ONLINE SALES AND AUCTION SITES, ISOLATED TRANSACTIONS AND THE *INCOME TAX ACT 2007* (NZ)

By Andrew Maples*

In 2007, David Beckham was in New Zealand to play an exhibition football match. While in Wellington, he dined at Nando's restaurant. Moments after finishing his meal a mystery diner swiped the football star's scraps and cutlery. The items were subsequently listed for sale on online auction site Trade Me. This article considers whether profits derived by the enterprising diner from this isolated transaction may be assessable under the Income Tax Act 2007 *(NZ). Specifically, the article focuses on the application of s CB 32 (Property obtained by theft), s CB 4 (Personal property acquired for purpose of disposal), and s CB 3 (Profit-making undertaking or scheme). The article concludes that the intrepid diner may be subject to tax on her profits under two of these provisions.*

1. INTRODUCTION

In 2007, David Beckham was in New Zealand to play an exhibition football match. While in Wellington, he dined at Nando's restaurant. Moments after finishing his meal a mystery diner swiped the football star's scraps and cutlery. The items were subsequently listed for sale on online auction site Trade Me. This article considers whether profits derived by the enterprising diner from this isolated transaction may be assessable under the *Income Tax Act 2007* (NZ). Specifically, the article focuses on the application of s CB 32 (Property obtained by theft), s CB 4 (Personal property acquired for purpose of disposal), and s CB 3 (Profit-making undertaking or

* Associate Professor of Taxation Law, Department of Accounting and Information Systems, University of Canterbury.

scheme). The article concludes that the intrepid diner may be subject to tax on her profits under two of these provisions.

In 2007, David Beckham, former England soccer star who now plays midfield for American Major League Soccer club Los Angeles Galaxy, was in New Zealand with his LA Galaxy team to play an exhibition match against local team Wellington Phoenix. While in Wellington he dined at Nando's restaurant in Courtenay Place. Moments after he had finished his meal '[a] mystery customer swiped the football star's cutlery'.[1] The haul included 'a half-eaten corn cob, a knife and fork with pieces of food still on them, a glass, and a half-filled Coke bottle'[2] (hereafter referred to as 'the Beckham items'). The items were subsequently listed on online auction site Trade Me for sale. It is unclear what amount(s) the seller actually received for these items. The Coke bottle at one stage had allegedly attracted a bid of NZD 5,000.[3] The partially gnawed corn cob, initially at least, failed to attract a bid after 'being listed for sale for the bargain-basement price of [NZD] 80.'[4] However, it also attracted much comment on the Trade Me website, including the following two 'tongue in cheek' questions: 'Is there much corn left, I really like corn from nandos, and will it be safe to eat by the time it gets to me?' and 'Is it true that if I eat the rest of this corn cob, I will turn into a half half [sic] human, half David Beckham, soccer ball wielding, crime fighting super hero?'[5]

---

[1] Fairfax NZ News, *Becks' dirt dished on Trade Me* (1 January 2009) Trade Me <http://www.stuff.co.nz/national/162782>.

[2] Ibid.

[3] Australian Associated Press, *Beckham's spit, corn cob on Trade Me,* The New Zealand Herald (6 December 2007) <http://www.nzherald.co.nz/sport/news/article.cfm?c_id=4&objectid=10480708>.

[4] Ibid.

[5] Trade Me, *David Beckham's Corn Cob* (10 December 2007) <http://www.trademe.co.nz/Antiques-collectables/Food-drink/Other/auction-130249060>.

In addition, '[a]lso up for sale is a fried chip, which Beckham supposedly dropped while sampling the capital's nightlife...'[6] At one stage this chip had received a bid of NZD 1.[7]

This is not the first example of such entrepreneurship. In 2006 a handbag used by Tana Umaga (former All Black and Hurricanes rugby player) to hit another player Chris Masoe at the Jolly Poacher tavern in Christchurch after the Super 14 rugby final was sold by its owner on Trade Me (allegedly for NZD 22,750)[8] along with the cell phone that was broken in the incident.

The Inland Revenue Department ('Inland Revenue') has been monitoring Trade Me and similar websites for some time.[9] For example, in the document *Helping you get it right - Inland Revenue's Compliance Focus 2009-10*[10] Inland Revenue, aware of the 'substantial increase in the volume of trading through online sales and auction sites',[11] has been focusing on the under-reporting of income from online sales. Inland Revenue's focus is on traders and those carrying on some form of business activity, not the one-off examples mentioned above.

---

[6] Fairfax NZ News, above n 1.

[7] Australian Associated Press, above n 3.

[8] David Fisher, *The $22,000 Umaga handbag farce*, The New Zealand Herald (4 June 2006) <http://www.nzherald.co.nz/news/print.cfm?objectid=10384924>. This listing was visited more than a million times: ibid.

[9] Trade Me has a section headed 'Tax implications of selling on Trade Me' to assist users of its site to determine their tax obligations: Trade Me, *Tax implications of selling on Trade Me* (2012) <http://www.trademe.co.nz/HELP/TOPIC.ASPX?help_id=478>.

[10] Inland Revenue, *Helping you get it right - Inland Revenue's Compliance Focus 2009-10* (June 2009) <http://www.ird.govt.nz/resources/4/d/4d9dd2004e687633aa24ae4bfdc4072d/compliance-focus-2009-10.pdf>.

[11] Ibid. The 2010-11 document also reports on the work undertaken by Inland Revenue and results in this area: Inland Revenue, *Helping you get it right - Inland Revenue's Compliance Focus 2010-11* (July 2010) 10 <http://www.ird.govt.nz/resources/3/c/3cffb480433082bf90f6f75d5f60e4be/our-compliance-focus-2010-11.pdf>.

ONLINE SALES AND AUCTION SITES

In the absence of a comprehensive capital gains tax in New Zealand,[12] the *Income Tax Act 2007* (NZ)[13] treats certain amounts as being within the term 'income' even though, generally, they would be considered capital gains; for example, because they are the product of a one-off transaction. This article considers, in order, the application of two such sections, s CB 4 (Personal property acquired for purpose of disposal) and s CB 3 (Profit-making undertaking or scheme) to the sale of the Beckham items. These sections, along with s CB 5 (Business of dealing in personal property) and their equivalent *Income Tax Act 2004* (NZ) provisions, replaced the former three limbs (parts) of s CD 4 of the *Income Tax Act 1994* (NZ) and s 65(2)(e) of the *Income Tax Act 1976* (NZ).[14] In addition, following a law change[15] to override a particular judgment,[16] the

---

[12] This is made explicit in the *Income Tax Act 2007* (NZ) by s BD 1(1) (Amounts of Income) and Flowchart B2: Calculating and satisfying income tax liabilities (which excludes from income capital and windfall gains). The Victoria University of Wellington Tax Working Group final report published in January 2010 did not support a comprehensive capital gains tax: The Victoria University of Wellington Tax Working Group, *A Tax System for New Zealand's Future*, (January 2010) Centre for Accounting, Governance and Taxation Research, 11 <http://www.victoria.ac.nz/sacl/cagtr/pdf/tax-report-website.pdf>. The New Zealand Prime Minister has also rejected the introduction of a capital gains tax: John Key, NZ National Party, *Statement to Parliament* (9 February 2010) 5-6 <http://www.beehive.govt.nz/sites/all/files/StatementToParliament_2010.pdf>.
Papers prepared for The Victoria University of Wellington Tax Working Group on capital gains taxation are available at <http://www.victoria.ac.nz/sacl/cagtr/twg/>.

[13] All subsequent legislative reference, unless otherwise noted, are to the *Income Tax Act 2007* (NZ).

[14] Section CB 3 is equivalent to the third limb of s CD 4 of the *Income Tax Act 1994* (NZ) and s 65(2)(e) of the *Income Tax Act 1976* (NZ), respectively. Section CB 4 of the *Income Tax Act 2007* (NZ) is equivalent to the second limb of s CD 4 of the *Income Tax Act 1994* (NZ) and s 65(2)(e) of the *Income Tax Act 1976* (NZ), respectively. The predecessor to s 65(2)(e) of the *Income Tax Act 1976* (NZ), s 88(1)(c) of the *Land and Income Tax Act 1954* (NZ), applied to both land and personal property transactions in respect of dispositions before 10 August 1973. Hence, a number of the cases relevant to the application of (now) ss CB 3 and CB 4 deal with the subject of land transactions.

[15] The relevant amending provisions were inserted by s 5 of the *Taxation (Tax Credits, Trading Stock, and Other Remedial Matters) Act 1998* (NZ).

misappropriation of money or property is now also assessable under s CB 32 (rather than being on capital account).

This article is divided into seven sections. Section II provides a brief outline of Trade Me as an online auction site. Section III analyses the tax treatment of proceeds from the sale of the uploaded items on the basis they were stolen from the restaurant (s CB 32). The application of ss CB 4 and CB 3 of the *Income Tax Act 2007* (NZ) is considered in Sections IV and V of this article, respectively. These provisions are analysed on the assumption that the items sold are not stolen (for example, because approval for their removal was given by the restaurant (manager)) and therefore the diner is the owner of the property with the right to sell the articles.[17] A number of key cases in this area consider the equivalent Australian provisions to ss CB 3 and CB 4, namely former s 26(a) of the *Income Tax Assessment Act* 1936 (Cth).[18]

For completeness, Section VI briefly considers the determination of net income on the basis that the proceeds of sale of the Beckham items are assessable. Concluding comments and observations are made in Section VII.

This article assumes that the sale of the Beckham items is an isolated transaction and is not part of a wider dealing business.

---

[16] *A Taxpayer v CIR* (1997) 18 NZTC 13,350.

[17] The manager of Nando's was quoted as saying he 'had no problem with the girl helping herself to the items. … Cutlery is cheap enough so we can replace the items easily, and as for taking the corn cob, well, what can I say? … I wish them luck.': Fairfax NZ News, *Becks' dirt dished on Trade Me,* above n 1.

[18] The *Income Tax Assessment Act 1936* (Cth), s 26(a) included within the definition of assessable income 'profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme'. For a comparison of s 26(a) of the *Income Tax Assessment Act 1936* (Cth) and s 65(2)(e) of the *Income Tax Act 1976* (NZ) see John Prebble, *The Taxation of Property Transactions* (Butterworths, 1986) 5-6. Section 26(a) became s 25A of the *Income Tax Assessment Act 1936* (Cth) and ultimately s 15-15 of the *Income Tax Assessment Act* (Cth) 1997, with application from 1 July 1997.

Accordingly, ss CB 1 (Amounts derived from business) and CB 5 are not considered in this article.[19] The article does not review the application of s CA 1(2), which taxes amounts that are income under ordinary concepts. This 'catch-all provision is intended to include in income any receipts that do *not* fall specifically within any of the categories set out in Pt C of the Income Tax Act 2007 [NZ].'[20] The author believes that the sale proceeds derived from the sale of the Beckham items will potentially be subject to income tax under two sections in Part C and, hence, there is no need to consider the application of s CA 1(2). In addition, one of the key case law indicators of income is periodicity. Holmes observes: 'Under the judicial interpretation of income, only flows from recurrent transactions give rise to income. Traditionally, gains arising from isolated transactions are not income unless they are part of a pattern of transactions undertaken in the carrying on of a trade or business.'[21] As stated, this article is premised on the basis that the uploading and subsequent sale of the various items is a one-off activity and, therefore, based on case law prima facie that the gains derived from sale would not be income according to ordinary principles.[22] This article also assumes that the items listed on Trade Me were sold.

[19] For a discussion of the taxation of business income see generally Kevin Holmes, *The Concept of Income – A Multi-Disciplinary Analysis* (IBFD Publications BV, 2001) Ch 6 and the New Zealand Court of Appeal decision in *Grieve v CIR* [1984] 1 NZLR 101.

[20] CCH New Zealand Limited, *New Zealand Master Tax Guide 2012* (CCH New Zealand Limited, 2012) [5]-[167] (emphasis added).

[21] Holmes, above n 19, 164.

[22] For a discussion of the concept of income according to ordinary concepts see generally Stephen Barkoczy, 'Income According to Ordinary Concepts - Part 1: Mere Realisation or Business Operation?' (Pt 1) (1997) 3 *New Zealand Journal of Taxation Law and Policy* 75; Stephen Barkoczy, 'Income According to Ordinary Concepts - Part 2: Extraordinary Transactions or Isolated Business Ventures?' (Pt 2) (1997) 3 *New Zealand Journal of Taxation Law and Policy* 131; Stephen Barkoczy, 'Income According to Ordinary Concepts - Part 3: Net Profits or Gross Receipts?' (Pt 3) (1997) 3 *New Zealand Journal of Taxation Law and Policy* 195.

2. TRADE ME – THE WEBSITE

Trade Me, managed by the company Trade Me Ltd, was founded in 1999 by a young computer consultant Sam Morgan and is the largest internet auction website operating in New Zealand.[23] In 2004 the company was awarded the Deloitte Fast 50 title for fastest growing New Zealand company.[24] The Australian Fairfax media company acquired Trade Me in 2006 for NZD 750 million and was it publicly listed as a separate entity on 13 December 2011. As of April 2012, Trade Me has 2,952,046 million active members[25] and is the fifth most visited website in New Zealand.[26] On average 687,375 people visit the site each day (6,146,735 per month) with Sunday being the busiest day of the week.[27] The site has specific terms and conditions as well as policies (including items that cannot be sold) and a code of conduct.[28]

Online auction sites such as Trade Me have made available another medium through which property can be sold. These sites provide sellers with a low-cost, easy and convenient method of selling items and their wide usage means a large potential market for vendors. The wide penetration, low cost aspect of online auction sites means that it is easy for sellers of 'unusual' articles such as the

[23] Hitwise New Zealand, *Top Websites and Search Engine Analysis* (2011) Experian Marketing Services <http://www.hitwise.com/nz/datacentre/main/>. A range of items can now be sold on the site including motor vehicles and motorcycles, real estate and general items.

[24] Deloitte, *Deloitte Fast 50 Index* (2004) <20Assets/Documents/Top%20of%20mind/Fast%2050/Index%20pdfs/NZ_En_Fast 50_Index_2004.pdf>_>.

[25] Nielson Online, *Site Stats* (April 2012) Trade Me <http://www.trademe.co.nz/About-trade-me/Site-stats>.

[26] Alexa, *Top Sites in New Zealand* <http://www.alexa.com/topsites/countries/NZ>. The top sites are Google New Zealand, Facebook, Google (the global website), and YouTube.

[27] Nielson Online, above n 25.

[28] Trade Me, *Policies, Terms and Conditions* (2012) <http://www.trademe.co.nz/Help/Default.aspx#Policiestermsandconditions>.

Beckham items, the subject of this article, to list their items and 'test the market'. There have been a number of other notable listings on Trade Me, including a time-machine (listed in 2005), a 'Scary Washing Machine' (so named because of its behaviour when washing) which eventually sold for NZD 5,160 (in 2009),[29] and, in 2010, a sketch of a silver fern by Prime Minister John Key on a breakfast television programme.[30] The increasing use of Trade Me and similar sites will mean that the principles in this article will apply to a range of listings[31] and not necessarily only to 'unusual' items.[32]

3. SECTION CB 32: MISAPPROPRIATED PROPERTY

This section considers the sale on Trade Me of the utensils and glass on the basis that these were stolen from the restaurant. This section does not consider any arguments as to the identity of the legal owner(s) of the property. However, it seems fair to assume that the glass, knife and fork were the property of the restaurant and the 'food' items (for example, the corn cob and Coke bottle) were owned

[29] NZ Press Association, *Scary washing machine fetches over $5000* (19 June 2009) Stuff.co.nz <http://www.stuff.co.nz/oddstuff/2517155/Scary-washing-machine-fetches-over-5000>.

[30] NZ Press Association, *Bids for PM's silver fern sketch reach $20,000* (12 February 2010) Stuff.co.nz <http://www.stuff.co.nz/national/politics/3319949/Bids-for-PMs-silver-fern-sketch-near-20-000>.

[31] For example, a fan of a famous rock-group who has her copy of the group's CD autographed lists this for sale. A fan of a cricket legend has his T-shirt signed by the legend and lists this item on an online auction site.

[32] Due to earthquake damage sustained in Christchurch in February 2011, the Sanitarium plant – which is the only plant in New Zealand which makes the yeast spread 'Marmite' – has been forced to close while remedial and strengthening work is undertaken. As a result, supplies of this iconic New Zealand spread have run out – a 'crisis' dubbed by some as 'Marmageddon' - leading to unopened bottles of the product being offered for up to NZD 250 on Trade Me: Trade Me, *'Marmite 100 year celebration-250 Gram-Un-Opened'* (18 April 2012) <http://www.trademe.co.nz/home-living/food-beverage/other/auction-464934097.htm>.

either by David Beckham (as the purchaser of the meal) or the restaurant.[33] It is also assumed in this discussion that the items were not given to the diner, either explicitly or implicitly.

Section CB 32 provides that money or property that is stolen (obtained 'without claim of right') is income of the person who misappropriated the property. In the event that property is stolen, the amount subject to tax is equal to the market value of property.[34]

Section CB 32 was enacted to overcome the decision in *A Taxpayer v CIR*.[35] In that case an accountant who managed his employer's short-term investment fund stole NZD 2.23 million from the employer and invested it in the futures market. Only some of the money was ultimately recovered. Inland Revenue treated the stolen money as income of the accountant. The New Zealand Court of Appeal held that a taxpayer who stole money from his/her employer had no claim of right to that property and was not assessable to tax in respect of it. This was because the taxpayer had not derived the money beneficially.[36]

Section YA 1 defines 'claim of right' to mean, in relation to any act, 'a belief that the act is lawful, although that belief may be based on ignorance, or mistake, of (a) fact; or (b) any matter of law other than the enactment against which the offence is alleged to have been committed.' The writers at CCH New Zealand observe that '[t]he phrase 'claim of right' ('colour of right' before 1 October 2003) is well known in criminal law. A taking of property dishonestly and without claim of right is an ingredient of the crime of theft under s

[33] One newspaper report indicated that the restaurant manager viewed the food scraps as the restaurant's property: Fairfax NZ News, *Becks' dirt dished on Trade Me*, above n 1.

[34] See the definition of 'amount' in s YA 1.

[35] *A Taxpayer v CIR* (1997) 18 NZTC 13,350.

[36] The legislative provisions taxing gains from illegally obtained property were enacted retrospectively and affect past and present income tax legislation, essentially applying to income derived on or after 1 April 1989. This is subject to certain transitional rules.

219(1) of the *Crimes Act 1961*.' [37] Inland Revenue defines the term as 'an honest belief that the holder is entitled to possession or control of the property'.[38] Property obtained by fraud, embezzlement, theft and misappropriation are therefore obtained without claim of right.

Section CB 32(2) allocates the income to the year in which the person obtains possession or control of the stolen property or money. Where property is stolen CCH New Zealand observes that

> It is implicit in s CB 32 that the market value of the property is to be calculated *at the time* at which the property is obtained, being the time of derivation. In *CIR v Farmers' Trading Company Ltd*, Richardson J discussed the concept of derivation, citing *FCT v Clarke* in which Isaacs ACJ said at p 261: " 'Derived' only means 'obtained' or 'got' or 'acquired'…"[39]

Turning to the case of the Beckham items, the key question is whether they have been obtained without claim of right. It is arguable that the diner may have honestly (even if mistakenly) believed that she was entitled to remove and take possession of the corn cob and Coke bottle since David Beckham had evidently finished with the items and, presumably, the restaurant would subsequently have disposed of them. On this basis these items have not been misappropriated and s CB 32 does not apply. This scenario raises the issue of who owns discarded food or other items, the consideration of which is beyond the scope of this article.

---

[37] New Zealand Income Tax Law and Practice, *Property unlawfully obtained* (2012) CCH New Zealand Limited Database, <http://intelliconnect.wkasiapacific.com.ezproxy.canterbury.ac.nz/scion/secure/index.jsp#page[6]> [167]-[710]. The definition of 'claim of right' in s YA 1 is the same as in s 2 of the *Crimes Act 1961* (NZ).

[38] Inland Revenue, 'Taxation of property obtained without colour of right' (1998) 10(12) *Tax Information Bulletin* 34.

[39] New Zealand Income Tax Law and Practice, *Property unlawfully obtained*, above n 37 (emphasis added and citations removed).

The argument that the diner had an honest belief that the items could be taken is less likely to be successful with respect to the drinking glass and cutlery. The majority of people would assume that these items are the property of the restaurant and are not to be removed; indeed (unless of a plastic composition) they are likely to be reused by the restaurant rather than discarded. The diner therefore has no 'claim of right' over these items and would be assessable on their market value in the year that they are stolen under s CB 32.

The market value of these items is determined at the time they were acquired[40] which, in this case, arguably will be the price each items sells for on Trade Me. This assumes that the items are listed and sold on Trade Me shortly after being uploaded (that is, there is no price movement (due to inflationary or other pressures) between the time of uploading and ultimate sale). Where the items do not sell at all or are unsold in the year they are stolen (which is the year of assessment) then a valuation of the items would be required. Due to the unusual nature of such items, the market price will be very subjective and the fact that there is no readily comparable market makes establishing a market value in these circumstances very difficult. If no bid is received for an item, and there was no reserve, the market value would arguably be zero. Alternatively, if a reserve was set and bids were received either at or above the reserve but were not accepted, the highest bid in this case would presumably be the market value. In these circumstances the bid prices (or lack thereof) received on Trade Me will be the best guide of the market value of the Beckham items.

One final issue concerning this topic is that under the section 'What you can't sell'[41] in the Trade Me 'Policies, terms and conditions', where it is stated that '[y]ou may only sell items in your possession that you are legally entitled to sell.' If the Beckham items were stolen from the restaurant then the diner was not at liberty to

[40] Ibid.

[41] Trade Me, *What you can't sell* (2012) <http://www.trademe.co.nz/help/331/banned-restricted-items>.

sell them. This would not affect the tax treatment of the items stolen but would possibly have other legal implications, the consideration of which is beyond the scope of this article.

4. SECTION CB 4: PROPERTY ACQUIRED FOR THE PURPOSE OF SALE

Section CB 4 provides that '[a]n amount that a person derives from disposing of personal property is income of the person if they acquired the property for the purpose of disposing of it.' This provision is specifically concerned with the taxation of profits from isolated transactions 'and may be seen as a limited form of a capital gains tax.'[42] Alston identifies four key components or principles (and sources of contention) in his analyses of the predecessor to s CB 4.[43] Three of those components are considered below. The fourth, concerning whether property acquired as a hedge against inflation has the necessary dominant purpose for resale, is not considered to be relevant to the scenario the subject of this article.[44]

4.1 Identity between the property acquired and sold

According to this principle, s CB 4 applies only where the property that is sold is the same as that acquired.[45] However, this principle is referring not to the physical appearance of the property 'but the taxpayer's proprietary interest in it.'[46] In *Moruben Gardens*

[42] Andrew Alston, 'Taxation of Profits from the Sale of Personal Property' [1981] *Otago Law Review* 114, 122.
[43] Ibid 122-138.
[44] Ibid 137-138.
[45] Ibid 122; New Zealand Income Tax Law and Practice, *Personal Property Disposals* (2012) CCH New Zealand Limited Database <http://intelliconnect.wkasiapacific.com.ezproxy.canterbury.ac.nz/scion/secure/index.jsp#page[5]> [82]-[310].
[46] Ibid 123; Prebble, above n 18, 17-19. In *McClelland v FCT* (1970) 120 CLR 487 ('*McClelland*') the taxpayer inherited a one-half undivided share in land. She subsequently purchased her brother's share and proceeded to subdivide and sell the land. Justice Windeyer held that the sale of the property was not the same property

Pty Ltd v FCT,[47] the taxpayer company purchased land with a dwelling-house on it with the purpose of demolishing the house and erecting home units which it went on to sell with strata title at a profit. The taxpayer unsuccessfully argued that the equivalent Australian provision, the first part of s 26(a) of the *Income Tax Assessment Act 1936* (Cth), did not apply to profits from the sale on the basis that the property sold (land with strata title units on it) was different to the property that was purchased (land with a house on it). According to Mason J:

> when the first part of [section] 26(a) is applied in relation to profit made by selling real estate, the property to which it refers is the estate or interest in land acquired by the taxpayer. The property which the taxpayer acquired in this case was an estate in fee simple known as 21 Moruben Road and that was the estate that it sold. *There was therefore no lack of essential identity between what was acquired and what was sold*…[48]

In this particular case, whether the items listed on Trade Me are seen as one complete package or separate items (the author's view), the items sold are the same as purchased – the diner's interest in the property does not change between removing the items and selling them.

4.2 'Acquired'

The key component of s CB 4 that differentiates it from s CB 3 (and s CB 5) is the requirement that the property in question was 'acquired' by the taxpayer with a purpose of disposition.

(interest) as the two interests she had acquired and thus the necessary identity did not exist. See also *Cowan v FCT* (1972) 3 ATR 474; 72 ATC 4,121.

[47] *Moruben Gardens Pty Ltd v FCT* (1972) 3 ATR 225.

[48] Ibid 234 (emphasis added). See also *McClelland v FCT* (1970) 120 CLR 487; *Cowan v FCT* (1972) 3 ATR 474; 72 ATC 4,121.

Justice Henry in *Beetham v CIR* (*'Beetham'*)[49] observed that the word 'acquired' is a wide term which covers a wide variety of methods of acquisition.[50] However, case law shows that the term is not of unlimited breadth. In *McClelland v FCT*,[51] the Privy Council held that property received under a will had not been 'acquired for the purpose of profit-making by sale' as required by the first limb of s 26(a) of the *Income Tax Assessment Act 1936* (Cth).[52] It should be noted the words of s 26(a) of the *Income Tax Assessment Act 1936* (Cth) quoted in this case ('purpose of profit-making by sale') do not appear in the equivalent New Zealand section. Alston states this difference is irrelevant – the key is the link between 'acquisition' and 'profit-making' or of 'selling' (in the *Income Tax Act 1976* (NZ)).[53] The Full High Court of Australia subsequently approved this aspect of *McClelland* in *FCT v Williams* (*'Williams'*)[54] in respect of *inter vivos* gifts. Justice Gibbs in *Steinberg v FCT* (*'Steinberg'*)[55] observed, with respect to s 26(a) of the *Income Tax Assessment Act 1936* (Cth) (first limb), that '[t]he section does not require that the

[49] [1973] 1 NZLR 575.

[50] Ibid 581. Aside from the obvious purchase of property, the term includes acquisition by exchange or by way of distribution of assets *in specie* in a liquidation: *Steinberg v FCT* (1975) 134 CLR 640.

[51] (1970) 120 CLR 487.

[52] Ibid 493.

[53] Alston, above n 42, 127.

[54] *FCT v Williams* (1972) 127 CLR 226. In this case the husband of the taxpayer and two other persons purchased land with the purpose of sale at a profit. Upon discovering that he might have been subject to tax on any profit, he gave his interest in the property to his wife, the taxpayer. She did not solicit the gift but welcomed it as she regarded it as providing an opportunity to acquire for herself an asset she could ultimately convert into some income-earning form. The property was later sold at a profit. The Court held that the profit was not taxable and that s 26(a) of the *Income Tax Assessment Act 1936* (Cth) did not apply where property was acquired by unsolicited gift. Justice Gibbs stated '[i]f a donee who passively receives property the subject of a gift can be said to acquire that property within s 26(a) (which is doubtful), the main or dominant purpose with which he acquires that property … is simply to accept the bounty of the donor', at 248.

[55] (1975) 134 CLR 640.

acquisition should have been effected by any particular method - it is not limited - for example, to acquisition by purchase.'[56]

Commenting on *McClelland* and *Williams*, Alston observes that it is the passive nature of such an acquisition (ie, an unsolicited gift) which takes any profit outside the scope of the predecessor to s CB 4, s 65(2)(e) of the *Income Tax Act 1976* (NZ).[57] That section and s 26(a) of the *Income Tax Assessment Act 1936* (Cth):

> talk of something acquired by a person for some purpose which is specified in the provision. This refers to obtaining property by an act or acts done in the exercise of the taxpayer's own will. In *McClelland* and *Williams* the taxpayers did not get property by exercising their own wills. They were merely the passive, though willing recipients of property passed to them at the wills of other people.[58]

This view is in line with the leading New Zealand case on the issue, *AG Healing & Co Ltd v CIR* (*'AG Healing'*).[59] In this case a testator granted an option to the taxpayer company to buy certain property for New Zealand Pounds (NZP) 20,000 when the trustees of the will decided to sell it. The taxpayer exercised the option and sold the property the next day for NZP 47,000. Justice Wilson in the Supreme Court determined that the profit was not subject to tax under the equivalent to s CB 4 as the word 'acquired' 'connotes some positive step by the taxpayer which would be absent from an outright gift.'[60]

It is clear that the word 'acquired' therefore requires the taxpayer to take a positive step, to exercise the person's own will; it does not require consideration to be provided. On this basis, while no

---

[56] Ibid 695.
[57] Alston, above n 42, 127.
[58] Ibid 127-128.
[59] *AG Healing & Co Ltd v CIR* [1964] NZLR 222.
[60] Ibid 224. It should be noted that, while the exercise of the option was a positive step, the initial step was the *giving* of the option which gave the opportunity to purchase the property.

consideration was provided by the diner for the Beckham items taken from the Nando's restaurant, the items were 'acquired' as a positive step taken by the diner in removing them; they had exercised their will. If the restaurant had given the items to the diner then s CB 4 would not apply; the various items would not have been acquired within the meaning of that section. However, such a gift would have to be unsolicited for the reason that if the diner had first requested the items (which were then given to her), that request would constitute a positive action which was followed by a gift (ie, the reverse situation to *AG Healing* where the gift was followed by the positive act).

4.3 The purpose of disposal

4.3.1 A subjective test

Section CB 4 applies where the property was acquired for the 'purpose' of sale. Courts in both New Zealand and Australia have held that this is a subjective test,[61] 'requiring consideration of the state of mind of the purchaser as at the time of acquisition of the property.'[62] Where there is more than one purpose for which the property is acquired, to be subject to tax the 'dominant' purpose must be one of disposition.[63] A consideration of purpose where the taxpayer is a company[64] or

[61] *Davis v CIR* [1959] NZLR 635; *Pascoe v FCT* (1956) 6 AITR 315; *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 *('National Distributors')*; *CIR v National Insurance Co of New Zealand Ltd* (1999) 19 NZTC 15,135 ('*National Insurance'*).

[62] *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346, 6,350. See also *CIR v Walker* [1963] NZLR 339, 363; *CIR v National Insurance Co of New Zealand Ltd* (1999) 19 NZTC 15,135, 15,139.

[63] *CIR v Walker* [1963] NZLR 339, 361. See also *CIR v Hunter* [1970] NZLR 116; *Holden v CIR* (1974) 1 NZTC 61,146; *CIR v National Distributors Ltd v CIR* (1989) 11 NZTC 6,346. A contingent or conditional purpose can still amount to a dominant purpose: *Williams Property Developments Ltd v CIR* (1980) 4 NZTC 61,537.

[64] New Zealand Income Tax Law and Practice, *Personal Property Disposals*, above n 45, [83]-[010]; Prebble, above n 18, 22-23; Alston, above n 42, 132.

there are joint owners[65] is beyond the scope of this article. The taxpayer has the onus of proof to establish on the balance of probabilities that the property in question was not acquired for the purpose of sale.[66] Where, as in this case, a number of items are concerned, s CB 4 requires each item to be looked at separately and not on a global basis.[67]

4.3.2 Motive', 'purpose' and 'intention'

The courts have distinguished 'motive' from 'purpose'[68] and 'purpose' from 'intention'.[69] A consideration of the subtle differences between these terms is beyond the scope of this article on the basis that: (a) as stated in *National Insurance*[70] 'the ideas conveyed by the [three] respective words merge into each other without a clear line of differentiation';[71] and (b) for the reasons outlined in the next section, it is the author's view that the clear purpose in this situation is the sale of the property.

---

[65] New Zealand Income Tax Law and Practice, *Personal Property Disposals*, above n 45, [83]-[110].

[66] For an extended discussion of cases concerning the term 'purpose' in this context see also Prebble, above n 18, 20-33.

[67] See eg *Estate of King v CIR* (2008) 23 NZTC 21,729.

[68] *XCO Pty Ltd v FCT* (1971) 124 CLR 343.

[69] *Plimmer v CIR* [1958] NZLR 147. In this case the taxpayer wanted to buy all the ordinary shares in a company. However, the shareholders would only sell on the condition that the taxpayer also buy the preference shares in the company. The taxpayer reluctantly agreed, borrowing money to do so on the understanding that the preference shares would be sold as soon as possible. The Supreme Court held that the profit from the sale of the preference shares was not taxable – while the taxpayer had the intention of selling the preference shares, that was not his purpose. Rather, the taxpayer's purpose was to gain control of the company and the purchase of the preference shares was a necessary step to achieve that purpose. See also *CIR v Walker* [1963] NZLR 348; *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346; *CIR v National Insurance Co of New Zealand Ltd* (1999) 19 NZTC 15,135. For a discussion of the difference between 'intention' and 'purpose' see Holmes, above n 19, 393, 397-403.

[70] *CIR* v *National Insurance Co of New Zealand Ltd* (1999) 19 NZTC 15,135.

[71] Ibid 15,139.

4.3.3 Assessing purpose

The Court of Appeal in *National Insurance* outlined certain principles concerning the operation of the second limb of s 65(2)(e) of the *Income Tax Act 1976* (NZ) drawing from *National Distributors*[72] including:

> Where subjective purposes are in issue the statements of the taxpayer, or of someone who can speak for the taxpayer, are obviously important evidence. But for obvious reasons they must be assessed and tested in the totality of circumstances which will include the nature of the asset, the vocation of the taxpayer, the circumstances of the purchase … the number of similar transactions, the length of time the property was held and the circumstances of the use and disposal of the asset. Actions may speak louder than words and the totality of circumstances may negate the asserted purpose of the purchase.
>
> The nature of the asset is always an important consideration. Generally speaking, if the taxpayer is in pursuit of economic gain and is not acquiring an asset for private use or enjoyment or other extraneous reasons, the economic rewards, which are the recognised goals of most investments are ordinarily obtained either through periodic receipts such as dividends or through the gains derived on sale or through a combination of the two. And it will ordinarily be possible to conclude whether retention or resale is predominant at the time when purchase is made.[73]

In this scenario, setting aside any statements by the diner as to her purpose, of particular relevance to determining the tax treatment of any profits are the nature of the asset and the length of ownership (linked with the circumstances of use and disposal of the items). Without evidence to the contrary, it is assumed in this example that the taxpayer is not a dealer and that these are isolated transactions.

[72] *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346, 6,349-6,356.
[73] *CIR* v *National Insurance Co of New Zealand Ltd* (1999) 19 NZTC 15,135, 15,139-15,140.

With respect to the nature of the asset, the items in this case are unlikely to have been acquired for 'private use or enjoyment or other extraneous reasons'; at best, these items are utilitarian (the cutlery and the glass) while the corn cob and food scraps have no apparent utilitarian, aesthetic or other qualities. The immediate listing on Trade Me would support this view.

Turning to deriving economic reward from the items, due to their nature, the only way any gain can be crystallised is through disposition. They do not produce any form of income flow, unlike dividends and interest. There is an existing analogy in the form of vehicle registration plates acquired as an investment. The Inland Revenue's view is that profits from the sale of such plates are subject to income tax under the equivalent to s CB 4 on the basis 'that it would be difficult to see any other reason for acquiring an investment plate … As there is no other income stream associated with the purchase, the onus would be on the taxpayer to demonstrate that the 'investment' is not purchased with the intention of resale.'[74]

The other key indicator of the diner's purpose is the (short) period of ownership (along with the circumstances of the use and disposal of the items). In the context of share transactions, Richardson J in *National Distributors*, as a guide to assessing what was the dominant purpose at the time of purchase, stated:

> Ordinarily, too, the length of time the shares are held before being sold is regarded as of particular importance. If shares are held for a matter of months only, then in the absence of special reasons occasioning an earlier than contemplated sale, it is difficult to escape the conclusion that they were purchased with a view to the gain likely to arise on resale rather than with a view to reliance on the dividend income.[75]

[74] Inland Revenue, 'Vehicle registration plates bought as an investment – income tax implications' (1998) 10(5) *Tax Information Bulletin* 24.
[75] *CIR* v *National Distributors Ltd* (1989) 11 NZTC 6,346, 6,352.

In this case the items have not been used in any way. Rather, they have been listed immediately upon being uploaded, likely in part to take advantage of the media coverage and interest in David Beckham's visit to Wellington, strongly indicating a profit-making purpose.

Two qualifications can be made with respect to determining purpose. First, in *National Distributors*, Richardson J observed that '[t]he mere fact that at the time of purchase of the property the taxpayer did not expect to hold the property for ever and contemplated the possibility of sale does not attract the application of the second limb'.[76] The immediate listing of the Beckham items for sale would indicate that sale was more than contemplated at the time of acquisition.

Second, the courts have recognised that people may acquire property for no purpose at all, simply to own it.[77] In such a case the requisite purpose of resale does not exist and the section will not apply. The immediate listing of the Beckham items militates against this argument. Alternatively, a taxpayer may have had no definite purpose at the time of acquisition. Justice Richardson observed in *National Distributors*:

> However assets may be acquired by a taxpayer who has no clear purpose in mind. There may be no more than an intention to buy with the expectation of benefiting the taxpayer's financial position in some unformulated way, and without any clear consideration of the advantages of either retention or resale sooner or later. If that state of affairs is established the statutory onus on the taxpayer to prove that the shares were not purchased for the dominant purpose of sale will have been satisfied. To put it another way, to discharge the onus it is not necessary to establish some other specific purpose.[78]

[76] Ibid.
[77] *Williams Property Developments Ltd v CIR* (1980) 4 NZTC 61,537, 61,541; *Pascoe v FCT* (1956) 6 AITR 315, 320; *R G Williams v FCT* 74 ATC 4237, 4,250.
[78] *CIR* v *National Distributors Ltd* (1989) 11 NZTC 6,346, 6,352.

While the taxpayer bears the onus to establish that there was no clear purpose of resale at the time of acquisition, Richardson J above makes it clear that they do not need to establish some other specific purpose, although one would have thought that that would be the easiest way to discharge the onus. However, the Court of Appeal in *Williams Property Developments Ltd v CIR*[79] also held that where there was no evidence clearly indicating the purpose of the acquisition, Inland Revenue must succeed as the taxpayer has not discharged the onus placed on them.[80] While this may seem harsh, Prebble comments:

> But it is suggested that in practical terms the only taxpayers who will be seriously handicapped by this approach will be those who sell property a relatively short time after acquiring it. Those who have retained property for some time will be able to point to income flowing from it, or to some other use of it, which will corroborate their contention that the property was, indeed, purchased for purposes other than sale.
>
> Where property is bought and sold rather quickly one might well draw the conclusion that it was acquired for the purpose of sale, even in the absence of a specific onus on the taxpayer.[81]

In this case, to discharge the onus (that the relevant profit-making purpose did not exist) the diner will need to establish that at the time of acquisition a (dominant) purpose other than disposition existed (or at least create uncertainty as to her purpose at that time). The diner could argue that she simply saw an opportunity to obtain these items of 'memorabilia' with no clear purpose of what to do with them (it was a 'spur of the moment' decision). She does not need to establish another specific purpose. However, the nature of the items and immediate listing of the items on Trade Me would

[79] *Williams Property Developments Ltd v CIR* (1980) 4 NZTC 61,537.

[80] Ibid 61,542.

[81] Prebble, above n 18, 35 citing several cases including *IRC (NZ) v Hubbard* (1960) 8 AITR 92; *TRA Case 25* 1 TRNZ 388.

indicate that she did have a clear purpose of resale at the time she took the items.

4.4 'Addendum' – the handbag and Chris Masoe

Section CB 4 would not apply in the alternative scenario mentioned at the start of this article, the sale of the handbag used to hit Chris Masoe, on the basis that the handbag was purchased by its owner to use as a handbag. It was therefore not acquired for the purpose of sale at the time it was purchased; the purpose of sale arose subsequently, once it had gained notoriety and an increased value as a result.

5. SECTION CB 3: AN UNDERTAKING OR SCHEME TO MAKE A PROFIT

Section CB 3 provides that '[a]n amount that a person derives from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit is income of the person.' The section is equivalent to the second limb of s 26(a) of the *Income Tax Assessment Act 1936* (Cth). It is wider than s CB 4 as it does not require there to be an acquisition and disposition.[82] However, it is narrower than s CB 4 as there must be an 'undertaking or scheme', meaning that the mere purchase and sale of property will normally not be subject to this section but could be caught by s CB 4.[83] There are two key components to the operation of this section which are discussed in the following paragraphs.[84]

[82] Inland Revenue, above n 38.
[83] Ibid.
[84] For further discussion see also Alston, above n 42, 140-143.

5.1 'An undertaking or scheme'

5.1.1 The terms defined

In *Eunson v CIR*,[85] Henry J said the word 'undertaking' implied 'some engagement or the like with some other person or persons'.[86] Alston suggests the term is of limited application and the courts focus on defining the word 'scheme' or using the composite expression 'scheme or undertaking'.[87] In most respects, the terms have similar meaning.[88]

The word 'scheme' means 'a plan, design or programme of action, hence a programme of action devised in order to attain some end; an approach, an enterprise'.[89] In *Steinberg*, Stephen J stated an undertaking or scheme 'connotes a plan or purpose which is coherent and has some unity of conception.'[90] The Taxation Review Authority ('TRA') in *TRA Case F6*[91] found that the taxpayer had misinterpreted the meaning of the term 'undertaking or scheme' by treating it as meaning a legal undertaking, commitment or guarantee. The TRA rejected this interpretation and quoted[92] from the judgment of Windeyer J in *Investment & Merchant Finance Corp Ltd v FCT*,[93] where his Honour said '[a] scheme presupposes some programme of

[85] *Eunson v CIR* [1963] NZLR 278.
[86] Ibid 280.
[87] Alston, above n 42,140; see also Prebble, above n 18, 39.
[88] Prebble, above n 18, 39. Prebble comments that '[i]t seems probable that 'scheme' is the term of wider import and that most, perhaps all, 'undertakings' constitute, or at least entail, 'schemes' as the words are ordinarily used, so that 'undertaking' may well be supererogatory'; ibid.
[89] *Vuleta v CIR* [1962] NZLR 325, 329. The Court of Appeal later adopted this interpretation in *Cross v CIR* (1987) 9 NZTC 6,101, 6,109.
[90] *Steinberg v FCT* (1975) 134 CLR 640, 715.
[91] *TRA Case F6* (1983) 6 NZTC 59,591.
[92] Ibid 59,594.
[93] *Investment & Merchant Finance Corp Ltd v FCT* 70 ATC 4,001.

action, a series of steps all directed to an end result. Similarly an undertaking is an enterprise directed at an end result.'[94]

Thus, in *Steinberg*, the Full High Court of Australia held that the formation of a company to acquire land, the sale of one-half of the shares, the distribution of the land in specie to the shareholders and the sale of the land by the shareholders was a profit-making scheme.[95] By way of contrast, in *Clowes v FCT*,[96] the investment of money in forestry bonds, where the money was merely invested by the taxpayer and an independent forestry company carried out all the work, did not constitute a scheme or undertaking carried on by the taxpayer.[97]

One of the key aspects of s CB 3 is that it does not apply to a 'simple' transaction. As Prebble observes, 'a bare purchase and a sale of some property … will ordinarily be beyond [s CB 3].'[98] The major obstacle (at least from the Inland Revenue's perspective) to the section applying to the Beckham items is that *prima facie* this transaction appears to be the simple acquisition and sale of the same property. In order for the entrepreneurial diner to be subject to s CB 3, she must have been carrying on an undertaking or scheme, which means that she had a coherent plan involving a number of steps aimed at a particular result. This raises the issue of what amount of activity is required for a scheme to exist; will a few steps be sufficient, or does the scheme have to be in the nature of a business transaction? A related issue is, how formalised does the undertaking or scheme have to be at its inception? Do all the details have to have been fully worked out? These issues are addressed in the following sections.

---

[94] Ibid 4,007.
[95] See also *Macmine v FCT* (1976) 6 ATR 597.
[96] (1954) 91 CLR 209.
[97] See also *Kirkcaldie & Stains Ltd v CIR*; *Renouf Industries Ltd v CIR*; *Renouf Corporation Ltd v CIR* (1998) 18 NZTC 13,627 (New Zealand High Court); *CIR v Renouf Corporation Ltd* (1998) 18 NZTC 13,914 (New Zealand Court of Appeal) where the relevant transaction was held not to constitute a scheme.
[98] Prebble, above n 18, 37.

5.1.2 The character of a business deal

The profit-making undertaking or scheme must produce income and not a capital gain.[99] The realisation of a capital asset in the most advantageous manner does not amount to an undertaking or scheme.[100]

The Privy Council in *McClelland* concluded that, to be subject to tax, the undertaking or scheme must 'exhibit features which give it the character of a business deal … [t]he notion of business is implicit in the words "undertaking or scheme"'.[101] This view has been accepted as good law in New Zealand[102] but not Australia.[103] The practical effect of the Privy Council's approach is to 'restrict what might otherwise be thought to be the literal ambit of [s CB 3].'[104]

Turning to the diner selling the Beckham items on Trade Me, has she met the necessary threshold? Prebble observes that the Privy Council did not state that the Australian provision required a business to exist, '[r]ather, the Board said that the scheme in question must have the *character* of a business deal. Presumably, the scheme must be business-*like*.'[105] What is the test for 'business-like'? The factors stated in *Grieve v CIR* ('*Grieve*')[106] indicating the existence of a business could be used as a proxy to indicate a 'business-like'

---

[99] *Eunson v CIR* [1963] NZLR 278, 280; *Beetham* [1973] 1 NZLR 575, 582.
[100] *Eunson v CIR* [1963] NZLR 278; *Beetham* [1973] 1 NZLR 575.
[101] *McClelland v FCT* (1970) 120 CLR 487, 495.
[102] *Buck v CIR* (1982) 5 NZTC 61,221, 61,226; *Duff v CIR* (1982) 5 NZTC 61,131, 61,136. A contrary view to that outlined by the Privy Council in *McClelland* has been expressed in New Zealand. Prior to *McClelland*, in *Eunson v CIR* [1963] NZLR 278, 280 Henry J stated the equivalent to s CB 3 'catches some residue of methods of earning profits which are neither a business nor the realisation of property bought for the purpose of resale.' Justice Henry reaffirmed this view post-*McClelland* in *Beetham* [1973] 1 NZLR 575. See Alston, above n 42, 139-140 and Prebble, above n 18, 45.
[103] See, eg, *FCT v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, 362-367.
[104] Prebble, above n 18, 44.
[105] Ibid 45 (emphasis in original).
[106] *Grieve v CIR* (1984) 6 NZTC 61,682, 61,691.

scheme. These factors need to be considered with some caution as they are intended to indicate whether an activity conducted over a period of time constitutes a business for the purposes of s CB 1 and are not targeted at a one-off transaction as present here.

Even so, adopting that proviso, it would appear the activity is not 'business-like'. The volume of transactions and scale of the operation are very small; a number of items (six or thereabouts) have been taken and put up for sale on Trade Me. Crucially, there clearly has not been a significant commitment of time, money or effort (even over a short period of time). Justice Richardson in *Grieve* observed that underlying the term 'business' is 'the fundamental notion of the exercise of an activity in an organised and coherent way and one which is directed to an end result.'[107] The acquisition of the items appears very opportunistic rather than carefully planned as would be expected with a business-like activity. On the basis that the sale of the Beckham items are the only transactions being undertaken by the diner, the activity has been engaged in for a short period.

Two factors could indicate a business character. The financial results are unknown but may have provided a very good return. In addition, this activity arguably (except for its scale) is being conducted in a way that is characteristic of traders (and businesses) on the internet, especially on auction sites such as Trade Me. However, it is unlikely that these positive factors would outweigh the others that indicate something less than a business-like activity. Ultimately, whether a business is being carried on is 'a question of impression'.[108] In this case, the diner was simply realising capital assets (using that term broadly) in the most advantageous manner. Even if the diner knew David Beckham would be dining there that night so made plans to eat there (booking a table) in the hope of obtaining something of value, it is unlikely that this would be sufficient to transform the transaction into a 'business-like' one due to its small scale and very short term nature. However, this

[107] Ibid 61,688.
[108] *FCT v Radnor Pty Ltd* (1991) 91 ATC 4689, 4702.

conclusion could change if the sale of the Beckham items were part of a broader activity of buying/acquiring property and selling it on the internet.

5.1.3 What degree of specificity is required?

Section CB 3 applies where the person has the purpose of entering into or devising an undertaking or scheme to make a profit. The person's purpose is to be considered at the point the undertaking or scheme commences, not when the underlying property was acquired.[109] This leads to the question as to how carefully planned does the undertaking or scheme have to be at the point it commences. A profit-making scheme or undertaking can exist even though the undertaking or scheme was not the precise one the taxpayer initially had in mind,[110] and even though many of the scheme details had still to be worked out '[l]ack of a detailed scheme is not inimical to the application of [s CB 3].'[111] The majority of the High Court of Australia in *Steinberg*[112] also affirmed the view that it is unnecessary for all the details of the scheme or undertaking to be fully worked out at its inception. It is sufficient if at the time there is a purpose to derive a profit from the relevant asset; the details can be worked out later. A fairly generalised plan at the time the activity commences is all that is necessary for a scheme or undertaking to exist at that point (subject to the other criteria discussed in this article being satisfied).

If the diner made enquiries as to where David Beckham was dining, made a reservation and went into the restaurant with the clear purpose of carrying out a plan to take certain items, albeit unsure of what and how many items, there could be a sufficiently well-formulated plan to constitute an undertaking or scheme for s CB 3 to apply. However, the broad view of the level of planning required for an undertaking or scheme adopted by the courts means that a less

[109] *Gilmour v CIR* [1968] NZLR 136.
[110] *Duff v CIR* (1982) 5 NZTC 61,131, 61,134.
[111] Ibid 61,142.
[112] *Steinberg v FCT* (1975) 134 CLR 650, 714-715.

formulated, more spontaneous plan may suffice. For example, the provision arguably could apply even where the intrepid diner happened to be in the restaurant, sees an opportunity to obtain some 'memorabilia' and make some money, waits for the right moment to take the items but is uncertain at that stage exactly how to profit from her plan. Justice Gibbs in *Steinberg* observed:

> It cannot be said with certainty whether the purpose of the scheme was to make a profit from the sale of the shares or from the sale of the land, but that is immaterial: if the scheme had the requisite purpose it was a profit-making scheme *notwithstanding that the exact manner in which the profit was to be made had not been finally decided* ... When property is bought with the purpose of making a profit in the easiest or most advantageous way that may present itself, and the taxpayer adopts 'one of the many alternatives' that his plan leaves open, thereby returning himself a profit, he will rightly be said to be carrying out a profit-making scheme…[113]

5.2 Purpose of making a profit

The test to be applied in determining whether an undertaking or scheme has been entered for the purpose of making a profit is the same as in ascertaining whether s CB 4 applies to a transaction, that is, the dominant purpose test (where there is more than one purpose).[114] However, as indicated in the previous section of this article, the time at which the purpose is determined is the time when the undertaking or scheme is entered into and not when the underlying property was acquired.[115]

If the assumption is made that an undertaking or scheme exists, for the reasons discussed with respect to the application of s CB 4 (unique nature of the assets and short period of ownership), arguably the diner had a (dominant) purpose of making a profit.

[113] Ibid 699 (emphasis added).
[114] *CIR v Walker* [1963] NZLR 339.
[115] *Gilmour v CIR* [1968] NZLR 136.

5.3 'Addendum' - The handbag and Chris Masoe

It is unlikely that s CB 3 would apply to the sale of the handbag used to hit Chris Masoe mentioned in Section I of this article. Despite the fact that the section, unlike s CB 4, does not require the relevant property to be acquired by the person for the purpose of disposition, it is unlikely s CB 3 will apply as this simple transaction does not have the business-like character required. Rather, the owner is simply realising the handbag in the most advantageous way.

6. DETERMINATION OF NET INCOME

Section DA 1(1) allows a deduction for expenditure incurred in deriving assessable income. However, s DA 1 is subject to the capital limitation in s DA 2(1) which prohibits a deduction for expenditure of a capital nature. In respect of ss CB 3 and CB 4, in order to overcome the capital limitation, s DB 23 provides a specific deduction for the cost of revenue account property. Revenue account property is defined under s YA 1 as including trading stock of the person and is essentially property which would generate income upon its disposal in accordance with ss CB 3 and CB 4. Section DA 1 (the general permission) must still be satisfied for expenditure relating to amounts assessed under ss CB 3 and CB 4 to be deductible. In this case there appears to be the necessary nexus between amounts assessed under ss CB 3 and CB 4 and any expenditure incurred in deriving those amounts[116] for the expenditure to be deductible under s DA 1.

In determining the net income from the sale of property subject to s CB 4, therefore, any costs of acquisition (if there had been any incurred by the diner) would be deductible.[117] In addition, related costs of listing the items on the Trade Me website, for example, would also be deductible under s DA 1. The limitation from deducting expenditure of a private nature (the private limitation in s

[116] *Buckley & Young Ltd v CIR* [1978] 2 NZLR 485.
[117] The onus is on the taxpayer to establish the profit, including the original costs.

DA 2(2)) overrides s DA 1. Accordingly, any meal costs incurred by the diner in eating at the restaurant (to ensure she had the opportunity to uplift the items) would not be deductible as the expenditure would be of a private nature. There may be an argument that travel costs to and from the restaurant should be apportioned on the basis of the two purposes of the travel, removing the Beckham items and dining at the restaurant (private expenditure).

The same logic would apply to expenditure incurred with respect to amounts assessable under s CB 3 – if that section applied to tax the proceeds from the sale of the Beckham items – with one modification. In determining net income from the disposal of personal property subject to s CB 3, a deduction is allowed for an amount equal to the value of the property at the commencement of the undertaking or scheme (s DB 26) rather than deducting the original cost of the property. The section operates to ensure that only increases in the value of the property since the date of commencement of the undertaking or scheme are subjected to tax. Consequently, the taxpayer is assessed to tax on only the profit arising from the undertaking or scheme itself. No such concession exists for the purposes of s CB 4. As indicated under that section, the original cost of the property (unadjusted for inflation) is deducted from the sale proceeds. For the purposes of s CB 3, if there was an undertaking or scheme (a view the author does not favour) this concession may mean that there is no profit and no tax liability if it is argued that the market value at the time the scheme commenced is the amount that the item shortly thereafter sells for on Trade Me.

Turning to s CB 32, the author believes that any expenditure incurred by the diner in misappropriating the items would prima facie be deductible under s DA 1 on the basis there is a sufficient nexus between the expenditure and amounts assessed under s CB 32. However, in the author's view s DA 2(1) would prohibit a deduction as the one-off expenditure would be of a capital nature (or possibly of a private nature as discussed above depending on the nature of the expenditure). There is no equivalent provision to s DB 23 (as for s

CB 3 and s CB 4) to override the capital limitation. Support for this view (that the expenditure is capital) is drawn from the fact that specific provision is made in s DB 44 for a person who derives income under s CB 32 to claim a deduction for any restitution that they make to the legal or beneficial owner of the property.[118] The section specifically overrides the capital and private limitations (in s DA 2(1) and (2)) and its inclusion in the *Income Tax Act 2007* (NZ) indicates in the absence of s DB 44 a deduction would not otherwise be permitted for any payments of restitution on the basis of these two limitations.

7. CONCLUSION

This article has focused on the application of three sections in the *Income Tax Act 2007* (NZ) to the acquisition and sale of the Beckham items. Section CB 32 taxes misappropriated property. Depending on the assumptions made, the circumstances in which the cutlery and glass were taken may constitute theft and be assessable. The analysis of this section also raises additional questions; for example, who owns food scraps (or more generally discarded items) and can they be stolen when the diner (or owner) has finished consuming (or using) the item? A consideration of these questions is beyond the scope of this article.

Trade Me and other similar online auction sites has made available another medium through which property can be sold. Their wide usage means a large potential market for vendors providing them with a low cost, easy and convenient method of marketing items. It is therefore not surprising that there are some significant online traders and that the Inland Revenue are monitoring the dealing activity of such persons (and the application of s CB 1 (Amounts derived from business)). The *Income Tax Act 2007* (NZ) also may capture smaller, often 'one-off' transactions through ss CB 3 and CB 4. The latter section in particular has the potential to tax profits from

[118] The deduction is allocated to the year in which restitution is made: s DB 44(2).

isolated transactions such as those the subject of this article. It is the author's view that, based on the nature of the Beckham items and the short period of ownership, that any profit derived from their sale will be assessable under s CB 4. The scope of s CB 3 is restricted due to the requirement that transactions must exhibit a business character to be subject to the section and for this reason is unlikely to apply to the diner in this case. The analysis of these sections highlights the importance of determining the taxpayer's purpose. This raises the perennial question of whether taxing based on subjective purpose is appropriate or whether some form of capital gains tax (which is objective) is preferred.[119]

One thing is certain: the wide reach of the internet and appeal of online auctions provide unparalleled opportunities for people to market their wares. The provisions discussed in this article, in particular ss CB 3 and CB 4 will continue to have an active role in New Zealand.

[119] As indicated above in note 12, both The Victoria University of Wellington Tax Working Group and New Zealand Government have recently rejected the introduction of a comprehensive capital gains tax in New Zealand.