance that could be impacted by gifting e.g. student allowances.

So the message is quite simple; engage the brain and look at all of the potential implications before gifting off vast amounts of equity.



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Risk and Reward

Holiday pay—best practice



Kiwi businesses, especially those involved in contracting and service industries, often close for annual holidays just prior to Christmas and re-open in the New Year. Many businesses encourage their staff to take leave over the festive season 'when things are quiet'.

Staff employment agreements will include provision for staff to take at least part of their annual leave during this close-down period. The calculation of holiday pay is an integral part of employees' final pay for the calendar year.

Employees are entitled to receive their pay for annual leave before they commence their leave. This provision provides an employee with money to pay for travel and accommodation.

The employer and employee can agree to leave the normal pay cycle undisturbed by the time off work. If so, it's recommended that the employees' employment agreements reflect this.

Calculating annual holiday pay

Whichever of the following is the larger becomes the rate of the weekly holiday pay:

1. 'Average weekly earnings': Calculate 'total gross earnings' for the 12 months before the end of the last pay period before the annual holiday and divide this figure by 52.
2. 'Ordinary weekly pay': Multiply the ordinary hourly rate of the employee's pay as at the start of the holiday by the number of hours worked in a 'normal' week.

Calculating pay for statutory (public) holidays

1. 'Relevant daily pay': Find the amount of pay that the employee would have received if he or she had worked on the day concerned.
2. 'Average daily pay' is used when using relevant daily pay is not possible or practicable or there is variation in the daily pay during the pay period when the holiday occurs. Calculate gross earnings for the 52 weeks before the end of the immediately preceding pay period and divide by the number of whole or part days during which the employee earned those earnings including days of paid holiday or leave.

In the case of employees who have commenced employment during the year, their average weekly earnings are calculated by taking the amount of their gross earnings from starting work until the last pay period before the holiday and dividing that amount by the number of weeks worked. For examples on holiday pay please visit the Department of Labour's website: <http://www.dol.govt.nz/>

Pay calculations can be complex especially when employees receive allowances, (e.g. travel) and have deductions made (e.g. KiwiSaver, student loan) so contact us if you need assistance in getting these important calculations right.

Make that holiday happen

If you are a business owner, you'll know that the more stressed out you are, the more you need a holiday and the less easy it is to make the time. Here are a few tips to help you plan a holiday and make the most of it:



Put systems in place. If you write down your procedures and practices and ensure your team are following them, you can lie on the beach without worrying. The earlier you put systems in place within your business, the earlier you will reap the benefits.

Plan. Use your most productive time of day to plan your holiday. Don't try and do it once you get home, after the kids are in bed. Put aside 30 minutes each working day to really plan your holiday and book airfares and accommodation. You'll have less risk of booking incorrect dates and times and your holiday will be more cohesive.

Rethink how you use your time. If you spend your working day rushing from A to B, book a holiday that involves lying in one place. If you spend your work week on a wheelie chair in front of a monitor, go somewhere with plenty of places to walk and explore. Make sure your holiday is a real break from reality - not just the same behaviours moved to a different location.

Shut off. Leave your mobile and laptop behind and don't check your emails. Holiday like it's 1989 - if you are away from the office, you are out of contact. If it's an emergency, your team can call the hotel, but do not give any way to contact you directly.

Take a mini-break. If you really can't get away for a week or two, take a long weekend, unplug and relax. Explore your nearest large city and visit the theatre or get your blood pumping with a live sports game. If you are in the city, find your closest rural retreat, have a massage then get your gumboots on and step out into that invigorating fresh air.

A verbal contract is not worth the paper it's written on.

Samuel Goldwyn

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Trusts and Trusteeships — the dangers

Court Case Example

A recent High Court case (Frimley v Stonewall Homes Limited (2010) 2 NZTR 20-037) is sending a few shock waves through the ranks of professional trustees.

Many practitioners (both accounting and legal) have previously taken on personal trusteeships for their clients. All of those professionals will have ensured that they have limitation of liability clauses in place in various Trust documents.

First a standard clause in the Trust Deed itself which limits the trustee's liability to the assets of the Trust. This is an agreement between the independent professional Trustee and the Trust itself.

Second a specific limitation of personal liability clause on contracts entered into by the Trust e.g. advances to third parties, investments in shares, mortgages given by the Trust, guarantees etc. This is part of a contract between the independent professional trustee and third parties.

The problem which arose in Frimley v Stonewall Homes Ltd was the time at which the value of the assets of the Trust were to be measured for the purposes of calculating the trustee's liability. At the time the original contract was entered into the assets of the Trust were comfortably more than the potential liability that could arise from the deal. But at the time the contract was enforced the Trust assets had diminished to a level that gave rise to a considerable shortfall.

The Judge took the view that the Trustee was liable for the shortfall because he had failed to maintain sufficient capital in the Trust to cover the amount of the potential liability under the original contract.

That judgement has already prompted many independent (professional) trustees to have a serious rethink of their positions particularly in the light of things like the massive reduction in value of dairy farms from a few years ago. Or what about an independent (professional) trustee who signed a guarantee on mortgage borrowing of say \$2 million on Christchurch commercial property that was previously valued at \$4 million and is now worth only \$1.5 million.

The Frimley case is likely to be appealed, but in the meantime only one of the major banks (Rabobank) is saying that they will continue to accept what we might call the old Trustee limitation of liability rules. Namely, that provided the Trustee had not been involved in any dishonesty, fraud, omission, or wilful breach of trust etc their personal liability is genuinely limited to the assets of the Trust from time to time. i.e. no personal liability.

The other banks are saying that Frimley is limited to its own facts and their (the Banks) limitation of liability clauses will be interpreted as limiting liability to the assets of the Trust at the time of enforcement.

The problem is not what the clauses actually say, but whether or not trustees can rely on the Banks' (or the Courts') interpretation when the chips are down. Some firms of lawyers are pressing the Banks to change their standard clauses to provide genuine and reliable limitation of liability for independent trustees. At this stage, all of the Banks (except Rabobank) have said that they won't do that.

Hence the shock waves that are reverberating round legal and accounting offices where practitioners have in the past taken on the position of independent trustee in a personal capacity for their clients' trusts. Clearly, there will be some trusteeships where there are absolutely no worries, because the Trust has no liabilities, so no problems.

But many professionals are now saying an emphatic no to any new personal trusteeships and taking a serious look at resigning from previous appointments and inserting (in their place) a corporate trustee.

There are several corporate trustee mechanisms. One is for the firm (of accountants or lawyers) to set up a single trustee company which is used as the trustee for all of the firm's trust clients who want to engage an independent trustee.

There are some concerns about this, because if just one disaffected Trust or creditor took an action against the independent trustee (the firm's omnibus trustee company) it is possible that the company could collapse or be struck off and therefore disrupt all of the other (several hundred) Trusts that use the corporate trustee.

To spread the risk, some firms set up a new trustee company each year, and use it for all of the new trusts formed that year. This reduces the risk factor from 100's down to dozens.

The third mechanism is to establish a new trustee company to act as independent trustee for each and every individual trust.

We have used this third method in our office. It is more expensive - several hundred more company annual returns to do - but we think it is the most effective mechanism to use.

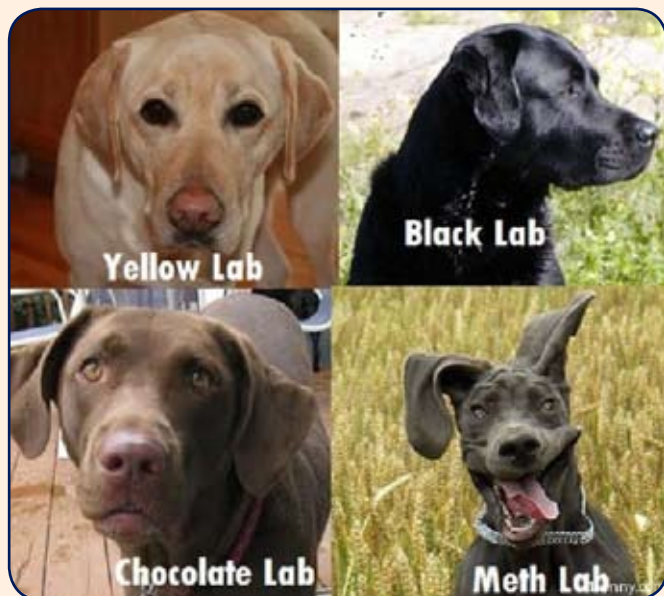
Funny

From a retired police officer ... and he says ...

"As a law enforcement officer, I have been approached by several people lately wanting to know how to identify a meth lab.

The following are four photos ...

I think it's pretty obvious which one is the meth lab."



Book out your bach: avoid the tax headache

Recent years have seen a surge in popularity in the short-stay rental of holiday homes. The internet has made it easier to list, book and review baches and cribs which are available when owners aren't in residence.

Inland Revenue have recently issued a paper proposing new rules on mixed-use assets (including holiday homes) where there is a mixture of business and personal use, with revised criteria that should be adhered to when booking out the bach. But until the rules are formally changed, the current policies still apply.

Firstly, it's vital that your intentions are bona fide. You must market the holiday home in a commercial manner such as setting up and using a website for the property, registering the property with a reputable holiday home website or listing the property for short stay rental with local real estate agencies. These efforts cannot be seen to be 'token', you should be accepting offers from suitable renters.

Secondly, your own (plus family and friends') use of the property must be diarised so you can determine the days in a year that the property was available for renting out.

If the property is owned by an individual or a family trust the expenses relating to the property including the utilities (power, rates, insurance), maintenance and interest on debt will be apportioned according to the number of days in a year the house was available for rent.

There are GST issues too. Short stay accommodation is a taxable supply for GST purposes so if the annual rent you are receiving exceeds \$60,000, the owning entity (individual, partnership, company or trust) is required to register for GST and return GST on the outputs (rent) and inputs (expenses and improvements) made and received.

This threshold may seem high but some do have more than one holiday home in the same entity! This threshold includes the market value of free or cheap use of the bach by persons associated to the owner.

The value of the property becomes a taxable supply when registration occurs and when the property is sold or the entity de-registered. Both the income tax and GST issues can be quite tricky so we recommend consulting us to make sure all the tax bases are covered correctly.



Holidays for busy business owners

Think you don't have time to take a holiday? Holidays are vital for tired, stressed business owners. Not only is the habit of taking regular holidays linked to reduced mortality and lower incidence of heart disease, but holidays have myriad benefits.

Going away with friends and loved ones, or taking solo time out is great for your mental health, reducing risk of depression and also alleviating stress. Extra sunshine helps boost Vitamin D and a few hours' extra sleep helps our well-being in general.

Holidays also allow more time to bond with family and make exercise fun. Go for walks on the beach, a city walking tour, hiking and tramping or playing backyard cricket.

Depending on your destination, you are likely to expand your mind also. All that botany, marine biology, history and culture leave little room to stress out about the banalities of the office. And there is the added benefit of keeping your mind challenged and taking young family members on a voyage of discovery.

Mini-holiday ideas

Roughing it: Visit the Department of Conservation's website for free or low-cost back-to-basics camping sites.

Take a Zest food tour - these walking tours in Auckland, Wellington and Dunedin will get your feet moving and your gastric juices flowing.

Night-time Ghost Tours, available in many cities including Auckland, Napier, Hamilton, Arrowtown and the most

famous, the Dunedin Hair Raisers Tour. Even if you don't believe in ghosts, it's guaranteed to be novel and interesting

For a dose of history, wherever you are in New Zealand, check out the Historic Places Trust's website. They list historic New Zealand sites such as Pompallier Mission in Russell and Pencarrow Lighthouse in Wellington.

Try an 'experience' - test your hand at race car driving in Taupo or sleepover with the kids at an Auckland Zoo 'Safari Night'. You'll be talking about it for years!

For more information about setting good business practices to make your holidays easier, please don't hesitate to come and see us.



GST Tax Invoices – Zero Rated Supplies

Some of the GST documentation on property transactions that we receive from our legal colleagues is less than satisfactory.

There have always been problems with going concern transactions and with the advent of compulsory zero rating on most of the land transactions that we deal with in the rural sector, we can expect to see more difficulties with inadequate or incorrect documentation.

The supply (by a registered person, to a registered person) as a going concern has always been a taxable supply. An identical situation arises under the new compulsory zero rating rules - it's a taxable supply.

But, subject to meeting the appropriate conditions, these taxable supplies have GST charged at the rate of 0%.

The vendor is required to issue a formal tax invoice (often the lawyer does it as agent for the vendor) which meets the standard requirements for tax invoices as set out in Section 24 (3) of the GST Act 1985.

GST Act 1985

1. the words "tax invoice" in a prominent place:
2. the name and registration number of the supplier:
3. the name and address of the recipient:
4. the date upon which the tax invoice is issued:
5. a description of the goods and services supplied:
6. the quantity or volume of the goods and services supplied:
7. either -
 - the total amount of the tax charged, the consideration, excluding tax, and the consideration, inclusive of tax for the supply; or
 - where the amount of tax charged is the tax fraction of the consideration, the consideration for the supply and a statement that it includes a charge in respect of the tax.

At item (7) the person issuing the tax invoice should insert

GST (zero rated going concern)

NIL

or (compulsory zero rated) NIL

Following on from the main tax invoice for the property itself, there are normally a series of other tax invoices that should be separately issued. These include

- > a **tax invoice** from the legal firm for their services (legal fees)
- > a **tax invoice** from the real estate agent for their services (commission)
- > a **tax invoice** or tax credit note covering any apportionment items e.g.
 - >> rates
 - >> insurance
 - >> prepaid Yellow pages advertising
 - >> prepaid Jasons subscription (motels)

All of the items should then be gathered together as appropriate on a separate **Settlement Statement** that the vendor's solicitor supplies to the purchaser's solicitor (balance required to settle). There will also be another **Settlement Statement** that the vendor's solicitor supplies to their client.

We regularly see a document that is described as Settlement Statement/Tax Invoice which incorporates deposits, payments, sales, apportionments and any other adjustments that the solicitor thinks appropriate.

These documents are often seriously wide off the mark and bear little resemblance to what is required under the GST Act 1985.

Obviously there is nothing wrong with the two Settlement Statements referred to above (one to the Purchaser for the amount required to settle, and one to the Vendor setting out full details of the gross monetary debits and credits.)

Where the system often falls over is in the failure to distinguish between a settlement statement and a tax invoice, and the failure to create proper tax invoices for the various apportionment items.



Comings and Goings BABY NEWS!!!

Renee Brown, one of our Accountants, is on maternity leave at present. A baby shower was held by us all on 9 November, to help Renee stock up on some items. Renee finished on Friday 11th November, to enjoy a restful month at home before baby is due.



NEWS FLASH!!!

Renee had their son on 4 December at Waikato Hospital, and Mum and baby are both well and healthy! Congratulations to Mel and Renee!

Melbourne Cup Day

It was decided that all of us at de Lautours.co 'dress-up' as though we were attending the Melbourne Cup Day for the races. We had some really gorgeous designs and outfits and even some prizes to complete the whole event! We all had some laughs and the team spirit was strengthened with a draw out of the hat and some money to be shared around!



A year in New Zealand business resilience



A year ago our nation was reeling following the Pike River Mine disaster and the first earthquake in Christchurch. One year on Christchurch has suffered another devastating quake with tragic loss of life and major property damage; the Hawke's Bay has been hit by a huge storm that washed out large areas of productive farm land; across NZ gold kiwifruit crops have been decimated by the Psa virus (with infection confirmed to green crops also). Most recently the Bay of Plenty's beaches were polluted by oil and debris from the Rena grounded on Astrolabe Reef.

These critical events apart, businesses have to cope with localised crises, such as losing a contract, a major bad debt or a key staff member leaving. How to cope when adversity strikes? Dr Sven Hansen of the Resilience Institute succinctly advises 'be calm, advance steadily, prevail.' We expand on this approach.

Be calm, a clear head will deliver decisive, thoughtful action. Mayor Bob Parker's calm strength in the aftermath of the Christchurch earthquakes is a classic example.

When a business crisis hits don't be afraid to communicate with your staff, customers, suppliers, advisors, and bank manager! The load gets shared and a solution may come from any quarter.

Advance Steadily, focus on the basics and mobilise the resources you need to plan your recovery. Plant and Food Research are doing just that in developing Psa resistant strains of kiwifruit and when oil spilled from the Rena, thousands of volunteers were marshalled in the clean-up.

Look for innovative bounce back solutions to stem the loss. The newly opened Cashel Street 'pop-up' Mall has bought retailing back to central Christchurch in a vibrant way.

Prevail, recovery from business crises can be slow and frustrating but a relentless approach will get you there...

Our isolation has made us a resilient nation. When the chips are down we're generous and supportive towards each other. As 2011 comes to a close, be uplifted by our amazing 2011 Rugby World Cup win (24 years in the making) - when an All Black team troubled by injury, securing scraps of possession and facing an impassioned French Les Bleus, stoically won the final. They remained calm, advanced steadily and prevailed.