

APPENDIX B TO TIB NO.3, SEPTEMBER 1989

THE INCOME TAX (FOREIGN INVESTMENT FUND DETERMINATIONS) REGULATION 1989

COPY OF ORDER OF COUNCIL

PURSUANT to sections 245s and 433 of the Income Tax Act 1976, the Governor-General, acting by and with the advice and consent of the Executive Council, hereby makes the following regulations.

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REGULATIONS

1. Title and commencement—(1) These regulations may be cited as the Income Tax (Foreign Investment Fund Determinations) Regulations 1989

(2) These regulations shall come into force on the 28th day after the date of their notification in the *Gazette*.

2. Interpretation—For the purposes of these regulations, unless the context otherwise requires,—

“The Act” means the Income Tax Act 1976:

“Applicant” means a person who applies for a determination:

“Application” means an application for a determination in accordance with these regulations:

“Working day” 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; and

(b) A day in the period commencing with the 25th day of December in any year and ending on the 15th day of January in the following year.

Other expressions used have the same meanings as in sections 245A and 245R of the Income Tax Act 1976.

3. Applications—(1) Every application by a foreign entity or any person or a determination under section 245s of the Act as to whether or not the rights held by persons in relation to that foreign entity constitute interests in a foreign investment fund, shall be made in the form specified in the First Schedule to these regulations.

(2) On receipt of an application that complies with subclause (1) of this regulation, the Commissioner shall forthwith—

(a) Record the application in the register to be kept for that purpose; and

(b) Give written notice of the date of registration to the applicant.

(3) Where, in the Commissioner’s opinion, the applicant has provided insufficient information for the Commissioner to make a determination, the Commissioner may decline to make a determination and notify the applicant of the Commissioner’s decision and reasons therefor.

(4) The applicant, and any person on whose behalf the application was made, and any person to whom the application relates, shall from time to time furnish to the Commissioner such information as may be required by the Commissioner for the purpose of making the determination.

(5) The applicant may, at any time, by notice in writing to the Commissioner, withdraw the application.

(6) The applicant may at any time amend the application by written notice to the Commissioner, and from the receipt by the Commissioner of such notice of amendment these regulations shall apply to the application as amended

4. Draft determinations—(1) The Commissioner shall, in respect of an application made under regulation 3 of these regulations, in writing, either—

(a) Make such draft determination as the Commissioner considers appropriate; or

(b) Decline to make a determination.

(2) Any draft determination may be made subject to such conditions as the Commissioner considers appropriate

(3) The Commissioner shall send the applicant a copy of the draft determination (if made) and the reasons for the draft determination or, as the case may be, for declining to make such determination.

5. Conferences—(1) The applicant shall notify the Commissioner in writing within the period of 20 working days after a date fixed by the

Commissioner if the applicant wishes to hold a conference in relation to the draft determination.

(2) The date fixed by the Commissioner pursuant to subclause (1) of this regulation shall not be earlier than the date on which the Commissioner sent the documents referred to in regulation 4 (3) of these regulations to the applicant.

(3) If the applicant—

- (a) Notifies the Commissioner within the period of 20 working days after the date fixed by the Commissioner that the applicant does not require the Commissioner to hold a conference in relation to the draft determination; or
- (b) Does not notify the Commissioner within that period that the applicant requires the Commissioner to hold such a conference,—

the Commissioner may, subject to regulation 11(2) of these regulations, make a determination in relation to the application at any time after the notification has been received or, as the case may be, that period expires.

(4) Within the period of 20 working days after the receipt of the applicant's notice pursuant to subclause (1) of this regulation, the Commissioner shall appoint a date (not being a date later than 20 working days after the expiration of that period of 20 working days referred to in subclause (1) of this regulation), time, and place for the holding of the conference and inform the applicant accordingly.

(5) The Commissioner may, notwithstanding subclause (3) or subclause (6) of this regulation, in any event determine to hold a conference in relation to the draft determination and shall appoint a date (not being a date later than 20 working days after the expiration of the period referred to in subclause (1) of this regulation), time, and place for the holding of the conference and inform the applicant accordingly.

(6) Where the Commissioner is of the opinion that 2 or more applications for determinations involve the same or substantially similar issues, the Commissioner may treat the applications as if they constituted a single application, and may prepare a single draft determination in relation to the applications and hold a single conference in relation to that draft determination.

6. Determination without consultation—Notwithstanding anything in regulations 4 and 5 of these regulations the Commissioner may make a determination without following the procedures set down in those regulations where—

- (a) The applicant has provided sufficient information to support the grounds upon which the applicant has relied in the application for the Commissioner to determine whether or not the rights in the foreign entity to which the application relates are interests in a foreign investment fund; or
- (b) The applicant waives or, as the case may be, all applicants waive the requirements of regulation 5 of these regulations by notice in writing to the Commissioner, or
- (c) The Commissioner, independently of an application made pursuant to section 245s of the Act, makes a determination incorporating the matter in respect of which an application has been made.

7. Procedure at conference—(1) At every conference called under regulation 5 of these regulations there shall be entitled to be present and to participate, both personally and through representatives,—

- (a) The Commissioner; and
- (b) The applicant; and
- (c) Any persons nominated by the Commissioner or by the applicant.

(2) The Commissioner shall cause such record of the conference to be made as is sufficient to set out the matters raised by the persons participating in the conference.

(3) The Commissioner or the representative of the Commissioner attending the conference may terminate the conference when he or she is of the opinion that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

(4) The Commissioner shall have regard to all matters raised at the conference and, subject to regulation 11 (2) of these regulations, may at any time after the termination of the conference make a determination in respect of the application.

8. Further submissions—In addition to any written and oral submissions provided for in the foregoing provisions of these regulations in relation to any application, the Commissioner may invite or accept and take into consideration such further submissions, whether written or oral, as the Commissioner considers appropriate.

9. Publication of determination—Every determination shall be published in the Gazette in the form set out in the Second Schedule to these regulations within 30 days after the making of the determination.

10. Fees—(1) The applicant for a determination shall pay such fee, inclusive of goods and services tax under the Goods and Services Tax Act 1985, as shall be prescribed by the Commissioner.

(2) In setting the rate for fees payable by applicants pursuant to these regulations, the Commissioner shall ensure as far as practicable that such fees cover the fixed costs of the Inland Revenue Department in administering the determination process.

(3) The Commissioner shall, from time to time, publish a schedule of the fees payable by applicants in respect of determinations.

11. Payment of fees—(1) Where the Commissioner exercises the discretion to make a determination in respect of an application under section 245s of the Act, the Commissioner shall inform the applicant and at the same time shall advise the applicant of the fee that is payable.

(2) On payment of the fee the Commissioner shall make the determination:

Provided that the Commissioner may make the determination and may cause the determination to be published pursuant to section 245s of the Act before the fee for the determination has been paid.

(3) Where an application is withdrawn the Commissioner shall advise the applicant of the fee payable for work completed before the Commissioner received notification of the withdrawal.

12. Waiver of fees—The Commissioner may in exceptional circumstances, in the Commissioner's discretion, waive in whole or in part any fee payable by an applicant under these regulations.

SCHEDULES

FIRST SCHEDULE

FORM OF APPLICATION FOR DETERMINATION UNDER SECTION 245S OF THE
INCOME TAX ACT 1976

1. Introduction—A brief outline of the matters considered in detail in the application.

2. Detailed description of entity—The name, description and place of residence of the foreign entity for the determination.

Information necessary to establish that rights in relation to the foreign entity do not constitute interests in a foreign investment fund.

3. Reasons in support of application—Detailed reasons in support of the application.

4. Declaration—The applicant shall make a declaration stating that the information provided in support of the application is true and correct to the best of the applicant's knowledge.

5. Annex—The following items, where applicable, are to be attached to the application:

- accounts prepared for the purpose of providing information to shareholders and creditors or other persons having an economic relationship with the foreign entity; and
- accounts prepared for the purpose of preparing an income tax return; and
- material used to promote or market rights in relation to the foreign entity.

SECOND SCHEDULE

FORM OF DETERMINATION FOR PUBLICATION UNDER SECTION 245S(8) OF
THE INCOME TAX ACT 1976

1. Description of entity—A description of the entity to which the determination relates

2. Determination—The determination to which the application relates.

3. Reasons in support of determination—The reasons for the determination with reference to the grounds on which the applicant relied in the application.

EXPLANATORY NOTE

This note is not part of the regulations, but is intended to indicate their general effect.

These regulations, which come into force on the 28th day after the date of their notification in the *Gazette*, set out the procedure for obtaining a determination by the Commissioner as to whether or not rights held by any person in relation to a foreign entity constitute an interest in a foreign investment fund for income tax purposes.

They set out the method of application for a determination (*regulation 3*) and the issue of a draft determination in respect of the application (*regulation 4*).

Provision is made for consultations to be held between the Commissioner and the applicant in relation to the draft determination before a final determination is made (*regulations 5 and 7*) and for final determinations to be made in certain cases without consultations (*regulation 6*).

The Commissioner may invite or accept further submissions in relation to any application for a determination (*regulation 8*).

Every determination is to be published in the *Gazette* in the form set out in the Second Schedule to the regulations within 30 days after the making of the determination (*regulation 9*).

Regulations 10 11, and 12 deal with the calculation and payment of fees in respect of determinations and the waiver of fees in exceptional circumstances.

Date of Notification in *Gazette*: 3 August 1989

Appendices to TIB No. 3, September 1989

- 1. Appendix A - To be issued with TIB No.4**
- 2. Appendix B - Income Tax (Foreign Investment Fund Determinations) Regulations 1989**
- 3. Appendix C - Income Tax Treatment of Bad Debts Since the Introduction of Accruals Rules**
- 4. Appendix D - Income Tax Amendment Act 1989: Superannuation**
- 5. Appendix E - FBT and Major Shareholder-Employees**