[Interpretation statement IS0018 issued by Adjudication & Rulings in August 1998]

AMATEUR SPORTS PROMOTER EXEMPTION—APPLICATION TO NON-RESIDENTS

Summary

This interpretation statement sets out the Commissioner's interpretation of whether a non-resident can qualify for the amateur sports promoter exemption from income tax provided by section CB 4(1)(h) of the Income Tax Act 1994.

The item concludes that a non-resident is **not** excluded from qualifying for the exemption solely by reason of being non-resident.

This item does not comment on the particular requirements in section CB 4(1)(h) for qualification for the exemption available to sports promoters. Only the question of whether a society or association which otherwise meets the requirements of being an amateur sports promoter is prevented from qualifying for the exemption because it is non-resident, is addressed.

All legislative references in this item are to the Income Tax Act 1994 unless otherwise stated.

Legislation

Section CB 4 provides an exemption from income tax for the income of certain non-profit bodies and charities. Section CB 4(1)(h) applies to income derived by amateur sports promoters and states that, to the extent that in the absence of the section the following amounts would be gross income, they are exempt income. It states:

> Any amount derived by any society or association, whether incorporated or not, which is, in the opinion of the Commissioner, established substantially or primarily for the purpose of promoting any amateur game or sport if that game or sport is conducted for the recreation or entertainment of the general public, and if no part of the funds of the society or association is used or available to be used for the private pecuniary profit of any proprietor, member, or shareholder of that society or association:

Application of the Legislation

Nothing in the strict wording of the provision itself, or in other sections of the Act, specifically limits the availability of the exemption in section CB 4(1)(h) to resident taxpayers. However, it is also necessary to ascertain whether such a limitation is to be inferred from statutory construction and/or the relevant case law. These two aspects are discussed below.

Statutory construction

Under section AA 2, a person who is resident in New Zealand or who has income from New Zealand is subject to the Income Tax Act. Accordingly, a non-resident deriving income from New Zealand is subject to New Zealand income tax unless otherwise exempted. Furthermore, a non-resident deriving New Zealand sourced income is also subject to the general application of provisions of the Income Tax Act unless the Act provides otherwise.

Examples of provisions which apply to specifically exempt certain New Zealand sourced income derived by non-residents include:

- Section CB 2(1)(a) - income derived by non-resident entertainers.

- Section CB 2(1)(b) - interest on certain government borrowings from a non-resident.

- Section CB 2(1)(c) - personal services income derived by non-residents visiting New Zealand for not more than 92 days.

- Section CB 2(1)(d) - income of visiting experts or students in New Zealand under government assistance arrangements.

On the other hand, the Act contains other exempt income provisions providing exemptions for certain interest income (sections CB 1(1)(a) and (c)), but which specifically exclude absentees from their application. An "absentee" for the purpose of these provisions is a person who is non-resident throughout the income year. It is possible to infer from this that if it were not for these specific exclusions provided in the legislation (in sections CB 1(1)(a) and (c)), a non-resident in receipt of such New Zealand sourced interest income would be entitled to claim these interest exemptions.

Section CB 4(1)(h) requires that the game or sport being promoted "is conducted for the recreation or entertainment of the general public". This condition does not impose any requirement that the promoter itself must be resident in New Zealand, but applies whether the promoter seeking to obtain the benefit of the exemption is resident or not.

The Australian Tax Office has issued a taxation ruling (TR 97/22) on the application of the income tax exemption available to sporting organisations under paragraph (c) of item 9.1 of the table in section 50-45 of the Income Tax Assessment Act 1997 (formerly contained in subparagraph 23(g)(iii) of the Income Tax Assessment Act 1936). However, that ruling does not address the issue considered in this interpretation statement.

*Summary***:** The statutory construction of the Act does not establish clearly whether the exemption provisions of section CB 4(1)(h) apply to non-residents. However, to the extent that the section's application can be inferred from the above analysis, statutory construction points to non-residents not being prevented from obtaining the exemption. It indicates that if a non-resident derives New Zealand sourced income which otherwise meets the criteria laid down for an exemption, the non-resident will not be excluded from the application of the exemption by reason only of being a non-resident, unless a specific exclusion for non-residents exists.

Case law

There are no reported cases on section CB 4(1)(h) and the question of its application to non-residents, or on similar residence questions relating to the application of other subsections of section CB 4(1) which exempt the income of specific societies or institutions (section CB 4(1)(b), (f), (g), (j), and (k)).

However, the issue was considered directly by the High Court of Australia in *University of Birmingham v Commissioner of Taxation* and *Epsom College v Commissioner of Taxation* (1938) 1 AITR 383, a case concerning section 23(e) of Australia's Income Tax Assessment Act 1936. Section 23(e) was a provision exempting the income of charitable institutions and was similar to section CB 4(1)(c) of New Zealand's Income Tax Act 1994. The facts were that the university and the college were both institutions established in Britain and carrying on no activities in Australia. However, they both derived income in Australia. Section 23(e) of the Income Tax Assessment Act 1936 provided:

The following income shall be exempt from income tax -
...
(e) the income of a religious, scientific, charitable or public educational institution

The Court found that there was no reason to restrict the availability of the exemption to institutions based in Australia. *Dixon* J stated [1]:

By section 17[section BB 1] income tax is imposed upon the taxable income of any person whether a resident or a non-resident. Taxable income means the amount remaining after deducting from the assessable income all allowable deductions (s.6). Section 25(1) [section BB 3] provides that the assessable income of a taxpayer shall include:- (a) where the taxpayer is a resident - the gross income derived directly or indirectly from all resources whether in or out of Australia: and (b) where the taxpayer is a non-resident - gross income derived directly or indirectly from all sources in Australia which is not exempt income.

The territorial basis of taxation is clearly shown by these provisions, ... The liability is in respect of all income, in the case of a resident, which is not exempt income and, in the case of a non-resident, of all Australian income which is not exempt income. ... The scope of the exemptions might well be expected to be commensurate with the application of the provisions imposing liability. ... An examination of the various paragraphs of the Income Tax Assessment Act 1936, which deal with many exemptions, shows that in some an express limitation is included based on territorial grounds. In section 78(1)(a) [section KC 5], which allows a deduction [rebate] to taxpayers in respect of gifts made to institutions of a specified charitable nature, there is an express qualification confining it to institutions in Australia. In view of these matters I think that to imply in section 23(e) [section CB 4(1)(c)] a restriction which has not been expressed would be to amend and not to interpret the language of the enactment.

Although the decision in *University of Birmingham* and *Epsom College* is not from the New Zealand jurisdiction, and the statutory provision to which it relates (section 23(e) of the Income Tax Assessment Act 1936 (Australia)) is different from section CB 4(1)(h), the decision can be treated as relevant and authoritative because:

- Section 23(e) is, like section CB 4(1)(h), a provision establishing a category of exempt income.

[1] Note: Where a provision in Australia's Income Tax Assessment Act 1936 is referred to, any equivalent provision in the New Zealand Income Tax Act 1994 is interpolated in square brackets.

- Section 23(e) is, like section CB 4(1)(h), a provision relating to institutions, and those institutions are capable of being either residents or non-residents.

- The same statutory scheme which influenced the Court in reaching its decision is present in the New Zealand statute, i.e. a scheme which imposes liability on income derived within the relevant jurisdiction by non-residents.

- Other sections and subsections in subpart CB of the Income Tax Act 1994, like other paragraphs in section 23 of the Australian statute, impose territorial limitations on aspects of other exemptions, for example:

  - CB 2(1)(c) - Income from personal services by visiting non-residents;

  - CB 2(1)(d) - Income from expert advice, etc., by visiting non-resident;

  - CB 4(1)(e) - Charitable purposes limited to those within New Zealand;

  - CB 4(1)(f) - Promotion of veterinary services within New Zealand only;

  - CB 4(1)(g) - Promotion of the standard of dairy cattle within New Zealand only;

  - CB 8(1)(b) - "Niue dividends" derived by a non-resident;

  - CB 9(f) - Life policies entered into within or outside New Zealand treated differently.

- Section KC 5(1) of the New Zealand statute, like the then section 78(1)(a) of the Australian statute, limits relief for "charitable donations" to donations to institutions within the jurisdiction.

Further case law in support of the view that non-residents are not excluded from the exemption in section CB 4(1)(h), is the decision of the New Zealand Court of Appeal in *CIR v Alcan New Zealand Limited* [1994] 3 NZLR 439. In that case the Commissioner had contended that the taxpayer and Alcan Australia Ltd were not within a group of companies for the purposes of section 191(3) of the Income Tax Act 1976. His grounds were that Alcan Australia was not a New Zealand taxpayer in the sense that it had assessable income or losses in New Zealand or been engaged in a business activity which produced assessable income or losses in New Zealand. The Court held that it was not implicit in section 191(3) that each of the companies in the group was to be a New Zealand taxpayer. The following comments from the judgment of the Court delivered by *McKay J*, are relevant:

> None of the arguments advanced provide sufficient basis for departing from the plain meaning of the words of the section. It is not necessary to read into those words some implied limitation. To do so would require speculation as to the legislative intent, as is illustrated by the changing stance adopted by the Commissioner as to the qualification for which he has contended. ... In our view there is no justification for reading any of these qualifications into the definition. The words are plain, and should be given their plain meaning.

A UK charity case that provides additional support for this position is *Camille and Henry Dreyfus Foundation Inc. v IR Commrs* [1954] 2 All ER 466. In one of the judgments in this case, Jenkins LJ commented (at page 483):

I agree that the general principle deducible from (for example) *Colquhoun v Heddon* (1890), 25 QBD 129; 2 Tax Cas. 621, cannot of itself provide any sufficient ground for limiting the exemption afforded by s.37 in the way contended for by the Crown. Where an Act of the United Kingdom Parliament imposes a tax on income arising in the United Kingdom, makes the tax equally exigible whether the person entitled to the income is British or foreign, resident or non-resident, and affords an exemption from the tax to persons fulfilling specified conditions which do not expressly include citizenship of or residence in the United Kingdom, **there can, in my view, be no justification for the implied exclusion from the benefit of the exemption of a foreign non-resident** who has suffered, or apart from the exemption would suffer, the tax, and **who satisfies all the express requirements of the exempting provision, merely on the grounds that he is a non-resident foreigner**. [Emphasis added]

Summary: The decision in the *University of Birmingham* and *Epsom College* case and comments in the *Alcan* and *Dreyfus Foundation* cases support the view that, unless specifically excluded, the income exemption provisions in subpart CB will apply to non-residents.

Conclusion

Non-residents are not excluded from the application of the amateur sports promoter income exemption in section CB 4(1)(h) by virtue of their status as non-residents. Accordingly, provided a non-resident satisfies the other particular requirements in section CB 4(1)(h), that person will qualify for the exemption.

Inland Revenue plans to issue a draft interpretation statement on the general application of the section CB 4(1)(h) amateur sports promoter exemption in the New Zealand context at a future date.