

QUESTIONS WE'VE BEEN ASKED

Income tax – Monthly retirement payments from the United Nations Joint Staff Pension Fund

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This Question We've Been Asked is relevant to retired United Nations staff receiving monthly retirement payments from the United Nations Joint Staff Pension Fund.

Key provisions

Income Tax Act 2007 – ss CF 1, CW 64

Diplomatic Privileges (United Nations) Order 1959, cl 14(b)

**REPLACES: "Tax treatment of United Nations Joint Staff Pension Fund pensions",
Tax Information Bulletin Vol 8, No 10 (December 1996)**

Question

Is a retired United Nations staff member who is a New Zealand tax resident exempt from New Zealand income tax on the monthly retirement payments they receive from the United Nations Joint Staff Pension Fund?

Answer

No, the tax exemption in the Diplomatic Privileges (United Nations) Order 1959 does not extend to the monthly retirement payments United Nations staff members receive from the United Nations Joint Staff Pension Fund.

In general, monthly retirement payments received by retired United Nations staff members are taxed as pensions under s CF 1(g). The foreign superannuation rules in s CF 3 do not apply to pensions.

There are two exceptions to this general rule:

- the retired United Nations staff member's interest in the United Nations Joint Staff Pension Fund is covered by the foreign investment fund rules; or
- the retired United Nations staff member is provided relief from tax under the transitional residency rules for the period of their transitional residency.

Key terms

UNJSPF means the United Nations Joint Staff Pension Fund.

Retired UN staff means former staff of the United Nations who have retired and are receiving monthly retirement payments from the UNJSPF.

Monthly retirement payments means a monthly retirement benefit received from the UNJSPF, as set out in arts 28, 29 or 30 of the UNJSPF Regulations, other than a commuted payment.

Transitional resident means someone who qualifies for a temporary tax exemption for usually up to 4 years on foreign income that is not employment income or income from services (s HR 8(2)).

Explanation

1. This Question We've Been Asked (QWBA) updates and replaces the QWBA published as "Tax treatment of United Nations Joint Staff Pension Fund pensions", *Tax Information Bulletin* Vol 8, No 10 (December 1996) (the 1996 QWBA). The answer regarding the taxation of monthly retirement payments received by retired UN staff remains the same but some of the rules around how such payments are taxed have changed.

What this QWBA covers

2. This QWBA addresses two issues:
 - whether retired staff of the United Nations and its associated member organisations (UN Staff) who are tax resident in New Zealand are exempt from New Zealand income tax on the monthly retirement payments they receive from the United Nations Joint Staff Pension Fund (UNJSPF) under New Zealand's diplomatic privileges and immunities rules; and
 - how the Income Tax Act 2007 (ITA 2007) taxes the monthly retirement payments of those retired UN staff.
3. This QWBA sets out the tax treatment for retired UN staff who are New Zealand tax residents, including those residents who are transitional residents. For more information on determining tax residence and transitional residence status refer to Interpretation Statement IS 16/03 *Tax residence* and the *Transitional residency flowchart* IR1028.
4. This QWBA does not address the tax treatment of lump sum payments received from the UNJSPF, either as a withdrawal settlement amount or as a commutation of the monthly retirement payments, or other benefits payable by the UNJSPF to former UN staff or their families. Lump sum payments from the UNJSPF may be taxed differently from monthly retirement payments.

Background

5. The UNJSPF is a fund established to provide retirement, death, disability and related benefits to UN staff after their service to the United Nations or one of its member organisations (UN) has ended. It was established in 1948 by a resolution of the General Assembly of the United Nations and is governed by the *Regulations, Rules and*

Pension Adjustment System of the United Nations Joint Staff Pension Fund (UNJSPF Regulations). This QWBA refers to the UNJSPF Regulations as at 1 January 2020.

6. In general, UN staff become participants in the UNJSPF (Participants) when they start working for the UN under an appointment that lasts longer than six months. UN staff contribute to the UNJSPF while employed by the UN. The UN also contributes to the UNJSPF, currently at twice the Participants' rate.
7. Contributions cease when a Participant "separates" from the UN. "Separation" means ceasing to be in the active service of the UN (otherwise than by death). Separation includes retirement. "Service" is employment as a member of staff of the UN.
8. A record is kept of a Participant's contributions to the UNJSPF over their years of contributory service. However, a Participant's entitlement to benefit from the UNJSPF only vests after their separation from the UN and is limited to the benefits they qualify for under the UNJSPF Regulations.
9. A Participant's entitlement to a retirement benefit from the UNJSPF vests on the day following the last day of their contributory service if they satisfy the necessary conditions for reaching retirement age and years of contributory service. Retirement benefits are paid monthly for life.
10. The UNJSPF is a foreign superannuation scheme for New Zealand tax purposes. It is a defined benefit scheme. The assets of the UNJSPF are acquired, deposited and held in the name of the UN, separately from the assets of the UN, on behalf of all the Participants and beneficiaries of the UNJSPF. If there is a deficiency in funds to meet its obligations to its beneficiaries, the UN will make good the deficiency.

Are the monthly retirement payments taxable?

11. UN staff currently in active service to the UN are exempt from New Zealand income tax on emoluments received by them as officers or servants of the UN. This is because the UN is an international organisation, and it is usual for New Zealand and other member states of such an organisation to extend immunities and privileges (like tax exemptions) to those organisations and its officials.
12. A common question asked by retired UN staff is whether their UNJSPF monthly retirement payments are exempt from New Zealand income tax on the same basis as the emoluments of UN staff currently in active service to the UN.

New Zealand's tax exemption for current UN staff

13. The ITA 2007 contains a provision that exempts income from income tax if it is exempted by another Act (s CW 64).
14. The Diplomatic Privileges and Immunities Act 1968 (the DPI Act) allows the Governor-General to make Orders in Council specifying tax exemptions for representatives of international organisations, like the UN.¹
15. Since New Zealand acceded to the Convention on the Privileges and Immunities of the United Nations (the UN Convention) on 10 December 1947, a number of Orders in Council have been made by the Governor-General of New Zealand. Essentially, these Orders are intended to give effect to New Zealand's obligations under the UN Convention in New Zealand law. The UN Orders in Council each contain broadly the same terms and so this QWBA focuses on the Diplomatic Privileges (United Nations) Order 1959 (the UN Order).
16. To determine if the income tax exemption in s CW 64 of the ITA 2007 applies to the monthly retirement payments received by retired UN staff it is necessary to determine if the tax exemption provided in the UN Order which gives effect to the UN Convention applies to those payments.

Does the UN tax exemption apply to the monthly retirement payments?

17. No. The tax exemption in the UN Order does not extend to monthly retirement payments received by retired UN staff from the UNJSPF. The UN Order was intended only to provide a tax exemption for emoluments earned by UN staff while they were actively serving as officers or servants of the UN.

Why are the monthly retirement payments taxable in New Zealand?

Approach to interpreting the UN Order

18. While the UN Order is a domestic enactment, it reflects and gives effect to New Zealand's international commitment to the UN as a member country. Accordingly, in

¹ The predecessor to the DPI Act was the Diplomatic Immunities and Privileges Act 1957 (the 1957 Act). Orders in Council made under the 1957 Act have continued effect under the DPI Act because of s 20 of the Interpretation Act 1999.

the Commissioner's view, it is not a narrow domestic view of the words that is required, but rather a broader purposive approach along the lines of the interpretation of international treaties and conventions. This is consistent with the approach Sinclair J took in *Andrews v CIR; Muir v CIR* (1979) 4 NZTC 61,443 when interpreting the legislation incorporating New Zealand's commitments to the Asian Development Bank. Sinclair J accepted that interpreting such legislation calls for an approach of "ascertaining the true meaning of the words" used. Also, there needs to be "a degree of pragmatism"² when interpreting the words in the UN Order to recognise the fact that the underlying UN Convention was an agreement negotiated by many countries and not simply by New Zealand.

19. Therefore, the Commissioner's approach to interpreting the tax exemption in the UN Order has been to ascertain the true meaning of the words used in the UN Order by considering:
- the purpose of New Zealand granting the tax exemption in the UN Order;
 - the wording and construction of the tax exemption granted in the UN Order;
 - the ordinary meaning of the word "emoluments", including how courts in New Zealand and overseas have interpreted that word domestically; and
 - the international stance on tax exemptions in international agreements.

Purpose of the tax exemption in the UN Order

20. To assist with ascertaining the true meaning of the words used in the tax exemption in the UN Order it is helpful to understand the purpose of the tax exemption. There is limited case law in New Zealand relevant to understanding the purpose of a tax exemption clause in one of New Zealand's international agreements and none directly considering the UN Order. However, the High Court in *Andrews* provides some assistance. It considered the purpose of the tax exemption clause contained in the Asian Bank Development Agreement that was implemented into New Zealand law by the International Finance Agreements Amendment Act 1966. The issue was whether amounts paid by the Asian Development Bank to independent contractors were exempt from New Zealand income tax as "emoluments". When interpreting the term "emoluments" for the purposes of the Asian Development Bank Agreement the High Court concluded that one of the tax exemption's purposes was to benefit the individual receiving the exemption and to incentivise people to undertake development work for the Bank in less-developed areas of the world covered by the Agreement.

² Craig Elliffe "Interpreting International Tax Agreements: Alsatia in New Zealand" (2018) 28 NZULR 1 at 4

21. Sinclair J explains at [61,448] what he considers to be the purpose of the Asian Development Bank income tax exemption:

He [Mr Molloy acting for the taxpayer] submitted that one of the purposes of the article was to encourage experts to go to inhospitable places to discharge New Zealand's duty under the treaty. I think that that submission is sound but I think it may also be said that the New Zealand Government recognised it had some obligations under the agreement and that it was prepared to forgo tax on monies paid to Experts performing missions for the Bank as part of the Government's contribution to the purposes of the agreement. Additionally I am of the view that the fact that no tax was to be payable in such circumstances was an inducement to experts to undertake such work at a lower rate than normal, thus assisting the Bank to discharge its obligations by obtaining top class expert advice at a discounted rate.

22. The High Court accepted that when ascertaining the true meaning of a tax exemption in an international agreement, the exemption may serve more than one purpose. The fact no tax was payable by workers was recognised as an inducement to Asian Development Bank workers to undertake work at a lower rate than normal and in inhospitable places, and in turn that helped the Bank achieve its economic development purposes in those countries and supported New Zealand in fulfilling its obligations to the Bank.
23. The Commissioner considers the decision in *Andrews* is consistent with the general international law principle that privileges and immunities granted to officials serving international organisations are not primarily for their personal benefit (although personal benefits can flow from the exemption as is demonstrated in *Andrews*) but are rather designed to benefit the relevant organisation and its objectives.
24. One of the most common reasons for member countries granting national tax exemptions for international organisations and their staff is to preserve the independence of the international organisation. National tax exemptions can prevent inequalities arising between the member countries that fund the organisation. Tax exemptions also ensure the independence of the organisation's serving staff, which could otherwise be jeopardised if their salaries and emoluments were taxed differently under the various national tax regimes of the member countries. This is so for the UN.³
25. Further, s 20 of Article V of the UN Convention confirms that the privileges and immunities for officials of the UN (including the exemption from taxes on the salaries

³ See Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, and James Sloan *Oppenheim's International Law: United Nations*, Volume 1 (Oxford University Press, Oxford, 2017) at [16.70]

and emoluments paid to them by the UN in s 18(b)) are granted to them in the interests of the UN and not for the personal benefit of the officials:

SECTION 20.

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

26. The High Court of Australia in *Macoun v Commissioner of Taxation* [2015] HCA 44 considered the purpose of a tax exemption granted under an Australian statute and regulations that gave domestic effect to their international commitments under certain international conventions. The Court viewed the purpose of privileges and immunities as being to benefit the international organisation, and not the individual. The Court's view was that the tax exemption would allow officials to remain independent since they would not be subject to the receiving state's tax laws. The Court noted that once the person was no longer an official, the international organisation had no interest in the person receiving a tax exemption.
27. In *Macoun*, the Court was influenced by the fact that relevant regulations provided the Secretary-General of the United Nations with the ability to waive an individual's privileges and immunities. The Court saw this as an indication that the privileges and immunities were intended to benefit the international organisation rather than the individual.
28. Taking account of the decision in *Andrews*, the High Court of Australia's decision in *Macoun* and the general international law principles, a New Zealand court would likely find that the purpose of the tax exemption in the UN Order is primarily to support the independence of the UN as an organisation by enabling pay equality for UN staff currently serving from different member countries. Interpreting the tax exemption more expansively to include monthly retirement payments to retired UN staff does not directly support the independence of the UN in this way.
29. Therefore, a New Zealand court, in the absence of any wording suggesting a different purpose, would likely look to interpret the UN Order in a way that gives effect to a tax exemption that benefits the United Nations, and not its officials. In the present context, this supports an interpretation that a tax exemption should apply only for current UN staff. This is because, as noted in *Macoun*, the United Nations would not have any interest in a continued tax exemption once a staff member has retired.

Wording and construction of the UN Order

30. There are four clauses in the UN Order that provide for tax exemptions for individuals. The most relevant clause is cl 14(b):

Immunities and Privileges of Other Officials

(14) Except in so far as in any particular case any immunity or privilege is waived by the Secretary-General of the United Nations, all officials of the United Nations (other than those referred to in clause 12 hereof) shall enjoy-

...

(b) Exemption from ordinary income tax and social security income tax in respect of emoluments received by them as officers or servants of the United Nations:

31. Clause 14(b) applies generally to officials of the UN when none of the preceding tax exemptions in cl 11 to 13 for specific UN officers and certain UN representatives apply. The Commissioner considers it is useful when seeking to ascertain the true meaning of the words used in cl 14 to consider it in the context of the other specific tax exemption clauses in the UN Order.

Clause 11 – government representatives

32. Clause 11 provides a tax exemption for government representatives serving at the UN. The exemption is only available “while [the representatives are] exercising their functions as such”. These words indicate that only current UN representatives receive an exemption.
33. The exemption provided by cl 11 is also stated to be equivalent to that of a “foreign envoy”, or foreign diplomat. For foreign diplomats, art 39 of the Vienna Convention on Diplomatic Relations 1961 (the VCDR)⁴ provides, in cl 2, that a diplomat’s privileges and immunities finish when their functions come to an end (allowing time for the diplomat to leave a country, or a reasonable period thereafter). Only the diplomat’s immunity from criminal and civil liability subsists after their functions come to an end. That immunity only applies for acts that were carried out as part of their diplomatic functions.

⁴ The VCDR is set out at sch 1 to the Diplomatic Privileges and Immunities Act 1968.

Clause 12 – Secretary-General, Under-Secretaries and equivalently ranked officials

34. In cl 12, the tax exemption available for the Secretary-General of the UN, Under-Secretaries and officers of equivalent rank is also equivalent to the tax exemption available to foreign diplomats. For the same reasons as in cl 11, the tax exemption in cl 12 only applies to people who currently hold one of those positions and finishes when their UN functions end.

Clause 13 – people on UN missions

35. In cl 13, the tax exemption is only available “while [those employed on UN missions are] performing their duties”. Like cl 11, these words indicate that only current UN representatives receive an exemption.

Clause 14 – other UN officials

36. In cl 14, the tax exemption is available to “officials of the United Nations ... (b) ... in respect of emoluments received by them as officers or servants of the United Nations”.
37. The ordinary meaning of the term “emoluments” includes a wide range of payments but generally limits them to payments received from a person’s current office or employment. The meaning of the term “emolument” in cl 14 is considered in more detail at [40] below.
38. For emoluments to be “received by them as officers or servants of the United Nations”, the emoluments need to be received by UN officials in that capacity. The phrasing in cl 14(b) narrows cl 14’s opening reference to “officials of the United Nations”. The two phrases cannot have been intended to be given the same meaning. The words “received by them as officers or servants of the United Nations” in cl 14(b) has the effect of restricting the tax exemption granted to UN officials in the opening words of cl 14 to payments received by them in their capacity as active UN staff members, and not as former or retired UN staff members.
39. When a monthly retirement payment is received, the former UN staff member is separated from the UN and is no longer an officer or servant. Article 1 of the UNJSPF Regulations defines the terms “separation” and “service” as:

- (v) “Separation” shall mean ceasing to be in the service of a member organization otherwise than by death.
- (w) “Service” shall mean employment as a full-time member of the staff of a member organization.

40. An entitlement to a retirement benefit only arises on separation from the UN. For example, art 28(a) of the UNJSPF Regulations provides:

(a) A retirement benefit shall be payable to a participant whose age on separation is the normal retirement age or more and whose contributory service was five years or longer.

41. For these reasons, cl 14(b) is interpreted as being intended to exempt from income tax in New Zealand only amounts received in the recipient's capacity as a servant of the UN, and not amounts received for some other reason after the recipient has retired or otherwise left the UN.
42. The Commissioner considers that restricting the scope of cl 14 to amounts received in the retiree's capacity as a servant of the UN (as opposed to after their separation from the UN) is consistent with the scope of the tax exemptions in cl 11 to 13, none of which extend after separation except as specifically provided (eg, diplomatic immunity under art 39 of the VCDR.) Further, there is no indication that the tax exemption for other officials in cl 14 was intended to be any more generous than the specific tax exemptions in cls 11 to 13. While not determinative, the Commissioner considers the above supports the view that the tax exemption was not intended to apply to monthly retirement payments.

Meaning of "emolument"

43. The term "emoluments" is used in cl 14(b) of the UN Order to describe the types of payments received as a servant or officer of the UN that will be exempt from tax in New Zealand.
44. An "emolument" is defined in the *Concise Oxford Dictionary* (12th ed, Oxford University Press, New York, 2011) as "a salary, fee, or profit from employment or office".
45. The following principles taken from New Zealand and overseas cases summarise the meaning given by the courts to the term "emolument" when used in domestic legislation:
- "Emoluments" are the advantages in money or money's worth which flow from occupation of an office or the like. Accordingly, a lump sum payment of the contributions an employee had made to the State Provident Fund before resigning, paid after employment ceased, was not an emolument: *Nette v Howath* [1935] 53 CLR 55 at [60].

- Emoluments must “arise” from the employment or office. If the profit arises from “something else” or arises for a different reason, it is not an emolument: *Brumby (Inspector of Taxes) v Milner* [1976] 3 All ER 636.
 - The term emolument is intended to catch any other payment to a worker connected with their employment or contract for service. It can extend to compensation or “tide-over” payments resulting from loss of employment: *Re Wellington Hospital Board's Clerical Workers* [1982] ACJ 207 at [211].
 - A scholarship awarded to an employee’s child by an educational trust established by the employer company was held to be an “emolument”: *Wicks v Firth (Inspector of Taxes); Johnson v Firth (Inspector of Taxes)* [1982] 2 All ER 9 (CA).
 - The proceeds of trusts established for the benefit of a company’s employees, and distributed to former employees eight months after the company’s cessation, were “emoluments” because they arose from the existence of the employer-employee relationship and not from “something else”: *Laidler v Perry* [1966] AC 1 at [30], *Bray (Inspector of Taxes) v Best* [1989] 1 All ER 969 (HL).
 - A transfer fee paid by the former employer of a professional football player was an emolument: *Shilton v Wilmshurst (Inspector of Taxes)* [1991] 3 All ER 148 (HL).
46. These cases confirm the dictionary definition that “emolument” is a broader term than simply “salary”. It is also clear that the ordinary meaning of the term “emoluments” includes a wide range of payments but they are generally limited to payments received from a person’s current office or employment - although on occasions for practical reasons some emolument payments may be received after the cessation of the relationship (eg, back pay, cost reimbursements or late payments).
47. In the Commissioner’s view the ordinary meaning of the term “emoluments” is not so wide as to include retirement benefits paid by a pension fund. An entitlement to monthly retirement payments paid by the UNJSPF does not arise from employment or office; they arise after the UN staff member has retired from employment (see [36] and [37] above). That entitlement and the payment of benefits is governed by the rules of the UNJSPF, and not by the employment relationship.
48. In addition, emoluments will usually be paid by or at the direction of the employer. Monthly retirement payments made to retired UN staff members are made by the UNJSPF, and not the UN.

International stance on scope of tax exemption under the UN Convention

49. The Commissioner acknowledges that there is no fixed international stance on whether pensions paid by international organisations are salary or emoluments and whether they are exempt from national taxes, and acknowledges some member countries treat the pensions as being exempt from national taxes, like Spain and India (see [53] below). However, on balance, the Commissioner considers the international view that best accords with New Zealand's approach to interpreting legislation such as the UN Order, is that the tax exemption in the UN Order does not extend to monthly pension payments.
50. Some overseas authorities that support the Commissioner's view that the tax exemption in the UN Order does not extend to monthly retirement payments are:
- *Tax regime governing pensions paid to retired UNESCO officials residing in France* 14 January 2003 as reported in the UN Reports of the International Arbitral Awards (Vol XXV at [231]–[266]) (the UNESCO-France decision). The UNESCO-France decision concerns the proper interpretation of the tax exemption in article 22(b) of the Headquarters Agreement between the French Government and UNESCO. Article 22(b) was modelled on s 18(b) of the UN Convention (and to which cl 14(b) of the UN Order relates). The United Nations Tribunal (UN Tribunal) held that:
 - the ordinary meaning of the term "officials" as it is used in the context of the tax exemption in art 22(b) does not include former officials (ie, officials who are no longer in active service with UNESCO); and
 - the ordinary meaning of the term "salaries" and "emoluments" does not cover retirement benefits.
 - *X v State Secretary for Finance, Supreme Court* (Netherlands) 16 January 2009: The Netherlands' Supreme Court followed the UNESCO-France decision and found that the term "salaries and emoluments" does not cover retirement benefits. They were also influenced by the drafting history of the UN Convention that in their view indicated pensions were not intended to be covered by the words "salaries and emoluments".
 - *Macoun v Commissioner of Taxation*: The High Court of Australia considered the phrase "salaries and emoluments" and decided that the term "emolument" is intended to capture a broader range of additional benefits than "salaries". However, it held monthly pension payments are not "advantages in money or money's worth which flow from occupation of an office or the like". Pensions do not flow from occupation of an office – they only flow from cessation of that

office: see at [65]. A pension is not an entitlement that exists when the staff member holds office – it exists only when the person leaves office.

51. Some further reasons given internationally for not extending the exemption to pension payments are:

- there is no generally accepted practice by member states to extend a tax exemption for monthly retirement payments from the UNJSPF, and so the Vienna Conventions on the Law of Treaties do not require the UN Convention to be interpreted as requiring a tax exemption to be extended for monthly retirement payments;
- the preparatory drafting work for the UN Convention indicates it was agreed not to include a provision in the Convention exempting pension payments; leading to the conclusion that an express provision is needed for a member state to exempt monthly retirement benefits from the UNJSPF;
- immunity from tax for officials is mainly for the benefit of the UN and not its officials. The independence of the UN is not reduced by its former officials being taxed on their monthly retirement payments;
- monthly retirement payments are not “emoluments” in the ordinary sense of the words as they do not arise from office or employment, but from retirement or separation from the UN;
- the focus should be on the time of receipt of the monthly retirement payment and therefore on the official’s status at the time the payment is received – monthly retirement payments are amounts received as former officials after separation from the UN;
- an official’s right to a monthly retirement payment from the UNJSPF does not vest until after the official has separated from the UN;
- monthly retirement payments are paid by the UNJSPF, and not the UN. The UNJSPF is a separate fund. While its assets are held by the UN, they are held on trust for Participants and beneficiaries; and
- the UN itself does not treat pension payments made by the UNJSPF to retired officials as salary or emoluments as the pension payments are not subject to the UN’s “staff assessment” rules.

Alternative argument – deferred salary or emolument

52. The Commissioner has also considered the alternative view that the monthly retirement payments received from the UNJSPF retain their character as “salary”. They

are an occupational pension, and therefore arguably the monthly retirement payments are a form of deferred salary. While employed by the UN, the Participant contributes a part of their salary to the UNJSPF. If the contributions had not been made, those contributions would have been received by the Participant tax-free as salary. This means, at least to the extent of the Participant's contributions, it is arguable that the monthly retirement payments should be characterised as deferred salary when received by the retired staff member. As deferred salary the monthly retirement payments (or part of them) would fall within the tax exemption for "emoluments" in cl 14(b) of the UN Order.

53. The Commissioner is aware of decisions from Spain and India where monthly retirement payments have been treated as payments of deferred salary or as emoluments when received, and the tax exemption in an international agreement has been found to apply.
54. For example, the Superior Court of Justice in Madrid *STSJ M 8207/2020*, 22 July 2020 decided that because pensions are taxed domestically as work income in the same way as salaries, they should therefore be included as emoluments for the purposes of the NATO tax exemption. Similarly, the Calcutta High Court in *Commissioner of Income-Tax vs Smt. Dipali Goswami* 1985 156 ITR 36 Cal found that because pensions are included within the definition of "salary" for Indian income tax purposes the tax exemption in the UN Convention should extend to them. Neither court was concerned that the payments were made to retired officials, who had separated from the international organisation.
55. In both these decisions the Commissioner considers the courts were influenced by their domestic approach to taxing retirement payments when interpreting the tax exemption in the UN Convention. Taking a domestic approach when interpreting international conventions is not the interpretative approach that has been accepted by New Zealand courts (see [18] above). Further, there is no general acceptance of the deferred salary argument internationally. This was confirmed in the UNESCO-France decision and *X v State Secretary for Finance*.
56. Accordingly, the Commissioner does not accept the alternative argument and considers the better view is that monthly retirement payments are not payments of deferred salary or emoluments under the UN Order.

How are the monthly retirement payments from the UNJSPF taxed in New Zealand?

57. Given UNJSPF monthly retirement payments are not exempt from New Zealand tax under the UN Order and s CW 64, the second issue addressed in this QWBA is to explain how those payments are taxed in New Zealand.
58. In general, monthly retirement payments received by retired UN staff members from the UNJSPF will be taxed as pensions under s CF 1(g). The foreign superannuation rules in s CF 3 do not apply to the monthly retirement payments because s CF 3 does not apply to pensions.
59. There are two exceptions to this general rule that the monthly retirement payments will be taxed as pensions under s CF 1(g):
- the retired UN staff member's interest in the UNJSPF is covered by the foreign investment fund rules (FIF rules); or
 - the retired UN staff member is provided relief from tax under the transitional residency rules for the period of their transitional residency.
60. For completeness, it is noted that since 2014, monthly retirement payments from the UNJSPF are not taxed as dividend income as was stated in the 1996 QWBA (s CD 36B). Nor are the payments taxable distributions from a foreign trust (s HC 15(4)(cc)). The UN officials are not settlors of a foreign trust when they make their contributions to the UNJSPF (s HC 27(3C)).
61. It is also noted that in New Zealand there is no mechanism within the income tax rules for that portion of a retiree's monthly retirement payment that correlates to the contributions they made to an occupational pension fund when they were employed to be returned to them tax free.

Do the FIF rules apply?

62. Since 1 April 2014 the FIF rules do not apply to interests in foreign superannuation schemes like the UNJSPF unless the interest is a "FIF superannuation interest" (as defined in s YA 1), and then only if the other requirements of the FIF rules in s CQ 5 are met.
63. A retired UN staff member's interest in the UNJSPF will only be a FIF superannuation interest if when they first started making contributions to the UNJSPF they were:
- a New Zealand tax resident (under s YD 1 or any double tax agreement); or

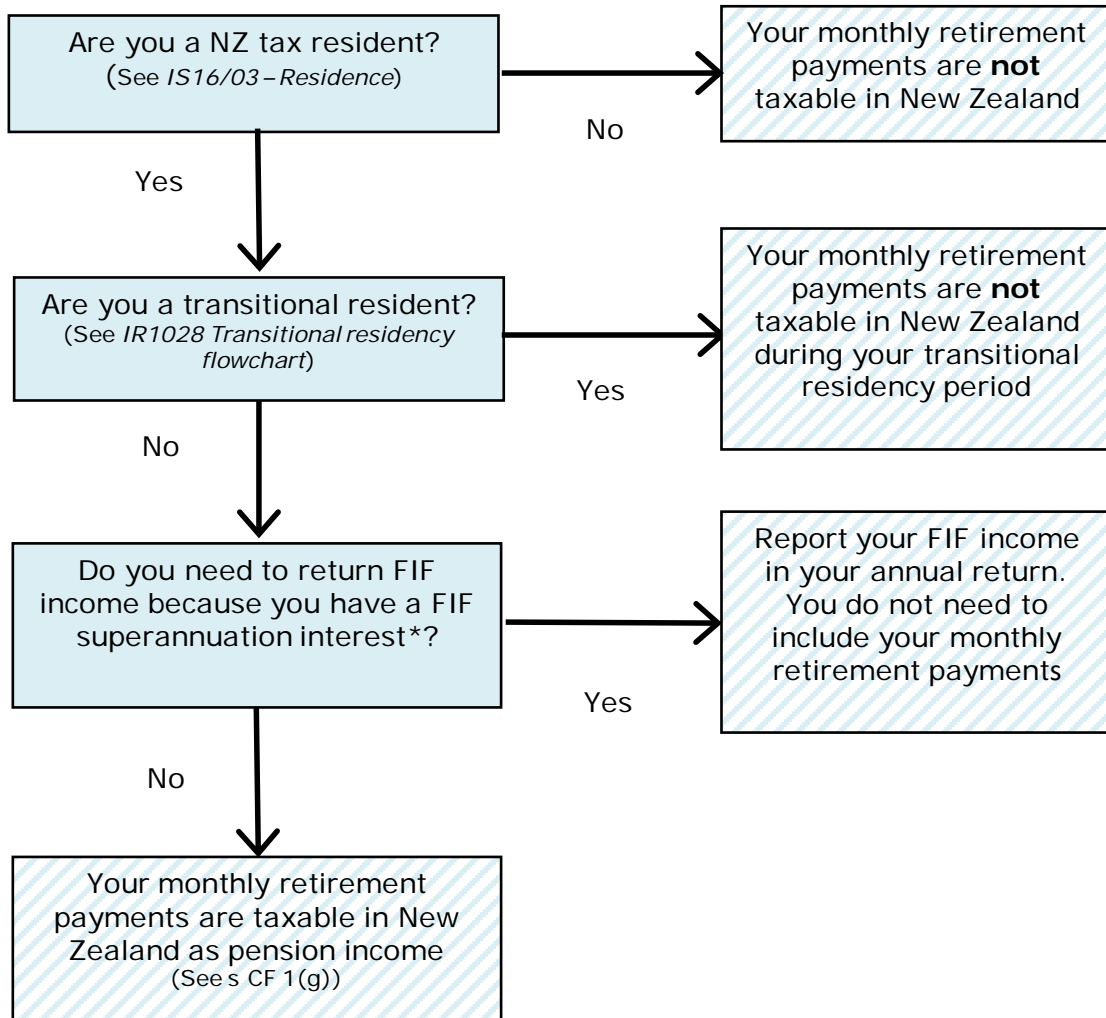
- not a New Zealand tax resident and they:
 - applied the FIF rules to their interest for an income year ended before 1 April 2014;
 - continued to apply the FIF rules to their interest in every subsequent income year since first applying the FIF rules; and
 - filed their 2013 or prior income tax return by 20 May 2013.
- 64. More information about how to determine New Zealand tax residency and what it means is in Interpretation Statement IS 16/03 *Tax residence*, available at www.taxtechnical.ird.govt.nz. Having a permanent home or continuing close ties to New Zealand, even when living and working overseas for extended periods, may mean a person remains a New Zealand tax resident.
- 65. More information about applying the FIF rules if the retired UN staff member's interest in the UNJSPF is a "FIF superannuation interest" and calculating FIF income can be found in IR257 *Overseas pensions and annuity schemes* (at 20) and IR461 *Guide to foreign investment funds and the fair dividend rate*, available at www.ird.govt.nz.

Do the transitional residency rules apply?

- 66. A transitional resident is someone who has recently immigrated or returned to New Zealand after an extended period overseas (around 10 years). The transitional residency rules provide a limited period of tax relief (for usually up to 4 years) on foreign-sourced income, except for employment income or income from services. This one-off exemption allows transitional residents time to organise their affairs and consider reinvesting any foreign investments or overseas savings in New Zealand.
- 67. If a retired UN staff member is a transitional resident, then they do not need to include FIF income or monthly retirement payments in their income tax return. At the end of their transitional residency period, the retired UN staff member will need to start paying tax on any monthly retirement payments received following the end of their transitional residency.
- 68. A retired UN staff member can choose to opt out of the transitional residency rules if they want (but – should it be relevant - would lose the exemption if they apply for Working for Families Tax Credits).
- 69. More information about transitional residency, how to qualify and what it means, is in Interpretation Statement IS 16/03 *Tax residence* from [206], and the *Transitional residency flowchart* IR1028, available at www.ird.govt.nz.

Flowchart

70. The rules for taxing monthly retirement payments are summarised in the following flowchart:



- * You will have a FIF superannuation interest if when you first started making contributions to the UNJSPF you were:
- a New Zealand tax resident (under s YD 1 or any double tax agreement); or
 - not a New Zealand tax resident but you:
 - applied the FIF rules to your interest for an income year ended before 1 April 2014;
 - continued to apply the FIF rules to that interest in every subsequent income year since first applying the FIF rules; and
 - filed your 2013 or prior income tax return by 20 May 2013.

Examples

Example 1 – Non-resident retired UN official immigrates to New Zealand

Vincent turns 65 and retires from his job at the United Nations in New York. He has worked there for the past 30 years and contributed to the UNJSPF.

Vincent decides to immigrate to New Zealand as many of his former colleagues have also retired here. He becomes a New Zealand tax resident.

On his retirement, Vincent became eligible to receive a retirement benefit from the UNJSPF. He opts to receive monthly retirement payments.

Vincent's monthly retirement payments are taxable income in New Zealand.

For the period of his transitional residency (approximately 4 years from becoming NZ tax resident) Vincent will not need to include his monthly retirement payments in his income tax return. However, once his transitional residency period expires, he will need to start including the monthly retirement payments as a pension in his annual tax return (s CF 1(g)).

Example 2 – New Zealand resident UN official returns to New Zealand to retire

Hemi is 65 years old and a New Zealand tax resident. For the past 6 years he has been working for the UN in Bangkok, spending 10 months each year working in Thailand. His partner has remained in New Zealand, living in their family home. Hemi remains a New Zealand tax resident according to the Income Tax Act 2007 and the NZ-Thailand double tax agreement.

Hemi retires and returns to New Zealand. While employed by the UN, Hemi and the UN contributed to the UNJSPF. Hemi's salary was the equivalent of around NZD\$200,000 per year, so at current contribution rates he and his employer together contributed just over NZD\$250,000.

Since starting work in Thailand, Hemi has been applying the FIF rules to his interest in the UNJSPF because he acquired it while a New Zealand tax resident and he remains a New Zealand resident. Even though he has no other foreign investments, he cannot apply the de minimis rule because the total contributions to the UNJSPF for his benefit are more than NZD\$50,000. None of the other FIF exemptions apply to Hemi's interest in the UNJSPF.

Hemi applies the fair dividend rate method to his interest in the UNJSPF and has included income calculated under that method in his income tax return for the past 4 years. He does not need to include his monthly retirement payments in his annual tax return, as he has already paid tax on the attributed income he calculated under the FIF rules. His UN salary and emoluments were exempt from New Zealand income tax and so he does not include them in his annual tax return.

On his return to New Zealand, he must continue to apply the FIF rules each year to his interest in the UNJSPF, and return attributed income as appropriate.

Hemi gets no relief from the transitional residency rules as he has always maintained his New Zealand tax residency.

References

Legislative References

Convention on the Privileges and Immunities of the United Nations, New York, 13 February 1946, ss 18(b), 20

Diplomatic Immunities and Privileges Act 1957

Diplomatic Privileges and Immunities Act 1968

Diplomatic Privileges (United Nations) Order 1959, cls 11, 12, 13, 14

Income Tax Act 2007, ss CD 36B, CF 1, CF 3, CQ 5, CW 64, HC 15(4)(cc), HC 27(3C), YA 1 "FIF superannuation interest", YD 1

Regulations, Rules and Pension Adjustment System of the United Nations Joint Staff Pension Fund, arts 1, 28

Vienna Convention on Diplomatic Relations 1961, art 39

Case References

Andrews v CIR; Muir v CIR (1979) 4 NZTC 61,443

Bray (Inspector of Taxes) v Best [1989] 1 All ER 969 (HL)

Brumby (Inspector of Taxes) v Milner [1976] 3 All ER 636

Commissioner of Income-Tax vs Smt. Dipali Goswami 1985 156 ITR 36 Cal (India)

Laidler v Perry [1966] AC 1

Macoun v Commissioner of Taxation [2015] HCA 44

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Wicks v Firth (Inspector of Taxes); Johnson v Firth (Inspector of Taxes) [1982] 2 All ER 9 (CA)

X v State Secretary for Finance, Supreme Court (Netherlands) 16 January 2009

Other References

Interpretation Statement IS 16/03 *Tax residence*

IR257 *Overseas pensions and annuity schemes*

IR461 *Guide to foreign investment funds and the fair dividend rate*

IR1028 *Transitional residency flowchart*

About this document

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