

INTERPRETATION STATEMENT: IS 19/01

Income tax – application of schedular payment rules to non-resident directors’ fees

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.

Contents

Summary	1
Identifying who you contracted with	2
Determining the source of directors’ fees	3
Directors’ fees paid to non-resident individuals	3
Non-resident individuals from most double tax agreement countries	4
Source rules under s YD 4(4) and (18)	5
Source of directors’ fees paid to non-resident entities	7
How the schedular payment rules apply	11
Definition of “non-resident contractor”	11
Payments for services provided by a company (s RD 8(1)(b)(iii))	12
Full relief under a DTA (s RD 8(1)(b)(v))	12
<i>De minimis</i> for non-resident contractors (s RD 8(1)(b)(vi))	14
Exempt payments (s RD 8(1)(b)(iv))	16
Your withholding obligations from directors’ fees	17
Withhold at the time of payment	17
Select the correct withholding rate	17
Flowcharts	20
References	23
Appendix – Legislation	24

Summary

1. This Interpretation Statement follows the Commissioner’s earlier guidance on directors’ fees in:
 - “IS 17/06: Income tax – application of schedular payment rules to directors’ fees” *Tax Information Bulletin* Vol 29, No 8 (September 2017): 7; and
 - “BR Pub 15/10: Goods and services tax – directors’ fees” *Tax Information Bulletin* Vol 27, No 7 (August 2015): 3.
2. This Interpretation Statement provides further guidance on directors’ fees by explaining when you must **withhold tax from directors’ fees paid to non-residents**, and how much you must withhold if you are required to do so.

3. **If you pay directors' fees to a non-resident director, you may be making a "schedular payment". If you make a schedular payment, you must withhold tax from that payment and pay the tax you withhold to Inland Revenue. If you make a payment of directors' fees that is not a schedular payment, then you are not required to withhold tax from that payment.**
4. **Payments of directors' fees to resident and non-resident directors have two main differences. The first difference is that directors' fees paid to non-residents might be non-residents' foreign-sourced income. If the income is non-residents' foreign-sourced income, it is not subject to tax in New Zealand and you are not required to withhold tax from it. The second difference is that the non-resident contractor regime might apply. Some payments to non-resident contractors are excluded from being schedular payments. This means you do not need to withhold tax from these payments.**
5. **Whether a payment of directors' fees is a schedular payment largely depends on who you contracted with to provide directorship services and, in some cases, where those services are performed.**

Identifying who you contracted with

6. Both non-resident individuals and non-resident entities, such as companies or partnerships, can provide directorship services to New Zealand companies. While the Companies Act 1993 requires the person holding the office of director to be a natural person, this does not mean contracts for directorship services must be with an individual director. Non-resident entities can contract to provide the services of a non-resident individual as a director, for example, an employee of a non-resident company or a partner in an overseas law firm. Therefore, the non-resident individual holding the office of director is not necessarily the person (or entity) that you contracted with to provide the directorship services.
7. Knowing whether you have contracted with a non-resident individual or a non-resident entity is important for working out whether the directors' fees you are paying for any directorship services have a New Zealand source. It is also important in the case of New Zealand-sourced directors' fees when determining whether any of the exclusions to the schedular payment rules apply.
8. **This interpretation statement does not cover directors' fees paid to non-resident executive directors who are employed under a contract of service to perform directorship duties. These fees will be "salary or wages" or "extra pay", and will be subject to PAYE. They are excluded from the schedular payment rules under s RD 8(1)(b)(i) and (ii), respectively.**
9. Note that **you may be paying "directors' fees" to a person who you might not ordinarily consider to be a "director". "Director" is broadly defined under the Act and may include:**
 - (a) a person occupying the position of director, even if they do not have the title of "director";
 - (b) a person who gives directions or instructions to a director, and that director is accustomed to act in accordance with those directions or instructions;
 - (c) a person treated as being a director by any provision of the Act; and
 - (d) for an entity without directors but which is treated as a company under the Act, any trustee, manager, or other person who acts like a director of a

company incorporated under the Companies Act 1993 would act. Entities that are treated as a “company” under the Act include:

- (i) listed limited partnerships;
- (ii) unit trusts;
- (iii) incorporated societies; and
- (iv) other body corporates.

Determining the source of directors’ fees

10. Unlike when you pay directors’ fees to a New Zealand resident, when you pay directors’ fees to a non-resident you first need to determine whether the directors’ fees have a New Zealand source or a foreign source.
11. If the directors’ fees you are paying have a New Zealand source, you need to consider whether any of the exclusions to the schedular payment rules apply to determine whether you must withhold tax from the payment. However, if you determine that the directors’ fees you are paying have a foreign source, the schedular payment rules do not apply, and you can make the payment without withholding any tax. Non-residents’ foreign-sourced income is generally not “assessable income”. The Commissioner considers that it would be inconsistent with the purposes of the Act to require tax to be withheld from income that is not “assessable income”.
12. The rules for determining the source of income – the source rules – are set out in s YD 4. **The source rules relevant to directors’ fees paid to non-residents** are in:
 - s YD 4(2) – Business in New Zealand;
 - s YD 4(3) – Contracts made or performed in New Zealand;
 - s YD 4(4) – Personal services in New Zealand
 - s YD 4(17D) – Income taxable under double tax agreement; and
 - s YD 4(18) – Any other source in New Zealand.
13. How the source rules apply depends on the facts of each case. It is not uncommon for more than one source rule to apply to a particular amount of income. The specific source rules in s YD 4(2) to s YD 4(17D) are not “exhaustive”. Even if the specific source rules do not treat an amount of income as having a New Zealand source, that income may still have a New Zealand source under the general source rule in s YD 4(18) (*Tillard v Commissioner of Taxes* [1938] NZLR 795).
14. This interpretation statement considers the source of directors’ fees paid to non-resident individuals (from [15]). It then discusses the source of directors’ fees paid to non-resident entities (such as companies and partnerships) (from [32]).

Directors’ fees paid to non-resident individuals

15. The Commissioner considers that directors’ fees a New Zealand company pays to a non-resident individual will, in most cases, have a New Zealand source, regardless of whether the directorship services are performed in New Zealand or from overseas. For clarity, a person attending a board meeting via videoconference from overseas is not considered to be performing directorship services in New Zealand.

Non-resident individuals from most double tax agreement countries

16. For non-resident individuals from most double tax agreement (DTA) countries (DTA countries) who are contracting in their personal capacity to provide directorship services to a New Zealand company, **the directors' fees they receive will have a New Zealand source under s YD 4(17D) regardless of where the directorship services are performed.**

17. Section YD 4(17D) provides:

Income taxable under double tax agreement

(17D) Income that may be taxed in New Zealand under a double tax agreement has a source in New Zealand.

18. Section YD 4(17D) was added by the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018 and applies for income years beginning on or after 1 July 2018.

19. Most DTAs to which New Zealand is a party include a "directors' fees" article based on the "directors' fees" article found in the OECD Model Tax Convention (OECD **directors' fees article**). An OECD **directors' fees article** permits New Zealand to tax **directors' fees** that a New Zealand company pays to an individual who is resident in the other country. For example, art 16 of the Double Taxation Relief (Australia) Order 1972 (Australian–New Zealand DTA) states:

Article 16

DIRECTORS' FEES

Directors' fees and other similar payments derived by a resident of a Contracting State in that person's capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

20. Because art 16 of the Australian–New Zealand DTA permits New Zealand to tax **directors' fees paid by New Zealand companies** to Australian resident individuals, those fees have a New Zealand source under s YD 4(17D). Example 1 illustrates this. **The full texts of New Zealand's DTAs can be found on Inland Revenue's tax policy website at taxpolicy.ird.govt.nz.**

Example 1: Directors' fees paid to non-resident individual from Australia

Buttercup is a professional director resident in Australia. Royal Humberdinck Ltd (a New Zealand–registered company) asks Buttercup to act as a director because of her knowledge of the Australian market. Buttercup accepts and contracts in her own name. Royal Humberdinck Ltd agrees that Buttercup can attend up to six board meetings via videoconference per year. Buttercup must attend the rest of **the year's board meetings in person in New Zealand**. In her first year as a director, Buttercup attends four board meetings via videoconference from Australia and attends the remaining eight board meetings in person in New Zealand. She comes to New Zealand for a total of eight days over a 12-month period, one day for each board meeting.

Because art 16 of the Australia–New Zealand DTA gives New Zealand a right to tax **all the directors' fees that a New Zealand company pays to Australian resident individuals, all of the directors' fees that Royal Humberdinck Ltd pays to Buttercup** have a New Zealand source under s YD 4(17D), even though **some of the directors' fees** were for meetings Buttercup attended via videoconference from Australia.

As a result, all directors' fees that Royal Humberdinck Ltd pays to Buttercup will be schedular payments. Therefore, Royal Humberdinck Ltd must withhold tax from

these payments unless one of the exclusions to the schedular payment rules applies. This scenario is continued in example 6 at [59].

21. Although most of New Zealand's DTAs include an OECD **directors' fees article**, some DTAs include alternatively **worded directors' fees articles** that do not give New Zealand taxing rights over **directors' fees paid by New Zealand companies in all** situations. Other DTAs, such as the DTA between the United States (US) and New Zealand, **do not include directors' fees articles** at all. The US–New Zealand DTA, for example, **deals with directors' fees** paid by a New Zealand company to a US resident (both individuals and entities) under art 7, "**Business Profits**". Article 7 prevents New Zealand from **taxing directors' fees that a New Zealand company** pays to a US resident, except where the US resident has a "**permanent establishment**" in New Zealand and the **directors' fees** are attributable to that permanent establishment. As a result, unless a US resident individual has a permanent establishment in New Zealand, s YD 4(17D) will not apply.
22. Because of the **differences between New Zealand's various DTAs**, not all **directors' fees** paid to non-resident individuals from DTA countries will necessarily have a New Zealand source under s YD 4(17D). **Directors' fees paid to non-residents** individuals from countries that do not have DTAs with New Zealand (non-DTA countries), cannot have a New Zealand source under s YD 4(17D) given the absence of a DTA. In situations where s YD 4(17D) does not apply, it becomes necessary to consider other relevant source rules.

Source rules under s YD 4(4) and (18)

23. The Commissioner considers that even where s YD 4(17D) does not apply, **directors' fees** paid to non-resident individuals will, in most cases, have a source in New Zealand under s YD 4(4) and s YD 4(18), for example, when paid to:
 - a US-resident individual who does not have a permanent establishment in New Zealand; or
 - a resident of a non-DTA country.

Note that for residents from DTA countries **without an OECD directors' fees article**, the DTA that New Zealand has with that country still governs the final New Zealand income tax result.

24. Under s YD 4(4), employment income under s CE 1, **which includes directors' fees**, has a New Zealand source if it is "**earned**" in New Zealand. Under s YD 4(18), the "**catch-all**" source rule, **income has a New Zealand source if it is "derived", directly or indirectly**, from any other source in New Zealand.
25. In several cases, when deciding the source of employment income, the courts have considered s YD 4(4) and s YD 4(18) together for the same employment income. The test that courts have applied to decide where employment or personal services income is "**derived**" under s YD 4(18) is essentially the same test the courts have **applied when deciding where employment income has been "earned" under** s YD 4(4) (*Case E46* (1982) 5 NZTC 59,277; *Case H6* (1986) 8 NZTC 153; *Case P17* (1992) 14 NZTC 4,115; and *Dow Chemical Overseas Management Co Ltd v CIR* (1994) 16 NZTC 11,143).
26. The approach used when considering issues of source, is that source is a "**practical, hard matter of fact**", not a question of law. The question to be posed is, "**Where would a 'practical person' regard the real source of the income to be?**". This

question involves balancing the factors for and against each potential source of that income (*CIR v NV Philips' Gloeilampenfabrieken* [1955] NZLR 868).

27. When considering the source of employment income specifically, the New Zealand courts have referred to Australian case law, which sets out three main factors that need to be weighed to determine source, namely:

- the place where the arrangement for the provision of the services was made;
- the place where the services were performed; and
- the place from which the payment was made.

(For instance, see *C of T v CAM & Sons Ltd* (1936) 4 ATD 32; *FCT v French* (1957) 98 CLR 398; and *FCT v Mitchum* (1965) 113 CLR 401 (HCA).)

28. While all three factors are relevant, in the absence of special circumstances, the **"place of performance" will likely have a stronger influence on the source of** employment income than the other two factors combined. However, this is not an absolute rule, and several New Zealand cases have held that amounts of employment income have a New Zealand source under the earlier equivalents of s YD 4(4) and s YD 4(18), despite the services being performed overseas (*Case E46* and *Case H6*). The courts reached this conclusion because of additional special factors identified in each case.

29. The Commissioner considers that unlike most other roles, special factors exist for directors of New Zealand companies. Where directorship services are physically performed overseas, the following special factors diminish the importance normally given to the place of performance or strengthen the practical connection between **the directors' fees and New Zealand**, such that those fees will most likely be found **to have been "earned" or "derived" in New Zealand** under s YD 4(4) and s YD 4(18) respectively:

- **Directors are unlike "ordinary" employees in that they have a special statutory connection with New Zealand.** The office of director is a statutory position provided for by the Companies Act 1993. In addition, the Companies Act 1993 sets out who is permitted to hold a directorship and requires the details of directors (including their names and addresses) to be recorded on the New Zealand Companies Register as a matter of public record.
- The Companies Act 1993 also sets out the duties and obligations of a director. These duties and obligations are owed in New Zealand and apply for the purposes of New Zealand law.
- **The amounts paid as directors' fees are subject to certain statutory requirements under s 161 of the Companies Act 1993.**
- A director who fails to discharge their statutory duties faces the possibility of prosecution under New Zealand legislation, for example, the Companies Act 1993, Income Tax Act 2007, Tax Administration Act 1994, Financial Markets Conduct Act 2013 and Takeovers Act 1993.
- **Directors' are often engaged for their knowledge and experience, rather than for the performance of a particular task.** The Commissioner considers that because directorship services can be provided without physical presence in New Zealand, the place where the directorship services are performed carries less significance than it ordinarily would (*Mitchum*).

30. Even where some or all of the directorship services are physically performed outside New Zealand, the Commissioner considers that a **"practical person" would**

conclude that directors' fees paid by a New Zealand company to a non-resident individual have their "real" source in New Zealand because:

- the director has a special statutory connection with New Zealand;
- the contract is most likely formed in, and subject to, New Zealand law; and
- payment is likely being made from New Zealand.

31. **Consequently, directors' fees paid to non-resident individuals will, in most cases, have a New Zealand source under s YD 4(4) and s YD 4(18). However, because source is a question of fact and, ultimately, turns on the specific factors of each case, the Commissioner accepts that situations could arise where directors' fees paid to a non-resident individual might not be found to have been "earned" or "derived" in New Zealand under s YD 4(4) and s YD 4(18) respectively. Example 2 illustrates this "balancing of factors" approach.**

Example 2: Directors' fees paid to a non-resident individual from a non-DTA country

Iocane Imports Ltd (a New Zealand company) appoints Inigo Montoya, a professional director resident in Venezuela, to be a director. Inigo has specialist knowledge of the industry and South American markets. Inigo contracts personally with Iocane Imports Ltd. The contract is formed in New Zealand, and payment is made by Iocane Imports Ltd from New Zealand. New Zealand does not have a DTA with Venezuela. Iocane Imports Ltd agrees that Inigo can attend all board meetings remotely via videoconference from Venezuela.

Because New Zealand does not have a DTA with Venezuela, s YD 4(17D) will not **treat the directors' fees paid to Inigo as having a New Zealand source**. However, **the Commissioner considers that the directors' fees** that Iocane Imports Ltd pays to Inigo will have a New Zealand source because the fees will be employment income **that is both "earned" (s YD 4(4)) and "derived" (s YD 4(18))** in New Zealand. The fact the services are performed in Venezuela may initially suggest the fees have a Venezuelan source. However, on balance, the Commissioner considers that given the contract is formed in New Zealand and that payment is made from New Zealand, together with the nature of directorships and their statutory **connection with New Zealand, Inigo's directors' fees have a closer practical connection with New Zealand than to Venezuela**. Therefore, Iocane Imports Ltd must consider whether the schedular payment rules apply to its payments of **directors' fees**.

Source of directors' fees paid to non-resident entities

32. **The source rules relevant to directors' fees paid to non-resident entities are in s YD 4(2), s YD 4(3) and s YD 4(17D). Directors' fees** that a non-resident entity derives from a business carried on in New Zealand will have a New Zealand source if the business is wholly carried on in New Zealand (s YD 4(2)). If the business is only partly carried on in New Zealand, **directors' fees will have a New Zealand source only to the extent apportioned under s YD 5**. A business of providing directorship services is likely to be "carried on" in New Zealand to the extent that services are physically performed in New Zealand.
33. **Similarly, directors' fees derived from a contract will have a New Zealand source to the extent they are paid for directorship services physically performed in New Zealand (s YD 4(3)) and as apportioned under s YD 5**. For completeness,

s YD 4(4) does not apply to directors' fees paid to non-resident entities, because only individuals can derive such fees as employment income.

34. Apportionment of directors' fees under s YD 4(2) and s YD 4(3) is determined by s YD 5(2) and (3). The directors' fees apportioned to a New Zealand source for the purposes of s YD 4(2) and s YD 4(3) is the amount that would have been paid to an independent third party for carrying out the non-resident entity's New Zealand directorship activities. This means the directors' fees apportioned to a New Zealand source under s YD 5 may differ from the amount the New Zealand company has contracted to pay the non-resident entity for directorship services to be performed in New Zealand. That said, the amount apportioned under s YD 5 cannot exceed the total directors' fees paid to the director.
35. Where directors' fees are paid as a global amount, it is necessary to identify the range of directorship services being performed. Once this has been done, the directors' fees are to be apportioned to a New Zealand source in proportion to those services physically performed in New Zealand. Appropriate records, such as timesheets, will need to be maintained to substantiate the apportionment.
36. The Commissioner considers that directors' fees paid to non-resident entities are unlikely to have a source under s YD 4(17D) because directors' fees paid to non-resident entities are not dealt with under the OECD director's fees articles found in most DTAs. This is because although a non-resident entity may contractually derive directors' fees, only individuals (natural persons) can derive directors' fees "in [their] capacity as a member of the board of directors of a company". Instead, directors' fees paid to non-resident entities are covered by the "business profits" article found in many DTAs.
37. "Business profits" articles generally prevent New Zealand from taxing the business income of a non-resident entity, except where that entity has a permanent establishment in New Zealand. If a non-resident entity has a permanent establishment in New Zealand, generally the directors' fees it receives from a New Zealand company that are attributable to the permanent establishment will all be treated as having a New Zealand source under s YD 4(17D). Practically however, this scenario is likely to be rare. In situations involving a non-resident entity from a non-DTA country with a permanent establishment in New Zealand, s YD 4(17C) would likely give rise to a similar source result as produced for a non-resident entity from a DTA country under s YD 4(17D). Example 3 illustrates the more common position for an entity from a DTA country.

Example 3: Directors' fees paid to a non-resident entity

Westley is a professional director resident in Australia. ROUS Pest Control Ltd, a New Zealand company, has approached Westley to act as a director. Westley accepts and contracts with ROUS Pest Control Ltd through his Australian-resident personal services company, DPR Services Pty Ltd, of which Westley is an employee. DPR Services Pty Ltd does not have a permanent establishment in New Zealand. Westley attends six of the 12 New Zealand board meetings in person and six via videoconference from Australia. Each meeting is five hours long. DPR Services Pty Ltd is paid \$1,000 per meeting Westley attends, regardless of whether he attends in person.

Valerie, the payroll manager for ROUS Pest Control Ltd, knows that s YD 4(2) and s YD 4(3) means **only the directors' fees paid to DPR Services Pty Ltd for** directorship services physically performed in New Zealand have a New Zealand source to the extent apportioned under s YD 5. Valerie initially decides that because DPR Services Pty Ltd provides directorship services throughout the year, then the six days Westley spends in New Zealand attending the six board meetings represents just 6/365th of the total directorship services provided to ROUS Pest Control Ltd. On this basis, Valerie calculates that only \$197.26 of the \$12,000 of **directors' fees should be apportioned to a New Zealand source.**

Valerie decides to check with **Vizzini, the company's** accountant. Vizzini correctly tells Valerie the portion of the directors' fees to be apportioned to a New Zealand source is the amount that would have been paid to an independent third party for **carrying out DPR Services Pty Ltd's New Zealand** directorship activities (s YD 4(2), s YD 4(3), and s YD 5). Vizzini tells Valerie it would be inconceivable for an independent third-party director to receive only \$197.26 for attending six board meetings in New Zealand.

Vizzini advises that on the basis that the \$1,000 DPR Services Pty Ltd receives per meeting represents what an independent third-party director would also receive for the same activities, then:

- **\$6,000 of directors' fees paid for the six meetings Westley attends in person** will have a New Zealand source; and
- **\$6,000 of directors' fees paid for the six meetings Westley attends from Australia via videoconference** will have a foreign source.

The foreign-sourced directors' fees are not subject to the schedular payment rules and can be paid without any tax being withheld. To decide if ROUS Pest Control Ltd must withhold tax from the New Zealand-sourced directors' fees, the company needs to consider whether any of the exclusions to the schedular payment rules apply.

Alternative scenario

Vizzini asks Valerie what services the \$1,000 per board meeting fee is intended to cover. Valerie confirms that the \$1,000 is intended to cover time spent preparing for meetings, as well as other attendances, such as company correspondence undertaken between board meetings.

Valerie also tells Vizzini that DPR Services Pty Ltd is likely to be providing at least some directorship services from Australia. Vizzini recommends that DPR Services Pty Ltd (that is, Westley) keeps accurate records of the time spent performing directorship services for ROUS Pest Control Ltd and whether those services are performed in Australia or New Zealand. These records show that for each five-hour board meeting, DPR Services Pty Ltd spends an equivalent amount of time performing other directorship services such as meeting preparation and correspondence. These other services are all performed in **Australia. Accordingly, the source of the \$12,000 of directors' fees paid to DPR Services Pty Ltd over the year is apportioned as follows:**

- **\$3,000 of the directors' fees relating to the six board meetings that Westley physically attends in New Zealand (25% of total time spent)** have a New Zealand source;
- **\$3,000 of the directors' fees relating to the six board meetings that Westley attends via videoconference from Australia (25% of total time spent)** have a foreign source; and
- **\$6,000 of the directors' fees relating to other non-meeting services such as preparation and company correspondence (50% of total time spent)** also have a foreign source.

For the foreign-sourced amounts, no withholding is required. ROUS Pest Control Ltd may be required to withhold tax from the New Zealand-sourced directors' fees, so the company needs to consider whether any of the exclusions to the schedular payment rules apply. This is discussed further in example 4 at [54].

39. Flowchart 1 at the end of this statement summarises how the source rules apply to **directors' fees** paid to non-resident entities and non-resident individuals.
40. **If the directors' fees you are paying have a New Zealand source**, then you need to consider the schedular payment rules and whether any of the exclusions to those rules apply to the payments you are making. These exclusions are discussed next. **However, if the directors' fees you are paying have a foreign source**, they will not be subject to the schedular payment rules and can be paid without any tax being withheld.

How the schedular payment rules apply

41. If a payment of directors' fees to a non-resident has a New Zealand source, it will be a "schedular payment", unless one of the exclusions in s RD 8(1)(b) applies.

42. The exclusions to the definition of "schedular payment" are set out in s RD 8(1)(b):

A schedular payment—

...

(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) an exempt payment referred to in section 24H and schedule 5, part C, clause 6 of the Tax Administration Act 1994 applies¹; 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.

43. The exclusions under s RD 8(1)(b)(i) and (ii), relating to payments of "salary and wages" and "extra pay", are not covered in this item. These types of payments will arise only when a person is employed (under a contract of service) to perform directorship duties. The Commissioner considers that, in most cases, non-resident individuals who perform directorship services, do so as contractors (under contracts for service), not as employees. For further information on the exclusions under s RD 8(1)(b)(i) and (ii), see "IS 17/06: Income tax – application of schedular payment rules to directors' fees" *Tax Information Bulletin* Vol 29, No 8 (September 2017): 7.

44. The exclusions under s RD 8(1)(b)(iii), (v) and (vi), as they apply to directors' fees paid to non-residents, are discussed next. Section RD 8(1)(b)(iv), which relates to exempt payments, is discussed separately in [60]. The discussion of s RD 8(1)(b)(iii), (v), and (vi) is grouped together because each of these three exclusions refers to "non-resident contractors".

Definition of "non-resident contractor"

45. Section YA 1 defines a "non-resident contractor" as:

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:

¹ This wording of s RD 8(1)(b)(iv) applies from 1 April 2019. Prior to 1 April 2019, s RD 8(1)(b)(iv) read, "a payment covered by an exemption certificate provided under section 24M of the Tax Administration Act 1994; or".

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

46. For the purposes of considering directors' fees paid to non-residents, the main requirement for being a "non-resident contractor" is that the non-resident individual or entity performs or provides services in New Zealand.

Payments for services provided by a company (s RD 8(1)(b)(iii))

47. If you are paying directors' fees to a non-resident company, you need to consider the exclusion under s RD 8(1)(b)(iii), which provides:

A schedular payment—

...

(b) does not include—

...

- (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, a company in relation to a payment described in schedule 4, part J or part W, or an agricultural, horticultural, or viticultural company; or

48. The definition of "company" is very wide and includes a variety of body corporates, such as limited liability partnerships, incorporated in New Zealand or overseas. Importantly, however, companies that are non-resident contractors are not subject to this exclusion.

49. If you pay directors' fees to a non-resident company for directorship services performed entirely from overseas, those fees are unlikely to have a New Zealand source, so will already be outside the scope of the schedular payment rules. In these situations, you do not need to consider the exclusion under s RD 8(1)(b)(iii).

50. If you are paying a non-resident company for directorship services performed or provided in New Zealand, that company will be a non-resident contractor. As a consequence, s RD 8(1)(b)(iii) will not apply and, unless another exclusion applies, the directors' fees you pay to that company for directorship services performed in New Zealand will be a schedular payment.

Full relief under a DTA (s RD 8(1)(b)(v))

51. As noted in [19], most DTAs permit New Zealand to tax directors' fees paid by New Zealand companies to non-resident individuals. As a result, s RD 8(1)(b)(v) is unlikely to apply to directors' fees you might pay to a non-resident individual. This is because, regardless of whether they are present in New Zealand for no more than 92 days, they will not be entitled to full relief on those fees under a DTA, as required by s RD 8(1)(b)(v).

52. However, if you are paying directors' fees to a non-resident entity from a DTA country, any New Zealand-sourced portion of those fees you pay is likely to be excluded from the schedular payment rules under s RD 8(1)(b)(v). You need to consider s RD 8(1)(b)(v) only in relation to New Zealand-sourced directors' fees (those paid for directorship services performed, entirely or in part, in New Zealand) because any foreign-sourced directors' fees paid are not subject to the schedular payment rules in any case.

53. Section RD 8(1)(b)(v) provides:

A schedular payment—

...

(b) does not include—

...

(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

54. As noted in [36], most DTAs provide that income derived by a non-resident entity has full relief from New Zealand tax so long as the non-resident entity does not have a permanent establishment in New Zealand. If the non-resident entity you are paying does not have a permanent establishment in New Zealand, you will still need to confirm that the non-resident entity has not been, and will not be, present in New Zealand for more than 92 days in a 12-month period. If a non-resident entity is entitled to full relief under a DTA but has been or will be present in New Zealand for more than 92 days, they may wish to apply to the Commissioner for an exemption for those payments (s RD 8(1)(b)(iv)), as discussed later at [60]. **Entities such as companies have no “physical” presence of their own.** For the purposes of s RD 8(1)(b)(v), where an individual (in most cases an employee) is physically present in New Zealand performing services on behalf of a non-resident entity, that entity will also be considered present in New Zealand. Examples 4 and 5 illustrate this.

Example 4: Exclusion as full relief under DTA – s RD 8(1)(b)(v)

In the alternative scenario of example 3, **\$3,000 of the \$12,000 directors’ fees paid** to DPR Services Pty Ltd were apportioned to a New Zealand source. Therefore, ROUS Pest Control Ltd must consider whether the schedular payment rules apply to those New Zealand-sourced directors’ fees.

Under s RD 8(1)(b)(v), the New Zealand-sourced portion of the directors’ fees paid to DPR Services Pty Ltd is excluded from being a schedular payment because DPR Services Pty Ltd:

- is a non-resident contractor because services are performed on its behalf through its employee, Westley, in New Zealand;
- has full relief from New Zealand tax under the Australia–New Zealand DTA, since business income derived by the company in New Zealand is subject to New Zealand tax only if DPR Services Pty Ltd has a permanent establishment in New Zealand, which it does not; and
- is not in New Zealand for more than 92 days, as prescribed in s RD 8(1)(b)(v).

As a result, no tax is required to be withheld from the New Zealand-sourced portion of the directors’ fees that ROUS Pest Control Ltd pays to DPR Services Pty Ltd.

Example 5: Directors' fees paid to non-resident individual from the US

Fezzik, a US tax resident, is approached by Miracle Max Healthcare Ltd, a New Zealand company, to be a director. Fezzik contracts in his own name to provide the directorship services to Miracle Max Healthcare Ltd. The contract is formed in New Zealand, and payment is made by Miracle Max Healthcare Ltd from New Zealand. Fezzik does not have a permanent establishment in New Zealand.

Fezzik physically attends half of Miracle Max Healthcare Ltd's board meetings in New Zealand and the other half via videoconference from the US. As part of physically attending board meetings in New Zealand, Fezzik spends 10 days in New Zealand.

On balance, the Commissioner considers **the directors' fees Miracle Max Healthcare Ltd pays to Fezzik have a New Zealand source under s YD 4(4) and s YD 4(18) regardless of where Fezzik physically performs the directorship services.** The combination of the place where the contract is formed, the place where payment is made, together with the nature of directorships and their statutory connection with **New Zealand, leads to the conclusion that Fezzik's directors' fees have a closer practical connection with New Zealand than the US.**

Because Fezzik performs some of his directorship services physically in **New Zealand, he is a "non-resident contractor". Furthermore, because Fezzik does not have a permanent establishment in New Zealand, art 7 of the US–New Zealand DTA provides that New Zealand is not permitted to tax Fezzik's directors' fees.**

Therefore, **the directors' fees that Miracle Max Healthcare Ltd pays to Fezzik are excluded from the schedular payment rules under s RD 8(1)(b)(v) because Fezzik is:**

- a non-resident contractor;
- entitled to full DTA relief from **New Zealand tax on his directors' fees; and**
- is present in New Zealand for 92 days or fewer in a 12-month period.

Accordingly, Miracle Max Healthcare Ltd pays Fezzik his directors' fees without withholding any tax.

If Fezzik were to be present in New Zealand for more than 92 days, s RD 8(1)(b)(v) would not be satisfied. It is possible **that some of Fezzik's directors' fees** might be excluded from the schedular payment rules under the *de minimis* provision in s RD 8(1)(b)(vi). These exclusions are discussed from [55]. However, for all of the **directors' fees paid by Miracle Max Healthcare Ltd** to be excluded, Fezzik would need an exemption* from the Commissioner. Fezzik would be eligible to apply for an exemption because he is entitled to full relief under the US–New Zealand DTA (by virtue of not having a permanent establishment in New Zealand).

*Prior to 1 April 2019, this exemption would be given by the Commissioner in the form of an exemption certificate.

De minimis for non-resident contractors (s RD 8(1)(b)(vi))

55. **Directors' fees that you pay to non-resident contractors** (individuals or entities) for directorship services performed in New Zealand will be excluded from the schedular payment rules if the total amount of contract payments that the non-resident contractor has received, or will receive, for any contract services or activities performed in New Zealand do not exceed \$15,000 in a 12-month period (s RD 8(1)(b)(vi)).

56. Section RD 8(1)(b)(vi) provides:

A schedular payment—

...

(b) does not include—

...

(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.

Contract payment for a contract activity or service

57. Section RD **8(1)(b)(vi)** applies only to directors' fees that are paid for directorship services performed in New Zealand by a non-resident contractor. The term **"contract payment"** is broadly defined under s YA 1 as being any payment that is not a reimbursement of expenses or other payment types that are not relevant to directorship services. **However, a "contract activity or service" is defined narrowly and limited to activities or services performed in New Zealand.**

58. Accordingly, if you pay directors' fees to a non-resident contractor specifically for directorship services performed in New Zealand, s RD 8(1)(b)(vi) will exclude those **fees from the schedular payment rules as long as "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"**. This means contract payments for all contract activities or services are to be included in the calculation of the \$15,000 cap, not just those received for directorship services and not just those you have paid to the contractor or another person on their behalf.

59. Directors' fees paid specifically for directorship services performed from overseas are not contract payments for a contract activity or service, so are not included in the calculation of the \$15,000 cap. **However, because directors' fees paid specifically for directorship services performed from overseas are not contract payments for a contract activity or service, s RD 8(1)(b)(vi) does not exclude them from the schedular payment rules.** Therefore, tax will need to be withheld from such fees unless one of the other exclusions to the schedular payment rules applies. Example 6 illustrates how the exclusion for exempt payments works, under s RD 8(1)(b)(iv).

Example 6: *De minimis* exclusion under s RD 8(1)(b)(vi)

Following on from example 1, Royal Humberdinck Ltd pays Buttercup \$18,000 for attending all 12 board meetings during the year (\$1,500 per meeting). Because Buttercup has performed some services in New Zealand, she meets the definition of a non-resident contractor. In the last 12 months, Buttercup has not received (and will not receive in the next 12 months), any other contract payments for New Zealand contract activities or services.

The \$12,000 of directors' fees paid to Buttercup for attending the eight meetings in New Zealand constitute contract payments of \$15,000 or less in a 12-month period. Therefore, s RD 8(1)(b)(vi) excludes those fees from the schedular payment rules. Royal Humberdinck Ltd may pay those fees without withholding tax from them.

The \$6,000 of directors' fees paid to Buttercup for attending the four meetings from Australia are not contract payments for contract activities or services. Therefore, they do not count towards the \$15,000 cap.

However, because **the \$6,000 of directors' fees Buttercup receives for attending** the four board meetings from Australia are not contract payments for New Zealand contract activities or services, they are not excluded from the schedular payment rules under s RD 8(1)(b)(vi). Therefore, Royal Humberdinck Ltd must withhold tax from the \$6,000 it pays Buttercup for attending meetings from Australia.

It is important to note that even though Royal Humberdinck Ltd is not required to **withhold tax from some of the directors' fees it pays to** Buttercup, Buttercup is still liable for New Zealand income tax on all **the directors' fees she receives from** the company (see example 1 for details). Therefore, Buttercup may wish to ask Royal Humberdinck Ltd to treat **the directors' fees she is paid for attending board meetings in New Zealand as "voluntary schedular payments"**. If Royal Humberdinck Ltd agrees to do so, it would need to withhold tax **from all directors' fees it pays to** Buttercup throughout the year. **This would reduce Buttercup's** final New Zealand income tax liability. Voluntary schedular payments are discussed at [74].

Exempt payments (s RD 8(1)(b)(iv))

60. Generally, if a non-resident individual or entity notifies you that they have an exemption for the **directors' fees** you are about to pay them, you are not required to withhold any tax from those exempt payments. You do not need to include exempt payments, or the details of the person you are paying them to, as part of the employment income information you file with the Inland Revenue.
61. Prior to 1 April 2019, the non-resident individual or entity would notify you of their **exemption by providing you with an "exemption certificate"**. Example 7 deals with exemptions.

Example 7: Directors' fees paid to non-resident individual from US

This example is a **variation of Fezzik's situation discussed in example 5**. Fezzik, a US tax resident, contracts in his own name to provide directorship services to Miracle Max Healthcare Ltd. The contract is formed in New Zealand and payment is made by Miracle Max Healthcare Ltd from New Zealand. Fezzik does not have a permanent establishment in New Zealand. Because Fezzik contracts in his own **name, all of his directors' fees have a New Zealand source** under s YD 4(4) and s YD 4(18).

Fezzik "attends" all board meetings via videoconference from overseas. By not performing any of his directorship services in New Zealand, Fezzik does not meet **the definition of a "non-resident contractor"**. This means the exclusions under s RD 8(1)(b)(v) and (vi) do not apply. Unless Fezzik obtains an exemption and notifies Miracle Max Healthcare Ltd of it before any payment is made, **Miracle Max Healthcare Ltd must withhold tax from Fezzik's directors' fees.**

Alternative scenario

Fezzik applies to the Commissioner for **his directors' fees to be exempt payments** on the basis that under the US–New Zealand DTA, he is entitled to full relief from **New Zealand tax on his directors' fees**. The Commissioner allows Fezzik an exemption for the **directors' fees**, which Fezzik notifies Miracle Max Healthcare Ltd of before any payment is made. **As a result, Fezzik's directors' fees are excluded** from the schedular payment rules under s RD 8(1)(b)(iv), and Miracle Max Healthcare Ltd can pay Fezzik's directors' fees to him without withholding any tax.

62. Flowcharts 2 and 3 at the end of this item summarise how the schedular payment rules apply to directors' fees paid to non-resident individuals and non-resident entities that have contracted to provide directorship services to a New Zealand company.

Your withholding obligations from directors' fees

Withhold at the time of payment

63. If the directors' fees you are paying are schedular payments and you are required to withhold tax from them, you must withhold at the time you make the payment. You are then required to pay the tax withheld to Inland Revenue. You will also need to record details of the non-resident individual or entity you are paying, the amount of the payment, and the tax withheld as part of the employment income information you file with Inland Revenue. For further information about your PAYE record-keeping, payday filing and withholding tax payment obligations, see the Inland Revenue website.

Select the correct withholding rate

64. Different withholding rates may apply depending on who you are paying and the information they give you. Therefore, it is important you determine the appropriate rate for each person or entity you pay.

65. Before you pay a schedular payment to a non-resident, they should complete a Tax Rate Notification for Contractors form (IR330C). The IR330C will record the **person's name and** New Zealand tax number. If the non-resident you are paying wants to elect their own withholding rate, they also need to record this in the IR330C. Elected rates are discussed in [68] and [69]. If a non-resident has been given a prescribed rate or additional deduction rate by the Commissioner, they must notify you of this in their IR330C. Prescribed rates and additional deduction rates are also discussed in [72] and [73].

Default withholding rates

66. If the non-resident individual or entity (other than a non-resident company) you are about to pay has not provided you with an IR330C recording their name and New Zealand tax number, you must withhold at the default withholding rate of 45%. The default withholding rate for a non-resident company is 20%. Prior to 1 April 2019, the default withholding rate was called **the "no-notification rate"**.

Standard withholding rate is 33%

67. If the non-resident you are about to pay provides you with an IR330C recording their name and tax number with no elected rate, and they are not subject to a prescribed rate or additional deduction rate, you must withhold tax at a rate of 33%. **This is the standard withholding rate for directors' fees. Because Schedule 4 provides a specific withholding rate for directors' fees, this rate prevails over the "non-resident contractor" rate set out in Part A of Schedule 4, even though the recipient is also a "non-resident contractor"**.

Elected rates must be at least 15%

68. A non-resident entitled to receive a schedular payment is allowed to elect their own withholding rate. However, the elected rate for non-residents (and temporary visa holders) cannot be less than 15%. A non-resident who wants to elect their own withholding rate must do so in their IR330C. As long as the elected rate is not less than 15%, you must withhold at that elected rate.
69. A non-resident can change their elected rate. However, if that person has already elected to change the withholding rate twice in the last 12-month period, you are not required to withhold at the newly elected rate unless you agree to the change.

Special tax rates

70. You may be obliged to withhold tax at a different rate if the non-resident you are paying has received a special tax rate from the Commissioner. A non-resident can elect a withholding rate below the minimum rate of 15% only if they have been granted a corresponding special tax rate. If the non-resident you are paying **directors' fees to has elected a rate less than 15%, you must deduct at that rate** only if they have notified you of their corresponding special tax rate. Prior to 1 April 2019, a special tax rate was issued in the form of a "special tax rate certificate", which needed to be provided to the payer prior to payment being made.
71. Where a non-resident has a 0% special tax rate, the directors' fees you pay to them will still be schedular payments even though you will not need to withhold any tax. Because they are still schedular payments, you must record the payments, and details of the non-resident you are paying, as part of the employment income information you file with Inland Revenue.

Prescribed rates and additional deduction rates

72. Occasionally, the non-resident you are paying may have outstanding tax liabilities with Inland Revenue. In this situation, the Commissioner may have prescribed a specific withholding rate for that non-resident and may have also prescribed an additional deduction rate for you to withhold and pay to Inland Revenue. Inland Revenue applies the additional deduction rate amounts to reduce a non-**resident's** outstanding tax liabilities.
73. You will be notified of this type of prescribed rate or additional deduction rate by the non-resident you are paying or by Inland Revenue directly. If you are notified of a prescribed rate or an additional deduction rate, you must withhold at those rates even if the person you are paying has elected a different rate.

Voluntary schedular payments

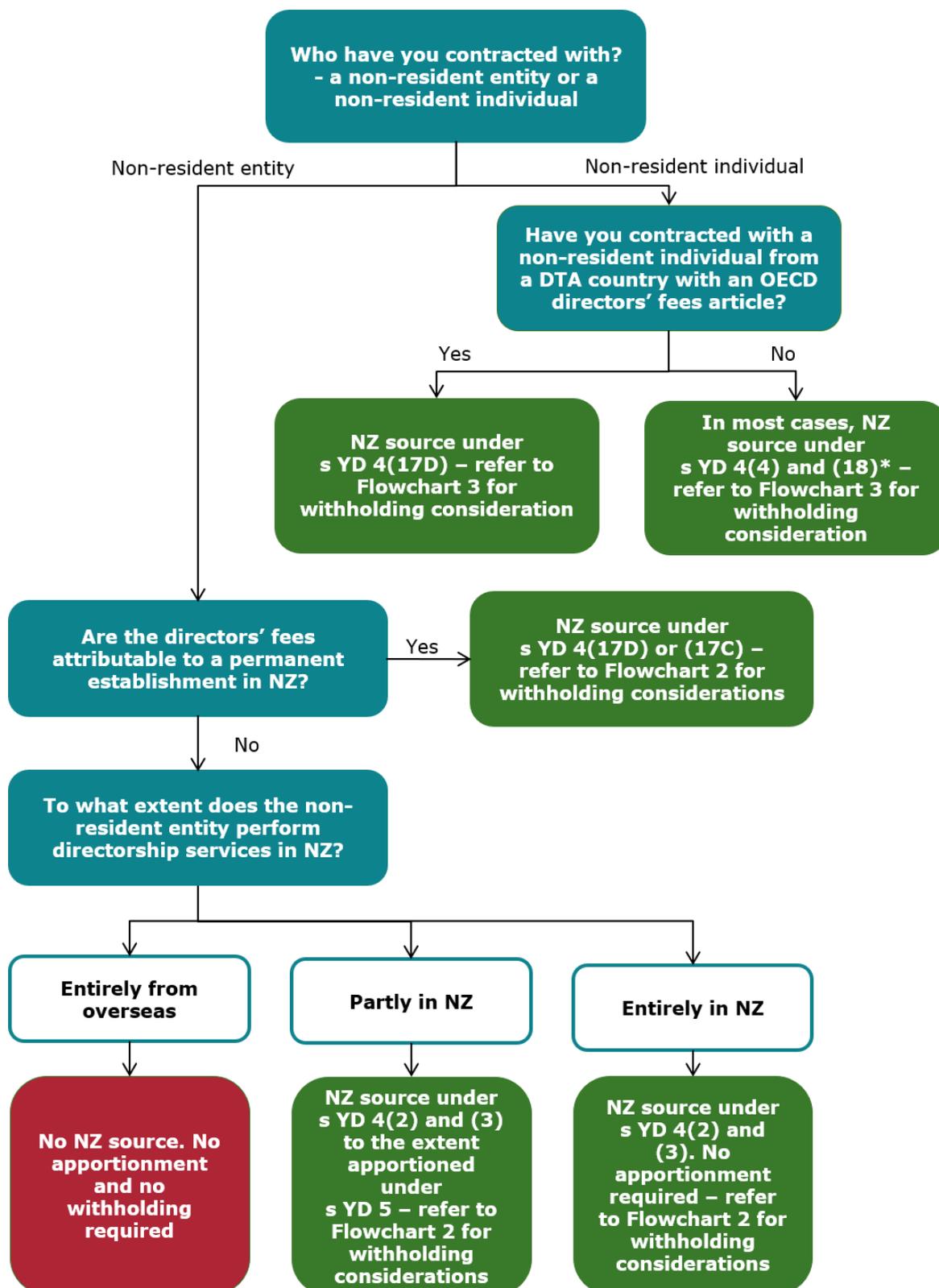
74. **If you are going to be paying directors' fees that are not schedular payments, the person or entity you are paying may nonetheless want you to withhold tax from those payments. If you agree to this, those directors' fees may be treated as "voluntary schedular payments". An agreement to treat non-schedular payments as voluntary schedular payments must be recorded in writing. If you have agreed in writing to treat certain payments of directors' fees as voluntary schedular payments, you must withhold tax from those payments and pay the tax withheld to Inland Revenue, as you would for any other schedular payments.**

Deduct from fees net of GST and reimbursements

75. Once you have determined the appropriate withholding rate for a payment, you must then apply that rate to the total amount of the schedular payment, exclusive of any GST charged.
76. If you reimburse a non-resident for an amount they have incurred as a necessary part of performing their role as director, for example, the cost of flights to attend a **board meeting, that payment is not a director's fee. Accordingly, any reimbursement amount will not be a schedular payment, so you will not need to withhold tax from it.**

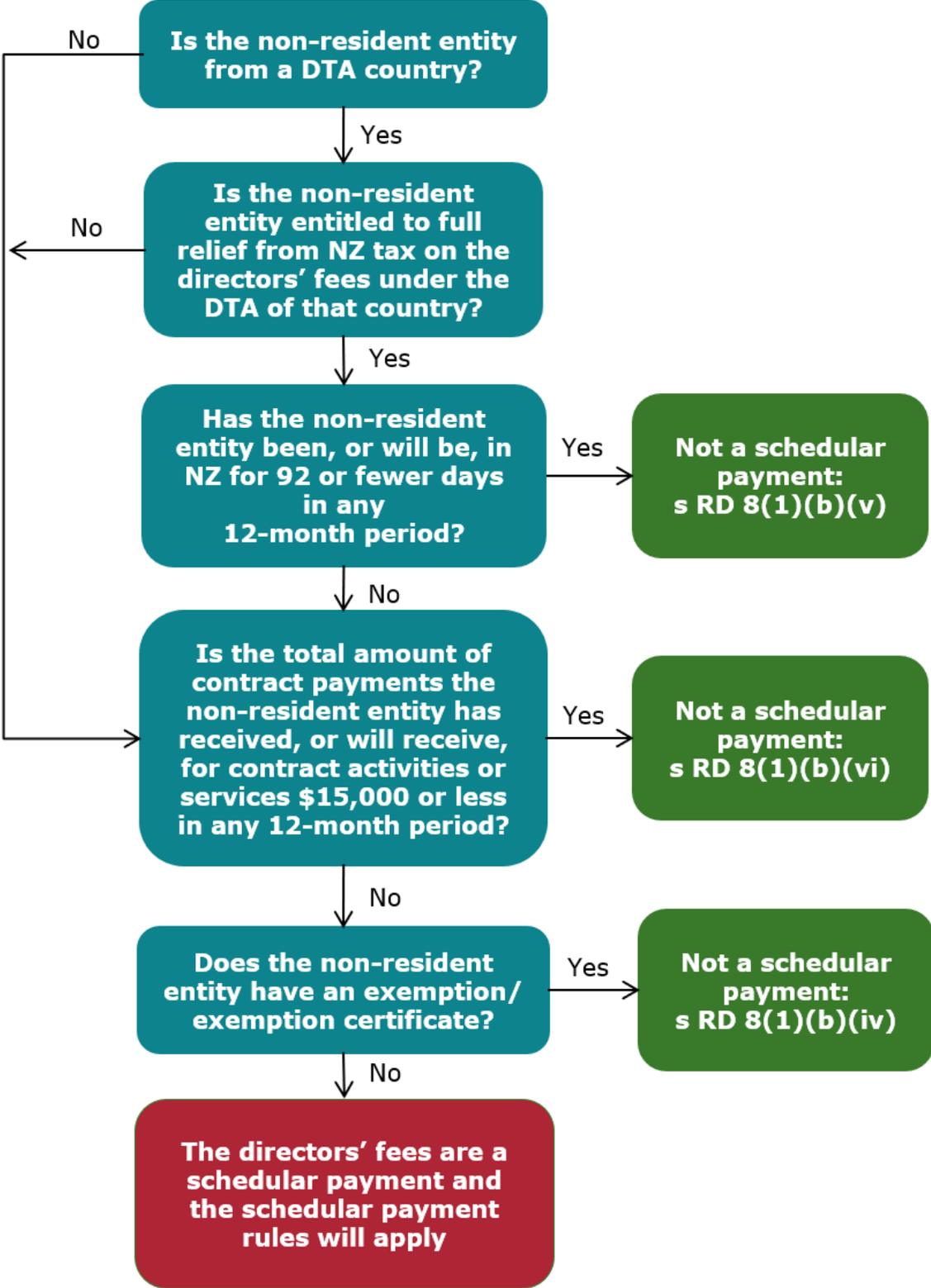
Flowcharts

Flowchart 1: **Source of directors' fees paid to non-resident entities and non-resident individuals**

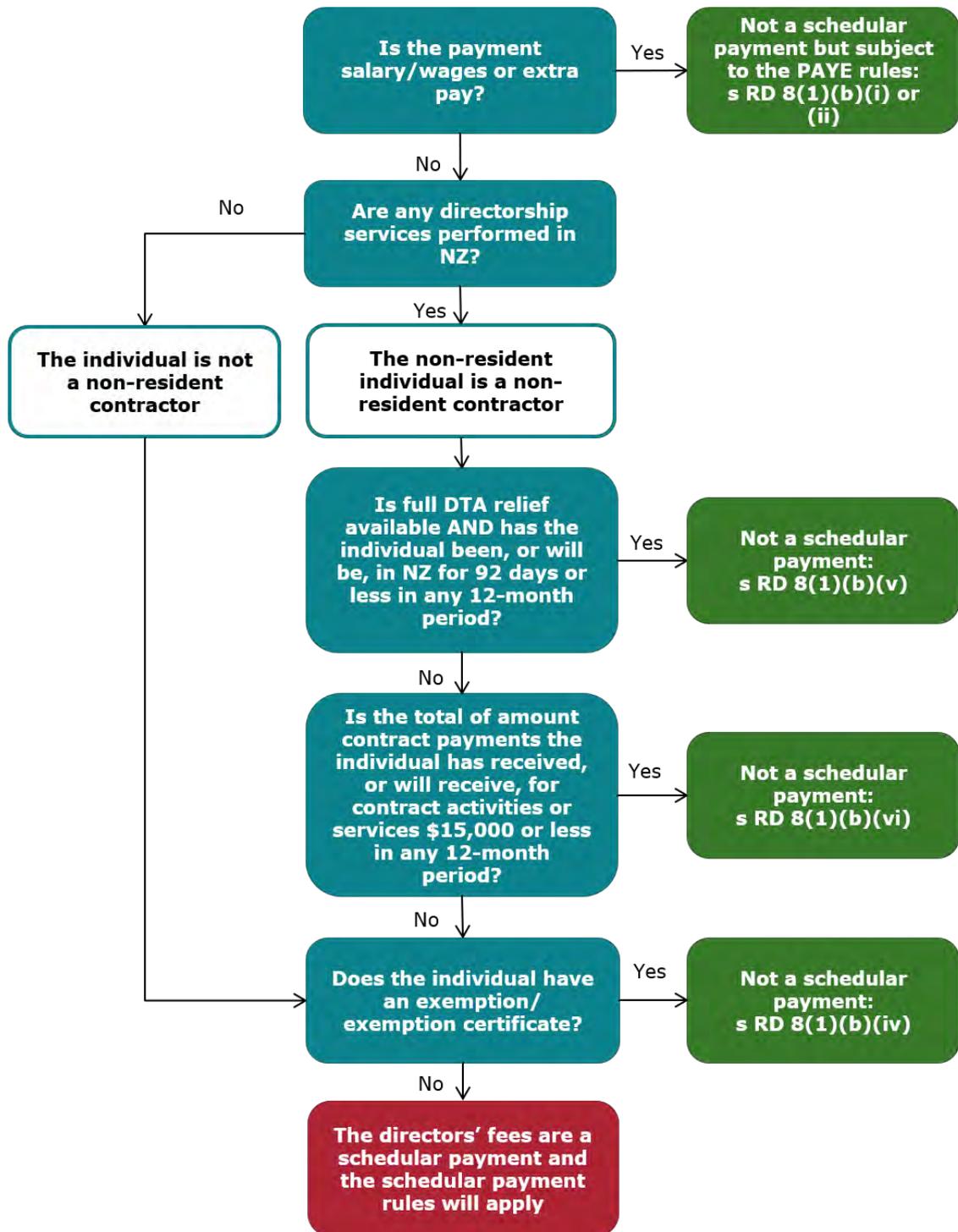


* As discussed in [23]-[31], directors' fees paid to a non-resident individual will, in most cases, have a New Zealand source under s YD 4(4) and (18). However, source under these provisions must ultimately be decided on the specific facts of each case.

Flowchart 2: Withholding from directors' fees paid to a non-resident entity –
 refer to Flowchart 1 to determine source



Flowchart 3: Withholding from directors' fees paid to a non-resident individual –
 refer to Flowchart 1 to determine source



References

Subject references

Directors' fees

Non-residents

Schedular payments

Source

Legislative references

Companies Act 1993, s 161

Double Taxation Relief (Australia) Order 1972, art 16

Financial Markets Conduct Act 2013

Income Tax Act 2007, ss CE 1, RD 8(1)(b), YA 1 ("**company**", "**contract activity or service**", "**contract payment**", "**director**", "**non-resident contractor**"), YD 4, YD 5, Schedule 4

Takeovers Act 1993

Tax Administration Act 1994

Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018

Case references

C of T v CAM & Sons Ltd (1936) 4 ATD 32

Case E46 (1982) 5 NZTC 59,277

Case H6 (1986) 8 NZTC 153

Case P17 (1992) 14 NZTC 4,115

CIR v NV Philips' Gloeilampenfabrieken [1955] NZLR 868

Dow Chemical Overseas Management Co Ltd v CIR (1994) 16 NZTC 11,143

FCT v French (1957) 98 CLR 398

FCT v Mitchum (1965) 113 CLR 401

Tillard v Commissioner of Taxes [1938] NZLR 795

Related rulings/statements

"BR Pub 15/10: Goods and services tax – directors' fees" *Tax Information Bulletin* Vol 27, No 7 (August 2015): 3

"IS 17/06: Income tax – application of schedular payment rules to directors' fees" *Tax Information Bulletin* Vol 29, No 8 (September 2017): 7

Appendix – Legislation

Income Tax Act 2007

1. Section CE 1(1)e provides:

CE 1 Amounts derived in connection with employment

Income

(1) The following amounts derived by a person in connection with their employment or service are income of the person:

...

(e) **directors' fees:**

2. Section RD 8(1) provides:

RD 8 Schedular payments

Meaning

(1) A schedular payment—

(a) means—

(i) a payment of a class set out in schedule 4 (Standard rates of tax for schedular payments); 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, a company in relation to a payment described in schedule 4, part J or part W, or an agricultural, horticultural, or viticultural company; or

(iv) an exempt payment referred to in section 24H and schedule 5, part C, clause 6 of the Tax Administration Act 1994 applies²; 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.

3. Section YA 1 provides the following definitions:

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:

² This wording of s RD 8(1)(b)(iv) applies from 1 April 2019. Prior to 1 April 2019, s RD 8(1)(b)(iv) read, "a payment covered by an exemption certificate provided under section 24M of the Tax Administration Act 1994; or".

- (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:
- (c) includes a trustee of a group investment fund that is not a designated group investment fund, but only to the extent to which the fund results from investments made into it that are—
 - (i) not from a designated source, as defined in section HR 3(5) (Definitions for section HR 2: group investment funds); and
 - (ii) not made before 23 June 1983, including an amount treated as invested at that date under the definition of pre-1983 investment in section HR 3(8):
- (d) includes an airport operator:
- (e) includes a statutory producer board:
- (f) includes a society registered under the Incorporated Societies Act 1908:
- (g) includes a society registered under the Industrial and Provident Societies Act 1908:
- (h) includes a friendly society:
- (i) includes a building society:
- (j) is further defined in section EX 30(7) (Direct income interests in FIFs) for the purposes of that section:
- (k) is defined in section HD 15(9) (Asset stripping of companies) for the purposes of that section

...

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

...

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 (Standard rates of tax for schedular payments)

...

director—

- (a) means—
 - (i) a person occupying the position of director, whatever title is used:

- (ii) a person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act:
 - (iii) a person treated as being a director by any other provision of this Act:
 - (iv) in the case of an entity that does not have directors and that is treated as, or assumed to be, a company by a provision of this Act, any trustee, manager, or other person who acts in relation to the entity in the same way as a director would act, or in a similar way to that in which a director would act, were the entity a company incorporated in New Zealand under the Companies Act 1993:
- (b) is defined in section HD 15(9) (Asset stripping of companies) for the purposes of that section

...

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

4. Section YD 4(1)–(4), (17D) and (18) provide:

YD 4 Classes of income treated as having New Zealand source

What this section does

- (1) This section lists the types of income that are treated as having a source in New Zealand for the purposes of this Act.

Business in New Zealand

- (2) Income derived from a business has a source in New Zealand if—
 - (a) the business is wholly carried on in New Zealand:
 - (b) the business is partly carried on in New Zealand, to the extent to which the income is apportioned to a New Zealand source under section YD 5.

Contracts made or performed in New Zealand

- (3) Income derived by a person from a contract has a source in New Zealand if the contract is—
 - (a) made in New Zealand, except to the extent to which the person wholly or partly performs the contract outside New Zealand, and the income is apportioned to a source outside New Zealand under section YD 5:
 - (b) made outside New Zealand but the person wholly or partly performs the contract here, to the extent to which the income is apportioned to a New Zealand source under section YD 5.

Personal services in New Zealand

- (4) An amount that is income under section CE 1 (Amounts derived in connection with employment) has a source in New Zealand if the amount is earned in New Zealand, even if the employer is not a New Zealand resident.

...

Income through permanent establishment

- (17C) Income attributable to a permanent establishment in New Zealand of a non-resident has a source in New Zealand, except if—
- (a) subsections (15) to (17) provide otherwise;
 - (b) the income is a dividend from a share in a foreign company that is not revenue account property.

Income taxable under double tax agreement

- (17D) Income that may be taxed in New Zealand under a double tax agreement has a source in New Zealand.

Any other source in New Zealand

- (18) Income derived directly or indirectly from any other source in New Zealand has a source in New Zealand.

5. Section YD 5(1), (1B), (2) and (3) provides:

YD 5 Apportionment of income derived partly in New Zealand

When this section applies

- (1) This section applies when—
- (a) a person carries on business partly in New Zealand and partly outside New Zealand; or
 - (b) a contract is made in New Zealand and is performed, in whole or in part, by a person outside New Zealand; or
 - (c) a contract is made outside New Zealand and is performed, in whole or in part, by a person in New Zealand; or
 - (d) interest or a redemption payment is derived from money lent outside New Zealand to a New Zealand resident (the borrower) for the purposes of a business they carry on outside New Zealand through a fixed establishment outside New Zealand and through which the borrower lends money to another New Zealand resident.

Relationship with source rules

- (1B) This section does not apply to limit the effect of—
- (a) any of the source rules in section YD 4 other than those in section YD 4(2), (3), and (11)(b)(i); or
 - (b) the source rules in section YD 4(2), (3), and (11)(b)(i) to the extent to which the income referred to is also income referred to in any source rule other than those in section YD 4(2), (3), and (11)(b)(i).

Apportionment

- (2) Subject to subsection (4), the amount of income derived from the business or under the contract, and the amount of expenditure incurred in deriving the income, must be apportioned between New Zealand and sources outside New Zealand to the extent necessary to achieve the result in subsection (3).
- (3) The result of the apportionment, to the extent consistent with subsection (2), must **be that the person's net income or net loss, in relation to the business or contract, is the same as a separate and independent person would have if they were carrying out only the person's activities in New Zealand and dealing at arm's length.**

6. Schedule 4 of the Income Tax Act 2007 provides:

Part B

Payments of company directors' fees, examiners' fees, honoraria, and other payments

- 1 A payment of a company director's fee, or an examiner's fee, or an honorarium, has a standard rate of tax of 0.33 for each dollar of the payment.

...

Part W

Voluntary schedular payments

- 1 A payment to a person is treated as a schedular payment (a voluntary schedular payment) and has a standard rate of tax of 0.20 for each dollar of the payment if—
- (a) there is no obligation to withhold an amount from the payment under this Act or under the Tax Administration Act 1994; and
 - (b) the payer and the payee have agreed that the payment is a voluntary schedular payment, and have recorded their agreement in a document.

Companies Act 1993

7. Section 161 of the Companies Act 1993 provides:

161 Remuneration and other benefits

- (1) The board of a company may, subject to any restrictions contained in the constitution of the company, authorise—
- (a) the payment of remuneration or the provision of other benefits by the company to a director for services as a director or in any other capacity;
- ...
- (e) the entering into of a contract to do any of the things set out in paragraphs (a), (b), (c), and (d),—
- if the board is satisfied that to do so is fair to the company.
- (2) The board must ensure that forthwith after authorising the making of the payment or **the provision of the benefit or ... the entering into of the contract, as the case may be, particulars of the payment or benefit ... or contract are entered in the interests register.**
- (3) The payment of remuneration or the giving of any other benefit to a director in accordance with a contract authorised under subsection (1) need not be separately authorised under that subsection.
- (4) **Directors who vote in favour of authorising a payment, benefit ... or contract under subsection (1) must sign a certificate stating that, in their opinion, the making of the payment or the provision of the benefit ... or the entering into of the contract is fair to the company, and the grounds for that opinion.**
- (5) Where a payment is made or other benefit provided or a guarantee is given to which subsection (1) applies and either—
- (a) the provisions of subsections (1) and (4) have not been complied with; or
 - (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (4),—

the director or former director to whom the payment is made or the benefit is provided ... **is personally liable to the company for the amount of the payment, or the monetary value of the benefit, ... except to the extent to which he or she proves that the payment or benefit ... was fair to the company at the time it was made, provided, or given.**

Double Taxation Relief (Australia) Order 1972

8. Article 16 of the Double Taxation Relief (Australia) Order 1972 provides:

Article 16

DIRECTORS' FEES

Directors' fees and other similar payments derived by a resident of a Contracting State in that person's capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.