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CONTENTS

This TIB has no appendix

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BINDING RULINGS

This section of the TIB contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our information booklet *Adjudication & Rulings, a guide to Binding Rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

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NETHERLANDS SOCIAL SECURITY PENSIONS – TAXATION WHEN THE RECIPIENT IS A NEW ZEALAND RESIDENT

PUBLIC RULING – BR PUB 03/01

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 98/6 which was published in *TIB* Vol 10, No 12, December 1998. BR Pub 98/6 applied until 30 November 2001. This new ruling takes into account minor changes in legislation since BR Pub 98/6 was published. Its period of application is from 1 December 2001 to 30 November 2006.

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

Taxation Law

All legislative references are to the Income Tax Act 1994 ("the Act"), and to the Double Tax Convention between the Netherlands and New Zealand, which appears in the Schedule to the Double Taxation Relief (Netherlands) Order 1981, S.R. 1981/43 ("the Double Tax Convention").

This Ruling applies in respect of Article 19(2) of the Double Tax Convention.

The Arrangement to which this Ruling applies

The Arrangement is the periodic payment of a Netherlands social security pension to a person who is a resident of New Zealand for tax purposes.

This person may be a national of the Netherlands, or of New Zealand, or of both countries. For the purposes of this Ruling the word "national" has the meanings attributed to it by Article 3, paragraph 1.h of the Double Tax Convention.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- When a New Zealand tax resident receives a Netherlands social security pension, and that person is also a New Zealand citizen, the pension is taxable only in New Zealand.
- When a New Zealand tax resident, who is not a New Zealand citizen, receives a Netherlands social security pension, the pension may be subject to tax in both the Netherlands and New Zealand, with the Commissioner giving a credit for tax paid in the Netherlands in accordance with New Zealand's foreign tax credit rules.

The period for which this Ruling applies

This Ruling will apply for the period from 1 December 2001 to 30 November 2006.

This Ruling is signed by me on the 24th day of January 2003.

Martin Smith
General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULING BR PUB 03/01

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in public ruling BR Pub 03/01 ("the Ruling").

Background

Confusion has arisen as to the New Zealand tax treatment of social security pensions paid by the Netherlands Government to people living in New Zealand. Some taxpayers believe that the pensions are not taxable in New Zealand if the recipients are not New Zealand citizens. This ruling clarifies New Zealand's jurisdiction to tax pensions paid by the Netherlands, including when New Zealand's right to do so is an exclusive right.

Legislation

Section BD 1(2) states:

An amount is not gross income of a taxpayer if it is …

(c) a foreign-sourced amount and the taxpayer is a non-resident when it is derived.

Article 19(2) of the Double Taxation Convention reads as follows:

a. Any pension paid by, or out of funds created by, one of the States or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority and any pension paid to an individual under the social security scheme of one of the States, may be taxed in that State.

b. However, such pension shall be taxable only in the State of which the individual is a resident if he is a national of that State.

Article 3(1)(h) defines the term "national" to mean:

1. in the case of the Netherlands, any individual possessing the nationality of the Netherlands, and any legal person, partnership and association deriving its status as such from the laws in force in the Netherlands;

2. in the case of New Zealand, any individual possessing citizenship of New Zealand and any legal person, partnership and association deriving its status as such from the laws in force in New Zealand.

Article X of the Protocol to the Double Tax Convention states:

X. With reference to Articles 18 and 19

It is understood that the term "pensions and other similar remuneration" includes only periodical payments.

Application of the Legislation

Under the Income Tax Act 1994, persons who are resident in New Zealand are subject to New Zealand tax on their worldwide income. Double Tax Conventions and Agreements with other countries override the Income Tax Act and determine which country has jurisdiction to tax the income in question. Among other issues the Double Tax Convention between the Netherlands and New Zealand determines the tax treatment of periodic pensions paid by an organisation in one country to residents of the other country.

Article 18 of the Double Tax Convention sets out which country has the jurisdiction to tax pensions paid by one country to the residents of the other country. This article, however, does not apply to pensions paid out:

- under social security schemes, or
- for services rendered to the country paying the pension.

Article 19 deals with these two classes of pension. Article 19(2) states that a social security pension may be taxed by the country from which it is paid but the pension shall be taxed only in the country in which the recipient of the pension is resident if the recipient is also a national of the country of residence. Therefore, a social security pension paid to a New Zealand tax resident who is also a national of New Zealand may be taxed **only** in New Zealand.

However, if the recipient is a New Zealand tax resident but is not a New Zealand citizen, New Zealand will not have an exclusive right to tax the pension. In those circumstances the Double Tax Convention does not restrict either the Netherlands or New Zealand from taxing the pension and the pension could be taxed in both the Netherlands and New Zealand under their domestic law. Persons who are not New Zealand citizens and have tax deducted by the Government of the Netherlands from their Netherlands social security pensions are entitled to tax credits under section LC 1. When this occurs the Commissioner will, in accordance with New Zealand's foreign tax credit rules, give the recipient a tax credit for the tax paid in the Netherlands. However, these tax credits cannot exceed the amount of tax due in New Zealand.

Residence and nationality

Article 4 sets out rules for determining the residence (for the purpose of the Double Tax Convention) of a person who is resident for tax purposes in both the Netherlands and New Zealand under their domestic law. The term "national" in the case of New Zealand is defined in the Double Tax Convention as:

… any individual possessing citizenship of New Zealand and any legal person, partnership and association deriving its status as such from the laws in force in New Zealand

(The rules determining how New Zealand citizenship is acquired are set out in the Citizenship Act 1977.) Hence, under the Double Tax Convention a person who is a citizen of New Zealand is a national of New Zealand.

Accordingly, under Article 19(2)(b) New Zealand will have an exclusive right to tax a Dutch social security pension when the recipient is determined to be a New Zealand tax resident under Article 4 and is also a New Zealand citizen. (This will be so whether or not that person is also a Dutch national. In the case of dual nationality, the recipient will still satisfy the requirements of Article 19(2)(b)—New Zealand tax residency and New Zealand citizenship—and the additional fact of possessing Dutch nationality will not alter the conclusion that only New Zealand may tax the pension.)

Liability to tax under New Zealand domestic law

The Double Tax Convention need not be considered unless an amount of Netherlands pension is taxable under New Zealand domestic law. A Netherlands pension could be fully or partly exempt from tax under sections CB 5(1)(f) or CB 5(1)(fa) of the Income Tax Act 1994. Section CB 5(1)(f) may apply where the New Zealand benefit payable to a Netherlands pensioner has been reduced in terms of section 70(1) of the Social Security Act 1964. Section CB 5(1)(fa) applies where an arrangement has been made in respect of an overseas pension under section 70(3) of the Social Security Act 1964.

Section 70(1) of the Social Security Act 1964 applies where the recipient of a Netherlands pension is also entitled to a benefit of a similar nature under New Zealand social welfare legislation. In that event the New Zealand benefit is to be reduced by the amount of a Netherlands pension and the effect of section CB 5(1)(f) is as follows:

- Where the amount of the New Zealand superannuation or veteran's pension payable has been reduced by the amount of a Netherlands pension under section 70(1) of the Social Security Act 1964, section CB 5(1)(f) does not apply. Therefore, the full amount of the Netherlands pension is taxable under New Zealand domestic law, and
- Where an entitlement to another type of New Zealand benefit has been reduced by the amount of a Netherlands pension, the Netherlands pension is exempt income under section CB 5(1)(f) to the extent that the New Zealand benefit has been reduced. Therefore, where a deduction from a New Zealand benefit entitlement has been made under section 70(1) of the Social Security Act 1964 and the amount of a Netherlands pension exceeds the amount of the New Zealand benefit entitlement, the amount exceeding the New Zealand benefit entitlement is taxable under New Zealand domestic law.

Under section 70(3) of the Social Security Act 1964 an arrangement may be made to pay the full amount of an overseas pension to the Chief Executive of the department responsible for administering that Act (which is currently the Department of Work and Income) in order to receive the full rate of a benefit payment under that Act, the Social Welfare (Transitional Provisions) Act 1990 or the New Zealand Superannuation Act 2001. This option is available to recipients of Netherlands pensions from 1 July 2002: Social Security (Alternative Arrangement for Overseas Pensions) Amendment Regulations 2002. Where such an arrangement is made the Netherlands pension is not taxable under New Zealand domestic law (but the equivalent amount of the New Zealand benefit would be taxable): section CB 5(1)(fa).

Example 1

A taxpayer is a Dutch citizen who immigrated to New Zealand two years ago. He receives a Netherlands social security pension. He has not become a New Zealand citizen, but is a tax resident of New Zealand. Both New Zealand and the Netherlands may tax his pension. New Zealand will grant him a tax credit for the tax charged on the pension by the Netherlands.

Example 2

A taxpayer also has Dutch nationality and immigrated to New Zealand five years ago. She likewise receives a Netherlands social security pension. Unlike the taxpayer in Example 1 she has become a New Zealand citizen. Only New Zealand may tax the social security pension that she receives from the Netherlands.

PRODUCT RULING – BR PRD 02/22

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Macquarie Financial Products Management Limited ("the Trustee").

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections BG 1, CG 1, CG 4, CG 5, CG 6, CG 7, CG 13, CG 15, DD 1, GB 1, OB 1, Subpart FG, and Schedules 3 and 4.

The Arrangement to which this Ruling applies

The Arrangement is the establishment and operation of the Macquarie Titan Trust ("the Titan Trust") in accordance with the Macquarie Titan Trust Replacement Trust Deed dated 17 December 2001 ("the Trust Deed"), the Deed of Participation. The Macquarie Titan Trust dated 21 December 2001 ("the Deed of Participation"), the Macquarie Titan Trust Investment Statement (prepared as at 7 January 2002 for the purposes of the Securities Act 1978) ("the Investment Statement"), and the Macquarie Titan Trust Prospectus dated 19 December 2001, as amended by a Memorandum of Amendment dated 25 January 2002 ("the Prospectus"). Further details of the Arrangement are set out below.

1. The Titan Trust is an Australian resident unit trust established for NZ investors by the Macquarie Titan Trust Trust Deed dated 30 November 2001. The Trust Deed amended the 30 November 2001 trust deed, by restatement and addition. The Trustee is an Australian resident company. The central management and control of the Titan Trust is in Australia. The Statutory Supervisor for the Titan Trust is New Zealand Permanent Trustees Limited.

2. The Trust Deed provides the facility for there to be more than one NZ investor subscribing for ordinary units and sharing as beneficiaries under the trust in the income and gains of the Titan Trust. The income and gains of the Titan Trust will arise from investments and other property subject to the trust. Every unit has identical interests and rights, and confers on its holder an undivided beneficial interest in the property (including the income) of the Titan Trust as a whole.

3. Clause 16 of the Trust Deed provides that the Trustee will determine the investment policy of the Titan Trust, and may from time to time vary that policy, and will describe the current investment policy in each prospectus or information memorandum (if any) for the Titan Trust.

4. Clause 29 of the Trust Deed provides that:

> The Trustee may at any time elect that any amount (capital or income) of the Trust be distributed to Holders pro rata to the number of Units held in the Trust as at a time determined by the Trustee. Each Holder is presently entitled as at the end of each Year to a share of Distributable Income for that Year, if any, which has not previously been distributed, in the proportion of the number of Units held to the aggregate of all Units then in issue in the Trust. Within 2 months after the end of each Year, the Trustee must distribute any undistributed share of Distributable Income to which any Holder is entitled, either in cash or Bonus Units as the Trustee may elect. **Distributable Income** is the net income of the Trust determined for the purposes of section 95 of the Tax Act. **Year** means a year or other period in relation to which taxable income of the Trust for purposes of the Tax Act must be determined. Each Holder has a vested and indefeasible interest in all amounts of Distributable Income to which that Holder becomes entitled in accordance with the operation of this clause.

5. Income may be derived by the Trust in the form of cash or growth in the value of its investments. The Trustee may elect that any distribution be in the form of Bonus Units, and the Trustee may elect to distribute any undistributed share of Distributable Income either in cash or Bonus Units. The Trustee intends to make distributions in the form of both cash and Bonus Units, and may use both methods in the same year. The Trustee has stated that there is no set policy of making only non-taxable bonus issues in preference to cash distributions. If the Titan Trust makes a cash distribution of its income such distribution will be of a more than modest amount.

6. Pursuant to the Securities Act 1978, the Trustee and the Statutory Supervisor executed the Deed of Participation to record the terms of issue of ordinary units in the Titan Trust. Clause 3.1 of the Deed of Participation provides that applications for units in the Titan Trust may be made upon and subject to the terms and conditions contained in the Deed of Participation, the Trust Deed, current investment statement and prospectus for the Titan Trust.

7. NZ investors have applied for ordinary units in accordance with the Investment Statement and the Prospectus. Any changes to the amount of money payable by an NZ investor can only be effected by change to the registered Prospectus in respect of the Trust. Alterations to the terms and conditions of issue of any units can be made by way of the Trustee amending the Trust Deed. The Trustee may only amend the Trust Deed with the consent of the Statutory Supervisor.

8. The Investment Statement states at page 18 that the Titan Trust is designed to be a medium-term investment for NZ investors to gain exposure to returns derived from a portfolio of international hedge funds. The Investment Statement provides for an Investment Maturity Date ("the IMD") of 31 March 2008, and for a Maturity Settlement Date ("the MSD") expected to be 28 April 2008, at which time net proceeds from the Titan Trust investments will be distributed to unit holders. The Trustee intends to terminate the Titan Trust shortly after the MSD.

9. The offer was a closed-end offer of ordinary units in the Titan Trust, at an issue price of $1 per unit with a minimum application amount of $5,000 and multiples of $1,000 thereafter. The units were issued on 27 March 2002. No applications for units will be accepted after 20 March 2002 except at the discretion of the Trustee.

10. The Investment Statement contains an offer to enter a Loan and Security Agreement ("the Investment Loan") with Macquarie Finance (NZ) Limited ("Macquarie Sub"). NZ investors do not have to take an Investment Loan in order to subscribe for units. The offer is for a loan of up to 100% of the subscription amount. The Investment Loan can only be used to subscribe for units in the Titan Trust. The Investment Statement states that based on market conditions as at 17 December 2001, the interest rates on the Investment Loan would be 9.54% (fixed rate) and 7.37% (variable rate). Interest is payable quarterly. The principal must be repaid in full upon the MSD, or upon the NZ investor ceasing to be a resident of New Zealand for tax purposes, or upon disposal of all units, or pro rata upon partial disposal of units.

11. The offer of units and of the Investment Loan was open to all NZ resident investors including companies, individuals, superannuation funds and trusts.

12. The current investment policy of the Titan Trust provides for the NZ investors' subscriptions to be invested in shares issued by Macquarie Offshore Funds No. 2 Limited ("the Fund") in accordance with the document entitled "Summary Document Macquarie Offshore Funds No. 2 Limited Class A Shares", dated 20 December 2001, amended and restated as at 25 January 2002 ("the Summary Document"). The Class A shares are the first class of shares issued by the Fund. The terms of issue of the Class A shares include the following. No pre-emption or other rights exists in respect of any of the shares. The Trustee as shareholder has: voting rights in the case of any variation of the rights attaching to the shares or as otherwise permitted by the Companies Act 1981 of Bermuda; entitlement to such dividends as may be declared; entitlement to redemption or repurchase of shares as provided in the by-laws; the right to share pro rata in the surplus assets of the Fund in the event of the winding up or dissolution of the Fund. The directors of the Fund are obliged to create and maintain an investment portfolio in respect of each class of shares. The holders of shares in one class have no rights whatsoever in respect of the assets of any other portfolio appertaining to any other class of shares. However, in the event of any insolvency of any one or more sub-fund(s) under this umbrella structure, any creditors in respect of such insolvent portfolio(s) would be creditors of the Fund as a whole and accordingly could proceed against any assets of the Fund.

13. The Fund is a Bermudan incorporated company, and is tax resident in Bermuda, with a majority of Bermudan directors. The Fund has taken the NZ dollars subscribed for shares and undertaken a spot trade to convert them into US dollars, using the US dollars to invest in a range of open-ended collective investment schemes, mutual funds, separately managed accounts and investment vehicles domiciled in jurisdictions outside Australia. The portfolio of investments ("the Titan Portfolio") will comprise a portfolio of international hedge funds, foreign exchange contracts, cash (at call), managed investments and/or term deposits. The Fund's investments will be managed by Macquarie International Capital Advisors Pty Limited, an Australian resident company.

14. The Fund's investment objective is to deliver consistent capital appreciation with low volatility. According to the Summary Document, while the directors of the Fund have the power to declare dividends, the directors intend that earnings from the Titan Portfolio will be retained by the Fund and no cash dividends on shares will be declared. Despite this, the Fund has made a dividend distribution which has been used by the Titan Trust to make a cash distribution for the three-month period ending 30 June 2002. Shares may be redeemed as at the last business day of any calendar month. The redemption price of each share is based on a determination of the net asset value of the Titan Portfolio in accordance with international accounting standards, and the redemption price is calculated after deducting an appropriate allowance for fiscal and sale charges including redemption fees.

15. Macquarie Bank Ltd ("Macquarie") will provide a loan facility to the Fund if certain performance criteria and other conditions precedent are met.

16. The Investment Statement provides an illustrative simulated performance of the Fund which shows a compound pre-tax annual return, after fees and expenses, of 15.9%. The Trustee will apply to

redeem all of its outstanding shares in the Fund as at the IMD and pay the net proceeds to investors as soon as practicable thereafter.

17. Pursuant to and subject to the terms and conditions of the put option agreement between the Fund and Macquarie, Macquarie has agreed to pay to the Fund on 28 April 2008 a cash settlement amount of the difference if the value of the Titan Portfolio at 31 March 2008 is less than its initial value plus 3%, after adjustments for redemptions. The put option will be cash settled. This agreement, subject to its terms and conditions (including terms and conditions set out in the Prospectus), provides a capital protection to the Titan Trust, and through the Titan Trust to NZ investors.

18. The Investment Statement provides that the Trustee has the discretion to dispose of all or some of the shares in the Fund and to purchase additional shares from new or existing issuers or to access an exposure to a fund of funds investment through other means. This discretion may be exercised in circumstances where the Trustee forms the view that overall returns to the Titan Trust could be improved either in terms of consistency or the absolute level of returns.

19. The Investment Statement records that disposal of units may be requested by investors at any time during the term of the investment by way of redemption of units by the Trustee or by way of sale of units to Macquarie Sub. Units may be purchased by Macquarie Sub at a price equal to 99% of the redemption price, and Macquarie Sub is able to sell or redeem such units. The derivation of a 1% margin from purchasing units is an important commercial reason for Macquarie Sub to fulfil this role.

20. A request for disposal by either method is required in writing at least forty calendar days prior to the last business day of a month ("the Disposal Date"). The price at which disposal will be effected will not be able to be known at the time of the request. Partial disposal of a unitholding must not change the ratio of ordinary units to bonus units held, and must be in a minimum amount of 5,000 units and leave a minimum holding of 5,000 units. Payment will be made as soon as the administrator of the Fund publishes the net asset value of the shares (in the case of sale), and the Trustee receives the proceeds from the redemption of the shares (in the case of redemption).

21. Redemptions will be processed once aggregate outstanding requests from all investors for such redemptions reach $250,000 subject to the possible suspension of the redemption of units for a period up to four months where it is impracticable at the redemption date for the Trustee to calculate the net asset value. While NZ investors may request disposal by way of sale, Macquarie Sub cannot, pursuant to Australian Prudential Regulatory Authority rules, be compelled to purchase units. Macquarie Sub has no set policy about when it will purchase units. Normal commercial factors (including the value of units and of the investments of the Titan Trust, the number of units already held, the Titan Trust's historical performance versus the risks of holding units at the time units are offered by NZ investors) will determine whether units are purchased. If Macquarie Sub does not purchase the units, the Trustee will redeem the units.

22. The Investment Statement states in the section headed "Maturity" that before the IMD, the Trustee will seek from NZ investors confirmation as to whether they wish to request a transfer of their units to Macquarie Sub or to continue to hold those units up to the MSD. Investors who choose to request a transfer must complete the transfer consent form and return it to the Trustee before the IMD. If Macquarie Sub agrees to accept the transfer, then transfer will be effected on or before the MSD.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) During the period of this ruling section LF 7 does not apply to limit the deductibility of interest.

(b) The Titan Trust is not a foreign entity, or a member of a class of foreign entities specified in Part B of schedule 4.

(c) The Titan Trust will calculate its income liable to income tax without applying any of the features specified in Part B of Schedule 3.

(d) The Trustee is resident in Australia for Australian tax purposes.

(e) The central management and control of the Titan Trust is in Australia.

(f) At the date of issue of this ruling, the Titan Trust is subject to the provisions of Division 6 of the Income Tax Assessment Act 1936.

(g) At the date of issue of this ruling, the Trustee is liable to pay tax under Division 6 of the Income Tax Assessment Act 1936 on the worldwide income of the Titan Trust to which the beneficiaries of the Titan Trust are not presently entitled.

(h) There will be no material changes to the way the Titan Trust is taxed in Australia for the period of this ruling.

(i) The Macquarie group's purposes for the facility that may be provided by Macquarie Sub to purchase

units from investors under the Arrangement are to allow the Macquarie group to control the secondary market, to provide liquidity, to reduce the group's exposure to the capital protection feature of the Arrangement and to allow Macquarie Sub to earn a fee and to provide a choice of investment exit mechanism for investors generally. Specifically, such a facility is not a preordained exit procedure that has been implemented with the purpose of enabling some or all investors to avoid deriving "dividends" (for income tax purposes) under the Arrangement.

(j) There is no "arrangement" (as defined by section OB 1) between any NZ investor and the Fund and/or any member(s) of the Macquarie group, including Macquarie, the Trustee, Macquarie Sub, and Macquarie International Capital Advisors Pty Limited, to prefer or treat differently any such investor as to the redemption of units and the application of the ordering rule (for income tax purposes).

How the Taxation Laws apply to the Arrangement

Subject in all respects to the conditions stated above, the Taxation Laws apply to the Arrangement as follows:

- Subject to Subpart FG (being the rules relating to thin capitalisation), for NZ investors who are individuals, or a company not excluded from section DD 1(3) by section DD 1(4), and who have borrowed an Investment Loan to invest in units in the Titan Trust, expenditure on interest incurred by those NZ investors (whether in relation to only the Investment Loan, or in relation to a financial arrangement that includes the Investment Loan) will be deductible under section DD 1(1)(b) or section DD 1(3);
- The interest of a New Zealand resident investor in the Titan Trust will not constitute an interest in a foreign investment fund by virtue of section CG 15(2)(b).
- If the Titan Trust is a CFC (as defined in section CG 4):
  - NZ investors will not be required to return attributed foreign income or losses pursuant to section CG 1 from the Titan Trust by virtue of section CG 13(1).
  - Subject to section CG 6(1)(a), those NZ investors having an "income interest of 10% or greater" (as defined in section OB 1) in the Titan Trust for any "accounting period" (as defined in section OB 1) are required to return FIF income or loss attributed to the investor pursuant to section CG 7(5).
  - Those NZ investors which do not have an "income interest of 10% or greater" (as defined in section OB 1) in the Titan Trust for any "accounting period" (as defined by section OB 1) are not required to return FIF income or loss by virtue of section CG 15(2)(b) and are not required to return FIF income or loss attributed to the investor pursuant to section CG 7(5).
- If the Fund is a CFC (as defined by section CG 4) as a consequence of the Titan Trust being a CFC (as defined in section CG 4) and holding qualified control interests (as defined by section CG 4(6)) in the Fund:
  - Subject to section CG 6(1)(a), those NZ investors holding an "income interest of 10% or greater" (as defined by section OB 1) in the Fund for any "accounting period" (as defined by section OB 1) are required to return attributed foreign income or loss pursuant to section CG 1, and
  - Subject to section CG 6(1)(a), those NZ investors holding an "income interest of 10% or greater" (as defined by section OB 1) in the Fund for any "accounting period" (as defined by section OB 1) are required to return foreign investment fund income or loss of the Fund attributed to the investor pursuant to section CG 7(5).
- If an underlying foreign company is a CFC (as defined by section CG 4) as a consequence of the Fund being a CFC (as defined by section CG 4) and holding "qualified control interests" (as defined by section CG 4(6)) in the underlying foreign company, the rulings in (c) above shall apply, subject to section CG 13, in respect of the underlying foreign company, and so on down any chain of CFCs.
- Sections BG 1 and GB 1 do not apply to the Arrangement to negate or vary any of the above conclusions.

The period for which this Ruling applies

This Ruling will apply from 1 March 2002 to 30 April 2008.

This Ruling is signed by me on the 11th day of December 2002.

John Mora
Assistant General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD 02/23

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Platinum Asset Management Limited ("PAML").

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3(1)(a), CF 8(b), CG 15(2)(b) and the definition of "non-taxable bonus issue" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the investment by New Zealand resident Unit Holders in the Platinum European Fund (the "Fund"), an Australian resident unit trust, and the establishment of two new classes of units, namely Class D and Class E. This is pursuant to the Platinum Trust Consolidated Constitution (the "Constitution"), an Investment Statement dated 11 June 2002 (the "Investment Statement"), and a Product Disclosure Statement dated 11 June 2002 (the "Disclosure Statement"). These documents were supplied to the Rulings Unit on 17 June 2002 and 27 September 2002. In addition, a copy of an Administration Agreement between PAML (as Trustee of the Platinum Trust) and a New Zealand investor was provided to the Rulings Unit on 15 November 2002. Apart from these documents, there is no other agreement, arrangement or understanding between PAML and any Unit Holder. Further details of the Arrangement are set out in the paragraphs below.

1. PAML is the Responsible Entity performing both the role of Trustee and Manager of the Fund. The operation of the Fund is governed by the Constitution. The Fund is managed and controlled in Australia by PAML. New Zealand residents will be invited to purchase units in the Fund.

2. The objective of the Fund is to provide investors with capital growth over the long-term (five or more years) by investing in stock markets in Europe (including the emerging markets of Eastern Europe and Russia). The portfolio consists of around 40-60 stocks.

3. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund is an Australian tax resident unit trust and is not resident in New Zealand.

4. The Fund will be liable to tax in Australia by reason of the Fund being resident in Australia and its central management and control being in Australia. The Fund is governed by the laws of New South Wales and PAML is an Australian-based company which operates from its offices in Sydney, Australia.

5. The Manager holds the assets of the Fund on trust. Unit Holders have a beneficial interest in the Fund, which is divided into units of one or more classes as designated by the Manager. Every unit will be of equal value to each other unit in the Fund and will confer an equal interest in the Fund and its distributable income. A unit in the Fund will not confer any interest in any particular part of the Fund nor in any particular asset forming part of the Fund.

6. According to the Constitution, the distributable income of the Fund will be determined by the Manager at the end of each financial year and the income shall be distributed as soon as reasonably practicable after the end of the relevant financial year (Clauses 16.1, 16.4, 16.5 and 16.6).

7. The Constitution further provides that the Manager may at any time create and issue units of a particular class in the Fund with special terms of issues, rights, or liabilities (Clause 6.2).

8. Under the memoranda of unit classes establishing the Class D and Class E units ("the Memoranda"), the Manager will automatically reinvest the distributable income which a Unit Holder of Class D and Class E would otherwise receive as a distribution by way of the issue of additional units in the Fund (Clause 5). New Zealand resident Unit Holders provide no consideration to the Fund for the issue of the additional units.

9. The Fund is predominantly held by Australian Unit Holders. Pursuant to clause 6.4 of the constitution of the Fund, the New Zealand Unit Holders do not have the power to control the exercise of decision-making rights with respect to the Fund.

10. The Manager retains the discretion to pay income distributions in cash under the terms of the Memoranda.

11. This Ruling is in relation to Class D and Class E units which are subject to non-discretionary reinvestment in additional units.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) An investment in the Fund will not be an investment in a controlled foreign company as defined in section CG 4.

(b) All distributable income from Class D and Class E units will be automatically reinvested in Class D and Class E units in accordance with the Constitution.

(c) PAML will not exercise its discretion to pay cash distributions to Unit Holders in accordance with clause 5(b) of the Memoranda.

(d) PAML will not make an election under section CF 8 that the issue of additional units will be a "taxable bonus issue".

(e) New Zealand Unit Holders will not use the branch equivalent method of accounting for income under the foreign investment fund regime.

(f) The Fund is not resident in New Zealand.

(g) The Trustee of the Fund is resident in Australia for Australian tax purposes.

(h) The central management and control of the Fund is in Australia.

(i) At the date of issue of this Ruling, the Fund is subject to the provisions of Division 6 of the Income Tax Assessment Act 1936.

(j) At the date of issue of this Ruling, the Trustee is liable to pay tax under Division 6 of the Income Tax Assessment Act 1936 on the worldwide income of the Fund to which the beneficiaries of the Fund are not presently entitled.

(k) There will be no material changes to the way the Fund is taxed in Australia for the period of this Ruling.

(l) The Fund will not be a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.

(m) Any Administration Agreements entered into with PAML in respect of the Fund, are not materially different to the Administration Agreement provided to the Rulings Unit on 15 November 2002.

(n) There is nothing permitted by law that enables New Zealand Unit Holders to control the exercise of decision-making rights with respect to the Fund.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Where Class D and Class E units are issued on the terms that PAML has the power to reinvest the income entitlements in additional units, the issue of additional units to Unit Holders will constitute a "non-taxable bonus issue" (under section CF 8(b) and the definition of "non-taxable bonus issue" in section OB 1).
- These units will be excluded from the definition of a dividend in terms of section CF 3(1)(a).
- Interests held by New Zealand investors in the Fund will be excluded from the definition of "foreign investment fund" by virtue of section CG 15(2)(b).

The period or income year for which this Ruling applies

This Ruling will apply for the period 20 December 2002 to 19 December 2007.

This Ruling is signed by me on the 20th day of December 2002.

Martin Smith
General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD 02/24

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Platinum Asset Management Limited ("PAML").

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3(1)(a), CF 8(b), CG 15(2)(b) and the definition of "non-taxable bonus issue" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the investment by New Zealand resident Unit Holders in the Platinum International Brands Fund (the "Fund"), an Australian resident unit trust, and the establishment of two new classes of units, namely Class D and Class E. This is pursuant to the Platinum Trust Consolidated Constitution (the "Constitution"), an Investment Statement dated 11 June 2002 (the "Investment Statement"), and a Product Disclosure Statement dated 11 June 2002 (the "Disclosure Statement"). These documents were supplied to the Rulings Unit on 17 June 2002 and 27 September 2002. In addition, a copy of an Administration Agreement between PAML (as Trustee of the Platinum Trust) and a New Zealand investor was provided to the Rulings Unit on 15 November 2002. Apart from these documents, there is no other agreement, arrangement or understanding between PAML and any Unit Holder. Further details of the Arrangement are set out in the paragraphs below.

1. PAML is the Responsible Entity performing both the role of Trustee and Manager of the Fund. The operation of the Fund is governed by the Constitution. The Fund is managed and controlled in Australia by PAML. New Zealand residents will be invited to purchase units in the Fund.

2. The objective of the Fund is to provide capital growth over the long term by investing in companies with well recognised consumer brand names from around the world such as producers of luxury goods, other consumer durables, as well as food, beverages, household and personal care products. The portfolio consists of around 40 stocks.

3. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund is an Australian tax resident unit trust and is not resident in New Zealand.

4. The Fund will be liable to tax in Australia by reason of the Fund being resident in Australia and its central management and control being in Australia. The Fund is governed by the laws of New South Wales and PAML is an Australian-based company which operates from its offices in Sydney, Australia.

5. The Manager holds the assets of the Fund on trust. Unit Holders have a beneficial interest in the Fund, which is divided into units of one or more classes as designated by the Manager. Every unit will be of equal value to each other unit in the Fund and will confer an equal interest in the Fund and its distributable income. A unit in the Fund will not confer any interest in any particular part of the Fund nor in any particular asset forming part of the Fund.

6. According to the Constitution, the distributable income of the Fund will be determined by the Manager at the end of each financial year and the income shall be distributed as soon as reasonably practicable after the end of the relevant financial year (Clauses 16.1, 16.4, 16.5 and 16.6).

7. The Constitution further provides that the Manager may at any time create and issue units of a particular class in the Fund with special terms of issues, rights, or liabilities (Clause 6.2)

8. Under the memoranda of unit classes establishing the Class D and Class E units ("the Memoranda"), the Manager will automatically reinvest the distributable income which a Unit Holder of Class D and Class E would otherwise receive as a distribution by way of the issue of additional units in the Fund (Clause 5). New Zealand resident Unit Holders provide no consideration to the Fund for the issue of the additional units.

9. The Fund is predominantly held by Australian Unit Holders. Pursuant to clause 6.4 of the constitution of the Fund, the New Zealand Unit Holders do not have the power to control the exercise of decision-making rights with respect to the Fund.

10. The Manager retains the discretion to pay income distributions in cash under the terms of the Memoranda.

11. This Ruling is in relation to Class D and Class E units which are subject to non-discretionary reinvestment in additional units.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) An investment in the Fund will not be an investment in a controlled foreign company as defined in section CG 4.

(b) All distributable income from Class D and Class E units will be automatically reinvested in Class D and Class E units in accordance with the Constitution.

(c) PAML will not exercise its discretion to pay cash distributions to Unit Holders in accordance with clause 5(b) of the Memoranda.

(d) PAML will not make an election under section CF 8 that the issue of additional units will be a "taxable bonus issue".

(e) New Zealand Unit Holders will not use the branch equivalent method of accounting for income under the foreign investment fund regime.

(f) The Fund is not resident in New Zealand.

(g) The Trustee of the Fund is resident in Australia for Australian tax purposes.

(h) The central management and control of the Fund is in Australia.

(i) At the date of issue of this Ruling, the Fund is subject to the provisions of Division 6 of the Income Tax Assessment Act 1936.

(j) At the date of issue of this Ruling, the Trustee is liable to pay tax under Division 6 of the Income Tax Assessment Act 1936 on the worldwide income of the Fund to which the beneficiaries of the Fund are not presently entitled.

(k) There will be no material changes to the way the Fund is taxed in Australia for the period of this Ruling.

(l) The Fund will not be a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.

(m) Any Administration Agreements entered into with PAML in respect of the Fund, are not materially different to the Administration Agreement provided to the Rulings Unit on 15 November 2002.

(n) There is nothing permitted by law that enables New Zealand Unit Holders to control the exercise of decision-making rights with respect to the Fund.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Where Class D and Class E units are issued on the terms that PAML has the power to reinvest the income entitlements in additional units, the issue of additional units to Unit Holders will constitute a "non-taxable bonus issue" (under section CF 8(b) and the definition of "non-taxable bonus issue" in section OB 1).
- These units will be excluded from the definition of a dividend in terms of section CF 3(1)(a).
- Interests held by New Zealand investors in the Fund will be excluded from the definition of "foreign investment fund" by virtue of section CG 15(2)(b).

The period or income year for which this Ruling applies

This Ruling will apply for the period 20 December 2002 to 19 December 2007.

This Ruling is signed by me on the 20th day of December 2002.

Martin Smith
General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD 02/25

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Platinum Asset Management Limited ("PAML").

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3(1)(a), CF 8(b), CG 15(2)(b) and the definition of "non-taxable bonus issue" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the investment by New Zealand resident Unit Holders in the Platinum International Technology Fund (the "Fund"), an Australian resident unit trust, and the establishment of two new classes of units, namely Class D and Class E. This is pursuant to the Platinum Trust Consolidated Constitution (the "Constitution"), an Investment Statement dated 11 June 2002 (the "Investment Statement"), and a Product Disclosure Statement dated 11 June 2002 (the "Disclosure Statement". These documents were supplied to the Rulings Unit on 17 June 2002 and 27 September 2002. In addition, a copy of an Administration Agreement between PAML (as Trustee of the Platinum Trust) and a New Zealand investor was provided to the Rulings Unit on 15 November 2002. Apart from these documents, there is no other agreement, arrangement or understanding between PAML and any Unit Holder. Further details of the Arrangement are set out in the paragraphs below.

1. PAML is the Responsible Entity performing both the role of Trustee and Manager of the Fund. The operation of the Fund is governed by the Constitution". The Fund is managed and controlled in Australia by PAML. New Zealand residents will be invited to purchase units in the Fund.

2. The objective of the Fund is to provide capital growth over the long term by taking advantage of the opportunities being created by the developments in information technology and telecommunications. The Fund invests in companies around the world, including providers of computing, networking and telecommunications equipment, software, semiconductors and related capital equipment providers, IT services, as well as network operators, content providers and internet-based businesses. The portfolio consists of around 30-60 stocks.

3. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund is an Australian tax resident unit trust and is not resident in New Zealand.

4. The Fund will be liable to tax in Australia by reason of the Fund being resident in Australia and its central management and control being in Australia. The Fund is governed by the laws of New South Wales and PAML is an Australian-based company which operates from its offices in Sydney, Australia.

5. The Manager holds the assets of the Fund on trust. Unit Holders have a beneficial interest in the Fund, which is divided into units of one or more classes as designated by the Manager. Every unit will be of equal value to each other unit in the Fund and will confer an equal interest in the Fund and its distributable income. A unit in the Fund will not confer any interest in any particular part of the Fund nor in any particular asset forming part of the Fund.

6. According to the Constitution, the distributable income of the Fund will be determined by the Manager at the end of each financial year and the income shall be distributed as soon as reasonably practicable after the end of the relevant financial year (Clauses 16.1, 16.4, 16.5 and 16.6).

7. The Constitution further provides that the Manager may at any time create and issue units of a particular class in the Fund with special terms of issues, rights, or liabilities (Clause 6.2).

8. Under the memoranda of unit classes establishing the Class D and Class E units ("the Memoranda"), the Manager will automatically reinvest the distributable income which a Unit Holder of Class D and Class E would otherwise receive as a distribution by way of the issue of additional units in the Fund (Clause 5). New Zealand resident Unit Holders provide no consideration to the Fund for the issue of the additional units.

9. The Fund is predominantly held by Australian Unit Holders. Pursuant to clause 6.4 of the constitution of the Fund, the New Zealand Unit Holders do not have the power to control the exercise of decision-making rights with respect to the Fund.

10. The Manager retains the discretion to pay income distributions in cash under the terms of the Memoranda.

11. This Ruling is in relation to Class D and Class E units which are subject to non-discretionary reinvestment in additional units.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) An investment in the Fund will not be an investment in a controlled foreign company as defined in section CG 4.

(b) All distributable income from Class D and Class E units will be automatically reinvested in Class D and Class E units in accordance with the Constitution.

(c) PAML will not exercise its discretion to pay cash distributions to Unit Holders in accordance with clause 5(b) of the Memoranda.

(d) PAML will not make an election under section CF 8 that the issue of additional units will be a "taxable bonus issue".

(e) New Zealand Unit Holders will not use the branch equivalent method of accounting for income under the foreign investment fund regime.

(f) The Fund is not resident in New Zealand.

(g) The Trustee of the Fund is resident in Australia for Australian tax purposes.

(h) The central management and control of the Fund is in Australia.

(i) At the date of issue of this Ruling, the Fund is subject to the provisions of Division 6 of the Income Tax Assessment Act 1936.

(j) At the date of issue of this Ruling, the Trustee is liable to pay tax under Division 6 of the ITAA on the worldwide income of the Fund to which the beneficiaries of the Fund are not presently entitled.

(k) There will be no material changes to the way the Fund is taxed in Australia for the period of this Ruling.

(l) The Fund will not be a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.

(m) Any Administration Agreements entered into with PAML in respect of the Fund, are not materially different to the Administration Agreement provided to the Rulings Unit on 15 November 2002.

(n) There is nothing permitted by law that enables New Zealand Unit Holders to control the exercise of decision-making rights with respect to the Fund.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Where Class D and Class E units are issued on the terms that PAML has the power to reinvest the income entitlements in additional units, the issue of additional units to Unit Holders will constitute a "non-taxable bonus issue" (under section CF 8(b) and the definition of "non-taxable bonus issue" in section OB 1).
- These units will be excluded from the definition of a dividend in terms of section CF 3(1)(a).
- Interests held by New Zealand investors in the Fund will be excluded from the definition of "foreign investment fund" by virtue of section CG 15(2)(b).

The period or income year for which this Ruling applies

This Ruling will apply for the period 20 December 2002 to 19 December 2007.

This Ruling is signed by me on the 20th day of December 2002.

Martin Smith
General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD 02/26

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Platinum Asset Management Limited ("PAML").

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3(1)(a), CF 8(b), CG 15(2)(b) and the definition of "non-taxable bonus issue" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the investment by New Zealand resident Unit Holders in the Platinum International Fund (the "Fund"), an Australian resident unit trust, and the establishment of two new classes of units, namely Class D and Class E. This is pursuant to the Platinum Trust Consolidated Constitution (the "Constitution"), an Investment Statement dated 11 June 2002 (the "Investment Statement"), and a Product Disclosure Statement dated 11 June 2002 (the "Disclosure Statement"). These documents were supplied to the Rulings Unit on 17 June 2002 and 27 September 2002. In addition, a copy of an Administration Agreement between PAML (as Trustee of the Platinum Trust) and a New Zealand investor was provided to the Rulings Unit on 15 November 2002. Apart from these documents, there is no other agreement, arrangement or understanding between PAML and any Unit Holder. Further details of the Arrangement are set out in the paragraphs below.

1. PAML is the Responsible Entity performing both the role of Trustee and Manager of the Fund. The operation of the Fund is governed by the Constitution. The Fund is managed and controlled in Australia by PAML. New Zealand residents will be invited to purchase units in the Fund.

2. The objective of the Fund is to provide investors with capital growth over the long term through searching out undervalued listed and unlisted investments around the world. The Fund invests in traditional and emerging markets from around the world. The portfolio consists of around 60-100 stocks.

3. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund is an Australian tax resident unit trust and is not resident in New Zealand.

4. The Fund will be liable to tax in Australia by reason of the Fund being resident in Australia and its central management and control being in Australia. The Fund is governed by the laws of New South Wales and PAML is an Australian-based company which operates from its offices in Sydney, Australia.

5. The Manager holds the assets of the Fund on trust. Unit Holders have a beneficial interest in the Fund, which is divided into units of one or more classes as designated by the Manager. Every unit will be of equal value to each other unit in the Fund and will confer an equal interest in the Fund and its distributable income. A unit in the Fund will not confer any interest in any particular part of the Fund nor in any particular asset forming part of the Fund.

6. According to the Constitution, the distributable income of the Fund will be determined by the Manager at the end of each financial year and the income shall be distributed as soon as reasonably practicable after the end of the relevant financial year (Clauses 16.1, 16.4, 16.5 and 16.6).

7. The Constitution further provides that the Manager may at any time create and issue units of a particular class in the Fund with special terms of issues, rights, or liabilities (Clause 6.2).

8. Under the memoranda of unit classes establishing the Class D and Class E units ("the Memoranda"), the Manager will automatically reinvest the distributable income which a Unit Holder of Class D and Class E would otherwise receive as a distribution by way of the issue of additional units in the Fund (Clause 5). New Zealand resident Unit Holders provide no consideration to the Fund for the issue of the additional units.

9. The Fund is predominantly held by Australian Unit Holders. Pursuant to clause 6.4 of the constitution of the Fund, the New Zealand Unit Holders do not have the power to control the exercise of decision-making rights with respect to the Fund.

10. The Manager retains the discretion to pay income distributions in cash under the terms of the Memoranda.

11. This Ruling is in relation to Class D and Class E units which are subject to non-discretionary reinvestment in additional units.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) An investment in the Fund will not be an investment in a controlled foreign company as defined in section CG 4.

(b) All distributable income from Class D and Class E units will be automatically reinvested in Class D and Class E units in accordance with the Constitution.

(c) PAML will not exercise its discretion to pay cash distributions to Unit Holders in accordance with clause 5(b) of the Memoranda.

(d) PAML will not make an election under section CF 8 that the issue of additional units will be a "taxable bonus issue".

(e) New Zealand Unit Holders will not use the branch equivalent method of accounting for income under the foreign investment fund regime.

(f) The Fund is not resident in New Zealand.

(g) The Trustee of the Fund is resident in Australia for Australian tax purposes.

(h) The central management and control of the Fund is in Australia.

(i) At the date of issue of this Ruling, the Fund is subject to the provisions of Division 6 of the Income Tax Assessment Act 1936.

(j) At the date of issue of this Ruling, the Trustee is liable to pay tax under Division 6 of the ITAA on the worldwide income of the Fund to which the beneficiaries of the Fund are not presently entitled.

(k) There will be no material changes to the way the Fund is taxed in Australia for the period of this Ruling.

(l) The Fund will not be a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.

(m) Any Administration Agreements entered into with PAML in respect of the Fund, are not materially different to the Administration Agreement provided to the Rulings Unit on 15 November 2002.

(n) There is nothing permitted by law that enables New Zealand Unit Holders to control the exercise of decision-making rights with respect to the Fund.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Where Class D and Class E units are issued on the terms that PAML has the power to reinvest the income entitlements in additional units, the issue of additional units to Unit Holders will constitute a "non-taxable bonus issue" (under section CF 8(b) and the definition of "non-taxable bonus issue" in section OB 1).
- These units will be excluded from the definition of a dividend in terms of section CF 3(1)(a).
- Interests held by New Zealand investors in the Fund will be excluded from the definition of "foreign investment fund" by virtue of section CG 15(2)(b).

The period or income year for which this Ruling applies

This Ruling will apply for the period 20 December 2002 to 19 December 2007.

This Ruling is signed by me on the 20th day of December 2002.

Martin Smith
General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD 02/27

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Platinum Asset Management Limited ("PAML").

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CF 3(1)(a), CF 8(b), CG 15(2)(b) and the definition of "non-taxable bonus issue" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the investment by New Zealand resident Unit Holders in the Platinum Japan Fund (the "Fund"), an Australian resident unit trust, and the establishment of two new classes of units, namely Class D and Class E. This is pursuant to the Platinum Trust Consolidated Constitution (the "Constitution"), an Investment Statement dated 11 June 2002 (the "Investment Statement"), and a Product Disclosure Statement dated 11 June 2002 (the "Disclosure Statement"). These documents were supplied to the Rulings Unit on 17 June 2002 and 27 September 2002. In addition, a copy of an Administration Agreement between PAML (as Trustee of the Platinum Trust) and a New Zealand investor was provided to the Rulings Unit on 15 November 2002. Apart from these documents, there is no other agreement, arrangement or understanding between PAML and any Unit Holder. Further details of the Arrangement are set out in the paragraphs below.

1. PAML is the Responsible Entity performing both the role of Trustee and Manager of the Fund. The operation of the Fund is governed by the Constitution. The Fund is managed and controlled in Australia by PAML. New Zealand residents will be invited to purchase units in the Fund.

2. The objective of the Fund is to provide investors with capital growth over the long term (five or more years) through searching out undervalued listed and unlisted investments in Japanese and Korean companies. The Fund invests principally in Japanese stocks and may invest up to 25% of the fund in Korea. The portfolio consists of around 40-60 stocks.

3. The Fund is registered as a managed investment scheme under Chapter 5C of the Corporations Law of Australia. The Fund is an Australian tax resident unit trust and is not resident in New Zealand.

4. The Fund will be liable to tax in Australia by reason of the Fund being resident in Australia and its central management and control being in Australia. The Fund is governed by the laws of New South Wales and PAML is an Australian-based company which operates from its offices in Sydney, Australia.

5. The Manager holds the assets of the Fund on trust. Unit Holders have a beneficial interest in the Fund, which is divided into units of one or more classes as designated by the Manager. Every unit will be of equal value to each other unit in the Fund and will confer an equal interest in the Fund and its distributable income. A unit in the Fund will not confer any interest in any particular part of the Fund nor in any particular asset forming part of the Fund.

6. According to the Constitution, the distributable income of the Fund will be determined by the Manager at the end of each financial year and the income shall be distributed as soon as reasonably practicable after the end of the relevant financial year (Clauses 16.1, 16.4, 16.5 and 16.6).

7. The Constitution further provides that the Manager may at any time create and issue units of a particular class in the Fund with special terms of issues, rights, or liabilities (Clause 6.2).

8. Under the memoranda of unit classes establishing the Class D and Class E units ("the Memoranda"), the Manager will automatically reinvest the distributable income which a Unit Holder of Class D and Class E would otherwise receive as a distribution by way of the issue of additional units in the Fund (Clause 5). New Zealand resident Unit Holders provide no consideration to the Fund for the issue of the additional units.

9. The Fund is predominantly held by Australian Unit Holders. Pursuant to clause 6.4 of the constitution of the Fund, the New Zealand Unit Holders do not have the power to control the exercise of decision-making rights with respect to the Fund.

10. The Manager retains the discretion to pay income distributions in cash under the terms of the Memoranda.

11. This Ruling is in relation to Class D and Class E units which are subject to non-discretionary reinvestment in additional units.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) An investment in the Fund will not be an investment in a controlled foreign company as defined in section CG 4.

(b) All distributable income from Class D and Class E units will be automatically reinvested in Class D and Class E units in accordance with the Constitution.

(c) PAML will not exercise its discretion to pay cash distributions to Unit Holders in accordance with clause 5(b) of the Memoranda.

(d) PAML will not make an election under section CF 8 that the issue of additional units will be a "taxable bonus issue".

(e) New Zealand Unit Holders will not use the branch equivalent method of accounting for income under the foreign investment fund regime.

(f) The Fund is not resident in New Zealand.

(g) The Trustee of the Fund is resident in Australia for Australian tax purposes.

(h) The central management and control of the Fund is in Australia.

(i) At the date of issue of this Ruling, the Fund is subject to the provisions of Division 6 of the Income Tax Assessment Act 1936.

(j) At the date of issue of this Ruling, the Trustee is liable to pay tax under Division 6 of the ITAA on the worldwide income of the Fund to which the beneficiaries of the Fund are not presently entitled.

(k) There will be no material changes to the way the Fund is taxed in Australia for the period of this Ruling.

(l) The Fund will not be a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.

(m) Any Administration Agreements entered into with PAML in respect of the Fund, are not materially different to the Administration Agreement provided to the Rulings Unit on 15 November 2002.

(n) There is nothing permitted by law that enables New Zealand Unit Holders to control the exercise of decision-making rights with respect to the Fund.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Where Class D and Class E units are issued on the terms that PAML has the power to reinvest the income entitlements in additional units, the issue of additional units to Unit Holders will constitute a "non-taxable bonus issue" (under section CF 8(b) and the definition of "non-taxable bonus issue" in section OB 1).
- These units will be excluded from the definition of a dividend in terms of section CF 3(1)(a).
- Interests held by New Zealand investors in the Fund will be excluded from the definition of "foreign investment fund" by virtue of section CG 15(2)(b).

The period or income year for which this Ruling applies

This Ruling will apply for the period 20 December 2002 to 19 December 2007.

This Ruling is signed by me on the 20th day of December 2002.

Martin Smith
General Manager (Adjudication & Rulings)

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Privy Council.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

LATE OBJECTION APPLICATION TO BE RECONSIDERED

Case: R G Lawton v CIR

Decision date: 19 December 2002

Act: Income Tax Act 1976

Keywords: Judicial review, late objection

Summary

Mr Lawton sought judicial review of the Commissioner's decision to not accept an application for late objection in relation to share-trading losses. Commissioner's decision upheld in the High Court, but the Court of Appeal ruled Commissioner to reconsider the application for late objection, highlighting consideration of the merits while upholding the High Court's finding that the Commissioner is not under a statutory duty to assess omitted income.

Facts

Mr Lawton is a builder who in 1986 forayed into the stock market. Between 1986 and 1992 he incurred losses of $566,183.33 and interest costs of $281,020, only making a profit in the income years ended 1987 and 1989.

Until 1993, Mr Lawton viewed his profits or losses (and associated interest costs) as being on capital account and therefore did not include them in his income tax returns for those years. He did return the dividend income.

In 1993, following publicity of the Court of Appeal's decisions in *CIR v Inglis* [1993] 2 NZLR 29 and *CIR v Stockwell* [1993] 2 NZLR 40, Mr Lawton consulted his existing accountant who advised him his share transactions were on revenue account.

Mr Lawton's accountant then sought that corresponding adjustments be made by the Commissioner and reassessments issued. The Commissioner declined to exercise his discretion to do so, treating the accountant's letter as a late objection under s30(2) of the Income Tax Act 1976. This decision of 12 November 1993 was the decision under review.

The matter was revisited several times. The Commissioner maintained his position in relation to the income years to 1992, and allowed Mr Lawton's losses for the 1993 year. Mr Lawton did not consider his request to be a late objection.

In June 2001, Mr Lawton sought judicial review of the Commissioner's decision not to reassess, which was dismissed (reported at (2002) 20 NZTC 17,531). He then lodged this appeal, seeking reassessments be issued for the relevant years.

Decision

The issues before the Court were whether the Commissioner has a statutory duty to assess omitted income; whether the decision of 12 November 1993 was a valid exercise of his discretion, and if not, whether any errors were rectified in the subsequent reviews; and if there are grounds for review, whether the delay in filing proceedings should lead to denial of relief.

The Court of Appeal upheld the High Court's finding that the Commissioner is not under a statutory duty to assess omitted income.

The Court of Appeal's decision reinforces *CIR v Wilson* (1996) 17 NZTC 12,512, in which case it was held the merits of the objection may be one relevant factor (ie not the overriding factor), stating the paramount consideration in all cases is not necessarily the correctness of the assessment.

While finding the Commissioner is entitled (in a case such as this) to treat any request to reassess as a late objection, the Court held the decision of 12 November 1993 was not a valid exercise of the Commissioner's discretion because the merits of Mr Lawton's proposed objection were not considered.

This error was not rectified in the subsequent reviews. The Court found the merits were not considered by the primary officer, or the Regional Controller initially, and

when the merits were considered by the departmental solicitor and later by the Regional Controller again, that they were not given any weight but rather, departmental policy was rigidly adhered to in declining to accept the late objection.

The Court found Mr Lawton did not "seek advantage", but rather was "prompted" by the publicity surrounding the other two cases, to make enquiries of his existing accountant. The Court did not find any of the following amounted to seeking an advantage from the recently publicised cases: the scale, volume or frequency of the share transactions; Mr Lawton's experience in business; that he had an accountant; or the lack of objection through the then applicable process. Rather, his losses would have been on revenue account even if those earlier decisions had not found in favour of those taxpayers.

The Court held the delay in filing proceedings should not lead to denial of relief, taking into account the reasons for the delay, the failure by the Commissioner to examine the merits of his case in a proper fashion, and the absence of prejudice to the Commissioner from the delay.

However, the Court did not grant the relief sought by Mr Lawton (the issuing of reassessments for the relevant years). Rather, the Court ordered the CIR to reconsider the application for acceptance of a late objection, in accordance with the terms of its judgment, being to consider the merits of Mr Lawton's position and properly weigh them.

APPLICATION FOR LEAVE TO APPEAL

Case: CIR v Surjeet Singh

Decision date: 20 December 2002

Act: Section 71A Districts Courts Act 1947

Keywords: Appeal against findings of fact

Summary

The CIR successfully resisted the application for leave to appeal.

Facts

On 12 October 2001, in the context of proceedings for recovery of tax, Judge Cadenhead determined a factual dispute between the Commissioner and taxpayer over whether the department had agreed to accept a late notice of objection. He found in favour of the department. A statement of defence filed asserted the taxpayer had objected to a default assessment on 22 October 1998, and again to further assessments from time to time, the last being on 17 July 1999.

A challenge by way of judicial review followed, which was reported as *Singh v CIR* (2002) 20 NZTC 17,811. In those proceedings, the taxpayer alleged the Commissioner had failed to take into account certain returns he claimed to have made in relation to the 1990-1998 tax years. Alternatively, he sought a determination that the Commissioner had acted wrongly in failing to find that delays in challenging assessments were due to exceptional circumstances so the time for challenge should be extended.

The High Court found each ground advanced in respect of the first cause of action failed, and there were no exceptional circumstances. Consequently the judicial review application was dismissed.

In the course of its judgment the High Court had said:

> "Factual issue (ii) has been determined adversely to the plaintiff by the District Court's decision delivered by Judge Cadenhead on 12 October 2001. *The plaintiff is bound by the decision which, save by appeal brought within time, cannot be challenged.* I do not accept the plaintiff's submission that this application for review is to be treated as such appeal. To do so would multiply error: effectively treating as reviewable by the District Court the determination of the Crown's delegate not to find "exceptional circumstances"; and as reviewable by this court the limited factual determination by the District Court on the point. Litigation must be kept on the correct jurisdictional rails. (Emphasis added)

In the light of these comments, the taxpayer made the present application to the District Court for leave to appeal against the judgment of Judge Cadenhead. That judgment had not been sealed, and relative to the date of sealing, there was no dispute that the application for leave was in time.

Decision

The taxpayer confirmed in argument that he really wanted to appeal the finding of credibility made by Judge Cadenhead and that he preferred the evidence of the Department. He submitted the District Court need not be troubled by the detail, as justice required that whatever the taxpayer wanted reconsidered by the High Court should go to it.

The Court referred to observations on the purpose of requiring leave in *Sandle v Stewart* [1982] 1 NZLR 708,715, and noted that an appellate Court will only interfere in a finding of credibility in exceptional circumstances, where, for example, the judge at first instance has failed to take advantage of evidence he has heard. It was therefore difficult to see the point of giving leave in this case, unless it could be established where the judge might have gone wrong.

The Court found that no details of any arguable complaint about the factual findings were forthcoming. It also expressed the view the District Court probably had no power to inquire into the factual issue at all, as that offended section 109 of the Tax Administration Act 1994.

In the result, the Court found there was no merit of any kind in the application and observed the application had been brought without any apparent sign of even the most basic consideration of principle and statutory provision. In the circumstances, the Commissioner was awarded $1,500 costs.

APPEAL NOT PERMITTED AFTER UNSUCCESSFUL JUDICIAL REVIEW

Case: TRA 47/97

Decision date: 14 January 2003

Act: Taxation Review Authorities Act 1994

Keywords: Judicial review, appeal, cases stated

Summary

Judge Barber refused to allow an appeal of a decision of the Taxation Review Authority after that decision had previously been unsuccessfully judicially reviewed.

Facts

This case involved certain participants of a well-known tax avoidance scheme developed by Mr J G Russell, an Auckland accountant. Mr Russell's template has been held to be a tax avoidance arrangement (see the Privy Council in *Miller v CIR* [2001] 3 NZLR 316).

This case relates to the aftermath of the *Wetherill* judicial review case which culminated in the Privy Council refusing leave to hear the applicants' appeal on 2 October 2002.

Wetherill related to two decisions of Judge Barber in the Taxation Review Authority ("the TRA"): *Case U35* ((2000) 19 NZTC 9,330) and *Case U41* ((2000) 19 NZTC 9,380). In *Case U35* Judge Barber allowed the Commissioner to file certain cases stated out of time, and refused the objectors' applications that their objections be allowed. In *Case U41* Judge Barber struck out an attempted appeal of *Case U35* and refused to state a case on appeal for the opinion of the High Court.

In *Wetherill*, a judicial review of *Case U35* and *Case U41*, the High Court (O'Regan J) found for the objectors/applicants: *M & J Wetherill & Co Ltd & Ors v TRA & CIR* (2001) 20 NZTC 17,166. However, the Court of Appeal overturned O'Regan J's decision and later refused leave to appeal to the Privy Council: *M & J Wetherill & Co Ltd & Ors v TRA & CIR* (2002) 20 NZTC 17,624; *M & J Wetherill & Co Ltd & Ors v TRA & CIR* (2002) 20 NZTC 17,681. The Privy Council itself refused special leave.

In this case the objectors attempted to appeal, as opposed to review, the TRA's decision in *Case U35*.

The objectors argued that O'Regan J had held that there was a right of appeal in relation to the decision in *Case U35* and that as the Commissioner had not appealed against that finding the TRA was bound to follow the ruling of the High Court. They submitted that O'Regan J's decision was res judicata and the TRA was therefore obliged to state a case on appeal in respect of *Case U35*.

The essence of the objectors' arguments was summarised by Judge Barber in paragraph [52] as follows:

> "Essentially then, Mr Judd puts it that, with regard to my said findings in *Case U35*, I am now required to state a Case on Appeal to the High Court pursuing to section 26 as the High Court found that I should."

The Commissioner argued that O'Regan J's decision on this point was at best obiter, and that he had not made any orders in relation to the relevant section of the Taxation Review Authorities Act 1994. The Commissioner also submitted that the Court of Appeal had made it clear that there was no basis for a separate appeal to the High Court in respect of the matters that were covered by the judicial review. The Court of Appeal had also remarked that in this case there was no room for different factual conclusions on judicial review or appeal.

Decision

Judge Barber stated that the Court of Appeal "seemed to me to confirm my rulings in both *Cases U35* and *U41*. One of those rulings was that the objectors had no right of appeal from the orders and findings which I made in *Case U35*. In simple terms, it seems to me that one of the orders which I made in *Case U41* still stands, namely, that the taxpayers' Notice of Appeal from my interlocutory ruling of 4 February 2000 (*Case U35*) be struck out, and this has been confirmed by all our appellate Courts, so there is no notice of appeal on which a form of Case Stated can now be based."

Judge Barber concluded that his decision in *Case U41* to strike out the reported appeal still stood intact. Furthermore, he agreed with counsel for the Commissioner's submission that many of the points raised in the purported case on appeal had already been dealt with "and dismissed" by the Court of Appeal. The case stated on the appeal that had been submitted to the TRA was "ineffective and invalid".

REGULAR FEATURES

DUE DATES REMINDER

March 2003

5 Employer deductions and employer monthly schedule

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

7 Provisional tax instalments due for people and organisations with a March balance date

20 Employer deductions

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due

Employer deductions and employer monthly schedule

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

31 GST and return payment due

These dates are taken from Inland Revenue's Smart business tax due date calendar 2002 – 2003. The 2003 – 2004 calendar was unavailable when this publication went to print.

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