

MAORI TRUST BOARDS: DECLARATION OF TRUST FOR CHARITABLE PURPOSES MADE UNDER SECTION 24B OF THE MAORI TRUST BOARDS ACT 1955 – INCOME TAX CONSEQUENCES

PUBLIC RULING - BR Pub 01/07

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 97/8 which was published in *TIB* Vol 9, No 8 (August 1997). BR Pub 97/8 applied up until 31 March 2001. Therefore this new ruling still relates to the charitable status of trusts established by Maori Trust Boards pursuant to the execution of a declaration of trust, under section 24B(1) of the Maori Trust Boards Act 1955. However it should be noted that the reissue of BR Pub 97/8 is separate from the government discussion document on taxation issues relating to charities and non-profit bodies (Tax and Charities) which was released for public consultation on 14 June 2001, for comments by the end of July 2001.

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

Taxation Law

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

This Ruling applies in respect of sections CB 4 (1)(c) and CB 4 (1)(e) of the Income Tax Act 1994.

The Arrangement to which this Ruling applies

This arrangement is the derivation of income by a trust established by a Maori Trust Board pursuant to the execution of a declaration of trust, under section 24B(1) of the Maori Trust Boards Act 1955, declaring that it stands possessed of any of its property upon trust for charitable purposes.

How the Taxation Law applies to the Arrangement

Where a Maori Trust Board executes a declaration of trust that it shall stand possessed of property for charitable purposes, under section 24B(1) of the Maori Trust Boards Act 1955, the income of such a trust is exempt from income tax under sections CB 4 (1)(c) or CB 4 (1)(e) of the Income Tax Act 1994 if:

- all of the purposes specified in the declaration of trust are purposes that are specified in sections 24 or 24A of the Maori Trust Boards Act 1955; and
- the Commissioner is satisfied that, with the exception of the charitable purpose requirement and the public benefit test, all other requirements of charitable status are met; and

- the declaration of trust has been submitted to and approved by the Commissioner of Inland Revenue, as required by section 24B(3) of the Maori Trust Boards Act 1955.

The period for which this Ruling applies

This Ruling applies to income derived by such a Maori Trust Board during income years falling within the period 1 April 2001 and 31 March 2006 (inclusive).

This Ruling is signed by me on the 9th day of July 2001.

Martin Smith

General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULING BR Pub 01/07

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 01/07 (“the Ruling”).

Background

Sections CB 4 (1)(c) and (e) of the Income Tax Act 1994 provide the following exemptions from income tax for income derived by a charitable trust:

- Under section CB 4 (1)(c), income derived by trustees in trust for charitable purposes or by any institution established exclusively for charitable purposes (except income to which section CB 4 (1)(e) applies).
- Under section CB 4 (1)(e), income derived from a business carried on by trustees in trust for charitable purposes or by any institution established exclusively for charitable purposes.

Neither exemption is available if any person is able to influence the amount of any private pecuniary benefit from the trust. The exemption under CB 4 (1)(e) only applies to the extent that the charitable purposes are limited to New Zealand.

Under section 24B of the Maori Trust Boards Act 1955, a Maori Trust Board may declare that it holds property in trust for charitable purposes. The income of the trust can only be applied for those purposes set out in sections 24 and 24A of that Act and which are specified in the declaration of trust. Section 24B deems the income of such a trust to be income derived by trustees in trust for charitable purposes for the purposes of the Income Tax Act 1994.

Income tax exemption - section CB 4 (1)(c) and (e)

Section CB 4 (1) provides an exemption from income tax for:

- ...
- (c) Any amount derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, except where the income so derived is income to which paragraph (e) applies:
- ...
- (e) Any amount derived directly or indirectly from any business carried on by or on behalf of or for the benefit to trustees in trust for charitable purposes within New Zealand, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes and not carried on for the private pecuniary profit of any individual.

Provided that if those purposes are not limited to New Zealand the Commissioner may apportion the income in such manner as the Commissioner deems just and reasonable between those purposes within New Zealand and the like purposes out of New Zealand, and accordingly only a part of the amount may be exempt income:...

Maori Trust Boards Act 1955

Section 24B of the Maori Trust Boards Act 1955 states:

- (1) Any Board may from time to time, in its discretion, execute under its seal a declaration of trust declaring that it shall stand possessed of any of its property, whether real or personal, upon trust for charitable purposes.
- (2) Any income derived by the Board from any property to which the declaration relates shall be applied for such purposes referred to in section 24 or section 24A of this Act as may be specified in the declaration of trust; and, for the purposes of the Income Tax Act 1994, any such income shall be deemed to be income derived by trustees in trust for charitable purposes.
- (3) No declaration of trust under this section shall have any force or effect unless it has been approved by the Commissioner of Inland Revenue.

Sections 24 and 24A specify the purposes for which a Maori Trust Board may apply money.

Application of the Legislation

Charitable purposes

For a trust to be considered charitable for the purposes of the Income Tax Act, it must generally meet the common law requirements of charity. That is, a trust must be established for a “**charitable purpose**”, and must meet what is known as the “**public benefit test**”.

The term “charitable purpose” is defined in the Income Tax Act, as:

...includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community:

The Court of Appeal noted in *Molloy v CIR* (1981) 5 NZTC 61,070 that the definition of charitable purpose in the Income Tax Act does not have the effect of enlarging or altering the ordinary, general law, meaning of charity. This means that it is necessary to refer to general law to determine whether any specific taxpayer, or activity, is charitable. In *Comms of IT v Pemsel* [1891] AC 531, p.583, Lord Macnaghten determined that all charitable purposes fall within four classes of charity (known as the “Pemsel Heads”), namely:

- the advancement of religion;
- the relief of poverty;
- the advancement of education; and
- any other matter beneficial to the community.

In addition to falling within one of the “Pemsel Heads”, with the exception of a trust for the relief of poverty, to be charitable in law a trust must be established for **the benefit of the community or a sufficiently important class of the community**, rather than for the benefit of private individuals. This requirement, which is in addition to the objects of the charity falling within one of the four heads listed above, is known as the public benefit test.

The public benefit test has been endorsed and further developed by a large body of case law, including *Verge v Somerville* [1924] All ER 121, *Oppenheim v Tobacco Securities Trust Company Limited* [1951] 1 All ER 31, *Davies v Perpetual Trustee*

Co. (Ltd.) [1959] 2 All ER 128 and *New Zealand Society of Accountants v CIR* [1986] 1 NZLR 148.

Section 24B of the Maori Trust Boards Act 1955

Section 24B of the Maori Trust Boards Act 1955 was inserted into that Act by section 3 of the Maori Trust Boards Amendment Act 1962. Section 24B permits the establishment of charitable trusts by Maori Trust Boards, and provides a concessionary tax treatment of the income of such trusts.

There are two possible interpretations of the meaning of section 24B of the Maori Trust Boards Act:

- The first interpretation is that a declaration can only be made under section 24B(1) if the purposes of the trust are exclusively charitable, i.e. “charitable” being interpreted as the common law meaning of the term. Although section 24B(2) only requires that the income of the trust must be applied for purposes referred to in section 24 and 24A, it follows from this approach that, as the trust must be also charitable, the income can only be applied for section 24 and 24A purposes that are themselves charitable. Such income would therefore be exempt under the provisions of the Income Tax Act.
- The second interpretation is that the income of a section 24B trust can be applied for any of the purposes referred to in section 24 or 24A - whether those purposes are charitable under general law or not. However, this approach proceeds upon the basis that any income derived by the trust is **deemed** by section 24B(2), to the extent that it is applied for purposes specified in sections 24 and/or 24A, to be income derived in trust for charitable purposes for the purposes of the Income Tax Act, and therefore exempt from income tax. This is irrespective of whether the purpose is a purpose that would generally be considered charitable in law.

The background papers relating to the introduction of section 24B, including *Hansard*, indicate that the new section was intended to remedy the concern, at the time, that trusts established by Maori Trust Boards were not considered charitable in terms of both the common law and the income tax legislation.

This view of the law was confirmed by the Court in *Arawa Maori Trust Board v Commissioner of Inland Revenue* (1961) 10 MCD 391. In that case Donne S M ruled that a trust established by the Arawa Maori Trust Board was not charitable because:

- Many of the purposes specified in section 24 of the Maori Trust Boards Act 1955 were not charitable purposes under the general law; and
- The trust failed the public benefit test because it was for the benefit of a group of persons determined by their bloodline, or whakapapa. The Court determined that such a group of people did not satisfy the public benefit test.

Analysis

The Commissioner believes the better view of the law to be that contained in the second interpretation, as set out above, and that the first interpretation was not what was intended by Parliament.

As has been noted, at the time that section 24B was enacted, it was strongly arguable, taking into account the Court decision in *Arawa*, that a trust that benefits a specific tribe or iwi, or the members of such a tribe or iwi, cannot be charitable at common law because it will not meet the requirements of the public benefit test. Therefore, it would be arguable that any trust established under section 24B could not be charitable, irrespective of the purposes for which it was established, because Maori Trust Boards are acknowledged by the Maori Trust Boards Act to be for the benefit of iwi and hapu determined on the basis of whakapapa.

This would give rise to a situation where, despite the enactment of section 24B, trusts established by Maori Trust Boards would possibly continue to be denied charitable status, and the amendment would have no effective operation. Clearly, this cannot have been the intention of Parliament.

Taking this into account, and after considering the available background documents, the Minister's statement (as recorded in *Hansard*) and the Commissioner of Inland Revenue's practice immediately following the enactment of section 24B, the Commissioner believes that the second interpretation is the correct view of the law.

Under this interpretation, section 24B(1) allows a Maori Trust Board to declare that it holds property in trust for charitable purposes, and authorises the Trust Board to settle some of the Trust's assets to a charitable trust.

Section 24B(2) contains two limbs. The first limb states:

Any income derived by the Board from any property to which the declaration relates shall be applied for such purposes referred to in section 24 or section 24A of this Act as may be specified in the declaration of trust; ...

The Commissioner considers that this limb limits the purposes for which the income of a charitable trust can be applied to those purposes that are referred to in sections 24 and 24A. The purposes for which the income is to be applied must be specified in the declaration of trust.

As previously noted, many of the purposes referred to in sections 24 and 24A may not be charitable purposes under common law. In addition, any trust established by a Trust Board is only allowed to apply its income for the benefit of the Trust Board's beneficiaries, which are restricted, by the Maori Trust Boards Act, to the members of specified iwi. Such a requirement could mean that a trust would fail the public benefit test applied under the common law.

However, the second limb of section 24B(2) **deems** the income of the trust to be "income derived by trustees in trust for charitable purposes". The second limb states:

and, for the purposes of the Income Tax Act 1994, any such income shall be deemed to be income derived by trustees in trust for charitable purposes.

Therefore, the effect of this section is to deem the income of the trust, even though it is established for purposes that may not be charitable in general law, to be "income derived by trustees in trust for charitable purposes" for the purposes of the Income

Tax Act 1994. This means that the requirements of sections CB 4 (1)(c) and (e) of the Income Tax Act 1994, to the extent that those sections only apply to “income derived by trustees in trust for charitable purposes”, have been satisfied. It is, therefore, not necessary for such a trust to satisfy the common law requirements of “charitable purpose” and the “public benefit test”.

However, it should be noted that section 24B(2) of the Maori Trust Boards Act only modifies the requirements of the Income Tax Act. It does not apply for any other purposes.

Therefore, whatever may be the position of such a trust under common law and irrespective of whether the public benefit test would be failed in other contexts, the Commissioner is satisfied that in this provision Parliament intended for a trust established under section 24B to be treated as being a charitable trust for income tax purposes. The income of such a trust is therefore treated as having been derived for charitable purposes and as such is exempt from income tax under sections CB 4 (1)(c) or (e) of the Income Tax Act 1994.

Nevertheless, before that exemption can be applied, the requirements of section 24B(3) must be satisfied. That section requires a declaration of trust under section 24B(1) to be approved by the Commissioner of Inland Revenue before it will take effect. The Commissioner must still be satisfied that the constituting documents of the trust meet the legal requirements of a charitable trust, other than the public benefit test discussed above.

Approval of charitable trust

As has been outlined earlier in this commentary, section 24B(2) of the Maori Trusts Board Act 1955 modifies the general law requirements of a trust established under subsection (1) to the extent that the trust is not required to satisfy the meaning of “charitable purpose” in section OB 1 of the Income Tax Act 1994 or the public benefit test. However, before such a trust will be approved by the Commissioner under section 24B(3) as wholly exempt from tax, the trust must still meet the other criteria of a charitable trust.

For example, the Commissioner must also be satisfied that the declaration of trust provides that:

- the charitable activities are restricted to New Zealand;
- the rules of the trust cannot be changed in order to allow the income of the trust to be applied to purposes that are not specified in sections 24 or 24A of the Maori Trust Boards Act, or to otherwise affect the charitable nature of the trust;
- no person is able to derive a personal pecuniary profit from the trust;
- trustees are unable to materially influence their remuneration;
- professional services provided by trustees to the trust are provided at commercial rates and that conflicts of interest are avoided; and
- upon winding up, any remaining trust assets must be applied for charitable purposes.

This is not an exhaustive list of all matters that the Commissioner will consider when deciding whether or not a trust is charitable, and therefore entitled to the tax exemptions under sections CB 4 (1)(c) and (e).

When a section 24B trust has previously obtained the approval of the Commissioner, as required by section 24B(3) of the Maori Trust Boards Act, that approval will continue to apply. Approval given by the Commissioner under section 24B(3) cannot be revoked. However, continued tax exemption in respect of the income of the trust is dependent on the trust continuing to apply its income for the purposes specified in the declaration.

Comments on technical submissions received prior to the previous public ruling being issued

When a draft public binding ruling on this subject was first made available for public comment, a number of submissions were received that disagreed with the views expressed in that draft ruling. In particular, those submissions noted that the Commissioner did not appear to have taken into account the use of a deeming provision in section 24B. That view, that the deeming provision effectively creates a charitable trust where one would not exist under general charitable law, was incorporated into the previous ruling and has been included in this ruling.

A number of commentators also disagreed with the Court decision in *Arawa* and the general position of trusts for the benefit of iwi under the public benefit test. That issue was referred to in the commentary to the previous ruling, and is referred to in this commentary in so far as it is relevant to the issue being considered. While the Commissioner did consider the position of such trusts generally in an interpretation paper (IP3168) which went out for public consultation in January 2000 that matter has been put on hold pending the outcome of the recently released government discussion document on taxation issues relating to charities and non profit bodies.

A submission was also received that argued that the Commissioner was not legally able to issue a binding ruling on the effect of a declaration made under a provision of an Act other than one of the Inland Revenue Acts. The Commissioner was, and is, of the view that he is able to issue this Ruling because it relates to the consequences of such a declaration under the income tax law and, in particular, to the application of sections CB 4 (1)(c) and CB 4 (1)(e) of the Income Tax Act 1994.

In the context of the previous ruling, Te Runanga O Ngai Tahu asked for the ruling to be expanded to deal specifically with its specific circumstances. The Ngai Tahu Trust Board executed a declaration of trust pursuant to section 24B in 1975. That Trust Board was dissolved by the Te Runanga O Ngai Tahu Act 1996, which also established the Runanga. All of the assets and liabilities of the former trust board were vested in the new Runanga. Section 30(1)(c) of the Te Runanga O Ngai Tahu Act provides:

30. Taxes and duties—(1) For the purposes of the Inland Revenue Acts (as defined in section 3(1) of the Tax Administration Act 1994) and any other enactment that imposes or provides for the collection of any tax, levy, or other charge,—

(c) Notwithstanding the dissolution of the Ngaitahu Maori Trust Board by this Act, any

income derived by Te Runanga o Ngai Tahu from any property to which a declaration of trust made by the Ngaitahu Maori Trust Board under section 24B of the Maori Trust Boards Act 1955 and dated the 24th day of March 1975 relates shall, if applied for the purposes specified in the declaration, be deemed, for the purposes of the Income Tax Act 1994, to be income derived by Te Runanga o Ngai Tahu in trust for charitable purposes.

The Commissioner remains of the view that, notwithstanding the fact that the Trust Board has been dissolved and no longer exists, section 30(1)(c) provides that any income derived from property that was subject to the original declaration, to the extent that it is applied for the purposes specified in the declaration, shall be treated for tax purposes as being derived in trust for charitable purposes. This means that the income of the trust created under section 24B of the Maori Trust Boards Act will continue to be exempt for tax purposes.

Similar provisions may apply to other section 24B trusts established by Trust Boards that have since been dissolved.

Application of this Ruling

Section 91DA(1)(d) of the Tax Administration Act 1994 requires the Commissioner to state the period for which a public binding ruling applies. The Commissioner has determined that this public ruling will apply to income derived by approved trusts during income years falling within the period 1 April 2001 to 31 March 2006, inclusive.

Examples

Example 1

A Maori Trust Board executes a declaration of trust under section 24B of the Maori Trust Boards Act 1955. The declaration provides that the trust will hold certain assets upon trust for charitable purposes. The declaration specifies that the income of the trust will be applied by making grants to reimburse any dental costs incurred by any of the beneficiaries, being members of the iwi.

The declaration is submitted to the Commissioner who is satisfied that the purpose for which the trust's income will be applied is a purpose specified in section 24 of the Maori Trust Boards Act (*section 24(2)(a)(iii) "The promotion of health ... by providing, subsidising, or making grants for medical, nursing, or dental services"*) and that there are adequate provisions in the Trust Deed to prevent the Trust's income and assets from being used for other purposes.

The Commissioner will therefore approve the declaration and the income of the trust will be exempt from income tax under sections CB 4 (1)(c) and CB 4 (1)(e) of the Income Tax Act 1994.

Example 2

A Maori Trust makes a declaration under section 24B for the same purpose as described in Example 1. The Commissioner is satisfied that the purpose for which the Trust's income is to be applied is a purpose that is specified in either section 24 or section 24A of the Maori Trust Boards Act.

However, it is found that the declaration does not prohibit the trustees from materially influencing the amount of remuneration that they receive. The declaration also does not provide for the disbursement of assets, upon winding up, to other charitable entities or purposes.

The Commissioner will therefore decline approval until such time as the declaration is amended in such a manner to satisfy the Commissioner's requirements.