

This Appendix to TIB No. 3 explains the Income Tax Amendment Act (No 2) 1989 which was enacted on 26th July 1989.

Part 1 of the Act contains legislation implementing the Resident Withholding Tax Regime and extends the Fringe Benefit Regime to include certain non-cash dividends paid to shareholders. Part II of the Act consists of sundry consequential and miscellaneous amendments.

Note: There are a number of issues relating to the practical application of the Resident Withholding Tax regime which have been or are under consideration. An explanation of these outstanding issues will be issued as an appendix to a future TIB.

## **SECTION 1 SHORT TITLE**

The Act shall be titled the Income Tax Amendment Act (No 2 ) 1989

## **SECTION 2 INTERPRETATION**

### **“Non Cash Dividends”**

Subsection (1) amends section 2 by inserting a definition of the term “non-cash dividend” which means any dividend other than a dividend to the extent that it is paid in money; or is a taxable bonus issue as that term is defined in section 4 (3) of this Act.

For the purposes of the definition, a dividend that is “paid in money” does not include any dividend that arises in terms of section 4(1)(b) to (e) of the principal Act.

The new definition identifies those dividends that will be subject to fringe benefit tax when paid or made available to non-corporate shareholders refer to commentary below on section 14 of the Amendment Act.

### **“Interest”**

Section 2 is further amended by repealing the existing “Interest” definition and inserting a new definition. The new definition adds after the words “... in respect of money lent” the words “... to the person making the payment or to any other person.”

This amendment clarifies that where the original borrower on lends to a third party the transaction will be one of “money lent” and as such continues to be covered by the Interest withholding tax regime.

## **“Working Day”**

Section 2 is further amended by inserting the following definition:

“Working Day” which means any day of the week other than

- (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, Labour Day, the Sovereign's birthday, and Waitangi Day
- (b) A day in the period commencing with the 25th December in any year and ending with the 15th day of January in the following year.

Where there are requirements within the Act to complete certain actions within a specified number of days the use of the term “working days” will prevent difficulties arising where weekends or holidays shorten the time available.

Application date. These amendments apply in respect of the tax on income derived on or after the 1st day of October 1989.

## **SECTION 3 MEANING OF THE TERM “DIVIDENDS”**

1. Section 3 amends the definition of “dividends” in section 4 of the principal Act.
2. Section 3(1) inserts a new paragraph (ba) into subsection (1) of section 4. The new provision makes it clear that where a company forgives an amount payable under a loan made to a shareholder the amount of the loan is treated as a dividend if it is virtually a distribution of profits or an amount capitalised by way of a bonus issue.
3. The amendment confirms the existing application of the definition of dividends whereby forgiveness of a loan made to a shareholder has been regarded as a sum distributed to the shareholder under section 4(1)(a) of the current definition (as inserted by the Income Tax Amendment Act (No 5) 1988) and also under section 4(1)(a) of the previous definition to the extent that the company has retained earnings (*Campbell v CIR* 1968).
4. The amendment outlines the circumstances in which a loan is considered to be forgiven.
5. Section 3(2) of the Amendment Act amends section 4(1)(e) of the principal Act by removing the

requirement for the Commissioner to form an opinion as to whether the making available of property is virtually a distribution of an amount that would be dividends. The effect is that whether or not an amount is included as a dividend under section 4(1)(e) is to be determined on a factual basis. The provision applies to the extent that the company has shareholders' funds available that would be treated as dividends if distributed to shareholders while the company continues to operate.

6. This amendment should facilitate the application of the fringe benefit tax payable quarterly in respect of non-cash dividends arising under section 4(1)(e). It should similarly ease the application of the non-resident withholding tax provisions and the foreign dividend withholding payment provisions in relation to such cross-border dividends.

7. Section 3(3) of the Amendment Act inserts a new subsection (10) into section (4) of the principal Act. The amendment applies in relation to section 4(1)(e) where the making available of property of the company for the benefit of the shareholder consists of a low interest loan that is made available as a virtual distribution of an amount that would be dividends.

8. Subsection (1)(e) of section 4 was inserted by section 31 of the Income Tax Amendment Act (No.5) 1988 to include as a dividend property made available for the benefit of a shareholder in a company where "...the property is virtually a distribution of an amount that, if distributed other than in the course of winding up of the company, would be dividends" under the Act.

9. At the time of the 1988 amendment it was intended that the new section (4)(1)(e) would apply to low interest loans. However, the amendment did not provide any valuation rules for determining the amount of concessional interest that is to be included as a dividend under section (4)(1)(e). In view of the application of the fringe benefit tax regime to non-cash dividends from 1 October 1989 (refer to commentary below on section 12 of the Amendment Act) as well as the application of the non-resident withholding tax and foreign dividend withholding payment regimes, it is important to provide such valuation rules in relation to low interest loans.

10. Subsection (10) of section 4 provides rules for valuing the amount of dividends that arise where a low interest loan is made available to a shareholder. The new subsection essentially uses the fringe benefit tax formulation in respect of low interest loans and provides that:

(a) the amount of dividends arising is to be determined on a quarterly basis and deemed to be derived on the last day of the quarter;

(b) the amount of the dividend is determined as follows:

the amount of interest that would have accrued on that loan had interest been calculated on the daily balance of that loan in that quarter at the rate of interest specified in paragraph (c) of subsection (10)

reduced by

the amount of interest actually payable in respect of the loan during the quarter (whether or not the interest is paid during that quarter);

(c) The rate of interest specified for the purposes of the subsection is

- the prescribed rate of interest (as defined in section 336N(1)) that applies for fringe benefit tax purposes, where the amounts payable under a loan are expressed in New Zealand currency;
- where the amounts payable under a loan are payable in a foreign currency, any rate prescribed by the Commissioner in respect of that currency in any quarter or, if no such rate is prescribed, the market rate of interest that applies on an arm's length basis determined at the end of the quarter for a loan made on the same terms as that loan advanced in the foreign currency;
- in the case of any other loan, the market rate of interest that applies on an arm's length basis determined at the end of the quarter for a loan made on the same terms as that loan.

11. In relation to low interest loans made to a shareholder, section (4)(1)(e) applies to include concessional interest as a dividend only where the loan is made in substitution for dividends. Therefore the provision does not apply where a loan arises by virtue of a normal commercial transaction, e.g., goods purchased on current account by a parent company from a subsidiary.

12. It is important to note the relationship between section 4(1)(e) and section 4(1)(b) in relation to low interest loans. There are two main considerations. Firstly, such loans are dividends under section 4(1)(b) if the Commissioner considers they

are not a bona fide investment and are virtually a distribution of profits. Where section 4(1)(b) is applied to include such a loan as a dividend in the year in which the advance was made it is acknowledged that it would not be a loan to which section 4(1)(e) applies. In such a case any tax paid in the interim (whether fringe benefit tax or income tax) by virtue of the application of section 4(1)(e) would have to be refunded by the Department. Secondly, where a low interest loan is repaid by a shareholder so that section (4)(1)(b) does not apply, it is appropriate that section 4(1)(e) apply to include the concessional element of the loan as a dividend since the shareholder will have had the benefit of the money advanced during the period of the advance. In this respect there is no conflict between section 4(1)(b) and section 4(1)(e) of the Act.

13. It is also important to note the application of section 4(1)(1) in relation to low interest loans made to an associated person of a shareholder. Where, for example, a low interest loan is made by a proprietary company to a subsidiary company, a dividend may arise by virtue of the application of section 4(1)(e), section 4(1)(1), and section 8 (associated persons). The arrangement would give rise to a dividend in the hands the proprietary company's shareholders. Likewise a dividend may arise where a subsidiary company of a proprietary company advances a low interest loan to another subsidiary of that proprietary company. In both instances where a proprietary company has more than one shareholder, section 4(7) provides that the dividend is to be apportioned among the shareholders in proportion to each shareholder's amount of paid-up capital.

14. The Department is currently considering the application of section 4(1)(1) in relation to the other provisions of section 4(1). Section 4(1)(1) essentially reflects the wording of the previous section 4(3) that existed prior to the amendment of definition of dividends by the Income Tax Amendment Act (No 5) 1988. The previous section 4(3) of the Act was generally regarded as applying only where a distribution was made to an associated person outside the corporate group.

**Date of Application**

These provisions apply in relation to income derived on or after 1 October 1989.

**SECTION 4 REBATE IN CERTAIN CASES FOR CHILDREN**

The original purpose of the child rebate was to obviate the need for children to file tax returns. The introduction of the RWT regime along with the

removal of the \$200 interest and dividend exemption facilitates the removal of interest and dividend income from the child rebate.

Section 50A is amended to restrict the application of the Child Rebate to income which is effectively salary and wages, and specifically to deny any tax rebate to income which comprises interest and dividends.

**Rebate**

The following formula ensures that interest and dividend income is excluded from income to which the rebate applies.

The rebate is now an amount equal to the lesser of \$156 or an amount calculated as follows:

$$(x - y) \times \frac{15}{100}$$

where -

x is an amount equal to the assessable income of the taxpayer for that income year; and

y is an amount equal to the resident withholding income derived by the taxpayer in that year.

**Transitional provision**

In respect of income derived in the income year commencing 1 April 1989 the expression "resident withholding income" in the above formula shall be read as "resident withholding income derived on or after 1 October 1989".

Example: Example of child rebate calculation showing apportionment

Year ended 31/3/90	
Income from wages	\$600
Income from interest (derived 1/4/89 to 30/9/89)	\$105
Resident withholding income (derived 1/10/89 to 31/3/90)	\$105
<b>TOTAL INCOME</b>	<b>\$810</b>
Formula (\$810 - \$105) x .15	
<b>REBATE</b>	<b>\$105.75</b>

Application Date This section applies in respect of income derived in the income year commencing 1 April 1989.

## **SECTION 5 THE INTEREST AND DIVIDEND EXEMPTION**

With the introduction of the resident withholding tax regime the existing \$200 general exemption which applies to interest and dividends received by most taxpayers will be abolished.

As the withholding tax regime commences partway through an income year there will be a partial exemption in relation to interest and dividend income derived in the first half of the introductory year, and a complete repeal in respect of income derived after 1 April 1990.

Subsection (1) Section 61(13) is repealed with effect from the income year commencing 1 April 1989. A partial exemption applies to the extent of \$100 in respect of interest and dividends derived between 1 April 1989 and 30 September 1989. The existing provisos will apply in respect of this transitional provision.

Subsection (2) inserts a new section 61(12A) which exempts from income tax any non-cash dividend made available after 1 October 1989 to the extent to which fringe benefit tax is payable on the dividend.

## **SECTION 6 DIVIDEND EXEMPTION**

An additional limitation on exemptions is added to section 63 to take effect in relation to income derived on or after 1 October 1989.

The amendment removes the inter-corporate dividend exemption in relation to dividends that arise in connection with any forgiveness of a loan made by a company to a shareholder company under section 4(1)(ba). This treatment is consistent with the accrual rules as, where the accrual rules treat forgiveness of debt as income to the borrower, such treatment applies regardless of whether the borrower is an individual or a company.

Therefore, where the application of section 4(1)(ba) gives rise to a dividend derived by a company, the amount of the dividend will be regarded as assessable income of the company.

## **SECTION 7 INCOME AND EXPENDITURE WHERE FINANCIAL ARRANGEMENT REDEEMED OR DISPOSED OF**

The base price adjustment in section 64F(2) of the accruals regime is amended to take into account any forgiveness of debt that has been included as dividends under section 4(1)(ba) and that is assess-

able to a company by virtue of the amendment to section 63(3) (refer to section 6 of the Amendment Act).

The amendment ensures that such dividends are not subject to double taxation. Any amount of interest or principal remitted that is assessable to the borrower as a dividend is excluded from the base price adjustment.

## **SECTION 8 DISTRIBUTION OF TRADING STOCK**

Section 8 amends section 197(3) of the principal Act by removing the requirement for the Commissioner to form an opinion as to whether the price which trading stock is deemed to have realised exceeds an amount which is a return of capital.

The effect is that it will be a question of fact whether the price exceeds the share capital and any determination as to the extent of a dividend does not need to be considered by the Commissioner.

## **SECTION 9 CLOSE OF TRADING SPOT EXCHANGE RATE**

Section 9 amends the definition of "close of trading spot exchange rate" in section 245A of the principal Act. The definition applies in relation to converting the branch-equivalent income of a Controlled Foreign Company to NZ dollars for income attribution under Part IVA of the Act.

Subparagraph (a) of the previous definition specifies that the rate is to be "an average of the spot rates of exchange for the purchase of NZ currency quoted at 3 p.m. NZ time...by foreign exchange dealers authorised under the RBNZ Act 1964 on the market approved by the Commissioner.

The previous definition, if used in relation to RWT deductions would give rise to situations for example where interest credited on a Monday in foreign currency would have to be converted into NZ dollars at exchange rates ruling on the Friday. It has been argued that this unnecessarily exposes deductors to exchange rate risks.

This amendment to the definition provides a method for converting foreign currency which is set out in relation to spot contracts in determination G6A made under S 64E of the Act, and provides that rates quoted on the next business day are to apply where no rates are quoted on the relevant day.

## **SECTION 10 DATE FOR PAYMENT OF NON-RESIDENT WITHHOLDING TAX**

The payment date by which any deductions of non-resident withholding tax which have been made are required to be paid to the Commissioner has been aligned with the payment date for deductions of resident withholding tax. This is to streamline payment procedures for persons who will be required to pay tax deductions from both resident and non-resident withholding income to the Commissioner on a regular basis.

Sections 315(1), 316, 319 and 320 are amended by changing the payment due date from the 20th to the 14th of the month following the month in which the deduction was made.

This change is effective in respect of non-resident withholding tax payable on or after 1 October 1989.

## **SECTION 11 NON-RESIDENT WITHHOLDING TAX DEDUCTED IN ERROR**

A new section 326A is inserted into the Non-resident withholding tax (NRWT) provisions to enable the Commissioner (on application) to refund any overdeductions of NRWT made.

### **326A (1) Deductions made and paid to the Commissioner to be refunded.**

Where a deduction has been made, paid to the Commissioner, and exceeds the amount which should have been deducted, the Commissioner shall refund that amount to the person who derived the amount from which the deduction was made.

### **326A (2) Application to be in approved form**

The person entitled to the refund may make an application in an approved form.

### **326A (3) The Commissioner requires evidence**

The Commissioner requires evidence that the tax has been deducted and has been paid to the Commissioner.

### **326A (4) Refund may be applied in satisfying amounts due**

The Commissioner may apply any amount which is due to be refunded to any obligation of the person to whom the amount is owing.

### **326A (5) Power to recover where excess refund made**

Where an excess amount has been refunded the Commissioner may recover the amount in excess as if it were income tax.

Where the person led the Commissioner to pay the refund by wilful default or neglect that excess shall be payable on the date on which the refund was paid. In any other case the amount will be payable on the 7th of the month following the month in which the person was notified that the amount was payable.

### **326A (6) No further appropriation is required.**

All money payable by the Commissioner shall be paid without further appropriation being required.

## **Date of application**

This section comes into force on the 1st day of October 1989 and applies to any payment (of NRWT) due to be made to the Commissioner on or after that date.

## **SECTION 12 RESIDENT INCOME WITHHOLDING TAX**

A new Part IXA is inserted into the Act to bring into effect a Resident Income Withholding Tax.

### 327A - INTERPRETATION

#### **327A Subsection (1) Definitions**

A number of terms are defined for the purposes of this Part of the Act, especially where the general definitions in Section 2 need to be expanded for the purposes of resident withholding tax e.g., the definition of "interest" is expanded for withholding tax purposes to include "redemption payments".

#### **"Accounting Year"**

A new term Accounting Year which is a year, or other period ending with the annual balance date of a person's accounts, is specifically defined for these provisions because definitions in section 2 did not meet certain situations.

"Income Year" only applies to periods during which persons derive income and there may be situations where persons pay interest from which deductions should be made but do not derive income. "Year" is restricted to those periods commencing 1 April and ending 31 March. "Year of Assessment" means a year for which income tax is payable which assumes that an assessment will be made.

The new definition is particularly applicable in the case of non-profit bodies who derive income but because of the proviso to section 61(34) do not file tax returns. Their obligation to deduct is partially based on interest paid in their previous "accounting year". See section 327C (5)

**“Certificate of Exemption”** Section 327M provides for the issuing of “Certificates of Exemption” and details who may apply, and the conditions governing their application.

**“Close of trading spot exchange rate”** This term is defined in section 245A for the purposes of the attributed foreign income regime. A definition is required for the resident withholding tax regime to determine the exchange rate for payers to use when making resident withholding tax deductions from interest paid on foreign currency investments.

The definition of “*close of trading spot exchange rate*” in section 245A has been amended - refer to discussion under section 9 above.

**“Company”** includes a group investment fund established under the Trustee Companies Act 1967 or the Public Trust Office Act 1957 in so far as that fund pays dividends on any shares invested in the fund.

**“Dividend withholding payment credit”**  
This is a term used in the foreign dividend withholding payments regime. (Refer to section 394ZX which is discussed in the appendix to TIB No. 1.

**“Exempt Interest”** lists the types of interest which are exempt from the withholding regime. The following types of interest are not subject to the deduction of resident income withholding tax.

- (a) Interest payable in respect of any debt made in accordance with generally accepted commercial practice for the purchase of goods or services, being a purchase made in the ordinary course of the purchaser’s taxable activity. This would include such items as interest charged on overdue accounts payable, or any standard trade debt incurred during the course of business.

Note: This provision does not require the debt to be owed to the person from whom the goods were purchased.

Example:

A plumber who purchases supplies under a 30 day credit facility in the ordinary course of the plumbing business, and incurs an interest penalty on payment after 30 days, is not liable to deduct RWT from that payment of penalty interest as it is exempt interest

- (b) Any interest payable under a hire purchase agreement.

- (c) Interest exempt from tax pursuant to section 61(18) (Government borrowing from a non-resident) and section 61(50) (any income expressly exempted from income tax by any other Act)

- (d) Any interest payable under a specified lease (as defined in S222A (1)).

- (e) Interest payable in respect of bonus bonds. The “prize” draws on bonus bonds are deemed to be interest and without this exemption such prizes would be subject to tax deductions.

- (f) Interest which is an inflation premium payable on an inflation adjusted savings bond issued by the New Zealand Government.

- (g) Interest payable by the Commissioner on overpayments of provisional tax in terms of Section 413A, or on delayed refunds in terms of section 46 of the Goods and Services Tax Act 1985.

### **“Financial arrangement”**

Terms such as “financial arrangement”, “holder”, “issued” and “issuer” (refer below) which have meanings expressly applicable for, and limited to, the accruals legislation, are used in the withholding tax provisions so they have been given an extended application to this Part of the Act.

Financial arrangement means -

- (a) Any debt or debt instrument; and
- (b) Any arrangement whereby a person obtains money in consideration for a promise by any person to provide money to any person at some future time, or on the occurrence or non-occurrence of some future event or events; and
- (c) Any arrangement which is of a substantially similar nature, -

but shall not include any excepted financial arrangement that is not part of a financial arrangement. (Excepted financial arrangement is defined in section 64B (1)).

“Foreign Withholding Tax” in respect to any amount of resident withholding income means any tax, other than New Zealand tax, that

- (a) is deducted from that amount of resident withholding income; and

(b) is of substantially the same nature as non-resident withholding tax.

“Holder” is a person who, if all amounts under the financial arrangement were due and payable at that time, would be entitled to receive a pecuniary benefit from payment of those amounts.

In general - Holder = lender = vendor = creditor i.e. the person who receives income

“Imputation credit”

This is a term used in the imputation regime. (Refer to section 394F which is discussed in the appendix to TIB No.1)

“Interest” includes a redemption payment. The section 2 definition of interest does not include redemption payments, but for the purposes of this regime redemption payments are expressly included.

The effect is that the difference between the original issue price and redemption price of a Commercial Bill (as that term is defined in section 65(1)(a) of the Act) is interest subject to RWT.

Example:

Mary Investor subscribes for Government stock on 1 June 1989. Details are as follows.

Coupon interest rate	12½%
Face value	\$50,000
Issue price	\$45,000
Maturity date	30 June 1992

Mary is a non-exempt recipient (does not hold a COE) and the stock is held to maturity. She is a cash-basis holder for the purposes of the Accruals regime.

RWT will be deducted from each coupon payment. Mary will be assessed on the gross interest paid (inclusive of RWT deducted) and will receive a tax credit for the RWT deducted.

On 30 June 1992 Mary will receive \$48,800 being \$50,000 less the \$1,200 RWT deducted from the redemption payment of \$5,000.

Mary will be assessed on the redemption payment (in the 1993 income year), being assessable income under the Accruals regime, and will receive a credit for the RWT deducted.

Example:

Facts as in above example except that Mary sells the Government Stock to George on 1 July 1991

for \$49,000. George holds the stock to maturity.

Mary will be assessed (in the 1992 income year) on the \$4,000 profit derived from the sale of the Government stock; being assessable income under the Accruals regime.

No RWT is deducted from the sale proceeds of the stock.

On 30 June 1992 George will receive \$48,800 being \$50,000 less the RWT deducted from the redemption payment of \$5,000 (being \$1,200)

Note: The amount of the redemption payment is not the difference between the acquisition price of the stock and its redemption price, but rather the original issue price of the stock and its redemption price.

If George had sold the stock to an exempt recipient (holder of a COE) shortly before 30 June 1992 he would have been assessed on the profit derived (under the Accruals regime), but he would not incur RWT. The purchaser would receive \$50,000; the redemption payment being excluded from the RWT regime as it is paid to an exempt recipient.

### “Issued and Issuer”

“Issuer” is a person who is a party to a financial arrangement and is not a holder in relation to the financial arrangement.

In general - Issuer = borrower = purchaser = debtor i.e. the person who incurs expenditure

“Paid” is defined to include credited to, applied on account of, or dealt with in the interests of any person. “Pay” and “payment” have corresponding meanings.

This is to ensure that persons cannot circumvent the requirement to make deductions by crediting an account or otherwise avoiding an actual payment in a narrow meaning of the term.

“Resident withholding income” and “Resident withholding tax”

These terms have the meanings assigned to them by sections 327B and 327C respectively. (Discussed below)

“Resident withholding Tax deduction certificate” (s327H) and

“Resident withholding tax deduction Reconciliation Statement” (S327I) are defined for this Part of the

Act to distinguish them from the definitions in Section 2 which refer to “tax deduction certificates” and “reconciliation statements” which are defined by and have reference to the PAYE provisions for Salary and Wage earners.

“Shares” includes the investment of an investor in a group investment fund.

“Taxable Activity” has the same meaning as in the GST Act 1985 except that it specifically includes the making of exempt supplies (e.g., provision of financial services, and residential rentals). This modification ensures that persons conducting banking type activities are required to deduct resident withholding tax.

This term is used to cover a “business” in the broadest sense of the word so that situations where persons are paying interest which is tax deductible, but where the intention to make a profit is not necessarily present are still subject to the withholding tax provisions. In addition, a number of public and local authorities are not conducting a business in the widest sense of the word, but they are conducting taxable activities.

A taxable activity is:

- any activity
- carried on continuously or regularly
- by any person
- whether or not for pecuniary profit
- and involves, or is intended to involve, in whole or in part
- the supply of goods and services
- to any other person
- for a consideration.

For further discussion on “taxable activity” refer to the GST Manual.

“Taxable bonus issue” as in section 4(3) of the principal Act means

- a) any bonus issue in lieu of dividends;
- b) any bonus issue that a company elects to be a taxable bonus issue treated as a dividend (S4(5)(a)(i))

“Tax File Number” has a wide scope, being any number allocated to a person by the Commissioner. It would include IRD numbers which are not currently defined and GST registration numbers which are defined in the GST Act 1985 and will now include the Certificate of Exemption number issued in terms of Section 327M(4)(c).

Subsection (2) Dividends paid by Friendly Societies deemed to be interest.

The amendment deems “dividends” paid by

Friendly Societies, Credit Unions, Industrial unions, etc. (which are incorporated in New Zealand under any Act) to be interest and not to be dividends for the purposes of resident withholding tax.

The sums paid out by these organisations could be both “interest” and “dividends” as defined in the principal Act. As the withholding tax rates are different for interest and dividends it is necessary to clarify the category to which these distributed sums belong.

Subsection (3) Application of the term “specified dividends”

The term “specified dividends” applies for the purposes of certain sections of the withholding tax regime. Specified dividends are dividends paid by a company which is not entitled to attach imputation (or dividend withholding payment credits) to dividends paid. The legislation provides for additional notification requirements in respect of specified dividends. The additional notification requirements are the same as those applying in respect of resident withholding tax on interest.

Specified dividends are dividends that are -

(a) paid by a company which at the time of payment is

- a company that is not resident in New Zealand, or
- a company whose constitution prohibits all of its income from being distributed to any proprietor, member or shareholder. This would include, for example, incorporated clubs and societies, or
- a company the income of which is exempt from tax (e.g., an incorporated charity). However dividends derived by a company the income of which consists solely of dividends exempt from tax under section 63 are not specified dividends, or
- a company to which section 204 applies where that company is engaged in New Zealand solely in the business of life insurance or reinsurance and does not maintain a foreign dividend withholding payment account; or

(b) dividends paid by a company in relation to specified preference shares where the com-



pany has been allowed a deduction in respect of those dividends; or

- (c) amounts distributed by a Maori Authority that are deemed to be dividends under section 236(2) of the Act.

### 327B Application of this Part

327B Subsection (1) This Part of this Act applies notwithstanding anything in any other Part of the Act. This is a section used whenever new forms of tax policy are introduced to ensure that other provisions of the Act do not hinder the successful implementation of the changes.

327B Subsection (2) Resident withholding income (RWI) consists of interest and dividends, paid after 1 October 1989, subject to the exceptions detailed below.

### INTEREST

- (a) (i) Exempt interest (defined in S327A ) is not RWI

- (a) (ii) and (b) (iv)  
Interest or dividends paid to a person who holds a valid Certificate of Exemption will not be subject to RWT deductions. (Section 327M discusses Certificates of Exemption)

- (a) (iii) and (b) (v)  
Interest and Dividends which constitute non-resident withholding do not constitute RWI.

As residence may not always be determined until some time after a payment of interest or dividends provisions have been made for any NRWT paid to the Commissioner to be retained and credited in part payment of income tax or resident withholding tax due. (Section 326A inserted by section 11 of this Act refers.)

- (a) (iv) and (b) (vi)  
Interest and dividends derived from outside New Zealand by a person not resident in New Zealand do not constitute RWI. These paragraphs ensure that there is no obligation on payers of interest or dividends unconnected with New Zealand. Failure to include such provisions would leave an area of doubt.

- (a) (v) Interest paid between members of a Group of companies.

As the grouping provisions of section 191 are in respect of an income year the test as to whether any interest is or is not resident withholding income is whether the companies between whom the interest passes would be members of the same group if the date the interest was paid was the end of an income year.

- (a)(vi) Interest derived by a non-resident investment company from any development investments within the meaning of section 5.

### DIVIDENDS

Dividends which do not form part of resident withholding income also include -

- (b) (i) Any non-cash dividends in respect of which fringe benefit tax is payable under section 336N(8) as inserted by section 13 of the Amendment Act. The term "non cash dividend" is defined in section 2 of the principal Act (refer to section 2 of the Amendment Act).

- (b) (ii) Dividends that are exempt from income tax in New Zealand by section 63(2) of this Act or which would be so exempt but for the exclusion in paragraph (e) of Section 63(3) (refer to commentary to section 6 of the Amendment Act). Therefore RWT does not apply to dividends that are exempt income of a company or which, under section 4 (1)(ba) are dividends derived by a company as a consequence of the forgiveness of debt (refer to above commentary on section 3 of the Amendment Act).

- (b) (iii) Deemed dividends which arise through the operation of certain sections of the Act:

section 97 - excess remuneration paid by a partnership to a relative of a partner or by a company (other than a proprietary company) to a relative of a director or shareholder of the company. This provision also applies to remuneration paid by a partnership to a relative of a director or shareholder of a company that is a partner in the partnership;

section 190 - excess remuneration paid by a proprietary company to a shareholder or a director (or relative of same);

Section 199(6) - certain rebates paid by Mutual Associations are deemed, under the proviso, to be dividends in the hands of members to the extent that they are not allowable deductions to the Association.

The proviso to subsection (2) clarifies the situation where beneficiary income pursuant to section 226(1) is derived also by the trustee. The proviso ensures that beneficiary income derived by a trustee who holds a valid COE is deemed not to be derived by the trustee and thus retains its character as resident withholding income in all cases where the beneficiary does not also hold a COE.

The proviso only applies “for the purposes of each of the sub-paragraphs of paragraph (a) and (b) of this subsection” and does not generally apply for the purposes of Part IXA of the Act. (Thus it does not apply for the purposes of section 327M).

**327C - Deduction of Resident Withholding Tax (RWT)**

This section provides a basic rule that all Resident Withholding Income is subject to a deduction, to be called Resident Withholding Tax, at the time of payment.

The regime has been introduced to ensure that income from interest and dividends which is currently not being included in taxpayers’ returns of income is subject to taxation.

Qualifying interest payments will have RWT deducted when paid or credited to the interest recipient.

Dividends are also subject to deductions of RWT. The RWT to be deducted is dependent upon the amount of imputation and foreign dividend withholding payment credits attached to the dividend paid. No RWT is deductible from a fully credited dividend.

There is a full explanation of the imputation regime, and the terms, such as “imputation credits” and “dividend withholding payment credits”, which are used in this commentary, in the Appendix to TIB No 1.

**327C Subsection (1) Rate of deduction.**

**(a) Interest**

The rate of RWT deduction from interest, less any foreign tax credits, is specified in clause 1 of the new Nineteenth schedule to the Act. From 1 October 1989 the rate will be 24 cents in the dollar.

The formula is:

$$(a \times (b + c)) - c$$

where -

- a is the rate of RWT on interest expressed as a percentage
- b is the amount of interest paid before the deduction of resident withholding tax;
- c is the amount of \*foreign withholding tax paid or payable in respect of that amount of interest paid.

\* Foreign withholding tax. This term is defined in section 327A (refer to above commentary). Essentially it is tax deducted from the dividend in the overseas country and which is available as a credit of tax in New Zealand.

**(b) Dividends**

The rate of RWT deduction from dividends is specified in clause 2 of the new Nineteenth schedule to the Act. From 1 October 1989 it will be 33 cents in the dollar. (The rate will normally be in line with the company tax rate to prevent any complication arising through the operation of the imputation regime.)

The 33 per cent rate of deduction will apply in full where a dividend is paid without imputation credits or dividend withholding payment credits attached.

Where a dividend has imputation credits attached at the maximum imputation ratio (currently 33/67) of the dividend there will be no deduction of resident withholding tax.

In all other cases the following formula is used to calculate the amount of RWT to be deducted. The amount of RWT deductible is not to exceed 33 percent of the amount of the dividend paid (inclusive of credits).

The formula is

$$(a \times (b + c)) - c$$

- a is the rate of RWT on dividends expressed as a percentage; and
- b is the amount of dividend paid (before the deduction of RWT); and
- c is -
  - (i) in the case of a dividend paid in relation to shares issued by a company which is at the time of payment not resident in New Zealand, the foreign withholding tax paid or payable in respect of that dividend; or

- (ii) in the case of any other dividend -  
the aggregate of -  
(A) any imputation credit attached; and  
(B) any dividend withholding payment credit attached

The effect of this formula is to apply the relevant rate of RWT to the aggregate amount of the dividend paid and any credits attached to that dividend, and then to apply the withholding rate to that total. The resulting amount is reduced by the amount of any credits attached to the dividend paid in order to determine the amount of RWT to be deducted.

#### Example

Dividend declared	\$100.00
Imputation credits attached	<u>\$ 20.00</u>
Aggregate amount subject to RWT	<u>\$120.00</u>
RWT @ 33c	\$39.60
Less imputation credits	<u>\$20.00</u>
RWT payable	<u>\$19.60</u>
Assessable income of shareholder	
Cash dividend (100 -19.60)	\$ 80.40
Imputation credits	\$ 20.00
Dividend withholding payment credit	<u>\$ 19.60</u>
Assessable Income	<u>\$120.00</u>

#### (c) Taxable bonus issues

It should be noted that amending legislation has been introduced in the Taxation Reform Bill (No.6) 1989 to clarify the amount of RWT to be deducted in relation to a taxable bonus issue. The proposed amendments provide for the following treatment:

- (i) In respect of a taxable bonus issue made where an amount of money's worth is offered as an alternative to the bonus issue, e.g. under a dividend election scheme or a bonus issue in lieu, the amount of RWT to be deducted is calculated on a similar basis to dividends, i.e., in accordance with the following formula -

$$(a \times (b + c) - c)$$

a is the rate of RWT on dividends,

b is the amount of money or money's worth offered as an alternative to the bonus issue (before the deduction of RWT),

c is -

- (A) in the case of a dividend paid in relation to shares issued by a company which is at the time of payment not resident in New Zealand, the foreign withholding tax paid or payable in respect of that dividend; or  
(B) in the case of any other dividend the aggregate of  
(A) any imputation credit attached; and  
(B) any dividend withholding payment credit attached

#### Example

Dividend declared with option available to shareholder to	
Receive taxable bonus issue in lieu	\$100.00
Imputation Credits attached	<u>\$ 49.00</u>
Aggregate amount subject to RWT	<u>\$149.00</u>
RWT @ 33 cents	\$49.00
Less imputation credits*	<u>\$49.00</u>
RWT payable	<u>Nil</u>
Assessable income of shareholder	
Bonus issue	\$100.00
Imputation credits	<u>\$ 49.00</u>
Assessable income	<u>\$149.00</u>

\* It is expected that in most cases taxable bonus issues will be fully credited with imputation credits.

- (ii) In respect of a taxable bonus issue made where there is an amount capitalised in the making of the bonus issue the amount of RWT to be deducted is calculated in accordance with the following formula

$$\left( \frac{a}{1 - a} \times b \right) - c$$

a is the rate of RWT,

b is the amount capitalised in the making of the bonus issue,

c is -

- (A) in the case of a dividend paid in relation to shares issued by a company which is at the time of payment not resident in New Zealand, the foreign withholding tax paid or payable in respect of that dividend; or

(B) in the case of any other dividend -

- the aggregate of  
 (A) any imputation credit attached; and  
 (B) any dividend withholding payment credit attached

#### Example

Amount capitalised in making bonus issue	\$100.00
Imputation credits attached	\$ 49.00
RWT @ 33 ¢	$\frac{33}{67} \times 100 = 49 - 49 = \text{Nil}$

Assessable income of shareholder	
Bonus issue	\$100.00
Imputation credits	<u>\$ 49.00</u>
Assessable income	<u>\$149.00</u>

#### 327C Subsection (2) RWT on Taxable Bonus Issues

As deductions are not able to be made from bonus shares, subsection (2) provides for payment to the Commissioner of an amount of RWT equal to the amount of RWT which would be payable if the amount of the taxable bonus issue had been paid as a "cash dividend". The amount payable is regarded as a deduction of RWT.

#### 327C Subsection (3) Conversion Rate Where RWI is in Foreign Currency

This subsection provides for the calculation of the amount of resident withholding tax to be deducted and credited against income tax assessed (or treated as a dividend withholding payment credit) where RWI is not paid in NZ dollars.

It states that for the purposes of such calculations only (i.e. the calculations outlined in subsection 327C (3) (a) and (b), RWI is to be converted into New Zealand dollars. This does not mean that payments of RWI denominated in foreign currency have to be physically converted into NZ dollars prior to the deduction of RWT and then re-converted back into the foreign currency prior to payment. Rather, it means that the amount of RWT to be deducted or credited is to be calculated as if such currency conversion of the RWI had occurred.

#### Subsections 327C (3) (c) and (d) outline the alternative rates of exchange at which such RWI can be converted into NZ dollars.

Subsection 327C (3) (c) provides for the use of the close of trading spot exchange rate on the day on which the RWT deduction is required to be made. Where a payment of RWI is made outside NZ, however, the person may elect to use the spot rate on the next succeeding day.

Alternatively, subsection 327C (3) (d) provides for the use of an arm's length exchange rate where a payment of RWI has actually been physically converted into NZ dollars at the time of payment.

#### 327C Subsection (4) Persons Liable to Deduct

A person is only required to make tax deductions from RWI if:-

- a) that person is, at the time of payment, either
- (i) Resident in New Zealand, or
  - (ii) Carrying on a taxable activity in N.Z. through a fixed establishment.

Provided that ss (4) (a) shall not apply where the Commissioner is satisfied that -

(A) the payment of interest or dividends is attributable to, or effectively connected with a fixed establishment of that person outside New Zealand

in the case of dividends payable in respect of shares issued by a company, that company is not resident in New Zealand.

(B) all amounts payable in relation to money lent or to shares to which the RWI relates are payable in a currency other than New Zealand currency;

(b) and

Either

(i) that person holds at the time of payment a valid COE (S327M refers); or

(ii) that payment is made wholly or partly\* in the course of or furtherance of a taxable activity, whether acting as an agent or trustee or otherwise; or

(iii) that payment is a dividend on shares issued by the company making the payment.

\* An example of a "partly" is the case of a taxpayer who has interest expenditure apportioned between business use and private use where the money was borrowed to acquire a business premise which has residential accommodation attached (e.g., a doctor, dentist, dairy owner, motel owner.)

**327C Subsection (5) Relief from Liability to Withhold in Certain Circumstances**

Any person who makes a payment of resident withholding income, being interest, and

- (a) Either-
  - (i) Does not hold a valid COE; or
  - (ii) Holds a certificate of exemption issued in accordance with the following paragraphs of S 327M (1):-
    - (g) tax exempt persons; or
    - (h) non-profit bodies subject to Section 61(34); or
    - Section 327M(12) certain tax loss (or anticipated tax loss) taxpayers; and
- (b) paid less than \$5000 RWI in the previous year - is not liable to deduct RWT until RWI payments made in the year exceed a total of \$5,000.

Once that level of qualifying interest payments is reached, in a year, deductions of RWT are required from all further payments in that year, and in future until the payer completes a full year of payments less than \$5000.

The exclusion of persons who have a Certificate of Exemption issued under S327M (12) relates to those persons who have been issued with a certificate for a determined period in circumstances such as carry-forward losses or an anticipated over deduction situation.

It is anticipated that the \$5,000 threshold exemption will remove the liability to deduct and account for RWT for a large numbers of payers who pay relatively small amounts of interest in a year.

Where any person has not previously been deducting RWT but makes a payment which takes the total interest paid in the accounting year (as defined in Section 2) over the \$5000 threshold that person must deduct RWT from that payment (but only to the extent of the excess over \$5,000\*), and from any subsequent payments until such time as they complete an accounting year in which they pay a total of less than \$5000.

Also, as a consequence of exceeding the \$5,000 threshold in an accounting year RWT should be deducted from all interest paid in the following year (unless the interest is exempt or excluded interest).

\* NOTE: Legislation has been introduced in the Taxation Reform Bill No.6 to change the requirement that RWT is only deducted from the "excess over \$5,000". There are practical difficulties in deducting "only to the extent of the excess" in situations where payments are being made to more than one person simultaneously which take the total for the year over the \$5,000 level. To overcome these practical problems the requirement will be to deduct from the whole of any payment which takes the total for the year over the \$5,000 threshold.

**327C Subsection (6) Prevention of Double Deductions**

Where any person (liable to make a deduction of RWT) makes or receives a payment from which RWT has been deducted either in full or in part that person is only required to make a deduction to the extent of the shortfall, if any. This is to ensure that successive deductions are not made when RWI passes through someone such as an agent or trustee.

**327C Subsection (7) Payments Deemed not to Constitute Resident Withholding Income**

Where any person makes a payment to another person, or receives a payment as agent or bare trustee for another person, that person has to determine whether the interest or dividend paid or received is resident withholding income.

The issue to be determined is whether or not the person deriving the interest or dividend is the holder of a COE - in which case the relevant interest or dividend would not constitute RWI and there is no requirement to deduct RWT.

There are two tests, the first relates to the certificate and the second relates to the possible cancellation of the certificate.

The requirements regarding the holder of the Certificate of Exemption are:

327C(7) (c) (i) Either

- (A) Where the person deriving the interest or dividend is a person to whom paragraphs (a) to (d) of S 327M(1) applies (e.g. banks, building societies, trustee banks, trustee companies etc.) the payer is only required to be satisfied that the recipient belongs to that category, and is not required to sight the COE; or
- (B) Where the person deriving the interest or dividend is a person to whom paragraphs

(e) to (g) of S 327M(1) applies (e.g. persons whose principal form of business is the borrowing or lending money and persons who have derived, or who believe they will derive \$2 million of gross assessable income) the payer must be supplied with the person's tax file number and have been notified by the person that the person holds a COE; or

(C) Where the recipient of the interest or dividend is a person to whom paragraphs (h) and (i) of S327M (1) applies (e.g. tax ex-empts, charities, non-profit bodies etc.) or to whom S327M (12) applies (certain tax loss persons) then the payer is required to sight the certificate of exemption and take reasonable steps to be satisfied that the recipient is the person named in the certificate; and

#### 327C(7) (c) (ii)

In all the circumstances outlined above the payer also needs to be satisfied

- in respect of a payment of interest made on or before 1 April 1991 that no notice of cancellation of the COE has been published in any issue of the Gazette more than 5 working days before the time the money was lent, or
- in the case of a payment of dividends, more than 5 working days before the payment was made.

In any case where a notice of cancellation has been published in the Gazette and a certificate has been issued with a date later than the date of publication of cancellation, the payer will need to sight such certificate; and

#### 327C(7) (c) (iii)

In the case of any payment of interest made on or after 1 April 1991 the payer will need to be satisfied that no notice of cancellation of a certificate of exemption held by the recipient has been published in any issue of the Gazette on or after 1 April 1991 and more than 5 working days before the payment of interest is made.

Where there has been a notice of cancellation and a further certificate of exemption has been issued the payer can either

- ascertain that there has been publication of a notice of re-issue of such certificate; or

- sight a certificate with a date subsequent to the date of issue of the Gazette with the notice of cancellation; and

#### 327C(7) (c) (iv)

In addition to publication of notice of cancellation in the Gazette, there are other ways in which a payer may have been notified of cancellation.

A payer therefore needs to check that there has not been a notification of cancellation received from either the Commissioner, or the recipient, that the recipient's certificate has been cancelled more than 5 working days prior to the day on which payment is made.

If the payer has been so advised, there will still be no requirement to treat the payment of interest or dividend as resident withholding income if either

(A) Notice of issue of a further COE has been published in the Gazette more than 5 working days before the day payment is made; or

(B) the payer has sighted a certificate which has been issued with a date subsequent to the date on which the earlier advice of cancellation was received; and

#### 327C(7) (c) (v)

The payer does not have any other grounds for believing that the recipient is not eligible to be issued with a certificate of exemption; and

#### 327C(7) (c) (vi)\*

The payer does not have any other grounds for believing that the interest or dividends are income derived by a person other than the person to whom the payment is being made; or

#### 327C(7) (d)

In the case of a payment which consists only of dividends the payer has taken reasonable steps to confirm that the recipient is a company in whose hands the dividend income is treated as exempt income (by the application of S 63(2)) or would have been but for the application of paragraph (e) of S63 (3) (a new paragraph inserted by this Act referring to dividends arising through the forgiveness of debt) and that the payer does not have any grounds for believing that the dividends are derived by any person other than the recipient.

\* Note: Amending legislation has been introduced in the Taxation Reform Bill (No 6) to

restrict the application of Section 327C(7)(c)(vi) to payments made to banks, building societies and trustee banks. This ensures that payers of interest can not avoid making deductions of RWT by paying to a lender through a bank, building society etc which has a Certificate of Exemption.

### **327C Subsection (8) Relief Where Payer not Aware that Payment Constituted Resident Withholding Income**

Where any payer to whom paragraphs (a) to (c) of S 327M (1) applies (banks, building societies and trustee banks ) receives a payment, or makes a payment at the request of another person (i.e. as agent or trustee) for the purpose of determining whether that payment constitutes resident withholding income such payment will not be deemed to constitute RWI if the payer could not reasonably be expected to know that the payment did constitute RWI.

### **Branch Registers**

Section 327C applies in respect of dividends paid by a New Zealand branch share register on behalf of a non-resident company. In relation to taxable bonus issues where a non-resident company issues bonus shares through a branch register in New Zealand then RWT is payable. Where the non-resident company issues the bonus shares direct to shareholders the treatment is the same as it would be for dividends, i.e., no RWT is payable.

### **327D Requirement for Agents or Trustees to Make Resident Withholding Tax Deductions on Receipt of Payments**

Where a person receives interest as an agent or trustee for another person, that person (the agent) will only be obliged to make a deduction of RWT from that payment if the payer of that payment was liable to deduct and either failed to do so, or did not deduct the full amount.

If such an event arises the first person is obliged to make a deduction of RWT (or the amount of the deficiency of that tax ) at the time of receiving the payment.

327D Subsection (1) Where -

- a) A payment which consist in whole or part of resident withholding income has been made; and
- b) The payer was liable to deduct RWT (or would have been but for the application of S327C (7); and

c) RWT was not deducted from that payment, or was not deducted in full; and

d) the recipient of that payment is, in relation to that payment, an agent or trustee for another person -

the recipient shall deduct RWT, or any balance of RWT from that payment. The deduction shall be forwarded to the Commissioner by the 14th of the following month.

327D Subsection (2) Subsection (1) does not apply where the recipient holds a valid Certificate of Exemption and received the payment as a trustee of a trust (not being a bare trust).

327D Subsection (3) Where a person is required under this section to make a deduction of RWT from a dividend which is not a specified dividend the RWT deduction shall be treated as if the dividend was a specified dividend.

This covers the situation where an agent who is not covered by the imputation or dividend withholding payment regime pays dividends on behalf of a principal. The recording and reporting provisions which apply to interest and specified dividends also apply to such dividends.

327D Subsection (4) Where a person would be required to make a deduction of RWT from a dividend which is a taxable bonus issue a deduction is not to be made from the taxable bonus issue, but an amount equal to the amount which would be required to be deducted, if the amount of the bonus issue was paid in cash, is required to be paid to the Commissioner. Such an amount will be treated as if it were resident withholding tax.

327D Subsection (5) Except in so far as section 327C(6) applies (which relieves a payer from an obligation to deduct RWT when there has already been a sufficient deduction from a particular payment) nothing in this section shall restrict the provisions of section 327C which require any person to make a deduction of RWT.

### **327E Payment of Deductions of Resident Withholding Tax to Commissioner**

This section determines how and when tax deductions which have been made from Resident Withholding Income are paid to the Commissioner.

Payers of interest are required to make an estimate at the beginning of each year of the total amount of tax deductions which they will make in that year. They have been divided into two groups based on

the amount of tax deductions which they estimate they will be making for each month of the ensuing year. Potential payers will form part of an IRD payers' register after completion of form IR 15R.

Payers who cease to be payers pursuant to either subsection (6) or (7) will complete a Cessation form IR 15K.

**327E Subsection (1) Payers Making Tax Deductions of More Than \$500 per Month**

All payers of interest who estimate that they will make tax deductions totalling more than \$500 in each month of a particular year are required to pay their total tax deductions made in each month to the Commissioner by the 14th day of the month following the month in which the deductions were made.

**327E Subsection (2) Payers Making Tax Deductions of less than \$500**

Payers of interest who estimate that they will not make tax deductions totalling more than \$500 in each month of a particular year are required to pay tax deductions to the Commissioner in two instalments.

For example, payers, such as Credit Unions, who normally pay the bulk of members' interest either annually or half yearly thus substantially exceeding \$500 in one or two months only during any year, and then paying minimal amounts under \$500 in the other months, would fall into this category.

Example


Tax deductions made in the period between 1 April and 30 September are to be paid to the Commissioner by the 14th October next.

Tax deductions made in the period from 1 October to 31 March are required to be paid to the Commissioner by the 14 April next.

**327E Subsection (3) Twice-yearly Payer Exceeding the \$500 Threshold**

Where a payer who has previously estimated that total tax deductions from payments of interest in each month for that year will be less than \$500 makes deductions in any month which takes the total deductions made since the last 6 monthly payment date above \$500 the aggregate of tax deductions held by that payer shall be paid to the Commissioner by the 14th of the following month.

Example:


**327E Subsection (4) Payers of Dividends**

Payers of dividends which are Resident Withholding Income and from which deductions of RWT are made shall pay those deductions to the Commissioner by the 14th of the month following the month in which the dividends are paid.

**327E Subsection (5) Information to Accompany Tax Deductions Paid to the Commissioner**

Payments of deductions of withholding tax forwarded to the Commissioner shall be accompanied with certain details on an authorised form - IR 15P.

**327E Subsection (6) Payer Ceasing to Carry on a Taxable Activity**

Where a person who will not be retaining a Certificate of Exemption:

- ceases to carry on a taxable activity; or
- ceases to carry on any such taxable activity in New Zealand, -

that person shall pay to the Commissioner (by the 14th of the following month) all tax deductions which have been made and not earlier paid to the Commissioner.

**327E Subsection (7) Person ceases to hold a Valid Certificate of Exemption**

Where a person in any month ceases to hold a valid Certificate of Exemption, and is not required to



make deductions due to continuing in a taxable activity, that person shall pay to the Commissioner all resident withholding tax deductions made, and not earlier paid, by the 14th of the following month.

### **327F - Resident Withholding Tax Deductions Varied to Correct Errors**

Where there has been an error in the tax deduction made from resident withholding income, the error may be corrected from subsequent payments in the same year.

In the case of dividends, which are not specified dividends, corrections can only be made in the period between the date of deduction and the date of payment to the Commissioner. Because of the limitations imposed by the imputation regime on the number of credits of any sort which can accompany dividends there is no room to remedy underdeductions or shortfalls in deductions from one issue of dividends by an increase in deductions in a subsequent issue.

### **327F Subsection (1) Deductions not made, or insufficient deduction made.**

This section deals with a payer's liability to deduct RWT from a payment of interest or specified dividends.

Where a payer has failed to make a deduction from a payment or has deducted less than the prescribed amount the payer may correct that default by either

- deducting the amount in default from any subsequent payment made in the same year in which the default occurred; or
- otherwise recover from the recipient of the payment a sufficient amount to correct the deficiency.

Provided that this shall not apply where any other person has made good the deficiency.

### **327F Subsection (2) Overdeduction from interest or specified dividends resulting from payer error may be refunded**

Where a payer makes an error which results in an overdeduction from a payment, either of interest or specified dividends (e.g., dividends paid by a non-resident company through an agent) the payer may pay the excess to the recipient in the period between the making of the deduction and the due date for payment of the RWT deduction to the Commissioner. In that event, an amended RWT

deduction certificate may be required, if one was prepared at the time of making the deduction.

### **327F Subsection (3) Overdeduction from dividends other than specified dividends may be refunded**

Where a payer makes an error which results in an overdeduction from a dividend (not being a specified dividend) paid by a New Zealand company the payer may pay the excess to the recipient in the period between the making of the deduction and the due date for payment of the RWT deduction to the Commissioner. In that event, an amended shareholder dividend statement shall be issued.

### **327F Subsection (4) Overdeduction resulting from recipient's error to be paid to Commissioner**

Where a payer deducts an amount in excess of the prescribed deduction due to an error or omission on the part of the recipient the full amount deducted shall be paid to the Commissioner on the due date. The payer shall not be liable to refund that excess to the recipient or any other person.

### **327G Refunds of Deductions**

327G Subsection (1) Tax deductions made from interest paid to tax exempt persons and received by Commissioner may be refunded.

Where an RWT deduction -

- has been made in accordance with the provisions of this Part of the Act; and
- has been paid to the Commissioner, and
- is in excess of any RWT deduction (if any) which was required,

an amount equal to that tax deduction may be refunded to the person deriving the payment from which the deduction was made.

### **327G Subsection (2) Refund application to be in writing**

Any person who is entitled to a refund because RWT has been deducted in error (or over-deducted) must make an application in writing on an approved form - IR 15F.

### **327G Subsection (3) Commissioner requires evidence**

The Commissioner shall not make a refund under

this section without satisfactory evidence (such as proof that the tax deduction was made, and that the deduction has been paid to the Commissioner).

**327G Subsection (4) Refund may be applied to other amounts due**

Where any person to whom a refund is due has any amount due to be paid in accordance with any other provision of this Act the Commissioner may apply the refund towards satisfying that amount due.

**327G Subsection (5) Any excess refund may be recovered from recipient**

Where the Commissioner is satisfied that an excessive amount has been refunded to a recipient that amount can be recovered as if it were income tax. The due date for recovery of an excess amount refunded shall be:-

- where the recipient led the Commissioner to pay the refund by wilful default or neglect, the date upon which the refund was paid;
- in any other case, on the 5th working day of the month following the month in which the person is notified that the refund is to be repaid.

**327G Subsection (6) Refund to be made from Consolidated Fund without further appropriation**

Refunds payable pursuant to this section are to be made from the Consolidated Fund and no further appropriation is required.

**327H Resident Withholding Tax deduction certificates (IR 15)**

This section requires payers of interest or specified dividends to provide recipients with tax deduction certificates showing gross interest paid or derived and deductions made. Certificates must be given by 20th May in relation to the previous year and must be given earlier on request in certain circumstances. They can be given in relation to total payments or each payment. A payer who pays interest of less than \$20 to any particular recipient is not required to give a tax deduction certificate in respect of that interest unless requested. Where 2 or more persons are joint account holders, only one tax deduction certificate need be issued.

**327H Subsection (1) Payer to prepare a certificate with details of interest or specified dividends paid and deductions made.**

Every payer, including persons who make payments as agents or trustees) shall prepare tax deduction certificates to notify recipients of interest or specified dividends of the amount of payments made and the amount of tax deductions which have been made. The information is to be given on an approved form of certificate and will contain the information detailed in subsection (6)

It is anticipated that the Commissioner will approve modifications to forms already issued by payers, such as bank statements, etc., provided they meet the requirements concerning information to be supplied.

**327H Subsection (2) Tax Deduction Certificate may be issued annually or at time of payment**

Note. In this section the term-

- *recipient* refers to any person to whom resident withholding income is paid, or by whom such income is derived in accordance with section 327D.
- *payer* refers to any person who is making a payment direct to a recipient or to any agent or trustee who has received a payment on behalf of a recipient and is required to make an RWT deduction in accordance with S327D.

A tax deduction certificate may, at the payer's discretion, be prepared and supplied to a recipient either in respect of all amounts paid, or for each amount paid in any one year. The certificate must be given not later than the 20th of May in respect of payments in the immediately preceding year ended 31st March.

**327H Subsection (3) Tax Deduction Certificate to be provided on request**

A recipient may, during a relevant year, request a payer to provide a tax deduction certificate in respect of deductions made during that year where a financial arrangement in respect of which a tax deduction was made has matured, been remitted or disposed of.

The payer shall provide such a tax deduction certificate within 20 working days of the request being made.

PROVIDED that no payer shall be obliged to

provide a tax deduction certificate pursuant to this section before the 20th May 1990 except where the Commissioner so requires.

This proviso is in recognition of the initial difficulties anticipated by the financial institutions during the commencement of this regime.

**327H Subsection (4) Tax Deduction Certificate to be provided on cessation of taxable activity**

Where a person who will not continue to hold a Certificate of Exemption, in any month:

- ceases to carry on a taxable activity; or
- ceases to carry on any such taxable activity in New Zealand, -

that person shall prepare and provide to recipients any required tax deduction certificates by the 20th day of the following month.

**327H Subsection (5) Person ceases to hold a Valid Certificate of Exemption**

Where a person in any month ceases to hold a valid Certificate of Exemption, and is not required to make deductions due to continuing in a taxable activity, that person shall prepare and provide to recipients any required tax deduction certificates by the 20th day of the following month.

**327H Subsection (6) Information to be included on tax deduction certificates**

Tax deduction certificates shall contain the following information:

- a) the full name and relevant address of the payer;
- b) full name and last known address of the recipient except where the payer is unable to obtain such details of the recipient, after making reasonable enquiries;
- c) type of resident withholding income to which the certificate relates (either interest or specified dividends);
- d) the date on which the deduction was made, or the year to which the certificate relates (in cases where an annual total is provided);
- e) the total amount of tax deductions, and the total amount of the income from which the deductions were made;
- f) Such further information as the Commissioner may require.

**327H Subsection (7) No Certificate where annual interest payment was less than \$20**

Where the total interest paid by a payer to a recipient in any one year is less than \$20 a tax deduction certificate need not be supplied in relation to that payment or tax deduction unless a request has been received in writing for the issue of a certificate which must be supplied within 20 working days.

**327H Subsection (8) Tax deduction certificates to be retained for 3 years.**

Tax deduction certificates must be retained by the person to whom they are provided for 3 years unless the Commissioner otherwise permits e.g. where the Commissioner has requested earlier delivery of certificates by recipients.

**327H Subsection (9) Joint Accounts**

Where two or more persons hold joint financial arrangements, bank accounts etc, a payer preparing a tax deduction certificate may treat those persons as one person; i.e. only issue one certificate. The certificate shall be issued in the name of the holders jointly unless the holders specify any one or more of those holders as the person(s) to whom the certificate should be supplied.

**327H Subsection (10) Tax deduction Certificate deemed to have been provided**

A tax deduction certificate is deemed to have been provided to a recipient where it is given to the recipient personally, sent by post to the last known place of abode or business or given personally or sent by post to any other person authorised to act for the recipient.

**327H Subsection (11) Transitional Provision**

Where the Commissioner is satisfied in relation to withholding tax deductions made in the year commencing 1 April 1989 that a person, or class of persons is unable to comply with the above requirements the Commissioner may vary those requirements in one or more of the following ways:

- a) reducing the nature or amount of information required to be included in the RWT deduction certificate;
- b) extending the time within which the payer must prepare and provide the RWT deduction certificate;
- c) relieving the payer from the obligation to prepare and provided RWT deduction certificates.

**327I - Resident Withholding Tax Deduction  
Reconciliation statements - (IR 15S)**

This section requires all persons who deduct resident withholding tax in relation to interest or specified dividends to deliver to the Commissioner an annual statement showing total tax deductions which have been paid to the Commissioner, and total tax deductions which were required to be made as well as other information in respect of payments made. Copies of all tax deduction certificates should accompany this reconciliation statement, unless the Commissioner grants an exemption (an alternative).

**327I Subsection (1) Reconciliation statement approved form**

All persons who make tax deductions from interest or specified dividends during a year are required to furnish a reconciliation statement to the Commissioner by the 31st May of each year. The statement will be on an approved form and will include such information as the Commissioner may require.

**327I Subsection (2) Copies of tax deduction certificates and information on exempt interest recipients**

While copies of RWT deduction certificates which support the information contained in the Reconciliation statement are not required to accompany every reconciliation statement, the Commissioner is given wide powers to request such information as he may require.

Copies of all RWT deduction certificates or of a particular RWT deduction certificate may be requested by the Commissioner from any payer who furnishes an annual reconciliation statement.

Where a payer has paid interest or specified dividends to a person who holds a Certificate of Exemption, and the payer has therefore not made any tax deduction from such payments during a year the Commissioner may also request details including:

- Full name and last known address of a recipient;
- Total amount of interest or specified dividends paid to that recipient;
- In the case of any payments made after 1 April 1990 the tax file number shown on that recipient's Certificate of Exemption (except where the recipient is a registered bank, building society, trustee bank, trustee company or the Maori Trustee or Public Trustee);

- any other information which the Commissioner may require

Such information shall be in such form as the Commissioner may approve. This is intended to allow for the use of electronic tape, computer discs etc when payers provide details of tax deductions to the Commissioner.

**327I Subsection (3) Time by which information to be provided**

Any information requested pursuant to subsection (2) must be supplied to the Commissioner:

- where the Commissioner has requested such information not less than 30 working days before the 31st of May, the information shall be provided with the reconciliation statement;
- in any other case within 30 days of a request being made.

Following the repeal of section 429 from 1 October 1989 the provisions of this section will enable the Commissioner to request particular payers of resident withholding income to provide information as required. At least 30 days notice of such a requirement is mandatory.

Note: The expression "30 days" in being amended by the Taxation Reform Bill (No 6) to "20 working days".

**327I Subsection (4) Reconciliation statement where payer ceases business**

Where any payer who does not continue to hold a Certificate of Exemption -

- disposes of or ceases to carry on any taxable activity; or
- ceases to carry on any such business in New Zealand,

in any month during a year in which tax deductions have been made, that payer must, within 40 working days after the end of that month, furnish a reconciliation statement for that portion of the year during which tax deductions were made.

**327I Subsection (5) Reconciliation statement where payer ceases to hold a valid Certificate of Exemption**

Where any payer who does not continue to be required to make resident withholding tax deductions by virtue of carrying on a taxable activity, ceases to be entitled to hold a Certificate of Exemption in any month during a year in which tax deductions have been made, that payer must,

within 40 working days after the end of that month, furnish a reconciliation statement for that portion of the year during which tax deductions were made.

**327I Subsection (6) Power to vary**

The Commissioner may vary any of the requirements of this section.

**327J Disclosure of interest payments where no RWT deduction is required**

This section, which takes effect from 1 April 1990, requires disclosure of information relating to payments of RWI being interest which are deductible expenditure to the payer but from which no RWT deduction has been made.

It would apply in situations where, for example, a person borrows money for the purpose of purchasing shares. That person may return income from dividends and deduct any interest expense incurred but is not conducting "a taxable activity".

It also applies where deductions are not made because the total interest paid is less than \$5000 (Section 327C (5) refers.

**327J Subsection (1) Disclosure of deductible interest from which no tax deduction has been made**

Any person who makes any interest payment after 1 April 1990 which:

- (i) is not incurred in the course of or furtherance of a taxable activity and is therefore not subject to the provisions of Section 327C; or

from which no deduction is made because the total interest paid is less than \$5000 (section 327C(5); and

- (ii) is incurred in gaining or producing assessable income; and

- (iii) is paid to a non-exempt recipient;

is required to provide certain information with their annual income tax return.

This information includes the name, address and tax file number of all recipients of any payments of interest made during the year and the total amount of interest paid to each recipient, and such further information as the Commissioner may require.

**327J Subsection (2) Interest recipient to supply tax file number to payer on request**

A recipient who receives a payment of interest from which there has been no tax deduction made because the payment was not made in the course of a taxable activity, or because the payer had paid less than \$5000 in interest during that year, and who receives a written request from the payer for the tax file number of the recipient shall provide that number within 10 working days of receiving the request.

**327K Resident Withholding Tax deductions to be credited against Income Tax assessed**

RWT deductions made will be credited against income tax payable by the recipient. Initially, information obtained from RWT deduction certificates will be recorded in a recipient's annual return of income, but a taxpayer may be required to supply those certificates to verify information in the return.

**327K Subsection (1) Income and Specified dividends include any amount deducted**

Where any interest or specified dividends are derived from which RWT has been deducted the amount derived shall include the amount of the deductions made.

e.g. \$100 interest derived  
\$ 24 RWT deducted

\$ 76 actually paid, but \$100 deemed to be derived for the purposes of calculating assessable income.

**327K Subsection (2) Tax deductions to be credited**

Where resident withholding tax (excluding additional tax or penal tax) has been deducted from any interest or specified dividends derived by any person in any year, the Commissioner shall credit the total tax deductions made in that year in payment successively of

- a) any income tax payable by that person for that year;
- b) any income tax due and unpaid in respect of any previous year;
- c) any income tax due and unpaid in respect of any year after that income year, and if more than one, in the order of those years

and shall refund to the recipient any tax deductions not so credited.

**327K Subsection (3) Credits to be applied after Foreign Tax Credits or Imputation Credits**

This subsection provides an ordering rule so that credits arising from tax deductions shall be applied after any credit arising from Foreign Tax Credits (Section 293), or Imputation Credits (Section 394ZE).

This is because those credits are not refundable whereas RWT deduction credits are.

**327K Subsection (4) Information to be included in return of income**

The Commissioner shall not allow a credit of tax or pay a refund unless the Commissioner has received either an RWT certificate or other satisfactory evidence in writing, and any other information the Commissioner may require.

The intent of this provision is that taxpayers will record in the tax return the details of resident withholding income and the deductions made therefrom. If the information is inadequate the Commissioner can then request that the actual tax deduction certificates be forward to enable the information in the return to be verified.

**327K Subsection (5) Where claim is in excess of credit available Commissioner may refuse to allow claim**

Where the Commissioner believes that an excess amount has been claimed either as a credit or as a refund the claim may be refused.

**327K Subsection (6) Commissioner may recover any amount credited or refunded which was in excess of available tax deductions.**

Any amount which has been credited or refunded which was in excess of the amount of tax deductions made from RWI paid to a recipient shall be recoverable by the Commissioner and shall be due:

- a) Where the excess has been paid as a refund -
  - (i) if the person by wilful default or neglect led the Commissioner to allow the refund, on the date upon which the refund was paid; or
  - (ii) in any other case by the 5th working day of the month following the month in which the recipient is notified that the excess is payable.
- b) Where the excess has been allowed as a credit against income payable, upon the date on

which was payable the tax against which the excess tax credit was allowed.

**327K Subsection (7) Commissioner may alter assessments**

For the purposes of this section the Commissioner may at any time alter any assessment or determination notwithstanding anything in section 25 of this Act. (Section 25 sets time limits beyond which the Commissioner cannot reassess returns to increase a liability except in cases of fraud.)

**327L Resident Withholding Tax Deductions from Dividends deemed to be Dividend Withholding Payment Credits**

An RWT deduction is deemed to be a dividend withholding payment credit attached to a dividend under Part XIIB of the Act for certain purposes, such as reporting to the Commissioner and notifying shareholders. The foreign dividend withholding payment regime therefore provides the mechanism whereby a shareholder may claim the amount of the RWT deduction as a credit of tax.

**327L Subsection (1) - Definitions for the purposes of this section**

Certain terms which have been specially defined in various sections for purposes of the Imputation regime have to be re-defined here with reference to the original sections in which the terms are used to integrate the withholding tax regime with the imputation regime and the foreign dividend withholding payment regime

- “Dividend withholding payment account company” - 394ZK
- “Dividend withholding payment account return” - 394ZZC
- “Imputation credit account company” - 394A
- “Imputation return” - 394J

**327L Subsection (2) - Tax deductions from dividends deemed to be dividend withholding payment credits**

Any RWT deduction made from a dividend (not being a specified dividend) is deemed to be a dividend withholding payment credit and the company paying the dividend is deemed to be a dividend withholding payment account company for the purposes of the following provisions of the principal Act:

- a) Paragraph (h) of the definition of ‘residual income tax’ in S375;

This allows for credits arising through RWT deductions to be taken into account before arriving at an amount of residual income tax.

b) S394ZC, Dividends to include credits for Part IV of the Act.

Total dividend income derived includes the dividend paid, plus imputation credits or dividend withholding payment credits attached to the dividend.

c) S394ZD, Determination of amount of credit in certain cases.

Section 394ZD provides rules for determining the amount of imputation credit and dividend withholding payment credit in a variety of circumstances (refer to Appendix to TIB No 1 for a discussion of that section).

d) S394ZP, Credit of tax for dividend with holding payment credit in hands of shareholder.

Where assessable income of a taxpayer includes the amount of any dividend withholding payment credit the taxpayer is entitled to a credit of tax of the amount so included.

e) S394ZQ, Refund to non-resident or exempt shareholders

Where any dividend with dividend withholding tax credits attached is paid to a non-resident shareholder, or to a tax exempt shareholder, the shareholder may apply in writing for a refund of the attached credits.

f) S394ZR, Refund out of Consolidated Account

Refunds of dividend withholding payment credits may be paid out of the Consolidated Fund without further appropriation.

g) S394ZZB, Statement to shareholder when dividend paid

Where any dividend withholding payment credit is attached to a dividend, a shareholder dividend statement is required to be given to the shareholder.

### **327L Subsection (3) - Annual Information to be provided and means of providing**

Where RWT deductions are made from dividends, not being specified dividends, by a New Zealand resident company certain information is to be provided to the Commissioner

- In the case of a 'dividend withholding payment account company', the information is to

be provided in the company's annual dividend withholding payment return.

- In the case of an 'imputation credit account company' which is not also a 'dividend withholding payment account company', the information is to be provided in the company's annual imputation return.

(The methods of providing information in connection with payments of specified dividends are included in sections 327H & 327I.)

### **327L Subsection (4) Information to be completed at time of deduction**

Any resident company which pays dividends, which are not specified dividends, and makes RWT deductions therefrom is required to provide certain information to the Commissioner.

- Where a company is an 'imputation credit account company' that information is to be included in the company dividend statement prepared in accordance with section 394H.
- In any other case the information is to be included in an approved form showing:
  - The number of shares in respect of which the dividend is declared or, in the case of a bonus issue, the number of shares included in the bonus issue;
  - The date the dividend is declared and the date of payment of the dividend;
  - The total amount paid as dividends
  - Such further information as may be required.

### **327M Certificates of Exemption (IR 15C)**

Certain persons can apply for a certificate of exemption which enables them to receive interest and dividends without the deduction of RWT.

Included in this section are details of how to apply for a certificate of exemption, commentary on special rules for specific applicants, and an outline of the implications associated with the cancellation of the certificate.

### **327M Subsection (1) Persons who may apply for a Certificate of Exemption**

The following persons may apply for the issue of a certificate of exemption:-

- (a) Any registered bank;
- (b) Any building society;
- (c) Any trustee bank;
- (d) The Public Trustee, the Maori Trustee or any Trustee company;
- (e) Any person whose principal form of business is the borrowing of money, or accepting of deposits, or receiving of credit, or selling of any credit instrument, and the lending of money, or granting of credit or buying or discounting any credit instrument;
- (f) Any person who has derived total assessable income before allowable deductions in excess of \$2,000,000, as shown in their most recent return of income - provided all returns required to be filed under the Act have been filed by the due date;
- (g) Any person who believes in any income year that their income in the next accounting year will exceed \$2,000,000;

(This category provides for situations such as amalgamations and take-overs where future income can be estimated with a degree of certainty. It would also provide for a situation where a smaller business enters into a firm contract which will increase existing total assessable income above the \$2 million criteria, and numerous similar situations.)

- (h) Any person whose income is wholly or partly exempt from income tax through various provisions of Section 61. \* See Note below

This includes:-

- S 61 (2) Local or Public Authority \* See Note
- S 61 (23) Friendly Society
- S 61 (24) Scientific or Industrial research promoter
- S 61 (25) Charity
- S 61 (26) Charitable Estate
- S 61 (27) Charity - business income
- S 61 (28) Veterinary Services Promoter
- S 61 (29) Herd improvement promoter
- S 61 (30) Amateur sports promoter
- S 61 (32) Racing Clubs
- S 61 (33) District Improvements
- S 61 (44) Cornwall Park

- but the exemption only applies to the activities in respect of which the income is exempt, not to interest received for any other purpose;

- (i) S 61 (34) Non-profit body - however, as the exemption given to non-profit bodies under this subsection is only to the extent that the aggregate income of any such society or association, whether incorporated or not, does not exceed \$1,000, a blanket exemption will not be available for all non-profit bodies;

Note: The taxation Reform Bill (No 6) includes amendments to section 327M to:

- (1) clarify that nominee companies engaged in contributory finance arrangements and whose activities are governed either by rules made pursuant to the Law Practitioners Act 1982 or the Securities Act (Contributory Mortgage) Regulations 1988 are eligible for certificates of exemption.
- (2) provide that certificates of exemption may be issued to persons exempt from tax under other Acts and also to Local Authorities which were previously exempted under section 61(2) of the principal Act and are now exempt under section 61(2A) of the principal Act.
- (3) remove the requirement that persons making application for a certificate of exemption in respect of carry-forward losses, or other limited circumstances, have to complete a separate declaration in addition to the declaration on the actual prescribed application form.

### **327M Subsection (2) Application to be in writing**

The application for an exemption is to be on an approved form (IR 15E) and must state which category of exemption is applicable to the person applying. There will be a declaration to be signed by the applicant, or by an officer on behalf of the applicant, that the criteria are met.

Note: Each company in a group of companies must apply separately for a certificate of exemption. There is no provision for a single group registration.

### **327M Subsection (3) Commissioner may require further information**

The Commissioner may require further information including books of account, accounting information or any records needed in order to confirm an applicants status before the issue of a certificate of exemption.



**327M Subsection (4) Certificate shall be valid from date stated on Certificate**

After receipt of an application and any further information required the Commissioner may issue a Certificate of Exemption for such period as he shall determine. The certificate will be dated and will be valid from the date on the certificate. Where the certificate is issued for a limited period the date of termination will be shown on the certificate. The applicant's tax file number will also be shown on the certificate.

**327M Subsection (5) Certificate lost or destroyed may be replaced**

Where the Commissioner receives a satisfactory explanation of loss or destruction of a Certificate of Exemption, a replacement certificate may be issued.

**327M Subsection (6) Estimation of \$2,000,000 assessable income to be supported by evidence at end of accounting year**

Where a person has been issued with a Certificate of Exemption pursuant to an estimate that the person will derive in excess of \$2,000,000 total assessable income before allowable deductions in an ensuing accounting period, that person shall produce sufficient evidence within three months after that accounting year to satisfy the Commissioner that the threshold figure was exceeded. Otherwise, the Certificate may be cancelled (327N).

**327M Subsection (7) Where expectation of \$2 M assessable income not realised additional tax will be chargeable.**

Where a person has obtained an exemption in the expectation of exceeding \$2,000,000 of assessable income and does not reach that threshold additional tax will be charged on the amounts which would have been deducted from interest received by that person had that person not held a Certificate of Exemption.

Additional tax will be charged from each date on which any deduction would have been payable to the Commissioner, and will incur incremental penalties each following 6 months. (Section 327U refers)

**327M Subsection (8) Group members may combine to reach \$2,000,000 threshold of assessable income.**

Companies which are members of a group of companies (pursuant to Section 191 of the Act) may combine their income in the year to which the most

recently filed returns of income relate for the purposes of obtaining a Certificate of Exemption based on the \$2,000,000 threshold of total assessable income before allowable deductions.

**327M Subsection (9) Group provisions apply when estimating potential income above threshold.**

Where a company which is applying for a certificate of Exemption pursuant to subsection (1) (g) anticipates that it will be a member of a group for the relevant 12 month period that company may include the income of the whole group for the purposes of estimating that it will exceed the \$2,000,000 threshold.

**327M Subsection (10) Exclusion of inter group interest payments for purposes of \$2 million threshold**

A group of companies must exclude income derived from inter-group transactions when determining whether it satisfies the \$2 million test.

This is an avoidance measure targeted at group transactions which may otherwise be entered into to manipulate group profits.

**327M Subsection (11) Commissioner's discretion in respect of failure to meet the \$2 million threshold**

The Commissioner has a discretion to -

- a) issue a certificate of exemption; or
- b) permit the retention of a certificate; or
- c) remit the whole or part of any additional tax payable by virtue of ss (7), -  
where a person has failed to either maintain, or meet the expected \$2 million threshold. In exercising discretion the Commissioner needs to be satisfied that the failure is solely as a consequence of extraordinary circumstances that are -
- d) beyond the reasonable control of the person concerned; and
- e) not likely to be repeated in subsequent years; and
- f) in the case of remission of additional tax, circumstances which the applicant for a certificate could not reasonably have been expected to foresee.

**327M Subsection (12) Certificates may be issued where taxpayer in loss position or where aggregate allowable deductions not less than aggregate of assessable income**

Any person who is not eligible for a Certificate of Exemption under any of the above provisions may

be granted a certificate for a specified period in certain prescribed circumstances.

The Commissioner will need to be satisfied that either -

- the person will or is likely to incur a loss or
- is likely to be entitled to claim aggregate deductions from their assessable income which will exceed that income; or
- the person would, in each income year any part of which falls in the period for which the certificate is issued, be likely or entitled to claim resident withholding tax credits which would exceed that person's income tax liability for that year by more than \$500.

An application for a certificate under these provisions must be in writing on form IR 15E and should be accompanied by -

- a declaration by the applicant or any duly authorised officer of the applicant stating which of the above categories of this section applies for the proposed period of the certificate; and
- a set of budgeted accounts detailing, for the proposed period of the certificate of exemption
  - projected income; and
  - deductions; and
  - resident withholding tax credits; and
  - income tax liability of the person; and
- such further information in relation to the person or to the budgeted accounts as the Commissioner may require.

Note: The Taxation Reform Bill (No 6) includes an amendment to section 327M to remove the requirement that persons making application for a certificate of exemption under this subsection have to complete a separate declaration in addition to the declaration on the actual prescribed application form.

### **327M Subsection (13) Date of termination of Certificate to be date of Cancellation**

Where a certificate has been issued in terms of subsection (12) and is not immediately replaced by another valid certificate, the date of termination shown on the certificate will be treated as notification by the Commissioner to the holder of that certificate that the certificate is cancelled. All the

provisions of section 327N which covers cancellation of certificates will apply from the date of termination.

### **327M Subsection (14) No notification without copy of certificate issued under Ss12**

Any holder of a certificate issued in terms of subsection (12) and who notifies any other person (e.g. payers of interest or dividends) that the holder has a valid certificate of exemption, must provide the other person with a copy of that certificate.

### **327N Unincorporated Bodies**

Any body of persons may apply for a certificate of exemption if they meet the criteria discussed under S327M. The following rules apply to the members of such bodies.

### **327N Subsection (1) Definitions**

The following definitions apply to this section:-

“Body” means an unincorporated body of persons; and includes a partnership, a joint venture and the trustees of a trust;

“Member” means a partner, a joint venturer, a trustee, or a member of any body;

“Partnership” and “Partner” have the same meanings as in the Partnership Act 1908.

### **327N Subsection (2) Activities of particular bodies in relation to taxable activity not activities of individual members**

Where any body that carries on any taxable activity is issued with a certificate of exemption in relation to the carrying on of that taxable activity the following rules apply, for the purposes of this Part of this Act.

- a) The members of that body will not individually be entitled to a certificate of exemption in relation to that taxable activity; and
- b) Any payments made in the course of that taxable activity will be deemed to be made by that body, and not by the members of that body; and
- c) Any payment received by any member of that body in their capacity as a member of that body in the course of the taxable activity shall be deemed to be made by that body and

deemed not to be received by that individual member; and

d) The certificate of exemption shall be in the name of the body, or where the body is the trustee of a trust, in the name of the trust; and

e) Subject to subsection (3) any change of members of that body shall have no effect.

**327N Subsection (3) Members of body holding Certificate of Exemption jointly and severally liable**

Every member of a body which has a certificate of exemption in relation to a particular taxable activity is jointly and severally liable with any other member for all resident withholding tax payable. Where a member is an individual, in the event of that member's death, that member's estate shall be severally liable for any unpaid RWT.

Where any such body is a partnership, joint venture or the trustees of a trust, a member will not cease to be a member until any change of membership is notified in writing to the Commissioner.

**327N Subsection (4) Notice to body deemed to be served on all members of that body**

Any properly served notice addressed to a body by the name in which a certificate of exemption was issued is deemed to be served on that body and on all the members of that body.

**327N Subsection (5) Requirement of this Part imposed jointly and severally on all members**

Subject to subsection (6) any requirement of this Part of the Act for any thing to be done shall be the joint and several liability of all members of the body to do that thing. Once any liability has been fulfilled by any one member that will satisfy the obligation on all members.

**327N Subsection (6) Requirements where body has wide membership**

Subject to subsection (3) the obligations of any body which is not a partnership, joint venture or trustees of a trust, and the affairs of which are managed by members or a committee or committees of its members shall be the joint and several responsibility of

a) Every officer such as president, chairman, treasurer, secretary or similar; or

b) In default of any such officer, every member who holds office as a member of a committee.

Where any obligation has been done by one of the persons in categories a) or b) above that will be sufficient compliance with any requirement.

**327O Cancellation of Certificates of Exemption**

The Certificates of Exemption remain valid unless cancelled.

This section states the circumstances in which a Certificate of Exemption may be cancelled.

**327O Subsection (1) Holder of Certificate of Exemption to inform Commissioner when circumstances change, and to return the Certificate.**

Where any person who holds a Certificate of Exemption ceases to come within the basis of exemption under which the certificate was issued that person shall, within 5 working days of becoming aware of the fact that they no longer meet the criteria, inform the Commissioner in writing that the exemption no longer applies and return the Certificate of Exemption.

The Commissioner may request details of all persons to whom the person has shown the certificate for the purposes of gaining an exemption, and in this case that information is to be supplied within 5 working days.

This is to enable the Commissioner to inform the payers of interest or dividends that the Certificate has been cancelled.

**327O Subsection (2) - Commissioner may cancel Certificate in certain circumstances**

The Commissioner may cancel any person's certificate of exemption at any time in the following circumstances:

(a) If the Commissioner believes that the basis of exemption specified in the application no longer applies;

(b) If the person is not within the basis of exemption applied for but has obtained the certificate on the basis of misleading or insufficient information;

(c) Where the certificate was obtained on the basis of an estimate that income in the following accounting year would exceed \$2,000,000 and -

the evidence supplied within the 3 months after the 12 month period shows that the assessable income derived did not exceed \$2,000,000; or where the person does not provide the required evidence within the 3 month period; or

where the Commissioner has reason to believe that the evidence furnished by the person is incorrect or misleading;

(d) If the person has not paid any income tax due and payable by the due date.

Whenever the Commissioner cancels a person's certificate notice shall be given in writing to that person that the certificate has been cancelled and that it should be delivered to the Commissioner within 5 working days. The Commissioner may also ask for details of all payers to whom the person has shown the Certificate for purposes of obtaining an exemption from deductions.

Except where a certificate has been cancelled because income tax due has not been paid, the Commissioner shall not cancel a certificate of exemption where a holder ceases to meet one set of criteria while notwithstanding still meeting another set of criteria.

### **327O Subsection (3) Commissioner may inform**

The Commissioner may inform any person of the cancellation of a Certificate of Exemption at any time.

### **327O Subsection (4) Person whose Certificate is cancelled to inform payers**

Any person who is notified that their Certificate of Exemption has been cancelled shall, within 5 working days of receiving notification, notify in writing all payers of resident withholding income to whom they have previously shown the Certificate that this has been cancelled.

### **327O Subsection (5) Publication of Cancellations**

By the 30th June each year the Commissioner shall publish -

- a list of all Certificates of Exemption which have been cancelled during the previous year, unless a further certificate has been issued subsequently in that year; and
- a list of all certificates of exemption which have been re-issued, not within that same year. i.e. where the certificate was cancelled and details of the cancellation published in a prior year.

The Commissioner shall also publish quarterly, in April, July, October and January, in the last issue of the Commercial edition of the Gazette in each of those months -

- a list of all certificates cancelled in the quarter which ended on the last day of the previous month; and
- a list of re-issued certificates which have been re-issued, not within that same 3 month period, i.e. where the certificate was cancelled and details of the cancellation published in a prior Gazette.

### **327O Subsection (6) Cancelled certificates to be returned to Commissioner**

Where a person who has a certificate cancelled is requested to deliver such certificate to the Commissioner that person shall deliver all original copies which have been issued.

### **327O Subsection (7) Certificate ceases to be valid 5 working days after publication or notification**

Where notice of cancellation of a Certificate of Exemption appears in an issue of the Gazette the certificate shall cease to be valid 5 working days after publication date.

Where any person is advised by the Commissioner, or by the person to whom the Certificate had applied, the certificate shall cease to be valid 5 working days from such notice being given.

These provisions incorporating a 5 working day grace period are to allow for financial institutions or other persons to update any EDP or computer programmes to commence deductions of RWT.

In practice it is intended to ensure that cancellations are notified, or take effect from dates which will not interfere with the end of the month interest calculations of institutions.

## **327P RECORDS TO BE KEPT**

### **327P Subsection (1) Meaning of "Records"**

"Records" is given the same meaning as in S 428 which details many of the standard business and accounting records which are required to be kept by persons deriving income.

### **327P Subsection (2) Additional records to be kept by persons making deductions**

Every person who is required to make tax deductions from resident withholding income shall keep, in English, sufficient records to enable the

Commissioner, at any time, to ascertain readily the following information:

- a) The amount of the payment before any deduction;
- b) The amount of the resident withholding tax deduction;
- c) The date of the payment;
- d) The full name and last known address the recipient of the payment;
- e) In the case of an interest payment, any number used to identify the financial arrangement in relation to which the interest was paid; (i.e. bank account number, etc)
- f) such other information as the Commissioner may prescribe.

### **327P Subsection (3) Records required where payments made to holders of Certificates of Exemption**

Every person who makes payments of interest or pays dividends, from which deductions are not made because the recipient holds a Certificate of Exemption shall keep in English sufficient records to enable the Commissioner, at any time, to ascertain:-

- a) The amount and date of each payment
- b) Full name and last known address of recipient
- c) Each recipient's Certificate of Exemption number

### **327P Subsection (4) Details of financial arrangements**

Payers who are required to keep records pursuant to either subsections (2) or (3) i.e. whether or not deductions were made, shall also record in relation to each recipient of interest or specified dividend sufficient information to enable all financial arrangements under which interest has been paid to that recipient to be identified.

### **327P Subsection (5) Details in respect of payments made by non-business taxpayers and in respect of recording Tax file numbers**

Persons required to report details to the Commissioner regarding either payment of interest from which deductions are not made or details of the tax file numbers of persons receiving resident withholding income from which deductions are required to be made, shall keep those records in English to allow verification by the Commissioner.

### **327P Subsection (6). Records to be retained in safe custody for 10 years**

Reasonable precautions should be taken for the safe custody of all required records.

Records required for the RWI regime are required to be retained for 10 years except where the Commissioner has given notice in writing that retention is not required; where the records have been required to be provided to another person; or where the person is a company which has been wound up and dissolved-.

## **327Q RECOVERY OF RESIDENT WITHHOLDING TAX DEDUCTIONS**

### **327Q Subsection (1) Deduction in Trust for Crown**

Resident withholding tax deductions are held in trust for the Crown. They shall not be the property of the person who is required to pay them to the Commissioner. In the event of the bankruptcy or liquidation of the deductor, or of any assignment for the benefit of the person's creditors, the deductions shall not form part of the deductor's funds.

### **327Q Subsection (2) Ranking of unpaid deductions**

The provisions of S365(2) which deal with unpaid PAYE deductions made by an employer are paralleled here.

- a) Any unpaid deductions which are deemed to be held in trust rank in the event of bankruptcy, or an assignment for the benefit of creditors of the person who made the deduction, in priority after claims in respect of wages etc. and in priority to any other claims.
- b) In the event of a liquidation or receivership, where unpaid deductions were made by a company, the amount of the tax deduction shall rank after the debts referred to in S308 (1) of the Companies Act 1955. Where the assets of the company are insufficient to meet the amount of the tax deduction it has priority over the claims of holders of debentures under any floating charge.

### **327Q Subsection (3) Application of section**

This section applies notwithstanding anything in any other Act, and in particular section 308 of the Companies Act 1955 shall apply subject to this section.

## **327R UNPAID RESIDENT WITHHOLDING TAX DEDUCTIONS CONSTITUTE CHARGE ON PAYER'S PROPERTY**

### **327R Subsection (1) Unpaid deductions constitute a charge on Payer's Property**

Where any payer fails either to deduct the full amount of RWT deduction required, or to pay any deductions made to the Commissioner, an amount equal to the amount unpaid (together with any additional tax or penal tax ) shall constitute a charge on all the real and personal property of the payer.

Where judgement (in any Court action for recovery of the amount outstanding) is obtained, any fees, costs or expenses included will also form part of that charge.

### **327R Subsection (2) Charge over property of person liable**

These provisions parallel the provisions in the source deduction regime, to enable a charge to be secured over the property of a person who fails to account for RWT deductions.

The provisions of S367 detail priority of charges, registration, giving of notices, releasing, operating, enforcement, vesting orders and the effects of a vesting order.

### **327R Subsection (3) Ranking of charge**

Any amount secured under this section shall rank equally with amounts secured under S 367 ( PAYE deductions) in any receivership or liquidation of any company, or in any bankruptcy or creditors' assignment where the payer of the RWI is an individual.

## **327S PERSON FAILING TO MAKE RESIDENT WITHHOLDING TAX DEDUCTIONS**

### **327S Subsection (1) Default deemed debt due to Commissioner from date due for payment**

Where a payer fails to make an RWT deduction as required, the amount which should have been deducted will constitute a debt payable to the Commissioner and will be deemed to have become due on the day on which it should have been due to be paid to the Commissioner had it been properly deducted.

### **327S Subsection (2) Commissioner may recover from payer and/or recipient**

The Commissioner has the right to recover the amount of any RWT deduction which should have been made from the payer, in addition to the right to recover the amount of income tax payable by the recipient in respect of the resident withholding income from which the deduction should have been made.

The Commissioner may take whatever steps are necessary to recover the amount from both the payer and the recipient; from either of them; or partly from one and partly from the other.

### **327S Subsection (3) Payment made by person other than person liable**

Where any payer who has a debt due in respect of unpaid tax deductions can satisfy the Commissioner that the resident withholding tax payable by that payer has been paid by any other person that payment shall be deemed to be made by the payer with the initial liability.

## **327T ASSESSMENT OF RESIDENT WITHHOLDING TAX DEDUCTIONS TO BE MADE UNDER THIS PART OF THIS ACT**

In circumstances where a payer has either failed to make an RWT deduction, or having made a deduction fails to pass it on to the Commissioner, then a formal assessment may be made which will enable any outstanding money to be collected using the standard procedures used for outstanding income tax.

### **327T Subsection (1) Power to make assessments**

The Commissioner may make an assessment of any amount which becomes due or payable and the person to whom the assessment is issued shall be liable to pay that amount unless an objection made to that assessment, either on the grounds that the amount is excessive, or that that person is not liable to account, is upheld.

### **327T Subsection (2) Other sections to apply**

Other sections of the Act are hereby made applicable to an assessment issued under this section. They are

S 23 - Authority to amend assessments.

S 25 - Limitation of time for amendment of assessments

S 26 - Validity of assessments not affected by failure to comply with any of the sections of the Act;

- S 27 - Assessment deemed correct except on proceedings on objection;
- S 28 - Copies or extracts of returns or assessments shall be sufficient evidence;
- S 29 - Notice of assessment to be given as soon as convenient after making the assessment, but failure to give such notice shall not invalidate the assessment;

They apply as if -

- the term “tax already assessed” included an amount assessed under subsection (1); and
- the term “taxpayer” used in sections 23, 27 & 29 shall include a person who is assessed under subsection (1); and
- the term “income tax for any year” in section 25(1) included an amount assessed under subsection (1) of this section; and
- the term “income” in section 25 (2) included an amount of resident withholding income.

**327T Subsection (3) Assessment subject to objection**

An assessment made in connection with RWT shall be subject to the objection procedures detailed in Part III of the principal Act in the same manner as if the outstanding amount was income tax imposed under section 38. The terms “income tax” and “tax” as used in Part III shall include any amount assessed under this section, and the term “taxpayer” shall include a person who is assessed.

**327U ADDITIONAL TAX FOR DEFAULTS**

**327U Subsection (1) Additional tax imposed**

Where any person either fails to deduct RWT or having made a deduction fails to pay the amount of the RWT deduction to the Commissioner an additional tax of ten percent of the amount unpaid shall be payable from the date failure occurs.

If the amount outstanding, and any additional tax is unpaid at the end of 6 months, a further ten percent of the total shall be payable.

Ten percent will continue to be added for each consecutive period of 6 months thereafter until the total amount outstanding is paid.

**327U Subsection (2) Time of deduction**

An RWT deduction is deemed to have been made at the time of payment of net resident withholding income.

**327U Subsection (3) Payment by other person deemed to be made by first person for purposes of determining additional tax liability**

A person (the first person) who is liable to pay any amount of additional tax in relation to a failure to make an RWT deduction, or failure to pay to the Commissioner any tax deduction which has been made may be able to satisfy the Commissioner that a second person has made a deduction, or paid the outstanding amount to the Commissioner.

If the Commissioner is so satisfied, for the purposes of determining the liability of the first person to pay any additional tax, the payment will be deemed to have been made by the first person.

**327U Subsection (4) Nature of Additional Tax**

Additional tax imposed under this section is deemed to be of the same nature as the amount on which it is imposed, but will not give rise to credits under Section 327K(2) or to dividend withholding payment credits.

**327U Subsection (5) Other Parts of the Act to apply**

Subject to this Part, other Parts of the principal Act apply to any additional tax imposed by this section as if it were additional tax imposed under section 398(2) and as if the person liable to pay were the taxpayer.

A particular application relates to Section 413 which gives the Commissioner discretion to grant relief from additional or incremental tax where it is equitable to do so.

**327V OFFENCES**

**327V Subsection (1) Specific offences are committed under this Part of the Act by any person who:**

- a) pays resident withholding income and fails to make a required deduction; or
- b) having made deductions of RWT applies that deduction for any purpose other than payment to the Commissioner; or
- c) makes any false or misleading application for a Certificate of Exemption; or

misleads, attempts to mislead or gives any false information to the Commissioner or any officer of IRD, or any other person in relation to any matter or thing affecting either RWT deductions, or Certificates of Exemption; or

- d) alters any Certificate of Exemption; or
- falsely claims to be the person named in a Certificate; or possesses any imitation of a Certificate of Exemption; or causes or attempts to cause any person to make a smaller deduction of RWT or to refrain from making a deduction by the production of any document; or
- e) attempts to obtain all or any part of a RWT deduction made by any other person; or
- f) fails to inform the Commissioner that a Certificate of Exemption should be cancelled because the grounds for the issue of the exemption no longer apply; or
- having had a Certificate of Exemption cancelled, fails to notify all persons from whom resident withholding income is received that the Certificate has been cancelled; or
- g) fails to supply either an RWT deduction certificate or a shareholder dividend statement where appropriate.

**327V Subsection (2) Failure to Account - time of offence**

To determine when an offence against subsection (1) (b) occurs an RWT deduction shall be deemed to be made at the time any payment of the net amount of resident withholding income is made, and the RWT deduction shall be deemed to have been applied for another purpose if the amount of the deduction is not paid to the Commissioner on the due date.

There is a proviso that no person shall be convicted of an offence under subsections (1) (a) or (b) if the Court is satisfied that the RWT deduction has been accounted for and that the reason for non payment by due date was due to illness, accident or causes outside the person’s control.

**327V Subsection (3) No offence where deduction not made & payer subsequently found to be “in business”**

Where failure to make a deduction results from a person concluding, on reasonable grounds, that the payment was not made in the course of conducting a taxable activity no person shall be convicted of an offence.

**327W PENAL TAX FOR DEFAULT IN MAKING OR PAYING RESIDENT WITHHOLDING TAX DEDUCTIONS**

**327W Subsection (1) Penal Tax payable**

Where a payer either:-

- (a) fails (whether in whole or in part) to deduct resident withholding tax; or
- (b) having made an RWT deduction knowingly fails to pay that amount to the Commissioner,-

penal tax shall be chargeable in addition to any other penalty. Any penal tax charged shall not be more than treble the amount of the deficient deduction.

**327W Subsection (2) Failure to Account - time of offence**

To determine when an offence against subsection (1) (b) occurs an RWT deduction shall be deemed to be made at the time any payment of the net amount of resident withholding income is made, and the RWT deduction shall be deemed to have been applied for another purpose if the amount of the deduction is not paid to the Commissioner on the due date.

There is a proviso that no person shall be chargeable with an offence under subsection (1) (b) if the Commissioner is satisfied that the RWT deduction has been accounted for and that the reason for non-payment by due date was due to illness, accident or causes outside the person’s control.

**327W Subsection (3) Nature of Penal Tax**

Penal tax imposed under this section is deemed to be of the same nature as the deficient deduction and recoverable accordingly.

Penal tax paid will not give rise to a RWT credit.

**327W Subsection (4) Application of other Parts**

Subject to this Part, other Parts of this Act apply to any penal tax imposed by this section as if -

- a) it were penal tax imposed under section 420;
- b) the person liable to pay were the taxpayer; and
- c) the deficient deduction were deficient tax payable for the same year of assessment as that in which the deficient deduction became due and payable to the Commissioner.



### **327X AGREEMENTS NOT TO MAKE RESIDENT WITHHOLDING TAX DEDUCTIONS TO BE VOID**

Any agreement not to make any resident withholding tax deduction required to be made by this Part of the Act shall be void.

### **327Y CONSEQUENCE OF INABILITY TO PROVIDE TAX FILE NUMBERS**

Relieves a person from an obligation to provide a tax file number where they are unable, despite making reasonable efforts, to obtain a tax file number from an other person.

This applies in respect of -

S327J - Disclosure of interest payments where no resident withholding tax deduction required;

S327ZB - Disclosure of transactions in financial arrangements

S327ZD - General disclosure of tax file numbers

### **327Z NON-RESIDENT WITHHOLDING TAX DEDUCTED IN SUBSTITUTION FOR RESIDENT WITHHOLDING TAX**

**327Z Subsection (1)** Where a person makes or receives a payment which is considered at the time to be non-resident withholding income but was in fact derived by a resident there will be no subsequent obligation to pay any amount of resident withholding tax provided that reasonable inquiries were made at the time of payment.

**327Z Subsection (2)** For the purpose only of determining the liability under the resident withholding tax rules of any person who has acted in accordance with subsection (1) the payment shall be deemed to be derived by a non-resident.

This means that when a recipient has had non-resident withholding tax deducted incorrectly the obligation to recover the additional amount of withholding tax which would arise because of the difference in rates of deduction will not be placed on an innocent payer.

#### **327ZA Amount of Resident Withholding Tax Deduction deemed to have been received**

Where an RWT deduction is made from any payment of resident withholding income the amount deducted will be deemed to have been received by the person who received the payment.

It shall also be deemed to have been derived by the recipient at the same time and in the same way as the payment from which it was deducted.

#### **327ZB Disclosure of Transactions in Financial Arrangements**

This section is designed to ensure that where persons are trading in negotiable instruments on the secondary market certain details of their activities are disclosed to the Commissioner.

It can be contrasted with the situation where a non-exempt person acquires a financial arrangement direct from the issuer, receives any coupon interest payments during the life of the arrangement less RWT deductions, and disposes of the arrangement at maturity having RWT deducted from any redemption payment gain which is again subject to RWT.

In the situations which this section covers, financial arrangements which have been traded between exempt and non-exempt persons to prevent the deduction of RWT will be disclosed to the Commissioner to ensure that taxable income from these arrangements is being declared by the persons deriving such income.

**327ZB Subsection (1)** This section takes effect from 1 April 1990. Where any person who holds a Certificate of Exemption (i.e. an exempt person) at any time during a year either:

- a) acquires a financial arrangement from a person who was not either the issuer of the financial arrangement (borrower of funds) or the holder of a Certificate of Exemption; or
- b) disposes of a financial arrangement to a non exempt person; and
- c) the financial arrangement is one in relation to which interest is payable and which would have been subject to a deduction of RWT but for the certificate of exemption, -

that exempt person shall, in their return of income that year, provide information in relation to each person, and each acquisition or disposition during that year as follows:

- d) the full name and last known address of the non-exempt person;
- e) the date of acquisition or disposition;
- f) the consideration paid or received (less any fees);

- g) the tax file number of the non exempt person;
- h) such further information as the Commissioner may prescribe;

Unless the Commissioner otherwise requires the information in (d), (e) (f) (g) and (h) may be provided in the form of summary totals of acquisitions and summary totals of dispositions.

**327ZB Subsection (2) Tax file number to be supplied on request**

Every non-exempt person who either disposes of or acquires any financial arrangement to which subsection (1) applies shall, if requested in writing, supply their tax file number to the exempt person within 10 working days.

**327ZB Subsection (3) Exempt person required to provide information to Commissioner**

Any exempt person who is not required to furnish a return of income in any year in which any acquisition or disposition to which subsection (1) applies shall provide the information detailed in that subsection in such form as the Commissioner shall prescribe, within 2 months after the end of that year.

**327ZC Application of Other Provisions to Amounts Payable under this Part**

Subject to this Part of this Act, the other Parts of this Act shall apply to every amount that any person is liable to account for or pay to the Commissioner as if the amount were income tax.

In particular, section 99(3) which provides for adjustments of income shall apply as if the term "assessable income" were replaced with "liability to resident withholding tax".

**327ZD General disclosure of Tax File Numbers**

From 1/4/92 payers of resident withholding income will be required to record the Tax file number (IRD Number) of all persons to whom they pay such income.

**327ZD Subsection (1) Information to be supplied**

This section is to take effect from 1 April 1992. Any payer of resident withholding income who is required to make a deduction of RWT from that income shall provide the following information to the Commissioner in an approved form:

- a) Full name and last known address of the recipient

- b) The total resident withholding income paid in that year.
- c) The tax file number of the recipient.
- d) Such further information as the Commissioner may require.

**327ZD Subsection (2) Recipient to provide TFN to payer**

Where a payer requests the tax file number from a recipient in writing the recipient shall provide that number within 10 working days of receiving the request.

**327ZD Subsection (3) Commissioner's Discretion**

The Commissioner may waive all or any of the requirements to furnish the above information.

**Section 12 (2)**

A new Nineteenth Schedule is added to the Principal Act. This schedule details the rates of resident withholding tax deductions.

**Section 12 (3)**

The resident withholding tax regime commences on the 1st day of October 1989 and applies to any dividend or interest paid on or after that date.

**Section 13 Transitional provisions in relation to resident withholding tax**

This provision was an emergency provision to be used to allow the Commissioner to declare that under certain circumstances that a person, or a class of persons who have made applications for a Certificate of Exemption and have not received it may make a statutory declaration which will be deemed to be a Certificate of Exemption until 31 January 1990.

This provision was in case there was a hold up in the issuing of Certificates at the commencement of the Resident Income Withholding Tax Regime. It was not to be available for use by individual applicants but was to be used only in circumstances where it became apparent that the issue of a large number of certificates had been held up.

**Qualified applicants**

A "qualified applicant" is a person or a class of persons who have made an application for a Certificate of Exemption prior to 30 September

- a) The Commissioner may permit qualified applicants to make a written declaration in

such form as the Commissioner shall require confirming that:

- an application has been made;
  - that the applicant is a person who qualifies for a Certificate of Exemption under section 327M; and
  - a Certificate of Exemption has not been issued, nor denied to the applicant.
- b) The declaration is deemed to be a Certificate of Exemption only in respect of resident withholding income paid on or before 31 January 1990.
- c) Any person who holds a deemed Certificate of Exemption in accordance with these provisions must show a copy of the declaration to a payer of RWI in order to prevent deductions of RWT.

#### **Subsection (2) Deemed Certificates of Exemption cancelled from 1 February 1990**

Regardless of any other provisions of this Part of the Act, any deemed Certificate of Exemption issued in accordance with this Section shall be deemed to be cancelled in respect of any resident withholding income paid on or after 1 February 1990.

## **SECTION 14 FRINGE BENEFIT TAX ON NON-CASH DIVIDENDS**

### **Application**

Section 14 amends section 336N of the principal Act by inserting a new subsection (8) to extend the application of the fringe benefit tax (FBT) regime to non-cash dividends paid or made available on or after 1 October 1989 by a company that is resident in New Zealand to a non-corporate shareholder who does not hold a certificate of exemption.

The term “non-cash dividends” is defined in section 2 of the principal Act (refer to commentary on section 2 of the Amendment Act). Essentially, non-cash dividends are dividends that arise under sections 4(1)(b) to (e) of the principal Act.

To ensure that there is no double taxation section 61 of the principal Act has been amended by inserting a new subsection (12A) to provide that a non-cash dividend paid on or after 1 October 1989 will be exempt from income tax to the extent that FBT is payable on that dividend (refer to section 5 of the Amendment Act).

The payment arrangements and reporting requirements for FBT on non-cash dividends are the same as those provided for under section 336T of the principal Act in relation to the existing FBT regime, i.e., payments of FBT will be made quarterly on the basis of quarterly FBT returns. For the purposes of the FBT regime the new subsection (8) of section 336N deems:

- a non-cash dividend to be a fringe benefit,
- the person paying the non-cash dividend to be an employer,
- the person (i.e. the shareholder) deriving the non-cash dividend to be an employee,
- any low interest loan that, under section 4(1)(e), gives rise to a non-cash dividend to be an employment related loan (this will enable section 3360(2) to apply to compute the value of a benefit in relation to a low interest loan).

### **Exclusions**

The proviso (paragraph (e)) to section 336N(8) excludes from the application of the FBT regime any non-cash dividend that is:

- derived by a company as income exempt from income tax by virtue of section 63(2),
- an amount remitted in relation to a loan owed by a shareholder company that gives rise to a dividend derived by that company under the new paragraph (ba) of section 4(1) of the principal Act and that is not exempt from tax under the new paragraph (e) of section 63(3) (refer to commentary on sections 3 and 6 of the Amendment Act),
- a payment of excessive salary or wages (or an allocation of an excessive share of profits) that is deemed to be a dividend under section 97 of the principal Act or a payment of excessive remuneration that is deemed to be a dividend under section 190,
- a rebate or part of a rebate paid to a member of a mutual association that is deemed to be a dividend pursuant to the proviso to section 199(6),
- derived by a person who holds a valid certificate of exemption issued pursuant to section 327M,
- non-resident withholding income,

- derived by a person not resident in New Zealand and not derived from New Zealand,
- exempt from income tax pursuant to section 61(50) which exempts from income tax income expressly exempt under any other Act.

The proviso (paragraph (f)) to section 336N(8) also extends the application of the FBT regime by providing that:

- sections 336N(5) and (6) do not apply - the effect is that the exemptions from the FBT regime for discounts customarily allowed in respect of goods sold to employees do not apply in relation to non-cash dividends,
- the proviso to section 336S does not apply - the effect is that, in relation to FBT on non-cash dividends, the general \$50 exemption provided in certain circumstances does not apply.

#### **Valuation of non-cash dividends deemed to be fringe benefits**

The rules set out in section 336O of the principal Act to determine the value of a fringe benefit apply to compute the value of a non-cash dividend by virtue of such dividends being deemed to be fringe benefits under section 336N(8) of the Act.

It should be noted however that section 33 of the Amendment Act amends section 336O to provide that the value of an employment-related loan (including a loan on current account to a shareholder) may be reduced by amounts of provisional income paid to an employee (shareholder) to the extent that such amounts are applied in repayment of the loan (refer to commentary on section 33).

## **SECTION 15 PAY PERIOD TAXPAYERS**

Section 356 is repealed and a new section 356 is substituted. This is because the introduction of resident withholding tax will create a new class of persons whose income is only from interest and/or dividends from which tax deductions have been made thus bringing that class of persons on an equal footing with salary and wage earners whose income is fully subject to PAYE tax deductions.

### **356 (1) Definition of Interest**

For the purposes of this section the term “interest” is interest as defined in section 327A.

### **356 (2) Which taxpayers will be pay-period taxpayers**

A taxpayer will be a pay period taxpayer if the only income derived in the income year comprises: -

- income from employment; or
- income in the nature of interest or dividends; or
- A combination of any of those classes of income and in relation to that taxpayer and that year
- the total income derived -
  - Did not exceed \$9,500; or
  - Did not exceed \$20,000 and did not include any income from employment; or
  - Did not exceed \$20,000 and did not include more than \$1,500 of income in the nature of interest; and
- a tax deduction was made from all employment income; and
- a resident withholding tax deduction was made from all interest or dividends received; and
- where the taxpayer is a national superannuitant, the total income from employment and from interest and dividends did not exceed \$6006.

### **356 (3) Which taxpayers will not be pay-period taxpayers**

A taxpayer will not be a pay period taxpayer in relation to any year where -

- The taxpayer derived income during that year as a shearer or a shearing shed hand; or
- The taxpayer was an absentee that year;
- Either the taxpayer or the taxpayer’s spouse was entitled to receive any Family Support Tax Credit during that year; or
- The Commissioner is of the opinion that: -
 

The reduction in income from employment is due to the retirement, death, absence or other event which ended or suspended the taxpayer’s employment; and

The taxpayer is not usually a pay period taxpayer, or it appeared during the year that the taxpayer would not be a pay-period taxpayer that year.

### **356 (4) Deemed tax deduction from dividends**

Where dividend income is received from which no resident withholding tax has been deducted through the application of the formula which

allows imputation credits and withholding payment credits to be taken into account when determining the amount of any required deduction, (e.g., fully credited dividends), tax deductions shall be deemed to have been made for the purposes of subsection (1).

**Subsection (2) Tax of pay-period taxpayers to be determined by amount of tax deductions or by assessment**

Section 357 of the Principal Act is amended by inserting the words “or Part IXA” which means that the income tax of pay period taxpayers will be deemed to have been fully paid by the deduction of either PAYE or resident withholding tax, where the provisions of the Act have been properly applied.

**Subsection (3) Adjustment of Excessive Tax Deductions**

Section 358 of the Principal Act is amended by inserting the words “or under Part IXA” in paragraphs (a) and (b). This section allows for the adjustment of excessive tax deductions.

**Subsection (4) Various enactments repealed**

Various previous amendments to the Act are repealed.

**Subsection (5) Section to take effect from income year commencing 1 April 1990**

These changes in respect of income derived by a Pay-period Taxpayer do not take effect until the income year commencing 1 April 1990.

**SECTION 16 AMENDMENTS TO THE PROVISIONAL TAX REGIME.**

SUBSECTION (1) DEFINITIONS

Provisional Income now means the assessable income derived by any person in the income year (before the deduction of losses under section 188 or any inter group deductions under S191) less the aggregate of -

- a) any source deductions payments;
- b) any non-resident withholding income; and
- c) in the case of individuals, any RWI which constitutes dividends from which RWT required to be deducted has been deducted.

**Provisional Taxpayer**

The definition of “provisional Tax” in Section 375 is amended to exclude a pay-period taxpayer.

This is because any person who derives income in the form of interest and dividends which has been fully subject to deductions of resident withholding income tax, and whose income is below \$20,000 will not have any residual income tax liability.

**Subsection (2) Residual Income Tax**

The definition of “RIT” is amended by including RWT credits within the list of tax credits to be deducted from the total amount of the income tax liability of a taxpayer to determine the RIT liability of that taxpayer.

**Subsection (3) Application Date**

This section applies to any provisional tax payable on or after the 1st day of April 1990

**SECTION 17 TRANSITIONAL PROVISIONS IN RELATION TO PROVISIONAL TAX**

This provision for the calculation of 1991 Provisional Tax is necessary to allow for the fact that the residual income tax figure for 1990 will result AFTER the deduction of RWT deductions in respect of HALF A YEAR only, i.e. from 1 October 1989 to 31 March 1990.

**Subsection (1)**

Where calculating the provisional tax payable in respect of income derived during the year commencing 1 April 1990, by any person who has not held a Certificate of Exemption during any part of the previous income year, the amount will be the greater of:

(a) Nil; and

(b) The actual 1990 residual income tax less an amount equal to:

$$(a \times b) + ((c \times d) - e)$$

where

a is the amount of interest (which is by definition Resident withholding income pursuant to S 327B (2) and which equivalent income will therefore have Tax deductions made therefrom in the 1991 income year) derived between 1 April 1989 and 30 September 1989

b is the rate of withholding tax on interest

c is the amount of dividends (which are resident withholding income pursuant to S 327B (2) ) derived between 1 April 1989 and 30 September 1989

d is the rate of withholding tax on dividends

e is the aggregate of

(i) any dividend withholding payments attached to the dividends included in item c; and

(ii) any imputation credits attached to any of the dividends included in item c.

Note: There are provisions relating to 1990 Provisional Tax in the Taxation Reform Bill (No 6)

## **SECTION 18 SHAREHOLDER DIVIDEND STATEMENT**

Section 18 repeals section 394I of the principal Act and substitutes a new section 394I. Under the new section 394I the requirement that a shareholder dividend statement is to be sent to a shareholder when a dividend is paid with an imputation credit attached is extended to apply also when a dividend is paid with a dividend withholding payment credit attached. This is because the resident withholding tax that is deducted from dividends with insufficient or no imputation credits attached is passed through to shareholders as a dividend withholding payment credit. The section sets out the information required to be shown on the statement.

The amendment applies in respect of dividends paid on or after 1 October 1989.

## **SECTION 19 STATEMENT TO SHAREHOLDER WHEN DIVIDEND PAID**

Section 394ZZB of the principal Act provides that a company attaching a dividend withholding payment credit to a dividend is required to include in a shareholder dividend statement, to be given to the shareholder, the information specified in the section.

Section 19 repeals section 394ZZB and substitutes a new section 394ZZB to require a company that

attaches a dividend withholding payment credit, including a deemed dividend withholding payment credit arising through the resident withholding tax regime, to include certain additional information in the shareholder dividend statement required to be issued by section 394I.

As the requirements of subsection (2) of the repealed section 394ZZB have been incorporated into the amended section 394I, subsection (2) is no longer necessary and has been repealed (refer to section 18 of the Amendment Act and above commentary thereon).

The amendment applies in respect of dividends paid on or after 1 October 1989.

## **SECTION 20 POWER OF COMMISSIONER IN RESPECT OF SMALL AMOUNTS**

The amounts of tax about which the Commissioner may exercise discretion as to whether to collect or refund have both been increased from \$2 to \$5.

## **SECTION 21 INTEREST ON TAX OVERPAID**

For the purpose of determining the amount of interest payable by the Commissioner on an overpayment of provisional tax (refer Section 413A (1)) the definition of the term RIT has been amended (effective from 1 October 1989) to be net of RWT credits.

## **SECTION 22 PENALTIES FOR OFFENCES**

Persons who are convicted of the offences of "failing to account" to the Commissioner for amounts which have been deducted in the form of either resident withholding tax or non resident withholding tax are to be subject to the same penalty provisions as failure to account for PAYE deductions i.e. either a term of imprisonment or a substantial fine.

## **SECTION 23 PUBLICATION OF NAMES OF TAX EVADERS**

The names of persons who have been convicted of the offences of "failing to deduct" or "failing to account for" resident withholding tax or non-resident withholding tax deductions may be published by the Commissioner in the Gazette.

## **SECTION 24 RETURNS OF INTEREST PAID ON DEPOSITS**

Section 429 is repealed. This section previously gave the Commissioner power to request information from banks, Local or Public Authorities, or other persons about interest paid. The new reporting provisions included in the resident withholding tax legislation now give similar powers.

This section comes into force on 1 October 1989

## **SECTION 25 RECORDS AND RETURNS OF CHARITIES**

Subsection (1) The definition of "specified body" has been extended for the record keeping provisions in this section to include any person who is issued with a Certificate of Exemption in accordance with section 327M (1) (h) or (i) of the resident withholding tax legislation.

This is to ensure that all the records required to be kept for resident withholding tax purposes will be kept, and that no tax exempt person can avoid their obligations because they are not included within the existing list of specified bodies.

Subsection (2) The section will apply from 1 October 1989.

Note: Tax exempt entities and non-profit bodies issued with a COE under Section 327M will be required to keep sufficient records to enable the Commissioner to ascertain the source and application of donations made to them.

## **SECTION 26 CONSEQUENTIAL AMENDMENT TO ESTATE AND GIFT DUTIES ACT 1968**

As a consequence of the amendment to section 4(1) of the principal Act to insert a new paragraph (ba) dealing with forgiveness of debt to a shareholder an amendment has been made to section 75B of the Estate and Gift Duties Act 1967 by inserting a new subsection (2). This corrects a previous deficiency and ensures that gift duty is not payable where a debt forgiven gives rise to a dividend.

The new subsection (2) provides that any transaction that is a dividend within the meaning of paragraph (ba) of section 4(1) of the Income Tax Act 1976, i.e., forgiveness of a loan, does not constitute a gift for the purposes of the Estate and Gift Duties Act.

## **PART II**

### **MISCELLANEOUS PROVISIONS**

#### **SECTION 27 Interpretation**

Section 27 substitutes a new definition of the term "trustee" in section 2 of the principal Act. The new definition does not differ in substance from the earlier one, but simply re-orders it in a more appropriate form.

#### **SECTION 28 Exclusions from the term "Dividends"**

This section ensures that the distribution of certain reserves, created by the concessional tax free revaluation of livestock and wine and whisky stocks, are not treated as dividends on winding up.

Specifically excluded from the term "dividends" are tax free gains resulting from:

- (a) The transitional write-off of livestock revaluation given by section 86E; and
- (b) The ongoing valuation of livestock under the provisions of the herd scheme (section 86A); and
- (c) The transitional 50 percent write-off of wine and whisky revaluation that can be opted for under section 87A.

The exclusion does not apply to such reserves if capitalised by way of bonus issue.

This amendment is retrospective in that it takes effect from the commencement of the 1988/89 income year.

Any farmers wishing to take advantage of this amendment and the Winding Up Distribution Tax will have to make distributions in the course of winding up before 30 September 1989.

#### **SECTION 29 Life insurance and reinsurance agents**

Section 29 amends section 204 of the principal Act which relates to the taxation of life insurance and reinsurance companies in respect of their superannuation and annuity business. The amendment widens the application of subsection (9A) to companies with a non-standard annual balance date, as well as to companies with a 31 March balance date (except to the extent that subsection (9B) caters for any non-standard year that contains 1 April 1988).

### **SECTION 30 Interpretation provision relating to trusts**

Section 30 amends a drafting error, making it clear that the amendment to section 226(1) of the Act that was contained in section 14(1) of the Income Tax Amendment Act 1989 relates to definition of the term “beneficiary income”.

### **SECTION 31 Valuation of loans provided by superannuation fund deemed to be income of fund**

Section 31 amends section 232A of the principal Act, which provides that the value of certain loans made by a superannuation scheme to its members may be deemed to be income of the scheme. The amendment limits this provision to schemes that are superannuation funds. Where appropriate, loans to members by schemes that are not superannuation funds will be governed by other provisions of the Act, including the new extended definition of a dividend in section 4 of the Act.

### **SECTION 32 Surcharge paid as provisional tax**

Section 32 makes various consequential amendments to the superannuitant surcharge as a result of the introduction of the new provisional tax regime.

Subsection (1) repeals section 336I of the principal Act as this section is now directly incorporated in the new provisional tax regime. Subsection (2) amends section 336F (2) (a) (i) of the principal Act to provide that superannuitants subject to the surcharge who consider that all their other income will be provisional income pay provisional tax according to the new provisional tax rules.

Subsections (3) and (4) repeal sections 336(k)(2) and (3) of the principal Act. These amendments provide that taxpayers, subject to the superannuitant surcharge, pay provisional tax under the provisional tax legislation rather than the national superannuitant surcharge legislation. Subsection (5) provides for various consequential repeals as a result of the above amendments.

Subsection (6) provides that these amendments apply with respect to the tax on income derived in the income year that commenced on 1 April 1989.

### **SECTION 33 Value of fringe benefit**

Section 33 amends section 336O of the principal Act by inserting three new subsections - subsections (2A) (2B) and (2C) - relating to the value of a fringe benefit that consists of an employment related loan. The amendments are made in the context of the

extension of the application of the fringe benefit tax regime to shareholder-employees of private companies as provided in the Income Tax Amendment Act (No.5) 1988 with effect from 1 April 1989.

As an employment related loan includes an overdrawn current account of a shareholder-employee the amendments are considered necessary in recognition of the practical difficulties faced by companies and to minimise compliance costs in maintaining current accounts on a daily basis in order to comply with the FBT regime. The main effect of the amendment to section 336O is to do away with the need for companies to maintain a daily record of shareholder-employees' current accounts on an ongoing basis.

The amendment to section 336O (new subsection (2A)) ensures that where the amount of salary or wages or extra emolument or dividends or interest paid to an employee (including a shareholder employee) is determined after the end of an income year the amount of the income is deemed to have been credited to the current account of the employee on the later of either:

- the first day of that income year, or
- the day on which the balance of the current account first went into debit during that income year

provided that the amount of salary or wages or other income

- constitutes income of the employee derived in that income year or in any previous income year, and
- does not constitute resident withholding income, non-resident withholding income, or income subject to source deductions under Part XI of the principal Act.

*Therefore, where the amount of the income credited to the current account after the end of the income year exceeds the amount of any debit balance in that account during that year there will be no FBT liability.*

For an example of the application of this provision refer to appendix E to TIB No. 3.

The new subsection (2B) serves two purposes. Firstly, for the purposes of the references to an income year in the new subsection (2A), it provides the standard accounting year provision for employers with non-31 March balance dates that furnish returns for an accounting year. Secondly, it provides for the reference in subsection (2C) to an



income year of an employee to be the same income year as that of the employer.

The new subsection (2C) outlines the circumstances in which income paid to an employee after the end of an income year and, under subsection (2A), deemed to have been applied in repayment, during that income year, of an employment related loan may be treated as having been derived in that income year for the purposes of applying subsection (2A). The purpose of this provision is to cover the situation where the employee would normally return the income as income for the income year in which the amount of the income was determined rather than for the preceding income year in respect of which the income has been deemed to have been applied in repayment of the loan.

The employee is required to notify the Commissioner in writing of the employee's election to include the income in the tax return for the income year in which the income is deemed, under subsection (2A), to have been applied in repayment of the employee related loan. The notification is required by the date the employee is required to furnish the income tax return allowing for any extension of time that may be granted.

#### **SECTION 34 Failure to deduct specified superannuation contribution withholding tax**

Section 34 corrects an error in the formula contained in section 336ZF of the principal Act to cater for the situation where an employer fails to deduct the appropriate amount of specified superannuation contribution withholding tax.

At present the formula does not deal appropriately with the situation where an employer has satisfied part, but not all of the obligation. This amendment will correct that error.

#### **SECTION 35 Tax deemed for certain purposes to have been received by superannuation fund**

Section 35 clarifies the obligations of an employer with respect to contributions to a superannuation scheme. The Income Tax Amendment Act 1989 when it was passed, did not make clear the question of an employer's obligations to a superannuation scheme.

This section introduces a new section, section 336ZL, to the Act that for the purpose of determining whether an employer has satisfied its obligations to make contributions to a superannuation fund, deems the amount of any specified superannuation contribution withholding tax payable by

the employer, to have been received by the fund.

This is deemed to be received at the same time as the specified superannuation contribution actually received by the fund. This section is deemed to come into force on March 22 1989, the date of assent to the Income Tax Amendment Act 1989

There is also a provision to ensure that, where there has been an overpayment in respect of an employer's obligations to the fund because of previous legislative silence on this issue, there is scope for a refund, or credit against future obligations for that employer - subject to it making a written application (to the fund) before 1 November 1989.

#### **SECTION 36 Determination of assessable income**

Section 36 amends Family Support to provide for a consistent treatment of the amount of depreciation recovered, by section 117 of the principal Act, on the sale of a building. The result of the amendments is that depreciation on a building is not deductible for Family Support purposes but any depreciation recovered is also non-assessable for Family Support purposes.

Subsection (1) amends section 374B (1) (d) (i) of the principal Act. This paragraph provides that section 117 depreciation recovered may not be spread forward over future income years but is assessable, for Family Support purposes, in the year the income is actually derived. The amendment overrides this provision and allows the spread forward for depreciation recovered on the sale of a building. This income is then made non-assessable for Family Support purposes by section 374B (1) (e) (ii) of the principal Act.

Subsection (2) amends section 374B (1) (e) of the principal Act by adding a new paragraph (v) providing that assessable income, for Family Support purposes, does not include any depreciation recovered under section 117 of the principal Act where the depreciation recovered is assessable income, in the income year the building is sold.

Subsection (3) provides that the above amendments apply to tax on income derived in the income year that commenced on the 1st day of April 1988 and every subsequent year.

#### **SECTION 37 Debits arising to imputation credit account**

Section 37 amends section 394E of the principal Act to ensure that a refund of excess export tax credits

or tourist promotion tax credits made under section 156F(4) of the Act is to be debited to the imputation credit account (ICA) of the company receiving the refund.

The amendment rectifies the amendment made to section 394E(1)(b) by section 62(1) of the Income Tax Amendment Act 1989. That amendment did not have the effect of ensuring that section 156F(4) refunds are debits to the ICA as it is considered that such refunds are not refunds of income tax as specified in subsection (1)(b) of section-394E.

### **SECTION 38 Imputation return to be furnished in certain circumstances**

Section 38 amends section 394K of the principal Act by inserting a new subsection (2A). This allows an imputation credit account company to furnish, in addition to the annual imputation return, an imputation return at any time during the imputation year. Such an imputation return will cover the period commencing with the first day of an imputation year and ending on a day that is no earlier than 7 days before the date on which the imputation return is furnished to the Commissioner.

This amendment is made in conjunction with the amendment to section 394M (refer to section 40 of the Amendment Act) which has the effect of relaxing the restrictions on refunds of income tax where a company has insufficient credits in its ICA.

### **SECTION 39 Further tax payable where end of year debit balance or where company ceases to be an imputation credit account company**

As a refund of tax credit made pursuant to section 156F(4) gives rise to a debit to the ICA of a company, a company in loss that has not paid income tax during an imputation year will have a debit balance in its ICA at the end of the imputation year. In the absence of any amendment, the debit balance would give rise to a liability for further income tax equal to the amount of the debit balance as well as a liability for imputation penalty tax. In such a case the payment of further income tax would effectively be a clawback of the tax credit refunded.

Section 39 amends section 394L of the principal Act to provide that where a company has a debit balance in its ICA at the end of an imputation year it will not be required to pay an amount of further income tax to the extent that the amount of the debit balance includes any refund of tax credit made pursuant to section 156F(4). The effect is that

there will be no clawback of such a refund.

### **SECTION 40 Limits on refunds of income tax**

Section 40 amends section 394M of the principal Act to allow the Commissioner to issue a refund of income tax to the extent of the amount of the credit balance in the ICA at the end of the period covered by the most recently furnished imputation return.

Prior to this amendment section 394M applied to restrict refunds for overpayment of income tax to the amount of the credit balance in a company's ICA at the preceding 31 March (end of the most recently ending imputation year). This would have created problems for, in particular, a post-31 March balance date company that would have been prevented from obtaining a refund for any overpayment of provisional tax to the extent that the overpayment occurred after 31 March, even where the tax had not been allocated as imputation credits to the company's shareholders.

By virtue of the amendment to section 394K (refer to section 38 of the Amendment Act) a company will now be able to voluntarily furnish an additional imputation return at any time during the imputation year. This will enable the company to satisfy the Commissioner that the amount of any refund due does not exceed the amount of the credit balance in its ICA.

Of course the refund of income tax will give rise to a debit to the ICA of the company.

### **SECTION 41 Refund out of consolidated Account**

Section 394ZR is amended by inserting the word "credit" after the words "dividend withholding payment". This corrects a drafting error in the Income Tax Amendment Act (No 5) 1988.

### **SECTION 42 Interest and additional tax not to be charged in respect of certain superannuation scheme and insurance company income for the year ended 31 March 1989**

Section 42 is a transitional provision correcting an anomaly to the taxation of category 1 schemes, and life insurance companies to whom section 204 of the principal Act applies, which have not previously paid income tax.

Section 31 (1) of the Income Tax Amendment Act 1989 removed the obligation of trustees and life companies to pay provisional tax on the income of Category 1 schemes for the 1988 and 1989 income year.

However Section 398A of the principal Act imposes an additional interest charge at a rate of 10% if provisional payments fall short of the residual income tax liability.

Superannuation Category 1 and life companies in respect of any specified superannuation or annuity income will, as directed by statute, have paid no provisional tax by the third provisional tax instalment date.

They are, therefore, exposed to the penalty under section 398A(4) of the Act which imposes an additional interest rate of 10% if provisional tax payments fall short of the residual income tax liability.

Superannuation schemes and life companies with early and standard balance dates will be granted remission of this additional tax impost under section 384(3). However, this has adversely affected superannuation schemes and life companies with late balance dates whose third provisional tax payment date falls after April 1.

This section ensures that interest is not charged for income years ending 31 March 1989 to 30 September 1989.

#### **SECTION 43 Payment of tax**

Section 395 is amended by inserting a new subsection (2).

This sets a due date for payment of terminal tax for taxpayers who are neither employees nor provisional taxpayers. Previously all taxpayers were either provisional taxpayers or employees. With the introduction of the RWT regime there will be a new class of persons who are not employees, and where they derive either

- income by way of interest of less than \$3000;  
or
- income only from dividends which have been subject to the RWT regime

are not provisional taxpayers.

#### **SECTION 44 Date for payment of penal tax**

A new section 422A is inserted which provides that penal tax shall be paid not later than the 28th day after the date of issue of the assessment. This is to clarify the due date for payment of penal tax.

#### **SECTION 45 First Schedule amended in relation to trustees of superannuation category 3 schemes**

The rate of tax for superannuation category 3 schemes will be 33 cents in the dollar for the income year commencing on 1 April 1989 and subsequent years. The current rate is 40.5 cents.

#### **SCHEDULE**

New Nineteenth Schedule to Principal Act

**NINETEENTH SCHEDULE Section 327C**

**Rate of Resident Withholding Tax Deductions**

1. The rate of deduction from payment of RWI being interest shall be 24c per \$1.
2. The rate of deduction from payment of RWI being dividends shall be 33c per \$1.

# APPENDIX A TO TIB NO. 3, SEPTEMBER 1989

## EXPLANATION OF THE INCOME RESIDENT WITHHOLDING TAX REGIME

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(Prepared in order of sections of the Act)

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