

**TECHNICAL DECISION SUMMARY > PRIVATE RULING****WHAKARĀPOPOTO WHAKATAU HANGARAU > WHAKATAUNGA  
TŪMATAITI**

# Application of schedular payment rules

Decision date | Rā o te Whakatau: 24 March 2025

Issue date | Rā Tuku: 11 July 2025

**TDS 25/17**

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## Subjects | Kaupapa

Directors fees; non-residents; schedular payments

## Taxation laws | Ture tāke

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

## Summary of facts | Whakarāpopoto o Meka

1. The application concerned the procurement of board directorship services by Company A from non-resident individuals through contractual arrangements with Company A's offshore subsidiaries (Subsidiaries).
2. The Arrangement was that the Subsidiaries would procure and supply directorship services of offshore individuals to Company A. The Subsidiaries would also enter into services agreements with offshore individuals to acquire the directorship services of the individuals.
3. Company A's board of directors included non-executive directors (Directors) whose role was to contribute their jurisdictional experience and local market knowledge to the decision-making of Company A.
4. Company A entered into formal agreements for directorship services with the Subsidiaries. The Subsidiaries were remunerated by Company A for directorship services at an arm's length amount (Directorship Services Payments).
5. None of the Subsidiaries:
  - were tax resident in New Zealand;
  - had a permanent establishment in New Zealand under a double tax agreement (DTA);
  - had any person physically present in New Zealand acting on their behalf for more than 92 days in any 12-month period; or
  - were a "non-resident entertainer" as defined in ss CW 20 and YA 1.
6. Each Subsidiary entered into an agreement for services with each Director under the Letter of Appointment. Each Director was engaged as an independent contractor of the Subsidiary.

7. Consequently, the Directors contracted directly with the relevant Subsidiaries rather than with Company A. The roles and responsibilities of the Directors included serving as non-executive directors on the Board of Company A.
8. None of the Directors:
  - were tax resident in New Zealand;
  - had a permanent establishment or fixed base in New Zealand under a DTA;
  - were physically present in New Zealand for more than 92 days in any 12-month period;
  - were a “non-resident entertainer” as defined in ss CW 20 and YA 1;
  - were associated with Company A under the Act; or
  - were associated with a Subsidiary under the Act.

## Issues | Take

9. The main issues considered in this ruling were whether:
  - the Directorship Services Payments made by Company A to the Subsidiaries were subject to withholding tax under the PAYE rules;
  - the Director Remuneration Payments made from the Subsidiaries to the Directors were subject to withholding tax under the PAYE rules; and
  - s BG 1 applied to the Arrangement.

## Decisions | Whakataau

10. It was concluded that:
  - The PAYE rules (as defined in s RD 2) did not apply to the Directorship Services Payments under ss RD 2 and RD 3.
  - The PAYE rules (as defined in s RD 2) did not apply to the Director Remuneration Payments under ss RD 2 and RD 3.
  - Section BG 1 did not apply to the Arrangement.

## Reasons for decisions | Pūnga o ngā whakatautau

### Issue 1 | Take tuatahi: Whether Directorship Services Payments were schedular payments

11. The PAYE withholding tax rules (as defined in s RD 2) apply to a PAYE income payment which includes a "schedular payment" under s RD 8.
12. To be a "schedular payment" under s RD 8, the Directorship Services Payments from Company A to the Subsidiaries must meet all of the following:
  - be New Zealand sourced income under s YD 4;
  - fall within schedule 4 of the Act under s RD 8(1)(a)(i); and
  - not be excluded under s RD 8(1)(b)(v).

#### New Zealand sourced

13. The Directorship Services Payments were partly sourced in New Zealand based on at least one of the meetings being physically held in New Zealand under s YD 4(2) (business in New Zealand) or s YD 4(3) (contracts made or performed in New Zealand).
14. To the extent the Directorship Services Payments were not sourced in New Zealand, the PAYE rules did not apply.

#### Schedule 4

15. The Directorship Services Payments (to the extent they were New Zealand sourced) fell within schedule 4 of the Act as either a contract payment to a non-resident contractor under part A or as directors' fees or as a payment for services performed by a member of a board under part B.

#### Section RD 8(1)(b)(v) exclusion

16. Section RD 8(1)(b)(v) states that a payment is not a schedular payment if all of the following are met:
  - It is for services provided by a non-resident contractor.
  - The non-resident contractor has full relief from tax under a DTA.
  - The non-resident contractor is present in New Zealand for 92 days or fewer in a 12-month period.
17. The above requirements were met because:

- The Directorship Services Payments (to the extent they were New Zealand sourced) were for directorial services provided by the Subsidiaries. The Subsidiaries were each a non-resident contractor because they were each a non-resident performing services in New Zealand through the Directors attending Company A Board meetings in New Zealand.
- The Subsidiaries had full tax relief under the relevant DTA. The directors' fee article of the relevant DTA did not apply to give New Zealand taxing rights because only individuals can derive directors' fees in their capacity as a board member.
- The Subsidiaries were not present in New Zealand for more than 92 days in a 12-month period.

### Conclusion

18. In conclusion, the Directorship Services Payments from Company A to the Subsidiaries were not subject to the PAYE rules under ss RD 2 and RD 3 because either:
- They were foreign sourced income.
  - S RD 8(1)(b)(v) applied to exclude the amounts attributable to New Zealand sourced income.

## Issue 2 | Take tuarua: Whether Director Remuneration Payments were schedular payments

19. To be a "schedular payment" that is subject to the PAYE rules, the Director Remuneration Payments from the Subsidiaries to the Directors must meet all of the following:
- be New Zealand sourced income;
  - fall within schedule 4 of the Act;
  - not be excluded under s RD 8(1)(b)(v); and
  - be within New Zealand's territorial jurisdiction if paid by a non-resident.

### New Zealand sourced

20. The Directors were physically present in New Zealand for at least one board meeting a year. Therefore, the payments made to the Directors were partly sourced in New Zealand under s YD 4(2) (business in New Zealand) or YD 4(3) (contracts in New Zealand).

21. As the Director Remuneration Payments were partially sourced in New Zealand (when the Directors attend board meetings in New Zealand) they met the first “schedular payment” requirement.
22. To the extent the Director Remuneration Payments were not sourced in New Zealand, the PAYE rules did not apply.

#### **Schedule 4**

23. The Director Remuneration Payments (to the extent they were New Zealand sourced) fell within schedule 4 of the Act as either a contract payment to a non-resident contractor under part A or as directors’ fees or as a payment for services performed by a member of a board under part B.

#### **Section RD 8(1)(b)(v) exclusion**

24. Section RD 8(1)(b)(v) states that a payment is not a schedular payment if all of the following are met:
  - It is for services provided by a non-resident contractor.
  - The non-resident contractor has full relief from tax under a DTA.
  - The non-resident contractor is present in New Zealand for 92 days or fewer in a 12-month period.
25. The above requirements were met because:
  - The Director Remuneration Payments (to the extent they were New Zealand sourced) were for directorial services provided by the Directors. The Directors were a non-resident contractor because they were a non-resident performing services in New Zealand through the Directors attending Board meetings in New Zealand.
  - If s CW 19 (exemption for short term visits) did not apply, the Directors had full tax relief under the relevant DTA because:
    - The directors’ fee article did not apply to give New Zealand taxing rights because it was not a payment made by a New Zealand resident company to a non-resident individual (rather it was a payment from a non-resident company to a non-resident individual).
    - The Directors did not have a permanent establishment or fixed base in New Zealand so qualified for tax relief under either business profits or independent personal services articles.
  - The Directors were not present in New Zealand for more than 92 days in a 12-month period.

## Territorial limitation

26. If the s CW 19 exemption applied to the New Zealand sourced payments, then the exclusion in s RD 8(1)(b)(v) from the PAYE rules did not apply because the Directors did not have “full relief from tax under a DTA.” However, the territorial limitation prevented New Zealand imposing a PAYE obligation on the Local Entities. This is because the Local Entities did not have a sufficient presence in New Zealand.

## Conclusion

27. In conclusion, the Directorship Remuneration Payments were not subject to the PAYE rules under ss RD 2 and RD 3 because one of the following applied:
- They were foreign sourced income.
  - S RD 8(1)(b)(v) applied to exclude the amounts attributable to New Zealand sourced income.
  - The territorial limitation prevented New Zealand imposing a PAYE obligation on the Local Entities.

## Issue 3 | Take tuatoru: Whether s BG 1 applied to the Arrangement

28. Section BG 1(1) provides that a “tax avoidance arrangement” is void as against the Commissioner. Section GA 1 enables the Commissioner to make an adjustment to counteract a tax advantage obtained from or under a tax avoidance arrangement.
29. The Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289 considered it desirable to settle the approach to applying s BG 1. This approach is referred to as the Parliamentary contemplation test, which is an intensely fact-based inquiry. *Ben Nevis* has been followed in subsequent judicial decisions.
30. The Tax Counsel Office’s approach in making this decision is consistent with Interpretation Statement: IS 23/01 Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007 (3 February 2023) (IS 23/01). IS 23/01 will not be replicated in this TDS but in summary the steps are as follows:
- Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement’s tax effects.

- Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
  - Identifying and understanding Parliament's purpose for the specific provisions that are used or circumvented by the arrangement.
  - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts. Artificiality and contrivance are significant factors.
  - Considering the implications of the preceding steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
- If the arrangement has a tax avoidance purpose or effect that is not the sole purpose or effect of the arrangement, consider the merely incidental test. The merely incidental test considers many of the same matters that are considered under the Parliamentary contemplation test.

31. Taking into account all of the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) the Tax Counsel Office concluded as follows.

### **The legal form of the arrangement**

32. The arrangement for s BG 1 purposes was that the Subsidiaries would procure and supply directorship services of offshore individuals to Company A. The Subsidiaries would also enter into services agreements with offshore individuals to acquire the directorship services of the individuals. This was the same as the Arrangement described in the ruling.
33. According to the taxpayer, the commercial or private purposes of the Arrangement were:
- Having directors with local market expertise on the Company A board. This helped ensure that the decision-making process underpinning the strategic direction of the group incorporated a thorough understanding of the local markets where the group had a significant presence.
  - Having the contracting and payroll managed by the Subsidiaries made commercial sense to Company A. The Directors already held positions, relating to the local markets, with a significant portion of their responsibilities and tasks



centred around these local roles. Aligning the contracting and payment arrangements for the Directors with where the majority of their work lay was commercially and administratively more efficient.

34. The Arrangement gave rise to the following tax effects:

- The PAYE rules (as defined in s RD 2) did not apply to the Directorship Services Payments under ss RD 2 and RD 3.
- The PAYE rules (as defined in s RD 2) did not apply to the Director Remuneration Payments under ss RD 2 and RD 3.

## **Determining whether the arrangement has a tax avoidance purpose or effect**

### **Identifying Parliament's purpose**

35. Parliament's purpose is that New Zealand retains taxing rights on directors' fee payments from New Zealand resident companies to foreign directors regardless of where the services are performed. However, if a payment is made from a non-resident entity to a non-resident director, New Zealand has no taxing rights under the directors' fee article, nor can New Zealand impose a withholding tax obligation on a non-resident entity that does not have a sufficient presence in New Zealand.

### **The commercial and economic reality of the Arrangement**

36. In relation to the commercial and economic reality of the Arrangement:

- There was no artificiality, contrivance or pretence in the Arrangement.
- It is common or orthodox that entities such as companies or partnerships can contract to provide the services of an individual as a director. This is consistent with Inland Revenue's position in:
  - IS 17/06: Application of schedular payment rules to directors' fees (2017);
  - IS 19/01: Application of schedular payment rules to non-resident directors' fees (2019); and
  - GA 21/01: Tax on any fees paid to a member of a board, committee, panel review group or task force (2021)).
- The Directors were neither associated with the Subsidiaries nor Company A.

- The Subsidiaries were remunerated by Company A for directorship services at an arm's length amount.
- The Subsidiaries had real economic substance. They were not shell companies controlled by the Directors to avoid the imposition of withholding tax.
- The commercial and economic effects of the Arrangement were consistent with the legal form.

### **Answering the ultimate question**

37. The Arrangement, when viewed in a commercially and economically realistic way, made use of the specific provisions in a manner consistent with Parliament's purpose. Therefore, the Arrangement did not have a tax avoidance purpose or effect.
38. As it was concluded that there was no tax avoidance purpose or effect of the Arrangement, it was not necessary to consider the merely incidental test. Accordingly, it was concluded that s BG 1 did not apply to the Arrangement.