

Interpretation Statement IS 10/04

NON-RESIDENT CONTRACTOR SCHEDULAR PAYMENTS

This interpretation statement replaces “Non-Resident Contractor’s Withholding Tax – Who is Affected by the Withholding Tax Rules”, *Tax Information Bulletin* Vol 6, No 14 (June 1995).

All legislative references in this interpretation statement are to the Income Tax Act 2007 (“ITA 2007”) unless otherwise stated.

This item addresses some interpretative issues and other practical matters related to non-resident contractor’s tax on schedular payments, previously referred to as “withholding payments”.

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Introduction

1. This interpretation statement replaces “Non-Resident Contractor’s Withholding Tax – Who is Affected by the Withholding Tax Rules”, *Tax Information Bulletin* Vol 6, No 14 (June 1995). This interpretation statement covers aspects of schedular payments to non-resident contractors that were covered in the *Tax Information Bulletin* item, in the context of the new legislative provisions.
2. The following aspects, which were covered in the *Tax Information Bulletin* item are discussed in this interpretation statement:

- the imposition of tax on schedular payments to non-resident contractors, in particular the relevant rate that is provided in Schedule 4, special tax rate certificates, and exemption certificates;
 - the payment of tax to the Commissioner, in particular the amount of tax;
 - who is liable for paying the tax;
 - the non-resident contractor's tax obligations as a payer of PAYE income payments to subcontractors or employees; and
 - specific exemptions for non-resident contractors and non-resident employees from New Zealand tax, including relief under double tax agreements.
3. Information on applications and enquiries are at the end of this interpretation statement, followed by examples illustrating how the non-resident contractor provisions operate. There is also a flow chart diagram setting out steps to be followed.

Background

4. Before the introduction of the ITA 2007, the term "non-resident contractor's withholding tax" referred to the tax that generally must be withheld from payments to non-resident contractors and paid to the Commissioner.
5. Before the ITA 2007 the legislation relating to withholding payments was contained in the Income Tax (Withholding Payments) Regulations 1979 ("the Regulations") and the Income Tax Act 2004. This legislation has been repealed by the ITA 2007 effective with respect to income derived in the 2008/09 and later income years. The legislation relating to tax to be withheld and paid on payments to non-resident contractors is now contained in the ITA 2007 and the Tax Administration Act 1994 ("TAA"). The term "withholding payments" has been replaced by "schedular payments" in the ITA 2007 and the TAA. The term "schedular payments" refers generally to payments, other than salary or wages, of a kind set out in the classes listed in Schedule 4. All of the payments listed in Schedule 4 relate to payments under a contract for services, as opposed to payments under a contract of service. A contract of service means that the parties are in an employee/employer relationship whereas under a contract for services the parties are independently contracted. For further discussion of the differences between a contract of service and a contract for services see the Supreme Court judgment in *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721.
6. Generally, the payer of a schedular payment to a non-resident contractor is required to apply the PAYE rules to the payment. Under the PAYE rules, the payer of a schedular payment to a non-resident contractor must withhold an amount of tax calculated on the gross amount of the payment generally at the relevant rate set out in Schedule 4. The relevant rate is generally 15 percent for schedular payments to non-resident contractors (except if it is a payment to which the source is specifically provided for in another part of Schedule 4 that is taxed at a different rate). The non-resident contractor may get relief from the amount of tax withheld by

obtaining a certificate of exemption or a special tax rate certificate from the Commissioner.

7. Schedule 4 provides a 20 percent rate of tax on payments to non-resident entertainers for providing schedular entertainment activities. For more information on non-resident entertainers, see Inland Revenue's *Employers Guide* (IR335).
8. Non-resident contractors may be natural or non-natural persons, including companies. Payments to non-resident contractors that are companies can be schedular payments, unlike payments to most resident contractors that are companies (except for agricultural, horticultural, and viticultural companies).

Tax on schedular payments to non-resident contractors

9. The payer of a schedular payment to a non-resident contractor must generally withhold tax from the payment at either the relevant rate provided in Schedule 4, or a special tax rate the Commissioner has specified in a special tax rate certificate. Tax is not required to be withheld from a contract payment to a non-resident contractor if the non-resident contractor holds an exemption certificate in respect of the payment.

Relevant rate in Schedule 4

10. The relevant rate for schedular payments to non-resident contractors is generally the rate of 15 percent that is provided for contract payments to non-resident contractors in Part A of Schedule 4. However, if the schedular payment is a kind of payment to which the source is specifically provided for in another part of Schedule 4 (eg, clause 1 of Part F of Schedule 4, which provides a 25 percent rate of tax to apply specifically to payments for media contributions carried out by freelance contributors), then the relevant rate is the rate provided for that specific source of payment.
11. The reason the other schedular payment categories (formerly the withholding payment categories) are to be considered and applied before the non-resident contractor category is because the other categories have always been generally applicable to non-residents. From the time that the categories were introduced in 1957, there has been no general exclusion of payments to non-residents. The non-resident contractor category, which was first introduced in 1981, was an extension to the withholding payment categories. The non-resident contractor category was intended first, from 1981, to cover non-resident contractors performing work associated with "contract projects" that were not already covered by the withholding payment categories. "Contract projects" were projects involving construction, installation, assembly, exploration, exploitation or other similar activities. Then, from 1990, the non-resident contractor category was extended to cover all other non-resident contractors not already covered by the other withholding payment categories.
12. It is acknowledged that it is not entirely clear in the legislation that the other schedular payment categories are to be considered and applied before the non-resident contractor category. This is particularly so with

the ITA 2007, where the non-resident contractor category comes first in Schedule 4 rather than last as was the case in the Schedule to the Regulations.

13. However, application of the non-resident entertainer class of payment provides another indication that this is the correct interpretation. Clause 4 of Part F of Schedule 4 provides a rate of 20 percent for payments to non-resident entertainers that provide or perform schedular entertainment activities. The definition of "non-resident contractor" is broad enough to include those who are also defined as a "non-resident entertainer", and the definitions of "contract payment" and "contract activity or service" are broad enough to cover payments for "schedular entertainment activities". Therefore, the specific non-resident entertainer class of payment would be redundant if the correct interpretation were that the non-resident contractor rate applies to all contract payments that relate to a non-resident contractor's contract activity or service. Therefore, the preferred interpretation is that the non-resident contractor rate is to be applied only when there is no other rate that could apply.

Special tax rate certificates

14. Section 24N of the TAA provides the Commissioner with the discretion to issue a special tax rate certificate, to a person entitled to receive a schedular payment, which specifies the amount of tax on the payment or the rate of tax applying to the payment. However, section 24N(2) of the TAA provides that special tax rate certificates cannot be issued in respect of schedular payments to non-resident entertainers. Also, it is not the Commissioner's practice to issue a special tax rate certificate that applies retrospectively.
15. A non-resident contractor may apply to the Commissioner for a special tax rate certificate. The Commissioner may issue a certificate with a rate higher or lower than the rate provided in Schedule 4 for the schedular payment. A non-resident contractor may request a special tax rate to be aligned with the non-resident contractor's New Zealand marginal tax rate, which is determined by the non-resident contractor's taxable income as defined in the ITA 2007. Therefore, the special tax rate may be determined based on any relevant factors such as the expected revenue and expenditure of the contract, and the non-resident contractor's other sources of income or losses.
16. A payment made to the non-resident contractor for the use of, or right to use personal property is a schedular payment taxed at 15 percent pursuant to Part A of Schedule 4. However, several double tax agreements ("DTAs") that New Zealand has signed have a "royalties" article that includes as royalties, payments for the use of, or the right to use, industrial, commercial or scientific equipment. Therefore, a non-resident contractor who has received a schedular payment for the use of, or right to use personal property may request a special tax rate to align with the tax rate provided in the "royalties" article of the relevant DTA. An example that includes payments for the use of, or the right to use, industrial, commercial or scientific equipment as royalties is Article 12 of the Double Taxation Relief (Republic of South Africa) Order 2004. Under Article 12 of the Double Taxation Relief (Republic of South Africa) Order 2004 the tax shall not exceed 10 percent of the gross amount of the royalties. However, if those royalties are effectively connected with a

permanent establishment of the non resident contractor in New Zealand, those royalties will be considered under Article 7 (business profits). As individual DTAs can be different and are subject to change, the appropriate DTA will need to be considered when considering what the non resident contractor's marginal tax rate will be.

Exemption certificates

17. Section RD 24 provides that a non-resident contractor may apply to the Commissioner for an exemption certificate to be issued under section 24M of the TAA in respect of a contract payment. An exemption certificate can be applied for if one of the three conditions provided in section RD 24(1) are satisfied. However, section 24M(2) of the TAA provides that exemption certificates cannot be issued in respect of schedular payments to non-resident entertainers.
18. Section 24M of the TAA provides the Commissioner with the discretion to issue an exemption certificate that specifies payments to which no tax is to be withheld. An example of where a non resident contractor may apply for an exemption certificate is where it is clear there will be no final income tax liability. This may be because of the application of a DTA or because the income earned by the non resident contractor will not be assessable income under the ITA 2007 (eg under section CW 19 which provides that amounts are exempt income where they are derived from performing personal or professional services during visits of 92 or fewer days in New Zealand and certain other requirements are satisfied).
19. An exemption certificate issued by the Commissioner will specify that no tax is to be withheld from specific payments stated on the certificate, and will specify the period for which the certificate is valid. It is not the Commissioner's practice to issue an exemption certificate that applies retrospectively. The Commissioner has previously required exemption certificates to be signed in order to be valid. The Commissioner has also required any expired exemption certificates to be returned to the Commissioner. Having reviewed the matter the Commissioner considers that the requirement to sign a certificate should remain but that, from the date of issue of this Interpretation Statement, non resident contractors will no longer be required to return any expired exemption certificates.

Payments of tax to the Commissioner

20. Section RD 4(1) provides that the payer of a schedular payment to a non-resident contractor is required to pay the tax withheld from that payment to the Commissioner.
21. Where a payment to a non-resident contractor has had tax withheld but the tax has not been paid to the Commissioner, the tax owing will be calculated from applying the applicable rate on the amount before the employer withheld tax. That is, tax will be calculated on the gross payment.
22. Also, where it is clear from the contract that the payer of the schedular payment is responsible for the tax on the payment (as determined from records and/or contracts) and no tax has been deducted, the payment to

the non-resident contractor must be grossed up before the tax is calculated.

23. It is necessary to gross up the payment, in the above situations, because the payment is regarded as the net amount and therefore the payment must be grossed up to correctly tax that payment. The grossed up amount is calculated by dividing the net amount by 1 minus the applicable withholding tax rate from Schedule 4 (eg 0.85 where the 15% non resident withholding tax rate is applicable).

Example:

Where grossing up is required and the contract payment made to a non resident contractor is \$85 then the grossed up amount will be \$100.

$$\$85 / (1 - 0.15) = \$100$$

24. Section RD 4(2) provides that if the payer of a schedular payment to a non-resident contractor has not withheld the tax from the payment, and subsequently has not paid the tax to the Commissioner, then the non-resident contractor must pay the tax that should have been withheld. In such a case where the tax has not been withheld or where the non-resident contractor is responsible for the tax withheld (also determined from records and/or contracts), the non-resident contractor would have received a "before-tax" payment and so the tax owing is calculated from applying the applicable rate on the amount received. That is, the payment to the non-resident contractor is not grossed up before the tax is calculated.

Who is liable for paying the tax

25. In cases where the payer of the schedular payment has withheld tax from the payment (or contracted to be responsible for the tax on the payment made) but has not paid the tax to the Commissioner, the payer of the schedular payment will be liable to pay the deficient tax. This is referred to as a failure to account.
26. Where tax has not been withheld, section 168 of the TAA provides that the tax owing constitutes a debt payable to the Commissioner by the payer of the schedular payment. This is referred to as a failure to deduct. Section 168 of the TAA provides the Commissioner with the right to recover the deficient tax from the payer, the non-resident contractor, or both concurrently. Therefore, in a case where the non-resident contractor has no continuing presence in New Zealand the Commissioner may solely seek payment from the payer of the schedular payment.

Subcontractors and employees of non-resident contractors

27. Pursuant to section RD 20, a non-resident contractor must withhold and pay tax on payments made to a subcontractor, if the payments are PAYE income payments (which mean payments of salary or wages, extra pay, and schedular payments).

28. Further, pursuant to section RA 5, a non-resident contractor who has employees or subcontractors, must account for and pay to the Commissioner all of the following as applicable:
- tax on PAYE income payments;
 - fringe benefit tax;
 - tax on employer's superannuation contributions (including KiwiSaver contributions).
29. The non-resident contractor may also be required to fulfil obligations relating to accident compensation levies. For more information about employer's tax obligations, see Inland Revenue's *Employers Guide* (IR 335).

Specific exemptions for non-residents from New Zealand tax

30. The question of whether a payment is exempt income under the ITA 2007 or whether the payment has full relief from New Zealand tax under a DTA is separate to whether or not that payment is a schedular payment. Therefore, tax on schedular payments to non-resident contractors must be withheld from the payment (even if the amount of the payment is exempt income under the ITA 2007 or the recipient has full relief from New Zealand tax under a DTA), unless the non-resident contractor holds an exemption certificate in respect of that payment.
31. However, pursuant to section RD 8(1)(b), a payment to a non-resident contractor will not be a schedular payment and so tax will not need to be withheld, if the payment is:
- salary or wages; or
 - an extra pay; or
 - a payment for services provided by a public authority, a local authority, a Maori authority, or a company, other than a non-resident contractor, a non-resident entertainer, or an agricultural, horticultural, or viticultural company; or
 - a payment covered by an exemption certificate provided under section 24M of the TAA; or
 - a payment for services provided by a non-resident contractor who has full relief from tax under a DTA, and is present in New Zealand for 92 or fewer days in a 12-month period; or
 - a contract payment for a contract activity or service of a non-resident contractor when the total amount paid for those activities to the non-resident contractor or another person on their behalf is \$15,000 or less in a 12-month period.
32. Section RD 8(1)(b)(v) provides that "a payment for services provided by a non-resident contractor who has full relief from tax under a double tax agreement, and is present in New Zealand for 92 or fewer days in a 12-month period" is not a schedular payment. The Commissioner considers

that the words “full relief from tax under a double tax agreement” refer to each particular contract activity. This means that, for the purposes of section RD 8(1)(b)(v), each contract activity needs to be considered under any applicable DTA. Where a non-resident contractor is involved in more than one particular type of activity or investment, the fact that one or more of those activities or investments does not have full relief, under any applicable DTA, will not affect whether or not payments for the other activities are excluded from being schedular payments under section RD 8(1)(b)(v).

33. An example of the above interpretation of section RD 8(1)(b)(v) is where a non resident contractor undertakes a contract activity which has relief under a DTA but also earns interest or dividends which are only partially relieved under a DTA. The fact that the interest or dividends do not have full relief does not affect whether or not the contract payments for the other activities are schedular payments. In addition, while each particular contract activity is considered separately for the purposes of section RD 8(1)(b)(v), some DTAs link different activities and deem that connected activity to be a permanent establishment. An example is Article 5(4) of the Double Taxation Relief (Australia) Order 2010 (Article 5 contains the definition of a permanent establishment). In this case the particular activity being considered will not be considered to have full relief under that particular DTA for the purposes of section RD 8(1)(b)(v).
34. Section RD 8(1)(b)(vi) provides that “a contract payment for a contract activity or service of a non-resident contractor when the total amount paid for those activities to the contractor or another person on their behalf is NZ\$15,000 or less in a 12-month period” is not a contract payment. The phrase “a contract payment for a contract activity or service” means that section RD 8(1)(b)(vi) must be considered each time a person makes a contract payment to a non resident contractor. The phrase “the total amount paid for those activities” means that all contract payments for all contract activities undertaken by a non resident contractor in a 12 month period are added together to determine “the total amount paid for those activities”. Determining “the total amount paid for those activities” requires that the person paying the contract payment has regard to all New Zealand-sourced contract payments received by or on behalf of the non resident contractor and all contract payments to be received by or on behalf of the non resident contractor (from any person) in any 12 month period. For example, if a non resident contractor contracts with party A for NZ\$10,000 in a 12 month period, and in that same period contracts with party B for NZ\$20,000, the rule will not apply.
35. Section RD 23 provides that where it cannot reasonably be determined at the time of the PAYE income payment whether the payment will be exempt income of the non-resident contractor or non-resident employee under either section CW 19 or a DTA, then the payer of the PAYE income payment may apply to the Commissioner to be released from the obligation to withhold the amount by providing a bond or other security to the Commissioner for the amount that would otherwise be required to be withheld.

An interim tax

36. The tax required to be withheld from schedular payments to non-resident contractors is an interim tax. That is, the withheld tax is paid to the

Commissioner towards the non-resident contractor's New Zealand income tax liability. The non-resident contractor's New Zealand income tax liability for a tax year is determined by an assessment of the contractor's taxable income for that year. The taxable income is then multiplied by the basic tax rate, at which stage a refund of any overpaid tax can be requested, or additional tax paid, by the non-resident contractor.

Relief under double tax agreements

37. A non-resident may be provided with relief from their New Zealand income tax liability if a DTA exists between New Zealand and the country in which the non-resident is a tax resident.
38. When considering whether a DTA provides a non-resident contractor with relief from New Zealand tax, common issues that arise are:
 - whether the income is a royalty as defined in the DTA;
 - if the non-resident contractor is an enterprise, whether it has a permanent establishment in New Zealand at the time the contract activity is performed;
 - if the non-resident contractor is an individual, whether relief is provided by the personal services articles of the DTA (often relief is based on the length of the visit and whether a fixed base is available to the non-resident contractor in New Zealand).
39. Many DTAs contain articles dealing with particular areas or industries, which may provide a non-resident contractor with relief from New Zealand tax. Although DTAs have many similarities, they can also differ, so relief provided under a DTA to a non-resident contractor from one country may not be provided under another DTA to a non-resident contractor from another country. Care should be taken in considering the effect of a DTA on any particular situation.
40. For the non-resident contractor's employees, relief may be available under the "Dependent Personal Services" or similar article in the DTA. These articles usually contain the following three requirements that an employee must meet to obtain relief under the DTA:
 - The employee's presence in New Zealand must not exceed in aggregate 183 days in a 12-month period.
 - The remuneration is paid by, or on behalf of, an employer who is not a resident of New Zealand.
 - The remuneration is not borne by a permanent establishment or fixed base that the employer has in New Zealand.
41. A non-resident who has a tax liability in New Zealand may still be required to declare New Zealand income in their country of tax residence. However, the non-resident may be able to claim some or all of the New Zealand paid taxes as a tax credit in the country of tax residence.

Applications and Enquiries

42. Applications for exemption certificates must contain the following information:
- the name and tax residence of the non-resident contractor;
 - a detailed description of the contract activity to be performed by the non-resident contractor in New Zealand, including start and finish dates of the contract activity to be performed in New Zealand;
 - a copy of the contract entered into between the non-resident contractor and the payer;
 - details of the contract period, contract payment amounts and their payment dates;
 - names of all the non-resident contractor's employees and/or subcontractors who will be present in New Zealand performing the contract activity, and their arrival and departure dates; and
 - a brief background of any previous contract activity performed in New Zealand in the past two years by the non-resident contractor, and comments on any anticipated contract activity that the non-resident contractor is likely to undertake in New Zealand in the future.
43. Applications for special tax rate certificates should include the same information as required for applications for exemption certificates, and also disclosure of anticipated total revenue and expenditure for the contract activity and any other anticipated income or losses that will be included in the non-resident's New Zealand taxable income.
44. Applications for an exemption certificate or a special tax rate certificate, or any enquiries about tax on payments to non-resident contractors should be made to:
- Non-Resident Contractors Team
Inland Revenue Department
PO Box 2198
Wellington
New Zealand
- Telephone: 64 04 890 3056
Facsimile: 64 04 890 4510
Email: nr.contractors@ird.govt.nz
45. As well as tax on schedular payments to non-resident contractors, the Non-Resident Contractors Team also deals with the other associated tax issues of a non-resident contractor (ie, tax on other PAYE income payments, goods and services tax, and fringe benefit tax).

Examples

46. Unless specifically discussed, these examples assume that the contract payments are **not** excluded from being schedular payments by virtue of section RD 8(1)(b) and do not consider:
- Whether the payment is exempt income under the ITA 2007 (in particular section CW 19), or
 - The effect of a DTA on the non resident contractor's final tax liability.

Example 1

47. A non-resident individual specialises in the computer programming of robotics machinery. The non-resident is contracted by a New Zealand manufacturing company to undertake a two-month contract in New Zealand writing a computer program for one of the company's new automated plants. The contract for the non-resident's services as a computer software consultant is a contract for service as opposed to a contract of service. Therefore, the non-resident is a "non-resident contractor". The Commissioner notes that the schedular payment rules do not distinguish between a non-resident individual (who is an independent contractor) and a non-resident company.
48. In this example the non resident contractor is present in New Zealand for 92 or fewer days. Therefore, under section RD 8(1)(b)(v), if the non resident contractor is entitled to full relief under a DTA then the payment will not be a schedular payment. This means that tax would not need to be withheld from the payments to the non resident contractor. However, if the non resident contractor is not entitled to full relief under a DTA then the contract payments made under the contract will be schedular payments. This means that tax must be withheld from the payments to the non resident contractor at the appropriate rate under Schedule 4.
49. Contract payments will also be schedular payments if the New Zealand manufacturing company contracts a non-resident company to provide the computer programming services, and that company sends one of its employees to New Zealand to perform the contracted services.

Example 2

50. A non-resident demolition expert is contracted by a New Zealand company to demolish a tall industrial chimney at one of the company's sites in New Zealand. The non-resident demolition expert is required to provide all the necessary equipment and personnel to carry out the contracted work, and brings an employee to New Zealand to assist in the demolition contract. The contract is a contract for services and therefore, the non-resident demolition expert is a "non-resident contractor". This means that the contract payments made under the contract to the non-resident demolition expert will be schedular payments unless the payment is excluded from being a schedular payment by section RD 8(1)(b).
51. The salary paid to the non-resident demolition expert's employee while the employee is present in New Zealand is sourced here in accordance with section YD 4(4). However the employee's salary is excluded from the

definition of the term “schedular payment” under section RD 8(1)(b). The salary will however be within the definition of the term “PAYE income payment” in section RD 3. This means that the non-resident demolition expert will have to withhold PAYE and pay this to the Commissioner under the PAYE rules in subpart RD of the ITA 2007, unless the Commissioner is satisfied that the employee will be exempt from New Zealand tax under the ITA 2007 (eg section CW 19) or that the employee has full relief under a DTA.

Example 3

52. A non-resident company has vehicles, vessels, and aircraft available for worldwide hire. A New Zealand company contracts the non-resident company to supply a small submarine on bare boat charter for a period of eight months for use in New Zealand. The contract provides for payment of a monthly rental fee. Therefore, the non-resident company is a “non-resident contractor” that is receiving payments for a “contract activity or service”, being the provision of the use, in New Zealand, of the non-resident’s personal property.
53. The contract also provides the New Zealand company with an option to have the non-resident company supply suitably qualified personnel to operate the submarine. An additional fee is charged for these services. The New Zealand company does not have a suitably qualified operator to operate the submarine, so it exercises its option under the contract. The non-resident company has on call several independent operators who it may contract. The non-resident company contracts a non-resident independent operator who is qualified to operate the submarine. The contract between the non-resident company and the non-resident independent operator is a contract for service and therefore the non-resident operator is a “non-resident contractor”.
54. The contract payments that the New Zealand company makes to the non-resident company for the hire of both the submarine and the personnel are schedular payments to which the New Zealand company must withhold tax. The contract payments by the non-resident company to the non-resident independent operator are also schedular payments, and the non-resident company must also withhold tax on these schedular payments.

Example 4

55. A New Zealand company engages the services of a marketing company in Melbourne to undertake a marketing study in Australia of possible consumer interest in small appliances that are manufactured in New Zealand. The contract services provided by the Melbourne company are not performed in New Zealand. Therefore, the income does not have a source in New Zealand and consequently the payments will not be schedular payments. This means that tax will not need to be withheld from any payments for the company’s services.

Example 5

56. A non-resident company specialising in the manufacture of compressed fibreboard fabricating machinery sells machinery to a New Zealand timber

company that is in the business of manufacturing compressed fibreboards. Fabrication of the machinery takes place outside New Zealand, and the non-resident company arranges for transport of the machinery to the New Zealand company's premises. The machinery is all computer-controlled, and specially trained personnel are required to operate and maintain it.

57. The contract to supply the machinery includes the requirement for the non-resident company to supply specialist engineering personnel to supervise the installation of the machinery at the New Zealand timber company's New Zealand plant, and to provide the New Zealand company's personnel with training in the use and maintenance of the machinery.
58. The payments made for the actual supply of the machinery cannot be schedular payments, as there is no source in New Zealand. The machinery was fabricated outside New Zealand.
59. The contract payments made by the New Zealand company to the non-resident company for providing personnel to supervise the installation of the machinery and for the training services are schedular payments as both these activities are performed in New Zealand by the non-resident company, which is a "non-resident contractor".
60. The salary paid to the non-resident company's employee while the employee is present in New Zealand is sourced here in accordance with section YD 4(4). However the employee's salary is excluded from the definition of the term "schedular payment" under section RD 8(1)(b). The salary will however be within the definition of the term "PAYE income payment" in section RD 3. Therefore the non-resident company will have to withhold PAYE and pay this to the Commissioner under the PAYE rules in subpart RD of the ITA 2007, unless the Commissioner is satisfied that the employee will be exempt from New Zealand tax under the ITA 2007 (eg under section CW 19) or that the employee has full relief under a DTA.

Example 6

61. The New Zealand company in example 5 enters into a further agreement with the non-resident company to manufacture and market the compressed fibreboard fabricating machinery in New Zealand. The non-resident company grants the New Zealand company exclusive rights to manufacture, market, and distribute the machine in New Zealand. The licence granted entitles the New Zealand company to the use of the trademark and technical information, including specifications and plans, and access to the non-resident company's technical staff.
62. The New Zealand company pays a royalty to the non-resident company for the trademark and technical information. The non-resident company charges the New Zealand company an hourly rate for the services of its staff in support of the New Zealand company's operations.
63. The royalty payments are not schedular payments as a royalty (as defined in section CC 9(2) and (3)) is specifically excluded from the definition of "contract payment". Instead, the royalties paid for the trademark and technical information are subject to non-resident withholding tax, which is imposed under Subpart RF of the ITA 2007. (For more information on non-resident withholding tax contact the Non-resident Centre at nonres@ird.govt.nz, or on 64 03 951 2020.)

64. The fees paid to the non-resident company for the assistance provided by its staff also constitute royalties, as the fees come within the terms of paragraph (h) of the definition of "royalty" in section CC 9(2) and (3). Paragraph (h) provides that the supply of any assistance that enables the application of the trademark or technical information is also a royalty.

Example 7

65. A non-resident freelance journalist comes to New Zealand to report on the New Zealand visit of an important overseas dignitary. A New Zealand newspaper company contracts the non-resident journalist to write a cover story on the visit of the overseas dignitary, for which a contract fee is payable. The newspaper will hold all rights to the story written. The contract is a contract for service that the non-resident journalist performs in New Zealand. Therefore, the contract payments to the non-resident journalist will be schedular payments because the non-resident is a "non-resident contractor" who is carrying out a "contract activity or service".
66. Although Part A of Schedule 4 provides a 15 percent rate of tax for contract payments to non-resident contractors, clause 1 of Part F of Schedule 4 provides a 25 percent rate of tax to apply specifically for payments for contributions by freelance journalists. Therefore, the 25 percent rate will apply to these contract payments.

Appendix One: Legislation

Schedular payments in subpart RD of the Income Tax Act 2007

67. Section RD 3(1) includes schedular payments as PAYE income payments.

RD 3 PAYE income payments

Meaning generally

- (1) The PAYE rules apply to a **PAYE income payment which—**
- (a) means—
 - (i) a payment of salary or wages, *see* section RD 5; or
 - (ii) extra pay, *see* section RD 7; or
 - (iii) a schedular payment, *see* section RD 8:

68. Section RD 4(1) provides that the payer of the PAYE income payment must pay the required amount of tax withheld from the payment to the Commissioner. Section RD 4(2) provides that if some or all of the amount of tax for the PAYE income payment is not withheld and paid pursuant to section RD 4(1), then the recipient of the PAYE income payment must pay the tax.

RD 4 Payment of amounts of tax to Commissioner

Payments monthly or fortnightly

- (1) An employer or PAYE intermediary who withholds an amount of tax for a PAYE income payment must pay the amount to the Commissioner as follows
- (a) on a monthly basis, if they are an employer to whom section RD 22(3) or (4) applies:
 - (b) for 2 payment periods in a month, if paragraph (a) does not apply.

Liability when amount not withheld

- (2) If some or all of the amount of tax for a PAYE income payment is not withheld and paid under subsection (1), the employee in relation to whom the payment is made must—
- (a) pay an amount equal to the amount of tax to the Commissioner by the 20th day of the month following that in which the PAYE income payment was made; and
 - (b) provide an employer monthly schedule to the Commissioner by the date described in paragraph (a).

69. Section RD 8 provides that payments of the classes specified in Schedule 4 are schedular payments. Section RD 8(1)(b) excludes particular payments from being schedular payments.

RD 8 Schedular payments

Meaning

- (1) A **schedular payment—**
- (a) means—

- (i) a payment of a class set out in schedule 4 (Rates of tax for schedular payments); and
 - (ii) in relation to a sale, the net amount paid after subtracting from the purchase price all commission, insurance, freight, classing charges and other expenses incurred by the seller in connection with the sale; and
- (b) does not include—
- (i) salary or wages; or
 - (ii) an extra pay; or
 - (iii) a payment for services provided by a public authority, a local authority, a Maori authority, or a company, other than a non-resident contractor, a non-resident entertainer, or an agricultural, horticultural, or viticultural company; or
 - (iv) a payment covered by an exemption certificate provided under section 24M of the Tax Administration Act 1994; or
 - (v) a payment for services provided by a non-resident contractor who has full relief from tax under a double tax agreement, and is present in New Zealand for 92 or fewer days in a 12-month period; or
 - (vi) a contract payment for a contract activity or service of a non-resident contractor when the total amount paid for those activities to the contractor or another person on their behalf is \$15,000 or less in a 12-month period.

70. Section RD 10(3) provides that the amount of tax for a schedular payment is calculated from the gross amount of the schedular payment at the relevant rate set out in Schedule 4.

RD 10 Amounts of tax for PAYE income payments

...

Schedular payments

- (3) The amount of tax for a schedular payment is determined—
- (a) at the relevant rate set out in schedule 4 (Rates of tax for schedular payments); and
 - (b) on the basis of the gross amount of the payment, whether—
 - (i) some or all of the payment is income; and
 - (ii) the full income tax liability lies with the person receiving the payment, or lies partly with an employee or subcontractor of the person.

...

71. Section RD 18 provides the amount of tax that must be withheld by the payer of a schedular payment if notification required under section 24L of the TAA has not been provided to them.

RD 18 Schedular payments without notification

When this section applies

- (1) This section applies when a person makes a schedular payment but the notification required under section 24L of the Tax Administration Act 1994 has not been provided to them.

When this section does not apply

- (2) This section does not apply when a person other than a company incorporates a company to obtain a reduction in an amount of tax for a schedular payment.

Amount of tax

- (3) The person must withhold the amount of tax for the schedular payment of an amount determined as follows:
- (a) 5% of the amount of the schedular payment in addition to an amount calculated under section RD 10(3) if—
 - (i) the person receiving the payment is a company that is a non-resident contractor; and
 - (ii) the non-resident contractor receives the payment other than as a result of a choice that is made for purposes that include a purpose of defeating the intent and application of paragraph (c); and
 - (iii) paragraph (b) does not apply:
 - (b) zero, if the schedular payment is made to a non-resident entertainer:
 - (c) 15% of the amount of the schedular payment if paragraphs (a) and (b) do not apply.

Note: If the payer of the schedular payment has not been notified with a completed *Tax Code Declaration* (IR 330) by the non-resident contractor, as required by section 24L of the TAA, then the payer must withhold tax from the payment at the applicable rate specified in section RD 18(3), which is to be applied in addition to the rate of tax specified in Schedule 4.

72. Section RD 19 sets out the non resident entertainer's obligation to forward the tax on a schedular payment to the Commissioner where that schedular payment has been received without having NRCT deducted.

RD 19 Schedular payments to non-resident entertainers

When this section applies

- (1) This section applies when a non-resident entertainer derives income from an activity or performance connected with any of the activities or performances described in the definition of non-resident entertainer.

Amounts withheld [Repealed]

- (2) [Repealed]

Amounts not withheld

- (3) If the entertainer has received a schedular payment from which no amount of tax has been withheld, the entertainer must pay the amount of tax to the Commissioner by the 20th day of the month following that in which the payment was made, or by the date of their departure from New Zealand if that is earlier.

73. Section RD 20 provides that where a non-resident contractor is paid a schedular payment for services provided under a contract, and a subcontractor has provided services under that contract, the PAYE rules

apply to the non-resident contractor in relation to payments to the subcontractor for the work carried out under the contract.

RD 20 Schedular payments to subcontractors

When this section applies

- (1) This section applies when a contractor is paid a schedular payment for services provided under a contract, and a subcontractor has provided services under the contract.

Obligation to retain amount

- (2) The PAYE rules apply to the contractor in relation to a payment made to the subcontractor in relation to the work carried out under the contract.

74. Section RD 24 provides that a non-resident contractor may apply to the Commissioner for an exemption certificate to be issued under section 24M of the TAA in respect of a contract payment. An exemption certificate can be applied for in respect of a contract payment for a contract activity or service if one of the three conditions provided in section RD 24(1) are satisfied.

RD 24 Exemption certificates for non-resident contractors

When this section applies

- (1) This section applies when—
 - (a) a non-resident contractor derives an amount from a contract activity or service that is not income, whether because of a double tax agreement or for another reason; or
 - (b) the contractor provides a bond or other security for the payment of any income tax payable on an amount derived by them from a contract activity or service; or
 - (c) the contractor has in the period of 24 months before the date of the application referred to in subsection (2) paid all income tax payable by them and complied with their obligations under the Inland Revenue Acts, and the Commissioner is satisfied that the contractor will continue to do this.

Exemption certificate

- (2) The non-resident contractor may apply to the Commissioner to provide them with an exemption certificate under section 24M of the Tax Administration Act 1994 for a contract payment made to them or another person acting on their behalf in relation to a contract activity or service set out in the certificate for which no amount of tax is to be withheld.

Note: An application for an exemption certificate for a non-resident contractor should be made on the application form IR 197.

Definitions in sections YA 1 and CC 9 of the Income Tax Act 2007

75. Section YA 1 includes a definition of a “non-resident contractor”.

non-resident contractor, in the PAYE rules, means a person who—

- (a) is not resident in New Zealand under subpart YD (Residence and source in New Zealand); and
- (b) undertakes under a contract, agreement, or arrangement (other than a contract of service or apprenticeship)—

- (i) to perform services of any kind in New Zealand:
- (ii) to supply the use, or right to use, in New Zealand any personal property or services of another person

76. In relation to a non-resident contractor, section YA 1 contains definitions of a “contract activity or service” and a “contract payment”.

contract activity or service, for a non-resident contractor, means—

- (a) performing any work in New Zealand:
- (b) rendering a service of any kind in New Zealand:
- (c) providing the use of, or right to use, in New Zealand, any personal property or services of a person other than the non-resident contractor

Note: “Personal property” in (c) of the definition of “contract activity or service” means any property that is not land. Therefore, the definition of “contract activity or service” would include the lease of any type of equipment for use in New Zealand. This can be relevant when these provisions interface with certain DTAs. This is discussed further above in the “special tax rate certificates” section of this statement.

contract payment, for a non-resident contractor, means any payment other than—

- (a) a royalty; or
- (b) a payment made to the non-resident contractor by or on behalf of a person who is not associated with the contractor to reimburse costs incurred by the contractor; or
- (c) a payment referred to in schedule 4, part E (Rates of tax for schedular payments)

Note: A royalty in the definition of “contract payment” is defined in section CC 9(2) and (3).

77. Section YA 1 also contains a definition of a “non resident entertainer”.

non-resident entertainer is defined in section CW 20(4) (Amounts derived by visiting entertainers including sportspersons) for the purposes of that section, and in the PAYE rules, means a person who—

- (a) is not resident in New Zealand under subpart YD (Residence and source in New Zealand); and
- (b) undertakes a Part F activity
- (c) Repealed.

Withholding rates found in Schedule 4 of the Income Tax Act 2007

78. Schedule 4 lists from Part A to Part I, a range of different types of activities and services for which a payment may be made and the relevant tax rate. Some examples of the types of activities provided for in schedule 4 are provided below.

Part A
Payments to non-resident contractors

- 1 A contract payment that relates to a non-resident contractor’s contract activity or service has a 0.15 rate of tax for each dollar of the payment, if the payment is—

- (a) to the non-resident contractor:
- (b) to an agent of the non-resident contractor:
- (c) to a person acting on behalf of the non-resident contractor.

...

Part D

Payments for commercial cleaning and maintenance work, or for general contracting

- 1 A payment for commercial cleaning or maintenance work has a 0.20 rate of tax for each dollar of the payment.

...

- 3 In this part,—

commercial cleaning or maintenance work means work or services that are related to schedular commercial land, if the work or services have the following nature

- (a) cleaning all or part of premises:
- (b) cleaning or laundering plant, vehicles, furniture, furnishings, fittings, or equipment:
- (c) gardening (including grass cutting and hedge cutting):
- (d) destroying vermin:
- (e) destroying weeds

...

Part E

Payments for labour-only building work, or for labour-only fishing boat operating

- 1A payment for labour-only building work, or for labour-only fishing boat work, has a 0.20 rate of tax for each dollar of the payment.

- 2 In this part,—

labour-only fishing boat work means work or services under a contract, arrangement, or agreement for profit-sharing which is exclusively or substantially for the supply of labour in connection with operating or maintaining a fishing boat that is required to be registered under section 103 of the Fisheries Act 1996

labour-only building work means work or services under a contract or arrangement which is exclusively or substantially for the supply of labour in connection with a building or a construction (including pre-fabrication and pre-cutting for the relevant building or construction), if the work or services have the following nature

- (a) work or services that, customarily, may form part of the work or services of a carpenter under a building contract:
- (b) work or services connected with roof-fixing, steel-fixing, erecting fences, or laying concrete, bricks, blocks, tiles, slabs, or stones, if the relevant building or construction is not land that is used or intended to be used for farming or agriculture:
- (c) work or services connected with hanging wallpaper, hanging decorative wall coverings or furnishings, or painting or decorating (including plastering):
- (d) work or services connected with installing fibrous plaster, wallboard, insulating material, interior tiles, interior lining, floor tiles, carpet, linoleum, or floor coverings.

Part F
Payments for activities related to sports, media, entertainment, and public speaking

1 A payment of a media contribution fee, or of a promotional appearance fee, has a 0.25 rate of tax for each dollar of the payment.

...

7 In this part,—

media contribution fee means fees or remuneration, paid to a contributor, that relate to a contribution for television, radio, theatre, stage, or printed media

...

promotional appearance fee means fees or remuneration that relate to a personal attendance for exhibiting or demonstrating goods

...

...

Amounts derived during short-term visits are exempt income

79. Section CW 19 provides that certain income derived by a non-resident for services performed in New Zealand during a visit is exempt income.

CW 19 Amounts derived during short-term visits

Exempt income

- (1) Income that a non-resident person derives in a tax year from performing personal or professional services in New Zealand during a visit is exempt income if—
- (a) the visit is for 92 or fewer days, counting the days of arrival and departure as a whole day each; and
 - (b) the total number of days on which the person is present in New Zealand in the tax year is 92 or fewer; and
 - (c) the services are performed for or on behalf of a person who is not resident in New Zealand; and
 - (d) the amount derived from the personal or professional services is chargeable in the country or territory in which the person is resident with a tax that is substantially the same as income tax imposed under this Act.

Exclusion

- (2) This section does not apply to the income of a public entertainer.

Meaning of public entertainer

- (3) In this section, public entertainer includes—
- (a) circus performers, dancers, lecturers, motion picture artists, musicians, radio artists, singers, television artists, and theatre artists; and
 - (b) athletes, boxers, wrestlers, and other professional sportspersons.

Tax Administration Act 1994

80. Section 24L of the TAA provides that the recipient of a schedular payment must notify the payer of the applicable schedular tax code before receiving the payment.

24L Schedular notification

- (1) This section applies to a person who is entitled to receive a schedular payment described in section RD 8 of the Income Tax Act 2007.
- (2) Before the person receives the schedular payment, they must notify the person making the payment of the applicable schedular tax code.
- (3) The notification referred to in subsection (2) must be in a form authorised by the Commissioner.

81. Section 24M of the TAA provides the Commissioner with the discretion to issue an exemption certificate that specifies payments to which no tax is to be withheld.

24M Exemption certificates for schedular payments

- (1) The Commissioner may provide a person who is entitled to receive a schedular payment with an exemption certificate setting out the payments for a period for which no amount of tax is to be withheld.
- (2) Subsection (1) does not apply to a payment to a non-resident entertainer.
- (3) The Commissioner may cancel an exemption certificate at any time.
- (4) If the Commissioner cancels an exemption certificate, the person who was provided the certificate must return it within 7 days of the date of cancellation.
- (5) An exemption certificate must not be altered or be used to cause a person making a schedular payment not to withhold an amount of tax for the payment.

82. Section 24N of the TAA provides the Commissioner with the discretion to issue a certificate that specifies the amount of tax on a payment, or the rate of tax applying to the payment.

24N Special tax rate certificates for schedular payments

- (1) The Commissioner may provide a person who is entitled to receive a schedular payment with a special tax rate certificate setting out the amount of tax for the payment, or the rate applying to the payment or a part of each payment as if it were the whole payment.
- (2) Subsection (1) does not apply to a payment to a non-resident entertainer.
- (3) The Commissioner may cancel a special tax rate certificate at any time. The Commissioner must give notice of the cancellation.
- (4) If the Commissioner cancels a special tax rate certificate, the person who was provided the certificate must return it within 7 days of the date of notification of the cancellation.
- (5) A special tax rate certificate must not be altered or be used to cause a person making a schedular payment not to withhold an amount of tax for the payment.

83. Section 141AA of the TAA provides for a specific shortfall penalty in respect of schedular payments that are contract payments to non-resident contractors where the non-resident contractor is not liable to pay tax on the payment, whether because of a DTA or otherwise.

141AA Shortfall penalty if non-resident contractor relieved from all liability to pay tax on contract payment

- (1) If a person makes a schedular payment that is a contract payment to a person who is a non-resident contractor and the non-resident contractor is not liable to pay income tax on the contract payment, whether because of a double tax agreement or otherwise, the person who makes the contract payment to the non-resident contractor is liable to pay a shortfall penalty of \$250 for each return period—
 - (a) for which the person is required to deliver to the Commissioner an employer monthly schedule; and
 - (b) in which the person fails to withhold an amount of tax that is required from a contract payment to the non-resident contractor.
- (2) A person who is liable to pay a shortfall penalty under subsection (1) is not liable to pay a shortfall penalty based on the tax shortfall that, but for this section, would be calculated under section 141 in relation to the amount of tax required to be withheld.
- (3) The liability under subsection (1) of a person is limited to a total of \$1,000 for each return period for which the person is required to deliver to the Commissioner an employer monthly schedule.

Note: If section 141AA of the TAA does not apply in respect of the tax shortfall, then section 141 of the TAA will apply.

84. Section 168(1) of the TAA provides that in the case where tax has not been withheld, the tax owing constitutes a debt payable to the Commissioner by the payer of the PAYE income payment. Section 168(2) of the TAA provides that the Commissioner's right to recover the deficient tax from the payer is in addition to the right to recover from the recipient in accordance with the PAYE rules.

168 Employer or PAYE intermediary failing to withhold or deduct tax or payments

- (1) Where an employer fails to withhold or deduct an amount of tax or combined tax and earner-related payment in accordance with the employer's obligations under the PAYE rules and, where applicable, section 115 of the Accident Rehabilitation and Compensation Insurance Act 1992 or section 285 of the Accident Insurance Act 1998 or section 221 of the Injury Prevention, Rehabilitation, and Compensation Act 2001, the amount in respect of which default has been made shall constitute a debt payable by the employer to the Commissioner, and shall be deemed to have become due and payable to the Commissioner on the date on which under section RD 4 of the Income Tax Act 2007 the employer would have been required to pay to the Commissioner the tax or combined tax and earner-related payment.
- (2) The right of the Commissioner to recover from the employer the amount in respect of which default has been made shall be in addition to any right of the Commissioner to recover that amount from the employee under the PAYE rules; and nothing in those rules shall be construed as preventing the Commissioner from taking such steps as the Commissioner thinks fit to recover that amount from the employer and from the employee concurrently, or from recovering that amount wholly from the employer or from the employee or partly from the employer and partly from the employee.

Appendix Two: Flowchart for considering whether a payment is a schedular payment and any applicable withholding rate

