

**OPERATIONAL STATEMENT****Non-resident employers' obligations to deduct PAYE, FBT and ESCT in cross-border employment situations**

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Operational statements set out the Commissioner of Inland Revenue's view of the law in respect of the matter discussed and deal with practical issues arising out of the administration of the Inland Revenue Acts.

This Statement discusses and provides guidance on the approach to take with regards to a non-resident employers' obligations to deduct PAYE, FBT and ESCT in certain cross-border employment situations.

All legislative references in this Statement are to the Income Tax Act 2007, unless specified otherwise.

## Introduction

Operational statements set out the Commissioner's view of the law in respect of the matter discussed and deal with the practical issues arising out of the administration of the Inland Revenue Acts.

This Statement discusses and provides guidance on the approach to take with regards to a non-resident employers' obligations to deduct PAYE, FBT and ESCT in certain cross-border employment situations.

All legislative references are to the Income Tax Act 2007 (the Act) unless specified otherwise.

## Summary of approach

1. A non-resident employer has an obligation to withhold PAYE from a PAYE income payment made to an employee if:
  - The employer has made themselves subject to New Zealand tax law by having a sufficient presence in New Zealand; and
  - The services performed by the employee are properly attributable to the employer's presence in New Zealand.
2. A non-resident employer may have a Fringe Benefit Tax (FBT) or Employer Contribution Superannuation Tax (ESCT) liability for a benefit provided to, or a contribution made for an employee if:
  - The employer has made themselves subject to New Zealand tax law by having a sufficient presence in New Zealand; and
  - The services performed by the employee are properly attributable to the employer's presence in New Zealand.
3. There is no PAYE withholding obligation if a PAYE income payment is "non-residents' foreign sourced income" for the employee.

4. There is also no PAYE withholding obligation for a PAYE income payment made to a non-resident employee working in New Zealand if the domestic exemption in s CW 19 applies, or a Double Taxation Agreement (DTA) gives relief from source taxation such as where the employee is in New Zealand 183 days or less in a twelve-month period.

## Application of the statement

5. This statement provides general guidance to assist non-resident employers' in meeting their tax obligations regarding when to deduct PAYE, FBT and ESCT in cross-border situations. The Statement will apply from the date it is issued. However, the Commissioner will not be applying resources to examine positions taken by taxpayers prior to that date.
6. If you have any concerns about compliance with the tax obligations discussed in this statement, you should discuss the matter with a tax professional or Inland Revenue.

## Discussion

7. This Statement provides guidance on whether employers have PAYE, FBT and ESCT obligations in various cross-border employment situations.
8. The different situations involve different combinations of; the residence of the employer, the residence of the employee, and the country in which the employment services are performed.

### Non-resident employers

#### *Territorial limitation - Presence*

9. The PAYE rules<sup>1</sup> are intended to apply to New Zealand residents or matters over which New Zealand has jurisdiction. A non-resident may make themselves subject to New Zealand law (including the PAYE rules) by having a sufficient presence in New Zealand (*Alcan*<sup>2</sup> and *Clark*<sup>3</sup>). The nature and extent of the required presence may vary

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<sup>1</sup> Section RD 2 of the Income Tax Act 2007.

<sup>2</sup> *Alcan New Zealand Ltd v CIR* (1993) 15 NZTC 10,125 (HC).

<sup>3</sup> *Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 1 All ER 133 (HL).

depending on the facts in each case. For example, a sufficient presence could range from a non-resident employer having a permanent office or site in New Zealand where trading operations are performed, or a non-resident employer having a single employee in New Zealand working from home and performing contracts in New Zealand on their behalf utilising labour and resources in New Zealand to perform that contract.

10. If a non-resident employer has a trading presence in New Zealand, such as carrying on operations and employing a workforce for the purpose of trade, this would normally be sufficient for the employer to have a PAYE withholding obligation for employees they pay PAYE income payments to.
11. A sufficient presence for a non-resident employer would also include having a permanent establishment, a branch, contracts that have been entered into in New Zealand and performing those contracts in New Zealand with employees based there for the purposes of carrying on trading operations as mentioned in [10]. An address for service (in New Zealand) may also indicate that the non-resident employer has made themselves subject to New Zealand law, even though this may be for reasons other than tax purposes.
12. A sufficient presence would not include a situation where an employee chooses (as a matter of personal preference) to undertake their employment activities in New Zealand where those activities have no necessary connection to New Zealand, and where this was the non-resident employers' only connection with New Zealand.
13. It is considered that merely having employees in New Zealand would not, of itself, constitute a presence of the employer sufficient to subject the employer to New Zealand's jurisdiction. Therefore, the degree to which an employee "represents" the employer in activities mentioned in [9], [10] and [11] will be one of the things to take into account to decide whether the presence is sufficient to mean that the employer has submitted themselves to New Zealand's jurisdiction.
14. It is also considered that having a parent, subsidiary or associate would not be enough in itself to have a presence in New Zealand without something more, such as any of the factors mentioned in paragraphs [9], [10] and [11].

**Example 1:**

Boston Architects (BA) is an architect firm based in the USA. BA employs George who lives in Wellington. George participates in virtual meetings and completes all of his work in Wellington but as BA does not have any New Zealand clients, all the work is sent back to the US electronically.

Would BA have an obligation to deduct PAYE?

No. There would be no obligation to deduct PAYE as George's employment activities have no necessary connection to New Zealand, and the only connection to New Zealand is that George lives there. George would have to account for his own tax through the New Zealand tax system (see paragraphs 15-18).

**Example 2:**

George's work is highly respected and quite specialised, as he only designs schools. When there is a project to build a new school in Wellington, George is asked by BA to provide his expertise and advice.

Would BA have an obligation to deduct PAYE?

No. George's expertise and advice does not require him to be in New Zealand to give it. He is not carrying on operations or employing a workforce (on behalf of BA) in New Zealand to give this advice. Although there is a connection to New Zealand while undertaking his employment activities for this project, this is not enough to impose a PAYE obligation on BA as there is no indication of a trading presence or the utilisation on behalf of BA of resources and labour to subject BA to New Zealand tax law. George would have to account for his own tax through the New Zealand tax system (see paragraphs 15-18).

**Example 3:**

George's work on the school went well. When a new school project comes up, BA puts George in charge of dealing with the client and running the project. While some work is also done in the US, 3 more staff are hired in Wellington to help George out. It is hoped that this might be the start of more New Zealand work for BA.

Would BA have an obligation to deduct PAYE?

Yes. In this situation there is a sufficient presence in New Zealand for BA to have an obligation to deduct PAYE. George (on behalf of BA) is carrying on operations for the purpose of its business, he is entering into and performing contracts in New Zealand (on behalf of BA), and additional staff have been employed on behalf of BA in connection with the project being undertaken in Wellington.

*Paying PAYE in New Zealand*

15. An employee (in New Zealand) will have an obligation to account for and pay their own tax if their employer has no obligation, or does not for any reason, deduct PAYE.
16. As in example one and two, BA does not have an obligation to deduct PAYE from George, therefore George will be required to register as an IR 56 taxpayer, file an Employment Information form and pay any taxes to Inland Revenue.
17. Due to the nature of their work circumstances, IR56 taxpayers are required to account for their own tax. Guidance can be found on the IR website under [IR56 taxpayers](#) to help employees manage this process.
18. A non-resident employer can also register voluntarily to be an employer and therefore make the deductions and payments for their employees in New Zealand. The process for doing this can be followed on the IR website under [Register as an employer](#).

### *Services performed*

19. Where a non-resident employer has made themselves subject to New Zealand law by having a sufficient presence in New Zealand, the extent of the non-resident employer's obligations will be limited to matters that are properly attributable to their New Zealand presence.
20. This means that if, for example, a non-resident employer carries on a business in New Zealand and pays wages to an employee who performs services that are properly attributable to the New Zealand business, the employer will have an obligation to withhold PAYE from those wages.
21. Most of the time the PAYE withholding obligations will arise where the employee is based in New Zealand.
22. However, it is possible that a New Zealand resident employee could perform services overseas that are properly attributable to the non-resident employers' New Zealand presence.
23. For example, a New Zealand resident employee may be temporarily based overseas investigating the purchase of new equipment to be used in the employers' New Zealand operations. The services of the employee would be properly attributable to the New Zealand operations and, therefore, the non-resident employer would be required to withhold PAYE from PAYE income payments made to the employee.

### *Section CW 19 - Amounts derived during short-term visits*

24. Under s CW 19, 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:
  - The visit is for 92 or fewer days (counting the day of arrival and departure as whole days);
  - The person is present in New Zealand for 92 days or fewer in total in each 12-month period that includes the period of the visit;
  - The services are performed for or on behalf of a person (which could include an employer) who is not resident in New Zealand;

- The income is chargeable with income tax in the country in which the person is resident.

25. Exempt income is excluded from the definition of “salary or wages” and, therefore a “PAYE income payment<sup>4</sup>” is also exempt under this provision. No PAYE withholding obligation will arise for any payments described in s CW 19.

#### *Relief given by a DTA*

26. No PAYE withholding obligation will arise for PAYE income payments where a DTA provides the employee with relief from New Zealand taxation.

27. A DTA may have the effect of denying New Zealand any taxing rights for an amount of employment income derived by a non-resident employee for employment services performed in New Zealand. This may occur if the non-resident employee is in New Zealand for in total, 183 days or less in a twelve-month period, the remuneration is paid by a non-resident employer, and the remuneration is neither borne by nor deductible in determining the profits attributable to a permanent establishment which the employer has in New Zealand.

28. Please note, the example above assumes the wording of the DTA as described, although this wording may vary slightly within different DTA’s with regards to the taxing rights for employment income.

#### **New Zealand resident employers**

29. An issue with regards to payments by a New Zealand resident employer is whether there is an obligation to withhold PAYE where the PAYE income payment is paid to a non-resident employee for work performed overseas.

30. It is considered that a New Zealand resident employer does not have any obligation to withhold PAYE from a PAYE income payment that is “non-residents’ foreign-sourced income”<sup>5</sup> for the employee. This is because:

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<sup>4</sup> “PAYE income payment” is principally defined by reference to “salary or wages” which excludes an amount of exempt income (s RD 5(1)(c)(i)).

<sup>5</sup> As defined in s BD 1(4).

- The Core Provisions indicate that the purpose of the Act is to tax assessable income. Income tax is generally not intended to apply to non-residents' foreign-sourced income; certainly not in the case of employment income.
- It would be inconsistent with the purpose of the Act to impose a PAYE withholding obligation on the employer in relation to such income.

#### **Example 4:**

Sarah is a UK resident and lives in London. She has never been to New Zealand. She is employed by a New Zealand Company that resides in New Zealand and does all her work remotely in the UK for this company.

The income she receives as an employee is considered to be "non-resident foreign sourced income" and is therefore not assessable income in New Zealand.

Sarah is not required to file a tax return in New Zealand. As this income is not assessable to Sarah in New Zealand, the New Zealand Company does not have an obligation to deduct PAYE or any employment related taxes.

The New Zealand Company would need to account for Sarah's income as an expense in their accounts and will not be required to add Sarah to their Employment Information Schedule.

### **Employer superannuation contribution tax (ESCT)**

31. A non-resident employer who has made themselves subject to New Zealand's law by having a sufficient presence in New Zealand, and who pays PAYE income payments, may have a liability for ESCT. Like the situation for PAYE on a PAYE income payment, the employer's superannuation contribution would have to relate to employment services that are properly attributable to the employer's presence in New Zealand.
32. This means that, for a non-resident employer, an ESCT liability will normally only arise when the employee is performing services in New Zealand. However, a non-resident employer could have an ESCT liability for a contribution made for the benefit of an employee working overseas, if the services provided by the employee overseas are properly attributable to the employer's New Zealand presence.

33. A non-resident employer who has not made themselves subject to New Zealand's jurisdiction has no liability for ESCT. This is so whether or not the employee is a New Zealand resident and whether or not the employment services are performed in New Zealand or overseas.

#### **Fringe benefit tax (FBT)**

34. A non-resident employer who has made themselves subject to New Zealand's jurisdiction by having a sufficient presence in New Zealand, and who pays PAYE income payments, will have a liability for FBT (subject to the discussion below). Like the situation for PAYE on a PAYE income payment, for an FBT liability to arise the provision of a fringe benefit to an employee would have to be a benefit provided to an employee in connection with the employer's presence in New Zealand.
35. This means that, for a non-resident employer, an FBT liability will normally only arise where the employee is performing services in New Zealand. However, a non-resident employer could have an FBT liability for a benefit provided to an employee working overseas, if the services provided by the employee overseas are properly attributable to the employer's New Zealand operations.
36. An FBT liability will also depend on other factors, including whether the employee has received a PAYE income payment in the period. Additionally, s CX 26 provides that a benefit is not a fringe benefit to the extent to which it is received in a quarter or an income year in which they derive one or more PAYE income payments, all of which are not liable for income tax.
37. A non-resident employer who has not made themselves subject to New Zealand's jurisdiction has no liability for FBT.

This Statement was signed on 1 December 2021.

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