

**PUBLIC RULINGS**

# **Income tax – Australian limited partnerships and foreign tax credits**

Issued: 29 April 2022

**BR PUB 22/01 – 22/05**

These five Rulings address the ability of a New Zealand resident partner of an Australian limited partnership to claim foreign tax credits for Australian income tax and dividend withholding tax paid by the partnership on Australian source income. The Rulings do not consider any other situations involving foreign income and foreign tax paid. The Rulings concern Australian limited partnerships that are corporate limited partnerships for Australian tax purposes and are treated under Australian tax law as companies while in New Zealand they retain partnership and flow through tax treatment.

A foreign tax credit will be available to the New Zealand partners of an Australian limited partnership for Australian income tax or dividend withholding tax that is paid by the limited partnership in certain situations (detailed below). The amount and timing of the tax credit is determined under subpart LJ of the Income Tax Act 2007.

**START DATE - END DATE**

The first day of the 2022/23 income year to the last day of the 2026/27 income year.

**REPLACES**

These Rulings are a reissue of BR Pub 18/01 to 18/05.

(THIS TITLE PAGE DOES NOT FORM PART OF THE RULING.)

## Public Ruling BR Pub 22/01

### Income tax – Australian source income earned by Australian limited partnership and foreign tax credits

This is a public ruling made under s 91D of the Tax Administration Act 1994.

#### Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This ruling is on ss BH 1 and HG 2, subpart LJ and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement), as modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

#### Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) or s YD 2 (residence of companies) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

#### The Arrangement to which this Ruling applies

The Arrangement is as follows:

- Australian source income is earned by an Australian limited partnership that is income to the New Zealand partners under ss HG 2, CB 1 and CB 35.
- The Australian source income of the Australian limited partnership is attributable to a permanent establishment in Australia.

- Australian income tax is paid on that income.

To avoid doubt, the Arrangement does not include arrangements where:

- subpart BG applies to void the arrangement; or
- an election has been made under s FH 14.

### **How the Taxation Laws apply to the Arrangement**

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are allowed a foreign tax credit for the Australian income tax paid, calculated in accordance with subpart LJ. The foreign tax credit arises under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement, and ss BH 1 and LJ 1. Under s HG 2 the tax credit claimed by the New Zealand partners must be in proportion to their partnership share of the income earned by the partnership.

### **The period or income year for which this Ruling applies**

This ruling will apply from the first day of the 2022/23 income year to the last day of the 2026/27 income year.

This Ruling is signed by me on 29 April 2022.

#### **Susan Price**

Group Leader, Public Advice and Guidance

Tax Counsel Office

## Public Ruling BR Pub 22/02

### Income tax – distributions made by Australian limited partnership and foreign tax credits

This is a public ruling made under s 91D of the Tax Administration Act 1994.

#### Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This ruling is on ss BH 1 and HG 2, subpart LJ and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement), as modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

#### Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) or s YD 2 (residence of companies) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Dividend withholding tax** means the amount withheld from a dividend to discharge the liability to pay tax on dividends under s 128B of the Income Tax Assessment Act 1936 (Aust).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

## The Arrangement to which this Ruling applies

The Arrangement is as follows:

- An Australian limited partnership makes a distribution to its partners and the New Zealand partners are not liable for New Zealand income tax on their partnership share of that distribution.
- Australian income tax in the form of dividend withholding tax is deducted from the payments made to the New Zealand partners.

To avoid doubt, the Arrangement does not include arrangements where:

- subpart BG applies to void the arrangement; or
- an election has been made under s FH 14.

## How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are not allowed a foreign tax credit for the Australian dividend withholding tax withheld on the distribution made by the partnership.

## The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2022/23 income year to the last day of the 2026/27 income year.

This Ruling is signed by me on 29 April 2022.

### Susan Price

Group Leader, Public Advice and Guidance

Tax Counsel Office

## Public Ruling BR Pub 22/03

### Income tax – distributions made by Australian unit trust to Australian limited partnership and foreign tax credits

This is a public ruling made under s 91D of the Tax Administration Act 1994.

#### Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This ruling is on ss BH 1 and HG 2, subpart LJ and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement), as modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

#### Definitions

For this ruling:

- **Australian unit trust** means a unit trust that is tax resident in Australia and derives Australian source income.
- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

## The Arrangement to which this Ruling applies

The Arrangement is as follows:

- A distribution is made by an Australian unit trust to an Australian limited partnership that is a dividend under s CD 1 and income to the New Zealand partners under ss HG 2 and CB 35.
- Australian source income of the Australian limited partnership is attributable to a permanent establishment in Australia.
- The limited partnership pays Australian income tax on that distribution.

To avoid doubt, the Arrangement does not include arrangements where:

- subpart BG applies to void the arrangement; or
- an election has been made under s FH 14.

## How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are allowed a foreign tax credit for the Australian income tax paid, calculated in accordance with subpart LJ. The foreign tax credit arises under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement, and ss BH 1 and LJ 1. Under s HG 2 the tax credit claimed by the New Zealand partners must be in proportion to their partnership share of the income earned by the partnership.

## The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2022/23 income year to the last day of the 2026/27 income year.

This Ruling is signed by me on 29 April 2022.

### Susan Price

Group Leader, Public Advice and Guidance

Tax Counsel Office

## Public Ruling BR Pub 22/04

### Income tax – franked dividend received by Australian limited partnership and foreign tax credits

This is a public ruling made under s 91D of the Tax Administration Act 1994.

#### Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This ruling is on ss BH 1 and HG 2, subpart LJ and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement), as modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

#### Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Franking credit** for Australian tax purposes is defined in s 205-15 of the Income Tax Assessment Act 1997 (Aust).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.



## The Arrangement to which this Ruling applies

The Arrangement is as follows:

- An Australian limited partnership receives a dividend that has a franking credit attached.
- The New Zealand partners are liable to tax on their partnership share of the dividend received by the limited partnership under ss HG 2, CD 1 and CB 35. The dividend income derived by the New Zealand partners excludes the amount of franking credits used to reduce the amount of Australian income tax payable.

To avoid doubt, the Arrangement does not include arrangements where:

- subpart BG applies to void the arrangement; or
- an election has been made under s FH 14.

## How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are not allowed a foreign tax credit for the franking credit attached to the dividend received by the limited partnership.

## The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2022/23 income year to the last day of the 2026/27 income year.

This Ruling is signed by me on 29 April 2022.

### Susan Price

Group Leader, Public Advice and Guidance

Tax Counsel Office

## Public Ruling BR Pub 22/05

### Income tax – tax paid by an Australian limited partnership as a “head company” and foreign tax credits

This is a public ruling made under s 91D of the Tax Administration Act 1994.

#### Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This ruling is on ss BH 1 and HG 2, subpart LJ and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement), as modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

#### Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) or s YD 2 (residence of companies) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

#### The Arrangement to which this Ruling applies

The Arrangement is as follows:

- Australian source income is earned by an Australian limited partnership that is income to the New Zealand partners under ss HG 2, CB 1 and CB 35.
- The Australian source income of the Australian limited partnership is attributable to a permanent establishment in Australia.

- The Australian limited partnership is a head company under s 703-15(2) of the Income Tax Assessment Act 1997 (Aust).
- The limited partnership pays income tax in Australia on all the taxable income of the consolidated group.
- The taxable income of the consolidated group in Australia includes income, such as business income earned by Australian subsidiary companies that does not form part of the New Zealand partners' partnership share of the partnership income under ss HG 2 and CB 35.

The Arrangement excludes situations where one or more of the group entities are in a loss position.

To avoid doubt, the Arrangement does not include arrangements where:

- subpart BG applies to void the arrangement; or
- an election has been made under s FH 14.

## **How the Taxation Laws apply to the Arrangement**

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are allowed a foreign tax credit for the Australian income tax paid on the income the limited partnership earns directly (and not through the subsidiary companies), calculated in accordance with subpart LJ. The foreign tax credit arises under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement, and ss BH 1 and LJ 1. Under s HG 2 the tax credit claimed by the New Zealand partners must be in proportion to their partnership share of the income the partnership earns directly.

## **The period or income year for which this Ruling applies**

This ruling will apply from the first day of the 2022/23 income year to the last day of the 2026/27 income year.

This Ruling is signed by me on 29 April 2022.

### **Susan Price**

Group Leader, Public Advice and Guidance

Tax Counsel Office

# Commentary on Public Rulings BR Pub 22/01 – 22/05

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Rulings BR Pub 22/01 – 22/05 (“the Rulings”).

## Contents

Summary .....	12
Background .....	12
Australian partnerships.....	13
(Ordinary) partnerships .....	13
Limited partnerships .....	14
Incorporated limited partnerships.....	14
Australian tax treatment of Australian limited partnerships .....	15
Corporate limited partnerships .....	15
Australian tax consolidated groups .....	17
Application of the Legislation.....	17
Australian limited partnerships under New Zealand income tax law.....	17
Limited partnerships .....	18
Partners in limited partnerships.....	19
Foreign tax credits, the Australia and New Zealand Double Tax Agreement and the MLI 20	
Hybrid mismatch rules.....	23
Examples.....	24
References.....	35
Appendix – Legislation .....	38
New Zealand Tax Legislation .....	38
New Zealand partnership legislation .....	43
Australian Tax Legislation .....	44
About this document .....	45

## Summary

1. Foreign tax credits for Australian tax paid by Australian limited partnerships are available to New Zealand resident partners, in proportion to their partnership share, when all the following are met:
  - the Australian limited partnership is treated as a company for Australian income tax purposes but not for New Zealand tax purposes;
  - the Australian source income on which the tax was paid is assessable in New Zealand;
  - the Australian tax paid was paid on the Australian source income that is assessable in New Zealand; and
  - Australia has more than a residence based taxing right in respect of the income under the provisions of the Australia and New Zealand Double Tax Agreement.

## Background

2. The question being considered is whether a foreign tax credit is available to New Zealand residents that earn Australian source income through a limited partnership registered in a state of Australia (that is an Australian limited partnership).
3. Previous versions of these public Rulings were:
  - BR Pub 18/01 to BR Pub 18/05 published in Tax Information Bulletin Vol 30, No 4 (April 2018) and expired on the last day of the 2021/22 income year.
  - BR Pub 14/01 to BR Pub 14/05 published in Tax Information Bulletin Vol 26, No 6 (July 2014) and expired on the last day of the 2016/17 income year.
  - BR Pub 10/01 to BR Pub 10/05 published in Tax Information Bulletin Vol 23, No 1 (February 2011) and expired on the last day of the 2012/13 income year.
4. The relevant Australian limited partnerships are those that are treated as corporate limited partnerships for Australian income tax purposes, under s 94D of the Income Tax Assessment Act 1936 (Aust), but do not meet the definition of "company" in s YA 1 of the New Zealand Income Tax Act 2007. The Australian law on limited partnerships registered in Australia and the Australian tax treatment must be considered before looking at the relevant foreign tax credit legislation in New Zealand.

## Australian partnerships

5. There are three types of Australian partnerships. The three types are:
  - (ordinary) partnerships;<sup>1</sup>
  - limited partnerships; and
  - incorporated limited partnerships.
6. The three different types of partnerships are taxed differently under Australian income tax law.

### **(Ordinary) partnerships**

7. The first, and most common, type of Australian partnership is an ordinary partnership. The regulation of ordinary partnerships in Australia falls under state law which includes the:
  - Partnership Act 1958 (Victoria);
  - Partnership Act 1892 (New South Wales);
  - Partnership Act 1891 (Queensland);
  - Partnership Act 1963 (Australian Capital Territory);
  - Partnership Act 1891 (South Australia);
  - Partnership Act 1891 (Tasmania);
  - Partnership Act 1997 (Northern Territory); and
  - Partnership Act 1895 (Western Australia).
8. These Acts provide that an ordinary partnership is the relation between people carrying on a business in common with a view of profit. The partners are jointly and severally liable for the legal actions and debts of the partnership, have management control, share the profits of the partnership in predefined proportions, and have apparent authority as agents of the partnership to bind all the other partners in contracts with third parties. An ordinary partnership is not a separate legal entity.

---

<sup>1</sup> Referred to as "partnerships" in Australian state legislation.

## Limited partnerships

9. The second type of Australian partnership is a limited partnership. Limited partnerships in Australia can be formed and registered only under:
  - Part 3, ss 49 – 79 Partnership Act 1958 (Victoria);
  - Part 3, ss 50A – 81A Partnership Act 1892 (New South Wales);
  - Chapter 3, ss 48 – 69 Partnership Act 1891 (Queensland);
  - Part 3, ss 47-84 – Partnership Act 1891 (South Australia);
  - Part 3, ss 50 – 101 Partnership Act 1891 (Tasmania); and
  - Limited Partnership Act 2016 (Western Australia).
10. The state laws require a limited partnership to satisfy the general law requirements of a partnership (set out at [8] above), as far as they are consistent with the requirements for a limited partnership discussed below. The partnership laws of the Australian Capital Territory and the Northern Territory do not allow for limited partnerships; they only allow for incorporated limited partnerships.
11. The provisions, listed above, provide that a limited partnership is one where there are both general partners and limited partners. The general partners have the rights and obligations as in an ordinary partnership. The limited partners are not jointly and severally liable for the debts of the partnership and their exposure is limited to their partnership investments, and a corresponding share of the profits. The limited partners also cannot participate in the management of the partnership or act as an agent for the partnership. Despite the limited liability of the limited partner(s), a limited partnership does not have a separate legal identity (unless it is an incorporated limited partnership).

## Incorporated limited partnerships

12. The third type of Australian partnership is an incorporated limited partnership. An incorporated limited partnership is a type of limited partnership, but because of its incorporation it is treated differently under Australian law. Incorporated limited partnerships can be formed in all Australian states and territories. An incorporated limited partnership is a partnership that must have at least one general partner and one limited partner. Under the relevant state laws, the partnership is a separate legal entity with the powers and capacity of a natural person subject to the limitations in the partnership agreement. As discussed below, an incorporated limited partnership is not a partnership under New Zealand's Income Tax Act 2007 because it is a separate legal

entity under Australian state laws. As a result, incorporated limited partnerships are not covered by these Rulings.

## Australian tax treatment of Australian limited partnerships

13. A “limited partnership” is defined in s 995-1 of the Income Tax Assessment Act 1997 (Aust)<sup>2</sup> as:

- (a) an association of persons (other than a company) carrying on business as partners or in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited; or
- (b) an association of persons (other than one referred to in paragraph (a)) with legal personality separate from those persons that was formed solely for the purpose of becoming a VCLP, an ESVCLP, an AFOF or a VCMP and to carry on activities that are carried on by a body of that kind.<sup>3</sup>

### Corporate limited partnerships

14. Section 94D of the Income Tax Assessment Act 1936 (Aust), Corporate Limited Partnerships, provides that a limited partnership is a corporate limited partnership if:

- the year of income is the 1995-96 or later year of income; or
- the partnership was formed on or after 19 August 1992; or
- the partnership was formed before 19 August 1992 and either it does not pass the continuity of business test set out in Division 5A at s 94E, or there has been a change in composition of the partnership after 19 August 1992 and no election has been made by the partners under s 94F that the partnership not be treated as a corporate limited partnership; and

---

<sup>2</sup> The definition in the Income Tax Assessment Act 1936 (Aust) is the same and referenced to that in the Income Tax Assessment Act 1997 (Aust).

<sup>3</sup> A VCLP is a venture capital limited partnership and defined in s 118-405(2) of the Income Tax Assessment Act 1997 (Aust); an ESVCLP is an early stage venture capital limited partnership and defined in s 118-407(4) of the 1997 Act; an AFOF is an Australian venture capital fund of funds and defined in s 118-410(3) of the 1997 Act; and a VCMP is a venture capital management partnership and defined in s 94D(3) of the 1936 Act. In all cases these types of limited partnership must have been registered under Part 2 of the Venture Capital Act 2002 (Aust).



- the limited partnership is not either a foreign hybrid limited partnership<sup>4</sup> in relation to the particular year of income, or a VCLP, an ESVCLP, an AFOF or a VCMP.
15. These Rulings only apply to limited partnerships that are also corporate limited partnerships under s 94D of the Income Tax Assessment Act 1936 (Aust). Corporate limited partnerships do not have identities separate from their members. Section 94D excludes certain limited partnerships (VCLP, ESVCLP, AFOF, venture capital management partnerships, and foreign hybrid limited partnerships (defined in footnote 3 above)) from being corporate limited partnerships.
16. Division 5A concerns the taxation of limited partnerships. Nothing in Division 5A of the Income Tax Assessment Act 1936 (Aust) overrides the state partnership laws by recharacterising limited partnerships as companies. Division 5A simply treats a limited partnership that also meets the test for a corporate limited partnership as a company for certain Australian income tax purposes. In particular, subdivision C of Division 5A provides:
- company includes a reference to a corporate limited partnership (s 94J);
  - partnership does not include a reference to a corporate limited partnership (s 94K); and
  - dividend (other than a dividend within the meaning of subs 44(1A) of the Income Tax Assessment Act 1936) includes a reference to a distribution made by a corporate limited partnership (s 94L).
17. This is discussed in the explanatory memorandum to the Taxation Laws Amendment Act (No. 6) 1992 (Aust) that accompanied the introduction of subdivision C Division 5A:
- Under the existing law, limited partnerships are treated as partnerships for taxation purposes. However, the structure of a limited partnership is comparable to that of a limited liability company in that there are "limited partners" who are similar to shareholders in a company; they do not take part in the management of the business, and their liability generally is limited to the extent of their investment.
- Limited partners are not at risk beyond the limit of their liability. Generally, their liability is limited to their investment. They are not required to make good losses of their partnership, nor are they liable to meet the obligations of the partnership. If limited partners are treated in the same way as partners in any other partnership, however, they may benefit from distributions of losses that exceed their limited liability. Those losses could be used to reduce taxable income, and so tax paid, even though the loss is not one that exposes the partner to any risk of having to meet obligations or make good losses.
- State legislation enabling the formation of limited partnerships currently exists in New South Wales, Victoria, Western Australia, Queensland and Tasmania.

---

<sup>4</sup> A foreign hybrid limited partnership is formed outside Australia as defined in ss 830-10(1) and (2) of Income Tax Assessment Act 1997 (Aust).

### Explanation of proposed amendments

The Bill will amend the Principal Act to introduce taxation arrangements in new Division 5A of Part III of the Act for taxing limited partnerships ...

**The object of this new Division is to ensure that limited partnerships will be treated as companies for taxation purposes. This is not confined to the payment of income tax by limited partnerships, but includes all other purposes under income tax law, including the payment of tax by partners in limited partnerships; for instance, imputation and the taxation of dividends to shareholders ...** [Emphasis added]

## Australian tax consolidated groups

18. The introduction of Australia's consolidation rules reinforced that corporate limited partnerships are to be treated as companies for Australian income tax law. The explanatory memorandum to the New Business Tax System (Consolidation) Act (No. 1) 2002 (Aust) makes it clear that corporate limited partnerships can also be head companies within that regime because they are sufficiently equivalent to a company for Australian income tax purposes.

3.29 To qualify as a head company, an entity must be a company as defined in s 995-1 of the ITAA 1997.

3.30 A corporate limited partnership will also satisfy this requirement. This is consistent with the objective of ensuring consolidated groups generally receive a tax treatment like ordinary companies because these partnerships are effectively treated as companies for income tax purposes.

19. The effect of becoming a head company in an Australian consolidated group is that all the income of the group is deemed to have been earned by the head company and not by the individual companies in the group: s 701-1 of the Income Tax Assessment Act 1997 (Aust).

## Application of the Legislation

### Australian limited partnerships under New Zealand income tax law

20. As these Rulings focus on the ability of New Zealand partners to claim foreign tax credits for tax paid or deducted by an Australian limited partnership, the key provisions in the Act are:
- the definitions of "company", "partnership", and "limited partnership" in s YA 1;
  - section HG 2, which sets out that partnerships are transparent;

- section CB 35, which sets out that income arising from subpart HG is assessable income to the partner;
  - section BH 1, which sets out the relationship between the Double Taxation Relief (Australia) Order 2010 and subpart LJ. The Schedule to the Double Taxation Relief (Australia) Order 2010 contains the Convention between Australia and New Zealand for the avoidance of double taxation with respect to taxes on income and fringe benefits and the prevention of fiscal evasion (signed 29 June 2009, entered into force 18 March 2010) (the Australia and New Zealand Double Tax Agreement). The Australia and New Zealand Double Tax Agreement is modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI), which is contained in the Schedule to the Double Tax Agreements (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) Order 2018; and
  - subpart LJ, which determines the amount and timing of a foreign credit.
21. In addition to the above provisions, articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement provide New Zealand partners in an Australian limited partnership with relief for Australian income tax and dividend withholding tax paid by the limited partnership.
22. These provisions are discussed below.

## Limited partnerships

23. Section YA 1 sets out the definition of a company:

**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;
- ...
- (ac) includes a listed limited partnership;
- (ad) includes a foreign corporate limited partnership;
- (b) includes a unit trust;
- ...

24. A listed limited partnership and a foreign corporate limited partnership are also defined in s YA 1. In essence, they are defined respectively as a New Zealand or overseas limited partnership that is listed on a recognised exchange, and an overseas limited partnership that is treated as a separate legal entity under the partnership laws of the country concerned.
25. Unless an Australian limited partnership is listed on a recognised exchange or the underlying state partnership laws give it a separate legal personality, it will not meet the definition of a company in New Zealand. This is irrespective of whether it is treated as a company for Australian income tax purposes.
26. Section YA 1 defines:
- “partnership” in paragraph (d) as meaning a limited partnership; and
  - “limited partnership” as including an overseas limited partnership as defined in s 4 of the Limited Partnerships Act 2008 but excluding a listed limited partnership or a foreign corporate limited partnership.
27. Section 4 of the Limited Partnerships Act 2008 defines an overseas limited partnership as:

**overseas limited partnership** means a partnership formed or incorporated outside New Zealand with—

- (a) 1 or more general partners who are liable for all of the debts and liabilities of the partnership; and
- (b) 1 or more limited partners who have only limited liability for the debts and liabilities of the partnership

28. Therefore, an Australian limited partnership that:
- meets the definition of an “overseas limited partnership” under s 4 of the Limited Partnerships Act 2008, and
  - is not listed on a recognised exchange, and
  - is not treated as a separate legal entity in Australia under Australian state partnership laws,

will be treated as a partnership under New Zealand tax law.

## Partners in limited partnerships

29. The tax treatment of New Zealand partners in Australian limited partnerships that meet the definition of “partnership” in s YA 1 is set out in s HG 2(2):

- (2) Despite subsection (1), for a partner in their capacity of partner of a partnership, the amount of income, tax credit, rebate, gain, expenditure, or loss that they have from a particular source, or of a particular nature, is calculated by multiplying the total income, tax credit, rebate, gain, expenditure, or loss of the partners of the partnership from the particular source or of the particular nature by the partner's partnership share in the partnership's income.

30. "Partnership share" is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.
31. The effect of s HG 2(2) and the definition of "partnership share" is that the assessable income of partners in a partnership includes their "partnership share" of the partnership income. Section CB 35 also confirms that this is assessable income of the partner:

#### **CB 35 Amounts of income for partners**

A person who is a partner has an amount of income to the extent to which an amount of income results from the application of subpart HG (Joint venturers, partners, and partnerships) to them and their partnership.

32. Section HG 2(2) also makes reference to tax credits. Section LA 10 provides that an amount is a tax credit of a person if it is their tax credit under a provision of Part L. Foreign tax credits arise under subpart LJ so are tax credits under s LA 10. Under s HG 2(2), therefore, partners are entitled to foreign tax credits in proportion to their partnership share.

## **Foreign tax credits, the Australia and New Zealand Double Tax Agreement and the MLI**

33. The Australian tax considered in these Rulings is income tax and dividend withholding tax on Australian source income. Section BH 1(4) means the Australia and New Zealand Double Tax Agreement has an overriding effect as to New Zealand income tax, including the income and tax credit sections of the Income Tax Act 2007. The income and tax credit sections, therefore, must be read together with the relevant Australia and New Zealand Double Tax Agreement articles. Where there is any inconsistency between the two, the domestic law must be read subject to the Australia and New Zealand Double Tax Agreement.
34. Subject to the comments below, the combined effect of the Australia and New Zealand Double Tax Agreement, and s BH 1 and subpart LJ of the Income Tax Act 2007 is that a

New Zealand tax resident is allowed a tax credit for Australian income tax and dividend withholding tax.

35. Articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement provide a New Zealand partner in an Australian limited partnership with relief for income tax or dividend withholding tax that the limited partnership pays in Australia. These articles are affected by the MLI. Relevantly, article 23 of the Australia and New Zealand Double Tax Agreement (referred to as the Convention) is affected by article 3(2) of the MLI, which provides:

*[The provisions of Article 23 of the Convention that require a Contracting State to provide a credit equal to the tax paid under the laws of the other Contracting State in accordance with the Convention] shall not apply to the extent that such provisions allow taxation by that other [Contracting State] solely because the income is also income derived by a resident of that other [Contracting State].*

36. The approach to interpretation of the MLI and its effect on the Australia and New Zealand Double Tax Agreement is set out in Issues Paper IRRUIP15.<sup>5</sup> Effectively, article 3(2) of the MLI clarifies that New Zealand is not obliged to provide relief for tax levied in Australia exclusively on the basis of the residence of the taxpayer, and that New Zealand is only obliged to provide relief to the extent that taxation by Australia is in accordance with the provisions of the Convention that allow taxation of the relevant income as the State of source or as a State where there is a permanent establishment to which that income is attributable.
37. As these Rulings only address Australian source income and Australian limited partnerships that give rise to a permanent establishment in Australia, the MLI does not affect the foreign tax credit outcome of these Rulings.
38. The relief is in the form of a tax credit in New Zealand under subpart LJ. Subpart LJ calculates the amount of the tax credit on the basis of a segment of foreign-sourced income under ss LJ 1(1), LJ 1(2)(a), and LJ 2(1):

#### **LJ 1 What this subpart does**

##### *When tax credits allowed*

- (1) This subpart provides the rules for dividing assessable income from foreign-sourced amounts into segments and allows a tax credit for **foreign income tax paid in relation to a segment of that income.**

<sup>5</sup> Issues Paper: IRRUIP15: Income tax – trusts and the Australian-New Zealand Double Tax Agreement (18 December 2020).

*Limited application of rules*

- (2) The rules in this subpart apply only when—
- (a) a person resident in New Zealand derives assessable income that is sourced from outside New Zealand; and
  - (b) foreign income tax is not paid in a country or territory listed in schedule 27 (Countries and types of income with unrecognised tax) to the extent to which the foreign income tax is paid on the types of income listed in the schedule.

...

**LJ 2 Tax credits for foreign income tax**

*Amount of credit*

- (1) A person described in section LJ 1(2)(a) has a tax credit for a tax year for an amount of **foreign income tax paid on a segment of foreign-sourced income**, determined as if the segment were the net income of the person for the tax year. The amount of the New Zealand tax payable is calculated under section LJ 5.

*Limitation on amount of credit*

- (2) The amount of the person's credit in subsection (1) must not be more than the amount of New Zealand tax payable by the person in relation to the segment calculated under section LJ 5(2), modified as necessary under section LJ 5(4).

**Amount adjusted**

- (3) The amount of the person's credit in subsection (1) may be reduced or increased if either section LJ 6 or LJ 7 applies.

[Emphasis added]

39. A "segment of foreign-sourced income" is defined in s LJ 4 as:

**LJ 4 Meaning of segment of foreign-sourced income**

For the purposes of this Part, a person has a segment of foreign-sourced income equal to an amount of assessable income derived from 1 foreign country that comes from 1 source or is of 1 nature.

40. Therefore, three key elements must be satisfied for a New Zealand resident partner of an Australian limited partnership to be allowed a foreign tax credit under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement (as modified by the MLI), ss BH 1 and HG 2, and subpart LJ of the Income Tax Act 2007:
- A person resident in New Zealand must derive assessable income sourced from outside New Zealand.

- Foreign income tax must be paid. In the context of an Australian limited partnership, Australia must have more than a residence based taxing right under the provisions of the Australia and New Zealand Double Tax Agreement.
  - That foreign income tax must be paid on that foreign-sourced assessable income.
41. It follows that a foreign tax credit is not available where:
- There is no assessable income calculated under New Zealand tax law.
  - No foreign income tax has been paid.
  - The foreign income tax has not been paid on income that is assessable in New Zealand.
42. The foreign income tax could be Australian income tax or dividend withholding tax as appropriate.
43. The amount of foreign tax credit is calculated in accordance with subpart LJ and is, for example, limited to the notional tax liability that the taxpayer would have paid on the relevant segment of income in New Zealand under ss LJ 2(2) and LJ 5. Interpretation Statement IS 16/05<sup>6</sup> sets out how to calculate the amount of a foreign tax credit in accordance with subpart LJ. Also refer to Interpretation Statement IS 21/09.<sup>7</sup>

## Hybrid mismatch rules

44. The Australian limited partnership in these Rulings will be a “hybrid entity” for the purposes of subpart FH of the Income Tax Act 2007. Accordingly, a New Zealand resident earning income through such an Australian limited partnership will need to consider whether any of the hybrid mismatch rules in subpart FH apply.
45. In particular, the New Zealand resident limited partner may wish to consider:
- The potential application of ss FH 6 and FH 12 if there is some form of arrangement generating payments between the Australian limited partnership and the limited partner, where a deduction is allowed in Australia for the payment.

---

<sup>6</sup> “Interpretation Statement: IS 16/05: Income Tax – foreign tax credits – how to claim a foreign tax credit where the foreign tax paid is covered by a double tax agreement”, *Tax Information Bulletin* Vol 28, No 12 (December 2016) at [159] to [182].

<sup>7</sup> “Interpretation Statement: IS 21/09: Income tax – foreign tax credits – how to calculate a foreign tax credit”, *Tax Information Bulletin* Vol 34, No 1 (February 2022).



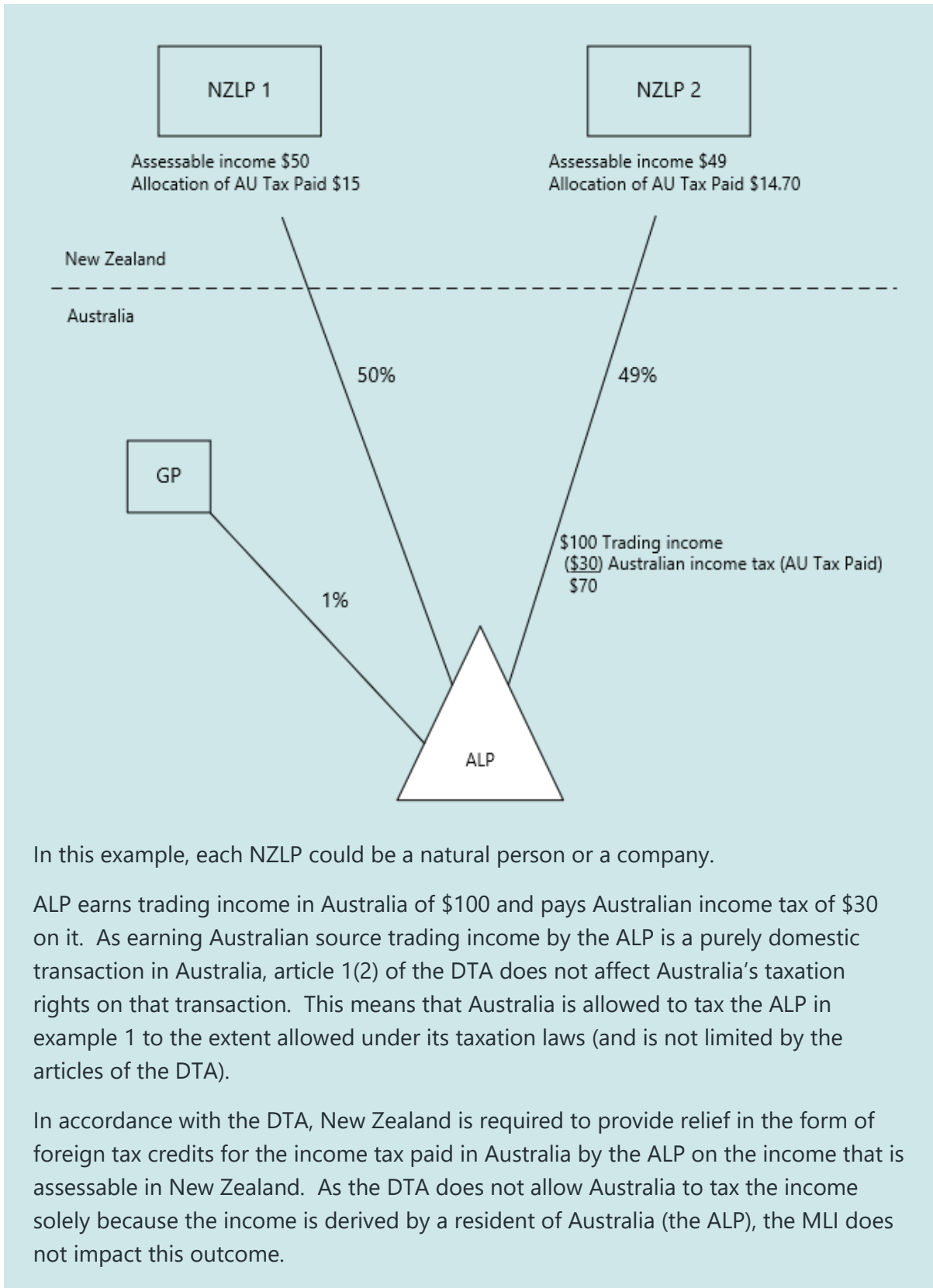
- The potential application of ss FH 8 and FH 12 where the Australian limited partnership is allowed to set off under Australian tax laws its expenditure or loss against income of another person or entity.
46. The effect of one of the provisions in subpart FH applying is generally that the New Zealand resident either has assessable income or is denied a deduction in New Zealand. In the arrangements the subject of these Rulings, the application of subpart FH does not generally impact on the availability of a foreign tax credit under subpart LJ. However, the calculation of the amount of the foreign tax credit may be affected in some circumstances due to the person's deductions and net income in New Zealand being relevant to the calculation in s LJ 5(2).
47. A New Zealand resident could have made an election under s FH 14 in certain circumstances to treat a hybrid entity as a company for New Zealand tax purposes. If such an election has been made, the Australian limited partnership is treated as an opaque company rather than a transparent partnership for New Zealand tax laws. For the avoidance of doubt, these Rulings do not apply to any Australian limited partnership in respect of which such an election has been made.

## Examples

48. The following examples are included to assist in explaining the application of the law.
49. This section of the commentary discusses the specific factual scenarios related to each of the five Rulings. In all cases they involve Australian tax being paid on Australian source income, but the issue is whether a foreign tax credit is available to the New Zealand partners. Whether a foreign tax credit is available turns on whether the three key elements set out above at [40] are satisfied.
50. In all five examples the Australian limited partnership ("ALP") has three partners:
- one general partner ("GP") based in Australia having a 1% partnership share; and
  - two New Zealand resident limited partners ("NZLP 1" and "NZLP 2") with 50% and 49% partnership shares respectively (the 50% and 49% partners). In Example 1, Example 2 and Example 5, NZLP 1 and NZLP 2 may be either a company or a natural person but in Example 3 and Example 4, NZLP 1 and NZLP 2 are natural persons only.
51. The partners in Example 3 and Example 4 are limited to natural persons. If the partners were New Zealand resident companies the dividends may be exempt income under s CW 9(1) and, in that circumstance, foreign tax credits would not be available.

52. As an aside, dividends received by a company in New Zealand are not exempt if one of the exclusions in s CW 9(2) applies. The exclusions in s CW 9(2) include dividends paid in relation to rights that are:
- a direct income interest in a foreign company that is a non-attributing interest in a FIF because it falls within one of the relevant exclusions in s CW 9(2)(a); or
  - a fixed-rate foreign equity (s CW 9(2)(b)); or
  - rights to a deductible foreign equity distribution (s CW 9(2)(c)).
53. The Commissioner acknowledges that an exclusion set out in s CW 9(2) could apply, and any dividends received by a corporate partner in such circumstances would not be exempt income.
54. The Commissioner also acknowledges that a New Zealand partner could hold an attributing interest in a FIF through an ALP. If so, and a dividend is treated as not being income under s EX 59(2), s LJ 2(6) and (7) specify which amount of income is to be used for the foreign tax credit provisions.
55. The Australian limited partnership is treated as a corporate limited partnership for Australian income tax law but is treated as a partnership for New Zealand income tax law (as discussed above).
56. To avoid currency exchange issues, the reference to "\$" is not a reference to any particular currency; it is used simply for illustrative purposes.

**Example 1: Australian source income**



In this example, each NZLP could be a natural person or a company.

ALP earns trading income in Australia of \$100 and pays Australian income tax of \$30 on it. As earning Australian source trading income by the ALP is a purely domestic transaction in Australia, article 1(2) of the DTA does not affect Australia’s taxation rights on that transaction. This means that Australia is allowed to tax the ALP in example 1 to the extent allowed under its taxation laws (and is not limited by the articles of the DTA).

In accordance with the DTA, New Zealand is required to provide relief in the form of foreign tax credits for the income tax paid in Australia by the ALP on the income that is assessable in New Zealand. As the DTA does not allow Australia to tax the income solely because the income is derived by a resident of Australia (the ALP), the MLI does not impact this outcome.

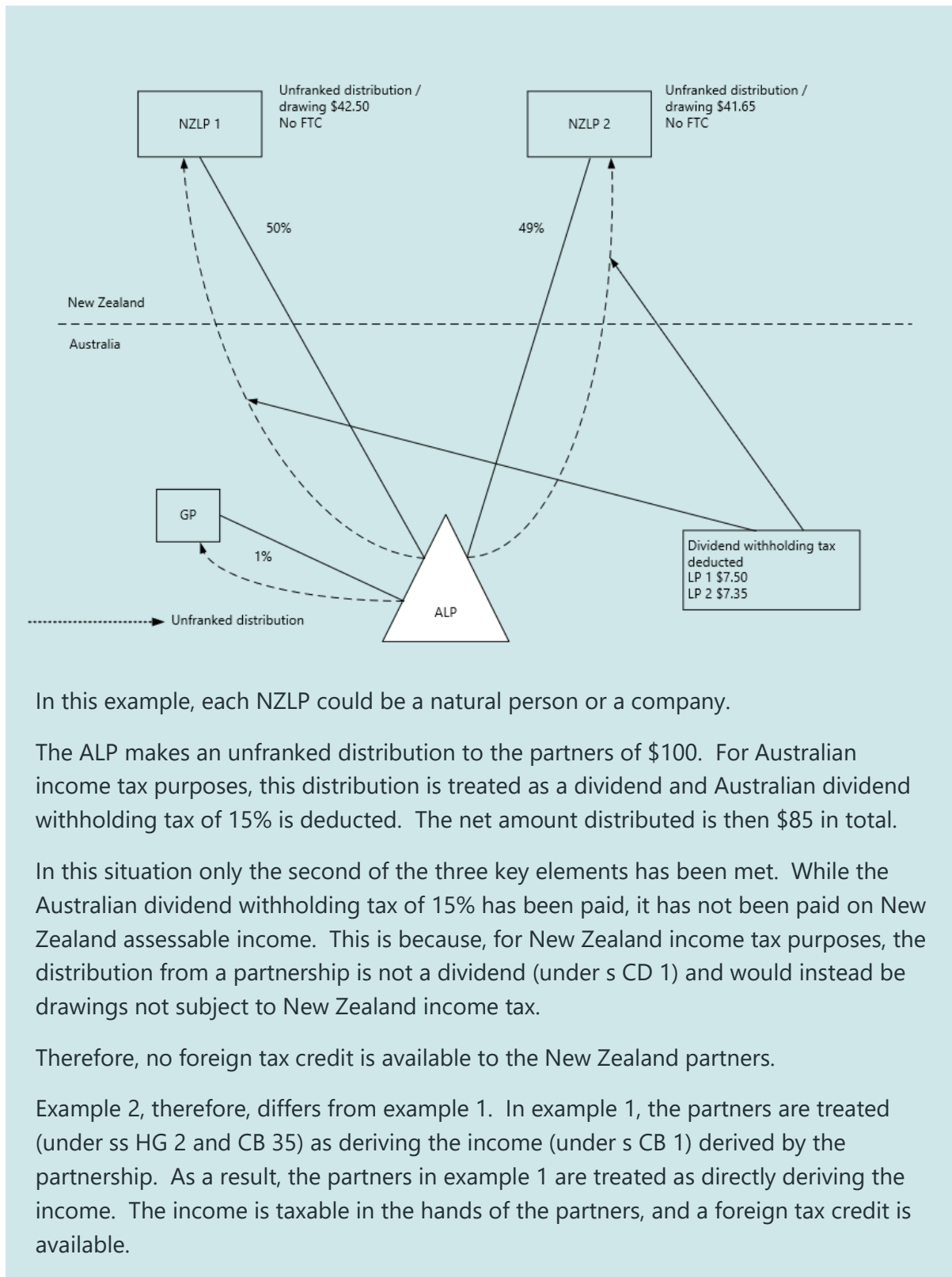
The trading income is income for New Zealand income tax purposes under s CB 1 and partnership income to the New Zealand partners under ss HG 2 and CB 35, so they must include their partnership share in their New Zealand assessable income. The Australian income tax is allowed as a foreign tax credit in the same proportion as the partner's partnership share. This is because the three key elements are met:

- The partnership income is assessable to the New Zealand partners under ss HG 2, CB 1 and CB 35.
- The ALP has paid Australian income tax on the income.
- The Australian income tax was paid on the trading income of the ALP (which is the income that is assessable in New Zealand).

In the specific example, the 50% partner – NZLP 1 – has assessable income of \$50 and is allocated \$15 of the Australian income tax paid and the 49% partner – NZLP 2 – has assessable income of \$49 and is allocated \$14.70 of the Australian income tax paid. These are their respective partnership shares of the trading income and the Australian income tax paid.

The amount of the foreign tax credit must be calculated in accordance with subpart LJ and is, for example, limited to the partner's notional tax liability in relation to the segment of foreign-sourced income (refer ss LJ 2(2) and LJ 5(2)).

## Example 2: Distribution made by Australian limited partnership



In this example, each NZLP could be a natural person or a company.

The ALP makes an unfranked distribution to the partners of \$100. For Australian income tax purposes, this distribution is treated as a dividend and Australian dividend withholding tax of 15% is deducted. The net amount distributed is then \$85 in total.

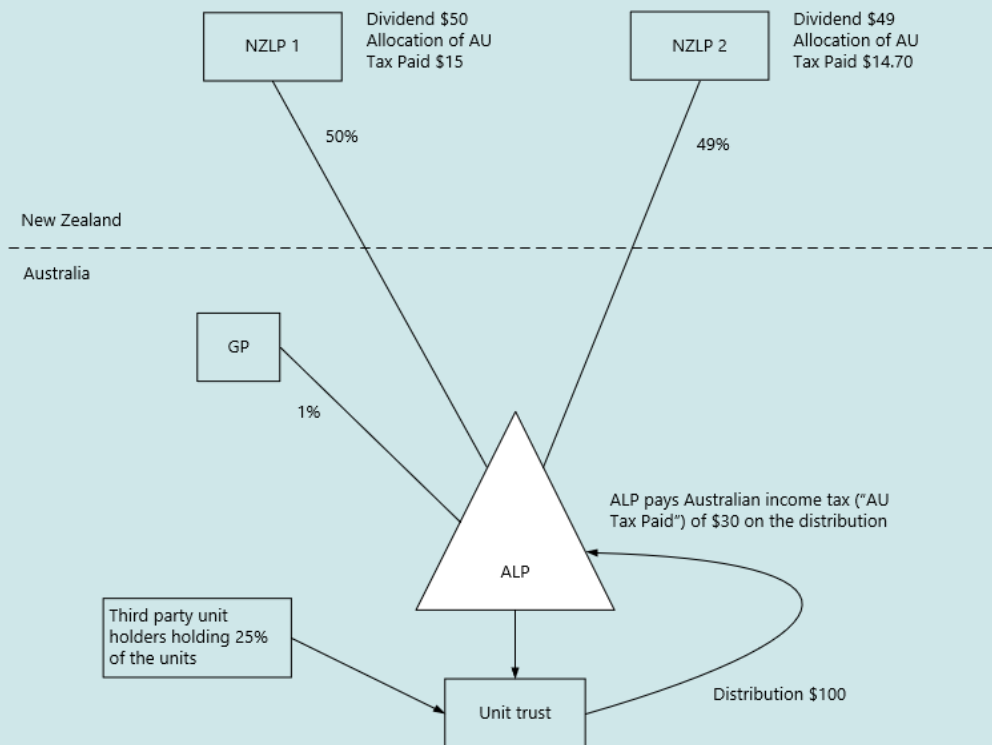
In this situation only the second of the three key elements has been met. While the Australian dividend withholding tax of 15% has been paid, it has not been paid on New Zealand assessable income. This is because, for New Zealand income tax purposes, the distribution from a partnership is not a dividend (under s CD 1) and would instead be drawings not subject to New Zealand income tax.

Therefore, no foreign tax credit is available to the New Zealand partners.

Example 2, therefore, differs from example 1. In example 1, the partners are treated (under ss HG 2 and CB 35) as deriving the income (under s CB 1) derived by the partnership. As a result, the partners in example 1 are treated as directly deriving the income. The income is taxable in the hands of the partners, and a foreign tax credit is available.

In example 2, the payment to the partners is a drawing down of the partners' capital: *Case F123* (1984) 6 NZTC 60,117. The payment does not relate to any income derived by the partnership that has flowed through to the partners under s HG 2. As the payment is drawings, it is not taxable in the hands of the partners, and so no foreign tax credit is available.

**Example 3: Distribution made from unit trust**



In this example, each NZLP is a natural person.

In example 3, the ALP owns units in a unit trust and the New Zealand partners are natural persons. As noted above at [8] and [10], one of the requirements for an ALP is that it is carrying on a business. The above ALP is in the business of managing various investments (including its investment in the unit trust). As seen above at [23], a unit trust is included in the definition of "company" for New Zealand income tax purposes. The unit trust distributes income of \$100 to the ALP and the ALP pays income tax on the distribution of \$30.<sup>8</sup>

<sup>8</sup> Under Australian tax law, a distribution from a unit trust is taxed as a distribution from a trust or as a dividend from a company (depending on the circumstances of the unit trust). The reference in this example to a distribution includes both situations.

The payment of the distribution from the unit trust to the ALP is a purely domestic transaction in Australia, so article 1(2) of the DTA does not affect Australia's taxation rights on that transaction. This means that Australia is allowed to tax the ALP in example 3 to the extent allowed under its taxation laws (and is not limited by the articles of the DTA).

In accordance with the DTA, New Zealand is required to provide relief in the form of foreign tax credits for the income tax paid in Australia by the ALP on the income that is assessable in New Zealand. As the DTA does not allow Australia to tax the income solely because the income is derived by a resident of Australia (the ALP), the MLI does not impact this outcome.

The distribution from an Australian unit trust is treated as a dividend for New Zealand income tax purposes under s CD 1 and partnership income to the New Zealand partners under ss HG 2 and CB 35, so they must include their partnership share in their New Zealand taxable income. The Australian income tax is allowed as a foreign tax credit in the same proportion as the partner's partnership share.

This is because the three key elements are met:

- The dividend will be assessable income to the New Zealand partners under ss CD 1, CB 35 and HG 2.
- The ALP has paid Australian income tax on the income.
- The Australian income tax was paid on the distribution (which is the income that is assessable in New Zealand).

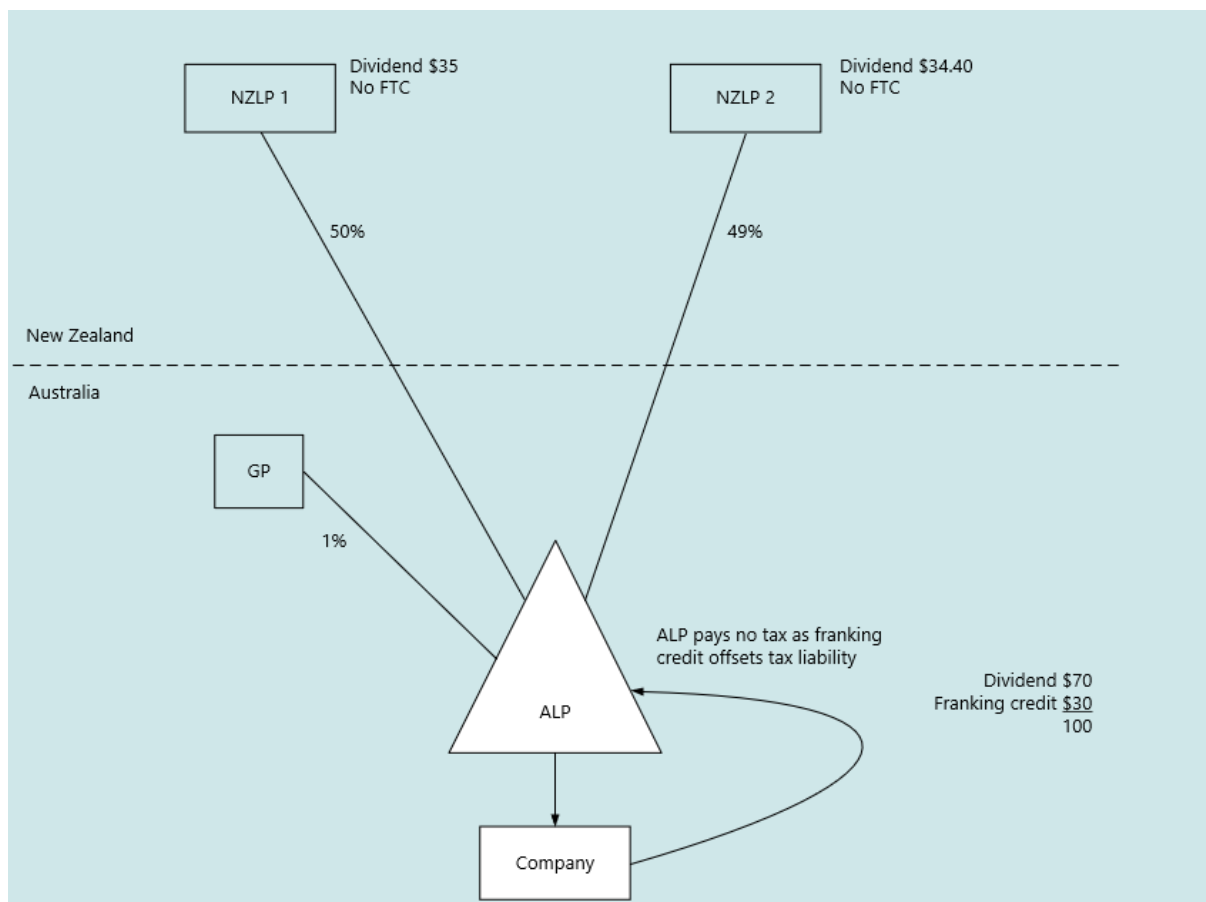
In the specific example, the 50% partner – NZLP 1 – has dividend income of \$50 and is allocated \$15 of the Australian income tax paid and the 49% partner – NZLP 2 – has dividend income of \$49 and is allocated \$14.70 of the Australian income tax paid. These are their respective partnership shares of the trading income and the Australian income tax paid.

The amount of the foreign tax credit must be calculated in accordance with subpart LJ and is, for example, limited to the partner's notional tax liability in relation to the segment of foreign-sourced income (refer ss LJ 2(2) and LJ 5(2)).

If no Australian income tax is paid on the distribution, the New Zealand partners will not be entitled to a foreign tax credit. This example only addresses the situation where the ALP pays Australian income tax on the same segment of income that is taxable to the New Zealand partners (ie, the distribution). The example does not consider whether a foreign tax credit arises where the Australian unit trust pays tax on the income it derives.

Example 3 differs from example 2. The difference between the two examples is that there is assessable dividend income under s CD 1 in New Zealand in example 3. Specifically, the payment to the partners in example 2 is a drawing down of the partners' capital and so is not assessable dividend income under s CD 1 in New Zealand. In contrast, in example 3 the partners are deemed to derive directly the dividend income derived by the partnership under s HG 2. The dividend is assessable income of the partners in New Zealand.

**Example 4: Franked dividend received by Australian limited partnership**



In this example, each NZLP is a natural person.

The ALP is treated as owning a subsidiary company under Australian tax law. The company pays a \$70 franked dividend to the ALP. The underlying basis of the franking credit was income tax the subsidiary company had paid previously on its trading income. While dividends received by the ALP are subject to tax in Australia, the attached franking credit offsets any tax liability on this dividend so the ALP does not pay tax on that income.

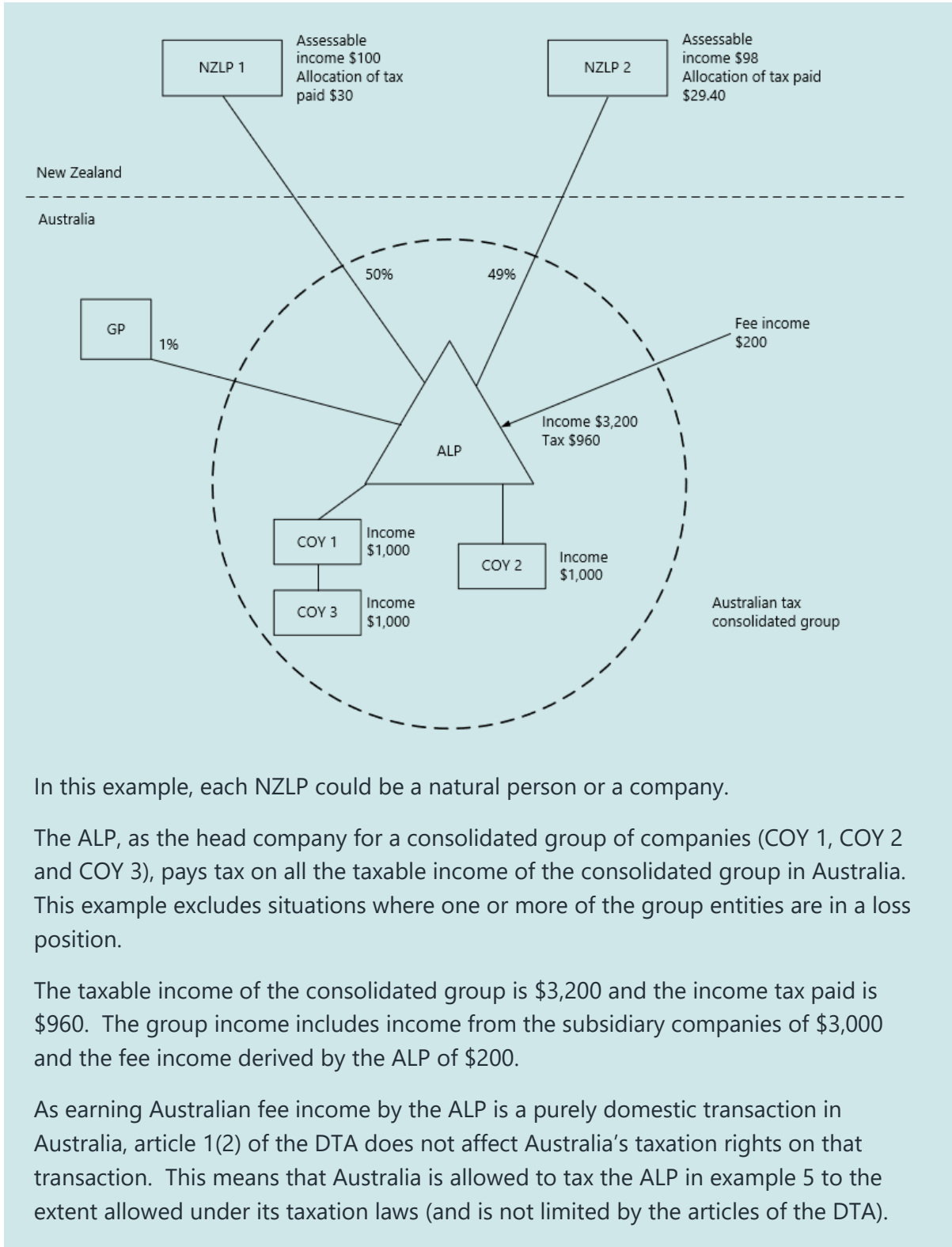


In this case, only the first key element is satisfied. The dividend is assessable income to the New Zealand partners under ss CD 1, HG 2 and CB 35. The second and third key elements are not satisfied because no Australian income tax has been paid on the dividend by the ALP. In Australia, a franking credit reduces the amount of income tax that a taxpayer has to pay: s 4-10 of the Income Tax Assessment Act 1997 (Aust.). As a result, under the arrangement the ALP had a nil income tax liability for the relevant period, and so paid no income tax. Whatever income tax may have been paid by the subsidiary, the tax was not paid on the segment of income that the New Zealand partners are liable for income tax on (namely the dividend income).

In terms of New Zealand assessable income, however, there is dividend income of \$35 and \$34.30 to the 50% partner and 49% partner respectively. The dividend income derived by the New Zealand partners excludes the amount of franking credits used to reduce the amount of Australian income tax payable.

The Commissioner acknowledges that there may be situations where an ALP has insufficient franking credits to reduce the Australian income tax liability to nil. The ALP may then be required to pay the residual income tax liability. The second element would be satisfied in that situation to the extent of the residual income tax paid. In other words, where a dividend is only partially franked or not franked at all, then a foreign tax credit may arise for the income tax actually paid.

**Example 5: Tax paid by Australian limited partnership as “head company” of an Australian tax consolidated group**



In this example, each NZLP could be a natural person or a company.

The ALP, as the head company for a consolidated group of companies (COY 1, COY 2 and COY 3), pays tax on all the taxable income of the consolidated group in Australia. This example excludes situations where one or more of the group entities are in a loss position.

The taxable income of the consolidated group is \$3,200 and the income tax paid is \$960. The group income includes income from the subsidiary companies of \$3,000 and the fee income derived by the ALP of \$200.

As earning Australian fee income by the ALP is a purely domestic transaction in Australia, article 1(2) of the DTA does not affect Australia’s taxation rights on that transaction. This means that Australia is allowed to tax the ALP in example 5 to the extent allowed under its taxation laws (and is not limited by the articles of the DTA).

In accordance with the DTA, New Zealand is required to provide relief in the form of foreign tax credits for the income tax paid in Australia by the ALP on the income that is assessable in New Zealand. As the DTA does not allow Australia to tax the income solely because the income is derived by a resident of Australia (the ALP), the MLI does not impact this outcome.

The fee income is income for New Zealand income tax purposes under s CB 1 and partnership income to the New Zealand partners under ss HG 2 and CB 35. The fee income is treated as assessable income of the partners sourced from outside New Zealand (satisfying the first element). The ALP has paid income tax on the fee income (satisfying the second and third elements). As a result, the three elements are met and a foreign tax credit will be available to the partners of the ALP but only to the extent that the tax paid relates to the fee income.

As noted above, the first element requires the New Zealand resident partner to derive assessable income sourced from outside New Zealand. The New Zealand partner, therefore, must derive income according to New Zealand tax law. In the case of the income from the Australian consolidated group of companies that income is not derived by the ALP for New Zealand tax purposes.

The New Zealand partners must return their share of the income derived directly by the ALP. That is, \$100 and \$98 for the 50% partner and 49% partner respectively. The New Zealand partners do not need to return income that was derived by the subsidiary companies.

A foreign tax credit will be available for the Australian income tax paid on the income earned directly by the ALP (subject to calculation in accordance with subpart LJ). In the specific example, Australian tax paid of \$30 will be allocated to the 50% partner – NZLP 1 – and Australian tax paid of \$29.40 will be allocated to the 49% partner – NZLP 2. These are their respective partnership shares of the income earned directly by the ALP and the Australian income tax paid on that income.

As an aside, ss FH 8 and FH 12 would apply in this example to any expenditure incurred by the ALP due to it being part of a consolidated group in Australia, as Australia's tax laws allow its expenditure to be set off against income of the subsidiary companies.

## References

### Expired Rulings

BR Pub 10/01 "Australian source income earned by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/02 "Distributions made by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/03 "Distributions made by Australian unit trust to Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/04 "Franked dividend received by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/05 "Tax paid by an Australian limited partnership as a "head company" and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 14/01 "Australian source income earned by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/02 "Distributions made by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/03 "Distributions made by Australian unit trust to Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/04 "Franked dividend received by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/05 "Tax paid by an Australian limited partnership as a "head company" and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 18/01 "Australian source income earned by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 30, No 3 (April 2018): 4-23.

BR Pub 18/02 "Distributions made by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 30, No 3 (April 2018): 4-23.

BR Pub 18/03 "Distributions made by Australian unit trust to Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 30, No 3 (April 2018): 4-23.

BR Pub 18/04 "Franked dividend received by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 30, No 3 (April 2018): 4-23.

BR Pub 18/05 "Tax paid by an Australian limited partnership as a "head company" and foreign tax credits" *Tax Information Bulletin* Vol 30, No 3 (April 2018): 4-23.

## Legislative references

*Double Taxation Relief (Australia) Order 2010.*

*Double Tax Agreements (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting) Order 2018.*

*Income Tax Act 2007, ss BB 1, BG 1, BH 1, CB 1, CB 35, CD 1, FH 6, FH 8, FH 12, FH 14, HG 2, LA 10, LJ 1–LJ 5, YA 1 "company", "foreign corporate limited partnership", "limited partnership", "listed limited partnership", "partnership" and "partnership share", YD 1, YD 2.*

*Income Tax Assessment Act 1936 (Aust), Division 5A, ss 94D, 94E, 94F, 94J, 94K, 94L, 128B.*

*Income Tax Assessment Act 1997 (Aust), ss 4-10, 4-15, 205-15, 701-1, 703-15(2), 830-10(1)-(2) 995-1 "limited partnership".*

*Income Tax Rates Act 1986 (Aust), s 23(2).*

*Limited Partnerships Act 2008, s 4.*

*Limited Partnership Act 2016 (Western Australia).*

*Partnership Act 1963 (Australian Capital Territory).*

*Partnership Act 1892 (New South Wales), Part 3, ss 50A–81A.*

*Partnership Act 1997 (Northern Territory).*

*Partnership Act 1891 (Queensland), Chapter 3, ss 48–69.*

*Partnership Act 1891 (South Australia), Part 3, ss 47-84.*

*Partnership Act 1891 (Tasmania), Part 3, ss 50 – 101.*

*Partnership Act 1958 (Victoria), Part 3, ss 49-79.*

*Partnership Act 1895 (Western Australia).*

*Partnership Law Act 2019.*

## Other references

New Business Tax System (Consolidation) Act (No. 1) 2002 (Aust), explanatory memorandum.

Taxation Laws Amendment Act (No. 6) 1992 (Aust), explanatory memorandum.

Issues Paper: IRRUIP15: Income tax – trusts and the Australian-New Zealand Double Tax Agreement (18 December 2020).

Interpretation Statement: IS 16/05: Income Tax – foreign tax credits – how to claim a foreign tax credit where the foreign tax paid is covered by a double tax agreement”, *Tax Information Bulletin* Vol 28, No 12 (December 2016) at [159] to [182].

Interpretation Statement: IS 21/09: Income tax – foreign tax credits – how to calculate a foreign tax credit”, *Tax Information Bulletin* Vol 34, No 1 (February 2022).

*Case F123* (1984) 6 NZTC 60,117.

## Appendix – Legislation

### New Zealand Tax Legislation

#### Australia and New Zealand Double Tax Agreement (as modified by the MLI)

##### Article 1

##### Persons covered

- (1) This Convention shall apply to persons who are residents of one or both of the Contracting States.

**The following paragraph 1 of Article 3 of the MLI replaces paragraph 2 of Article 1 of this Convention:**

- (2) For the purposes of *[the Convention]*, income derived by or through an entity or arrangement that is treated as fiscally transparent under the tax law of either *[Contracting State]* shall be considered to be income of a resident of a *[Contracting State]* but only to the extent that the income is treated, for purposes of taxation by that *[Contracting State]* as the income of a resident of that *[Contracting State]*.

##### Article 23

##### Elimination of double taxation

- (1) ...
- (2) ...
- (3) Where, in accordance with paragraph 2 of Article 1, an item of income is taxed in a Contracting State in the hands of a person that is fiscally transparent under the laws of the other State, and is also taxed in the hands of a resident of that other State as a participant in such person, that other State shall provide relief in respect of taxes imposed in the first-mentioned State on that item of income in accordance with the provisions of this Article.

**The following paragraph 2 of Article 3 of the MLI applies and supersedes the provisions of this Convention:**

*[The provisions of Article 23 of the Convention that require a Contracting State to provide a credit equal to the tax paid under the laws of the other Contracting State in accordance with the Convention]* shall not apply to the extent that such provisions allow taxation by that other *[Contracting State]* solely because the income is also income derived by a resident of that other *[Contracting State]*.

**Income Tax Act 2007****BH 1 Double tax agreements***Meaning*

- (1) **Double tax agreement** means an agreement that—
- (a) has been negotiated for 1 or more of the purposes set out in subsection (2); and
  - (b) has been agreed between—
    - (i) 1 or more governments of territories outside New Zealand and the government of New Zealand; or
    - (ii) the Taipei Economic and Cultural Office in New Zealand and the New Zealand Commerce and Industry Office; and
  - (c) has entered into force as a result of a declaration by the Governor-General by Order in Council under subsection (3).

*Purposes*

- (2) The following are the purposes for which a double tax agreement may be negotiated:
- (a) to provide relief from double taxation:
  - (b) to provide relief from tax:
  - (c) to tax the income derived by non-residents from any source in New Zealand:
  - (d) to determine the income to be attributed to non-residents or their agencies, branches, or establishments in New Zealand:
  - (e) to determine the income to be attributed to New Zealand residents who have special relationships with non-residents:
  - (f) to prevent fiscal evasion:
  - (g) to facilitate the exchange of information:
  - (h) to assist in recovering unpaid tax.

*Entry into force*

- (3) An agreement to which subsection (1)(a) and (b) apply comes into force as declared by the Governor-General by Order in Council and on the date determined under the agreement.

*Overriding effect*

- (4) Despite anything in this Act, except subsection (5), or section RF 11C (Interest paid by non-resident companies to non-residents) or (5B) or section BG 1 or GB 54 (which relate to tax avoidance) or, in any other Inland Revenue Act or the Official Information Act 1982 or the Privacy Act 1993, a double tax agreement has effect in relation to—
- (a) income tax:
  - (b) any other tax imposed by this Act:



- (c) the exchange of information that relates to a tax, as defined in paragraphs (a)(i) to (v) of the definition of “tax” in section 3 of the Tax Administration Act 1994.

...

### **CB 35 Amounts of income for partners**

A person who is a partner has an amount of income to the extent to which an amount of income results from the application of subpart HG (Joint venturers, partners, and partnerships) to them and their partnership.

### **HG 2 Partnerships are transparent**

*Look-through in accordance with share*

- (1) For the purposes of a partner's liabilities and obligations under this Act in their capacity of partner of a partnership, unless the context requires otherwise,—
  - (a) the partner is treated as carrying on an activity carried on by the partnership, and having a status, intention, and purpose of the partnership, and the partnership is treated as not carrying on the activity or having the status, intention, or purpose:
  - (b) the partner is treated as holding property that a partnership holds, in proportion to the partner's partnership share, and the partnership is treated as not holding the property:
  - (c) the partner is treated as being party to an arrangement to which the partnership is party, in proportion to the partner's partnership share, and the partnership is treated as not being a party to the arrangement:
  - (d) the partner is treated as doing a thing and being entitled to a thing that the partnership does or is entitled to, in proportion to the partner's partnership share, and the partnership is treated as not doing the thing or being entitled to the thing.

*No streaming*

- (2) Despite subsection (1), for a partner in their capacity of partner of a partnership, the amount of income, tax credit, rebate, gain, expenditure, or loss that they have from a particular source, or of a particular nature, is calculated by multiplying the total income, tax credit, rebate, gain, expenditure, or loss of the partners of the partnership from the particular source or of the particular nature by the partner's partnership share in the partnership's income.

...

### **LJ 1 What this subpart does**

*When tax credits allowed*

- (1) This subpart provides the rules for dividing assessable income from foreign-sourced amounts into segments and allows a tax credit for foreign income tax paid in relation to a segment of that income.

*Limited application of rules*

- (2) The rules in this subpart apply only when—
- (a) a person resident in New Zealand derives assessable income that is sourced from outside New Zealand; and
  - (b) foreign income tax is not paid in a country or territory listed in schedule 27 (Countries and types of income with unrecognised tax) to the extent to which the foreign income tax is paid on the types of income listed in the schedule.
- (3) [Repealed]...

*Source of dividends*

- (4) If a company is not resident in New Zealand, and is resident in another territory or is resident in another territory for the purposes of a double tax agreement between New Zealand and the territory, and foreign income tax is imposed by the territory on a dividend paid by the company, a dividend paid by the company has a source in the territory.
- (5) [Repealed]...

*Relationship with section YD 5*

- (6) Section YD 5 (Apportionment of income derived partly in New Zealand) applies to determine how an amount is apportioned to sources outside New Zealand.

**LJ 2 Tax credits for foreign income tax***Amount of credit*

- (1) A person described in section LJ 1(2)(a) has a tax credit for a tax year for an amount of foreign income tax paid on a segment of foreign-sourced income, determined as if the segment were the net income of the person for the tax year. The amount of the New Zealand tax payable is calculated under section LJ 5.

*Limitation on amount of credit*

- (2) The amount of the person's credit in subsection (1) must not be more than the amount of New Zealand tax payable by the person in relation to the segment calculated under section LJ 5(2), modified as necessary under section LJ 5(4).

*Amount adjusted*

- (3) The amount of the person's credit in subsection (1) may be reduced or increased if either section LJ 6 or LJ 7 applies.

...

*When subsection (7) applies*

- (6) Subsection (7) applies to a person who derives an amount from an attributing interest in a FIF when the amount is treated as not being income under section EX 59(2) (Codes: comparative value method, deemed rate of return method, fair dividend rate method, and cost method).

*Tax credit: attributing interest in FIF*

- (7) The person has a tax credit under this subpart for foreign income tax paid on or withheld in relation to the amount. The calculation of the maximum amount of the tax credit is made under section LJ 5(2), modified so that the item **segment** in the formula is the amount of FIF income from the attributing interest that the person derives in the period referred to in section EX 59(2).

...

### **LJ 3 Meaning of foreign income tax**

For the purposes of this Part, **foreign income tax** means –

- (a) an amount of a tax of another country meeting the requirements of section YA 2(5) (Meaning of income tax varied);
- (b) in relation to a double tax agreement providing relief from tax or double taxation, an amount of tax to which the double tax agreement applies.

### **LJ 4 Meaning of segment of foreign-sourced income**

For the purposes of this Part, a person has a **segment of foreign-sourced income** equal to an amount of assessable income derived from 1 foreign country that comes from 1 source or is of 1 nature.

### **Section YA 1 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;
- ...
- (ac) includes a listed limited partnership;
- (ad) includes a foreign corporate limited partnership;
- (b) includes a unit trust;
- ...

**foreign corporate limited partnership** means an entity or group of persons that—

- (a) meets the definition of **overseas limited partnership** in section 4 of the Limited Partnerships Act 2008; and
- (b) is treated as a separate legal entity under the laws (other than taxation laws) of the country, territory, or jurisdiction where it is established

### **limited partnership—**

- (a) means a limited partnership registered under the Limited Partnerships Act 2008; and

- (b) includes an “overseas limited partnership” as defined in section 4 of that Act; and
- (c) despite paragraph (a) or (b), does not include a listed limited partnership or a foreign corporate limited partnership

**listed limited partnership** means an entity or group of persons that is listed on a recognised exchange, and that entity or group of persons—

- (a) is a limited partnership registered under the Limited Partnerships Act 2008; or
- (b) meets the definition of **overseas limited partnership** in section 4 of that Act

**partnership** means—

- (a) a group of 2 or more persons who have, between themselves, the relationship described in section 8(1) of the Partnership Law Act 2019:
- (b) a joint venture, if the joint venturers all choose to be treated as a partnership for the purposes of this Act and the Tax Administration Act 1994:
- (c) co-owners of property, other than persons who are co-owners only because they are shareholders of the same company, or settlors, trustees, or beneficiaries of the same trust, if the co-owners all choose to be treated as a partnership for the purposes of this Act and the Tax Administration Act 1994:
- (d) a limited partnership

**partnership share** means, for a particular right, obligation, or other property, status, or thing, the share that a partner has in the partnership.

## New Zealand partnership legislation

### Partnership Law Act 2019

#### 8 Definition of partnership

- (1) **Partnership** is the relationship that exists between persons carrying on a business in common with a view to profit.
- (2) This section is subject to section 9.

#### 9 Relationships that are not partnerships

The relationship between the shareholders of members of any of the following is not a partnership within the meaning of this Act:

- (a) a company registered under the Companies Act 1993:
- (b) a limited partnership that is registered under the Limited Partnerships Act 2008:
- (c) an association registered as a body corporate under or any other Act:
- (d) a body corporate or other association formed or incorporated by or under any Act or letters patent, or Royal Charter.

**Limited Partnership Act 2008****Section 4**

**overseas limited partnership** means a partnership formed or incorporated outside New Zealand with—

- (a) 1 or more general partners who are liable for all of the debts and liabilities of the partnership; and
- (b) 1 or more limited partners who have only limited liability for the debts and liabilities of the partnership

## Australian Tax Legislation

**Income Tax Assessment Act 1936****94D Corporate limited partnerships**

- (1) For the purposes of this Division, a limited partnership is a corporate limited partnership in relation to a year of income of the partnership if:
  - (a) the year of income is the 1995-96 year of income or a later year of income; or
  - (b) the partnership was formed on or after 19 August 1992; or
  - (c) both:
    - (i) the partnership was formed before 19 August 1992; and
    - (ii) the partnership does not pass the continuity of business test set out in section 94E; or
  - (d) all of the following apply:
    - (i) the partnership was formed before 19 August 1992;
    - (ii) a change in the composition of the partnership occurs during the period:
      - (A) beginning on 19 August 1992; and
      - (B) ending at the end of the year of income;
    - (iii) the partners do not elect, in accordance with section 94F, that the partnership is not to be treated as a corporate limited partnership in relation to the year of income.

- (2) However, a partnership that is a VCLP, an ESVCLP, an AFOF or a venture capital management partnership cannot be a corporate limited partnership.<sup>9</sup>

**Income Tax Assessment Act 1997****Section 995-1**

**limited partnership** means:

- (a) an association of persons (other than a company) carrying on business as partners or in receipt of \*ordinary income or \*statutory income jointly, where the liability of at least one of those persons is limited; or
- (b) an association of persons (other than one referred to in paragraph (a)) with legal personality separate from those persons that was formed solely for the purpose of becoming a \*VCLP, an \*ESVCLP, an \*AFOF or a \*VCMP and to carry on activities that are carried on by a body of that kind.

**Income Tax Rates Act 1986****23 Rates of tax payable by companies**

...

- (2) The rate of tax in respect of the taxable income of a company is:
- (a) if the company is a base rate entity for a year of income – 25%; or
  - (b) otherwise – 30%;
- if subsections (3) to (5) and section 23A do not apply to the company.

## About this document

Public Rulings are issued by the Tax Counsel Office. Public Rulings set out the Commissioner's view on how tax laws apply to a specific set of facts – called an arrangement. Taxpayers whose circumstances match the arrangement described in a Public Ruling may apply the ruling but are not obliged to do so. Public Rulings are binding on the Commissioner. This means that if you are entitled to apply a Public Ruling and you have calculated your tax liability in accordance with the ruling, the Commissioner must accept that assessment. A Public Ruling applies only to the taxation laws and arrangement set out in the ruling, and only for the period specified in the ruling. It is important to note that a general similarity between a taxpayer's circumstances and the arrangement covered by a Public Ruling will not necessarily lead to the same tax result.

---

<sup>9</sup> A VCLP is a venture capital limited partnership and defined in s 118-405(2) of the Income Tax Assessment Act 1997 (Aust); an ESVCLP is an early stage venture capital limited partnership and defined in s 118-407(4) of the 1997 Act; and an AFOF is an Australian venture capital fund of funds and defined in s 118-410(3) of the 1997 Act. In all cases these types of limited partnership must have been registered under Part 2 of the Venture Capital Act 2002 (Aust).