Inland Revenue
Te Tari Taake

INTERPRETATION STATEMENT | PUTANGA WHAKAMĀORI

# Tax residence

Issued | Tukuna: 16 May 2025

IS 25/16

This interpretation statement explains the tax residence rules in the Income Tax Act 2007. It covers the tax residence of natural persons (individuals) and companies, and the residence implications in relation to trusts.

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

**REPLACES | WHAKAKAPIA**

- This interpretation statement updates and replaces IS 16/03: **Tax residence**

# Contents | Ihirangi

# Introduction | Whakataki

## Overview

1. This interpretation statement explains the tax residence rules in the Income Tax Act 2007 (the Act).

2. The analysis in this statement is in three parts:

   - **Part 1: Tax residence of natural persons (individuals)**, from page 7, which covers:
     - how to determine whether a natural person (individual) is tax resident in New Zealand;

- the relationship between the New Zealand domestic tax residence rules and the residence articles contained in New Zealand's double taxation agreements (DTAs); and
- the transitional resident rules – under which new migrants and returning New Zealanders may be entitled to temporary tax exemptions for certain foreign-sourced income.

- **Part 2: Tax residence of companies**, from page 73, which covers:
  - how to determine whether a company is tax resident in New Zealand; and
  - the consequences of a company being a dual resident.
- **Part 3: Tax residence and trusts**, from page 104, which covers residence and the taxation regime for trusts. How trust income is taxed depends on whether it is beneficiary income or trustee income, and on the residence of persons connected with the trust – the trustee, settlors and beneficiaries.

# Relevance of tax residence

3. The concept of tax residence is a central feature of the Act and the Goods and Services Tax Act 1985 (the GSTA 1985). Tax residence may also be relevant for student loan borrowers who are away from New Zealand. The relevance of tax residence in New Zealand is explained below.

## Income Tax Act 2007

### Scope of taxation in New Zealand – main relevance of tax residence

4. Under the Act, the main relevance of tax residence is that it determines whether a person is assessable for tax on worldwide income or only on New Zealand-sourced income (s BD 1(5)).

5. New Zealand residents are assessable on worldwide income (other than exempt income and excluded income), though their liability may be modified if they are tax resident in more than one country and there is a DTA in place between the countries. They may be entitled to a credit for foreign tax paid on foreign-sourced income or gains (see further from [36]).

6. Non-residents are assessable only on New Zealand-sourced income (other than exempt income and excluded income).

7. If you are tax resident in more than one country, you may need a tax residency certificate from Inland Revenue to prove your tax residency status to an overseas tax

authority. See Inland Revenue's website: Certificates of residency for information on how to get a tax residency certificate.

***Working in New Zealand during a short-term visit***

8. Income a non-tax resident derives from performing personal or professional services in New Zealand during a visit to New Zealand will be exempt income if certain criteria are met (s CW 19).[1] The visit generally cannot be for more than 92 days – though this may be extended to 183 days if there is a DTA between New Zealand and the other country. If the visit is for more than 92 days (or 183 days, as relevant), all income derived from the time of arrival is subject to tax in New Zealand.

## Working for Families tax credits

9. Tax residence is also relevant to a person's eligibility for Working for Families tax credits, including Best Start (which is a payment for families with a newborn baby).

10. However, there are further additional residence requirements that either the principal caregiver or the dependent child must meet for the purposes of Working for Families tax credits (ss MC 5 and MD 7). These relate to:

- being "New Zealand resident" as defined in s MA 8 – which means ordinarily and lawfully resident, other than only because of holding a temporary entry class visa;
- presence in New Zealand; and
- the transitional residence status of the principal caregiver and their spouse or partner (see from [152]).

## Foreign superannuation schemes

11. Tax residence is also relevant to the rules for the taxation of interests in foreign superannuation schemes. In particular, it is relevant in the following situations:

- Since 1 April 2014, lump sum withdrawals or transfers from foreign superannuation schemes are generally taxed on an amount that approximates the gains made during the period the person is a New Zealand resident under either one of two new methods: the schedule method or the formula method. Both methods require the person to determine the length of their "assessable period" (s CF 3(8)). The duration of a person's tax residence is relevant to determining the length of the assessable period.

[1] These rules do not apply to non-resident public entertainers. There are specific rules that may be relevant to entertainers: see IS 19/03: Income tax – Exempt income of non-resident entertainers.

- However, there is an exemption period for lump sum foreign superannuation withdrawals or transfers for people who acquired the interest in the scheme when they were non-resident[2] (see ss CW 28B and CF 3). The exemption period runs until the end of the 48th month after the month in which the person satisfied the residence requirements in the Act (see s CF 3(6)). This is similar to the temporary exemption for transitional residents.[3] However, unlike the transitional resident rules, there is no minimum period of non-residence required to qualify for the exemption period.
- Since 1 April 2014, the foreign investment fund (FIF) rules generally no longer apply to interests in foreign superannuation schemes. However, one situation where the FIF rules continue to apply is where a person acquires an interest in the foreign superannuation scheme while they are a New Zealand resident (see the definition of "FIF superannuation interest" in s YA 1).

## Goods and Services Tax Act 1985

12. Under the GSTA 1985, residence is relevant for determining the place of supply of goods and services. In particular, under s 8(2) of the GSTA 1985 supplies by:
    - residents are deemed to be made in New Zealand; and
    - non-residents are generally deemed to be made outside New Zealand
13. The term "resident" in the GSTA 1985 means resident as determined in accordance with the tax residence rules in the Income Tax Act (ss YD 1 and YD 2), but excluding s YD 2(2), and ignoring the back-dating rules in s YD 1(4) and (6). However, the definition of resident in the GSTA 1985 also provides that a person is deemed to be resident in New Zealand:
    - to the extent they carry on a taxable activity or any other activity in New Zealand while having any fixed or permanent place in New Zealand relating to that activity; and
    - if the person is an unincorporated body (which includes a partnership, a joint venture, and the trustee of a trust) that has its centre of administrative management here.
14. Supplies by non-residents may be treated as being supplied in New Zealand under s 8(3), (4) and (4B) of the GSTA 1985.

[2] Provided they have not had such an exemption period before acquiring the interest.

[3] Discussed from [152].

### Student Loan Scheme Act 2011

15. Tax residence under the Act may also be relevant for the purposes of the Student Loan Scheme Act 2011 (the Student Loan Scheme Act).

16. In some circumstances, student loan borrowers who are not physically in New Zealand may be treated as being physically in New Zealand. Being physically in New Zealand, or treated as such, is relevant to whether a borrower is "New Zealand-based" or "overseas-based" for the purposes of the Student Loan Scheme Act.[4] Whether a borrower is New Zealand-based or overseas-based determines whether their loan is interest-free and what their repayment obligations are.

17. In some situations where borrowers who are not physically in New Zealand may be treated as being physically in New Zealand, there is a requirement that the borrower is tax resident in New Zealand. This is the case, for example, where there is an unplanned absence from New Zealand or an unexpected delay in returning to New Zealand.

18. In addition, tax residence may be relevant to a New Zealand-based borrower's filing requirements under the Student Loan Scheme Act.

## Absentees

19. An "absentee" is defined in s YA 1[5] as someone who has not been tax resident in New Zealand during any part of the tax year. Absentees are, therefore, non-resident – though a non-resident may not be an absentee (for example, in the year they become non-resident they will not be an absentee).

20. There are a number of tax consequences arising from being an absentee – the main ones being that an absentee cannot receive tax credits for charitable or other public benefit gifts (s LD 2) and does not qualify for the child taxpayer exemption (s CW 55BB).

# Analysis | Tātari

21. As noted at [2], The analysis in this interpretation statement is in three parts:

- **Part 1: Tax residence of natural persons (individuals)** – from page 7.
- **Part 2: Tax residence of companies** – from page 73.
- **Part 3: Tax residence and trusts** – from page 104.

[4] The terms "New Zealand-based" and "overseas-based" are defined in ss 4(1), 22 and 23 of the Student Loan Scheme Act.

[5] Other than for the purposes of subpart HD (Agents).

# Part 1: Tax residence of natural persons (individuals)

## Overview

### When an individual is a New Zealand tax resident

22. An individual is a New Zealand tax resident if they:

- have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere (s YD 1(2)) (the permanent place of abode rule); or
- have been personally present in New Zealand for more than 183 days in total in any 12-month period (s YD 1(3)) (the 183-day rule); and:
  - have not ceased to be tax resident under the 325-day rule (see [27] and [28]); and
  - are not treated as being non-resident because they are employed under the recognised seasonal employment scheme (see from [131]); or
- are personally absent from New Zealand in the service of the New Zealand Government (see from [147]).

23. The permanent place of abode rule is the overriding tax residence test for individuals. This means that if a person has a permanent place of abode in New Zealand, they are tax resident here regardless of any of the other rules.

24. The courts have described a permanent place of abode in New Zealand as being a place where a taxpayer habitually resides from time to time even if they spend periods of time overseas. A person must have a place of abode (that is, a dwelling) in New Zealand to potentially have a permanent place of abode here, but they do not need to own the place of abode and it does not need to be vacant or able to be occupied immediately.

25. If a person is tax resident under the 183-day rule, they are treated as resident from the first of those 183 days (s YD 1(4)), unless they acquired a permanent place of abode in New Zealand earlier than the first of those 183 days – in which case they are resident from the date they acquired a permanent place of abode.

26. The permanent place of abode test is most relevant to people leaving New Zealand. People moving to New Zealand typically become resident under the 183-day rule (because residence under that test back-dates to the first counted day of presence) and do not need to consider the permanent place of abode test. However, in some situations someone moving to New Zealand could establish a permanent place of abode in New Zealand before the first day of presence counted for the 183-day rule. For example, a person who establishes a new family home in New Zealand, but the

person moves between two countries for some time while finishing up a work contract and does not spend more than 183 days in New Zealand before they establish a permanent place of abode here. Also, there may be situations where someone does not move to New Zealand as such, but lives between New Zealand and another country or countries. In that situation, New Zealand residence could be triggered under either the permanent place of abode test or the 183-day rule.

### When an individual ceases to be a New Zealand tax resident

27. An individual who is tax resident in New Zealand **only** because of the 183-day rule (that is, they do not have a permanent place of abode in New Zealand) will cease to be tax resident if

    - they are personally absent from New Zealand for more than 325 days in total in a 12-month period (s YD 1(5)) (the 325-day rule); and
    - they are not absent from New Zealand in the service of the New Zealand Government (see from [147]).

28. If a person ceases to be tax resident under the 325-day rule, they are treated as not resident from the first of those 325 days (s YD 1(6)), provided they did not have a permanent place of abode in New Zealand at any time during the 325-day period. Because the permanent place of abode rule is the overriding tax residence test for individuals, someone cannot cease to be tax resident any earlier than the day after the day they cease having a permanent place of abode in New Zealand.

### Personal presence in or absence from New Zealand

29. The 183-day and 325-day rules refer to a person being personally present in or personally absent from New Zealand.

30. "New Zealand" is defined in s YA 1 as including the continental shelf. It also includes the water and airspace above any part of the continental shelf beyond New Zealand's "territorial sea"[6] to the extent to which exploration or exploitation of that part of the continental shelf or its natural resources may be undertaken there.

31. However, s 13 of the Legislation Act 2019 provides that when "New Zealand" is used as a territorial description it means the islands and territories within the Realm of New Zealand, excluding the Cook Islands, Niue, Tokelau and the Ross Dependency.

32. This means physical presence in or absence from New Zealand is limited to the main islands and closer offshore islands of the Realm of New Zealand.

[6] As defined in s 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.

33. Presence in New Zealand embassies or New Zealand consulate offices overseas is not personal presence in New Zealand.

### How part days of presence or absence are treated

34. In applying the 183-day and 325-day rules, a person who is personally present in New Zealand for part of a day is treated as present in New Zealand for the whole day and not absent for any part of the day (s YD 1(8)). For example, if someone arrived in New Zealand at 3pm on 28 July, that day would be counted as a full day of presence. Similarly, if someone left New Zealand at 6am on 10 May, that day would be counted as a full day of presence.

35. If someone is unsure about their departure and arrival dates, they can contact Immigration New Zealand to obtain those dates, in order to apply the day-count tests. Search for "request my information" on immigration.govt.nz.

### If someone is tax resident in more than one country

#### *If New Zealand has a DTA with the other country*

36. If someone is tax resident both in New Zealand and another country under the domestic law of each country, and there is a DTA between the countries, a series of "tie-breaker" tests is applied to allocate tax residence to one of the countries for the purposes of the DTA. That allocated tax residence is then relevant to what taxing rights each of the countries has in relation to matters covered by the DTA. See further from [187].

37. If both countries have some right to tax a particular item of income or gain that a person has, the person may be entitled to a credit for foreign tax paid on foreign-sourced income or gains. For further information, see IS 16/05: **Income tax – Foreign tax credits – How to claim a foreign tax credit where the foreign tax paid is covered by a Double Tax Agreement**.

#### *If New Zealand does not have a DTA with the other country*

38. If someone is tax resident both in New Zealand and another country under the domestic law of each country, and there is not a DTA between the countries, they are assessable in New Zealand on their worldwide income (other than exempt income and excluded income) but may be entitled to a credit for foreign tax paid on foreign-sourced income or gains. For further information, see IS 14/02: **Income tax – Foreign tax credits – What is a tax of substantially the same nature as income tax imposed under s BB 1?**

### Transitional residence – temporary tax exemptions for new migrants and returning New Zealanders

39. New migrants and returning New Zealanders who have been non-resident for at least 10 years may be eligible to be transitional residents. Transitional residents are entitled to temporary tax exemptions for certain foreign-sourced income. However, neither they nor their spouse or partner can receive Working for Families tax credits (including Best Start).

40. It is important to note that if a person who is a transitional resident applies for Working for Families tax credits (including Best Start), or if their spouse or partner does, this application is treated as an election for both parties to no longer be transitional residents. This deemed election cannot be reversed. Therefore, careful consideration should be given (and professional advice sought if necessary) to a decision to apply for Working for Families tax credits during the transitional residence period.

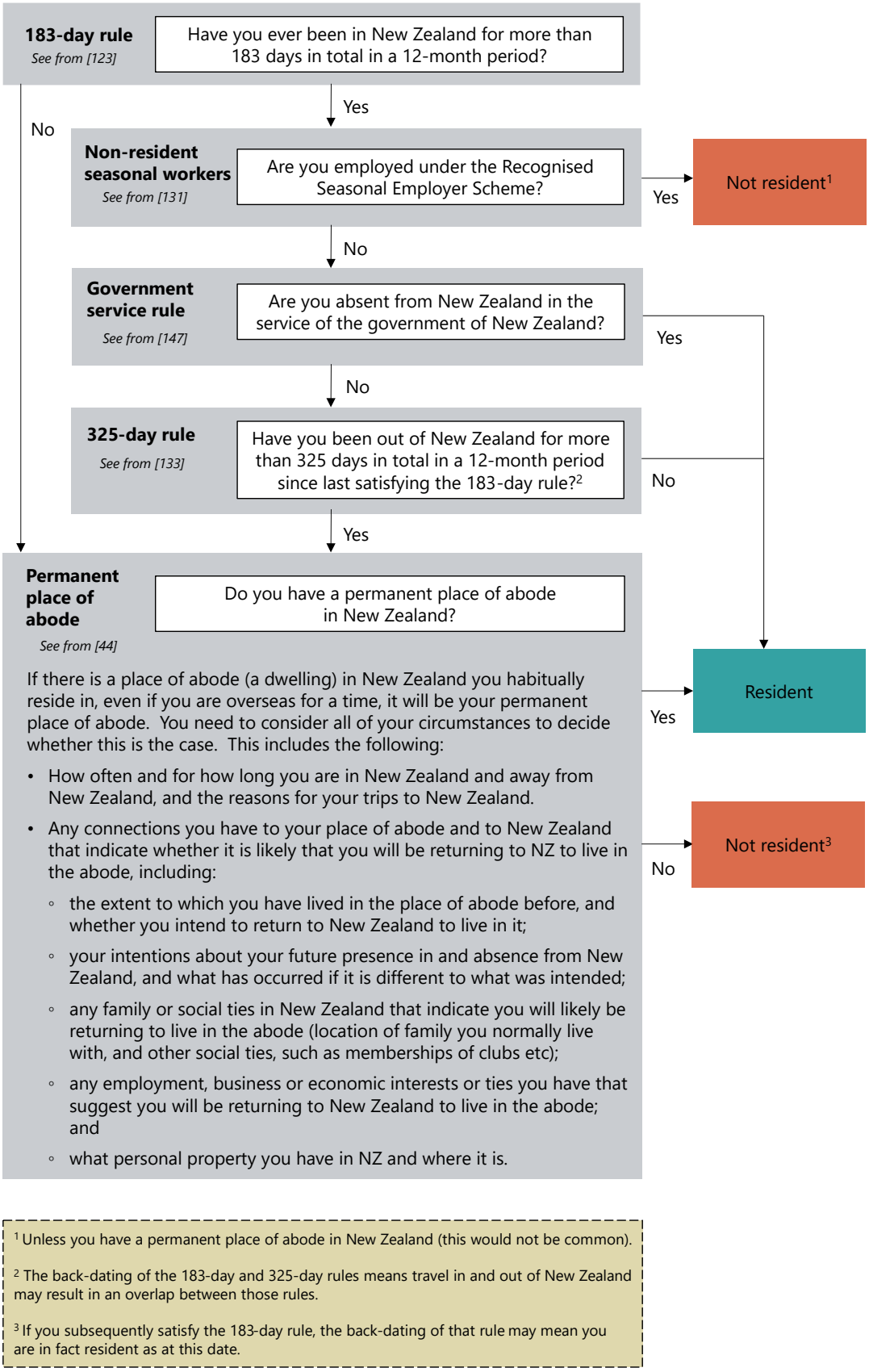
41. Transitional residents may receive FamilyBoost tax credits (which provide caregivers with financial assistance for early childhood education costs). Applying for FamilyBoost is not treated as an election to no longer be a transitional resident.

42. The rules for transitional residence are discussed from [152].

## Flowchart – How to determine whether an individual is tax resident in New Zealand

43. Figure | Hoahoa 1 contains a flowchart that sets out what needs to be considered to determine whether an individual is tax resident in New Zealand.

## Figure | Hoahoa 1: How to determine whether an individual is tax resident in New Zealand




[1] Unless you have a permanent place of abode in New Zealand (this would not be common).

[2] The back-dating of the 183-day and 325-day rules means travel in and out of New Zealand may result in an overlap between those rules.

[3] If you subsequently satisfy the 183-day rule, the back-dating of that rule may mean you are in fact resident as at this date.

## Permanent place of abode

44. The permanent place of abode test is set out in s YD 1(2), which says:

> **YD 1 Residence of natural persons**
>
> ...
>
> *Permanent place of abode in New Zealand*
>
> (2) Despite anything else in this section, a person is a New Zealand resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere.

45. The permanent place of abode test applies "despite anything else" in s YD 1. This makes the permanent place of abode test the overriding residence rule for individuals. This means a person is a New Zealand resident if they have a permanent place of abode in New Zealand, irrespective of any of the other rules.

46. The term "permanent place of abode" is not defined in the Act.

47. *CIR v Diamond* [2015] NZCA 613 (CA) is the leading New Zealand case discussing the meaning of permanent place of abode. The permanent place of abode test has been considered in New Zealand in different factual contexts in *Van Uden v CIR* [2018] NZCA 487 (CA), and in several Taxation Review Authority cases. There is also Australian case law on the meaning of permanent place of abode – most notably *FCT v Applegate* 79 ATC 4307 (FCAFC), as the New Zealand legislative history shows that Parliament intended to adopt the test as articulated in *Applegate*.[7]

48. The following discussion of what it means to have a permanent place of abode, and the relevant factors to weigh up in determining whether someone has a permanent place of abode in New Zealand draws on the principles from the case law.

### Meaning of permanent place of abode

49. The Court of Appeal has described "permanent place of abode" as meaning **a place where a taxpayer habitually resides from time to time even if they spend periods of time overseas** (*Diamond* and *Van Uden*).

50. Permanent means the opposite of temporary, and the Court of Appeal observed in *Diamond* that something is permanent when it is "continuing or designed to continue indefinitely without change" (at [para 48]). However, it is clear from the New Zealand case law that the person does not need to intend to live somewhere for the rest of

[7] As noted in *Diamond*.

their life for it to be their permanent place of abode (*Case H97* (1986) 8 NZTC 664 (TRA), *Case J98* (1987) 9 NZTC 1,555 (TRA), *Case Q55* (1993) 15 NZTC 5,313 (TRA)).

51. A person can be resident in New Zealand under the permanent place of abode test even if they also have a permanent place of abode outside New Zealand. The focus is not on determining which place the person has the strongest connections to, but on whether their place of abode here is a permanent place of abode. See further from [103].

#### *A dwelling is required*

52. A person must have a place of abode (that is, a dwelling) in New Zealand to potentially have a permanent place of abode here. This is because, as pointed out by the Court of Appeal in *Diamond* (at [48]), "abode" means a "habitual residence, house or home or place in which the person stays, remains or dwells".

53. A person needing to have a dwelling in New Zealand to potentially have a permanent place of abode here does not mean the person needs to own the dwelling. For example, the property might be rented, held in a family trust, or owned by a family company or other family member.

54. A place of abode does not need to be vacant or able to be occupied immediately by a person to be a permanent place of abode for them. Someone who is temporarily overseas may lease their property to a third party or enable someone else to use it during their absence. A place of abode can be a person's permanent place of abode even if it is rented to or used by someone else while the person is overseas. If the person habitually resides in the property, despite being absent from New Zealand for a time, the property can still be their permanent place of abode, irrespective of whether the property is occupied by someone else for limited periods. See, for example, *Case Q55*, *Case F138* (1984) 6 NZTC 60,237 (TRA), *Case J98* and *Case J41* (1987) 9 NZTC 1,240 (TRA).

55. However, simply having a dwelling in New Zealand is not sufficient. The dwelling must be the person's permanent place of abode. The discussion from [58] explains how to determine whether this is the case.

### When the test needs to be considered

56. The permanent place of abode test is usually considered when someone who has habitually resided at a dwelling in New Zealand has left New Zealand for a time. In that situation, the question is whether they can be regarded as **continuing to habitually reside** at their place of abode in New Zealand, despite a period or periods of absence, such that it can still be considered to be a permanent place of abode for them. The factors discussed from [68] help determine that question.

57. The permanent place of abode test can also be relevant when someone who was not a New Zealand tax resident, and who has not become resident under the 183-day rule, establishes a place of abode here. The question in that scenario is whether, and at what point, the person can be considered to have **begun habitually residing** at their abode here, such that it can be considered to be their permanent place of abode (irrespective of whether they also have a permanent place of abode outside New Zealand). The permanent place of abode test may also be relevant in other contexts, such as if someone moves between New Zealand and another country or countries. See further [26] and [82].

## How to determine whether someone has a permanent place of abode in New Zealand

### *An overall assessment of the circumstances is required*

58. Deciding whether someone habitually resides at a dwelling here such that it is a permanent place of abode for them requires an overall assessment of the person's circumstances and the nature and quality of the use the person habitually makes of the place of abode. It is not just the situation during the person's absence from New Zealand that is relevant. The situation before and after periods of absence from New Zealand should be considered in assessing how close the person's connection with their place of abode is (*Diamond*, *Van Uden* and *Case Q55*).

### *Factors to consider*

59. In determining whether a person habitually resides at a place of abode in New Zealand such that it is a permanent place of abode for them, it is necessary to consider the:

- continuity and duration of the person's presence in New Zealand (discussed from [68]); and
- durability of the person's association with the place of abode and how close their connection with it is (discussed from [76]).

(See *Diamond*, *Applegate*, *Van Uden*, Case *H97*, *Case J98* and *Case Q55*).

### *Connections are relevant only if they indicate a particular dwelling is a person's permanent place of abode*

60. It does not matter how strong a person's ties to New Zealand are if those ties do not indicate that the particular dwelling in question is the person's permanent place of abode. For example, if a person has strong connections to New Zealand, but the only dwelling they have here is a property they have never lived in and never intend to live

in, that property could not be their permanent place of abode. They clearly could not be regarded as habitually residing there.

61. In *Diamond*, the taxpayer had never resided, or intended to reside, in his dwelling in New Zealand. The dwelling had only ever been used as an investment property. In those circumstances, the court considered the dwelling could not be the taxpayer's permanent place of abode, irrespective of any of the ties he had to New Zealand. Because there was simply no question about whether the taxpayer habitually resided in the dwelling before he left New Zealand (he did not), there could be no question about whether he *continued* to habitually reside there during the tax years in question (the first 4 years of his absence from New Zealand). Therefore, the court did not need to analyse and weigh up the nature and extent of each of the connections the taxpayer had to New Zealand. No matter how strong the taxpayer's connections to New Zealand were, because he did not have any residential connections to the dwelling at all, none of his connections to New Zealand could indicate that the dwelling was a permanent place of abode for him. On any overall assessment of the taxpayer's circumstances, the property was not a permanent place of abode for him before or after his departure.

### When a place of abode is a person's permanent place of abode

62. In most cases it is a simple matter to establish whether a person's place of abode in New Zealand is a permanent place of abode. Assume, for example, that a person who normally lives in New Zealand, who owns and occupies a house here and who has employment ties here, is absent for a fixed period of, say, 12 months. This person has an enduring relationship with their New Zealand place of abode, and it is the place where they usually live. That place of abode is their permanent place of abode – they habitually reside there even though they are away from New Zealand for a time.

63. More difficult cases arise where the person has been absent from New Zealand for a substantial period or where the person is here intermittently. Where the answer is not clear, all relevant factors must be weighed carefully. As noted above, this involves considering the continuity and duration of the person's presence in New Zealand, and the durability of the person's association with the place of abode and how close their connection with it is.

64. Paragraphs [76] – [102] discuss the relevant factors to consider in assessing the continuity and duration of the person's presence in New Zealand and the durability of the person's association with the place of abode and how close their connection with it is. It is important to understand that those factors are not of equal weight, and the significance of each of them depends on the person's particular circumstances. The question is whether, having regard to the overall picture, there is a place of abode in New Zealand in which the person habitually resides, such that it can be regarded as a permanent place of abode for them.

65. A person's connections to the location in New Zealand where their place of abode is situated are relevant in objectively assessing whether a particular place of abode is a permanent place of abode for them. The strength of such connections may indicate that the abode is a place where the person habitually resides, even though they are away for a time, and a place to which the person will likely return to live on an enduring basis.

66. A person may also have connections to New Zealand generally, such as keeping a New Zealand bank account, having membership in professional or trade associations, or maintaining medical insurance with a New Zealand company (see further from [94]). Such connections could be relevant to any location in New Zealand and are not by their nature tied to any specific dwelling or location. General connections to New Zealand are relevant only to the extent that they provide some indication about whether the person is likely to return to New Zealand to live in their abode here, such that it can be regarded as a permanent place of abode for them.

67. The factors that need to be considered are discussed next.

***Continuity and duration of presence in New Zealand***

68. As a general rule, the longer a person is present in New Zealand, the more likely it is that their place of abode here is a permanent place of abode for them. Conversely, the longer a person is absent from New Zealand, the less likely it is that their place of abode here will continue to be a permanent place of abode for them.

69. This is not to say that periods of presence in or absence from New Zealand are the overriding consideration. However, when a person is absent from New Zealand for an extended period, it is less likely that their place of abode here continues to be a permanent place of abode for them, even though they may still have connections with New Zealand. The longer the period of absence, the less likely that the abode can be considered a place in which they habitually reside.

70. Where a person is absent from New Zealand, a point would eventually be reached where it would no longer be reasonable to consider that a place of abode they have in New Zealand is still a permanent place of abode for them. Such an assessment would be made taking all material facts into account. This would include whether the person has maintained connections in New Zealand that indicate they will be returning to live at the place of abode on a durable basis.

71. The longer a person is away from New Zealand, the fewer ties to New Zealand they are likely to retain and the weaker their ties to New Zealand are likely to get. This would typically support a conclusion that their dwelling here is no longer a permanent place of abode for them. That said, there may be situations in which a person lives in another country for an extended time but still maintains strong ties to New Zealand. Depending on the circumstances, the person may continue to have a permanent place

of abode here. As discussed from [103], a person may have more than one permanent place of abode. However, for the person to continue to have a permanent place of abode in New Zealand, the ties they have to New Zealand would need to indicate that they continue to habitually reside at their place of abode in New Zealand, despite a period or periods of absence, and that it is a place to which the person will likely return to live on an enduring basis. The longer a person is away from New Zealand without returning from time to time and residing in their abode here, the less likely that will be the case.

72. There is no specific length of presence in, or absence from, New Zealand that results in a person acquiring or losing a permanent place of abode here. If a person has strong connections with New Zealand and their place of abode here, it could be expected that a longer period of absence would be required for their place of abode to no longer be considered their permanent place of abode than if the person's connections to New Zealand and the place of abode were weaker. The totality of the particular circumstances must be considered in each case.

73. The duration of presence factor focuses on the length of the person's presence or presences in New Zealand. The continuity of presence factor refers to whether the person is present in New Zealand for continuous or interrupted periods.

74. The more continuous the periods a person is at their place of abode in New Zealand, the stronger the indication that their place of abode here is their permanent place of abode. This is because they are actually living here, rather than merely visiting for brief periods. Likewise, the more continuous the periods of absence from New Zealand are, the more that might indicate the person's place of abode here is no longer a permanent place of abode for them. This can be compared with a situation where someone frequently returns to New Zealand.

75. However, while frequent trips back to New Zealand are a factor that might help determine whether a person's place of abode here is a permanent place of abode for them, this is not necessarily the case, and such trips must be viewed in context. For example, regular visits may be explicable because the person is returning to see children who live here with an ex-spouse, or to visit extended family. The weight to be given to frequent visits should be considered in light of all the circumstances (including whether they stay at their abode on those visits) and the reasons for their trips to New Zealand.

***Durability of association with a place of abode***

76. Consideration of the durability of a person's association with a place of abode involves an examination of the extent and strength of the attachments the person has established and maintained in New Zealand. The strength of such connections may

indicate whether the place of abode is a place the person habitually resides, even though they are away for a time.

77. The case law establishes that factors to be considered when assessing whether a person has a durable association with a place of abode, such that it can be regarded as a permanent place of abode for them, include:

- the nature and quality of the use of the dwelling and the person's connection with the dwelling (discussed from [78]);
- the person's intentions (discussed from [84]);
- the person's family and social ties (discussed from [89]);
- the person's employment, business interests and economic ties (discussed from [94]);
- the person's personal property (discussed from [99]); and
- any other factors that shed light on whether the place of abode is a permanent place of abode for the person (discussed from [101]).

(See, for example, *Applegate*, *Van Uden*, *Case Q55*, *Case F138*, *Case J98*, and *Case U17* (1999) 19 NZTC 9,174 (TRA)).

**The nature and quality of the use of the dwelling and the person's connection with the dwelling**

78. The nature and quality of the use of a dwelling a person has in New Zealand, and the connection the person has with the dwelling, are fundamental to determining whether the dwelling is a permanent place of abode for them. If the person owns a house or apartment in New Zealand they have previously lived in, for example, this would likely be a stronger indication of an enduring connection with the place of abode than, say, the ability to reside at a parent's house that had previously been lived in.

79. A situation that often arises is where a young person lives away from the family home some of the time, for example during university terms, but returns to the family home during holidays. If the young person goes overseas after their studies, there is often a question about whether the family home is a permanent place of abode for them. In such circumstances, it may well be that while the person had more than one residence in New Zealand before they left, the family home remained a permanent place of abode for them. It could therefore be that although they no longer have the abode that was their student accommodation once they leave New Zealand (for example, because they gave up the lease) the family home continues to be a permanent place of abode for them after their departure from New Zealand. As in any other circumstances, this depends on the nature and quality of the use the person habitually makes of that abode. In this context, it would be relevant to consider how often and for how long the person returned to the family home (both before they left New

Zealand and after their departure), the extent to which they are financially independent, and their intended future use of the abode (which may change over time). Whether the family home is the person's permanent place of abode is a question of fact and requires an overall assessment of the circumstances and the nature and quality of the use the person habitually makes of the abode.

80. As noted at [56], the permanent place of abode test is usually considered in a situation where someone who has habitually resided at a dwelling in New Zealand has left New Zealand for a time. In that situation, the question is whether they can be regarded as continuing to habitually reside at their place of abode in New Zealand, despite a period or periods of absence, such that it can be considered to be a permanent place of abode for them. It is clear from *Diamond* that a property that a person has never lived in, never intended to live in, and that has only ever been used as an investment could not be a permanent place of abode for the person.

81. However, there may potentially be circumstances where a place of abode that a person has not yet lived in, but intends to live in in the future, is their permanent place of abode. While this would only be in limited situations, the Commissioner considers that it could occur. For example, if the person's permanent place of abode had been the family home, and the family shifted during the person's absence from New Zealand, the new family home could be their permanent place of abode even though they had not yet lived in it. The Court of Appeal in *Diamond* did not consider this type of scenario, but the Commissioner considers that such an approach would be consistent with the court's approach and reasoning. The totality of the circumstances must be considered. In the absence of changed circumstances, in such a scenario the new family home could be viewed as essentially being a substitute for the previous family home, which was the person's permanent place of abode. If a person habitually resides in the family home, despite a period of absence from New Zealand, the Commissioner considers that a shift in the location of the family home would not alter the conclusion that the person continues to have a permanent place of abode in New Zealand.

82. On the other hand, someone who lived overseas and bought a house in New Zealand would not have a permanent place of abode here merely by virtue of that, even if they intended to live there in the future. That said, there are circumstances where a house someone has bought in New Zealand may become a permanent place of abode for the person either at some stage before they move here permanently or even if they do not ever move here to live all the time. For example, if they started coming to New Zealand and residing in the house at regular intervals or for significant enough periods, it may become their permanent place of abode at some stage, even if they also have a permanent place of abode elsewhere. As discussed from [103], the permanent place of abode test is not about comparing the relative strength of a person's connections with different places of abode, if they have more than one place of abode. However, it is

always necessary to consider the circumstances as a whole, including the continuity and duration of the person's presences in New Zealand, the nature of the person's visits to New Zealand and the reasons for them, what occurs over time (that is, the pattern over several years), and all the other relevant factors and connections discussed in this statement.

83. The extent to which a person has lived in a dwelling is a relevant consideration in assessing whether the dwelling is a permanent place of abode for them.

**Intention**

84. Determining whether a person's place of abode in New Zealand is a permanent place of abode for them is an objective enquiry (*Case H97*, *Case J98* and *Case Q55*). However, a person's intention can also be considered in such an enquiry (*Case F138*, *Case F139* (1984) 6 NZTC 60,245 (TRA), *Case H97* and *Case Q55*).

85. A person's intentions about their presence in or absence from New Zealand and about a place of abode they have here are important factors, though a person's intentions are not the central consideration. It is necessary to consider not only what was intended, but what in fact occurred (*Case F139* and *Case H97*).

86. In cases where a person is overseas, the intention to return to New Zealand to live may be indicative of their place of abode here continuing to be a permanent place of abode for them – a place in which they habitually reside, despite a period overseas.

87. However, it is important to balance consideration of a person's intentions with all other relevant factors. For example, if a person has departed from New Zealand for an extended period, but intends to ultimately return, that intention alone will not establish that the person's place of abode here remains a permanent place of abode for them. On the other hand, if a person has departed for a relatively short period of fixed duration, the intention to return will be a strong indicator that the person's place of abode here continues to be a permanent place of abode for them.

88. A person's intention is subjective. However, the weight a person's stated intention is given depends on the extent to which the circumstances support that stated intention.

**Family and social ties**

89. The location of a person's family may be a factor of some importance. For example, if a person is absent from New Zealand, but their immediate family (for example, spouse or partner and dependent children) remain here, that will tend to support a conclusion that the person's place of abode here continues to be a permanent place of abode for them.

90. Once again, however, family ties must be considered in relation to all the other relevant factors. If a person is absent from New Zealand for a relatively short period, the fact their family accompanies them overseas will not mean the person does not have a permanent place of abode in New Zealand.

91. The weight to be attached to family ties may vary from individual to individual, and in light of the nature and quality of the relationships. In determining the weight to be given to any family ties, it is important to bear in mind the person's particular circumstances.

92. For example, in some circumstances it might be relevant that a person has dependent children in New Zealand, and in other circumstances this would not be a relevant consideration. For instance, if someone's spouse or partner and children remain in the family home in New Zealand while the person is overseas for a time, those family connections are relevant, and indicate that the abode continues to be a permanent place of abode for the person. On the other hand, if someone has dependent children in New Zealand but they are estranged from them (as in *Case U17*) or they have agreed for their children to remain in New Zealand with an ex-spouse (as in *Diamond*), the fact the children are here does not provide any indication about whether the person's place of abode here continues to be a permanent place of abode for them. While in the latter situation the person has important, close family ties to New Zealand, and may well make regular trips back to New Zealand to see their children, those connections need to be viewed in light of all the other circumstances and do not necessarily suggest that any place of abode the person has in New Zealand continues to be a permanent place of abode for them. Of course, if the person returns to New Zealand from time to time to visit family and they stay at their place of abode here, the fact they habitually stay at their abode is a relevant consideration.

93. Other social ties, such as membership of sporting and cultural associations, may also be relevant in establishing whether a person's place of abode here continues to be a permanent place of abode for them – a place they habitually reside. Such ties are not necessarily of much weight by themselves, but may suggest the person will be returning to New Zealand to live (and in particular to the location in which their place of abode is), and, together with other ties to that location or place of abode, may be indicative of the person's place of abode here continuing to be a permanent place of abode for them.

**Employment, business interests and economic ties**

94. If a person is absent from New Zealand but retains employment, business, trade or professional ties with New Zealand, that may be relevant to the extent it indicates the person is likely to or intends to return to live in their place of abode here.

95. For example, university lecturers who take sabbatical leave overseas generally continue to be employed and paid by the university during their absence. The continued employment ties in such a situation are important in determining whether the person's place of abode in New Zealand remains a permanent place of abode for them. The weight to be given to employment ties depends on their strength – for example, whether employment is guaranteed after the absence or is likely still to be open to the person, and the reasons for the employment arrangements being as they are.

96. Memberships of trade and professional associations may provide some indication as to whether a person is likely to or intends to return to live in their place of abode in New Zealand so should be taken into account, but by themselves do not carry much weight.

97. The person's overall economic connections with New Zealand will be relevant only to the extent they indicate the person is likely to or intends to return to New Zealand and live in their place of abode here. Such connections are often of no assistance in determining this. There are numerous reasons a person might retain a bank account or credit card facility in New Zealand or have insurance coverage from New Zealand, superannuation in New Zealand, or investments here or managed from here. Unless, in the particular circumstances, these factors indicate the person habitually resides in their place of abode here, they will not be relevant.

98. The Commissioner considers that paying child support for children in New Zealand is not relevant, as it does not provide any indication about whether the person is likely to return to New Zealand to live in their abode here, such that it can be regarded as a permanent place of abode for them.

**Personal property**

99. If the person has personal property (for example, furniture or a vehicle) in New Zealand, this could be taken into account to the extent it indicates they are likely to or intend to return to live in their abode here.

100. The weight to be given to the fact a person has personal property in New Zealand depends on the nature of the property and the person's circumstances. For example, if someone leaves the bulk of their furniture and other personal effects in New Zealand, this would be of far more weight than someone leaving, say, a few personal effects with a relative or friend.

**Other factors**

101. Other factors, such as whether the person receives New Zealand social welfare assistance, or whether they regularly spend their holidays in New Zealand, may also be relevant, but again, only to the extent that they indicate the person is likely to or intends to return to live in their place of abode here.

102. There is no exhaustive list of factors to be taken into account. Any factor showing a person has a durable connection to their place of abode in New Zealand may be relevant, as it may assist in drawing the inference that the person intends to continue to habitually reside in their place of abode in New Zealand, such that it can be regarded as a permanent place of abode for them.

### A person may have a permanent place of abode elsewhere

103. Section YD 1(2) provides that a natural person is a New Zealand resident if they have a permanent place of abode in New Zealand, "even if they also have a permanent place of abode elsewhere". Therefore, it is clear from s YD 1(2) that a person may have more than one permanent place of abode.

104. The focus of the permanent place of abode test is on the person's connections with their place of abode in New Zealand, rather than on whether the person's connections are closer with the place of abode in New Zealand or with a place of abode in another country. A person may be resident in New Zealand under the permanent place of abode test even if they have closer connections with a place of abode in another country.

105. That said, factors that suggest a person has a durable connection to their place of abode in New Zealand must be weighed against contrary factors that indicate the person no longer habitually resides at their place of abode here. Such contrary factors could include evidence of the person's connections to a foreign country or to a place of abode in that country – for example, the purchase of a home in another country, or family, social or other ties to another country.

106. If a person has established strong connections to another country, it is less likely they will return to their place of abode in New Zealand, so it is less likely they can be regarded as continuing to habitually reside there. Conversely, the lack of strong connections to another country makes it more likely the person will return to their place of abode in New Zealand, so more likely they can be regarded as still habitually residing there (see, for example, *Case H97*).

107. However, there may be situations where a person has permanent places of abode in more than one country and moves between those countries. The fact a person has established strong connections in another country does not preclude them having a permanent place of abode in New Zealand.

108. There may also be situations where a person has no permanent place of abode anywhere. Lack of strong connections in another country will therefore not necessarily mean a person's place of abode in New Zealand is their permanent place of abode.

For example, in *Case 10/2013* (2013) 26 NZTC 2-009 (TRA)[8] Judge Sinclair did not place any particular weight on the taxpayer not having established roots in Iraq, noting that this was not surprising given the security issues in that country and the nature of the taxpayer's employment.

109. The extent of a person's connections to a foreign country will be relevant in assessing the person's connections to New Zealand and their place of abode here. However, the permanent place of abode test does not involve a comparison of the relative "permanence" of different permanent places of abode. So long as a person has a permanent place of abode in New Zealand, they are resident here under s YD 1(2).

### Summary – permanent place of abode

110. The above discussion about determining whether a person has a permanent place of abode in New Zealand can be summarised as follows:

- A place of abode is a person's permanent place of abode if it is a place where they habitually reside from time to time even if they spend periods overseas. To be a permanent place of abode, the abode must be a place where the person habitually resides on an enduring, rather than temporary, basis.
- A person must have a place of abode (that is, a dwelling) in New Zealand to potentially have a permanent place of abode here. This does not mean the person needs to own the dwelling. However, simply having a dwelling is not sufficient – the dwelling must be the person's permanent place of abode.
- Deciding whether a dwelling is someone's permanent place of abode requires an overall assessment of the person's circumstances and the nature and quality of the use the person habitually makes of the place of abode.
- In determining whether a place of abode is a person's permanent place of abode, it is necessary to consider the continuity and duration of the person's presence in New Zealand and the durability of the person's association with their place of abode here and how close their connection with it is.
- To determine whether a person has a durable association with their place of abode, the person's overall connections with their place of abode and with New Zealand must be weighed up. It is then necessary to evaluate the extent to which those connections indicate the person has an enduring relationship with their place of abode here, such that it can be considered to be their permanent place of abode.

[8] The Taxation Review Authority decision in the *Diamond* case, which was ultimately decided by the Court of Appeal.

- It does not matter how strong a person's ties to New Zealand are if those ties do not indicate the dwelling in question is a permanent place of abode for the person. For example, if a person has strong connections to New Zealand, but the only dwelling they have here is a property that they have never lived in and never intend to live in, that property could not be a permanent place of abode for them.

### Acquiring and losing a permanent place of abode

111. When a person becomes a New Zealand resident for tax purposes, the time that their tax residence starts must be identified. Individuals can become resident as a result of the operation of the permanent place of abode test or the 183-day rule (discussed from [123]).

112. When a person satisfies the 183-day rule, their tax residence is back-dated (under s YD 1(4)) to the first day of the 183 days that they were present in New Zealand in the 12-month period. In most situations where a person becomes tax resident in New Zealand, it is the 183-day rule and s YD 1(4) that establish when their residence starts.

113. However, a person could become resident under the permanent place of abode test from a time before the first day of their presence in New Zealand under the 183-day rule. This could occur, for example, if someone moved to New Zealand but regularly travelled in and out of the country on business and did not trigger the 183-day rule for some time. In those circumstances, the date at which the person acquired a permanent place of abode in New Zealand would need to be determined, as their New Zealand tax residence could start from that point.

114. When a person leaves New Zealand, the time when their New Zealand tax residence ends must also be identified. A person does not cease to be tax resident until they have been absent from New Zealand for more than 325 days in a 12-month period **and** no longer have a permanent place of abode here.

115. The date that a person ceases to have a permanent place of abode in New Zealand is therefore relevant if it occurs sometime after the 325 days of absence. The date a person ceases to have a permanent place of abode here is also relevant if it occurs during the 12-month period in which they satisfy the 325-day rule. In this situation, the interaction between the permanent place of abode test in s YD 1(2) and the back-dating rule in s YD 1(6) (see [133]) results in the person ceasing to be tax resident in New Zealand from the day after the day they cease having a permanent place of abode in New Zealand.

116. The time at which a person acquires or ceases to have a permanent place of abode is determined by an evaluation of the circumstances of each case. The objective is to determine the point in time at which the person:

- acquires a permanent place of abode in New Zealand by being present here and establishing an enduring connection with a place of abode here; or
- ceases to have a permanent place of abode in New Zealand by ceasing to habitually reside at a place of abode here.

117. If a person's circumstances change at any point, it is necessary to reconsider whether they have a permanent place of abode here. It may be that the change in circumstances results in the acquisition or loss of a permanent place of abode here. It is relevant to consider the time of occurrence of such events as:

- commencement or termination of employment;
- changes in the location of the person's family;
- changes in personal circumstances such as relationship status;
- purchase or sale of real or personal property;
- commencement or termination of a lease;
- transfer of financial affairs;
- appointment to or resignation from trade, professional, sporting or cultural associations; and
- departure from or arrival in New Zealand for an extended period.

118. In some situations, the combination of such factors may indicate a person acquires or ceases to have a permanent place of abode at a time other than on their arrival in or departure from New Zealand.

## Examples illustrating the concept of "permanent place of abode"

**Note:** The following examples deal **only** with the permanent place of abode test. They do not consider the 183-day rule, the 325-day rule, any DTA implications, or any potential application of the transitional resident rules.

The examples illustrate the way in which a person's overall circumstances need to be considered to determine whether they have a permanent place of abode in New Zealand.

The conclusions in the examples are based on the facts known at a particular time. If what eventuates differs from this, the results could be different for some or all of the years in question. If a person's circumstances change during their absence from New Zealand, it is necessary to reconsider whether they have a permanent place of abode here.

**Example | Tauira 1 – Three-year secondment overseas**

**Facts:** Cate, who is normally resident in New Zealand, is seconded to Canada in connection with her employment for a fixed period of 3 years. Cate intends to return to New Zealand after the period of secondment, and the terms of her secondment are such that her job is available for her to return to. Cate's partner and children accompany her to Canada.

The family home in New Zealand is owned by a family trust, of which Cate's parents and their solicitor's trustee company are trustees. Cate, her partner and their children, together with Cate's siblings and their families, are the trust's beneficiaries. The house is rented out while the family is in Canada.

Cate and her family leave their furniture and most of their other personal belongings in storage in New Zealand during their absence. Cate retains her New Zealand investments and her connections with several professional and sporting associations here. Cate and her family return to New Zealand each year to spend Christmas with family and have a summer holiday here.

**Result:** Cate would have a permanent place of abode in New Zealand when she leaves for Canada. During the period of her absence, her place of abode here may cease to be her permanent place of abode. This depends on what eventuates. Cate should assess her overall circumstances throughout the period of her absence from New Zealand to ascertain whether she continues to have a permanent place of abode here.

**Explanation:** Cate has a place of abode in New Zealand that she habitually resided in before leaving for Canada. The question is whether, during her absence from New Zealand, that house continues to be a place Cate habitually resides.

Although Cate will be absent from New Zealand for 3 years, this is not of itself inconsistent with her place of abode here remaining a permanent place of abode – a place she habitually resides. All the relevant factors must be weighed up. In this case, Cate has retained ties with New Zealand: she still has most of her personal property here, maintains membership of several professional and sporting associations, and has investments here. Cate also retains employment ties with New Zealand, as her secondment is in connection with her New Zealand employment. Cate has a definite intention to return to New Zealand at the end of the 3-year secondment and to resume living in the family home here. Although the house is owned in trust, Cate's parents are trustees and the family members are all beneficiaries. It is reasonable to infer that the trustees will enable the family to resume living in the family home on their return. At the time she leaves New Zealand, the strength of Cate's enduring connections with New Zealand and with her place of abode here are sufficient to establish that her home here continues to be a permanent place of abode.

If, at the time she left New Zealand, Cate's circumstances had been different, she may not have had a permanent place of abode in New Zealand from the time of her departure. For example, Cate would not have had a permanent place of abode in New Zealand from the time she left if she had not intended to return to New Zealand after the secondment, she did not have a guaranteed position available for her to return to, and she and her family had taken most of their furniture and other belongings with them.

However, whatever Cate's circumstances at the time of her departure, realistically those circumstances are unlikely to remain exactly as they were. Over the period of her secondment in Canada, decisions Cate makes and events that occur might lead to a conclusion that her place of abode here ceases to be her permanent place of abode from a particular time or might support a conclusion that it remains her permanent place of abode. For example, Cate and her family might decide they love Canada and want to stay, and Cate or her partner might secure work and visas to enable them to do that, and they may take their belongings out of storage and move them to Canada. In those circumstances, Cate would cease having a permanent place of abode in New Zealand from that point. On the other hand, Cate might not enjoy living in Canada, and might try to renegotiate her secondment arrangements to return to New Zealand earlier, or at least form the definite intention to return as soon as possible.

Further to the need to consider the circumstances as they evolve, another relevant factor is whether Cate and her family stay in their place of abode here on their trips back each summer (for example, because the property is rented to students during the university year, but able to be used by them between December and February). In those circumstances, Cate's place of abode here may well continue to be her permanent place of abode throughout the 3-year period.

It is always necessary to make an overall assessment of a person's circumstances and the nature and quality of the use they make of their place of abode in New Zealand in deciding whether it continues to be a permanent place of abode for them. Life events and changes in circumstances may mean someone ceases to have a permanent place of abode in New Zealand, so it is necessary to periodically consider the situation throughout the period of someone's absence.

**Example | Tauira 2 – Potential to live with parents on return does not mean a person will have a permanent place of abode in New Zealand**

**Facts:** Mike departs from New Zealand on a working holiday (his "OE" – overseas experience). He intends to return to New Zealand after his OE, though he is not sure when that will be. Before he left New Zealand, Mike had been living in a rented flat in

Wellington for a couple of years, prior to which he had lived with his parents (also in Wellington). Mike terminates his lease when he leaves New Zealand. Mike resigns from his job and stores his personal effects with his parents, who are happy for Mike to return to live with them if he wishes on his return. Mike leaves his KiwiSaver account in New Zealand and takes a contributions holiday. Mike ends up returning to New Zealand to live after 18 months away.

**Result:** Mike does not have a permanent place of abode in New Zealand while he is overseas.

**Explanation:** Mike terminated the lease on the flat he lived in before he left New Zealand. Therefore, it does not continue to be a place he habitually resides from that point.

Although Mike could return to live with his parents when he comes back to New Zealand, the fact he lived independently from his parents for a couple of years before leaving New Zealand means he no longer habitually resided at their house before his departure from New Zealand.

Therefore, it is irrelevant that Mike intends to return to New Zealand after his OE or that he has stored his personal effects here and has family ties here.

If Mike had never lived independently from his parents before going overseas, his parents' house might continue to be his permanent place of abode when he left New Zealand. While, when he leaves New Zealand, Mike does not know when he will return, he is going on an OE and does not have the intention of leaving New Zealand permanently. Mike has left his personal effects at his parents' house, has family ties here, and intends to return to New Zealand after his OE. In this scenario, because Mike had lived with his parents before going overseas, their house might continue to be his permanent place of abode because it is the place he habitually resides, despite a period of absence from New Zealand. However, this is a question of fact and requires an overall assessment of the circumstances, including the extent to which Mike is financially independent, and whether he intends to return to his parent's house to live more than temporarily. Even if Mike's parent's house is still his permanent place of abode at the time he leaves New Zealand, there could come a point at which it ceases to be, because he no longer habitually resides there – this depends on what ultimately occurs. It is always necessary to make an overall assessment of a person's circumstances and the nature and quality of the use they make of their place of abode in New Zealand when deciding whether it continues to be a permanent place of abode for them.

**Example | Tauira 3 – Permanent places of abode in New Zealand and elsewhere**

**Facts:** Li is a New Zealand citizen who has extensive business interests in New Zealand and Australia. Li owns a house in each country, neither of which is rented out, and both of which are available for his use. Li spends most of his time in Australia, but he regularly travels to New Zealand in connection with his business here. In total, Li spends up to 5 months of the year in New Zealand, staying in his house here most of the time he is here (except when his business requires him to be elsewhere in New Zealand). These trips vary in length from 2 days up to several weeks. Li has significant investments in New Zealand, and he is a member of cultural and sporting associations here. Li's immediate family lives in Australia.

**Result:** Li has a permanent place of abode in New Zealand.

**Explanation:** Li has a place of abode in New Zealand that he habitually resides in. He spends up to 5 months of the year in New Zealand, and for most of that time (whenever possible) he resides in his house here. Li's presence in New Zealand is generally for short periods – that is, his presence here is not of a continuous nature. However, Li resides in his house here for long enough each year that there is no question he habitually resides there, so it is a permanent place of abode for him.

In addition, Li has substantial connections with New Zealand, and those connections are maintained through regular trips to New Zealand. Those factors further bolster the conclusion that his place of abode here is a permanent place of abode.

Although he also has a place of abode in Australia, Li usually or typically lives in both of his places of abode on an enduring, rather than temporary, basis. A person with a permanent place of abode in New Zealand is tax resident under the permanent place of abode test even if they also have a permanent place of abode elsewhere.

**Example | Tauira 4 – Sale of former permanent place of abode but having another dwelling in New Zealand**

**Facts:** Ronan is a software developer who has lived in Wellington for 12 years and has a partner there. He and his partner own the apartment they live in and another similar apartment in a nearby building that they rent out. Ronan accepts a 2-year contract in Dublin.

For the first year of his contract, Ronan returns to Wellington every few months to see his partner, after which she decides to take a year of unpaid leave and join him in Ireland for the remainder of his contract.

At that time, they sell the apartment they had lived in, given that they will be down to one income and wish to travel a little in Europe in the second year of Ronan's contract. They sold the apartment they lived in rather than the investment property because it was not subject to a lease so was easier to sell promptly.

The couple intend to return to Wellington after Ronan's contract – they have many friends there and Ronan's partner's family live there. In addition to the investment property he owns with his partner, Ronan has a sizeable New Zealand share portfolio.

**Result:** Ronan has a permanent place of abode in New Zealand during the first year of his absence.

**Explanation:** In the first year of Ronan's absence, there is a place of abode in New Zealand that he habitually resided in before leaving for Ireland – the apartment he and his partner owned and in which they lived. Although Ronan was away from New Zealand, it remained his permanent place of abode for the first year of his absence. His partner continued to live there, and Ronan returned to see her every few months. The apartment would have been furnished with Ronan and his partner's belongings, and Ronan intended to return to New Zealand to live after his 2-year contract. In addition, Ronan has several enduring connections with New Zealand, and Wellington in particular – he has lived in Wellington for 12 years and intends to return there with his partner after his 2-year contract, he has family ties there (his partner's family), and he has substantial investments in New Zealand. These factors support a conclusion that he was likely to continue living in the apartment in Wellington on his intended return to New Zealand, so it remained a place in which he habitually resided, despite a period of absence.

In the second year of Ronan's absence from New Zealand, after the sale of the apartment in which he had lived, Ronan ceased having a permanent place of abode in New Zealand. Once the apartment was sold, Ronan no longer has an abode in New Zealand in which he habitually resides. Although Ronan and his partner own an investment property that is very similar to the apartment in which they lived, and they may indeed decide to live in it on their return to New Zealand, Ronan has never lived in that property, and it has only ever been used as an investment property. Therefore, it is irrelevant in respect of the second year of his absence that Ronan intends to return to New Zealand after his contract finishes or that he has numerous ties to New Zealand generally and Wellington more specifically – none of those ties indicate that the investment property is Ronan's permanent place of abode.

**Example | Tauira 5 – Spouses departing New Zealand and ceasing to have a permanent place of abode in New Zealand at different times**

**Facts:** Melanie and her husband and four young children live in Tauranga. Melanie gets a lucrative job offer in London and the family decide to move there. They have no intention to return to New Zealand to live in the foreseeable future and intend the move to be permanent. As such, the couple decide to sell their family home.

Melanie moves to London in October to start her new job. Her husband stays behind in Tauranga until December so the children can finish the school year and to arrange the sale of their home. Once Melanie arrives in London, she enrols the children in schools there from the start of the following year. Melanie and her husband retain a one-bedroom rental property in Tauranga, which they have owned for several years. They leave their share portfolio to be managed by their New Zealand broker. They have life insurance policies with a New Zealand insurance company and retain those policies. The family home is sold in November. The sale settles in mid-December, at the end of the school year, at which time Melanie's husband and children move to London as planned.

**Result:** Melanie does not have a permanent place of abode in New Zealand from the date of her departure in October. Her husband does not have a permanent place of abode from when the sale of the family home settles in mid-December.

**Explanation:** Although Melanie, at least initially, continues to have strong connections to New Zealand, her place of abode here is no longer her permanent place of abode. In the 2 months after she leaves New Zealand, her husband and children remain here, living in their family home. However, this is so the children can finish the school year here and Melanie's husband can arrange the sale of the family home. In the circumstances, it does not indicate that the family home continues to be Melanie's permanent place of abode – she no longer habitually resides there. Melanie has no intention to return to live in New Zealand in the foreseeable future, nor to live in the home again, and the sale of the home shortly after her departure supports this. The retention of some investments and insurance in New Zealand is not by itself significant, and does not indicate that the home continued to be Melanie's permanent place of abode until it was sold.

Melanie has never resided at the rental property that she and her husband own – it was acquired solely as an investment and has always been used as such. It is not a place they habitually live. Therefore, it would not be Melanie's permanent place of abode even if she maintained strong ties to New Zealand after her departure.

Melanie's husband continues to habitually reside in the family home until the sale settles in mid-December. Therefore, it remains his permanent place of abode until that time.

If some time after Melanie left New Zealand but before the family home was sold, circumstances changed such that Melanie ended up forgoing the job opportunity in London and returning to New Zealand to the family home to live, the home would become her permanent place of abode once again from that time. This would not alter the fact that on her departure the family home ceased to be her permanent place of abode.

**Example | Tauira 6 – Family home relocation during a person's absence from New Zealand**

**Facts:** Cameron is a civil engineer who goes to Japan for work for 18 months. Cameron's children are about to start high school, and the family had intended to move from Christchurch to Dunedin soon, to be closer to extended family. Cameron and his wife agree that she and the children will stay in New Zealand for the 18 months Cameron will be away, during which time they will move to Dunedin so the children can start high school there. Cameron's wife and children make the move from Christchurch to Dunedin, and Cameron will join them there once he returns from Japan.

**Result:** Cameron has a permanent place of abode in New Zealand during his absence.

**Explanation:** Cameron has a place of abode in New Zealand that he habitually resides in – being the family home. Cameron lived in the original family home in Christchurch before going to Japan. He had a durable association with the home in Christchurch, and it continued to be his permanent place of abode despite his absence. Once the family home shifts because the family move to Dunedin, Cameron has a durable association with the new family home there through his wife and children living there and his intention to live there on his return. This association establishes that the new family home is Cameron's permanent place of abode. Although Cameron has not previously lived in Dunedin, his family home has been established there during his absence, and he will join his family there on his return. Cameron habitually resides in the family home with his wife and children, and the fact the family home has shifted during Cameron's absence does not alter that. The new family home can be viewed as essentially being a substitute for the previous family home, which was clearly Cameron's permanent place of abode.

**Example | Tauira 7 – Fly-in fly-out worker with family in New Zealand**

**Facts:** Charlie and his wife own a house in Auckland, where they live with their children and where he is a member of several local clubs. Charlie starts working as a fly-in-fly-out (FIFO) miner in Moranbah in Queensland (Australia). He works for periods of 8 weeks at a time, between which he returns to his home in Auckland for a week off.

Charlie's wages are paid into an Australian bank account, in Australian dollars, and most of his wages are automatically transferred from there into the New Zealand bank account he holds jointly with his wife.

Charlie's employer provides him with accommodation at the mine site.

On his week off when he returns to New Zealand, Charlie maintains his sporting and social ties.

**Result:** Charlie has a permanent place of abode in New Zealand.

**Explanation:** Charlie has a place of abode in New Zealand that he habitually resides in – the house that he and his wife own and that is their family home. Although Charlie is absent from New Zealand for the bulk of each year, his absences are solely because of the nature of his job, and there is no question that his home in Auckland continues to be a place he habitually resides, so it is a permanent place of abode for him.

**Example | Tauira 8 – No dwelling in New Zealand that could be a permanent place of abode, and insufficient connections even if, on alternate facts, there was a dwelling**

**Facts:** Daniel is an engineer who has lived in Napier all his life. He accepts a 2-year contract working on an oil rig in Malaysia for periods of 4 weeks at a time. When he takes up the job, he terminates the lease on the flat he has lived in for the last year.

Between his stints on the rig, Daniel has two weeks off. He has a periodic lease on an apartment in Malaysia, and for most of his weeks off he stays there.

At other times he travels elsewhere, sometimes returning to New Zealand to visit family and friends here. When he is back in New Zealand, Daniel stays at his parents' house in Napier.

Daniel's wages are paid into his Malaysian bank account, in American dollars.

He has no plans to return to New Zealand permanently – his intention is to work and live in Malaysia indefinitely. Daniel's employer has sponsored his Malaysian work permit and will continue to do so as long as he stays with the company.

**Result:** Daniel does not have a permanent place of abode in New Zealand.

**Explanation:** Daniel terminated the lease on the flat he lived in before he left New Zealand. Therefore, it does not continue to be a place he habitually resides from that point.

Although Daniel might potentially be able to return to live with his parents when he comes back to New Zealand, the fact he lived independently from his parents for at least a year before leaving New Zealand means he no longer habitually resided at their house before his departure from New Zealand. The fact that he stays at his parents' house during some of his time off, when he returns to New Zealand to catch up with friends and family, does not suggest he habitually resides there.

Even if Daniel had recently graduated from his university degree before leaving New Zealand, so had lived with his parents immediately before going overseas, his parents' house would not be his permanent place of abode once he leaves New Zealand. This is because Daniel has not retained sufficient connections with New Zealand for his parents' house here to remain his permanent place of abode. Although Daniel periodically visits his parents and friends in Napier, he has no other significant ties here, does not intend to return to New Zealand permanently, and intends to work and live in Malaysia indefinitely. Daniel's employer will continue to sponsor his work permit, which indicates that this intention would seem to be reasonably held. In this scenario, Daniel would have lived with his parents before leaving New Zealand because he was still studying. However, by the time he left New Zealand he would have completed his degree and been financially independent. That, together with the fact Daniel has no intention to return to New Zealand permanently and intends to work and live in Malaysia indefinitely, indicate that Daniel would no longer be said to habitually reside at his parents' home.

**Example | Tauira 9 – Members of a family may acquire (or cease to have) a permanent place of abode in New Zealand at different times**

**Facts:** In 1982, Edward, a United Kingdom citizen, moved to New Zealand with his wife Amelia, a New Zealander. They both had a permanent place of abode here from that time. They married in 1985, and Edward was granted a permanent residence visa.

In 1995, the couple and their two daughters moved to Singapore because of a job opportunity for Edward.

In 2000, Edward and Amelia purchased a small lifestyle property just out of Auckland to use as a holiday home. They stayed at the property when they were back in New Zealand for holidays – about 2 or 3 months a year. Other family members in New Zealand also used the property for holidays.

In 2002, Amelia moved back to New Zealand to care for her mother who was terminally ill. Edward and Amelia decided their daughters should attend school in New Zealand, so the children moved here in January 2003 and went to boarding school. Amelia lived in the property that had previously been used as a holiday home, and the children lived there during school holidays.

In 2003, Edward came to New Zealand regularly to see Amelia and the children – about 2½ months in total over that year.

After Amelia's mother passed away in 2004, Amelia stayed in New Zealand as one of the children had been injured in a car accident. From that point, Edward re-arranged his work commitments so he could come to New Zealand not just for holidays, but more frequently, to support Amelia and the children. From that point, Edward spent about 4 months of each year in New Zealand with Amelia and the children.

It became clear the daughter's injuries would require long-term treatment, including surgeries and rehabilitation. At that point Edward decided to live in New Zealand all the time. He did so from 2006, giving up his lease in Singapore and bringing the rest of his personal effects from there to the family home in New Zealand.

**Result:** Edward has a permanent place of abode in New Zealand from 2004, when he re-arranged his work commitments so he could come to New Zealand more frequently – from which time he spent about 4 months of each year here.

**Explanation:** Edward had a place of abode in New Zealand from 2000, when he and Amelia purchased the property they used as a holiday house. However, the house was not Edward's permanent place of abode at that time, as he did not habitually reside there on a permanent basis, but rather for temporary periods during holidays in New Zealand.

The permanent place of abode test needs to be considered on an individual basis. The fact Amelia and the children moved back to New Zealand in 2002 and 2003, respectively, does not mean the house here became Edward's permanent place of abode by virtue of the family living there. This is because Edward continued to live in Singapore, where he had lived since 1995, he did not habitually reside in the New Zealand house on a permanent basis. He came back only for relatively short holidays, and he had no intention to do otherwise at that time.

It was after his daughter's accident, when Edward re-arranged his work commitments so he could come to New Zealand more frequently – spending about 4 months of each year here – that he established a permanent place of abode here. From that point, Edward started habitually residing in the family home more than just temporarily for relatively short holidays, though he continued to also habitually reside in his residence in Singapore. From that point, the nature and quality of the Edward's use of the

property changed. The house here therefore became Edward's permanent place of abode from that point.

## The day-count rules

119. In addition to the permanent place of abode test, there are day-count rules in the Act, under which a person can become tax resident in New Zealand or cease to be tax resident in New Zealand. These rules are referred to as the 183-day rule and the 325-day rule.

120. These rules are set out in s YD 1 as follows:

> **YD 1 Residence of natural persons**
>
> ...
>
> *183 days in New Zealand*
>
> (3) A person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.
>
> *Person treated as resident from first of 183 days*
>
> (4) If subsection (3) applies, the person is treated as resident from the first of the 183 days until the person is treated under subsection (5) as ceasing to be a New Zealand resident.
>
> *Ending residence: 325 days outside New Zealand*
>
> (5) A person treated as a New Zealand resident only under subsection (3) stops being a New Zealand resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period.
>
> *Person treated as non-resident from first of 325 days*
>
> (6) The person is treated as not resident from the first of the 325 days until they are treated again as resident under this section.

## The part-day rule

121. For the purposes of the 183-day and 325-day rules, if a person is present in New Zealand for part of a day, that day counts as a full day of presence and does not count at all towards days of absence. This is provided for in s YD 1(8) which states:

> **YD 1 Residence of natural persons**
>
> ...

*Presence for part-days*

(8) For the purposes of this section, a person personally present in New Zealand for part of a day is treated as—

(a) present in New Zealand for the whole day; and

(b) not absent from New Zealand for any part of the day.

122. Therefore, days of arrival in and departure from New Zealand are treated as full days of presence in New Zealand for the 183-day and 325-day rules.

## The 183-day rule

### Overview of the rule

123. Section YD 1(3) provides that a person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.

124. If the 183-day rule is satisfied, s YD 1(4) then provides that the person is treated as resident from the first of those 183 days, until they are treated as ceasing to be resident under subs (5) (the 325-day rule).

125. The 183-day rule is satisfied if a person is present in New Zealand for more than 183 days in total in **any 12-month period**. The rule does not relate to an income year, a calendar year, or any other particular 12-month period. The 12-month period does not need to include the date as at which residence is being assessed, and the days of presence do not need to be consecutive.

### Relationship between the 183-day rule and the permanent place of abode test

126. The 183-day rule operates in conjunction with the permanent place of abode test in s YD 1(2). But the permanent place of abode test is the overriding test.

127. Therefore, if a person has a permanent place of abode in New Zealand, they are resident in New Zealand even if they have not been present here for more than 183 days in total in any 12-month period.

128. Because the tests operate in conjunction with one another, a person who has acquired a permanent place of abode in New Zealand (for example, someone who has moved here from overseas) may have their residence back-dated to a time before that under the 183-day rule and s YD 1(4). This could occur, for example, if the person came to New Zealand for a holiday or job interview before moving here or because the person did not acquire a permanent place of abode immediately on moving to New Zealand, but some time later.

129. If a person has been present in New Zealand for more than 183 days in total in **any** 12-month period, that person is tax resident in New Zealand from the first of those days of presence (or from when they acquired a permanent place of abode here – whichever is earlier) until they cease to be tax resident.

130. A person who is tax resident under the 183-day rule ceases to be tax resident if they satisfy all of the following:

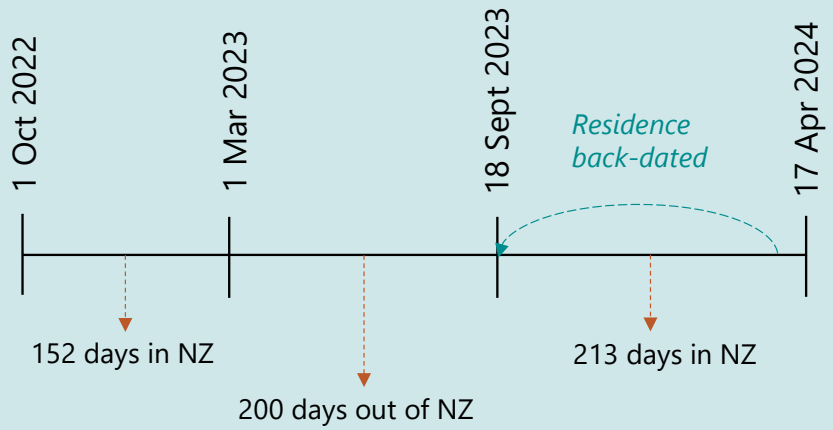
- They satisfy the 325-day rule (discussed from [133]).
- They do not have a permanent place of abode here (discussed from [44]).
- They are not absent from New Zealand in the service of the New Zealand Government (discussed from [147]).

## Examples illustrating the 183-day rule

**Note:** The following examples deal **only** with the 183-day rule. They do not consider the permanent place of abode test, the 325-day rule, any DTA implications, or any potential application of the transitional resident rules.

**Example | Tauira 10 – The 183-day rule**

**Facts:** Amy arrived in New Zealand on 1 October 2022 and stayed here until 1 March 2023, a total of 152 days of presence in New Zealand. Amy was then absent from New Zealand for 200 days. She then returned to New Zealand on 18 September 2023, and stayed here for a further 7 months – departing on 17 April 2024. It is assumed Amy was not resident in New Zealand before 1 October 2022 and that she had not been present in New Zealand before that date.



**Result:** Amy is resident in New Zealand from 18 September 2023.

**Explanation:** Amy was not personally present in New Zealand for more than 183 days in any 12-month period starting before 18 September 2023. Because of her absence from 2 March 2023 to 17 September 2023, Amy was in New Zealand for only 165 days in the 12-month period starting on 1 October 2022 (152 days from 1 October 2022 to 1 March 2023 plus 13 days from 18 September 2023 to 30 September 2023).

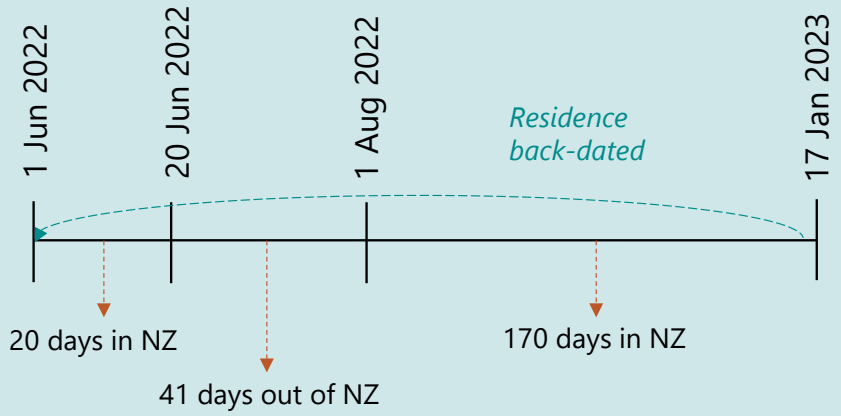
However, Amy was present in New Zealand for 7 months (213 days), in the 12-month period starting on 18 September 2023. Therefore, Amy is resident from the first day of presence in that period (that is, from 18 September 2023).

While Amy was not present in New Zealand for more than 183 days in a 12-month period until 19 March 2024 (her 184th day of presence since her arrival on 18 September 2023), the back-dating rule back-dates her New Zealand tax residence to the first of the days of presence in the 12-month period in which she exceeded 183 days of presence (the period starting on 18 September 2023).

Amy will continue to be resident in New Zealand until she ceases to be resident under the 325-day rule (assuming she has no permanent place of abode here).

**Example | Tauira 11 – The 183-day rule**

**Facts:** Ben arrived in New Zealand on 1 June 2022 and stayed here until 20 June 2022, a total of 20 days. Ben returned to New Zealand on 1 August 2022 and stayed here until 17 January 2023, a total of 170 days. It is assumed Ben was not resident in New Zealand before 1 June 2022 and that he had not been present in New Zealand before that date.



**Result:** Ben is resident in New Zealand from 1 June 2022.

**Explanation:** Ben was personally present in New Zealand for more than 183 days (190 days), during the 12-month period starting on 1 June 2022.

While Ben was not present in New Zealand for more than 183 days in a 12-month period until 11 January 2023 (his 184th day of presence since his first arrival on 1 June 2022), the back-dating rule back-dates his New Zealand tax residence to the first of the days of presence in the 12-month period in which he exceeded 183 days of presence (the period starting on 1 June 2022).

Ben will continue to be resident in New Zealand until he ceases to be resident under the 325-day rule (assuming he has no permanent place of abode here).

## Exception to 183-day rule – non-resident seasonal workers

131. Despite the 183-day rule, a person who is a "non-resident seasonal worker" is treated as non-resident during the time they are employed under the recognised seasonal employer (RSE) scheme (s YD 1(11)). The RSE scheme allows businesses in the horticulture and viticulture industries to recruit workers from Pacific Island countries for seasonal work. For more information about the RSE scheme, search for "recognised seasonal employer scheme" on immigration.govt.nz.

132. The non-resident seasonal worker rule does not override the permanent place of abode test. Therefore, if a non-resident seasonal worker acquires a permanent place of abode in New Zealand, they will be resident here.

## The 325-day rule

### Overview of the rule

133. Section YD 1(5) provides that a person who is resident **only under the 183-day rule** stops being resident here if they are personally absent from New Zealand for more than 325 days in total in a 12-month period.

134. If the 325-day rule is satisfied, s YD 1(6) then provides that the person is treated as non-resident from the first of those 325 days.

135. The 325-day rule is satisfied if a person is absent from New Zealand for more than 325 days in total in **any 12-month period**. The rule does not relate to an income year, a calendar year, or any other particular 12-month period. The 12-month period does not need to include the date as at which residence is being assessed, and the days of absence do not need to be consecutive.

### Relationship between the 325-day rule and the permanent place of abode test

136. The 325-day rule applies to make someone non-resident only if they do not have a permanent place of abode in New Zealand. If someone has a permanent place of abode here, they will remain resident even if they are absent from New Zealand for more than 325 days in a 12-month period.

137. A person who is absent from New Zealand for more than 325 days in a 12-month period and who does not have a permanent place of abode in New Zealand immediately before their departure, has their non-residence back-dated to the first day of the period of absence.

138. However, a person who is absent from New Zealand for more than 325 days in a 12-month period and who has a permanent place of abode in New Zealand at the time of their departure cannot have their non-residence back-dated to any earlier than the day after the day they cease having a permanent place of abode in New Zealand. In this situation, if the person has not returned to New Zealand in the interim, it is not necessary to start the day counting again after the person ceases having a permanent place of abode in New Zealand. If the person is absent for, say, 100 days before ceasing to have a permanent place of abode in New Zealand, those 100 days are taken into account for the purposes of the 325-day rule. When the person is finally absent for more than 325 days, they will cease to be resident from (and including) day 101 (that is, the day after the day on which they ceased having a permanent place of abode in New Zealand).

139. The combined effect of the 325-day rule and the permanent place of abode test is that after 325 days of absence from New Zealand in a 12-month period, a person ceases to be resident in New Zealand from the first of those days of absence on which they do not have a permanent place of abode here.

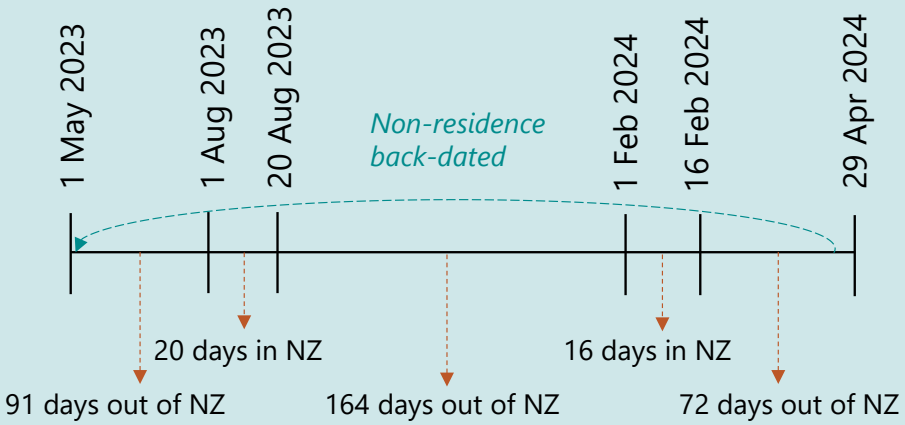
140. Once a person ceases to be resident, they remain non-resident until they either acquire a permanent place of abode in New Zealand or satisfy the 183-day rule.

## Examples illustrating the 325-day rule and its relationship with the permanent place of abode test

**Note:** The following examples deal **only** with the 325-day rule and its relationship with the permanent place of abode test. They do not consider the 183-day rule, any DTA implications, or any potential application of the transitional resident rules.

**Example | Tauira 12 – The 325-day rule**

**Facts:** Jeremy left New Zealand on 1 May 2023 and returned on 1 August 2023, a total of 91 days of absence. Jeremy stayed in New Zealand until 20 August 2023, a total of 20 days of presence. Jeremy remained absent until 1 February 2024, a total of 164 days. Jeremy came back to New Zealand from 1 February 2024 until 16 February 2024, a total of 16 days. After leaving again on 16 February 2024, Jeremy returned to New Zealand on 29 April 2024, after a period of absence of 72 days. It is assumed Jeremy did not have a permanent place of abode in New Zealand from the time he first left (1 May 2023) and that Jeremy was resident in New Zealand as at that date by virtue of the 183-day rule.




**Result:** Jeremy is non-resident from 2 May 2023.

**Explanation:** Jeremy was absent for 327 days in total in the 12-month period starting on 2 May 2023 (91 days starting on 2 May 2023 and ending on 31 July 2023, 164 days starting on 21 August 2023 and ending on 31 January 2024, and 72 days starting on 17 February 2024 and ending on 28 April 2024). Therefore, Jeremy is non-resident from the first day of absence in that period (that is, 2 May 2023).

While Jeremy was not absent from New Zealand for more than 325 days in a 12-month period until 27 April 2024 (his 326th day of absence since his first day of absence of 2 May 2023), the back-dating rule back-dates his New Zealand tax non-residence to the first of the days of absence in the 12-month period in which he exceeded 325 days of absence (the period starting on 2 May 2023).

Jeremy will remain non-resident until he acquires a permanent place of abode here or until he is present here for more than 183 days in any period of 12 months.

**Example | Tauira 13 – Relationship between the 325-day rule and the permanent place of abode test**

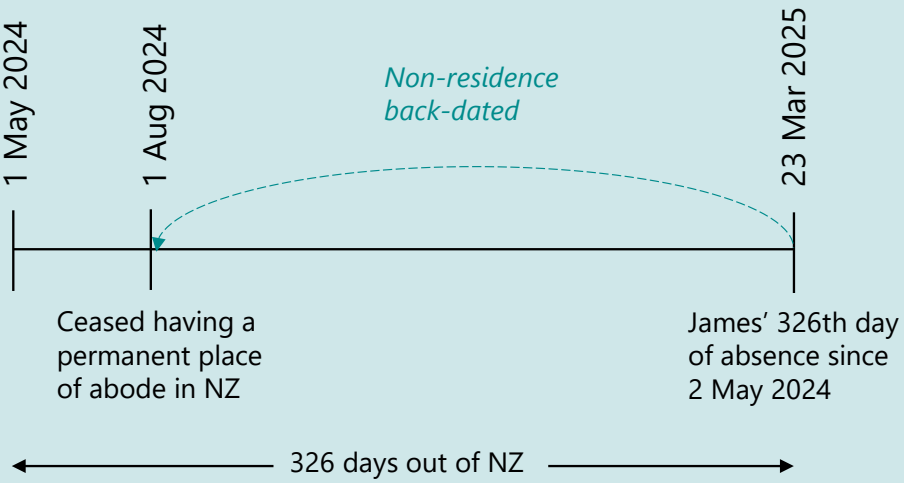
**Facts:** Claire leaves New Zealand on 1 April 2024 and returns on 1 August 2025. Claire has a permanent place of abode in New Zealand at all times during this period – she owns a house here, has strong economic and personal ties here, and remains in the employment of her New Zealand employer.

**Result:** Claire remains resident in New Zealand at all times during her absence.

**Explanation:** Although Claire is absent from New Zealand for more than 325 days (that is, 365 days) in the 12-month period starting on 2 April 2024, she remains resident here because she has a permanent place of abode in New Zealand at all times during her absence.

**Example | Tauira 14 – Relationship between the 325-day rule and the permanent place of abode test**

**Facts:** James was seconded to the Australian office of his employer for 6 months and left New Zealand on 1 May 2024. James had always lived in New Zealand (with his parents), had a boyfriend here, and intended to return after the 6-month period. James left most of his personal property, including his car, with his parents. After he had been in Australia for 3 months, James was offered a permanent job there. On 1 August 2024 he accepted the job and resigned from his position in New Zealand. James stayed in Australia, and arranged to have his personal property transported to Australia. James asked his parents to sell his car, and he ended his relationship with his boyfriend. James intends to remain in Australia indefinitely. He did not return to New Zealand at all until he had a holiday here in July 2025.



**Result:** James is non-resident from 2 August 2024.

**Explanation:** James was personally absent from New Zealand for more than 325 days in the 12-month period starting on 2 May 2024.

However, James did not cease having a permanent place of abode in New Zealand when he originally departed on 1 May 2024 because he had a place of abode available to him (his parents' house, where he had lived before his departure), he retained close personal and employment ties here, and he intended to return after a brief period of absence. James ceased having a permanent place of abode in New Zealand on 1 August 2024 when he resigned from his job in New Zealand and accepted the job in Australia, from which point he had decided to stay there indefinitely. Although it was in the following weeks that James arranged to have his property transported to Australia and ended his relationship, the decision to resign from his position in New Zealand and accept the permanent position in Australia is the time from which it is apparent that James had formed the intention to remain in Australia indefinitely. Accordingly, James ceased to have a permanent place of abode in New Zealand on 1 August 2024.

Because the permanent place of abode test is the overriding test, a person cannot have their non-residence back-dated under the back-dating rule to any earlier than the day after the day they cease having a permanent place of abode in New Zealand.

Therefore, while James met the requirement of being absent from New Zealand for more than 325 days in a 12-month period on 23 March 2025 (his 326th day of absence since his first day of absence of 2 May 2024), his tax non-residence cannot be backdated to the first of the counted 325 days (2 May 2024). It can be back-dated only to the first of the 325 counted days on which he no longer had a permanent place of abode in New Zealand (2 August 2024).

Therefore, James ceased being tax resident in New Zealand on 2 August 2024 – the day after the day he ceased having a permanent place of abode in New Zealand.

James will remain non-resident until he acquires a permanent place of abode in New Zealand again or until he is present here for more than 183 days in any period of 12 months.

## Relationship between the 183-day rule and the 325-day rule – overlap of the day count rules

141. As noted at [129], if a person is personally present in New Zealand for more than 183 days in a 12-month period they are resident here and are treated as such from the

first of those days of presence. The person then remains resident until they cease to be resident under the 325-day rule.[9]

142. The combined effect of the 325-day rule and the permanent place of abode test is that a person who is absent from New Zealand for more than 325 days in total in any 12-month period is treated as non-resident from the first of those days of absence or from the first day during the period of absence on which they no longer have a permanent place of abode here, whichever is later.

143. The effect of the back-dating of both the 183-day and 325-day rules means that where a person has travelled in and out of New Zealand there may be an overlap between those rules.

144. This is because a person who is resident under the 183-day rule may have been temporarily absent from New Zealand at some time before the 183-day rule was satisfied. If the person then satisfies the 325-day rule, they will cease to be resident in New Zealand from the first of those days of absence (assuming they have no permanent place of abode in New Zealand), even though that day falls before the final day that is taken into account for the purposes of the 183-day rule. In this situation, the period of absence taken into account for the purposes of the 325-day rule overlaps with the period of presence taken into account for the purposes of the 183-day rule. This may result in the person being treated as a New Zealand resident for a period of less than 183 days, even though they were present here for more than 183 days in a 12-month period.

145. The two rules may also overlap in the converse situation. A person who ceases to be resident under the 325-day rule may have been temporarily present in New Zealand at some time before the 325-day rule was satisfied. If the person then satisfies the 183-day rule by being present in New Zealand for more than 183 days in a 12-month period, they will become resident in New Zealand from the first of those days of presence, even though that day falls before the final day that is taken into account for the purposes of the 325-day rule. This may result in the person being treated as non-resident for a period of less than 325 days even though they were absent for more than 325 days in a 12-month period.

146. Where a period taken into account for the purposes of the 183-day rule and a period taken into account for the purposes of the 325-day rule overlap, the later period operates to confer residence or non-residence, respectively, from the first day of that period.

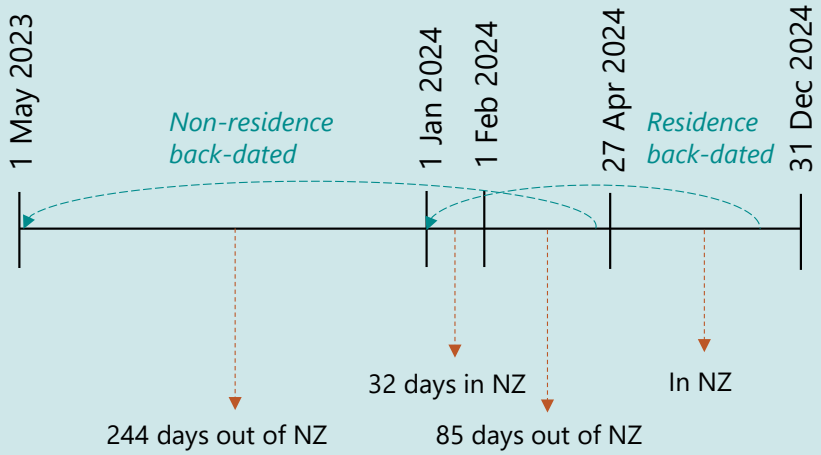
[9] As noted at [136], the 325-day rule can apply to make someone non-resident only if they do not have a permanent place of abode in New Zealand.

## Examples illustrating the relationship between the 183-day and 325-day rules

**Note:** The following examples deal **only** with the relationship between the 183-day and 325-day rules. They do not consider the permanent place of abode test, any DTA implications, or any potential application of the transitional resident rules.

**Example | Tauira 15 – Relationship between the 183-day rule and the 325-day rule**

**Facts:** Henry left New Zealand on 1 May 2023 and returned on 1 January 2024, after 244 days of absence. Henry left New Zealand again on 1 February 2024 after 32 days of presence here. Henry returned on 27 April 2024, after 85 days of absence, and remained in New Zealand from that point. It is assumed Henry did not have a permanent place of abode in New Zealand until after he returned on 27 April 2024. It is also assumed Henry was resident in New Zealand under the 183-day rule before his departure on 1 May 2023.




**Result:** Henry is treated as non-resident from 2 May 2023 until 31 December 2023. Henry is treated as resident in New Zealand again from 1 January 2024.

**Explanation:** Henry was personally absent from New Zealand for 329 days in total in the 12-month period starting on 2 May 2023 (that is, for 244 days from 2 May 2023 to 31 December 2023, and for 85 days from 2 February 2024 to 26 April 2024). Therefore, Henry is treated as non-resident in New Zealand from the first day of absence (that is, 2 May 2023.

While Henry was not absent from New Zealand for more than 325 days in a 12-month period until 23 April 2024 (his 326th day of absence since his first day of absence of

2 May 2023), the back-dating rule back-dates his New Zealand tax non-residence to the first of the days of absence in the 12-month period in which he exceeded 325 days of absence (the period starting on 2 May 2023).

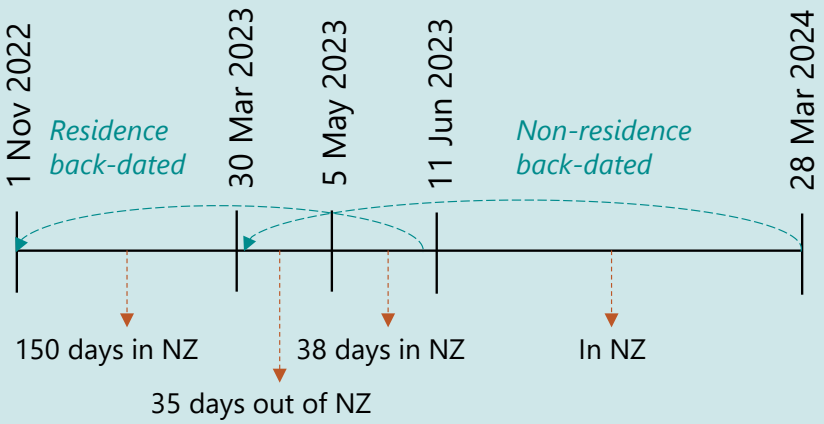
Henry was personally present in New Zealand for more than 183 days in the 12-month period starting on 1 January 2024 (that is, for 32 days from 1 January 2024 to 1 February 2024, and 249 days from 27 April 2024 to 31 December 2024 – a total of 281 days). Therefore, Henry is treated as resident from the first of those days of presence (that is, 1 January 2024).

While Henry was not present in New Zealand for more than 183 days in a 12-month period until 25 September 2024 (his 184th day of presence since his first day of presence of 1 January 2024), the back-dating rule back-dates his New Zealand tax residence to the first of the days of presence in the 12-month period in which he exceeded 183 days of presence (the period starting on 1 January 2024).

The period taken into account for the purposes of the 183-day rule cuts into the period taken into account for the purposes of the 325-day rule. Therefore, Henry is treated as non-resident only from the start of the period of absence (that is, 2 May 2023) until the day before the beginning of the period taken into account for the purposes of the 183-day rule (that is, 31 December 2023).

**Example | Tauira 16 – Relationship between the 183-day rule and the 325-day rule**

**Facts:** Belinda arrived in New Zealand on 1 November 2022 and stayed here for 150 days, until 30 March 2023. Belinda left New Zealand on 30 March 2023 and returned on 5 May 2023, a period of absence of 35 days (that is, from 31 March 2023 to 4 May 2023). Belinda was present in New Zealand from 5 May 2023 to 11 June 2023, a total of 38 days. Belinda left the country again on 12 June 2023 and has remained outside New Zealand since that time. It is assumed Belinda was resident outside New Zealand before she arrived on 1 November 2022 and that she did not at any time have a permanent place of abode in New Zealand.




**Result:** Belinda is treated as resident in New Zealand from 1 November 2022 to 30 March 2023. Belinda is treated as non-resident from 31 March 2023.

**Explanation:** Belinda was present in New Zealand for 188 days in the 12-month period starting on 1 November 2022 (that is, for 150 days from 1 November 2022 to 30 March 2023, and for 38 days from 5 May 2023 to 11 June 2023). Therefore, Belinda is treated as resident from the first of those days of presence (that is, 1 November 2022).

While Belinda was not present in New Zealand for more than 183 days in a 12-month period until 7 June 2023 (her 184th day of presence since her first day of presence of 1 November 2022), the back-dating rule back-dates her New Zealand tax residence to the first of the days of presence in the 12-month period in which she exceeded 183 days of presence (the period starting on 1 November 2022).

Belinda was absent from New Zealand for 328 days in the 12-month period starting on 31 March 2023 (that is, for 35 days from 31 March 2023 until 4 May 2023, and for 293 days from 12 June 2023 to 30 March 2024). Therefore, Belinda is treated as non-resident from the first of those days of absence (that is, 31 March 2023).

While Belinda was not absent from New Zealand for more than 325 days in a 12-month period until 28 March 2024 (her 326th day of absence since her first day of absence of 31 March 2023), the back-dating rule back-dates her New Zealand tax non-residence to the first of the days of absence in the 12-month period in which she exceeded 325 days of absence (the period starting on 31 March 2023).

The period taken into account for the purposes of the 325-day rule cuts into the period taken into account for the purposes of the 183-day rule. Therefore, Belinda is treated as resident only from the start of the period of presence (that is, 1 November

2022) until the day before the beginning of the period taken into account for the purposes of the 325-day rule (that is, 30 March 2023).

## Government service rule

147. There is a special residence rule for people who are overseas in the service of the New Zealand Government (s YD 1(7)).

148. Under this rule, a person who is absent from New Zealand in the service of the New Zealand Government cannot lose New Zealand tax residence under the 325-day rule for ending residence.

149. This means that a person who is tax resident in New Zealand when they commence being in the service of the New Zealand Government overseas will continue to be tax resident in New Zealand under domestic law so long as they remain in the service of the government, irrespective of the length of their absence. The rule can apply whether or not the person is in New Zealand when they commence being in the service of the New Zealand Government.

150. If there is a DTA between New Zealand and the other country, the government service article in the DTA will also need to be considered to determine how taxing rights are allocated.

151. The government service rule in the Act and DTA government service article are discussed in IS 25/17: **Tax residence – government service rule**.

## Transitional residence – temporary tax exemptions for new migrants and returning New Zealanders

### Requirements for transitional residence

152. New migrants and returning New Zealanders may be eligible to be transitional residents under s HR 8(2). If a person is a transitional resident they are entitled to tax exemptions for certain income for a period, even though they are tax resident in New Zealand.

153. Under s HR 8(2), a person is a transitional resident if they:

- are a New Zealand resident through acquiring a permanent place of abode here, or through the 183-day rule;
- did not, for a continuous period of at least 10 years immediately before acquiring a permanent place of abode or satisfying the 183-day rule (ignoring the back-

dating rule in s YD 1(4)), meet those requirements, and were not resident in New Zealand;

- have not previously been a transitional resident; and
- have not ceased to be a transitional resident (which may be because they have elected not to be one or because the period for transitional residence has expired – see [162]).

154. The transitional resident rules apply to people who satisfy the requirements to be a transitional resident on or after 1 April 2006, for the 2005–06 and subsequent income years.

### Income that is exempt during the transitional residence period

155. The transitional resident rules provide a temporary tax exemption (s CW 27) for all foreign-sourced income except for:

- employment income in connection with employment or service performed while the person is a transitional resident; and
- income from a supply of services.

156. The transitional resident rules also ensure that certain other provisions in the Act apply to produce a result for income tax purposes that is the same as if the transitional resident were non-resident (for example the controlled foreign company (CFC) rules, the FIF rules, the financial arrangements rules (the FA rules), the trust rules and the non-resident withholding tax (NRWT) rules) (see s HR 8(1)).

### Transitional residence and various family-related tax credits

157. Transitional residents cannot receive Working for Families tax credits (including Best Start) and maintain their transitional residence status. In addition, the spouse or partner of a transitional resident cannot receive Working for Families tax credits. (See ss MC 5, MD 7 and HR 8(5)).

158. It is important to note that if a person who is eligible to be a transitional resident applies for Working for Families tax credits (including Best Start), that application is treated as an election for both the person and their spouse or partner to not be transitional residents. This deemed election **cannot** be reversed. Therefore, whether to apply for Working for Families tax credits during the transitional residence period should be carefully considered, and professional advice sought if necessary.

159. Transitional residents may receive FamilyBoost tax credits (which provide financial assistance to caregivers for early childhood education costs). Applying for FamilyBoost is not treated as an election to no longer be a transitional resident, as FamilyBoost is not part of the Working for Families tax credit regime.

### Start date of transitional residence

160. A person meeting the requirements for transitional residence will be a transitional resident, unless they elect not to be, from the first day they are tax resident in New Zealand (under either the permanent place of abode test or the 183-day rule). What is relevant is when the person becomes tax resident under New Zealand domestic law. It is not relevant whether their tax residence tie-breaks under a DTA to another jurisdiction for the purposes of the DTA.

161. The back-dating rule in s YD 1(4) is **not ignored** in identifying the start date of transitional residence. Therefore, the start date of a person's transitional residence period is the earlier of the day they acquire a permanent place of abode in New Zealand or the first day of presence counted for the 183-day rule.

### End date of transitional residence

162. A person will remain a transitional resident until the earliest of the following:

- The end of the 48th month after the month in which they acquired a permanent place of abode in New Zealand or satisfied the 183-day rule (**ignoring** the back-dating rule in s YD 1(4)), whichever is earlier.
- The day before they stop being a New Zealand resident.
- The date on which they stop being a transitional resident because they elect not to be one (under s HR 8(4) or (5)).

163. Because transitional residence may run until the end of the 48th month in which the person acquired a permanent place of abode in New Zealand or satisfied the 183-day rule (ignoring the back-dating rule), in some situations a person may be a transitional resident for considerably longer than 48 months. For example, if a person arrives in New Zealand on 1 January 2024 and does not have a permanent place of abode in New Zealand until 1 August 2024, their transitional residency (assuming they meet all the requirements) would run from 1 January 2024 to 31 July 2028, a period of 55 months. This is because the person would satisfy the 183-day rule on 2 July 2024 (their 184th day of presence in New Zealand). The last day of the 48th month after the month in which the person's non-residence period ends (July 2024) is 31 July 2028.

164. A person can elect not to be a transitional resident by notifying the Commissioner of this, effective from a date the person nominates. This could be done when filing a tax return or by sending a message through MyIR. As noted at [158], if a person who is eligible to be a transitional resident applies for Working for Families tax credits (including Best Start), this is treated as an election for both the person and their spouse or partner not to be a transitional resident.

165. There has been some uncertainty about when transitional residence ends if it ends due to a person (or their spouse or partner)[10] applying for Working for Families tax credits. The Commissioner considers that in these circumstances transitional residence ends the day before the date their Working for Families tax credit application applies from (that is, the date from which they are eligible for the tax credit). This is based on the words in s HR 8(5) that the application is treated "for the period of the application" as a notice of election for the person (or their spouse or partner) not to be a transitional resident. This is illustrated in Example | Tauira 18 below.

### Further information about the transitional resident rules

166. **Transitional residency flowchart for individual New Zealand tax residents – IR1249** will help you determine whether you qualify to be a transitional resident.

167. For further information about the transitional resident rules and examples of how they apply, see **Temporary exemption from tax on foreign income for new migrants and certain returning New Zealanders**,[11] and **Temporary exemption for transitional residents**.[12]

168. However, it is noted that those items are not accurate in two respects. Firstly, the item in *Tax Information Bulletin* Vol 18, No 5 (June 2006) states that the period of transitional residence starts on the first day of the month in which the person migrates to New Zealand. However, as noted at [160], transitional residence starts on the first day the person is tax resident in New Zealand.

169. Secondly, the item in *Tax Information Bulletin* Vol 19, No 3 (April 2007) states that transitional residence lasts for 48 months after migration. However, as noted at [162], it lasts (presuming it is not opted out of) until the end of the 48th month after the month in which the person acquired a permanent place of abode in New Zealand (which will not necessarily be at the time of migration here) or satisfied the 183-day rule, whichever is earlier.

## Examples illustrating the transitional resident rules

### Example | Tauira 17 – Calculating the transitional residence period

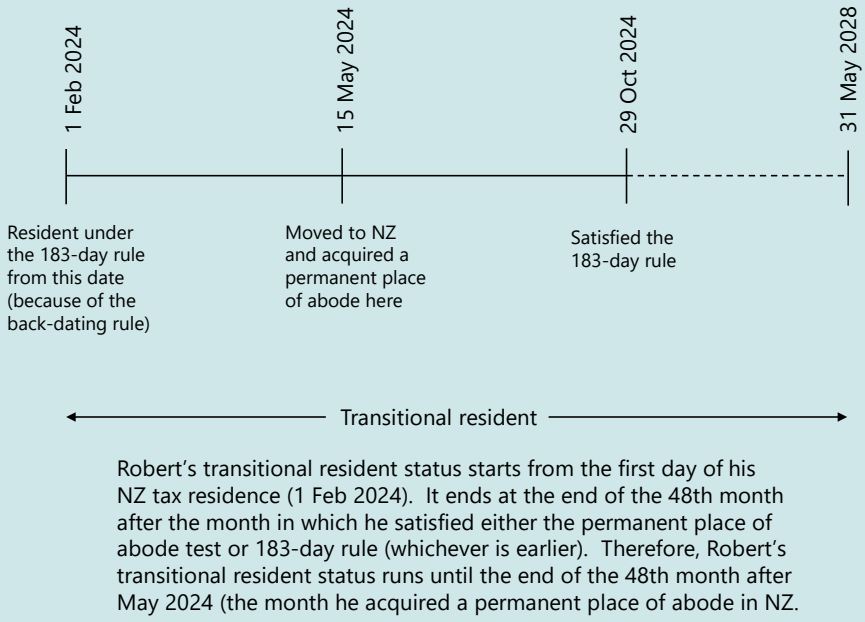
**Facts:** Robert visited New Zealand on 1 February 2024 for a job interview, and stayed here until 16 February 2024. On 15 May 2024 he relocated here permanently and

[10] If the spouse or partner is eligible to be a transitional resident.

[11] *Tax Information Bulletin* Vol 18, No 5 (June 2006): 103.

[12] *Tax Information Bulletin* Vol 19, No 3 (April 2007): 83.

acquired a permanent place of abode at that time. On 29 October 2024 he satisfied the 183-day rule and was deemed to be tax resident in New Zealand from 1 February 2024 because of the back-dating rule in s YD 1(4). He has never been tax resident in New Zealand before and has not elected not to be a transitional resident.




Robert's transitional resident status starts from the first day of his NZ tax residence (1 Feb 2024). It ends at the end of the 48th month after the month in which he satisfied either the permanent place of abode test or 183-day rule (whichever is earlier). Therefore, Robert's transitional resident status runs until the end of the 48th month after May 2024 (the month he acquired a permanent place of abode in NZ.

**Result:** Robert qualifies for transitional residence. His status as a transitional resident would run from 1 February 2024 to 31 May 2028, provided he remains resident here and does not make an election not to be a transitional resident.

**Explanation:** Robert is resident in New Zealand from 1 February 2024, under the 183-day rule and s YD 1(4). Robert has never been a tax resident or transitional resident in New Zealand before and has not elected to not be a transitional resident. Therefore, he satisfies the requirements of s HR 8(2).

Although Robert is treated as tax resident in New Zealand from 1 February 2024 (because of the back-dating rule in s YD 1(4)), he did not meet the requirements of either s YD 1(2) or s YD 1(3) (ignoring the back-dating rule) for being a resident until 15 May 2024, when he moved here and acquired a permanent place of abode here. Robert acquired a permanent place of abode in New Zealand before he satisfied the 183-day rule. Therefore, his status as a transitional resident would run from 1 February 2024 (the date from which Robert is tax resident in New Zealand) to 31 May 2028 (the end of the 48th month after the month in which he acquired a permanent place of abode in New Zealand).

**Example | Tauira 18 – Date transitional residence ends when an application for Working for Families tax credits is made**

**Facts:** Jane returned to New Zealand on 10 May 2023 and met the criteria to be a transitional resident. Jane gave birth to her daughter on 25 June 2023 and made an application for Working for Families tax credits on 1 July 2023. The Working for Families account was registered on 21 July 2023 with the first payment made on 22 July 2023. Payments were backdated to the date of Jane's daughter's birth.

**Result:** Jane was a transitional resident from 10 May 2023 to 24 June 2023.

**Explanation:** Under s HR 8(3), the start date of transitional residence is the first day of residence. This is 10 May 2023 when Jane returned to New Zealand.

The end date of transitional residence is the earliest of the dates specified in s HR 8(3). Relevantly for Jane, the earliest date is the day she nominates under s HR 8(4) not to be a transitional resident.

Section HR 8(5) states that an application under s 41 of the Tax Administration Act 1994 for an income year is treated "for the period of the application" as a notice of election under s HR 8(4) not to be a transitional resident.

The period of the application for Working for Families starts from 25 June 2023 (being the date of Jane's daughter's birth), as Jane is eligible for Working for Families from that date. Therefore, Jane's transitional residence ends the day before, on 24 June 2023.

## Changes in tax residence

170. The tax residence of a person may change during an income year if the:

- person acquires a permanent place of abode in New Zealand during the year;
- person ceases to have a permanent place of abode in New Zealand;
- first day of more than 183 days of presence in New Zealand in any 12-month period falls within the year;
- first day of more than 325 days of absence from New Zealand in any 12-month period falls within the year; or
- person ceases to be absent from New Zealand in the service of the New Zealand Government.

171. If a person's circumstances change during an income year and this may affect their tax residence, they should get in touch with Inland Revenue to let us know. This can be done by filling in IR886: **New Zealand tax residence questionnaire**, and sending it to us (through myIR or by post). If a person has derived income in the year their tax

residence changes, they will need to file a tax return in New Zealand. A taxpayer may wish to consult a tax professional if they are in doubt about their situation.

172. A person's transitional residence status may also change during an income year.

173. Some of the more significant income tax considerations that may be relevant when the residence or transitional residence status of a person changes during an income year are set out from [175] to [186]. A change in residence may also have implications for the application of a DTA. Further, if a person is a settlor or beneficiary of a trust and their residence status changes there may be tax implications – see from [428].

174. Because of the back-dating rules that apply to the 183-day and 325-day rules, a change of residence during a particular income year may not be confirmed until the subsequent income year. Unless there has been a permanent or long-term move to or from New Zealand, this may cause uncertainties if a return needs to be filed in the interim (that is, if it is not known whether the 183-day or 325-day rule will end up being met). Care should be taken in these circumstances if a taxpayer is not certain about whether their residence status will change.

### Taxation of foreign-sourced income, and expenditure incurred in deriving it

175. If the person derived income from sources outside New Zealand during the income year, that income (subject to the transitional resident rules) is assessable income for New Zealand tax purposes if it was derived while the person was resident here (s BD 1(5)).

176. Therefore, where a person's residence status changes during an income year, the amount of any foreign-sourced income the person derived while resident in New Zealand must be determined. To do this, the total foreign-sourced income derived needs to be reasonably apportioned to the periods of residence and non-residence.

177. Expenditure incurred by a non-resident in deriving foreign-sourced income is not deductible. Therefore, if a person ceases to be resident in New Zealand during an income year and they incur expenditure in deriving foreign-sourced income, any of that expenditure incurred from the point they cease to be resident is not deductible.

### The financial arrangements rules

178. The FA rules are a timing regime that spreads income and expenditure under a financial arrangement over the term of the arrangement.

179. If a person becomes a New Zealand resident who is not a transitional resident during an income year and is a party to a financial arrangement, they may become subject to the FA rules.

180. Where this is the case, they are treated as having assumed the accrued obligation to pay consideration under the financial arrangement immediately after the time at which they became a resident who is not a transitional resident, and as having paid the market value that a contract to assume the obligation had at that time (s EW 37(2)). The deemed acquisition price is then taken into account in any subsequent base price adjustment required by s EW 29.

181. To the extent that the exemption from the FA rules for non-residents (s EW 9) previously applied, that exemption ceases to apply when the person becomes resident.

182. If a person ceases to be a New Zealand resident during an income year and is a party to a financial arrangement, they must calculate a base price adjustment for the financial arrangement as at the date of ceasing to be resident (s EW 29). If the base price adjustment is positive, it is income derived by the person in the year for which the calculation is made (s EW 31(3)). If the base price adjustment is negative, it is expenditure incurred by the person in the year for which the calculation is made, and a deduction may be allowed for that expenditure under s DB 6, s DB 7, s DB 8 or s DB 11 (s EW 31(4)).

183. An exception to this is if the person is a cash basis person and they cease to be a New Zealand resident before the first day of the fourth income year following the income year in which they first became a New Zealand resident. In that case, they do not need to calculate a base price adjustment for a financial arrangement they were a party to both before becoming and after ceasing to be a New Zealand resident (s EW 30(1)).

184. A financial arrangement is an excepted financial arrangement for a transitional resident if no other party is a New Zealand resident and the financial arrangement is not for a purpose of a business carried on in New Zealand by a party to the arrangement (s EW 5(17)).

### Provisional tax

185. If a person ceases to be a New Zealand resident during the income year, they may cease to be a provisional taxpayer for the purposes of the provisional tax rules (being the provisions listed in s RC 2).

186. Conversely, if a person becomes a New Zealand resident during the income year, they may become a provisional taxpayer and liable to pay provisional tax in accordance with the provisional tax rules regime (s RC 3).

## Relevance of double taxation agreements

187. New Zealand is party to DTAs with numerous countries. If someone is tax resident in both New Zealand and a country with which New Zealand has a DTA, the DTA determines what taxing rights each country has.

188. For a list of countries with which New Zealand has DTAs, see Tax treaties on Inland Revenue's website.

### Dual tax residence

189. Dual residence occurs when an individual is tax resident in two countries under the laws of each of those countries. This can easily arise, as different countries have different tax residence tests and may use more than one residence test.

190. One situation where dual residence is likely to arise in practice is where one country has a personal presence test and another relies on more permanent connections focusing on factors such as the location of a person's home or their domicile. For example, if country A deems a person to be tax resident after they have been present there for 183 days, and country B has a test based on other factors, a person normally resident in country B who is present in country A for a 6-month period may be tax resident in both countries. Consequently, if both countries tax on a worldwide basis an element of double taxation may occur.

191. The New Zealand residence rules for individuals are intended to make it relatively easy to become tax resident here, and more difficult to cease being tax resident. Therefore, dual residence may occur quite easily in the New Zealand context. Individuals who become tax resident in New Zealand under the 183-day rule may also be tax resident in another country under a test based on other factors, such as domicile. Conversely, individuals leaving New Zealand may remain tax resident here under the permanent place of abode test, while at the same time becoming tax resident in another country under a personal presence rule.

192. Where there is a DTA between New Zealand and another country, dual residence issues are resolved by applying the residence article in the DTA. The object of the residence article is to ensure taxpayers are precluded from having dual residence for DTA purposes.

193. Where a taxpayer is tax resident under the domestic laws of New Zealand and the DTA partner, dual residence is avoided for the purposes of the DTA by applying a series of tie-breaker tests to allocate tax residence to one of the countries. That allocated tax residence is then relevant to what taxing rights each of the countries has in relation to matters covered by the DTA.

194. Section BH 1(4) states that DTAs have overriding effect:

> **BH 1 Double tax agreements**
>
> ...

*Overriding effect*

(4) Despite anything in this Act, except subsection (5), or in any other Inland Revenue Act or the Official Information Act 1982 or the Privacy Act 1993, a double tax agreement has effect in relation to—

(a) income tax:

(b) any other tax imposed by this Act:

(c) the exchange of information that relates to a tax, as defined in paragraphs (a)(i) to (v) of the definition of tax in section 3 of the Tax Administration Act 1994.

195. The Court of Appeal in *CIR v ER Squibb & Sons (NZ) Ltd* (1992) 14 NZTC 9,146 (CA) at 9,154 said this means that "wherever and to the extent that there is any difference between the domestic legislation and the double tax agreement provision, the agreement has overriding effect". This means the domestic legislation must be read together with the relevant DTA articles.

196. When a person who is tax resident in New Zealand under domestic law is deemed to be resident in another country for the purposes of a DTA, the person remains liable to New Zealand income tax on their worldwide income on the basis of their tax residence here under domestic law. However, the liability is modified by any restrictions the DTA imposes on New Zealand's right to tax persons who are deemed to be resident in the other country for the purposes of the DTA.

197. For example, if the person receives a dividend from a New Zealand resident company, the resident withholding tax (RWT) on the dividend would be calculated on the basis of the normal rate, but would be subject to the limitation the DTA imposes on New Zealand's right to tax dividends derived by someone deemed to be resident of the DTA partner for DTA purposes. In most cases, the amount of tax that could be levied in New Zealand could not exceed 15% of the gross amount of the dividend.[13]

198. Another example is someone who is tax resident in New Zealand under domestic law but deemed to be tax resident in another country for the purposes of a DTA, and who has a bond portfolio. As the person remains tax resident in New Zealand under domestic law, the FA rules apply and must be used to calculate the person's income in respect of the portfolio, with the DTA rates then being applied to that income. Because the person is tax resident in New Zealand under domestic law, the income is not "non-resident passive income", so the withholding tax limitation in s DA 2(5) does not apply to deny the person the ability to claim any relevant deductions for expenditure incurred in deriving the income (for example, portfolio management fees).

[13] For these purposes, the gross amount of the dividend is the net dividend plus withholding tax deducted. Imputation credits should be ignored.

199. The DTA residence articles are relevant **only for the purposes of the DTAs**. Someone who is resident in two countries under the domestic tax laws of those countries remains resident in both countries for other tax purposes (for example, GST).

### Residence article

200. The residence article in many of New Zealand's DTAs closely follows the residence article in the OECD's *Model Tax Convention on Income and on Capital* (the OECD Model Convention). The residence article (art 4) of the OECD Model Convention, as it relates to individuals, provides:

> 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
>
> 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> *a)* he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
>
> *b)* if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
>
> *c)* if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
>
> *d)* if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

201. As can be seen, the article applies when a person is a resident of both countries (Contracting States) under para 1. This does not include any person who is liable to tax in a state in respect only of income from sources in that state. When the article applies, the person's residence status for the purposes of the DTA is determined by applying a series of tie-breaker tests. The tie-breaker tests in the relevant DTA are applied in order, until residence can be determined under one of them.

202. The DTA residence tie-breaker tests apply only where the person concerned is resident of both countries under para 1 of art 4. Therefore, if a person comes to New Zealand from, say, Canada, becomes resident in New Zealand and ceases to be resident in Canada (so ceases to be liable to tax in Canada by reason of any of the listed criteria or similar criteria), it is clear the person is resident in New Zealand for both the purposes of the Act and the DTA with Canada. The residence allocation rules are not relevant in these circumstances because the person is not a resident of Canada under para 1 of

art 4. The DTA is still relevant in terms of allocating taxing rights for any Canadian-sourced income.

***Interpretation of terms used in the residence article***

203. The terms "permanent home", "personal and economic relations" (or "centre of vital interests") and "habitual abode" are not defined in any of New Zealand's DTAs.

204. The "general definitions" article of New Zealand's DTAs typically provides that in applying the DTA, "unless the context otherwise requires", any term not defined in the DTA has the meaning it has under the laws of that state for the purposes of the taxes to which the DTA applies, with any meaning under the tax laws of that state prevailing over any meaning of the term under other laws of that state. (See also OECD Commentary on art 3 at para 13.1).

205. This means the meaning of an undefined term in a DTA may be ascertained by reference to domestic laws generally, not just tax laws – though any tax law meaning will prevail.

206. But, as noted, reference to any meaning that undefined terms may have under domestic law is relevant only if the context does not require otherwise. One of the general rules of treaty interpretation in art 31 of the Vienna Convention on the Law of Treaties, which New Zealand has ratified, is that a special meaning is given to a term if it is established that the parties so intended (para 4 of art 31).

207. If a DTA between New Zealand and another country uses the wording of a particular article in the OECD Model Convention (or very similar wording), the Commissioner considers it can be inferred that the OECD commentary on that article reflects the meaning the parties intended to be given to any undefined terms in that article. The Commissioner considers that in such circumstances, the OECD commentary is a significant aid to interpreting the relevant undefined terms. In such a case, the Commissioner considers that the context requires the undefined term not simply be regarded as having the meaning (if any) it has under domestic law – which is the default position under the general definitions article.

208. The OECD commentary on the residence article gives guidance on the meanings to be given to the undefined terms "permanent home", "personal and economic relations" (or "centre of vital interests") and "habitual abode". New Zealand's DTAs generally follow, or closely follow, the wording in the OECD Model Convention. Therefore, the Commissioner considers that the OECD commentary on those terms is a significant aid to interpreting their meaning, and any case law (New Zealand or foreign) that considers the meaning of the undefined term in a DTA context should also be considered.

***Permanent home***

209. The first test in the residence articles in New Zealand's DTAs gives preference to the country in which the person "has a permanent home available to [them]". The test has three elements: there must be a home, it must be permanent, and it must be available for use.

210. It is clear from the OECD commentary that the concept of "home" is used in its physical sense. The commentary states that any form of home may be taken into account – that is, a house, apartment, rented or furnished room (OECD commentary on art 4 at para 13).

211. The OECD commentary states that for a home to be permanent "the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration" (OECD commentary on art 4 at para 12). Therefore, the test is an objective one, and it is necessary to consider the conditions under which the person retained the home and then conclude from that whether the home has the quality of permanence.

212. The OECD commentary on art 4 of the OECD Model Convention emphasises that the permanence of the home is essential, and states that this means that "the person has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purposes of a stay which, owing to the reasons for it, is necessarily of short duration". The OECD commentary gives as examples travel for pleasure, business travel, educational travel, attending a course at a school, etc. (OECD commentary on art 4 at para 13).

213. The home must be available for the person's use. Availability in this context is not based on mere occupation or immediate availability for occupation. "Available" is a broad term that includes several concepts including factual availability and legal availability (that is, legal rights and controls over the property). Determining whether a home is available involves assessing factors such as whether the:[14]

- home is capable of being used by the person;
- person has the right to determine occupancy and possession of the property;
- person has the power to dispose of the property.

214. Applying these factors, the Commissioner considers that a home will generally be unavailable to the landlord as a permanent home when:

- it is let out on an arm's length basis to a non-associated person;

[14] See *Case 12/2011* (2011) 25 NZTC 1-012 (TRA) and *Case J41*.

- it is let out under a tenancy to which the Residential Tenancies Act 1986 applies (including one let on a periodic tenancy).

215. If the house is let to an associated person or friend it may still be available to the owner as a permanent home, if the Residential Tenancies Act 1986 does not apply to the tenancy.

216. The Commissioner is of the view that owning or personally renting accommodation is not fundamental to a person having a permanent home available to them. For example, a person may have a permanent home where accommodation is owned or leased by an employer, a spouse or partner, a company or a trust (not controlled by the person), or where the person is able to live somewhere rent-free. If a person owns or personally rents a home that is a relevant consideration, but if a home is arranged or retained in some other way (by or through a third party, for example) this is not of itself determinative of whether the person has a permanent home. This is consistent with the view expressed in G A Harris' 1990 *New Zealand's International Taxation*. To the extent that *Case 12/2011* 25 NZTC 1-012 (TRA) may arguably suggest otherwise, the Commissioner does not agree.

217. If it is apparent that a person who is dual resident has a permanent home available in one country or jurisdiction that puts an end to the matter unless the person can establish that they also have a permanent home available in the other country or jurisdiction.

218. If a person has a permanent home available in both countries, the next test is generally the personal and economic relations test. The DTA between New Zealand and Malaysia[15] differs in that if residence cannot be resolved under the permanent home test, the next test is the habitual abode test, followed by the personal and economic relations test.

219. Where a person does not have a permanent home available to them in either country, the next test for consideration is generally the habitual abode test. However, this is not the case under New Zealand's DTAs with Australia,[16] Thailand,[17] the Republic of South Africa,[18] the United Arab Emirates,[19] Spain[20] and Papua New Guinea.[21] Under those DTAs, where a person does not have a permanent home available to them in either

[15] Signed on 19 March 1976.

[16] Signed on 26 June 2009.

[17] Signed on 22 October 1998.

[18] Signed on 6 February 2002.

[19] Signed on 22 September 2003.

[20] Signed on 28 July 2005.

[21] Signed on 29 October 2012.

country the next test is the personal and economic relations test, followed by the habitual abode test.

***Personal and economic relations (centre of vital interests)***

220. Generally, the next test in the residence articles in New Zealand's DTAs gives preference to the country "with which [the person's] personal and economic relations are closer (centre of vital interests)".

221. In applying this test, the person's personal and economic relations with both New Zealand and the other country must be considered, and the country with which these relations are closer (or, in other words, their centre of vital interests) must be determined.

222. The OECD commentary on art 4 of the OECD Model Convention indicates that the following types of factors may be taken into account in applying the test (at para 15):

> … regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

223. It is clear from the commentary that the "personal relations" referred to are wider than immediate family relations. Social relations are also taken into account, as are political, cultural and other activities. Sporting activities, for example, would fall into this latter category. Overall, a wide range of personal connections is considered.

224. The importance of the location of a person's family depends on the person's circumstances (that is, for some people the location of their family is going to be significant, for others not so). In many circumstances, personal relations will be more significant than economic relations because the location of a person's family is often highly significant. However, the issue needs to be determined on the specific facts relating to the person.

225. In *Hertel v MNR* 93 DTC 721 (TCC) at 723, Sobier TCCJ commented that:

> In determining the centre of vital interests, it is not enough to simply weigh or count the number of factors or connections on each side. The **depth of the roots** of one's centre of vital interests is more important than their number.

226. Assessing the depth of a person's roots requires weighing up the circumstances as a whole to determine which locality is of greater significance to the person. Some commentators have suggested that greater weight should be given to personal relations. However, the Commissioner considers that the better view is that the "centre of vital interests" concept is a composite one and does not give preference to either personal or economic relations. The OECD commentary states (at para 15) that "considerations based on the personal acts of the individual must receive special attention". The Commissioner considers that "personal acts" encompasses acts concerning both economic relations (such as seeking employment in a country) and personal relations (such as activities related to a person's family).

227. If a person's economic and personal relations are overall evenly balanced between New Zealand and another country (though personal relations are stronger with one country and economic relations with the other), the person has no centre of vital interests, as the factors are regarded as being of equal weight. In this situation, the next test needs to be considered.

228. A person's historical association with a country is relevant when considering the personal and economic relations test. If a person has always lived and worked in one country and retains a home, family and possessions there, it is likely their personal and economic relations are closer with that country even if a new home is established in another country (see *Gaudreau v R* 2005 DTC 66 (TCC) and *Yoon v R* 2005 DTC 1109 (TCC)). For example, a university lecturer going overseas on sabbatical leave for 12 months who has lived and worked in New Zealand for a significant time and retains their home and possessions in New Zealand, will have closer personal and economic relations with New Zealand than with the other country.

229. The focus of the test is on determining the country with which the person has closer personal and economic relations (their centre of vital interests). If such a determination cannot be made under the personal and economic relations test, the next test needs to be considered. Generally, the next test is the habitual abode test.

***Habitual abode***

230. Generally, the habitual abode test applies if a person:

- has a permanent home available in both countries, and the country with which their personal and economic relations are closer (their centre of vital interests) cannot be established; or

- has no permanent home available in either country.[22]

231. The focus of the test is on whether the person has a habitual abode in New Zealand or the other country or both. As stated by the Canadian Federal Court of Appeal in *Lingle v R* 2010 FCA 152 (at para [6]), the concept of a habitual abode:

> … involves notions of frequency, duration and regularity of stays of a quality which are more than transient. To put it differently, the concept refers to a stay of some substance in the jurisdiction as a matter of habit, so that the conclusion can be drawn that this is where the taxpayer normally lives.

232. A person has a habitual abode in a country if they live there habitually or normally. A person may habitually live in more than one country – the enquiry is not about assessing the country in which the person's abode is more habitual, but about whether they have a habitual abode in New Zealand or the other country or both.

233. The OECD commentary on art 4 of the OECD Model Convention indicates that the test is applied by taking into account all of a person's stays in a country, not only those at a home the person owns or rents there. For example, if a person has permanent homes available in both New Zealand and Australia, all stays in New Zealand, whether at their permanent home or elsewhere, are considered in determining whether the person has a habitual abode here.

234. It is important to consider the particular circumstances of the person when determining whether they have a habitual abode in a country. In assessing whether a stay is more than transient, the reasons for the stay are relevant. For example, where a person spends about 100 days in New Zealand in a year because they return to New Zealand every weekend, this may suggest the person has a habitual abode here. On the other hand, three stays of about 30 days' duration each in a year, for a course of medical treatment, may indicate that those stays are transient and not by themselves indicative of a habitual abode here.

235. The focus is on where the person normally lives **during the period of dual residence**. In obvious cases there is no need to consider other periods. However, a wider view (that is, looking beyond the period of dual residence) may assist in cases where it is unclear or when determining whether the stays in a particular country are transient or of substance.

236. As the OECD commentary on art 4 states:

> 19.1 Subparagraph *b)* does not specify over what length of time the determination of whether an individual has an habitual abode in one or both States must be made. The determination must cover a sufficient length of time for it to be possible to ascertain the frequency, duration and regularity of stays that are part of the settled routine of the individual's life. Care should be taken, however, to

[22] As noted at [219], the DTAs between New Zealand and Australia, Thailand, the Republic of South Africa, the United Arab Emirates, Spain, and Papua New Guinea are exceptions to this.

> consider a period of time during which there were no major changes of personal circumstances that would clearly affect the determination (such as a separation or divorce). The relevant period for purposes of the determination of whether an individual has an habitual abode in one or both States will not always correspond to the period of dual residence, especially where the period of dual residence is very short. …

237. The Commissioner considers that where it is appropriate to consider a period outside the period of dual residence, the appropriate length of time outside the period of dual residence to consider is just the amount necessary to determine whether the person had a habitual abode in New Zealand during the period of dual residence. The Commissioner now considers that the period looked at in applying the habitual abode test in the matter that became *Case* 12/2011 was inappropriately long.[23]

238. The OECD commentary on art 4 gives the following example of a situation where the period of dual residence is short, so it would be appropriate to consider a longer period than the period of dual residence:

> 19.1 … Assume that an individual resident of State C moves to State D to work at different locations for a period of 190 days. During that 190-day period, he is considered a resident of both States C and D under their respective domestic tax laws. The individual lived in State C for many years before moving to State D, remains in State D for the entire period of his employment there and returns to State C to live there permanently at the end of the 190-day period. During the period of his employment in State D, the individual does not have a permanent home available to him in either State C or State D. In this example, the determination of whether the individual has an habitual abode in one or both States would appropriately consider a period of time longer than the 190-day period of dual-residence in order to ascertain the frequency, duration and regularity of stays that were part of the settled routine of the individual's life.

239. In the Commissioner's view, in the above example, where the period of dual residence is only about half a year, it is not necessary to look beyond about a year either side of the period of dual residence to be able to ascertain whether the individual had a habitual abode in either or both of the states. Of course, the period that would appropriately be looked at depends on the particular facts of any situation, including how transient or settled the routine of the individual's life was both in and beyond the period of dual residence.

### *Nationality*

240. When a person has a habitual abode in both countries or in neither of them, residence is generally determined under New Zealand's DTAs on the basis of nationality or citizenship. In cases where nationality is stated to be the test, the concept of nationality (for individuals) is generally defined in relation to New Zealand to be a

[23] In any event, it is noted that the Taxation Review Authority's discussion of how the habitual abode test would apply to the facts of that case (which was along the lines of submissions made by counsel) was *obiter* – the authority having already found the taxpayer to be solely resident in New Zealand at all material times under the earlier tie-breaker tests.

person who is a New Zealand citizen. A New Zealand citizen is someone who has citizenship here under the Citizenship Act 1977.

***Mutual agreement***

241. If the residence issue cannot be resolved under the tie-breaker tests, the residence article provides that the question may be resolved by mutual agreement between the competent authorities of the Contracting States.

## Examples illustrating the DTA residence tie-breaker tests

**Note:** The following examples deal **only** with the DTA residence tie-breaker tests. They do not consider the domestic residence tests in detail, any DTA implications, or any potential application of the transitional resident rules.

**Example | Tauira 19 – The permanent home test**

**Facts:** Stacey, who is employed as a university lecturer, travels to the United Kingdom for 15 months' sabbatical leave at a United Kingdom university. While on leave, Stacey remains in the employment of a New Zealand university. She is required to work for the university on her return to New Zealand.

Stacey's partner travels with her to the United Kingdom.

Stacey and her partner let their house in New Zealand to tenants while they are in the United Kingdom. The tenancy is a periodic tenancy under the Residential Tenancies Act 1986, so is terminable with a 63-day notice period if Stacey requires it as her principal place of residence. The tenants are not associated with or friends of Stacey or her partner.

While in the United Kingdom, Stacey and her partner rent a house near the university where Stacey spends her sabbatical leave.

Stacey remains a member of several local clubs and organisations in New Zealand and keeps most of her personal property, including investments, in New Zealand (looked after and managed by family members).

For the purposes of this example, it is assumed Stacey is resident for tax purposes in the United Kingdom under the relevant United Kingdom legislation.

**Result:** Stacey is resident in both New Zealand and the United Kingdom under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and the United Kingdom, she is deemed to be a resident of the United

Kingdom from the time the tenancy in the United Kingdom starts until it ends and Stacey returns to New Zealand.

**Explanation:** Stacey is resident in New Zealand under s YD 1 because she has a permanent place of abode here. As noted above, it is assumed she is also resident for tax purposes in the United Kingdom under the relevant United Kingdom legislation.

The question of Stacey's residence for the purposes of the DTA is resolved by the permanent home test. Stacey does not have a permanent home available in New Zealand because she and her partner have rented out their New Zealand home on arm's length terms to tenants who are not associated with them or friends of theirs.

Stacey has a permanent home in the United Kingdom as she has rented a house there for 15 months. Although Stacey's stay in the United Kingdom is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary.

As Stacey has a permanent home in the United Kingdom and does not have one in New Zealand, she is deemed to be a resident of the United Kingdom for the purposes of the DTA from the time the tenancy in the United Kingdom starts until it ends and Stacey returns to New Zealand.

**Example | Tauira 20 – The permanent home, habitual abode, and personal and economic relations tests**

**Facts:** Luke owns a house in New Zealand and one in Malaysia. He has extensive business interests in both countries.

Luke regularly spends short periods in New Zealand, and these add up to about 5 months of the year. Luke's visits to New Zealand are primarily for business purposes, but he also spends time catching up with family here.

Luke works and lives in Malaysia for the remainder of the time, where he also occupies positions of responsibility in the community. Luke is married, and his wife and children live in Malaysia.

For the purposes of this example, it is assumed Luke is resident for tax purposes in Malaysia under the relevant Malaysian legislation.

**Result:** Luke is resident in both New Zealand and Malaysia under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Malaysia, Luke is treated solely as a Malaysian resident.

**Explanation:** Luke is resident in New Zealand under s YD 1 as he has a permanent place of abode here. As noted above, it is assumed he is also resident for tax purposes in Malaysia under the relevant Malaysian legislation.

Luke has permanent homes available to him in both New Zealand and Malaysia because his houses in both countries are continuously available to him for use.

As Luke has a permanent home available to him in both countries, the next question is whether he has a habitual abode in either country. (As noted at [217], the order of the tie-breaker tests in the DTA between New Zealand and Malaysia differs from that in New Zealand's other DTAs. Under New Zealand's other DTAs, if a person has a permanent home available in both countries, the personal and economic relations test is applied next.)

Luke has a habitual abode in Malaysia because he habitually lives there for about 7 months of the year. Luke also has a habitual abode in New Zealand because he habitually spends about 5 months of the year here. The reasons for Luke's stays in New Zealand (business and visiting family) suggest the stays are more than transient in nature.

As Luke has a habitual abode in both New Zealand and Malaysia, it is necessary to determine whether his personal and economic relations are closer with Malaysia or with New Zealand. (Again, note the difference in the order of the tie-breaker tests in the DTA between New Zealand and Malaysia compared to New Zealand's other DTAs.)

Luke has close economic relations with both countries due to his extensive business interests in both countries. Luke also has personal relations with both countries. These personal relations are considered to be stronger with Malaysia, given that Luke's wife and children live there and he is involved in the community there. Therefore, weighing up the circumstances as a whole, Luke's personal and economic relations are closer with Malaysia. Therefore, Luke is treated solely as a Malaysian resident for the purposes of the DTA.

**Example | Tauira 21 – The permanent home test**

**Facts:** Megan, who normally resides in Canada, is seconded to New Zealand by her Canadian employer for 18 months. While in New Zealand, Megan works for the New Zealand subsidiary of her Canadian employer.

While she is in New Zealand, Megan lets her house in Canada out for a fixed-term of 18 months. The tenant is not a friend of or associated with Megan.

Megan lives in rented accommodation in New Zealand.

Megan leaves most of her personal property in Canada, and most of her investments are in Canada.

For the purposes of this example, it is assumed Megan is resident for tax purposes in Canada under the relevant Canadian legislation.

**Result:** Megan is resident in both New Zealand and Canada under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Canada, Megan is deemed to be a resident only of New Zealand.

**Explanation:** Megan is resident in New Zealand under s YD 1 as she is present here for more than 183 days in a 12-month period. As noted above, it is assumed she is also resident in Canada under the relevant Canadian legislation.

Megan has a permanent home available to her in New Zealand as she has rented accommodation here for 18 months. Although Megan's stay in New Zealand is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary.

Megan does not have a permanent home available to her in Canada as her house there is rented out on arm's length terms to a tenant who is not associated with her or a friend of hers.

As Megan has a permanent home available to her in New Zealand but not in Canada, she is deemed to be a resident only of New Zealand for the purposes of the DTA.

**Example | Tauira 22 – The permanent home and habitual abode tests**

**Facts:** Jonty grew up in South Africa, and moved to Canada with his parents when he was 16 (when his father was temporarily transferred there for work). After 3 years, his parents moved back to South Africa. By this time, Jonty had started university in Canada and decided to stay there. Jonty graduated and had been working in Canada for 2 years when he was offered a 2-year secondment to New Zealand by his Canadian employer.

While in New Zealand, Jonty is employed by the New Zealand subsidiary of his Canadian employer.

Jonty retains his bank accounts in Canada and opens new ones in New Zealand. He does not transfer his Canadian superannuation into his New Zealand superannuation fund, as he may return to Canada at the end of his secondment.

Jonty lived in a rented flat in Canada, which he gave up when he moved to New Zealand.

Jonty has to travel between Auckland and Wellington, on a roughly week-about basis, for work, and he lives in his employer's serviced apartments in both cities.

Jonty has very little personal property. What he does have he either brings with him to New Zealand or sells before leaving Canada.

At the end of the 2-year secondment, Jonty's position in New Zealand is extended for another 18 months.

During the 3½ years Jonty lives in New Zealand, he returns to Canada once, for a 3-week holiday.

For the purposes of this example, it is assumed Jonty is resident for tax purposes in Canada under the relevant Canadian legislation.

**Result:** Jonty is resident in both New Zealand and Canada under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Canada, Jonty is deemed to be a resident only of New Zealand.

**Explanation:** Jonty is resident in New Zealand under s YD 1 as he is personally present here for more than 183 days in a 12-month period. As noted above, it is assumed he is also resident for tax purposes in Canada under the relevant Canadian legislation.

Jonty does not have a permanent home available to him in Canada because he gave up his rented flat there. Jonty does not have a permanent home available in New Zealand because his homes here (a series of serviced apartments) are not permanent.

As Jonty does not have a permanent home available in either country, the question is whether Jonty has a habitual abode in either country.

Jonty has a habitual abode in New Zealand because he habitually or normally lives here during the period of dual residence. The period of dual residence is sufficiently long that it is not necessary to look beyond that period to determine whether Jonty's time in New Zealand is transient or of substance. It is apparent that for the 3½ years of dual residence Jonty has a habitual abode in New Zealand.

Jonty clearly does not have a habitual abode in Canada during the period of dual residence – he returned there only once in that time, for a holiday of short duration. Consequently, Jonty is deemed to be a resident only of New Zealand for the purposes of the DTA.

# Part 2: Tax residence of companies

## Overview

242. Under s YD 2, a company is a New Zealand tax resident if:

- it is incorporated in New Zealand;
- its head office is in New Zealand;
- its centre of management is in New Zealand; or
- its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.

243. A company may easily satisfy more than one, or even all, of these tests. Such a company is clearly resident in New Zealand. However, the tests are alternatives, and a company needs to satisfy only one of them to be tax resident here.

244. A "foreign company" is a company that is not tax resident in New Zealand under s YD 2 or is treated under a DTA as not being tax resident in New Zealand (s YA 1). There are different tests to determine the country in which a foreign company is treated as tax resident for the purposes of the "international tax rules" (as defined in s YA 1). This is discussed briefly from [363].

## Company definition

245. "Company" is defined in s YA 1. The relevant definition for the purposes of the residence rules is:

> **YA 1 Definitions**
>
> In this Act, unless the context requires otherwise—
>
> ...
>
> **company**—
>
> (a) means a body corporate or other entity that has a legal existence separate from that of its members, whether it is incorporated or created in New Zealand or elsewhere:
>
> (ab) does not include a limited partnership, other than a listed limited partnership or foreign corporate limited partnership:
>
> (abb) does not include a look-through company, except in the PAYE rules, the FBT rules, the NRWT rules, the RWT rules, the ESCT rules, the RSCT rules, and for the purposes of subpart FO (Amalgamation of companies):

...

(b) includes a unit trust:

(c) includes a group investment fund that is not a designated group investment fund, but only to the extent to which the fund results from investments made into it that are—

(i) not from a designated source, as defined in section HR 3(5) (Definitions for section HR 2: group investment funds); and

(ii) not made before 23 June 1983, including an amount treated as invested at that date under the definition of **pre-1983 investment** in section HR 3(8):

(d) includes an airport operator:

(e) includes a statutory producer board:

(f) includes a society registered under the Incorporated Societies Act 1908:

(g) includes a society registered under the Industrial and Provident Societies Act 1908:

(h) includes a friendly society:

(i) includes a building society:

...

246. As the definition extends to any entity with a legal existence separate from that of its members, this includes a wide variety of entities established under the laws of other countries that, although not companies in the strict sense, are equivalent to companies. If any such entity satisfied any of the company residence tests in s YD 2, it would be a New Zealand tax resident company so would be liable for tax here on its worldwide income. Similarly, if a trust settled in another jurisdiction falls within the definition of "unit trust" in the Act, it will be a company for the purposes of applying the New Zealand company residence tests.

247. Usually a look-through company (LTC) is treated as being transparent, but for some tax purposes it is still treated as a company. For example, an LTC is not transparent for the purposes of the NRWT rules and the RWT rules. In those circumstances, the tax residence of the owners of the company is not relevant. This means someone paying passive income to an LTC that meets the requirements of subpart HB can assume they are making a payment to a New Zealand tax resident company and not to the owners of the company. The company can be assumed to be a New Zealand tax resident company because to qualify as an LTC in the first place the company needs to be a New Zealand tax resident under s YD 2 and any applicable DTA.

## Place of incorporation test

248. Section YD 2(1)(a) provides that a company is a New Zealand tax resident if it is incorporated in New Zealand. This is an objective and easily ascertainable test of corporate residence – a company is resident if it has been through a process of incorporation in New Zealand. A company incorporated under the Companies Act 1993 is resident here.

249. The place of incorporation test obviously cannot apply to companies incapable of being incorporated. For example, there is no incorporation procedure for unit trusts in New Zealand, so they cannot be tax resident here under s YD 2(1)(a). However, companies that cannot be incorporated may be resident in New Zealand under one of the other tests in s YD 2.

## Head office test

250. Section YD 2(1)(b) provides that a company is a New Zealand tax resident if its head office is in New Zealand.

251. The word "office" is defined in *The Oxford English Dictionary* (online ed, 3rd edition, Oxford University Press, 2013, accessed 20 August 2024) (relevantly) as meaning:

> **office, *n.***
>
> **6.a.** A room, set of rooms, or building used as a place of business for non-manual work; a room or department for clerical or administrative work. Also (in extended use): the staff of such a room, department, etc.

252. The Commissioner therefore considers that "office" in the context of the head office test means a physical place from where the business is conducted – a place where the administration and management (in the broadest sense) of a business is carried out.

253. The head office of a company is the office that is above all others – the place of administration and management that is superior to all others. It is the office from which the business of the company is directed and carried on.

254. An office is superior to other offices of the company if individuals working in those other offices are responsible to individuals located in that office. The focus of the test is therefore on a physical place, in the sense of a building, from which the company's overall operations are directed and carried on.

255. In determining whether a company has its head office in New Zealand the following factors may be relevant:

- The location of senior management staff. If senior management operate from an office in New Zealand, this is a strong indicator that the New Zealand office is the company's head office.

- Where the major strategic and policy decisions are made. If individuals working in other offices act in accordance with decisions and policy made at a particular office, that office is likely to be the head office.
- Whether specialised functions (for example, of an advisory nature) are carried out in a particular office. If several specialised functions are carried out in a particular office this may indicate that the office is the head office, though the significance of this factor depends on the company's overall structure.
- Whether the staff of the company consider that an office is the head office.

256. Weighing up these factors should identify whether a company's head office is in New Zealand. Usually, the location of a company's head office will be certain. If a company is engaged in carrying on business activities, identifying the company's highest office should not be difficult. An example where it could be more difficult is where a company is merely a passive investment vehicle. The passive nature of the company's activities may make identifying its highest office difficult, or the company may simply have no office. Another example where it may be difficult to identify a head office, or where there may not be one, is where a senior team carries out the administration and management of the business from different offices and members meet virtually.

257. The test must be applied in respect of the particular company being considered. If the company is part of a group of companies, while there may be some level of direction given by other companies in the group (for example, if a regional or headquarter office is operated by another company in the group), that in itself does not amount to that office being the head office of the company being considered.

## Centre of management test

### Description of the test

258. Section YD 2(1)(c) provides that a company is a New Zealand tax resident if its centre of management is in New Zealand. The focus of the test is on the centre of management of the company as a whole, not the management of only part of a company's operations. In determining where the centre of management of a company as a whole is, acts of management at various levels may be relevant (see: *Vinelight Nominees Ltd and Weyand Investments Ltd v CIR* [2013] NZCA 655).

259. The test is a *de facto* test – that is, the focus is on where the company's centre of management is as a matter of fact (*NZ Forest Products Finance NV v CIR* (1995) 17 NZTC 12,073 (HC)). The test is not limited to consideration of the company's formal management structures, such as those set out in corporate governance documents. The test focuses on how the company is managed in reality, even if that conflicts with the governance documents or formal structures.

260. Therefore, if the senior executives of a company established in a foreign country manage the company on the basis of instructions from persons located in New Zealand, without exercising their independent minds as to how the company should be managed, the centre of management of the company is in New Zealand rather than in the foreign country. This is the case even if the persons giving instructions from New Zealand are not officers of the company under the company's constitution. That said, the fact there are persons who influence the decisions made by the executives managing a company, or who provide guidance to them, does not necessarily amount to *de facto* management of the company. It depends on whether those charged with the management of the company are in fact exercising that management function independently, not merely doing the bidding of others who are in reality managing the company.

### Centre of management of the entire company

261. The centre of management test focuses on the centre of management of the entire company. Therefore, if a company that operates in several countries has a centre of management in New Zealand, but that centre of management relates only to the company's New Zealand operations, the company is not tax resident here under the centre of management test.

262. If management of a company is carried out by persons in different countries, it may be necessary to consider the functions carried out in each country to determine where the company's centre of management is.

263. In some cases, multinational companies conduct business in New Zealand directly through a branch rather than through a locally established subsidiary. The local branch may have its own executives and, occasionally, its own board of directors. In this situation, although the company has significant links with New Zealand, it is not tax resident here under the centre of management test. The management of a branch does not constitute the centre of management of a company as a whole, only the centre of management of a part of the company.

264. On the other hand, companies incorporated outside New Zealand, that conduct operations outside New Zealand, may have their centre of management in New Zealand. Such companies are tax resident in New Zealand under the centre of management test despite their close connections with other countries.

### Comparison between the centre of management test and the head office test

265. It may well be that a company satisfies both the head office and centre of management tests, as the centre of management of a company is commonly located in its head office. However, the focus of the two tests is different. The head office test concentrates on a physical place (that is, on an office that constitutes a company's

highest office). By contrast, the focus of the centre of management test is not on identifying the quality of a particular office, but rather on the broader question of whether the company's management is centred in New Zealand. A company does not need to have an office in New Zealand to satisfy the centre of management test.

266. A company may have no office (so obviously no head office) in New Zealand, but its centre of management may be here because the management decisions are effectively undertaken from New Zealand. In this situation, the company is tax resident under the centre of management test, even though the head office test is not satisfied.

## Director control test

### Description

267. Section YD 2(1)(d) provides that a company is a New Zealand tax resident if its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.

### Definition of director

268. The relevant definition of "director" in s YA 1 provides that:

> **YA 1 Definitions**
>
> In this Act, unless the context requires otherwise—
>
> …
>
> **director**—
>
> (a) means—
>
> (i) a person occupying the position of director, whatever title is used:
>
> (ii) a person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act:
>
> (iii) a person treated as being a director by any other provision of this Act:
>
> (iv) in the case of an entity that does not have directors and that is treated as, or assumed to be, a company by a provision of this Act, any trustee, manager, or other person who acts in relation to the entity in the same way as a director would act, or in a similar way to that in which a director would act, were the entity a company incorporated in New Zealand under the Companies Act 1993:
>
> …

269. This extended definition of director ensures *de facto* directors are included when considering whether a company is a New Zealand tax resident under the director control test.

***Persons carrying out director's duties***

270. A person is treated as a director if they occupy the position of director, whether or not that title is used. That is, any person carrying out the duties of a director is a director.

***Persons giving directions or instructions to nominated directors***

271. A person is also treated as a director if those occupying the position of directors of a company are accustomed to act in accordance with the person's directions or instructions. For example, if the directors of a company incorporated in Hong Kong are accustomed to act in accordance with instructions from a New Zealand resident individual, that individual would be a director of the company. The company may therefore potentially be a New Zealand tax resident under the director control test, as control of the company by a director is exercised from here. The discussion from [291] explains the considerations to have regard to when there is exercise of directorial control both in New Zealand and elsewhere.

272. In practical terms, it is necessary to consider a pattern of decision-making to determine whether the nominated directors are accustomed to act in accordance with another person's directions or instructions (whether formal or otherwise).

273. The Commissioner considers that the directions or instructions do not need to be given directly to the persons occupying the position of directors. For example, where a chain of companies has directors who are accustomed to act in accordance with the directions or instructions of another person, the chain must be traced through to establish on whose directions or instructions the directors are accustomed to act. That person will be considered a director under the Act. For example, if the directors of company X are accustomed to act under instructions from the directors of company Y, and the directors of company Y act under instructions from a New Zealand resident A, then A is a director of both X and Y under the definition of director in s YA 1.

***Companies without conventional directors***

274. The definition of director in the Act extends to entities that do not have directors in the conventional sense. In the case of an entity that is treated as or assumed to be a company under the Act, a person who acts in the same way or a similar way as a director would act is treated as a director. A person falls within this part of the definition if they are involved in making the types of decisions a director of a company

would normally make. These decisions would include major strategic and policy decisions.

275. Therefore, the manager of a unit trust is a director because they are involved in making the major decisions in relation to the unit trust (for example, the decisions in relation to the management of the unit trust's investments, the marketing of interests in the unit trust, and the distribution policy of the unit trust). If the manager exercises control of the unit trust from New Zealand, the unit trust is a New Zealand tax resident.

#### *Companies as directors*

276. The definition of director in the Act is broad enough to encompass both natural persons and companies that are appointed as or that act as directors.[24] This may result in a company that is a New Zealand tax resident being treated as a director of a company established in another jurisdiction (see Example | Tauira 23). This could be relevant in considering whether directorial control of the foreign company is exercised in New Zealand.

277. Where there is a company that is a director, the location from which the company's representatives (eg, employees, executives or other designated representatives) exercise control will be relevant.

### Control by directors

278. The director control test focuses on where the directors exercise their directorial control of the company from – that is, the place from which the strategic and policy decisions are made. A company is resident in New Zealand under this test if directors are effectively controlling the company from New Zealand – that is, if the central and directing mind of the company is here.

279. The test is satisfied only if directors acting in their capacity as directors exercise control from New Zealand. If directors control a company from New Zealand in their capacity as shareholders, but not in their capacity as directors, the company is not tax resident here under the director control test.

#### *De facto test*

280. The director control test is satisfied if control of a company is exercised in New Zealand, whether or not decision-making by directors is confined to New Zealand. The test is one of *de facto* control – that is, the question is whether control of the company by directors is actually exercised from New Zealand.

[24] While only a natural person may be appointed as a director of a company under the Companies Act 1993, the laws of other countries may allow a company to be appointed as or act as a director.

281. Directors may exercise control of a company in several ways. For example, control may be exercised through:

- decisions made during formal directors' meetings;
- decisions made during a telephone call or video conference between directors;
- the signing of resolutions outside directors' meetings; or
- informal decisions made by directors, acting in their capacity as directors, outside the course of the directors' meetings.

282. The method by which directors exercise control of a company may vary considerably from case to case. Each case must be considered on its facts to determine the place from which the directors actually exercise control of the company.

283. The significance of the location of directors' meetings (or the location from which directors attend the meetings, if they attend online) will vary from case to case. If directors exercise control only during directors' meetings, then the location of the meetings (or the location from which directors attend) is of paramount importance. On the other hand, if control is exercised outside of directors' meetings, and the meetings are merely to formalise decisions that have already been made, the location of the meetings (or the location from which directors attend) is of little significance.

284. The fact directors of a company exercise directorial functions from New Zealand does not necessarily mean control of the company by its directors is exercised from New Zealand. For example, if the directors ordinarily exercise their powers in Australia, the fact they occasionally travel to New Zealand and make directorial decision from here does not mean the directors are exercising control of the company from New Zealand. All of the circumstances would be relevant to consider in terms of what is ordinarily the case.

285. If the nominated directors do not exercise control of a company, but rather *de facto* directors exercise control from New Zealand, the company is resident in New Zealand even though the *de facto* directors are not directors under the company's constitution.

286. Determining whether the nominated directors exercise true control requires consideration of how the company is, in reality, controlled. The fact the nominated directors may be accustomed to act in accordance with the directions or instructions of another person does not necessarily mean they are not exercising true control of the company. However, it means the person in accordance with whose directions or instructions they are accustomed to act would also be a director under the definition in s YA 1. If the nominated directors exercise their independent minds in undertaking their directorial functions, rather than acting as mere pawns or "rubber stamping" others' decisions, they are exercising true control of the company.

287. In considering whether the nominated directors are truly exercising directorial control, the remuneration provided to them may be a relevant consideration. If their remuneration does not reflect their apparent duties and responsibilities, the nominated directors may not be carrying the burden of decision-making responsibility. It is also appropriate to consider who the nominated directors are. In tax havens, for example, directors commonly have several hundred directorships. Such a situation may suggest the directors are not actively involved in making decisions, and that their directorial functions are exercised in accordance with outside instructions without the independent thought required for them to be considered to be exercising true control of the company. The circumstances of the exercise of the directorial functions need to be considered closely to determine whether the nominated directors are in fact exercising the directorial function independently or merely doing the bidding of others who are in reality controlling the company.

***Distinction between de facto control, influence and the provision of services***

288. In practice, it may be difficult to determine whether the nominated directors of a company are acting under directions or instructions from another person or are merely influenced but not controlled by another person. A majority shareholder, for example a parent company, normally influences to some extent the actions of the company in which it is a shareholder. However, if the majority shareholder exercises only the powers that such a shareholder would have in general meetings — for example, to appoint and dismiss members of the board, and to approve and initiate changes to the financial structure of the company — that shareholder is not controlling the company in terms of the director control test.

289. By contrast, if the majority shareholder assumes the functions of the company's board, or if that board merely rubber-stamps decisions made by the majority shareholder without independent consideration being given to the decisions, the majority shareholder is a director of the company under the definition in the Act. This is consistent with the common law approach (see, for example, *Unit Construction Co Ltd v Bullock* [1959] 3 All ER 831 (HL)). If this is the case and if the majority shareholder exercises control of the company from New Zealand, the company is resident here under the director control test. In considering whether someone has *de facto* control over a company, the degree of autonomy exercised by the members of the company's board in relation to matters such as investment, production, marketing, finance and procurement must be considered. If the board cannot make decisions about matters of this type without prior approval from the majority shareholder, then the majority shareholder is likely to be in *de facto* control of the company.

290. In relation to companies that are subsidiaries, the *de facto* exercise of control by the parent company must be distinguished from the mere provision of advisory services. Often, large corporate organisations establish centralised advisory departments to

provide administrative, financial, accounting, and other services for companies that are members of the organisation. When a parent company provides services of this nature to a subsidiary, it is not in control of the subsidiary under the director control test merely because of the provision of those services.

***Exercise of powers in New Zealand and in another country***

291. In cases where a company has directors both in New Zealand and overseas, the functions performed by directors from New Zealand must be considered to determine whether they constitute the exercise of control of the company by its directors from New Zealand.

292. If the powers of all directors are equal (both legally and in fact), the issue may potentially be resolved by simply looking to where the majority exercise their control. For example, consider the situation of a company that has directors with equal powers, three of whom live in Australia and undertake their directorial functions only from Australia, and two of whom live in New Zealand and physically attend directors' meetings in Australia and also attend online meetings from New Zealand. If control of the company is exercised through the directors' meetings held in Australia and through the online meetings between the Australian and New Zealand directors, the company is not tax resident in New Zealand under the director control test. In these circumstances, when the directors exercise their powers concurrently from New Zealand and Australia, the majority of the directors are located in Australia. Consequently, on a simple majority approach, control of the company by its directors is not exercised from New Zealand.

293. In applying such an approach, it may be necessary to consider where each director ordinarily makes their directorial decisions. For example, during the COVID-19 pandemic, a relevant consideration was travel restrictions that resulted in directors exercising their functions from New Zealand when that would not ordinarily be the case or would not ordinarily be the case to the extent it was during that period.

294. A simple majority approach is not appropriate where any of the directors have exclusive special powers that enable them to control the company. Nor is it appropriate where any of the directors are otherwise in *de facto* control of the company, for example, because the other directors are merely nominees. In either of these situations, it is necessary to consider the circumstances as a whole to determine whether the controlling directors exercise control of the company from New Zealand.

295. Where a simple majority approach is appropriate, it may be that it does not resolve the matter, for example because there is an equal number of directors exercising control from New Zealand as there are directors exercising control from outside New Zealand. In such a situation, the circumstances would need to be closely considered to determine whether directorial control could nonetheless be considered to be exercised

from New Zealand. For example, consideration may need to be given to whether some directors are accustomed to act in accordance with directions or instructions of others, or if the director with the casting vote (eg, the chairperson) exercises their decision-making from New Zealand and how regularly decision making comes down to the casting vote.

#### *Continuing test*

296. The director control test is satisfied if the directors exercise control of a company from New Zealand on a continuing basis. Therefore, if control is ordinarily exercised from New Zealand, but is occasionally exercised from outside New Zealand, the company is tax resident in New Zealand on the basis that the directors exercise control from here.

#### *Tax residence of directors*

297. The tax residence status of a company's directors is not relevant in determining whether the director control test has been satisfied. The focus of the test is on whether the directors exercise control of the company from New Zealand.

#### *Control of the entire company*

298. A company is not tax resident here under the director control test unless the control exercised by directors from New Zealand is control of the company as a whole. Therefore, if New Zealand directors exercise control only in relation to the New Zealand operations of the company, and directors elsewhere exercise control of the company as a whole, the company is not tax resident here under the director control test.

### Comparison between the director control test and the head office and centre of management tests

299. The centre of management test focuses on the management of the company as a whole. Acts of management at various levels may be relevant to determining where the centre of management is. This differs from the director control test, which concentrates on the directorial control of the company – that is, the place from which the strategic and policy decisions are made. In some cases, there may not be a clear distinction between aspects of the management of the company and the directorial decision making and control, because, for example, the directors are involved in managing the company.

300. The head office of a company may also be the place from which the directors exercise control of the company. However, the two tests are different in nature. The head office test focuses on a physical place – that is, on the office from which the business of

the company is directed and carried on. In contrast, the director control test looks to the place from which the directors ultimately control the company.

## Examples illustrating the company tax residence tests

**Example | Tauira 23 – Company tax resident under the director control test**

**Facts:** Company A is incorporated in Hong Kong and carries on a business manufacturing clothes there. Company A's operations are all managed from Hong Kong. Company A has no office in New Zealand. All meetings of the board of directors are held in Hong Kong, but the Hong Kong directors always act on the instructions of Company A's New Zealand parent company, and unquestioningly implement the decisions the parent company makes.

**Result:** Company A is tax resident in New Zealand under the director control test.

**Explanation:** Company A is incorporated in Hong Kong, so is not tax resident in New Zealand under the incorporation test.

The centre of Company A's operations is in Hong Kong, and Company A has its centre of management there. Company A has no office in New Zealand. Therefore, Company A is not tax resident in New Zealand under either the head office test or the centre of management test.

The Hong Kong directors of Company A act on the instructions of the New Zealand parent company. Therefore, the New Zealand parent is a director of Company A (under para (a)(ii) of the definition of "director" in s YA (1)). The New Zealand parent is exercising *de facto* control of Company A, because the Hong Kong directors implement the decisions of the parent company without question. The Hong Kong directors are not exercising true directorial control of Company A. Company A is tax resident in New Zealand because the parent company is a director of Company A and exercises directorial control of Company A from New Zealand. The Hong Kong directors of Company A do not exercise true directorial control, so this is not a situation where it is necessary to weigh up the level of control exercised from New Zealand and from elsewhere.

**Example | Tauira 24 – Company not tax resident in New Zealand**

**Facts:** Company B is a holding company incorporated in Singapore. Company B has an office in Singapore and its operations are managed from this office. Company B has no office in New Zealand. Company B has five directors – three live in Australia and two in New Zealand. The powers of the directors are equal. The board of

directors meets 6-monthly in Singapore to review decisions made by the company's subsidiaries. The directors regularly hold online meetings to discuss issues, with the New Zealand-based directors attending from New Zealand and the Australian-based directors attending from Australia. Investment decisions are made during these meetings.

**Result:** Company B is not tax resident in New Zealand.

**Explanation:** Company B is incorporated in Singapore, so is not tax resident in New Zealand under the incorporation test.

Company B has no office in New Zealand, so is not tax resident here under the head office test.

Company B is managed from Singapore, so has its centre of management in Singapore rather than in New Zealand.

Although the board of directors meets only in Singapore, control of the company is also exercised outside the board meetings during the online meetings between the New Zealand and Australian directors. Therefore, there is some exercise of directorial functions from New Zealand. However, as the powers of each director are equal, Company B is not controlled by its directors from New Zealand, as the majority of directors are in Australia. Therefore, Company B is not tax resident in New Zealand under the director control test.

**Example | Tauira 25 – Company not tax resident in New Zealand**

**Facts:** Company C is an Australian incorporated bank. Company C conducts business in New Zealand through a branch. The New Zealand branch has its own executives and board of directors who operate from the bank's Wellington office. The worldwide operations of Company C are conducted from the Australian office, and all the major decisions concerning Company C are made by the Australian directors in Australia. The New Zealand executives and board are responsible only for managing Company C's New Zealand operations.

**Result:** Company C is not tax resident in New Zealand.

**Explanation:** Company C is incorporated in Australia, so is not tax resident in New Zealand under the incorporation test.

Company C's head office is not in New Zealand. The Wellington office is the company's highest New Zealand office, but it is not the highest office of the company as a whole. Company C's Australian office is its head office.

The centre of Company C's management is in Australia. The New Zealand branch management is responsible only for managing Company C's New Zealand operations. Therefore, Company C does not have its centre of management in New Zealand.

The Australian directors exercise control of Company C from Australia. The director control test is satisfied only if the directors exercise control of the company as a whole in New Zealand. However, in this case the control exercised by the New Zealand directors relates only to Company C's New Zealand branch. Therefore, Company C is not tax resident in New Zealand by virtue of the director control test.

**Example | Tauira 26 – Unit trust tax resident in New Zealand under the director control test**

**Facts:** D is a unit trust. D invests primarily in shares issued by New Zealand and overseas publicly listed companies. The manager of D is a New Zealand incorporated company. The manager makes all major decisions relating to marketing interests in D, investments, distributions, and so on. These decisions are all made from New Zealand.

**Result:** D is a company under the extended definition of "company" in the Act. D is tax resident in New Zealand under the director control test.

**Explanation:** D is not incorporated. Therefore, the incorporation test is not applicable. The fact D's manager is incorporated in New Zealand is irrelevant to D's tax residence status.

D's manager is a director of D under para (a)(iv) of the extended definition of "director" in s YA 1 because D's manager acts in the same way a director of a company incorporated under the Companies Act 1993 would act – that is, it makes all the major decisions in relation to investments.

The manager exercises control from New Zealand. Therefore, D is tax resident in New Zealand because its director exercises control of D from New Zealand.

**Example | Tauira 27 – Company tax resident in New Zealand under the head office and centre of management tests**

**Facts:** Company E is incorporated in Australia and is a 100% owned subsidiary of an Australian company. The Australian parent is in the business of manufacturing several products. Company E's business mainly involves the marketing of those products in New Zealand. The management of Company E takes place from its Auckland office. Company E does not have an office in Australia, but it has several branch offices in

New Zealand outside Auckland. The overall strategic control of the company by its directors is exercised from Australia.

**Result:** Company E is tax resident in New Zealand under the head office and centre of management tests.

**Explanation:** Company E is not tax resident in New Zealand under the director control test because its directors exercise control from Australia.

Company E's Auckland office constitutes its head office because it is the office from which the business of the company is managed and carried on. Therefore, Company E is tax resident in New Zealand under the head office test.

The management of Company E takes place from the Auckland office. Therefore, Company E is also tax resident in New Zealand because its centre of management is here.

**Example | Tauira 28 – Companies tax resident in New Zealand under the director control test**

**Facts:** Company F is a company incorporated in the Cook Islands, and is used as a financing vehicle for a group of companies based in New Zealand. Company G, which is also incorporated in the Cook Islands, is the sole nominated director of Company F. With respect to the affairs of both Company F and Company G, the directors of Company G act on instructions received from a New Zealand resident company (NZ Co) that is a member of the group, without discussing or considering those instructions. Both Company F and Company G are managed from the Cook Islands. Neither Company F nor Company G has an office in New Zealand.

**Result:** Both Company F and Company G are tax resident in New Zealand under the director control test.

**Explanation:** Company F and Company G are both incorporated in the Cook Islands. Therefore, they are not tax resident in New Zealand under the incorporation test.

Company F and Company G are both managed from the Cook Islands. Therefore, they are not tax resident in New Zealand under the centre of management test. Further, as neither Company F nor Company G has an office in New Zealand, neither is tax resident here under the head office test.

The nominated directors of Company G act in accordance with instructions from NZ Co in relation to Company G's affairs. Therefore, NZ Co is a director of Company G. NZ Co exercises *de facto* control of Company G because the directors of Company G act on NZ Co's instructions without discussing or considering those instructions. The

directors of Company G are not exercising true directorial control of Company G. As NZ Co exercises control of Company G from New Zealand, Company G is tax resident here under the director control test.

The nominated director of Company F (that is, Company G) acts in accordance with instructions from the nominated directors of Company G, who in turn act in accordance with instructions from NZ Co. Therefore, the nominated director of Company F acts in accordance with instructions from NZ Co, making NZ Co a director of Company F. NZ Co exercises *de facto* control of Company F because the directors of Company G (which is the director of Company F) act on NZ Co's instructions with respect to the affairs of Company F (as with the affairs of Company G) without discussing or considering those instructions. Company G, the nominated director of Company F, is not exercising true directorial control. Company F is tax resident in New Zealand because NZ Co is a director of Company F and exercises directorial control of Company F from New Zealand. Company G does not exercise true directorial control, so this is not a situation where it is necessary to weigh up the level of control exercised from New Zealand and from elsewhere.

**Example | Tauira 29 – Foreign-incorporated, sole-director personal services company, not tax resident in New Zealand**

**Facts:** Company H is incorporated in the United States of America. It is a personal services company through which Hugh, who works in the film industry, contracts. Hugh is the sole director of Company H. Company H secures a 12-month contract to provide services in New Zealand for a film being made here. Company H has no office in New Zealand. There are no directorial decisions or acts of management of the company as a whole made during the period of the contract, while Hugh is in New Zealand. Any control or management decisions made from New Zealand during the period of the contract relate only to the New Zealand operations of the company.

**Result:** Company H is not tax resident in New Zealand.

**Explanation:** Company H is incorporated in the United States of America, so is not tax resident in New Zealand under the incorporation test.

Company H is not tax resident under the head office test, as it does not have an office in New Zealand, so cannot have its head office here.

Company H is not tax resident under either the centre of management test or the director control test, as there are no directorial decisions or acts of management relating to the company as a whole made in New Zealand during the period of the contract. Any control or management decisions made from New Zealand during the period of the contract relate only to the New Zealand operations of the company.

Company H is a non-resident contractor. For information about the withholding tax obligations in relation to non-resident contractors see Inland Revenue's website (Non-resident contractors) and IS 10/04: **Non-resident contractor schedular payments**.

## Changes in company tax residence

301. As a company will be tax resident in New Zealand if it has its head office or centre of management here or its directors exercise control of the company here, a company's tax residence may change if the location of its head office, centre of management or place of directorial control changes. For example, a company that is resident in New Zealand under the centre of management test may cease to be resident here if it moves its centre of management to Australia, or a company that is not resident in New Zealand may become resident here if it shifts its head office here. A company may also transfer its place of incorporation from New Zealand to overseas.

302. Some of the more significant income tax consequences that may arise when the tax residence of a company changes between New Zealand and another country are set out from [303] to [327]. A change in tax residence may also have implications for the application of a DTA. Further, if a company is a settlor or beneficiary of a trust and its residence status changes there may be tax implications – see from [428].

### Company migration rules

303. A company that ceases to be a New Zealand tax resident is an "emigrating company", and under the company migration rules it is treated for tax purposes as if, immediately before emigrating, it had disposed of its property at market value, liquidated, and distributed the full amount available for distribution as dividends (ss FL 1 and FL 2). The company migration rules may also apply to companies that are still tax resident under New Zealand domestic law but become DTA non-resident, if certain "triggering events" occur (see s FL 3 and *Tax Information Bulletin* Vol 35, No 6 (July 2023): 54 at 59 for more information).

### Taxation of foreign-sourced income

304. A company is assessable for income tax on foreign-sourced income it derives while tax resident in New Zealand (s BD 1(5)(c)). In the case of a change in tax residence, therefore, the foreign-sourced income a company derived while it was tax resident in New Zealand must be calculated or a reasonable apportionment of the total foreign-sourced income must be made to the periods of residence and non-residence.

### Company imputation

305. A company that is tax resident in New Zealand is generally required to establish and maintain an imputation credit account (ICA) (s OB 1). Such a company is known as an "ICA company" (defined in s YA 1). Some companies are specifically excluded from being ICA companies, including companies that are tax resident in New Zealand but treated as not being tax resident in New Zealand under a DTA[25] – see [353].

306. A company that is tax resident in Australia may, in some circumstances, elect to establish and maintain an ICA in New Zealand (s OB 2). Such a company is known as an "Australian ICA company" (see para (a) of the definition in s YA 1). Otherwise, companies that are not tax resident in New Zealand are not permitted to establish an ICA.

307. If a company that is tax resident in New Zealand under domestic law stops being a company that is required by s OB 1 to maintain an ICA because its tax residence tie-breaks to Australia under the DTA between New Zealand and Australia, the company continues to be required to maintain an ICA (see s OB 2(3B)). Such a company is also an Australian ICA company (see para (b) of the definition of "Australian ICA company" in s YA 1).

308. Australian ICA companies also fall within the definition of ICA company.

309. A company that becomes an ICA company during an imputation year:

- needs to establish and maintain an ICA; and
- is not entitled to credit to its ICA any income tax paid in respect of income derived when it was resident outside New Zealand (s OB 4(3)(b)).

310. A company that ceases to be an ICA company during an imputation year:

- loses the right to maintain an ICA; and
- is required to debit its ICA by the amount of any credit existing in the account immediately before the company stopped being an ICA company (that is, when it ceased being resident) (s OB 56), or to pay further income tax for a debit balance in its ICA when it ceased being an ICA company (s OB 66).

311. A company that ceases to be an ICA company is also required to furnish an annual ICA return within 2 months from the day on which it ceased to be an ICA company (s 70(2) of the Tax Administration Act 1994).

[25] Except companies treated as not being tax resident in New Zealand under the Australia–New Zealand DTA – see [307].

### Controlled foreign company regime

312. A change of tax residence between New Zealand and another country may also have implications in relation to the CFC regime. Under s EX 24(1), when a company becomes a "foreign company" (being a company that is not tax resident in New Zealand or is treated as not tax resident in New Zealand under a DTA)[26] a new accounting period of the company starts on that day. The result is that if the company becomes a CFC because of its change in tax residence, only income derived after the company became a CFC is attributed under the CFC regime to tax residents holding interests in the company.

313. In the converse situation, a new accounting period starts on the day when a company ceases to be a foreign company (s EX 24(2)). The effect is that if the company was a CFC before it ceased to be a foreign company, only income derived before the company ceased to be a foreign company is attributed to tax residents under the CFC regime.

### The financial arrangements rules

314. When a company becomes a New Zealand tax resident during an income year and the company is a party to a financial arrangement, the company may become subject to the FA rules. Note, it may be that the company was already within the FA rules because prior to becoming a New Zealand tax resident it carried on business in New Zealand through a fixed establishment and was a party to a financial arrangement for the purposes of that business.

315. Where a company enters the FA rules as a result of becoming a tax resident in New Zealand, the company is treated as having:

- assumed the accrued obligation to pay consideration under the financial arrangement immediately after the time at which it became tax resident; and
- paid the market value that a contract to assume the obligation had at that time (s EW 37(2)).

316. The deemed acquisition price will then be taken into account in any subsequent base price adjustment required under s EW 29.

317. To the extent that the exemption from the FA rules for non-residents (s EW 9) previously applied, that exemption ceases to apply when the company becomes tax resident.

318. When a company ceases to be tax resident in New Zealand and the company is a party to a financial arrangement, generally it must calculate a base price adjustment for the

[26] Section YA 1.

financial arrangement as at the date of ceasing to be resident (s EW 29). If the base price adjustment is positive, it is income derived by the company in the year for which the calculation is made (s EW 31(3)). If the base price adjustment is negative, it is expenditure incurred by the company in the year for which the calculation is made, and a deduction is allowed for that expenditure (s EW 31(4)).

319. Two exceptions to this may be relevant:

- If a cash basis person ceases to be a New Zealand tax resident before the first day of the fourth income year following the income year in which they first became a New Zealand tax resident, they do not need to calculate a base price adjustment for a financial arrangement they were a party to both before becoming and after ceasing to be a New Zealand tax resident (s EW 30(1)).
- A party to a financial arrangement who ceases to be a New Zealand tax resident does not need to calculate a base price adjustment for a financial arrangement to the extent to which the arrangement relates to a business the party carries on through a fixed establishment in New Zealand (s EW 30(2)).

320. When a company ceases to be a New Zealand tax resident, the FA rules cease to apply to the company except to the extent to which the company is a party to a financial arrangement for the purpose of a business carried on through a fixed establishment in New Zealand (s EW 9).

### Grouping of losses

321. A change in tax residence between New Zealand and another country may also affect the grouping of tax losses under subpart IC.

322. Historically, for a company to be able to make its tax losses available to another company in the group, the company with the losses had to (among other things) meet certain tax residence requirements. In particular, the company could not group losses if it was:

- treated as not being tax resident in New Zealand under a DTA for the purposes of the DTA; or
- liable to income tax in another country because of domicile, residence, or place of incorporation.

323. Those tax residence requirements were repealed with effect on 15 March 2017. As a result, a company that is both New Zealand tax resident and tax resident in another jurisdiction may be able to offset its losses against the profits of another company in the same group of companies for New Zealand tax purposes. The company still needs to satisfy other requirements, including that for the commonality period it is either incorporated in New Zealand or carrying on a business through a fixed establishment

in New Zealand (see ss IC 5 and IC 7). The restriction for dual resident companies was previously in place because of the risk of such companies claiming a deduction for the same expense in more than one jurisdiction. That risk was effectively removed by the hybrid and branch mismatch rules introduced in 2018, hence the loosening of the loss grouping (and consolidation) rules.[27]

324. The historical residence requirements are still relevant for a commonality period that started before 15 March 2017 and continued after 15 March 2017, for losses incurred after the 1990–91 tax year. In that situation, the historical tax residence requirements would apply up to 15 March 2017 and cease from that date. As such, a dual resident company may offset a tax loss that arose before 15 March 2017 (so long as it was incurred after the 1990–91 tax year), provided the period of dual residence started after 15 March 2017. (See ss IC 5(8) and IZ 7B.)

325. Losses not available for grouping may be available for carry forward under s IA 3.

326. See further: *Commentary on the Taxation (Annual Rates for 2022-23, Platform Economy, and Remedial Matters) Bill (No 2)*, from page 63.

### Provisional tax

327. When a company becomes a New Zealand tax resident during an income year it may become a provisional taxpayer that is subject to the provisional tax regime contained in subpart RC. When a company ceases to be a New Zealand tax resident it may cease to be a provisional taxpayer (s RC 3).

## Dual tax resident companies

### Dual tax residence

328. A company may be tax resident in both New Zealand under s YD 2 and in another country under the domestic tax law of that country. Dual residence has several implications in relation to the application of the Act and New Zealand's DTAs.

329. For income tax purposes, dual tax residence has implications in a number of areas, including: imputation, the dividend withholding payment regime, the CFC and FIF regimes, the grouping of losses, and the hybrid rules.

[27] See: BEPS – Hybrid and mismatch rules *Tax Information Bulletin* Vol 31, No 3 (April 2019): 38 for further details of the hybrid and branch mismatch rules.

## Dual tax residence and double taxation agreements

330. Double taxation may arise where a company is tax resident in both New Zealand and another country if each country taxes the worldwide income of the company. This double taxation may be resolved where there is a DTA between New Zealand and the other country.

### *General position*

331. If there is a DTA, it generally allocates tax residence to one of the countries for the purposes of the DTA. In determining the treatment of income covered by the DTA, the company is then treated as being tax resident in only the country to which tax residence has been allocated. This gives that country the primary taxing right, so reduces the incidence of double taxation.

332. Where a New Zealand tax resident company (under s YD 2) is deemed to be tax resident in another country for the purposes of a DTA, New Zealand's right to tax foreign-sourced income may be restricted and limitations may be imposed on New Zealand's right to tax New Zealand–sourced income. The company remains liable to New Zealand income tax on income treated (under s YD 4) as having a source in New Zealand (s BD 1(5)). However, the liability is modified by any restrictions the DTA imposes on New Zealand's right to tax persons who are deemed to be resident in the other country for the purposes of the DTA. Therefore, the tax residence rules in s YD 2 cannot always be read in isolation. When a company satisfies the domestic tax residence requirements in both New Zealand and another country, the impact of the DTA (if there is one) must be considered.

333. The DTA residence article will not apply to allocate residence if the person (in this case the company) is not liable to tax in both countries by reason of domicile, residence, place of management or any other criterion of a similar nature (see para 1 of art 4, set out at [200]). So, for example, this may mean the DTA does not engage for a US LLC that is a disregarded entity in the US and becomes tax resident in New Zealand (which could happen, for example, because the director/shareholder moves to New Zealand and the company becomes tax resident here under one of the tests in s YD 2 – eg, the centre of management test or the director control test). This should be borne in mind, and tax advice should be sought prior to any person involved with a company migrating to another country or operating from another country for any extended period, to ensure there are no unintended tax consequences.

334. New Zealand's DTAs contain different rules for allocating company tax residence for DTA purposes. These rules do not apply for non-DTA purposes. Under these rules, which vary from one DTA to another, residence may be allocated according to the company's "place of effective management", its "day-to-day management", the "centre of its administrative or practical management" or the location of its "head office".

Under some of New Zealand's DTAs it may fall to the competent authorities of the Contracting States to settle the question by mutual agreement (in some instances with regard to specified factors).

> **Note**: DTAs may be modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting – the multilateral Instrument (the MLI).
>
> See from [338].

335. As noted at [207] in relation to individuals, if a DTA between New Zealand and another country uses the wording of a particular article in the OECD Model Convention (or very similar wording), the Commissioner considers it can be inferred that the OECD commentary on that article reflects the meaning the parties intended to be given to any undefined terms in that article. In such circumstances the OECD commentary is a significant aid to interpreting the relevant undefined terms. In such a case, the Commissioner considers that the context requires the meaning of the undefined terms to be considered without reference to any meaning those terms may have under domestic law.

336. Until 21 November 2017, the residence tie-breaker test for dual-resident non-individuals in the OECD Model Convention was the state in which the person's "place of effective management" is situated. Where New Zealand's DTAs adopt this test, the Commissioner considers that reference should be made to the former (2014) OECD commentary on the meaning of this term.

337. Where New Zealand's DTAs adopt residence allocation tests for non-individuals other than place of effective management, it may be necessary to have recourse to the domestic law meaning (if any) of any undefined term in that test.

***If the DTA is modified by the MLI***

338. As noted at [334], the relevant DTA may be modified by the MLI. If the other country has ratified the MLI, the MLI positions of New Zealand and the other country need to be considered.

339. If the MLI applies to modify the residence article in respect of companies (generally art 4(3) of New Zealand's DTAs), the competent authorities of both countries must endeavour to determine the company's residence by mutual agreement having regard to "its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors".

340. To obtain a determination of residence by the competent authorities under the above conventions, an application is required[28] (see Tax treaties: Australia on Inland Revenue's tax policy website).

341. If the authorities cannot agree, or no application has been made, **the company is not entitled to access the reliefs and exemptions available under the DTA**, except as the competent authorities agree.[29]

342. Note that art 4 of the MLI does not affect existing provisions of a "covered tax agreement" (defined in art 2 of the MLI) that deal with the tax residence of a company that is participating in a dual-listed company arrangement (see art 4(2)). This means it will not affect (for example) paras 5 and 6 of art 4 of the Australia–New Zealand DTA.

**New Zealand and Australia's administrative approach to article 4 of the MLI**

343. New Zealand and Australia have agreed a joint administrative approach to art 4 of the MLI. This approach was agreed as a measured risk-based approach to provide certainty and minimise compliance costs for taxpayers. It was agreed against the backdrop of the single economic market agenda between Australia and New Zealand, which seeks to create a seamless trans-Tasman business environment, and the fact the respective tax systems and administrations are comparable and both countries are committed to adopting measures to address risks associated with base erosion and profit shifting.

344. In short, under the administrative approach, if an eligible taxpayer reasonably self-determines its place of effective management to be located in:

- Australia, it is deemed to be a resident of Australia for the purposes of the Australia–New Zealand DTA; and
- New Zealand, it is deemed to be a resident of New Zealand for the purposes of the Australia–New Zealand DTA.

345. Eligibility criteria must be met for a taxpayer to use the administrative approach, including that:

- the taxpayer is an ordinary company incorporated under the Companies Act 1993 (in New Zealand) or the Corporations Act 2001 (in Australia);
- the taxpayer's group annual accounting income is less than 250 million AUD or 260 million NZD for the most recent reporting period; and

[28] Other than in the case of some Australian–New Zealand dual resident companies – see from [343].

[29] Note, this applies just to the company in question. The recipient of a payment from the company (eg, a dividend) may be entitled to treaty relief.

- the taxpayer's gross passive income is less than 20% of its total assessable income for the most recent income tax year.

346. There are also eligibility criteria in relation to the taxpayer or any member of the group not being subject to certain compliance activity.

347. If the administrative approach is used, there are conditions that must be satisfied on an ongoing basis, relating to:

- the taxpayer and members of the group not being involved in certain tax avoidance and other arrangements; and
- the taxpayer notifying the relevant revenue authority, in the event of new compliance activity, that the administrative approach has been used to determine tax residence for DTA purposes.

348. If there is a material change, the taxpayer must re-assess their eligibility, and approach either competent authority if the administrative approach no longer applies to their circumstances.

349. The full details of the eligibility criteria and on-going conditions are on Inland Revenue's website: Australia and New Zealand's administrative approach to MLI Article 4(1).

350. If a taxpayer is uncertain whether they satisfy the eligibility criteria or uncertain as to the self-determination of their place of effective management, it is recommended they engage with either competent authority about their circumstances.

351. If a taxpayer does not meet the eligibility criteria to use the administrative approach, an application will need to be lodged. See Tax treaties: Australia on Inland Revenue's tax policy website.

### Dual tax residence and imputation

352. Section OB 1 provides that, subject to several exclusions, a company that is tax resident in New Zealand must establish and maintain an ICA for each tax year. ICA companies may attach imputation credits to dividends they pay (s OB 60).

353. Several categories of company are excluded from being ICA companies and, therefore, from passing on imputation credits to their shareholders (s OB 1(2)). Among these are companies that are tax resident in New Zealand but are treated as not being tax resident in New Zealand under a DTA. This ensures dual resident companies that are treated as not resident here cannot be used to undermine the international tax regime by obtaining the benefit of the imputation regime.

354. As discussed at [307], there is an exception to this for companies that cease to be required by s OB 1 to maintain an ICA because their tax residence tie-breaks to

Australia under the Australia–New Zealand DTA. In this situation, the company continues to be required to maintain an ICA.

### Dual tax residence and the controlled foreign company and foreign investment fund regimes

355. The CFC and FIF regimes are in subpart EX. When a tax resident has an interest in a CFC, income and losses of the CFC may be attributed to the tax resident for income tax purposes. When a tax resident has an interest in a FIF, the annual change in value of the interest is taken into account for income tax purposes.

356. The CFC and FIF regimes both apply in relation to foreign companies. A foreign company is one that is not tax resident in New Zealand, or is treated under a DTA as not being tax resident in New Zealand. As such, companies that are dual resident under domestic law, but treated as tax resident outside of New Zealand for DTA purposes, may be brought within the CFC and FIF regimes. In the case of the CFC regime, this occurs if the closely held ownership test is satisfied. In the case of the FIF regime, it occurs if none of the exemptions applies.[30] This ensures dual resident companies cannot be structured with a view to defeating the CFC and FIF regimes.

### Dual tax residence and the grouping of losses

357. Section IA 3(2) allows companies within the same group of companies to group their income and losses (see also subpart IC, and the definition of "group of companies" in s IC 3).

358. As discussed from [321], historically one of the requirements for this was that the company with the available losses must meet certain tax residence requirements, including that it not be treated as non-tax resident in New Zealand under a DTA and that it not be liable by the law of another country or territory to income tax there through domicile, residence, or place of incorporation. Therefore, a dual resident company was not able to make its tax losses available to another company in the same group.

359. As discussed from [323], those tax residence requirements were repealed with effect on 15 March 2017. But the historical residence requirements are still relevant for a commonality period that started before 15 March 2017 and continued after 15 March 2017, for losses incurred after the 1990–91 tax year.

[30] See ss EX 31 to EX 43.

### Potential for dual tax residence if persons involved with a company migrate to or operate from another country

360. There is the potential for dual residence to arise if persons involved with a company (eg, directors) migrate to another country or operate from another country for an extended period. This may be the case whether or not there are trading operations or investments in the other country.

361. This is particularly important to bear in mind if persons involved with a company are considering migrating to or regularly operating from Australia – given the close relationship between Australia and New Zealand and the ease of migration and travel between the countries.

362. Tax advice should be sought prior to any person involved with a company migrating to another country or operating from another country for any extended period, to ensure there are no unintended tax consequences.

## Tax residence of foreign companies

363. As noted at [244], a "foreign company" is a company that is not tax resident in New Zealand under s YD 2 or is treated under a DTA as not being tax resident in New Zealand (s YA 1).[31] Section YD 3 sets out different tests to determine the country in which a foreign company is treated as tax resident for the purposes of the "international tax rules" (which are defined in s YA 1 as including the rules relating to CFCs, FIFs and foreign tax credits).

364. If a company is dual tax resident under the domestic law of New Zealand and another country with which New Zealand does not have a DTA, the company would not be a "foreign company" so the tests in s YD 3 would not apply. The company would therefore not be within the CFC or FIF regimes.

365. Section YD 3 provides:

> **YD 3 Country of residence of foreign companies**
>
> *When this section applies*
>
> (1) This section applies for the purposes of the international tax rules to determine the country in which a foreign company is treated as resident for an accounting period.
>
> *Liability to income tax*

[31] However, a company will be treated as remaining tax resident in New Zealand for the purposes of the international tax rules if it becomes a foreign company but is tax resident in New Zealand again within 183 days (s YD 2(2)).

(2) The company is treated as resident in a country if, at any time during the accounting period, it is liable to income tax in the country because any of the following is located in the country—

(a) its domicile:

(b) its residence:

(c) its place of management:

(d) any other criterion of a similar nature.

*Further rule: first application*

(3) Subsection (4) applies if the application of subsection (2) for an accounting period means that—

(a) the company is resident in 2 or more countries:

(b) the company is not resident in any country.

*Applying New Zealand rules*

(4) The company is treated as resident in the country in which—

(a) it is incorporated:

(b) it has its head office:

(c) it has its centre of management:

(d) its directors, in their capacity as directors, exercise control of the company, even if the directors' decision-making also occurs outside the country.

*Further rule: second application*

(5) The company is treated as resident in the country in which its centre of management is located for the accounting period if no 1 country of residence is identified under subsection (4).

*Final rule*

(6) The Commissioner must determine the country of residence if no 1 country of residence is identified under subsection (5).

366. Section YD 3(2) provides that a foreign company will be treated as tax resident in a country if, at any time during the accounting period, it is liable to income tax in the country because its domicile, residence, place of management or any other criterion of a similar nature is located in the country.

367. If subs (2) results in the company being tax resident in multiple countries, or not in any country, the company is treated (under subs (4)) as tax resident in the country in which it is incorporated, has its head office or centre of management, or in which its directors, in their capacity as such, exercise control of the company (even if the directors' decision-making also occurs outside the country).

368. If the application of subs (4) results in no one country of tax residence being identified, the company is treated (under subs (5)) as tax resident in the country in which its centre of management is located for the accounting period.

369. Finally, if the application of subs (5) results in no one country of tax residence being identified, subs (6) provides that the Commissioner must determine the country of tax residence.

# Part 3: Tax residence and trusts

## Introduction

370. Trusts are not treated as separate entities for income tax purposes, so there are no rules in the Act governing the tax residence of trusts. The tax residence of the persons connected with the trust (that is, the trustees, settlors and beneficiaries) is relevant to the tax treatment of trust income and distributions. The tax residence rules for individuals and companies apply (as relevant) to the trustees, settlors and beneficiaries.

371. The trust rules in the Act modify the general position that New Zealand tax resident trustees are assessable on worldwide income and non-residents are assessable on only New Zealand–sourced income. In general, the tax residence of the trustees alone does not determine the treatment of foreign-sourced amounts trustees derive – the tax residence of the settlors is also relevant. Therefore, if the tax residence of the settlors of a trust changes, there may be tax implications for the treatment of income derived by a trustee. The trust rules allow trustees, settlors and beneficiaries to make elections to change the way income derived by a trustee would otherwise be taxed according to residence.

372. Beneficiary income and taxable distributions are taxed according to the normal residence and source rules, but there is a specific rule for beneficiaries who cease to be tax resident in New Zealand and become tax resident again within 5 years (see [426]).

373. This part provides an overview of:

- how beneficiaries are taxed;
- how trust income is taxed, including the implications of the residence status of settlors and trustees for the taxation of income trustees derive; and
- the impact of changes in the tax residence of persons connected with a trust – the trustee, settlors and beneficiaries.

374. For more detailed information about the taxation of trusts, see IS 24/01: **Taxation of trusts**, IS 19/04: **Income tax – distributions from foreign trusts** and Overview: trusts on Inland Revenue's tax technical website.

## Disclosure rules

375. In general, trustees of trusts need to comply with either the foreign exemption trust disclosure rules or the domestic trust disclosure rules. Those rules may require annual returns to be filed and certain information to be disclosed to the Commissioner. The tax residence of settlors and trustees is relevant to those rules. IS 24/01 explains the foreign exemption trust disclosure rules (at [13.7] to [13.28]). The domestic disclosure

rules are explained in more detail in OS 22/02: **Reporting requirements for domestic trusts**.

## Table – How beneficiary income and trustee income are taxed

376. Table | Tūtohi 1 shows how income trustees derive can be beneficiary income or trustee income and how the income is taxed. Beneficiaries may also derive income from a foreign trust or a non-complying trust in the form of taxable distributions, as discussed from [384].

**Table | Tūtohi 1 – How beneficiary income and trustee income are taxed**

<table>
<tr><th colspan="2">Beneficiary income</th></tr>
<tr><td>Beneficiary tax resident in New Zealand<ul><li>All beneficiary income is included as assessable income except minor and close company beneficiary income.</li><li>Transitional residents do not include most foreign-sourced amounts.</li></ul></td><td>Beneficiary not tax resident in New Zealand<ul><li>Only New Zealand–sourced beneficiary income is included as assessable income.</li></ul></td></tr>
<tr><td colspan="2">Notes:<ul><li>Beneficiaries who ceased to be tax resident in New Zealand and become tax resident again within 5 years must include beneficiary income and taxable distributions received from foreign and non-complying trusts while non-resident.</li><li>Trustees are generally liable as agent for the income tax liability of a beneficiary for their beneficiary income and any taxable distributions they derive.</li></ul></td></tr>
<tr><th colspan="2">Trustee income</th></tr>
<tr><td colspan="2">New Zealand–sourced income is included in assessable income whether or not the trustee is tax resident in New Zealand. If a non-resident trustee only has non-resident withholding income and it has been taxed correctly, the tax withheld is a final tax.</td></tr>
<tr><td colspan="2">Note: Trustee income also includes minor beneficiary income, close company beneficiary income and certain property settlements.</td></tr>
</table>

| | |
|---|---|
| **Foreign-sourced income** is included in assessable income if:<br>• the trustee **was not tax resident** when the income was derived; and<br>• a settlor of the trust **was tax resident** (and not a transitional resident) in New Zealand at any point during the income year.<br>In general, this rule does not apply if:<br>• no settlement has been made on the trust after 17 December 1987; or<br>• a settlement has been made but the settlor was non-resident between 17 December 1987 and the date of the settlement. | **Foreign-sourced income** is exempt if:<br>• the trustee **was tax resident** when the income was derived; and<br>• **no settlor** of the trust was tax resident (and not a transitional resident) in New Zealand at any point during the income year;<br>provided that:<br>• if no settlor exists in the income year, the last surviving settlor was not a tax resident at the time of ceasing to exist;<br>• the trust is not at any time in the income year a superannuation fund, or a testamentary or *inter vivos* trust of which any settlor was tax resident in New Zealand when they died;<br>• no s HC 33 election has been made; and<br>• the registration and reporting obligations for foreign exemption trusts have been met. |

## Trustee income, beneficiary income, and taxable distributions

### Trustee income

377. Income a trustee derives from property held in trust is taxed as either beneficiary income or trustee income. Only trustees can claim deductions for expenditure or losses incurred in deriving the income (s DV 9).

378. Trustee income is the income the trustee of a trust derives, to the extent to which it is not beneficiary income (s HC 7(1)). This means amounts a trustee derives can be wholly beneficiary income, wholly trustee income or a mixture of both.

379. Beneficiary income is also treated as if it were trustee income for the purposes of paying tax and providing returns of income if it was derived by a:

- minor to whom s HC 35 applies (s HC 7(2)); or
- close company to which s HC 38 applies (s HC 7(2B)).

380. Section HC 7(3) extends trustee income to include the market value of any property settlement a trust receives that is excluded from corpus under ss HC 4(3) to (5). The amount is reduced by the market value that the trustee treats as beneficiary income or as a taxable distribution in the income year. Section CV 13(b) includes such amounts in the income of the trustee.

381. Trustee income is taxed at 33% or 39% from the 2024–25 income year. Trustee income that is minor or close company beneficiary income is taxed at 39%.

### Beneficiary income

382. Section HC 6 provides that an amount a trustee derives in an income year is beneficiary income to the extent to which either it vests absolutely in interest in a beneficiary of the trust in the income year, or it is paid to a beneficiary of the trust during the income year or by the later of:

- a date within 6 months of the end of the income year; or
- the earlier of the date:
  - on which the trustee files a return of income for the year; or
  - by which they must file a return for the year.

383. Beneficiary income derived by a New Zealand resident is taxed at the beneficiary's marginal rate. However, as noted at [379], minor and close company beneficiary income is treated as trustee income. It is excluded income for the beneficiary.

### Taxable distributions

#### *Classifications of trusts*

384. The tax treatment of distributions to beneficiaries of amounts that are **not** beneficiary income depends in part on the classification of the trust. For income tax purposes, trusts are classified as:

- complying trusts – essentially trusts where tax has always been paid in New Zealand on the worldwide income a trustee derives, whether by obligation or election, and the tax obligations relating to the trustee's income tax liability have been satisfied;
- foreign trusts – essentially trusts that have not had a New Zealand tax resident settlor (including a settlor who is a transitional resident) at any time since 17 December 1987; and
- non-complying trusts – trusts that are neither complying nor foreign trusts.

385. It is possible for a trust to be both a complying trust and a foreign trust. This type of trust is referred to as a dual status trust. This could occur, for example, where a New Zealand tax resident trustee of a foreign trust derives only New Zealand–sourced income as trustee income and satisfies their tax obligations relating to the trustee's income tax liability.

***The taxation of distributions***

386. In addition to the classification of the trust being relevant, the taxation of distributions also depends on whether the distribution is accumulated trustee income, capital gains or corpus, whether the source of the amount is in New Zealand or foreign, and the tax residence of the beneficiary.

387. In general, distributions to New Zealand tax resident beneficiaries of a trust, other than distributions of beneficiary income, are:

- exempt income, where the distribution comes from a complying trust or dual status trust;
- a taxable distribution, where the distribution consists of:
  - accumulated trustee income or certain capital gains derived through a transaction with an associated person, distributed by a foreign trust; or
  - accumulated trustee income or capital gains distributed by a non-complying trust; or
- a non-taxable distribution, where the distribution consists of:
  - capital gains of a foreign trust (other than certain capital gains derived through a transaction with an associated person); or
  - corpus of a foreign or non-complying trust.

388. As noted at [384], distributions a trustee makes from a dual status trust are treated as being from a complying trust. If a trust that was a dual status trust loses its status as a complying trust, it remains a foreign trust if it still meets the requirements to be one.

389. Ordering rules treat distributions as comprising of taxable amounts before non-taxable amounts.

390. Taxable distributions from a foreign trust to a New Zealand tax resident beneficiary are taxed at the beneficiary's marginal rate.

391. The tax on New Zealand–sourced non-resident passive income distributed to a non-resident beneficiary, such as interest and dividends, may be a final tax if the beneficiary has no other income sourced in New Zealand, but is otherwise an interim tax. Other New Zealand–sourced income, such as rental income, is taxed at the non-resident beneficiary's marginal rate. DTAs may affect New Zealand's taxing rights. Foreign-sourced amounts distributed to a non-resident are not subject to tax in New Zealand.

392. New Zealand–sourced taxable distributions from a non-complying trust are taxed at 45% whether the beneficiary is tax resident or non-resident. Foreign-sourced amounts distributed to a New Zealand tax resident are also taxed at 45%. However, foreign-sourced amounts distributed to non-resident beneficiaries as either beneficiary income or taxable distributions are not subject to tax in New Zealand.

393. Where a foreign trust or non-complying trust distributes accumulated trustee income that has been taxed, economic double taxation arises as the income is taxed to the trustee and then to the beneficiary.

394. Table | Tūtohi 2 summarises the tax treatment where the amount distributed is New Zealand–sourced, whether the beneficiary is a New Zealand tax resident or not.

**Table | Tūtohi 2 – Tax treatment of New Zealand–sourced distributions from a trust**

| Type of distribution from the trust | Complying trust | Foreign trust | Non-complying trust |
|---|---|---|---|
| Accumulated trustee income | Not taxable | Taxed at the beneficiary's marginal tax rate | Taxed at 45% |
| Non-associated capital gains and profits | Not taxable | Not taxable | Taxed at 45% |
| Associated capital gains and profits | Not taxable | Taxed at the beneficiary's marginal tax rate | Taxed at 45% |
| Corpus | Not taxable | Not taxable | Not taxable |

## Settlor tax residence

### Settlor tax residence and liability of trustees

395. Trustees are liable to tax on New Zealand–sourced trustee income as if they were an individual beneficially entitled to that income (s HC 24). This is the case whether or not the trustee or any settlor is tax resident in New Zealand. However, the tax residence of a settlor of the trust is relevant in determining whether foreign-sourced income a trustee derives is liable to tax in New Zealand.

396. Either s YD 1 or s YD 2 determines a settlor's tax residence, depending on whether the settlor is a natural person or a company. In general, a settlor is a person who transfers value to a trust.

#### *Foreign-sourced amounts may be exempt*

397. A foreign-sourced amount derived by a New Zealand tax resident trustee and included in trustee income for the income year is exempt income (s HC 26) if the following are all satisfied:

- No settlor of the trust is at any time in the income year a New Zealand tax resident (who is not a transitional resident) or, if no settlor exists in the income year, the last surviving settlor was a non-resident when that settlor ceased to exist.
- No election under s HC 33 has been made for the trust.[32]
- The trust is not a:
  - superannuation fund; or
  - testamentary trust or an *inter vivos* trust of which any settlor was tax resident in New Zealand when they died (whether or not they died during the relevant income year).
- The requirements in s HC 26(1)(c) or s HC 26(1)(d), as applicable, are met (these deal with registration and reporting obligations of foreign exemption trusts).
- The amount is not beneficiary income derived by a minor that is treated as if it were trustee income.

398. Provided registration and reporting requirements are met, foreign-sourced income derived by a New Zealand tax resident trustee of a foreign trust is exempt. The exemption continues during the period a settlor of a foreign trust is a transitional resident. Where an election is made under s HC 33, the tax obligations of the trustee are determined as if the trustee and a settlor of the trust are New Zealand tax residents so the exemption does not apply.

***Foreign-sourced amounts may be taxable***

399. A foreign-sourced amount derived by a non-resident trustee as trustee income that would be assessable income if derived by a person tax resident in New Zealand will, subject to the exceptions noted at [401], be assessable income of the trustee (under s HC 25) if, at any time in the income year:

- a settlor of the trust is a New Zealand tax resident (who is not a transitional resident); or
- the trust is a superannuation fund; or
- the trust is a testamentary trust or an *inter vivos* trust of which:
  - a trustee is tax resident in New Zealand; and

[32] Under s HC 33, a trustee, settlor or beneficiary can make an election to satisfy the income tax liability of a trustee.

- any settlor was tax resident in New Zealand when they died (whether or not they died during the relevant income year) or the last surviving settlor was tax resident in New Zealand when that settlor ceased to exist.

400. Section HC 25(2) applies so foreign-sourced amounts are assessable if any one of the settlors of the trust (if there is more than one settlor) is tax resident in New Zealand at any time during an income year. An entire year of tax residence is not required. The amount must be one that would be assessable income if derived by a person tax resident in New Zealand, so it excludes, for example, some capital gains.

401. The two exceptions to this (in s HC 25(3) and (4)) are where the trustee is tax resident outside New Zealand for the entire income year and either:

- no settlement has been made on the trust after 17 December 1987, and the trustee has not made an election referred to in s HZ 2 (an election under the Income Tax Act 1976 on or before 31 May 1989 to pay tax on trustee income); or
- any settlement made on the trust after 17 December 1987 was made only by a settlor who was not resident in New Zealand at any time from 17 December 1987 up to (and including) the date of settlement.

402. The second exception does not apply if the settlement is made by a transitional resident as they are tax resident in New Zealand.

403. Where the trustees are non-resident and foreign-sourced amounts are assessable as trustee income under s HC 25(2), the trustees are treated as tax resident in New Zealand under other provisions for the purpose of calculating the taxable income of the trustees. These provisions are:

- ss EW 9 and EW 11, which state the situations where the FA rules will or will not apply;
- s LJ 2, which states when a person can claim a tax credit for foreign income tax paid;
- s OE 1, which states when a person can choose to be a branch equivalent tax account person; and
- the international tax rules, which are defined in s YA 1 as including the rules relating to CFCs, FIFs and foreign tax credits.

### Settlor residence and liability of settlor

404. Under s HC 29, a settlor may be liable as agent of the trustee for income tax payable by the trustee on trustee income derived in an income year. This section facilitates the collection of tax on trustee income in cases where it may be difficult due to the trustee being non-resident.

405. This provision may apply where the:

- settlor has made a settlement to or for the benefit of a trust after 17 December 1987 (whether or not they settled property on the trust on or before that date); and
- trustee derives trustee income in an income year in which the settlor is resident in New Zealand.

406. Where there is more than one settlor to whom s HC 29 applies, the liability is joint and several.

407. However, the rule does not apply:

- to income tax that the trustee is liable for under s HC 32, which relates to the trustee's liability as agent for the tax liability of a beneficiary for their beneficiary income and taxable distributions derived;
- if the trust has a New Zealand tax resident trustee for the whole income year, or if the first settlement was made during the income year, from the day of that settlement until the end of the income year;
- where the trust is a tax charity or superannuation fund;
- to the extent to which the trustee income is derived from the settlor remitting an amount under a financial arrangement to which either s EW 31 or s EZ 38, which relate to base price adjustments, applies;
- if the settlor is a natural person who was not tax resident at the time of any settlement on the trust, and had not after 17 December 1987 previously been tax resident in New Zealand (unless they have made an election under s HC 33 to satisfy the income tax liability of the trustee); or
- to the extent to which the settlor can establish through full disclosure to the Commissioner of settlements made that, having regard to the settlements made by that settlor and by other settlors, another settlor should be liable.

408. Where s HC 29 applies, the settlor is liable for tax on trustee income as agent for the trustee. Therefore, the trustee remains liable for the tax on the trustee income. The provisions of subpart HD, dealing with the liability for tax of principals and agents, are relevant.

## Trustee tax residence

409. The tax residence of the trustee is determined under the rules in either s YD 1 or s YD 2, depending on whether the trustee is a natural person or a company. Section YD 1(12) clarifies that a natural person includes a natural person who is acting

in the capacity of trustee. Similarly, s YD 2(1B) clarifies that a company includes one that is acting in the capacity of trustee.

410. When a trust has multiple trustees, the trustees are treated as a notional single person when considering tax residence (s HC 2).[33] Where one of the trustees is tax resident, all the trustees as the notional single person under s HC 2 are tax resident in that capacity. If all the trustees are non-resident, then the notional single person under s HC 2 is non-resident as long as no election has been made under s HC 33.

411. As noted at [395], trustees are liable to tax on trustee income as if they were an individual beneficially entitled to that income (s HC 24). New Zealand–sourced income derived by the trustee is assessable whether or not the trustee, or any settlor, is tax resident in New Zealand. The tax treatment of foreign-sourced amounts depends on the tax residence of settlors.

412. As noted at [382], s HC 6 provides that an amount a trustee derives in an income year will be beneficiary income to the extent to which either it vests absolutely in interest in a beneficiary of the trust in the income year, or it is paid to a beneficiary of the trust in the relevant timeframes. A trustee who allocates all income derived during the year to beneficiaries has no trustee income.

413. The trustee of a trust is generally liable as agent for the income tax liability of the beneficiary for their beneficiary income and taxable distributions derived (s HC 32). This liability, therefore, depends on the tax residence of the beneficiary. If the beneficiary is tax resident in New Zealand, the trustee is liable for tax as agent of the beneficiary on worldwide beneficiary income and taxable distributions. If the beneficiary is tax resident outside New Zealand, the trustee is generally liable for tax as agent in respect of only New Zealand–sourced beneficiary income and taxable distributions.

414. The trustee's tax residence (without reference to the settlor's tax residence) is relevant if they derive passive income such as interest and dividends. If the trustee is not tax resident and derives "non-resident passive income" as defined in s RF 2, NRWT is payable on that amount. This may be a final tax if the non-resident trustee has no other income sourced in New Zealand. If the trustee is tax resident, RWT is deducted from passive income paid to them, unless they have RWT-exempt status. If an election has been made under s HC 33(1), non-resident passive income derived by a non-resident trustee is excluded as non-resident passive income from the effective date of the election and RWT should be deducted.

415. The tax residence of a trustee, whether an individual or a group of persons as a notional single person, is relevant for the purpose of applying the tie-breaker tests in

[33] They are also treated as a notional single person in their capacity as trustees and are jointly and severally liable to satisfy obligations imposed by s BB 2, such as filing returns.

DTAs. Many countries, such as Australia, tax trusts based on the tax residence of trustees, so dual resident situations can arise. For example, if a trust had two New Zealand tax resident trustees and one becomes tax resident in Australia, the notional single person is still tax resident in New Zealand due to one trustee being tax resident here, and the trust is also tax resident in Australia by virtue of one trustee being tax resident there.

416. In the case of the Australia–New Zealand DTA, under art 4(3), as modified by art 4(1) of the MLI,[34] the competent authorities of both countries must endeavour to determine the tax residence of the trust by mutual agreement having regard to "its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors".

417. In a trust situation, **an application is required** to obtain a determination of tax residence by the competent authorities under the above conventions (see Tax treaties: Australia on Inland Revenue's tax policy website).

418. If the authorities cannot agree, or no application has been made, the trustees are not entitled to access the reliefs and exemptions available under the DTA, such as reduced rates on non-resident withholding income.

**Note:** The administrative approach for certain dual resident companies, agreed by the competent authorities of Australia and New Zealand,[35] **does not apply to trusts**.

419. The tie-breaker provisions apply only for the purposes of a DTA. Even if a trust's tax residence tie-breaks to Australia, for example, it may still have obligations as a tax resident of New Zealand, such as under the disclosure rules.

## Beneficiary tax residence

420. The normal rules about tax residence and source apply to determine which items of beneficiary income and taxable distributions are included in a beneficiary's assessable income.

421. Beneficiaries are required to include in their assessable income all beneficiary income and taxable distributions they derive in an income year (ss HC 17 and CV 13) except where the income is derived by a:

- minor to which s HC 35 applies; or
- close company to which s HC 38 applies.

[34] Each DTA is different and other DTAs and the MLI positions of different countries (if they have ratified the MLI) need to be examined individually.

[35] Discussed from [343].

422. Where either of the above exceptions applies, the income is excluded income of the minor (s CX 58) or close company (s CX 58B), as relevant, and treated as trustee income under s HC 35 or s HC 38 to which a tax rate of 39% applies.

423. When a beneficiary is tax resident in New Zealand, the beneficiary is required to include all beneficiary income and taxable distributions in their assessable income (s BD 1). Taxable distributions from non-complying trusts are taxed at 45%.

424. When a beneficiary is not tax resident in New Zealand, only New Zealand–sourced beneficiary income and taxable distributions are included in assessable income. In this situation, there is an NRWT liability if the New Zealand–sourced income is non-resident passive income. This may be a final tax if the non-resident beneficiary has no other income sourced in New Zealand. Income derived by a beneficiary from a trust will have a source in New Zealand to the extent to which the income of the trust fund has a source in New Zealand (s YD 4(13)).

425. As noted at [413], the trustee of a trust is generally liable as agent for the income tax liability of the beneficiary for their beneficiary income and taxable distributions derived (s HC 32).

426. There is a specific rule for beneficiaries who cease to be tax resident in New Zealand and who become tax resident again within 5 years of the date of the end of their residence. In this situation, the beneficiary is treated as deriving income to the extent to which they would have been treated as deriving beneficiary income or taxable distributions from a foreign trust or a non-complying trust if they had remained in New Zealand during the period of their absence. Any such income is treated as derived on the day on which the beneficiary becomes resident again (ss CV 15 and HC 23).

427. The tax residence of a beneficiary is determined under the rules in s YD 1 or s YD 2, depending on whether the beneficiary is a natural person or a company.

## Changes in tax residence

428. The following discussion considers the implications in some situations of settlors, trustees and beneficiaries changing tax residence.

### Inbound settlor of a foreign trust and a tax resident trustee

429. If a non-resident settlor of a foreign trust with a tax resident trustee becomes tax resident in New Zealand (and is not a transitional resident), foreign-sourced amounts derived by a trustee in the year the settlor becomes tax resident are generally assessable. This is because the exemption in s HC 26 no longer applies. The trust becomes a non-complying trust.

430. However, it is possible for an election to be made for the trust to be treated as a complying trust for some distributions. This is done through a settlor, trustee or beneficiary of a trust electing to satisfy the income tax liability of the trustee. This applies if a settlor of the trust is a natural person who:

- becomes a New Zealand tax resident (and is not a transitional resident); or
- stops being a transitional resident and continues to be a New Zealand tax resident (either of these days is the "transition date");

provided the trust would be a foreign trust in relation to a distribution if a distribution were made immediately before the settlor became tax resident (ss HC 30 and HC 33).

431. If such an election is made, the person making the election is liable for the income tax payable by the trustee, other than income tax that the trustee is liable for as agent of a beneficiary (s HC 33(2)).

432. The election must be made before the election expiry date – being the first anniversary of the transition date. If an election is made, the trust is treated as a:

- foreign trust to the extent to which distributions consist of an amount derived by the trustee before the date of the election and that do not give rise after the transition date to an income tax liability that is paid before the distribution is made;
- complying trust to the extent to which distributions consist of an amount derived by the trustee:
  - before the date of the election and give rise on or after the transition date to an income tax liability that is paid before the distribution is made; or
  - on or after the date of the election, if the requirements of s HC 10(1)(a) are met for the trustee income derived after the date of the election; and
- non-complying trust to the extent to which the distribution consists of an amount that would not be included in the above.

433. This treatment means, for example, foreign-sourced trustee income accumulated while the trust is a foreign trust can be distributed to a non-resident or transitional resident beneficiary tax free. It also means accumulated trustee income derived after the election can be distributed tax free if the tax obligations in relation to trustee income have been met. Conversely, if an amount is derived after the date of the election and the requirements of s HC 10(1)(a) are not met, the distribution is treated as coming from a non-complying trust. If it is a New Zealand–sourced amount, it is taxed at 45% whether or not the beneficiary is a tax resident.

434. If an election is not made within the 12-month period, the trust is treated as a:

- foreign trust to the extent to which distributions consist of an amount derived by the trustee before the election expiry date and which does not give rise on or after the transition date to an income tax liability;
- complying trust to the extent to which the distribution consists of an amount derived by the trustee that gives rise on or after the transition date to an income tax liability meeting the requirements of s HC 30(4B) or s HC 10(1)(ab); or
- non-complying trust to the extent to which distributions consist of an amount derived by the trustee that gives rise on or after the transition date to an income tax liability that is not satisfied before the distribution is made.

435. An income tax liability that meets the requirements of s HC 30(4B) can be treated as coming from a complying trust if:

- the income tax liability is satisfied before the distribution is made, other than for the trust as a complying trust under an election under s HC 33;
- the income tax liability gives rise to a tax shortfall for the trustee for an income year ending before the distribution is made; and
- where a shortfall penalty arises for the tax shortfall, the shortfall penalty is satisfied before the distribution is made.

436. This provision allows for errors to be corrected before distributions are made so the tax treatment for a non-complying trust does not apply.

437. Retrospective elections are permitted if the requirements of s HC 10(1)(ab) are met so that complying trust status can apply to a distribution, but the period for making such an election is limited to 4 years before the start of the electing year. The ability to make retrospective elections assists migrants who were not aware of the impact of a foreign trust not making an election by the election expiry day. It is not compulsory to make an election. Some trusts may prefer not to do so depending on the circumstances.

438. If a settlor of a dual status trust becomes tax resident, the trust remains a complying trust. No election is required.

### Outbound settlor of a complying trust and a tax resident trustee

439. If a New Zealand tax resident settlor of a trust ceases to be New Zealand tax resident and there are no other New Zealand tax resident settlors of the trust, foreign-sourced amounts derived by a tax resident trustee in the following year are exempt (provided that no settlor is tax resident in New Zealand at any point in that income year and the registration and reporting obligations for a foreign exemption trust are met).

440. The change in residence could mean the trust loses its status as a complying trust if there are no other tax resident settlors and the trustee, for example, derives foreign-

sourced income that is exempt. However, this will not happen if the trustee elects to continue being taxed on worldwide income retained as trustee income and indicates that by ticking the relevant box in their return, **Income tax return: Estate or trust – IR6**. If the trustee is not required to file a return, they must notify the Commissioner in the return for foreign exemption trusts.

441. A retrospective election can also be made under s HC 33 to maintain complying trust status, but only up to 4 years before the income year in which the election is made. It may be necessary to pay shortfall penalties and use of money interest.

### Outbound trustees of a complying trust and a resident settlor

442. If a New Zealand trustee becomes non-resident, the trust's status as a complying trust may be lost if there are no other New Zealand tax resident trustees and the trustee derives non-resident passive income or non-residents' foreign-sourced income. An election can be made under s HC 33 to continue paying tax on worldwide income. The effect of the election is that the trustee is treated as tax resident. This means resident withholding tax will apply to any passive income sourced in New Zealand, instead of non-resident withholding tax.

443. If no trustees remain tax resident in New Zealand, the settlor may become liable as agent of the trustee.

444. In addition, if no trustees remain tax resident in New Zealand, the settlor needs to make a disclosure about the trust within 3 months on **Settlors of trusts disclosure – IR462**. This requirement also applies even if an election is made.

445. If a trustee departs from New Zealand but a New Zealand tax resident trustee remains, the trust may become a dual resident depending on where the departing trustee becomes tax resident. When dual residency arises, the trustees should consider making an application to the competent authorities of both countries to determine tax residence for the purposes of the applicable DTA.[36] Failure to do so may result in DTA relief, such as reduced withholding tax rates, not being available.

446. Given trans-Tasman mobility, dual residency commonly occurs when a New Zealand tax resident trustee moves to Australia. Tax advice should be sought prior to any trustee moving overseas, to ensure there are no unintended tax consequences for the trust.

[36] See [417].

### Inbound trustees and a non-resident settlor of a foreign trust

447. If a non-resident trustee of a foreign trust becomes tax resident, foreign-sourced income derived by the trustee is exempt if the trustee meets their obligations under the foreign exemption trust disclosure rules.

448. It also changes how passive income is taxed. If the trustee receives non-resident withholding income, they are taxed at the resident withholding tax rate.

### Outbound beneficiaries

449. If a New Zealand tax resident beneficiary becomes non-resident, they must continue to pay tax on New Zealand–sourced beneficiary income and New Zealand–sourced taxable distributions from a foreign or non-complying trust unless a DTA provides relief. Where the non-resident has income, the applicable return is **Income tax return: Non-resident individual taxpayers – IR3NR**. However, if the only income is non-resident withholding income, no return is required and the amount withheld is a final tax assuming the withholding is correct.

450. Trustees need to deduct non-resident withholding tax if the distributions include non-resident withholding income such as interest or dividends. Where applicable, they may arrange for the payer of the amounts to deduct the withholding.

451. As noted at [426], there is also a specific rule in relation to beneficiaries who cease to be tax resident in New Zealand and who become tax resident again within 5 years of ceasing to be tax resident and receive distributions from a foreign trust or non-complying trust.

### Inbound beneficiaries

452. A non-resident beneficiary who becomes tax resident may be eligible to be a transitional resident. This means foreign-sourced distributions from a foreign trust or non-complying trust would be exempt for the period of transitional tax residence.

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# About this document | Mō tēnei tuhinga

Interpretation statements are issued by the Tax Counsel Office. They set out the Commissioner's views and guidance on how New Zealand's tax laws apply. They may address specific situations we have been asked to provide guidance on, or they may be about how legislative provisions apply more generally. While they set out the Commissioner's considered views, interpretation statements are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further Status of Commissioner's advice (Commissioner's Statement, Inland Revenue, December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in an interpretation statement will not necessarily lead to the same tax result. Each case must be considered on its own facts.