Inland Revenue
Te Tari Taake

INTERPRETATION STATEMENT: IS 19/03

Income tax – Exempt income of non-resident entertainers

All legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the appendix to this Interpretation Statement.

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Summary

1. Where a non-resident entertainer or sportsperson carries out an activity or performance in New Zealand, the income they earn from that activity or

performance will usually be subject to tax in New Zealand. However, in certain circumstances, s CW 20 of the Income Tax Act 2007 provides non-resident entertainers and sportspersons with an exemption. This statement considers s CW 20, and the circumstances in which the exemption will apply.

2. This statement is primarily intended to assist those who are paying non-resident entertainers to decide whether the exemption in s CW 20 applies so that payers do not need to withhold tax from payments made. However, it may also be of assistance to non-resident entertainers who are unsure whether their income is exempt.

3. The exemption in s CW 20 covers income received by a non-resident entertainer in four situations. The situations are where the non-resident entertainer carries out an activity or performance in New Zealand, and one of the following occurs:

   (a) The activity or performance occurs under a government cultural programme. This is where a cultural programme belongs to, and is funded by, either the New Zealand Government or an overseas central government. (See s CW 20(1)(a) and the discussion from [23].); or,

   (b) The activity or performance occurs under a cultural programme that is wholly or partly sponsored by a government. This is where the New Zealand Government or an overseas central government provides more than minimal funding for the cultural programme. (See s CW 20(1)(b) and the discussion from [32].); or,

   (c) The activity or performance occurs as part of a programme that belongs to certain types of overseas bodies. To fall within this category, an overseas body needs to be a foundation, trust or other organisation. The body needs to have a more than minimal purpose of promoting cultural activity. The body also cannot be carried on for the private pecuniary profit of any member, proprietor, or shareholder; that is, none of those persons should be entitled to the body's surpluses or capital. (See s CW 20(1)(c) and the discussion from [43].); or,

   (d) The activity or performance relates to a game or sport, where the participants are official representatives of a body that administers the game or sport at a national level in an overseas country. (See s CW 20(2) and the discussion from [68].).

4. Section CW 20(3) also exempts amounts derived by another person (the **Service Provider**) who provides the services of a non-resident entertainer during a visit to New Zealand if certain conditions are met. In particular, the Service Provider must be related to the entertainer in one of the following ways:

   (a) The Service Provider is the non-resident entertainer's "employer". This can occur by the Service Provider engaging the non-resident entertainer as either an employee, or an independent contractor. (See from [101].);

   (b) The Service Provider is a company that has the non-resident entertainer as an officer. This will most commonly occur where the non-resident entertainer is a director of the Service Provider company that derives income by providing the entertainer's services. (See from [107].);

   (c) The Service Provider is a firm that has the non-resident entertainer as a principal. This will most commonly apply where the Service Provider is some other kind of unincorporated business and the entertainer is one of the senior persons in that business. (See from [110].).

5. If the exemption applies, those paying the non-resident entertainer or Service Provider are not required to deduct tax from the payments they make to the non-resident entertainer or Service Provider. If the exemption does not apply, there is a withholding liability on payers to deduct tax from income paid to non-resident entertainers or Service Providers under the PAYE rules in subpart RD.

6. This statement updates and replaces "Non-resident sports people and entertainers – application of section 61(17) of the Income Tax Act 1976" published in *Tax Information Bulletin* Vol 4, No 3 (October 1992) (**the 1992 item**).

Introduction

7. The term "non-resident entertainer" is defined in s CW 20(4):

> *Meaning of non-resident entertainer*
>
> (4) In this section, non-resident entertainer means a non-resident person, as defined in subpart YD (Residence and source in New Zealand), who carries out an activity or performance in connection with—
>
> (a) a solo or group performance by actors, comperes, dancers, entertainers, musicians, singers, or other artists, whether for cultural, educational, entertainment, religious, or other purposes; or
>
> (b) lectures, speeches, or talks for any purpose; or
>
> (c) a sporting event or sporting competition of any nature.

8. A wide variety of performers and sportspeople are covered by s CW 20(4) and could qualify for the exemption provided the requirements of s CW 20(1), (2) or (3) are met. In the Commissioner's view, the entertainers covered by s CW 20(4) include performers on both stage and screen.

9. This statement does not address whether a person is a non-resident for income tax purposes. More information about residency is in the Commissioner's Interpretation Statement "IS 16/03 Tax Residence" *Tax Information Bulletin* Vol 28, No 10 (October 2016).

10. Under the Act, non-residents are generally taxed on only their New Zealand–sourced income: s BD 1(5). For non-resident entertainers, income that they earn from activities or performances in New Zealand will generally have a source in New Zealand: s YD 4(3), (4) and (17D). Broadly, the Act does one of two things in relation to a non-resident entertainer's income. The Act either:

    (a) exempts the income under s CW 20, which depends on the circumstances of the non-resident entertainer's activity or performance; or,

    (b) creates a withholding liability on payers to deduct tax from the income under the PAYE rules in subpart RD.

11. The analysis in this statement focuses on the scope of s CW 20. The effects of the PAYE rules and double tax agreements are also briefly noted from [118] below, but those paying non-resident entertainers for their services do not need to consider those aspects if the exemption applies.

Analysis

Introduction

12. The analysis in this statement is structured in the following way:

    (a) First, the statement discusses the circumstances in which income derived by a non-resident entertainer, other than a sportsperson, will be exempt. The statement separately addresses each of the three circumstances listed in s CW 20.

    (b) Secondly, the statement discusses when income derived by a non-resident entertainer from sporting activities will be exempt.

    (c) Thirdly, the statement discusses what happens if the income is derived by the non-resident entertainer's employer, or by a company or firm with which the entertainer has some connection, rather than by the entertainer.

    (d) Finally, the statement briefly notes the further matters that payers should consider where the exemption does not apply, including the PAYE rules, and applicable double tax agreements.

Non-resident entertainers other than sportspersons

13. Section CW 20(1) exempts income derived by a non-resident entertainer, other than a sportsperson, from carrying out their "activity or performance" if the activity or performance occurs in one or more of three circumstances listed in the provision. Each circumstance is listed in a separate paragraph of s CW 20(1), and only one of the three paragraphs in s CW 20(1) needs to be met for s CW 20(1) to apply. However, a common theme in each paragraph is the reference to a "cultural" programme or activity.

A "cultural" programme or activity

14. The ordinary meaning of "cultural" includes "relating to the arts and to intellectual achievements" (*Concise Oxford English Dictionary*, Oxford University Press, online ed).

15. Case law also describes "cultural" as covering a wide range of artistic or cultural pursuits. For instance, the Court of Appeal in *Molloy v CIR* (1981) 5 NZTC 61,070 noted that that the word "may properly have attributed to it its ordinary dictionary meaning as relating to the training, development and refinement of mind, tastes and manners".

16. The word "cultural" was also considered in *Conyngham & Ors v Minister for Immigration and Ethnic Affairs* [1986] FCA 238, (1986) 68 ALR 423. *Conyngham* concerned an administrative policy under which temporary entry permits could be issued to entertainers or professionals who possessed a level of talent of such merit as to lead to "the continuing cultural enrichment of the Australian community". An American vocal group known as "The Platters", who sang songs from the 1950s delivered in 1950s style, had been denied a temporary entry permit to Australia under that policy. Wilcox J (at [30]) considered the word "cultural" in this context was not limited to specialised arts practised only by a minority. Rather, the term was used in its full and true sense as "pertaining to civilization". He went on to say that not everyone will appreciate a particular entertainer or their performance. However, this does not prevent the performance from enriching the culture of the community by extending the opportunities and range of those who do appreciate it.

17. That a cultural performance is not limited to specialised arts is consistent with the definition of "non-resident entertainer" in s CW 20(4) which lists a wide variety of activities. Following case law, whether the entertainer is widely appreciated is not relevant.

18. The *Concise Oxford English Dictionary* provides several definitions for "programme". The most relevant of those definitions is:

> A set of related measures or activities with a particular long-term aim.

19. Taking "programme" to mean a set of related measures or activities with a long-term aim, the ordinary meaning of "cultural programme" would therefore be a set of related measures or activities with a long-term aim of "culture".

20. Given a "programme" refers to a set of related measures or activities, a standalone or one-off project is unlikely to constitute a programme by itself. However, if that project forms part of a wider, for example, event or festival, the event or festival could be considered a programme.

21. For clarity, the Commissioner notes that the "cultural" programmes and activities covered in the provision are not limited to those that were explicitly listed in the 1992 item.

22. This statement goes on to consider separately the three circumstances set out in the three paragraphs in s CW 20(1).

Government cultural programmes – s CW 20(1)(a)

23. The first circumstance (under s CW 20(1)(a)) is where the non-resident entertainer's activity or performance:

> …occurs under a cultural programme of the New Zealand government or an overseas government…

24. Having already discussed the meaning of "cultural programme", the remaining issues in this paragraph are whether there is a programme "of" a government, and which "governments" qualify.

25. The ordinary meaning of the word "of" in this context suggests that the cultural programme must be associated with, or belong to, that government: *Concise Oxford English Dictionary* definition of "of".

26. The initial reference to "government" is to "<u>the</u> New Zealand" government. This implies that it refers to the national government of New Zealand (that is, central government), rather than to local authorities defined by the Local Government Commission that are independent of, and subordinate to, central government: J Wilson, "Nation and Government: Local Government" in *Te Ara: The Encyclopedia of New Zealand* (Ministry for Culture and Heritage, 2005, updated 16 September 2016). In context, then, the reference to an overseas government is to the national or central government of an overseas country and not to a local or state government.

27. For completeness, if a non-resident entertainer's activity or performance occurs under a cultural programme of, for instance, a local or state government s CW 20(1)(b) or (c) can still apply provided the other requirements in those provisions are met.

28. The policy intention behind s CW 20(1) is to facilitate cultural exchanges between New Zealand and other countries that:

- are funded by the government; or,
- occur under a programme of a cultural organisation the activities of which are not carried out for the private pecuniary profit of any member (covered by s CW 20(1)(c) which is discussed from [43]).

29. The same policy reason for s CW 20(1)(a) underlies similar provisions in some of New Zealand's double tax agreements (**DTA**). Some of these DTAs include a provision that income derived by a visiting non-resident entertainer will not be subject to New Zealand tax. In the absence of such a provision, the income will be taxable in the contracting state in which it is derived: art 17 of the OECD Model Tax Convention on Income and on Capital (the **OECD Model Tax Convention**). The OECD, in "Commentary on Article 17", in *Model Tax Convention on Income and on Capital: Condensed Version 2017* (OECD Publishing, Paris, 2017) explains that some DTAs provide that article 17 does not apply if the entertainer or sports person is employed in events **that are supported by public funds**:

> 13. Article 17 will ordinarily apply when the entertainer or sportsperson is employed by a Government and derives income from that Government: see paragraph 6 of the Commentary on Article 19. **Certain conventions contain provisions excluding entertainers and sports persons employed in organisations which are subsidised out of public funds from the application of Article 17**.
>
> 14. **Some countries may consider it appropriate to exclude from the scope of the Article events supported from public funds.** Such countries are free to include a provision to achieve this but the exemptions should be based on clearly definable and objective criteria to ensure that they are given only where intended. Such a provision might read as follows:
>
> > The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by entertainers or sportspersons if the visit to that State is **wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof.** In such a case, the income is taxable only in the Contracting State in which the entertainer or sportsperson is a resident. [Emphasis added]

30. In this light, a cultural programme will belong to the government (New Zealand or overseas) if that programme is funded by the government.

31. For completeness, the Commissioner notes that neither the wording nor the policy of the legislation requires:

- the non-resident entertainer to be an employee of the government or a government agency; or
- the funding to be by way of monetary remuneration to an employee.

For example, the funding may take the form of a grant given under a government cultural programme.

Government sponsored cultural programmes – s CW 20(1)(b)

32. The second circumstance (under s CW 20(1)(b)) is where the non-resident entertainer's activity or performance:

> …occurs under a cultural programme wholly or partly sponsored by the New Zealand government or an overseas government…

33. Unlike in s CW 20(1)(a), this circumstance does not require the cultural programme to *belong* to the New Zealand or overseas government. However, it does require

the programme to be "wholly or partly sponsored" by the government (New Zealand or overseas). The meaning of that phrase is considered further below.

"Sponsored"

34. To sponsor means to be a sponsor. "Sponsor" is defined in the *Concise Oxford English Dictionary*:

> 1 a person or organization who pays or contributes to the costs of an event or broadcast in return for advertising.
>
> 2 a person who pledges a sum of money to a charity after another person has participated in a fundraising event.
>
> 3 a person who introduces and supports a proposal for legislation.
>
> 4 a person taking official responsibility for the actions of another.

35. The meanings of "sponsor" contemplate either financial or non-financial support. As noted in [28], the policy behind s CW 20(1) is to facilitate cultural exchanges between New Zealand and another country that are funded by:

- the government, or
- a cultural organisation the activities of which are not carried out for the private pecuniary profit of any member.

36. In this light, the Commissioner's view is that sponsorship of a cultural programme requires the government (New Zealand or overseas) to pay or contribute to the costs of that programme. That is, the cultural programme must be wholly or partly funded by the government.

37. What must be sponsored is a "cultural programme" and the meaning of that term is discussed at [14] to [19]. Mere sponsorship of an entity is insufficient, unless that entity is carrying on a cultural programme, that cultural programme is sponsored, and the non-resident entertainer's activity or performance occurs under that programme.

"Wholly or partly"

38. The phrase "wholly or partly" is not defined in the context of s CW 20(1)(b). The ordinary meaning of "wholly" is entirely or fully and the ordinary meaning of "partly" is to some extent or not completely (*Concise Oxford English Dictionary*).

39. In *Dyck v Lohrer* [2000] BCJ No 629, the court interpreted "partly" as meaning something less than the entire part. The word "partly" means a piece, portion or part of a whole. It may mean a very small part or a very large part (*Re Schlatter and Defence Force Retirement and Benefits Authority and Brown* (1985) 8 ALD 133).

40. In *McKenzie v Baddeley* [1991] NSWCA 197, the court considered "partly" in the context of the phrase "wholly or partly dependent". It held that "partly" did not mean substantially. Rather, it meant "more than minimally" or "significantly".

41. The legislative context determines whether the phrase "wholly or partly" is a composite term or whether the word "partly" is read in isolation. The Commissioner's view is that "wholly or partly" is a composite phrase where the meaning of "partly" is coloured by "wholly". The word "partly" used in conjunction with the word "wholly" requires that the promotion of cultural activity must be a more than minimal purpose of the organisation's existence (*McKenzie v Baddeley*).

42. If a cultural programme is only minimally funded by the government, the Commissioner acknowledges that a boundary issue about the meaning of "partly" could arise. However, in such a case the Commissioner's view is that the provision's purpose should be considered. The Commissioner's view is that the provision was intended to promote programmes that are likely to result in little or no profit or might not happen without government funding. In practice, where governments do provide funding, one of the criteria that is likely considered by the agency or authority responsible for that funding is whether a programme is likely to happen without government funding. As such, the Commissioner's view is that a programme that has received government funding to any extent will be the kind of programme that was anticipated to qualify under the exemption.

Overseas foundations, trusts or other cultural organisations – s CW 20(1)(c)

43. The third circumstance (under s CW 20(1)(c)) is where the non-resident entertainer's:

> … activity or performance occurs as part of a programme of an overseas foundation, trust, or other organisation that—
>
> (i) exists wholly or partly to promote cultural activity; and
>
> (ii) is not carried on for the private pecuniary profit of any member, proprietor, or shareholder.

44. Section CW 20(1)(c) shares some common language with s CW 20(1)(a) and (b). In particular, para (c) refers to a programme "of" an organisation. As in para (a), the word "of" in para (c) also denotes ownership.

45. The programme must belong to an "overseas foundation, trust, or other organisation". These terms are not defined in the Act so the ordinary meanings are relevant. A "foundation" is an institution established with an endowment: *Concise Oxford English Dictionary*. A "trust" is a fiduciary relationship where a person holds the title of property for the benefit of another: *New Zealand Law Dictionary* (8th ed, LexisNexis NZ, Wellington, 2015). An "organisation" is an organised group of people with a particular purpose: *Concise Oxford English Dictionary*.

46. In context, the Commissioner notes that the overseas "foundation, trust, or other organisation" is the same body that must not be "carried on for the private pecuniary profit of any **member, proprietor, or shareholder**". The reference to a shareholder anticipates that an "other organisation" could include a company, since a trust or foundation would not be expected to have shareholders. Similarly, the references to "member" and "proprietor" suggest that other types of unincorporated bodies, such as partnerships or unincorporated societies, will qualify. On balance, the Commissioner's view is that, in practice, the inclusion of "other organisation" in s CW 20(1)(c) indicates that the provision potentially applies to any overseas group of people that meets the stipulated requirements outlined in [43].

47. Importantly, s CW 20(1)(c) will apply only if the cultural programme belongs to an *overseas* foundation, trust or organisation. This means a performance under a programme of a New Zealand organisation will not meet the requirements of s CW 20(1)(c). This is so even if the entertainer is a non-resident. The Commissioner's view is that the reference to an "overseas" body refers to a body that has been constituted, has been established or operates outside New Zealand.

Does the overseas body exist (wholly or partly) to promote cultural activity?

48. For s CW 20(1)(c) to apply, the overseas organisation must "exist wholly or partly to promote cultural activity". This phrase is undefined in the Act. However, in the Commissioner's view, this phrase suggests a test of the organisation's purpose (or purposes).

49. The organisation's purpose needs to be to "promote cultural activity". The ordinary meaning of "promote" is to move forward or advance (*Aporex Inc v Hoffmann La-Roche Ltd* [2000] OJ No 4732). Therefore, for s CW 20(1)(c) to apply, a purpose of the overseas organisation must be (wholly or partly) to move forward or advance cultural activity. As discussed from [14], culture relates to the training, development and refinement of mind, tastes and manners; it is not limited to specialised arts but pertains to civilisation.

50. The meaning of "wholly or partly" is discussed above at [38] to [42]. In summary, the case law suggests that "wholly or partly" can be read as "significantly" or "more than minimally": *McKenzie v Baddeley*. As discussed at [41], "partly" cannot refer to "significantly". Therefore, in the context of s CW 20(1)(c), the promotion of cultural activity must be a more than minimal purpose of the organisation's existence.

51. In determining if an organisation exists wholly or partly to promote cultural activity, it is necessary to consider the activities that the organisation actually engages in (*Capital Club Pty Ltd v Commissioner of State Revenue* (2007) ATC 4498). For the exemption in s CW 20(1)(c) to apply, the overseas organisation must have promoted cultural activity by providing an activity or performance by a non-resident entertainer in New Zealand as part of a programme. The exemption could apply where an overseas organisation exists to promote cultural activity and for other purposes. This is provided the promotion of cultural activity is a more than minimal purpose for the organisation's existence.

What does it mean for an activity not to be carried on for the private pecuniary profit of any member, proprietor or shareholder?

52. The phrase "private pecuniary profit of any member, proprietor or shareholder" is not defined in the Act. Case law suggests that an organisation will be viewed as not being carried on for private pecuniary profit if its surpluses or capital are unavailable for private benefit: *Trustees of the Auckland Medical Aid Trust v CIR* (1979) 4 NZTC 61,404 (HC). However, the cases also indicate that the requirement that funds not be available for the private pecuniary profit of a member does not prevent a person being paid for their services to the entity: *Presbyterian Church of New Zealand Beneficiary Fund v CIR* (1994) 16 NZTC 11,185 (HC) and *Hester & Ors v CIR* (2005) 22 NZTC 19,007 (CA).

53. In s CW 20(1)(c), the relevant individuals or groups are the members, proprietors or shareholders of the overseas foundation, trust or other organisation.

54. The *Concise Oxford English Dictionary* defines "member", "proprietor" and "shareholder" as:

> **member** … a person … that has joined a group, society, or team …
>
> **proprietor** … **1** the owner of a business. **2** a holder of property.
>
> **shareholder** … an owner of shares in a company.

55. The definitions "proprietor" and "shareholder" incorporate the concept of ownership. The meaning of "member" is arguably wider, suggesting that a person is a member

because of the nature of their relationship with an organisation. Therefore, the essence of being a member is that a person belongs to an organisation. However, in the context of s CW 20(1)(c), the "member" will be someone who could potentially receive a private pecuniary benefit from the organisation's activity unless prohibited by constitution or other founding document.

56. The grammar of s CW 20(1)(c) indicates that what cannot be carried on for private pecuniary profit of any member, proprietor or shareholder is the *overseas foundation, trust or other organisation*. Provided the requirements in s CW 20(1)(c) are met, it can still apply if the non-resident entertainer profits from their performance – as is clearly envisaged where a non-resident entertainer derives an amount of income from their performance.

57. Whether an organisation is or is not carried out for private pecuniary profit of any member, proprietor or shareholder is tested based on the wording of the constituting documents. These are then tested from a holistic perspective, having regard to the organisation's functions and activities (*CIR v Medical Council of New Zealand* (1997) 18 NZTC 13,088 (CA); *Crown Forestry Rental Trust v CIR* (2002) 20 NZTC 17,737 (CA)).

Activity … "in connection with"

58. To qualify for the exemption in s CW 20(1), a person needs to be a non-resident entertainer under s CW 20(4). They will be a non-resident entertainer if they are a "non-resident person … who carries out an activity or performance **in connection with**" various kinds of entertainment and sporting activities listed in s CW 20(4)(a) to (c).

59. Touring performers will often have supporting personnel. Although those personnel may play an important role in supporting performers, whether they qualify for the exemption depends on whether their activities have a sufficient "connection with", the relevant event, as those words must be interpreted in the provision.

60. The words "in connection with" and (as discussed later in this statement from [86]) "relating to" likely have a similar meaning. Case law has considered the words "relating to" as well as the similar phrases "in relation to" and "in respect of". In one context, the courts have said that the words "in respect of or in relation to" are "words of the widest import": *Shell New Zealand Ltd v CIR* (1994) 16 NZTC 11,303. However, in *New Zealand Forest Research Ltd v CIR* (1998) 18 NZTC 13,928, the High Court stated that the starting point in interpreting the meaning of "relating to" is to consider the ordinary and natural meaning of the phrase, in the context of the provision in which it is used. That approach is consistent with s 5(1) of the Interpretation Act 1999, which requires the meaning of an enactment must be ascertained from its text and in the light of its purpose, and the Supreme Court's decision in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767.

61. As noted at [80], the exemption's purpose at the time of enactment was to bring the exemption for certain non-resident entertainers – then set out in Part F of the Income Tax (Withholding Payments) Regulations 1975 – into the general tax law. What were the payment categories in the Income Tax (Withholding Payments) Regulations 1975 are now found in sch 4 of the Income Tax Act 2007. Schedule 4 may therefore be relevant in interpreting s CW 20(4).

62. The Commissioner notes that, in the context of entertainers, the sch 4 category for non-resident entertainers providing a "Part F activity" seems unlikely to include supporting personnel. Relevantly, sch 4 includes a specific category for people

providing services on- and off-set for television, video and film productions. That category was added by the Income Tax (Withholding Payments) Amendment Regulations (No 2) 2003 ("the Amendment Regulations").

63. The Commissioner understands that the Amendment Regulations added that category to ensure that those types of supporting personnel were subject to tax in approximately the same way as entertainers. By implication then, the Amendment Regulations would not have been necessary if supporting personnel already came within the entertainer category.

64. The discussion in the OECD's *Commentary on Article 17 concerning the taxation of entertainers and sportspersons* also stipulates at [4] that a distinction should be made between a person performing as an entertainer in a show and another taking a supporting role.

65. Consistent with the approach in sch 4 and the OECD Commentary, the Commissioner's view is that supporting personnel are not included as non-resident entertainers under s CW 20(4).

66. However, supporting personnel may still qualify for the exemption in s CW 19. Section CW 19 gives non-residents who derive personal services income an income tax exemption where they visit for short periods only, work for a person who is a non-resident, and are subject to an equivalent income tax in their residence country.

67. Similar considerations arise for sportspeople and are addressed below from [86].

Sportspersons

68. Section CW 20(2) contains an exemption for certain non-resident entertainers carrying out an activity or performance relating to a game or sport. It provides:

> Income that a non-resident entertainer derives from carrying out an activity or performance that relates to a game or sport in New Zealand during a visit is exempt income if the participants are the official representatives of a body that administers the game or sport in an overseas country.

Official representative

69. For the exemption to apply, the participants need to be "official representatives". The *Concise Oxford English Dictionary* defines "official", in its adjective form, as follows:

> 1 Relating to an authority or public body and its activities and responsibilities.
>
> 1.1 Having the approval or authorization of an authority or public body.
>
> 1.2 Employed by an authority or public body in a position of authority.

70. The example given in the *Concise Oxford English Dictionary* for definition 1.2 above is "an official spokesman". Given the reference in the provision is to an "official representative" of a sporting body, definition 1.2 seems most relevant in this context.

71. "Representative" is defined in the *Concise Oxford English Dictionary* as follows:

> 1 A person chosen or appointed to act or speak for another or others.

72. Taken together, these definitions appear to suggest that an "official representative" is a person chosen or appointed to act as a person employed by an authority or public body in a position of authority, in this context in relation to a sport.

73. In that way, a person who merely affiliates with, or is a member of, an administering body will not qualify for the exemption. Similarly, a person will not qualify if they affiliate with a sporting body but compete on an individual basis rather than as an "official representative" of that body. The person needs to "represent" the administering body.

74. For completeness, the Commissioner notes that while the dictionary definitions use the word "employed", this may not refer to the legal concept of employment. In other words, a person need not have an employment contract with a body to be an official representative of that body.

Body that "administers" the game or sport in an overseas country

75. For the exemption to apply, the body must administer the game or sport "in an overseas country". Income derived by official representatives of a New Zealand body which administers a sport is **not** exempt under this provision.

76. "Administer" is defined in the *Concise Oxford English Dictionary* as follows:

> Manage and be responsible for the running of (a business, organization, etc.)

77. Taking the ordinary meaning of "administer", the provision therefore seems to point towards bodies that manage, or are responsible for running matters to do with, the sport or game in an overseas country. Whether an organisation can be regarded as one that "administers" a game or sport will ultimately be a factual matter. The ordinary meaning of "administers" suggests that an analysis of the organisation's functions will be required. Without limiting the functions that might be considered, some examples of relevant "administrative" functions could include where the body is:

(a) Formally established or constituted;

(b) Responsible for promotion of the sport both within its country and internationally;

(c) Recognised on the international stage as that country's official body for its relevant sport;

(d) Affiliated with, or a member of, an international body responsible for administering the sport;

(e) Responsible for selection of players in international competitions;

(f) Responsible for setting rules or codes in relation to its sport;

(g) Responsible for disciplinary action against players or members.

National sporting body

78. The wording of s CW 20(2) suggests that there may be more than one administrative body for a game or sport in a country. This is because of the use of the indefinite article, "a body that administers the game or sport". But it is not clear whether the wording merely allows for the possibility of more than one body at a national level (for example, one for men and one for women), or whether it also allows for bodies at a regional or city level. On one reading of s CW 20(2), there might not appear to be any reason why a member of a club rugby team, who is an official representative of the board or committee who administers the sport for the overseas club, would not be covered by s CW 20(2).

79. However, the explanatory note to cl 5 of the Land and Income Tax Amendment Bill (No 4) 1975, which led to the insertion of what is now s CW 20(2), stated that the exemption related to players officially representing their country or their national organisation:

> Clause 5 exempts from income tax the income derived by non-resident entertainers (within the meaning of the Income Tax (Withholding Payments) Regulations 1975) from any activity or performance–
>
> …
>
> (c) In relation to any game or sport where the players officially represent their **country** or their **national** organisation. [Emphasis added]

80. Background materials, including submissions made on the Bill, indicate that cl 5 was intended to bring the exemption for certain non-resident entertainers – which already appeared in Part F of the Income Tax (Withholding Payments) Regulations 1975 – into the general tax law. The New Zealand Society of Accountants submitted on cl 5 of the Bill, suggesting that the exemption for certain sportspersons should be widened. As a matter of policy, the Government decided that the exemption should only apply to sportspersons *who officially represent their overseas country*.

81. The Commissioner also notes that the sportspersons exemption has subsequently been treated as applying to only national representatives. For instance, from 27 January 1995 the New Zealand-Australia DTA has included a specific rule for trans-Tasman sporting leagues, intended to reduce compliance costs for non-national sporting representatives: art 17(3) of the New Zealand-Australia DTA. The Finance and Expenditure Committee commented on the rule (at p 7):[1]

> The exclusion does not apply to national representative teams competing in international competitions such as the rugby world cup. **Existing domestic law provisions exempt foreign national representative teams competing in New Zealand.** [Emphasis added]

82. Both the pre-legislative materials and subsequent interpretative approach indicate that the legislative intention of what is now s CW 20(2) was that the "governing body" is the governing body at a national level. Representing a provincial body or a club does not suffice for the exemption to apply.

83. Further, that a visiting club team may have the approval of that governing body or the team's board or committee is not intended to qualify a player for an exemption. Rather, the players must be official representatives of the overseas national governing body for the sport.

84. In conclusion, s CW 20(2) applies when income is derived by a visiting sportsperson provided they officially represent a national body that administers the game or sport in an overseas country.

85. As mentioned above, it is possible that there might also be more than one administrative body at a national level (for instance where there are separate bodies for women and men). The exemption can still apply in such a case.

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[1] *International Treaty Examination of the Convention between New Zealand and Australia for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion* (Finance and Expenditure Committee, 2009, https://taxpolicy.ird.govt.nz/sites/default/files/tax-treaties/2009-nia-dta-nz-australia.pdf)

Activity … that "relates to", or is "in connection with", a game or sport

86. Similar to the position for non-resident entertainers other than sportspeople, touring sportspeople may have a number of supporting personnel. A similar statutory interpretation issue may arise about the meaning of "in connection with", as is described above at [58] to [67]. And for sportspeople, there is a separate but similar issue in s CW 20(2) because the non-resident entertainer's income is only exempt if it is derived "from carrying out an activity … **that relates to** a game or sport … if the participants are the official representatives of [a national administrative body]".

87. The meaning of "in connection with" and "relates to" is set out above at [60]. In the context of s CW 20(2), the Commissioner has again had reference to the schedular payments regime. Notably in sch 4, the definition of "Part F activity" arguably only provides an exclusion from withholding tax deductions for "official representatives" themselves. This suggests that supporting personnel are not covered by s CW 20(2).

88. The discussion in the OECD's *Commentary on Article 17 concerning the taxation of entertainers and sportspersons* also generally appears to refer to sportspersons, rather than supporting personnel, as coming within Article 17 of the OECD Model Tax Convention.

89. Therefore, the Commissioner's view is that the exemption in s CW 20(2) does not apply to supporting personnel. However, as explained at [66] supporting personnel may still qualify for the exemption in s CW 19. Section CW 19 gives non-residents who derive personal services income an income tax exemption where they visit for short periods only, work for a person who is a non-resident, and are subject to an equivalent income tax in their residence country.

Income … "from" an activity or performance that relates to a game or sport

90. Section CW 20(2) provides an exemption for income that a non-resident entertainer derives "**from** carrying out an activity or performance that relates to a game or sport".

91. In some cases, sportspersons may derive income from sources that are ancillary to the sportsperson's physical performance. Some examples might include:

    (a) Payments by sponsors, for instance where the sportsperson might wear a sponsor's branded clothing; or

    (b) 'Image rights' payments, where the sportsperson is paid for the use of their image, such as where a promoter wishes to use the sportsperson's image to advertise their appearance in the lead up to an event.

92. There may be a question as to whether income of these kinds can be regarded as "from" the sportsperson's activity or performance for the purposes of s CW 20(2). This would seem to depend on whether the income has the required degree of connection to, even if it is not directly from, the sportsperson's physical performance.

93. In many cases, it appears that New Zealand would have a shared right to tax these sources of income. The entertainers and sportspersons article in most of New Zealand's double tax agreements corresponds to Article 17 in the OECD's Model Tax Convention. The OECD's *Commentary on Article 17 concerning the taxation of entertainers and sportspersons* suggests that income from sources other than a sportsperson's (or entertainer's) physical performance can still fall within Article 17

of the OECD Model Tax Convention. This will be the case if the income has a "close connection" with the sportsperson's physical performance. Some examples of when there is a "close connection" are described in the Commentary – for instance, where a sportsperson gives a paid media interview while they are on tour in a country.

94. Section CW 20(2) was inserted alongside the exemptions for non-resident entertainers' cultural performances and activities. As stated at [42], the non-resident entertainers' exemption was intended, at least in part, to ensure that tax is not an impediment to cultural exchanges. The Commissioner considers it reasonable to assume that there was a similar policy rationale for the sportspersons' exemption. That is, Parliament's purpose was to remove the tax impost from sportsperson's incomes that might otherwise have been an impediment to hosting international sporting competitions.

95. If New Zealand imposed tax on income "closely connected" with a sportsperson's physical performance, it could, at the margins, create the kind of impediment to hosting international sporting competitions that Parliament likely sought to avoid. For that reason, the Commissioner's view is that the exemption was likely intended also to apply to income that is closely connected to a sportsperson's physical performance in New Zealand.

96. It is noted that the sportsperson would still need to meet all the elements of s CW 20(2). Most notably, the sportsperson has to be a national sporting representative. So, for instance, a fee paid for an interview with a member of a touring national rugby team while that player is on tour in New Zealand may qualify for the exemption, but a similar payment to a golfer competing on an individual basis may not.

Service Provider providing services of non-resident entertainer or sportsperson

97. Section CW 20(3) exempts amounts derived by a person (the Service Provider) who provides the services of a non-resident entertainer during a visit to New Zealand:

> *Exempt income: employer of non-resident entertainer*
>
> (3) If income derived from an activity or performance of a non-resident entertainer would be exempt income under this section if derived by the non-resident entertainer, that amount is exempt income if derived by a person who—
>
> (a) provides the services of the non-resident entertainer during the visit to New Zealand; and
>
> (b) is 1 of the following:
>
> (i) the entertainer's employer; or
>
> (ii) a company of which the entertainer is an officer; or
>
> (iii) a firm of which the entertainer is a principal.

98. Section CW 20(3) applies only if the income would have been exempt had it been derived by the non-resident entertainer. Therefore, it is first necessary to consider the application of s CW 20(1) and (2) to the income. If one of these exemptions would have applied, s CW 20(3) will exempt the income in the hands of the Service Provider.

99. There is no restriction in s CW 20(3) on the residency of the Service Provider.

100. The Service Providers who come within the categories listed in s CW 20(3)(b) include:

- the entertainer's employer
- a company of which the entertainer is an officer
- a firm of which the entertainer is a principal

The entertainer's employer

101. Section CW 20(3)(b)(i) exempts a payment received by a Service Provider that is "the entertainer's employer". The word "employer" is a defined term in s YA 1. The s YA 1 definition states, at para (a), that "employer":

> means a person who pays or is liable to pay a PAYE income payment…

102. Section CW 20(3)(b)(i) refers to "**the entertainer's** employer". Applying the s YA 1 definition in that context, the person referred to in para (a) of the definition of "employer" in s YA 1 is a "person who pays or is liable to pay a PAYE income payment" to the non-resident entertainer.

103. Included within the PAYE income payment definition in s RD 3(1) are "a payment of salary or wages" and "a schedular payment". A "schedular payment" includes a payment to a non-resident entertainer: s RD 8(1)(a)(i) and sch 4, Part F, cl 4.

104. The main difference between a person receiving a payment of "salary or wages" and a person receiving a "schedular payment" is the nature of their relationship with the payer. In essence, a payment of salary or wages is made under a contract of service while a schedular payment is a payment made under a contract for service.

105. The implication from the above is that the definition of "employer" in s YA 1 means that "the entertainer's employer", is not limited to a person who has engaged the entertainer under a contract of service. This is because the definition includes a person paying a PAYE income payment, which may be in the form of either a payment of salary or wages or a schedular payment. Schedular payments are payments made under contracts for services (that is, to independent contractors). And in the context of s CW 20, a payment to a non-resident entertainer who is an independent contractor will come within the schedular payments rules because it is a payment listed in sch 4, Part F.

106. In conclusion, s CW 20(3)(b)(i) covers situations where the "person" has engaged the entertainer either as an employee under a contract of service, or as an independent contractor under a contract for service.

A company of which the entertainer is an officer

107. Section CW 20(3)(b)(ii) exempts a payment received by a Service Provider that is "a company of which the entertainer is an officer". A "company" is defined in s YA 1 as:

> **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 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):
>
> (abc) does not include a company that is acting in the capacity of trustee:

(ac) includes a listed limited partnership:

(ad) includes a foreign corporate limited partnership:

(b) includes a unit trust:

...

108. There is no definition of "officer" in either the Income Tax Act 2007 or in the Companies Act 1993. The *Concise Oxford English Dictionary* defines "officer" as:

2 A holder of a public, civil, or ecclesiastical office.

2.1 A holder of a senior post in a society, company, or other organization.

109. Based on the ordinary meaning, a company "officer" will be a person holding a senior post within the company. The most common example of a company officer is likely to be a company director.

A firm of which the entertainer is a principal

110. Section CW 20(3)(b)(ii) exempts a payment received by a Service Provider that is "a firm of which the entertainer is a principal". The word "firm" is also not defined in the Act. The *Concise Oxford English Dictionary* defines "firm" as:

1 A business concern, especially one involving a partnership of two or more people.

111. The ordinary meaning, therefore, suggests that a firm will be some kind of business, perhaps, but not always, involving more than one person. The ordinary meaning also suggests that a firm is likely to include a partnership and a sole trader.

112. In legal dictionaries, "firm" is defined as "an unincorporated body of persons associated together for the purpose of carrying on business": *New Zealand Law Dictionary*.

113. While not directly applicable, it is noted that s 7 of the Partnership Act 1908 defines "firm" for the purposes of that Act:

> Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name.

114. The Partnership Act 1908 then goes on to use the term "firm" to describe partnerships that are the subject of that Act.

115. A "principal" of a firm is "the most important or senior person in [a firm]": *Concise Oxford English Dictionary*. Although, in the context of s CW 20(3)(b)(ii) which refers to "**a** principal", it is sufficient if the non-resident entertainer is one of the senior persons in that firm.

Summary

116. In summary, s CW 20(3) applies if one of the exemptions for non-resident entertainers and sportspersons in s CW 20(1) or (2) would have applied, but the services are supplied by another person. This is provided that other person has one of the kinds of relationship with the entertainer described at [101] to [115].

117. For instance, a company can qualify for the exemption if it derives income that would have been exempt under s CW 20(1) or s CW 20(2) in the non-resident entertainer's hands. The company needs to supply the entertainer's services, and

the entertainer needs to be an employee or officer of the company (for example, director).

What happens if the exemption does not apply

118. This statement is primarily intended to assist those paying non-resident entertainers to determine whether the exemption in s CW 20 applies. If the exemption applies, the payer will not need to consider withholding any tax or the effect of an applicable DTA.

119. However, for completeness, if the exemption in s CW 20 does not apply, a person paying a non-resident entertainer will need to:

(a) apply the PAYE rules when making the payment;

(b) consider whether the non-resident entertainer may be entitled to relief under a DTA.

Applying the PAYE rules

120. A person paying a PAYE income payment is obliged to withhold tax from that payment and pay that tax to the Commissioner.

121. As explained in [103] and [104] above, a PAYE income payment includes both "salary or wages" and a "schedular payment". Non-resident entertainers may be either employees (under a contract of service) or independent contractors (under a contract for services). As such, the first step for a payer is to determine whether the entertainer has been engaged under a contract of service or a contract for services. If the entertainer is an employee, the payer should look to withhold PAYE from the payment. If the entertainer is an independent contractor, the payer should apply the schedular payments rules.

122. Payers will also need to record details of the non-resident entertainer they are paying, the amount of the payment, and the tax withheld as part of the income information filed with Inland Revenue. For further information about PAYE record-keeping, payday filing and tax payment obligations for schedular payments, see the Inland Revenue website: www.ird.govt.nz.

123. If the payment is a schedular payment and no tax is deducted at source, the non-resident entertainer must pay the tax to the Commissioner by the earlier of the date of their departure from New Zealand or the 20th of the month following payment: s RD 19(3).

124. A non-resident entertainer cannot obtain an exemption certificate under s 24M(2) of the Tax Administration Act 1994.

Double tax agreements

125. The provisions of a DTA may override the domestic tax position for a non-resident entertainer: s BH 1(4).

126. In general, the articles in New Zealand's DTAs relating to entertainers and sportspersons follow the formulation in art 17 of the 2017 OECD Model Tax Convention. The general position in that article is that entertainers' and sportspersons' income may be taxed in the country in which their performance or activity occurs.

127. However, there are exceptions to this rule. One example of an exception is art 17(3) of the New Zealand-Australia DTA, referred to at [81]. Another can be found in Article 17(1) of the New Zealand-United States DTA, which gives sole taxing rights to the entertainer's or sportsperson's country of residence where the relevant payments do not exceed USD$10,000 per year.

128. In each case, the relevant DTA should be consulted.

Examples

The following examples assist in explaining the application of the law.

Example 1: Australian cultural artist visiting New Zealand

The Australian Federal Government establishes a programme aimed at establishing and maintaining a cultural presence in key overseas regions or countries. It provides funding for the programme on an annual basis.

As part of the programme, a group from Arnhem Land travelled to four overseas countries including New Zealand where the group held exhibitions and gave demonstrations of Aboriginal weaving. At the group's New Zealand events, the exhibitions were organised by a promoter who collected a small entry fee from those attending. The net proceeds from the entry fees were paid to the members of the group.

The programme is a cultural programme belonging to and funded by the Australian Federal Government. The group's exhibitions and demonstrations occur under this programme and they are carried out in New Zealand. The members of the group receive income for their performances from the promoter. This income will be exempt under s CW 20(1)(a), so the promoter does not deduct tax from the payment.

Example 2: Income received by a service provider

This example follows on from Example 1.

The Arnhem Land cultural group have, for their own administrative purposes, established their group as a company. The members of the group are directors and equal shareholders of the company.

Rather than paying each individual member, the promoter makes a payment to the company. The agreement is that the company will provide the services of each of the non-resident entertainers.

The payments are exempt under s CW 20(3). This is because the income derived by the company would have been exempt if derived by the non-resident entertainers directly (as occurred in Example 1), the company provided the non-resident entertainers' services, and the non-resident entertainers are officers of the company.

Example 3: New Zealand sponsored programme to facilitate cultural performances

The Culture Promo Association is an organisation based in Auckland. The Culture Promo Association is not carried on for the private pecuniary profit of any of its members.

The Culture Promo Association establishes a programme to facilitate exchanges between Asian and New Zealand performance groups. The Association is funded

from a legacy and contributes towards the travel of the performance groups. The programme is not funded by the New Zealand government in any way. A Japanese pop music group, made up of several professional singers and dancers, gives dance and music performances in New Zealand under the Culture Promo Association's programme and derives several thousand dollars of profit. The profit is split between the Japanese performers.

To the extent that the performances occur under the Culture Promo Association's cultural programme, the income derived is not exempt under s CW 20(1)(b) or (c). Section CW 20(1)(b) does not apply because the cultural programme is not sponsored financially by the New Zealand or an overseas government. Section CW 20(1)(c) does not apply because the Culture Promo Association is not an "overseas" organisation, since it is based in Auckland.

Even if the Japanese pop group's New Zealand tour activity can be regarded as occurring as part of the Japanese pop group's "programme", s CW 20(1)(c) will not apply. This is because the Japanese pop group is carried on for the private pecuniary profit of its proprietors or members.

Therefore, the income derived is not exempt under s CW 20 and the payer must deduct tax from the payment under the PAYE rules.

Example 4: Canadian curling competition in New Zealand

The Canadian Curling Association is the body that administers curling in Canada. Although competitions are usually held in Canada, from time to time competitions are also held in other countries to increase the sport's profile. The Association decides to approve a competition between several Canadian champion curlers, representing their local curling clubs, to be held on a curling sheet at a venue in Auckland. The curlers receive a percentage of the ticket sales from the promoter of the event for participating in the competition.

The curlers are not competing in New Zealand as national representatives for Canada. Rather, they are competing as representatives of their local Canadian clubs. The Association's approval does not mean that the curlers are officially representing the Association. Therefore, the income derived by the curlers in New Zealand is not exempt under s CW 20(2) and the payer must deduct tax from the payment under the PAYE rules.

Example 5: Curling competition against New Zealand curlers

This example follows on from Example 3.

As well as approving club curlers to compete in a contest in Auckland, the Canadian Curling Association has chosen a team made up of the best Canadian curlers at club level. It is to play a team selected by the New Zealand Curling Players Association. The contest will be held at the same venue in Auckland.

In contrast to example 3, the Canadian team members are official representatives of the Canadian Curling Association, the governing body that administers curling in Canada. Despite each player being a member of a club team, they are officially representing the Canadian Curling Association in this instance. Therefore, the income derived by the curlers in New Zealand is exempt under s CW 20(2), and the payer does not deduct tax from the payment.

Example 6: Trans-national sports team competing in New Zealand

A Scandinavian handball team is formed with representative players from Sweden, Denmark and Norway. The national handball administrative bodies for each of the three countries choose official representative players to join the team. The players are engaged by an entity formed to constitute the new team.

The team travels to New Zealand to play a series of handball matches against national and regional New Zealand handball teams. The Scandinavian team's players receive a payment for each match.

The Scandinavian players are "official representatives of a body that administers the game or sport in an overseas country" and will qualify for the exemption in s CW 20(2).

References

Subject references

Exempt income
Non-resident entertainer

Legislative references

Income Tax Act 2007, ss BD 1(5), BH 1, CW 19, CW 20, YD 4(3), (4) and (17D), LD 3, Subpart RD, Sch 4
Income Tax (Withholding Payments) Regulations 1975
Income Tax (Withholding Payments) Regulations 1979
Income Tax (Withholding Payments) Amendment Regulations (No 2) 2003
Interpretation Act 1999, s 5
Partnership Act 1908, s 7
Tax Administration Act 1994, s 24M

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Inland Revenue
Te Tari Taake

Appendix – Legislation

Income Tax Act 2007

1. Section s CW 20 provides:

CW 20 Amounts derived by visiting entertainers including sportspersons

Exempt income: cultural activities

(1) Income that a non-resident entertainer derives from carrying out their activity or performance in New Zealand during a visit is exempt income if—

(a) the activity or performance occurs under a cultural programme of the New Zealand government or an overseas government; or

(b) the activity or performance occurs under a cultural programme wholly or partly sponsored by the New Zealand government or an overseas government; or

(c) the activity or performance occurs as part of a programme of an overseas foundation, trust, or other organisation that—

(i) exists wholly or partly to promote cultural activity; and

(ii) is not carried on for the private pecuniary profit of any member, proprietor, or shareholder.

Exempt income: sporting activities

(2) Income that a non-resident entertainer derives from carrying out an activity or performance that relates to a game or sport in New Zealand during a visit is exempt income if the participants are the official representatives of a body that administers the game or sport in an overseas country.

Exempt income: employer of non-resident entertainer

(3) If income derived from an activity or performance of a non-resident entertainer would be exempt income under this section if derived by the non-resident entertainer, that amount is exempt income if derived by a person who—

(a) provides the services of the non-resident entertainer during the visit to New Zealand; and

(b) is 1 of the following:

(i) the entertainer's employer; or

(ii) a company of which the entertainer is an officer; or

(iii) a firm of which the entertainer is a principal.

Meaning of non-resident entertainer

(4) In this section, non-resident entertainer means a non-resident person, as defined in subpart YD (Residence and source in New Zealand), who carries out an activity or performance in connection with—

(a) a solo or group performance by actors, comperes, dancers, entertainers, musicians, singers, or other artists, whether for cultural, educational, entertainment, religious, or other purposes; or

(b) lectures, speeches, or talks for any purpose; or

(c) a sporting event or sporting competition of any nature.

Defined in this Act: amount, company, employer, exempt income, income, New Zealand, non-resident, non-resident entertainer