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TAX INFORMATION Bulletin

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Inland Revenue
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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents. Because we are keen to produce items that accurately and fairly reflect taxation legislation and are useful in practical situations, your input into the process, as a user of that legislation, is highly valued.

A list of the items we are currently inviting submissions on can be found at **www.ird.govt.nz**. On the homepage, click on "Public consultation" in the right-hand navigation. Here you will find drafts we are currently consulting on as well as a list of expired items. You can email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Office of the Chief Tax Counsel
Inland Revenue
PO Box 2198
Wellington 6140

IN SUMMARY

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INTERPRETATION STATEMENTS

This section of the *TIB* contains interpretation statements issued by the Commissioner of Inland Revenue.

These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

IS 14/01: TAX RESIDENCE – TRANSITIONAL OPERATIONAL POSITION

Interpretation Statement IS 14/01 replaces a number of items previously published by Inland Revenue, most notably "Income Tax Amendment Act (No 5) Rules 1989: New Residence Rules" (*Public Information Bulletin* (PIB) No 180, June 1989).

The Interpretation Statement applies from 1 April 2014. This means that when a taxpayer is deciding whether they are a New Zealand tax resident who needs to file an income tax return for the tax year ended 31 March 2015 and later years, they need to consider the analysis contained in the Interpretation Statement, and apply it to the relevant tax year.

There may be some situations in which the new Interpretation Statement gives a different result from application of the earlier PIB No 180.

As Inland Revenue considers that the legal analysis contained in the Interpretation Statement represents the correct view of the law, taxpayers can ask Inland Revenue to apply the analysis contained in the Interpretation Statement to tax positions taken in earlier years. The Commissioner will apply the principles set out in the Standard Practice Statement on section 113 on a case-by-case basis to determine whether to amend past assessments. These are currently set out in "SPS 07/03 Requests to amend assessments" *Tax Information Bulletin* Vol 19, No 5 (June 2007).

Taxpayers who have taken a tax position in past years, correctly applying the analysis in PIB No 180, will not be required to alter the position they have taken for those past years. However, those taxpayers should apply the analysis set out in the Interpretation Statement from the date of issue going forward.

In circumstances where the legal analysis contained in the Interpretation Statement has already been applied to a taxpayer's affairs (including where they are involved in a current dispute) Inland Revenue will continue to apply that analysis, and will not apply the approach in PIB No 180 to amend the previous position.

If you have reached a view on your tax residence under the approach in PIB No 180 and are unsure about how the Interpretation Statement might affect you, please see our frequently asked questions below. These FAQs provide practical examples of the application of this transitional operational position.

If taxpayers or tax advisors have questions about this transitional operational position or the frequently asked questions, they can email Inland Revenue at **TaxResidence@ird.govt.nz**. Please do not send general residence queries to this email address.

Frequently asked questions

Q1: I thought that I would no longer be **resident** for New Zealand tax purposes because I will be gone for three years. Would I be resident under the approach in the Interpretation Statement?

A1: In the past some people have considered that if they are away from New Zealand for three years they will not be resident here. There is no "three-year away from New Zealand" test in the legislation. All of your circumstances need to be weighed up to determine whether you are tax resident in New Zealand.

If you thought you were not resident because you would be away for a particular period of time, we recommend that you reconsider your position in light of the approach in the Interpretation Statement. This is particularly so if there is a dwelling in New Zealand that you could potentially live in.

Q2: I concluded that I am **not resident** for New Zealand tax purposes under the approach in PIB No 180. Do I need to do anything as a result of the publication of the Interpretation Statement?

A2: The Interpretation Statement applies from 1 April 2014.

Taxpayers who have taken a tax position in past years correctly relying on the approach in PIB No 180 are not required to alter the position they have taken for those past years, but those taxpayers should apply the analysis set out in the Interpretation Statement from 1 April 2014 onwards.

As noted in the answer to Question 1, there is no "three-year away from New Zealand" test in the legislation. A taxpayer who concluded that they were not resident in New Zealand simply because they would be away from New Zealand for a particular period of time, without weighing up all of the circumstances, may wish to reconsider their conclusion.

If, during your absence from New Zealand, there is a dwelling in New Zealand that you could live in and you have strong connections to New Zealand, then you may wish to speak to Inland Revenue or a tax advisor regarding your position.

Q3: I do not have a dwelling in New Zealand, but thought I was **resident** under the approach in PIB No 180. Would I be resident under the approach in the Interpretation Statement?

A3: If there is not a dwelling in New Zealand that you could live in on an enduring rather than temporary basis, you would not be resident under the permanent place of abode test. However, bear in mind that to be non-resident you will also need to:

- have been out of New Zealand for more than 325 days in total in a 12-month period;
- not have been in New Zealand for more than 183 days in total in a 12-month period since satisfying the 325-day rule; and
- not be absent from New Zealand in the service of the Government of New Zealand.

Q4: I live overseas and Inland Revenue has told me my student loan is/is not interest-free; does the new Interpretation Statement change this?

A4: No. Some of the situations where student loans are interest-free even when you are overseas require (among other things) that you are tax resident in New Zealand. Inland Revenue has considered all applications for interest-free student loans on the basis of the view in the Interpretation Statement, so your position will not have changed as a result of the publication of the statement.

Q5: I live overseas and have a rental property in New Zealand, does this mean I am tax resident in New Zealand?

A5: You will not be tax **resident** in New Zealand solely on the basis of having a rental property here. One of the residence tests for individuals is the "permanent place of abode" test. A property that has always been held as an investment would not commonly be a person's permanent place of abode, however, in some circumstances it could be. Your overall connections with the property and with New Zealand would need to be weighed up. We recommend that you seek advice if you are unsure about your tax status.

Q6: What if in previous years the application of the Interpretation Statement would have meant that I was a **non-resident**?

A6: As Inland Revenue considers that the legal analysis contained in the Interpretation Statement represents the correct view of the law you can ask Inland Revenue to apply the analysis contained in the Interpretation Statement to tax positions taken in earlier years. The Commissioner will apply the principles set out in the Standard Practice Statement on section 113 on a case-by-case basis to determine whether to amend past assessments. These are currently set out in "SPS 07/03 Requests to amend assessments" *Tax Information Bulletin* Vol 19, No 5 (June 2007).

Q7: If I have already had the legal analysis in the Interpretation Statement applied to my circumstances, can I ask for my position to be reconsidered applying the analysis in PIB No 180 because the Interpretation Statement applies from 1 April 2014?

A7: No. The Commissioner considers that the legal analysis contained in the Interpretation Statement represents the correct view of the law. Any request for a reassessment will be considered on the basis of the analysis in the Interpretation Statement.

Q8: Applying the Interpretation Statement I have determined that I am a **not** a New Zealand tax **resident** and therefore I do not have to file a tax return. Do I have to revisit this decision every year?

A8: No. If you have applied the Interpretation Statement correctly then unless your circumstances have changed you will remain a non-resident for tax purposes.

Q9: I no longer reside fulltime in New Zealand but applying the Interpretation Statement I have determined that I am a New Zealand tax **resident**. Do I have to revisit this decision every year?

A9: Your circumstances may change, meaning you are no longer a New Zealand tax resident. Therefore, it is advisable that you regularly consider your tax residency status.

Q10: Where else can I get information on tax residence?

A10: There is information on tax residence on Inland Revenue's website. Alternatively, if you are unsure how the Interpretation Statement applies to you, contact your tax advisor.

If taxpayers or tax advisors have questions about the transitional operational position or the frequently asked questions, they can email Inland Revenue at **TaxResidence@ird.govt.nz**. Please do not send general residence queries to this email address.

IS 14/01: TAX RESIDENCE

All legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this statement.

Introduction

Overview

1. This Interpretation Statement explains the residence rules in the Income Tax Act 2007, and applies from 1 April 2014.
2. The analysis in this Interpretation Statement is in three parts. The **first part (from [17])** deals with the rules governing the residence of natural persons (individuals), and discusses the relationship between those rules and the residence articles contained in New Zealand's double taxation agreements (DTAs). It also discusses the transitional resident rules. The **second part (from [308])** explains the residence rules for companies. It also explains the consequences of a company being a dual resident, and briefly discusses the relationship of the company residence rules to the controlled foreign company (CFC) regime. The **final part (from [432])** of this Interpretation Statement deals with residence and the taxation regime for trusts.
3. This Interpretation Statement updates and replaces "Income Tax Amendment Act (No 5) Rules 1989: New Residence Rules" (*Public Information Bulletin* No 180, June 1989). It also replaces the following items:
   - "Returning resident's visas – when a person seeking such a visa is resident for tax purposes" (*Tax Information Bulletin* Vol 11, No 11, December 1999);
   - "Is a person working overseas while on leave of absence for two years resident for tax purposes?" (*Tax Information Bulletin* Vol 11, No 10, November 1999);
   - "Determining a person's permanent place of abode" (*Tax Information Bulletin* Vol 7, No 1, July 1995); and
   - "Residence status of public servant and family while overseas" (*Tax Information Bulletin* Vol 6, No 11, April 1995).
4. The following items should not be relied on to the extent that they are inconsistent with this Interpretation Statement:
   - "Temporary exemption from tax on foreign income for new migrants and certain returning New Zealanders" *Tax Information Bulletin* Vol 18, No 5 (June 2006) (that item's inconsistency with this Interpretation Statement is noted at [232]); and
   - "Temporary exemption for transitional residents" *Tax Information Bulletin* Vol 19, No 3 (April 2007) (that item's inconsistency with this Interpretation Statement is noted at [233]).

Relevance of residence

5. The concept of residence is a central feature of the Act and the Goods and Services Tax Act 1985 (the GSTA 1985).
6. Under the Act, residence is relevant for determining whether a person is assessable for tax on worldwide income or only on New Zealand-sourced income. New Zealand residents are assessable on worldwide income (other than exempt income and excluded income), and non-residents are assessable only on New Zealand-sourced income (other than exempt income and excluded income) (s BD 1(5)). New Zealand residents may be entitled to a credit for foreign income tax paid on foreign-sourced income (s LJ 2).
7. Tax residence is relevant to the rules for the taxation of interests in foreign superannuation schemes. From 1 April 2014, lump sum withdrawals or transfers from foreign superannuation schemes will generally be taxed on an amount that approximates the gains made during the period the person is a New Zealand resident under either one of two new methods—the "schedule" method or the "formula" method. Both of these methods require the person to determine the length of their "assessable period" (CF 3(8)). The duration of a person's tax residence is relevant to determining the length of the "assessable period".
8. In addition to this, there is an exemption period for lump sum foreign superannuation withdrawals or transfers for people who acquired the interest in the scheme when they were non-resident[1] (see ss CW 28B and CF 3). The exemption period runs until the end of the 48th month after the month in which the person satisfied the residence requirements in the Act—similar to the temporary exemption for transitional residents[2]—(see s CF 3(6)). Unlike the transitional resident rules there is no minimum period of non-residence required to qualify for the exemption period.
9. From 1 April 2014 the foreign investment fund (FIF) rules generally no longer apply to interests in foreign superannuation schemes. However, one of the situations where the FIF rules will continue to apply is where a person acquires an interest in the foreign superannuation scheme while they are a New Zealand

[1] Provided they have not had such an exemption period before acquiring the interest.

[2] Discussed from [224].

resident (see the definition of "FIF superannuation interest" in s YA 1).

10. Tax residence is also relevant to a person's eligibility for working for families tax credits under the family scheme. However, there are further additional residence requirements that either the principal caregiver or the dependent child must meet for the purposes of the family scheme. These relate to: being "New Zealand resident" as defined in s MA 8 (which means ordinarily and lawfully resident, other than only because of holding a temporary entry class visa), presence in New Zealand, and the transitional residence status of the principal caregiver and their spouse/partner (ss MC 5 and MD 7).

11. Under the GSTA 1985, residence is relevant for determining the place of supply of goods and services. Supplies by residents are deemed to be made in New Zealand, and supplies by non-residents are generally deemed to be made outside New Zealand (s 8(2) of the GSTA 1985). It is noted that the term "resident" in the GSTA 1985 means resident as determined in accordance with ss YD 1 and YD 2 (excluding s YD 2(2)) of the Act. However the definition of "resident" in the GSTA 1985[3] also provides that:

    - a person is deemed to be resident in New Zealand to the extent that they carry on a taxable activity or any other activity here while having any fixed or permanent place in New Zealand relating to that activity; and
    - a person who is an unincorporated body (which includes a partnership, a joint venture, and the trustee of a trust) is deemed to be resident in New Zealand if the body has its centre of administrative management here.

    It is also noted that supplies by non-residents may be treated as being supplied in New Zealand under s 8(3), (4) and (4B) of the GSTA 1985.

12. Residence under the Act may also be relevant for the purposes of the Student Loan Scheme Act 2011 (the SLSA 2011). Borrowers who are not physically in New Zealand may, in some circumstances, be treated as being physically in New Zealand. Some of the circumstances in which a borrower may be treated as being physically in New Zealand are subject to the condition that the borrower is tax resident in New Zealand (for example in the case of an unplanned absence from New Zealand, or unexpected delay in returning to New Zealand). Being physically in New Zealand, or treated as such, is relevant to whether a borrower is "New Zealand-based"[4] for the purposes of the SLSA 2011. Whether a borrower is New Zealand-based determines if their loan is interest-free, and also determines the repayment obligations that will apply to them.

13. In addition, tax residence may be relevant to a New Zealand-based borrower's filing requirements under the SLSA 2011.

Examples

14. Throughout this Interpretation Statement, examples are given to illustrate points made. These examples are merely illustrative; they obviously do not cover the infinite number of factual scenarios that may arise. The relevant legislative provisions must be considered and applied to each case on its particular facts. That is, conclusions should not be drawn by determining whether the facts of a particular case may be analogous with a particular example, but rather on the basis of applying the correct tests established by the law. There are no "bright-line" tests, and different results in different examples should not be construed as indicating that there are. The examples deal with discrete residence tests, as identified by the headings under which they appear. They do not consider other tests—for example the permanent place of abode examples do not consider the day-count rules, any potential DTA implications, or the application of the transitional resident rules.

Legislation

15. "New Zealand resident" is defined in s YA 1 of the Act, which states:

> **YA 1 Definitions**
>
> In this Act, unless the context requires otherwise,—
>
> …
>
> **New Zealand resident—**
>
> (a) means a person resident in New Zealand under—
>
> (i) section EY 49 (Non-resident life insurer becoming resident):
>
> (ii) sections YD 1 to YD 3 (which relate to residence):
>
> (b) is defined in section MA 8 (Some definitions for family scheme) for the purposes of subparts MA to MF and MZ (which relate to tax credits for families)

16. Section YD 1 deals with the residence of natural persons (individuals)—discussed from [17]. Section YD 2 deals with the residence of companies—discussed from [308].

[3] It is noted that if enacted the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill 2013, introduced on 22 November 2013, will amend the definition of "resident" in the GSTA 1985. The proposed amendment would result in the back-dating rules in s YD 1(4) and (6) being ignored in determining the residence or non-residence of natural persons for GST purposes.

[4] Defined in s 4(1) of the SLSA 2011.

ANALYSIS

PART 1: RESIDENCE OF NATURAL PERSONS (INDIVIDUALS)

Overview

17. An individual is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period (s YD 1(3)) ("the 183-day rule"). The person will then be treated as resident from the first of those 183 days (s YD 1(4)). A person is also resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere (s YD 1(2)).

18. A person who is resident by virtue **only** of the 183 day rule will stop being a New Zealand resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period (s YD 1(5)) ("the 325-day rule"). The person will then be treated as not resident from the first of those 325 days (s YD 1(6)).

19. However the permanent place of abode test is the overriding residence rule for individuals. This means that a person who is absent from New Zealand for more than 325 days in a 12-month period will remain a New Zealand resident if they continue to have a permanent place of abode in New Zealand. Equally, a person who is present in New Zealand for less than 183 days in a 12-month period is still a New Zealand resident if they have a permanent place of abode in New Zealand. A person who is absent for more than 325 days in a 12-month period, but who has a permanent place of abode in New Zealand at any time during that period, cannot cease to be resident any earlier than the day they lose their permanent place of abode in New Zealand.

20. The permanent place of abode test is most relevant to people leaving New Zealand. People moving to New Zealand will typically be resident under the 183-day rule and will not need to consider the permanent place of abode test. However in situations where someone moves between New Zealand and another country or countries, New Zealand residence could be triggered under either test. Also, someone moving to New Zealand could potentially establish a permanent place of abode prior to the first day of their presence under the 183-day rule.

21. In applying the 183-day and 325-day rules, a person present in New Zealand for part of a day is treated as present in New Zealand for the whole day and not absent for any part of the day (s YD 1(8)). For example, if someone arrived in New Zealand at 3pm on 28 July, that day would be counted as a full day of presence. Presence in New Zealand embassies or New Zealand consulate offices overseas is not presence in New Zealand.

22. A person who is personally absent from New Zealand in the service of the New Zealand Government is treated as a New Zealand resident during that time (s YD 1(7)). See further from [202].

23. A person who is employed under the recognised seasonal employment scheme will be treated as non-resident even if they satisfy the 183-day rule, provided they do not have a permanent place of abode here (s YD 1(11)). See further from [170].

24. The discussion of the residence rules for individuals is structured as follows:

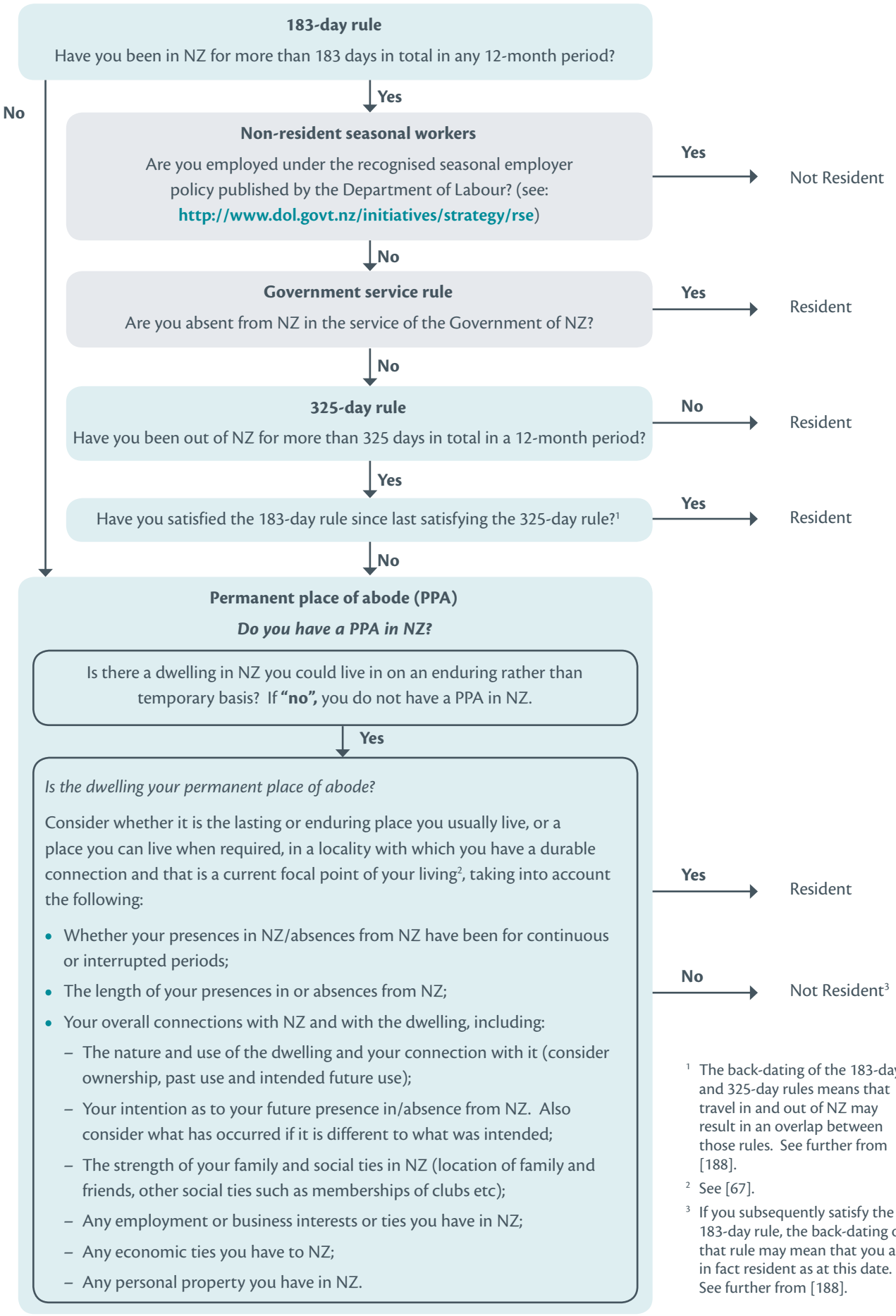
Flowchart – how to establish if an individual is tax resident in New Zealand

25. The following flowchart sets out the matters to be considered in establishing if an individual is tax resident in New Zealand, and shows the interrelationship between the various residence tests for individuals.

26. It should be noted that if someone is tax resident in New Zealand and also in a country with which New Zealand has a DTA, the DTA will determine what taxing rights each country has. See further from [246].

27. It should also be noted that new migrants or returning New Zealanders may be eligible to be transitional residents, and entitled to tax exemptions for certain foreign-sourced income. See further from [224].

How to establish if an individual is tax resident in New Zealand



[1] The back-dating of the 183-day and 325-day rules means that travel in and out of NZ may result in an overlap between those rules. See further from [188].

[2] See [67].

[3] If you subsequently satisfy the 183-day rule, the back-dating of that rule may mean that you are in fact resident as at this date. See further from [188].

Permanent place of abode

Structure of analysis

28. The permanent place of abode test is the overriding residence rule for individuals. It primarily needs to be considered in relation to people leaving New Zealand, though it may also be relevant in other contexts.

29. The discussion below details why the Commissioner considers that the permanent place of abode test requires the person to have a dwelling in New Zealand. The discussion of the practical application of the test, including the factors to be considered in determining whether a particular dwelling in New Zealand will be a person's permanent place of abode, starts from starts from [66]. Examples are set out from [123].

30. The discussion of the permanent place of abode test is structured as follows:

Meaning of "permanent place of abode"

31. Section YD 1(2) states:

> **YD 1 Residence of natural persons**
>
> ...
>
> *Permanent place of abode in New Zealand*
>
> (2) Despite anything else in this section, a person is a New Zealand resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere.

32. The term "permanent place of abode" is not defined in the Act. Its meaning has been expressed in different ways in cases that have considered the test. "Permanent place of abode" has been described as meaning a lasting *or enduring place where one usually lives* (*Case F138* (1984) 6 NZTC 60,237), and as a place in which one can live or dwell when required, in a locality with which the person has a durable connection and that is a current focal point of one's living (see further [67]) (*Case Q55* (1993) 15 NZTC 5,313).

33. *Case F138*, *Case Q55* and *TRA 43/11* [2013] NZTRA 10[5] make it clear that a permanent place of abode can either be a place someone has lived (ie, a place where one "usually lives") or a place someone could live in the future (ie, a place in which one "can live or dwell").

34. To determine whether a place of abode is a person's permanent place of abode, the continuity and duration of the person's presence in New Zealand and the durability of the person's association with their place of abode here must be considered (*FCT v Applegate* 79 ATC 4307 (FCAFC), *Case H97* (1986) 8 NZTC 664, *Case J98* (1987) 9 NZTC 1,555, *Case Q55*).

Is a dwelling required for a person to have a permanent place of abode?

35. There is a question as to whether "place of abode" in the context of s YD 1(2) refers to New Zealand generally, a city or locality within New Zealand, or a dwelling in New Zealand. The Commissioner considers "place of abode" in the context of s YD 1(2) means a place where a person dwells and sleeps and that is used as a base for their daily activities (*Case F138*, *Case Q55*). Therefore, the Commissioner's view is that the permanent place of abode test requires that the person have a dwelling in New Zealand. This view is consistent with the New Zealand cases that have considered the permanent place of abode test.

The ordinary meaning or meanings of "place of abode"

36. The ordinary meaning of the phrase "place of abode" is open to different interpretations, based on the meanings of the words "place" and "abode". These words are defined in the *Oxford English Dictionary* (online ed, 3rd edition, Oxford University Press, 2013, accessed 3 March 2014) (relevantly) as meaning:

> **place, *n.1***
>
> **5.**
>
> **a.** A particular part or region of space; a physical locality, a locale; a spot, a location. Also: a region or part of the earth's surface.
>
> ...

[5] It is noted that *TRA 43/11* is on appeal to the High Court.

> **b.** The amount or quantity of space actually occupied by a person or thing; the position of a body in space, or in relation to other bodies; situation, location.
>
> …
>
> **9.**
>
> **a.** A dwelling, a house; a person's home; (formerly) *spec.* a mansion, a country house with its surroundings, the principal residence on an estate. Also: a farm or farmstead.
>
> …
>
> **10.** A particular spot or area inhabited or frequented by people; a city, a town, a village.
>
> …
>
> **abode,** ***n.1***
>
> **3.** The action of dwelling or living permanently in a place; habitual residence. Freq. in ***place of abode.*** Also *fig.* Cf. ABIDING *n.* 3b.
>
> **4.** A place of ordinary residence; a dwelling place; a house or home. Cf. ABIDING *n.* 3a. Now somewhat *literary.*

37. As can be seen, the word "place" could mean either a specific point in space (ie, a particular address) or a location more generally (ie, a city or locality, or even a country). The word "abode" could refer to a specific abode (in the sense of a house or home), or it could refer more loosely to the fact of living somewhere. The phrase "place of abode" is therefore open to being interpreted as referring either to a particular house or dwelling, or to someone having a place of abode somewhere more generally in New Zealand.

38. Section YD 1(2) refers to someone having a permanent place of abode "in" New Zealand. This indicates that New Zealand in general could not be someone's "place of abode" for the purposes of s YD 1(2). If it were intended for that to be the case, the test could simply have been drafted such that a person would be a New Zealand resident "if New Zealand is their permanent place of abode". Nevertheless, the phrase "place of abode" in s YD 1(2) is still open to being interpreted, on an ordinary reading of those words, as meaning either a specific dwelling or a more general location in New Zealand.

39. The New Zealand case law on the permanent place of abode test indicates that the narrower of those interpretations is appropriate – that is, that "place of abode" refers to a dwelling. In *Case F138*, Judge Bathgate considered the *Shorter Oxford English Dictionary* definition of "abode", being:

> 1. The action of waiting;
>
> 2. A temporary stay;
>
> 3. Habitual residence;
>
> 4. A place of habitation; house or home.

40. In the context of the residence provisions in the Income Tax Act 1976, Judge Bathgate concluded that the phrase "place of abode" means "a place where one usually lives" (at 60,244). This is the same meaning Judge Bathgate had held the term to have in the context of the first home rebate provisions he considered in *Case F96* (1984) 6 NZTC 60,036. Judge Bathgate observed in *Case F138* that, in light of the English authorities holding the phrase to include **both business and residential addresses**, the interpretation he had given "place of abode" in *Case F96* could possibly be regarded as too narrow in contexts other than the one considered in that case. However, having considered the dictionary definition of "abode", he interpreted "place of abode" in the same way he had in *Case F96*, which indicates that he considered that interpretation was not too narrow in the context of the residence provisions. Therefore, it is clear that by "a place where one usually lives" Judge Bathgate meant "place" as in the actual physical dwelling or house where one usually lives, not the "place" more generally.

41. In *Case Q55*, Judge Barber stated that having a permanent place of abode means "having a place in which one can live or dwell whenever it is convenient for one to do so and which is a current focal point of one's living" (at 5,319–5,320). Judge Barber went on to say at 5,320:

> I consider that "has a permanent place of abode" does not require that a dwelling be always vacant and available for the taxpayer to live in; but that there is a dwelling in New Zealand which will be available to the taxpayer as a home when, and if, that taxpayer needs it, and that the taxpayer intends to retain that connection on a durable basis, with that locality. I do not think that a durable connection with a locality alone could create "a permanent place of abode" where a dwelling is not owned or tenanted or otherwise available such as the house of a parent, or relative, or friend. I consider that the phrase "has a permanent place of abode" requires, inter alia, the availability of a place in which to dwell but that the existence of a home or dwelling does not necessarily create a permanent place of abode. The latter concept also requires some durability of connection with a locality as well as the availability of a place in which to sleep. There must be many people who have no permanent place of abode. Some of these people may have a number of residences.
>
> I think that the strength of a person's ties with New Zealand is the paramount factor in assessing residency but those ties must include the availability on

> a permanent basis (continuing indefinitely) of a place in which to dwell and sleep if that person is to have a permanent place of abode somewhere in New Zealand. The enduring availability of a dwelling is a fundamental criterion to having a permanent place of abode, but it is not decisive on its own.

42. This passage from Judge Barber's judgment in *Case Q55* was cited in *TRA 43/11*, and Judge Sinclair's approach in that case is consistent with the view that there must be a dwelling in New Zealand that the person could reside in for them to potentially have a permanent place of abode here.

43. In all other New Zealand cases in which taxpayers have been held to have a permanent place of abode here, there has been a dwelling that has been regarded as the taxpayer's permanent place of abode: see for example *Case F139* (1984) 6 NZTC 60,245, *Case H97*, *Case J41* (1987) 9 NZTC 1,240 and *Case J98*.

44. In *Case F139*, Judge Barber considered that the taxpayer's permanent place of abode was with his parents, who he had lived with before his departure from New Zealand. Similarly, in *Case H97*, it was held that the taxpayer's permanent place of abode was the residence of his parents. In *Case J41*, Judge Barber considered that the taxpayer's permanent place of abode was in New Zealand, and found that "his enduring relationship was with the New Zealand house property; his association with it had durability" (at 1,242). In *Case J98*, the taxpayer was held to have a permanent place of abode in New Zealand, and Judge Barber noted that the taxpayer "at all times regarded his New Zealand home as his permanent place of abode" (at 1,560).

45. Although the Australian tax residence tests are different to New Zealand's, there are Australian cases in which the phrase "place of abode", in the context of either the expression "permanent place of abode" or "usual place of abode", was given a narrow meaning—in particular *Executors of the Estate of Subrahmanyam v FCT* (2002) ATC 2303. The Australian cases add further support to the view that a place of abode is a dwelling, rather than a place more generally. In *Subrahmanyam*, the Australian Administrative Appeals Tribunal noted there were a number of authorities (*Case U110*, 87 ATC 663, *Case N31*, 81 ATC 167 and *Applegate*) that indicated a wider interpretation of "place" in the phrase "place of abode" should not be adopted. In addition to those authorities, *Case S19*, 85 ATC 225, *Case W13*, 89 ATC 196, *Tanumihardjo v FCT* 97 ATC 4817 and (post *Subrahmanyam*) *Shand v FCT* [2003] AATA 279, (2003) ATC 2080 and *Boer v FC of T* [2012] AATA 574, (2012) ATC ¶10-269 also appear to support a narrower interpretation (that a place of abode is a dwelling) over a wider one (that a place of abode is something broader, ie, a city or country).

The purpose of section YD 1(2)

46. The Commissioner considers that an examination of the purpose of s YD 1(2), looking in particular to the historical context and wider statutory context, does not provide particularly strong guidance on the issue of whether a dwelling is a pre-requisite to having a permanent place of abode. It is worth observing, however, that there is nothing that would suggest that "place of abode" should be read as meaning a general locality in New Zealand, as opposed to a specific dwelling in New Zealand in which the person could live. On the other hand, some of the pre-legislative material suggests that Parliament intended a dwelling to be a pre-requisite to having a permanent place of abode.

47. There have been a number of legislative changes to the residence tests for individuals. Those changes and the inferences that may be drawn from the legislative history are outlined below.

48. The permanent place of abode test was introduced in 1980 as a consequence of the Supreme Court decision in *Geothermal Energy New Zealand Limited v CIR* (1979) 4 NZTC 61,478. A personal presence in New Zealand test was introduced at the same time. The previous test had been that a natural person would be resident "if his home is in New Zealand".

49. In *Geothermal*, Beattie J considered that the Taxation Review Authority (the TRA) was wrong in *Case B25* (1976) 2 NZTC 60,205 in holding that "home" should be regarded as being equivalent to "domicile", and even if it was not exactly equivalent that the concept of "home" meant "permanent home". Beattie J commented that if the legislature had meant "domicile" or "permanent home" it could simply have said so. Beattie J also stated (at 61,498) that: "[i]n very broad terms I consider that once a person lets his former dwelling place and moves away from it with his family it is not his "home" any more—at least until he and his family move back into it".

50. The 1980 legislative amendment was aimed at ensuring it was not as easy to lose New Zealand residence as it would have been under the test laid down in *Geothermal*—that a person's "home" is the centre of gravity of one's domestic life. In the case of a married (and not separated) person, Beattie J regarded this as being where the person's spouse/partner and family

live. In the case of a single person, Beattie J regarded it as being the place where the normal course of the person's life occurs. The Commissioner considers that Parliament intended the 1980 legislative changes to import the notion of permanency, so that simply being away from New Zealand for a time (with one's spouse/partner, if not single) would not mean that the person's "home" was no longer in New Zealand. The legislative change also appears to have been intended to counter the suggestion from *Geothermal* that letting one's house out meant it was no longer their "home". The phrase "permanent place of abode" is used in the Australian income tax legislation and it appears that the same phrase was chosen in New Zealand to bring in the benefit of Australian case law on the meaning of that phrase (in particular *Applegate*, which was decided shortly before *Geothermal*). The introduction of the permanent place of abode test in 1980 was intended to counter particular issues arising out of the decision in *Geothermal*.

51. There is nothing in the reasons for the introduction of the test that sheds any light on whether a dwelling was intended to be a pre-requisite for the test. However, the residence tests for individuals underwent further legislative change in 1988, and some inferences may be drawn from this part of the history to s YD 1(2) as to how Parliament understood the permanent place of abode test to operate.

52. The Minister of Finance had announced in the Budget of 18 June 1987 that the government would introduce measures to broaden the New Zealand tax base and to limit international tax avoidance. This announcement resulted in the formation of a Consultative Committee on international tax reform (the Valabh Committee). The report of the Valabh Committee (Valabh Committee, *International Tax Reform: Full Imputation Part II* (Consultative Committee on Full Imputation and International Tax Reform, July 1988)) recommended a number of changes: the introduction of a branch-equivalent regime and a foreign investment fund regime, and changes to the trust regime. These changes and new regimes were intended to reduce the numerous opportunities available to residents to avoid or defer New Zealand tax by interposing foreign entities between themselves and income-producing assets. To support these changes, the Valabh Committee also recommended changes to the residence rules.

53. Accordingly, the permanent place of abode test was amended in 1988 so that someone will be resident, despite anything else in the provision, if they have "a permanent place of abode in New Zealand, **whether or not they have a permanent place of abode outside New Zealand"** (emphasis added). This amendment was to ensure that the focus of the test is on the person's connections with New Zealand, rather than whether the person has closer connections with New Zealand or another country. This was intended to make it more difficult to lose New Zealand residence than it had been previously, when the test presumed that a person could have only one permanent place of abode. (See [2.4] of the Valabh Committee report.)

54. It could be argued that the intention to make it more difficult to lose New Zealand residence would not be achieved if the permanent place of abode test required a person to have a dwelling in New Zealand. However, the goal of making it easier for people to become tax resident in New Zealand and harder to lose that status was achieved by broadening the permanent place of abode test (to include the words "whether or not they have a permanent place of abode outside New Zealand"), and also by bolstering the personal presence test. The personal presence test introduced in 1980 had provided that a person would be resident in New Zealand for tax purposes if they were present for a continuous period of not less than 365 days. The 1988 amendments replaced that test with the current personal presence test, which provides that a person will be resident if they are personally present in New Zealand for a period or periods of more than 183 days during any 12-month period.

55. It seems implicit in the Valabh Committee report that the committee considered that a permanent place of abode test would require a dwelling as opposed to just links or ties with a locality. The report noted that, under the previous statutory provisions, a person could "cease to be a resident here by **disposing** of any permanent place of abode in New Zealand and **acquiring** a permanent place of abode outside New Zealand" ([2.4.5] of the Valabh Committee report). See also [2.4.6], which refers to "**disposing** of one's permanent place of abode in New Zealand".

56. The Valabh Committee proposed amendments that involved retaining the permanent place of abode test (but including the words "whether or not they have a permanent place of abode outside New Zealand"), and Parliament accepted those amendments. This supports the proposition that Parliament understood the phrase "permanent place of abode" to require a dwelling, as did the Valabh Committee.

Conclusion on whether "place of abode" requires a dwelling

57. The Commissioner considers, based on the ordinary meaning of the phrase "place of abode" and the case law, that the better view of the law is that having a dwelling in New Zealand is a **pre-requisite** to having a permanent place of abode here. No compelling purposive or other reason supports interpreting "place of abode" in s YD 1(2) as meaning a general locality within New Zealand, as opposed to a specific dwelling in which the person could live. Comments in the Valabh Committee report are consistent with this approach. The New Zealand case law supports this view. *Case Q55* overtly states that a dwelling is required, and the same approach was adopted in *TRA 43/11*. The approach in the other New Zealand cases that have considered the permanent place of abode test are consistent with this. The view that a dwelling is required is also consistent with the Australian case law (which, although only persuasive, is of particular interest given that the phrase "permanent place of abode" appears to have been chosen to bring in the benefit of Australian case law on the meaning of that phrase).

"Permanent" place of abode

58. Although a person must have a dwelling in New Zealand to have a permanent place of abode here, the existence of a dwelling is not determinative (*Case Q55*). The existence of a dwelling in which the person could live will not, of itself, give rise to tax residence in New Zealand. Having a dwelling in New Zealand may potentially mean that the person has a "place of abode" in New Zealand, but further to that, the person's place of abode in New Zealand must be their permanent place of abode.

The ordinary meaning of "permanent"

59. The word "permanent" is defined in the *Oxford English Dictionary* (online ed, 3rd edition, Oxford University Press, 2013, accessed 3 March 2014) (relevantly) as:

> **permanent, *adj.* and *n.***
>
> **A.** adj.
>
> **1.**
>
> **a.** Continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent. Opposed to *temporary*.

60. Case law establishes that the word "permanent" is capable of different meanings. As noted by Fisher J in *Applegate* at 4317:

> The section is difficult to apply particularly if the emphasis is on subjective intention. It is made doubly difficult by the indiscriminate use of the differing concepts of domicile, residence, permanent place of abode and usual place of abode. Moreover the concept of permanence is used in a context in which it does not, and could not, bear its primary meaning of "everlasting". It would amount to a contradiction in terms to suggest that an independent person could be domiciled in Australia but with his permanent residence outside Australia, if permanent bears its ordinary meaning.
>
> But it is clear that the meaning of permanent is far from intractable, and very much takes its colour from its context. As the Master of the Rolls, Lord Evershed said in *McClelland v. North Ireland Health Board* (1957) 2 All. E.R. 129 at p. 140:
>
> "The word (permanent) is clearly capable, according to the context, of many shades of meaning."

61. In *Case F138*, Judge Bathgate noted at 60,243:

> In the *Applegate* case the Court held that "permanent" was also to be construed in the light of the context in which it was used; it could have many shades of meaning. I regard it as the opposite to "temporary" and consider for the purposes of this case the first meanings given in the *Shorter Oxford English Dictionary* apposite, namely:
>
> "lasting or designed to last indefinitely without change; enduring; persistent; opposite to temporary."

62. The Australian courts have considered "permanent place of abode" in contrast to domicile, given the context of the Australian tax residence tests, and have concluded that "permanent" in that context means more than temporary, but cannot mean "everlasting". The Australian courts have therefore adopted the approach that it is "proper to pay greater regard to the nature and quality of the use which a taxpayer makes of a particular place of abode for the purpose of determining whether it qualifies as his permanent place of abode" (*Applegate*, per Fisher J at 4317).

63. Although the permanent place of abode test appears in a different context in the New Zealand legislation, the approach taken by the TRA indicates that "permanent" in the context of s YD 1(2) also does not mean "everlasting". In the New Zealand cases, the TRA has taken the same approach as the Australian courts, considering that in determining whether a place of abode is a person's permanent place of abode it is proper to pay greater regard to the nature and quality of the use a person makes of a place of abode, and that the material factors to consider are the continuity and duration of the person's presence and the durability of their association with the particular place. A person's intention with respect to the duration of their residence in a place is just one of the factors that is relevant (*Case H97*, *Case J98*, *Case Q55*). It is clear from

the New Zealand case law that the person does not need to intend to live somewhere for the remainder of their life in order for it to be their permanent place of abode. This indicates that "permanent" in the context of the New Zealand legislation similarly does not mean that the place of abode must be the place the person will live on an "everlasting" basis.

64. The case law establishes that a permanent place of abode is not necessarily the place of abode in which the person intends to live for the remainder of their life, but it must be more than a temporary or transitory place of abode; it is to be contrasted with temporary (*Applegate*, *Case F138*, *Case H97*, *Case J98*, *Case Q55*). As noted above, in *Case F138* Judge Bathgate considered that the appropriate definition of "permanent" was "lasting or designed to last indefinitely without change; enduring; persistent; opposite to temporary".

The purpose of section YD 1(2)

65. The purpose of s YD 1(2) is discussed above (from [46]–[56]). The purpose of the provision is consistent with "permanent" being read as meaning enduring, or the opposite of temporary. It is clear it was not intended that a person could only have a permanent place of abode if they had a place of abode in which they intended to live forever. On the other hand, the place of abode must be able to be used by the person as a place of abode on an enduring basis.

When will a person's place of abode be their permanent place of abode?

66. As noted above, New Zealand cases have described "permanent place of abode" as meaning a lasting or enduring place where one usually lives, and as a place in which one can live or dwell when required, in a locality with which the person has a durable connection and that is a current focal point of one's living.

67. The Commissioner considers that Judge Barber's statement in *Case Q55* about a person's permanent place of abode being "a current focal point of one's living" was not intended to suggest that the place needs to be the current day-to-day focus of a person's life. The permanent place of abode test operates to ensure that even if someone is away from New Zealand for 325 days or more in a 12-month period, they will remain a New Zealand resident so long as they have a permanent place of abode here. Obviously when someone is away from New Zealand for 325 days or more, any place of abode they may have in New Zealand will not be a current focus of their day-to-day life (ie, what they do on a daily basis). It would therefore seem that Judge Barber meant that the place would need to remain a focal point of the person's life in a broader sense.

68. Whether a place of abode is a person's permanent place of abode is determined by considering the continuity and duration of the person's presence in New Zealand and the durability of the person's association with their place of abode here (*Applegate*, *Case H97*, *Case J98*, *Case Q55*). The factors relevant to this enquiry are discussed below, from [81]. It is important to understand that the relevant factors are not of equal weight, and the significance to be afforded to each of the factors will depend on the person's particular circumstances. The question is whether, having regard to the overall picture, the person's place of abode in New Zealand can be regarded as their permanent place of abode.

What does it mean to have a dwelling in New Zealand?

69. The requirement for a person to have a dwelling in New Zealand does not mean that they must own, rent, or otherwise control the dwelling. The focus is on whether there is a dwelling that can objectively be said to be able to be used by the person as a place of abode. Ownership or control of the dwelling significantly assists in establishing that the person would be able to use the dwelling as a place of abode. However, the person may be able to use a dwelling even though he or she does not own it, for example, where the property is held in a family trust or owned by a family company (eg, as in *TRA 43/11*[6]). Similarly, the dwelling may be owned by a family member in circumstances where it would be able to be used by the taxpayer as a place of abode: for example, see *Case F139* and *Case H97*.

70. In addition, the requirement does not mean that the place of abode must be vacant or able to be occupied immediately. It is not uncommon for someone who is temporarily overseas to lease their property to a third party, or to enable someone else to use it during their absence. A place of abode can be a person's permanent place of abode even if it is rented to or otherwise used by someone else while the person is residing in a foreign jurisdiction. See, for example, *Case Q55*, *TRA 43/11*, *Case F138*, *Case J98* and *Case J41*.

71. In *Case F138* the taxpayer rented his house out, but retained the right to possession on 30 days' notice. In *TRA 43/11* the dwelling that was considered available to the taxpayer to reside in was an investment

[6] As noted above, *TRA 43/11* is on appeal to the High Court.

property rented out on a periodic tenancy. A property rented out on a fixed-term tenancy could also potentially be regarded as a dwelling that the owner (or some other person) could use as a place of abode, and that may therefore potentially be their permanent place of abode. For example, in *Case Q55*, the taxpayer's home was rented out under a fixed-term tenancy and was held to be his permanent place of abode. It is acknowledged that in that case the taxpayer and his wife timed their return to New Zealand to be a few days after the expiry of the tenancy, ensuring that the house would be available for them to reoccupy on their return. It is noted though that the tenancy could not be unilaterally terminated before the end of the fixed-term. As such, the taxpayer would not have been able to reoccupy the house any sooner, had he returned earlier than expected.

72. The above cases show that a property does not necessarily cease to be a person's permanent place of abode merely because the person is temporarily absent and during that period the dwelling is let out. If the person is able to use the property as a place to live on an enduring basis, then it can still be their permanent place of abode, irrespective of whether the property is otherwise occupied for limited periods of time.

73. A person may have multiple places of abode available to them in New Zealand. For example, in addition to his home, the taxpayer in *Case Q55* had a number of rental properties that Judge Barber noted would have been potential places of abode for the taxpayer had they been needed. Judge Barber accepted that there would have been some practical difficulties in the taxpayer taking up residence in any of those rental properties, but he nonetheless considered that the taxpayer could have dwelt or lived in at least one of them. Where a person has multiple places of abode, frequently one particular dwelling will obviously be the most likely place in which the person would choose to abide in New Zealand (as in *Case Q55*).

74. While an investment property may be a dwelling that a person could use as a place of abode, and could potentially be a permanent place of abode, the Commissioner considers that this would not commonly be the case. The considerations to have regard to in determining if a place of abode is a person's permanent place of abode are discussed below.

If a person has a dwelling in New Zealand, when will it be their permanent place of abode?

75. Having established that someone has a dwelling in New Zealand that they could use as a place of abode, it is necessary to determine whether it is their permanent place of abode. The material factors to have regard to in determining this are discussed in detail from [81].

76. In most cases it will be a simple matter to establish whether a person's place of abode in New Zealand is a permanent place of abode. Assume, for example, that a person who normally lives in New Zealand, who owns and occupies a house here and who has employment ties here, is absent for a fixed period of, say, 12 months. This person has an enduring relationship with their New Zealand place of abode, and it is the place where they usually live. That place of abode is their permanent place of abode.

77. More difficult cases will arise where the person has been absent from New Zealand for a substantial period, or where the person is here intermittently. Where the answer is not clear, all relevant factors must be weighed carefully. As noted above, this will involve a consideration of the continuity and duration of the person's presence in New Zealand and the durability of the person's association with their place of abode here.

78. A person's connections to the location in New Zealand where their place of abode is situated are relevant in objectively assessing whether the particular dwelling is the person's permanent place of abode. The strength of such connections may indicate that the area is a focal point of a person's life (See further [67]), and therefore lead to an inference that the abode is the person's permanent place of abode. In *TRA 43/11*, Judge Sinclair considered it important that the property was situated in a locality in which the taxpayer had continuing family and other ties.

79. A person may also have connections to New Zealand generally, such as keeping a New Zealand bank account, having membership in professional or trade associations, or maintaining medical insurance with a New Zealand company (see further from [103]). Such factors could be relevant to any location in New Zealand and are not by their nature tied to any specific dwelling or location. General connections to New Zealand, as opposed to connections to a place of abode or to the location in which the abode is situated, may still provide some indication that the taxpayer is likely to return to New Zealand to live and that their dwelling here may potentially be their permanent place of abode.

80. In establishing whether a person's place of abode in New Zealand is their permanent place of abode, the consideration is not limited to factors occurring within the relevant income year. It is appropriate to consider the person's past and likely future association with New Zealand and with the place of abode (*Case Q55*).

Material factors for determining whether a person's place of abode is their permanent place of abode

81. As noted above, to determine whether a place of abode is a person's permanent place of abode, these factors must be considered:

- the continuity and duration of the person's presence in New Zealand; and
- the durability of the person's association with their place of abode here (which is assessed by looking at the totality of the circumstances).

(*Applegate*, *Case H97*, *Case J98*, *Case Q55*).

These are discussed in turn below.

Continuity and duration of presence in New Zealand

82. As a general rule, the longer a person is present in New Zealand the more likely it is that their place of abode here is their permanent place of abode. Conversely, the longer a person is absent from New Zealand the less likely it is that their place of abode here will be their permanent place of abode.

83. This is not to say that periods of presence in, or absence from, New Zealand are the overriding consideration. However, where a person is absent from New Zealand for an extended period it is more likely that, on balancing the extended absence with the person's retention of enduring connections with New Zealand, the person does not have a permanent place of abode here.

84. Where a person is absent from New Zealand, a point would eventually be reached where it would no longer be reasonable to determine that a dwelling they have in New Zealand is still their permanent place of abode. Such an assessment would be made taking all material facts into account. This would include whether the person has maintained a level of connection to New Zealand that indicates they will be returning to live at the dwelling on a durable basis. The longer a person is away from New Zealand, the less ties to New Zealand they are likely to retain and the more ties to another place they are likely to establish. This would typically support a conclusion that their dwelling here is no longer their permanent place of abode. That said, there may be situations in which a person lives in another country for an extended time but still maintains strong ties to New Zealand. Depending on the circumstances, the person may continue to have a permanent place of abode here. As noted at [111], s YD 1(2) leaves open the possibility that a person may have more than one permanent place of abode.

85. There is no specific length of presence in, or absence from, New Zealand that results in a person acquiring or losing a permanent place of abode here. If a person has strong connections with New Zealand, it could be expected that a longer period of absence would be required for their place of abode here to no longer be considered their permanent place of abode than would be the case if the person's connections to New Zealand were weaker.

86. In the shareholder remuneration case of *Troon Place Investments Ltd v CIR* (1995) 17 NZTC 12,175 (HC), the court found that the shareholders of the taxpayers, who were on an overseas trip for three years and one month, were resident in New Zealand under the permanent place of abode test for the duration of their absence. The shareholders had business interests in New Zealand (the businesses operated by the taxpayer companies), and were involved in the administration and management of the companies during their absence from New Zealand. For most of the time the shareholders were overseas they travelled around the United Kingdom and Europe in a campervan. Despite the absence of just over three years, Tompkins J found that the shareholders had a permanent place of abode in New Zealand. It is acknowledged that there is no discussion of the permanent place of abode test in *Troon*, nor of the particular facts that led the court to conclude that the shareholders retained a permanent place of abode in New Zealand during their absence. However the court clearly had to turn its mind to the issue, and did not take the view that the length of absence was enough in the circumstances to result in the shareholders no longer having a permanent place of abode here.

87. Similarly, in *TRA 43/11* Judge Sinclair considered, despite the taxpayer living away from New Zealand for up to four years in the tax years in question, that he continued to have a permanent place of abode here in those years. However, Judge Sinclair noted that the taxpayer was not continuously absent during the four year period. Rather, he made regular trips back to New Zealand, spending on average 42 days a year here.

88. The totality of the particular circumstances must be considered in each case. As noted above, there is no particular length of absence from New Zealand that will necessarily be enough on its own to result in the

conclusion that someone does not have a permanent place of abode here.

89. The duration of presence criterion focuses on the length of the person's presence in New Zealand. The continuity of presence criterion refers to whether the person is present in New Zealand for continuous or interrupted periods. If the periods of presence are continuous, this may indicate the person's place of abode here is permanent, because they are actually living here rather than merely visiting for brief periods. Likewise, the more continuous the periods of absence from New Zealand are, the more that might indicate the person no longer retains a permanent place of abode in New Zealand, compared to a situation where someone returns to New Zealand frequently. While frequent trips back to New Zealand are a factor to consider in determining whether a person has a permanent place of abode here, such trips must be viewed in context. For example, regular visits may be explicable because the person is returning to see children who live here with an ex-spouse, or to visit extended family. The fact that the person has family here would be a factor to be taken into account in assessing whether the person has a durable association with a place of abode in New Zealand (see from [91]). However, the weight to be given to frequent visits should be considered in light of all of the circumstances and of the context of the person's trips to New Zealand.

90. The continuity and duration of a person's presence must be considered in conjunction with the durability of their association with their place of abode. For example, consider the case of an Australian business executive who travels to New Zealand on short business trips on numerous occasions during the year, and has an investment property here, but who otherwise has few ties with New Zealand. In this situation, the lack of continuity of presence, the limited duration of presence, the reason for the trips to New Zealand, the lack of any overly significant ties with New Zealand, and the fact that the investment property has not been used by the person as a place of abode (even if it could potentially be) indicate that the property here is not their permanent place of abode.

Durability of association

91. To determine whether a person has a durable association with their place of abode, the totality of the circumstances must be looked at and the person's overall connections with their place of abode and with New Zealand must be weighed up. It is then necessary to evaluate the extent to which those connections indicate that the person has an enduring relationship with their place of abode here such that it can be considered to be their permanent place of abode. Consideration of the durability of a person's association with a place of abode therefore involves an examination of the extent and strength of the attachments that the person has established and maintained in New Zealand. See, for example, *Case Q55*, *Case F138*, *Case J98*, *Case U17* (1999) 19 NZTC 9,174 and *TRA 43/11*.

92. The above cases establish that some of the material factors to be considered when assessing whether a person has a durable association with a place of abode such that it can be regarded as their permanent place of abode are:

- the nature and use of the dwelling and the person's connection with the dwelling;
- the person's intentions;
- family and social ties;
- employment, business interests and economic ties;
- personal property; and
- any other factors that shed light on whether the place of abode is the person's permanent place of abode.

These factors are discussed in turn below.

The nature and use of the dwelling and the person's connection with the dwelling

93. As noted at [57], a person must have a dwelling in New Zealand to potentially have a permanent place of abode here. As discussed from [69], this does not mean that the dwelling needs to be one that is owned by the person, or vacant or able to be occupied immediately. That said, the nature and use of a dwelling that a person has in New Zealand, and the connection that the person has with the dwelling, may provide a strong indication as to whether the person has an enduring connection with New Zealand and with the dwelling, such that it can be regarded as their permanent place of abode.

94. If the person owns a house or apartment in New Zealand, for example, this may, depending on the circumstances, be a stronger indication of an enduring connection with the place of abode and with New Zealand than, say, the ability to reside at a parent's house.

95. Whether (or the extent to which) a person has lived in a dwelling will be a relevant factor to take into account in assessing whether it is their permanent place of abode, but it is not essential that they have

lived in the particular dwelling before. That said, in assessing whether a place of abode is a person's permanent place of abode, the nature and quality of the use made by the person of that particular place of abode must be considered (*Applegate*, *Case Q68*, 83 ATC 343, *Case H97*). If a house or apartment owned by the person has been their home, this would carry substantial weight. There may be circumstances in which an investment property could be a person's permanent place of abode, though this would not commonly be the case. The ownership of property that has always been held purely as an investment would (as with other investments in New Zealand) be a factor to consider in determining whether the person has an enduring relationship with New Zealand. So too would ownership of a property that has been used exclusively as a holiday home, and not used by the person as a permanent residence. However, it is less likely that such a dwelling could be regarded as the person's permanent place of abode, compared to a dwelling that has been used by the person as their home.

96. The suitability of a dwelling will be relevant insofar as it assists in determining whether the property is the person's permanent place of abode. The possible unsuitability of a dwelling for the person to live in could lead to an inference that the property is not the person's permanent place of abode. For example, if a person with a family owned a studio flat, the inference may be that the flat is not the person's permanent place of abode, given that it may be regarded as unsuitable for the family. However, although a dwelling may objectively be regarded as unsuitable, a person's particular circumstances must be considered to determine whether it is their permanent place of abode (for example if they have previously lived in the dwelling, and would likely do so again).

Intention

97. Determining whether a person has a permanent place of abode in New Zealand is an objective enquiry (*Case H97*, *Case J98* and *Case Q55*). However a person's intention can also be considered in such an enquiry (*Case F138*, *Case F139*, *Case H97* and *Case Q55*).

98. A person's intentions about their presence in or absence from New Zealand and about any place of abode they have here will be important factors, although a person's intentions are not the central consideration. It is necessary to consider not only what was intended, but what in fact occurred (*Case F139* and *Case H97*). In cases where a person is overseas, the intention to return to New Zealand to live may be indicative of an enduring attachment to New Zealand and suggest their place of abode here is their permanent place of abode. However, it is important to balance intention with all other relevant factors. For example, if a person has departed from New Zealand for an extended period, but ultimately intends to return, that intention alone would not establish that the person's place of abode here is their permanent place of abode. On the other hand, if a person has departed for a relatively short period of fixed duration, the intention to return will be a strong indicator that the person's place of abode here is their permanent place of abode.

99. Although a person's intention is subjective, the degree to which it is reasonably held is relevant in terms of the weight to be given to it.

Family and social ties

100. The location of a person's family may be a factor of some importance. For example, if a person is absent from New Zealand, but their immediate family remain here, that will tend to support a conclusion that the person's place of abode here is their permanent place of abode. Once again, however, family ties must be considered in relation to all of the other relevant factors. If a person is absent from New Zealand for a relatively short period, the fact that the person's family accompanies them overseas will not mean the person does not have a permanent place of abode in New Zealand.

101. The weight to be attached to family ties may vary from individual to individual, and in light of the nature and quality of the relationships. In the case of a person who has extended family who they have not lived with, or not lived with for some time, the person's family ties to New Zealand will be relevant but should not be given too much weight. By contrast, where a person has more immediate family (such as a spouse/partner or dependent children) in New Zealand, that will generally provide a strong indication that the person has an enduring attachment to New Zealand and that their place of abode here is a permanent place of abode. However, in determining the weight to be given to any family ties it is important to bear in mind the person's particular circumstances and, as noted above, the nature of the relevant relationships. For example, there may be circumstances in which someone has dependent children in New Zealand but that factor is not of sufficient weight to result in them having a permanent place of abode here—for instance in the case of someone who is estranged from their children (see *Case U17*), or someone who has agreed

for their children to remain in New Zealand with an ex-spouse. Although in the latter situation the person has important, close family ties to New Zealand, and may well make regular trips back to New Zealand to see their children, these connections need to be viewed in light of all of the other circumstances and will not necessarily lead to a conclusion that the person has a permanent place of abode in New Zealand.

102. Other social ties, such as membership of sporting and cultural associations, are also relevant in establishing whether a person has an enduring attachment to New Zealand and therefore whether their place of abode here is their permanent place of abode. Such ties will not necessarily be of much weight by themselves, but may suggest that the person will be returning to New Zealand to live, and together with other ties to New Zealand may be indicative of the person's place of abode here continuing to be their permanent place of abode.

Employment, business interests and economic ties

103. If all or part of the person's employment, business, trade or profession is carried on in New Zealand, that may indicate an enduring association with New Zealand. Also, if the person is absent but retains employment, business, trade or professional ties with New Zealand, the retention of those ties may indicate an enduring association with New Zealand. For example, university lecturers who take sabbatical leave overseas generally continue to be employed and paid by the university during their absence. The continued employment ties in such a situation will be important in determining whether the person's place of abode in New Zealand remains their permanent place of abode. The weight to be given to employment ties will depend on their strength, for example, whether employment is guaranteed after the absence or is likely still to be open to the person, and the reasons for the employment arrangements being as they are.

104. The person's overall economic connections with New Zealand will also be relevant. Whether the person has a bank account or credit card facilities in operation in New Zealand, whether the person has insurance coverage from New Zealand or superannuation in New Zealand, and whether the person has any investments here or managed from here, must be considered. By themselves, these factors may not carry much weight. However, if the person has other connections with New Zealand, their economic connections, together with those other connections, may establish that the person has an enduring association with New Zealand, which would suggest that their place of abode here is their permanent place of abode.

105. Paying child support or other financial support to people in New Zealand may be relevant, as with any other economic connections to New Zealand. In *TRA 43/11*, Judge Sinclair noted that the taxpayer paid child support and contributed to other expenses for his children in New Zealand. However, it is noted that in that case the level of financial assistance was substantial.

106. Memberships of trade and professional associations should also be taken into account but, again, would not by themselves carry much weight.

Personal property

107. If the person has personal property (eg, furniture or a vehicle) situated in New Zealand, this should be taken into account in determining whether the person has an enduring association with New Zealand.

108. The weight to be given to the fact that a person has personal property in New Zealand will depend on the nature of the property and the person's circumstances. For example if someone leaves the bulk of their furniture and other personal effects in New Zealand this would be of more weight than someone leaving, say, a few personal effects with a relative or friend.

Other factors

109. Other factors, such as whether the person receives New Zealand social welfare assistance, or whether the person regularly spends their holidays in New Zealand, may also be relevant.

110. There is no exhaustive list of factors that can be taken into account. Any factor showing a person has a durable connection to New Zealand generally, to the location where their place of abode is situated, or to their place of abode itself may assist in drawing the inference that the person intends to live in New Zealand on an enduring basis, and therefore by implication that their dwelling here is their permanent place of abode.

"A" permanent place of abode

111. As noted above, s YD 1(2) provides that a natural person is a New Zealand resident if they have a permanent place of abode in New Zealand, "even if they also have a permanent place of abode elsewhere". Therefore, s YD 1(2) leaves open the possibility that a person may have more than one permanent place of abode.

112. It should be emphasised that the focus of the permanent place of abode test is on the person's

connections with New Zealand, rather than on whether the person's connections are closer with New Zealand or another country. A person may be resident in New Zealand under the permanent place of abode test even if they have closer connections with another country.

113. That said, factors that evidence a durable connection to New Zealand generally, to the location in New Zealand where the person's place of abode is situated, or to their place of abode itself must be weighed against contrary factors that weaken those connections. Such contrary factors could include evidence of the person's connections to a foreign country; for example, the purchase of a home in another country, or family, social, financial and other ties to another country.

114. If a person has established strong connections to another country, it is less likely that the person will return to their place of abode in New Zealand. Conversely, the lack of strong connections to another country make it more likely that the person will return to their place of abode in New Zealand: see, for example, *Case H97*.

115. However, there may be situations where a person has a permanent place of abode in more than one country and moves between those countries. A person having established strong connections in another country will not preclude them having a permanent place of abode in New Zealand. There may also be situations where a person has no permanent place of abode anywhere. Lack of strong connections in another country will therefore not necessarily suggest that a person's place of abode in New Zealand is their permanent place of abode. For example, in *TRA 43/11* Judge Sinclair did not place any particular weight on the taxpayer not having established roots in Iraq, noting that this was not surprising given the security issues in that country and the nature of the taxpayer's employment (though in that case the taxpayer was held to have a permanent place of abode in New Zealand).

116. The extent of a person's connections to a foreign country will be relevant in assessing the person's connections to New Zealand and their place of abode here. However, the permanent place of abode test does not involve a comparison of the relative "permanence" of different permanent places of abode. So long as a person has a permanent place of abode in New Zealand they will be resident here under s YD 1(2).

Summary – permanent place of abode

117. In summary:

- A person must have a dwelling in New Zealand to have a permanent place of abode here. However, the existence of a dwelling in which the person could live will not, of itself, give rise to tax residence in New Zealand.
- A place of abode will be a person's permanent place of abode if it is a lasting or enduring place where they usually live, or a place in which they can live or dwell when required, in a locality with which they have a durable connection and that is a current focal point of their living (see further [67]). To be a permanent place of abode the dwelling must be a place that the person is able and likely to live on an enduring rather than temporary basis.
- To determine whether a place of abode is a person's permanent place of abode, the continuity and duration of the person's presence in New Zealand and the durability of the person's association with their place of abode here must be considered.
- To determine whether a person has a durable association with their place of abode, the person's overall connections with their place of abode and with New Zealand must be weighed up. It is then necessary to evaluate the extent to which those connections indicate that the person has an enduring relationship with their place of abode here, such that it can be considered to be their permanent place of abode.

Acquiring and losing a permanent place of abode

118. When a person becomes a New Zealand resident for tax purposes, the time that their tax residence commences must be identified. Individuals can become resident as a result of the operation of either the permanent place of abode test, or the 183-day rule (discussed from [160]). When a person satisfies the 183-day rule, their tax residence is back-dated (under s YD 1(4)) to the first day of the 183 days that they were present in New Zealand in the 12-month period. In most situations where a person becomes tax resident in New Zealand, it will be the 183-day rule and s YD 1(4) that establish when their residence commences. However, a person could become resident under the permanent place of abode test from a time prior to the first day of their presence in New Zealand under the 183-day rule.

119. This could occur, for example, if someone moved to New Zealand but was out the country for much of the year on business and did not trigger the 183-day rule for some time. In those circumstances, the date at which the person acquired a permanent place of abode in New Zealand would need to be determined, as their New Zealand tax residence could commence from that point.

120. When a person leaves New Zealand, the time when their New Zealand tax residence ends must also be identified. A person will not cease to be tax resident here until they have been absent from New Zealand for more than 325 days in a 12-month period **and** no longer have a permanent place of abode here. The date that a person loses their permanent place of abode in New Zealand will therefore be relevant if it occurs some time after the 325 days of absence. The date that a person loses their permanent place of abode will also be relevant if it occurs during the 12-month period in which they satisfy the 325-day rule. In this situation, the interaction between the permanent place of abode test in s YD 1(2) and the back-dating rule in s YD 1(6) would result in the person ceasing to be tax resident in New Zealand from the time they lost their permanent place of abode.

121. The time at which a person acquires or loses their permanent place of abode is determined by an evaluation of the circumstances of each case. The objective is to determine the point in time at which either the person acquires a permanent place of abode in New Zealand by being present here and establishing connections of an enduring nature, or the person loses their permanent place of abode by ceasing to have an enduring or usual place of abode here.

122. If a person's circumstances change at any point during their absence from New Zealand, it is necessary to reconsider whether they have a permanent place of abode here. It may be that the change in circumstances results in the acquisition or loss of a permanent place of abode here. It is relevant to consider the time of occurrence of such events as:

- commencement or termination of employment;
- changes in the location of the person's family;
- purchase or sale of real or personal property;
- commencement or termination of a lease;
- transferral of financial affairs;
- appointment to, or resignation from, trade, professional, sporting or cultural associations; and
- departure from, or arrival in, New Zealand for an extended period.

In some situations, the combination of such factors may indicate that a person acquires or loses their permanent place of abode at a time other than arrival in or departure from New Zealand.

Examples illustrating the concept of "permanent place of abode"

The following examples deal **only** with the permanent place of abode test. They do not consider the 183-day rule, the 325-day rule, any DTA implications, or any potential application of the transitional resident rules.

The examples illustrate the way in which a person's overall circumstances need to be considered to determine if they have a permanent place of abode in New Zealand.

The conclusions in the examples are based on the facts that are known at a particular point in time. If what in fact eventuates differs from this, the results could be different for some or all of the years in question. It is important to bear in mind that if a person's circumstances change during their absence from New Zealand, it is necessary to reconsider whether they have a permanent place of abode here.

Example 1

Facts

123. Cate, who is normally resident in New Zealand, is seconded to Canada in connection with her employment for a fixed period of three years. Cate intends to return to New Zealand after the period of secondment, and the terms of her secondment are such that her job will definitely be available for her to return to. Cate's partner and children accompany her to Canada. The family home in New Zealand is owned by a family trust, of which Cate's parents and their solicitor are trustees. Cate, her partner and their children, together with Cate's siblings and their families, are the beneficiaries of the trust. The house is rented out while the family is in Canada. Cate and her family leave their furniture and most of their other personal belongings in storage in New Zealand during their absence. Cate retains her New Zealand investments and her connections with several professional and sporting associations here. Cate and her family return to New Zealand each year to spend Christmas with family and have a summer holiday here.

Result

124. Cate has a permanent place of abode in New Zealand during the period of her absence.

Explanation

125. Cate has a place of abode in New Zealand—being the house she and her family lived in before departing for Canada. Although the house is owned in trust, Cate's parents are trustees, and the family are all beneficiaries. It is reasonable to infer that the trustees will enable the family to resume living in the family home upon their return. Cate has retained ties with New Zealand – she still has a dwelling and most of her personal property here, maintains membership of several professional and sporting associations, and has investments here. Cate also retains employment ties with New Zealand, as her secondment is in connection with her New Zealand employment. Cate has a definite intention to return to New Zealand at the end of the three-year secondment and to resume living in the family home here.

126. Although Cate will be absent from New Zealand for three years, this is not inconsistent with her place of abode here remaining a permanent place of abode. All of the relevant factors must be weighed up. In this case, the strength of Cate's enduring connections with New Zealand and with her place of abode here are sufficient to establish that her home here continues to be a permanent place of abode.

127. If Cate had not intended to return to New Zealand after the period of secondment, but rather to take up other work opportunities in Canada, and the terms of her secondment were such that her employer in New Zealand would make its best endeavours to have a position available for her to return to should she wish, but could not guarantee this, and if Cate and her family had taken most of their furniture and other belongings with them, then Cate would not have a permanent place of abode in New Zealand.

Example 2

Facts

128. Mike departs from New Zealand on a working holiday (his "OE"). He intends to return to New Zealand after his OE, though he is not sure exactly when that will be. Before he left New Zealand, Mike had been living in a rented flat in Wellington for a couple of years, prior to which he had lived with his parents (also in Wellington). Mike terminates his lease when he leaves New Zealand. Mike resigns from his job and stores his personal effects with his parents, who are happy for Mike to return to live with them if he wishes upon his return. Mike leaves his KiwiSaver account in New Zealand and takes a contributions holiday. Mike ends up returning to New Zealand to live after 18 months.

Result

129. Mike does not have a permanent place of abode in New Zealand while he is overseas.

Explanation

130. Mike has a potential place of abode in New Zealand—being his parents' house, where his parents have told him he would be able to live upon his return. He has stored his personal effects in New Zealand and has family ties here, as his family still live here. However, these ties do not suggest that Mike's parents' house would be his permanent place of abode. Mike lived independently from his parents for a couple of years prior to leaving New Zealand. Although he could return to live with his parents, he would be unlikely to do so on an enduring rather than temporary basis. Mike intends to return to New Zealand after his OE, but there is no place of abode here with which he has a durable connection and to which he would likely return to live on a permanent basis.

131. If Mike had never lived independently from his parents prior to going overseas, his parents' house would be his permanent place of abode during his absence from New Zealand. Although when he leaves Mike does not know exactly when he will return to New Zealand, he is going on an OE and does not have the intention of leaving New Zealand permanently. Mike has left his personal effects at his parents' house, has family ties here, intends to return to New Zealand after his OE, and in fact returned to New Zealand to live after 18 months. In this scenario, because Mike had lived with his parents before going overseas, their house would be the place he usually lives, and would remain a place of abode in which he could live when required. In those circumstances Mike's parents' house would be the likely place to which he would return and live after his OE, and would remain his permanent place of abode during his absence.

Example 3

Facts

132. Li is a New Zealand citizen who has extensive business interests in New Zealand and Australia. Li owns a house in each country, and both houses are continuously available for his use. Li spends most of his time in Australia, but he regularly travels to New Zealand in connection with his business here. In aggregate, Li spends up to five months of the year in New Zealand, staying in his house here most of the time he is here (except when his business requires him to be elsewhere in New Zealand). These trips vary in length from two days up to several weeks. Li has significant investments in New Zealand, and he is a member of a number of cultural and sporting associations here. Li's immediate family live in Australia.

Result

Li has a permanent place of abode in New Zealand.

Explanation

133. Li has a place of abode in New Zealand—being the house he owns here. He has significant connections with New Zealand because he has extensive business interests here, a house here continually at his disposal, and connections with New Zealand sporting and cultural associations.

134. Li's presence in New Zealand is generally for short periods; that is, his presence here is not of a continuous nature. However, the fact that Li has substantial connections with New Zealand, and that these connections are maintained through regular trips to New Zealand, indicate that his place of abode here is a permanent place of abode. It is a place in which he can (and does) live when required, with which he has a durable connection, and that is a current focal point of his living. Although he also has a place of abode in Australia, Li usually or typically lives in both of his places of abode on an enduring rather than temporary basis.

Example 4

Facts

136. Ronan is a software developer who has lived in Wellington for 12 years and has a partner there. He and his partner own the apartment they live in and another similar apartment in a nearby building. Ronan accepts a two-year contract in Dublin. For the first year of his contract, Ronan returns to Wellington every few months to see his partner, after which she decides to take a year of unpaid leave and join him in Ireland for the remainder of his contract. At that time, they sell the apartment they had lived in, given that they will be down to one income and wish to travel a little in Europe in the second year of Ronan's contract. They sold the apartment they lived in rather than the investment property because it was not subject to a lease and so was easier to sell promptly. The couple intend to return to Wellington after Ronan's contract; they have many friends there and Ronan's partner's family live there. In addition to the investment property he owns with his partner, Ronan has a sizeable New Zealand share portfolio.

Result

137. Ronan has a permanent place of abode in New Zealand during his absence.

Explanation

138. Ronan has a place of abode in New Zealand—in the first year of his absence the apartment he and his partner owned and in which they lived, and subsequently the apartment the couple own as an investment property. Although Ronan has not lived in that apartment, it is a dwelling that would be able to be used by Ronan and his partner as a place of abode.

139. Ronan has a number of enduring connections with New Zealand, and Wellington in particular—he has lived in Wellington for 12 years and intends to return there with his partner after his two-year contract, he has family ties there (his partner's family), and he has substantial investments in New Zealand. These connections are sufficient to establish that the apartment Ronan lived in was a permanent place of abode, and after its sale the apartment that Ronan and his partner own became a permanent place of abode. Although Ronan has not lived in the investment property, it is a place of abode in which he and his partner could live when required, and is a likely place in which they would live upon their return to New Zealand. A property that has always been held as an investment would not commonly be a person's permanent place of abode, however it could be in some circumstances. In this case, given that the apartment is similar to the apartment Ronan and his partner lived in and is nearby to where they lived, it is a likely place in which they would live upon their return, given their particular circumstances.

Example 5

Facts

140. Melanie and her husband and four young children live in Tauranga. Melanie gets a lucrative job offer in London and the family decide to move there. They have no intention to return to New Zealand to live in the foreseeable future, and they intend the move to be a permanent one. The couple decide to sell their family home. Melanie moves to London in October to commence her new job. Her husband stays behind in Tauranga until December to enable their school-aged children to finish the school year, and to arrange the sale of their home. Once Melanie arrives in London, she enrols the children in schools there from the start of the following year. Melanie and her husband retain a one-bedroom rental property in Tauranga which they have owned for a number of years, and leave their share portfolio to be managed by their New Zealand broker. They have life insurance policies with a New Zealand insurance company, and retain those policies. The family home is sold in November, and Melanie's husband and children move to London at the end of the school-year as planned.

Result

141. Melanie does not have a permanent place of abode in New Zealand from the date of her departure in October.

Explanation

142. Although Melanie, at least initially, continues to have strong connections to New Zealand, her place of abode here is no longer her permanent place of abode. In the two months after she leaves New Zealand, her husband and children remain here, living in their family home. However, this is so the children can finish the school year here, and Melanie's husband can arrange the sale of the family home. In the circumstances, it does not indicate that the family home continues to be Melanie's permanent place of abode. Melanie has no intention to return to live in New Zealand in the foreseeable future. The sale of the family home supports this. The retention of some investments in New Zealand is not by itself significant. Maintaining life insurance with an insurance company is not a strong connection to New Zealand.

143. The rental property that Melanie and her husband own is not a place to which Melanie and her family would likely live upon their return to New Zealand, even if they did intend to return to New Zealand within a few years. It is not suitable to be used by them as a place of abode and, even if they maintained very strong ties to New Zealand, the rental property would not be Melanie's permanent place of abode.

144. Even if the rental property were a suitable house for Melanie and her family to live in, it would not be her permanent place of abode. Melanie does not intend to return to live in New Zealand in the foreseeable future—the move to London is intended to be a permanent one. The sale of the family home supports this stated intention. The investment property was acquired solely as an investment and has always been used as such. Even if it were a suitable house for Melanie and her family to live in, the fact that they do not intend to return to New Zealand to live in the foreseeable future and have not retained significant ties to New Zealand means that the rental property would not be Melanie's permanent place of abode. Melanie's family home in New Zealand would not continue to be her permanent place of abode from the time she leaves, so on the same basis her rental property would clearly not be, regardless of the nature of the property.

Example 6

Facts

145. Cameron is a civil engineer who goes to Japan with work for 18 months. Cameron's children are about to start high school, and the family had intended to move from Christchurch to Dunedin soon, to be closer to extended family. Cameron and his wife agree that she and the children will stay in New Zealand for the 18 months, during which time they will move to Dunedin so that the children can start high school there. Cameron's wife and children make the move from Christchurch to Dunedin, and he will join them there once he returns from Japan.

Result

146. Cameron has a permanent place of abode in New Zealand during his absence.

Explanation

147. Cameron has a place of abode in New Zealand—being the original family home in Christchurch, and then the new family home in Dunedin. Although Cameron has not previously lived in Dunedin, his

family home has been established there during his absence, and he will join his family there upon his return. The home is able to be used by Cameron as a place of abode.

148. Cameron has a durable association with the original family home in Christchurch. Once the family move to Dunedin, Cameron has a durable association with the new family home there through his wife and children living there and his intention to live there upon his return. This association establishes that the new family home is Cameron's permanent place of abode.

Example 7

Facts

149. Charlie and his wife own a house in Auckland where they live with their children, and where he is a member of a number of local clubs. Charlie works as a miner in Moranbah in Queensland (Australia) for periods of six weeks at a time, between which he returns to his home in Auckland for four weeks off. Charlie's wages are paid into an Australian bank account, in Australian dollars, though most of his wages are automatically transferred from there into the New Zealand bank account he holds jointly with his wife. Charlie's employer provides him with accommodation at the mine site. On his home visits, Charlie maintains his sporting and social ties.

Result

150. Charlie has a permanent place of abode in New Zealand.

Explanation

151. Charlie has a place of abode in New Zealand—being the house that he and his wife own. Although Charlie is absent from New Zealand for more than half of each year, his absences are solely because of the nature of his job. Charlie's home, family, and personal property are in New Zealand.

152. Charlie's place of abode in New Zealand is a permanent place of abode because he has a durable association with it—he lives there with his family when he is in New Zealand. Although Charlie is out of New Zealand more than he is here, that is solely for work purposes, and his home in Auckland is the lasting or enduring place where he usually lives.

Example 8

Facts

153. Daniel is an engineer who has lived in Napier all of his life. He accepts a two-year contract working on an oil rig in Malaysia for periods of four weeks at a time. When he takes up the job, Daniel terminates the lease on the flat he has lived in for the last couple of years. Between his stints on the rig, Daniel has two weeks off. He has a periodic lease on an apartment in Malaysia, and for most of his weeks off he stays there. At other times he travels elsewhere, sometimes returning to New Zealand to visit family and friends here. When he is back in New Zealand, Daniel stays at his parents' house in Napier. Daniel's wages are paid into his Malaysian bank account, in American dollars. He has no plans to return to New Zealand permanently—his intention is to work and live in Malaysia indefinitely. Daniel's employer has sponsored his Malaysian work permit and will continue to do so as long as Daniel stays with the company.

Result

154. Daniel does not have a permanent place of abode in New Zealand.

Explanation

155. Although Daniel has a potential place of abode in New Zealand—his parents' house—it is not his permanent place of abode. He stays at his parents' house during some of his time off, when he returns to New Zealand to catch up with friends and family. He would also presumably stay there temporarily if and when he ultimately returns to Napier to live. However, as Daniel has not lived with his parents for some time, it seems likely that this would only be until he found a new place to live. Daniel's use of his parents' house as a place of abode is temporary in nature, not enduring or indefinite. It is not a place where he usually lives or a place to which he would likely return and live on an enduring rather than temporary basis.

156. Even if Daniel had recently graduated from his engineering degree before leaving New Zealand, and so had lived with his parents immediately prior to going overseas, his parents' house would not be his permanent place of abode once he leaves New Zealand. Daniel has not retained sufficient connections with New Zealand for his parents'

house here to remain his permanent place of abode. Although Daniel periodically visits his parents and friends in Napier, he has no other significant ties here, does not intend to return to New Zealand permanently, and intends to work and live in Malaysia indefinitely. Daniel's employer will continue to sponsor his work permit, which indicates that this intention would seem to be reasonably held. In this scenario, Daniel would have lived with his parents before leaving New Zealand because he was still studying. However, by the time he left New Zealand he would have completed his degree and been financially independent. That, together with the fact that Daniel has no intention to return to New Zealand permanently and intends to work and live in Malaysia indefinitely, makes it unlikely that Daniel would return and live with his parents again on an enduring rather than temporary basis.

The day-count rules

157. In addition to the permanent place of abode test, there are day-count rules in the Act, under which a person can become resident in New Zealand or lose New Zealand tax residence (provided the person does not have a permanent place of abode here). These day-count rules are discussed below.

The part-day rule

158. For convenience and simplicity, s YD 1(8) establishes a part-day rule for the purposes of the 183-day and 325-day rules. Section YD 1(8) states:

> **YD 1 Residence of natural persons**
>
> ...
>
> *Presence for part-days*
>
> (8) For the purposes of this section, a person personally present in New Zealand for part of a day is treated as—
>
> (a) present in New Zealand for the whole day; and
>
> (b) not absent from New Zealand for any part of the day.

159. Therefore, days of arrival in, and departure from, New Zealand are treated as full days of presence in New Zealand for the 183-day and 325-day rules.

The 183-day rule

Description of the rule

160. Section YD 1(3) provides that a person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period. Section YD 1(4) then provides that if that is the case, the person is treated as resident from the first of those 183 days, until they are treated as ceasing to be resident under subs (5) (the 325-day rule). Those provisions state:

> **YD 1 Residence of natural persons**
>
> ...
>
> *183 days in New Zealand*
>
> (3) A person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.
>
> *Person treated as resident from first of 183 days*
>
> (4) If subsection (3) applies, the person is treated as resident from the first of the 183 days until the person is treated under subsection (5) as ceasing to be a New Zealand resident.
>
> *Ending residence: 325 days outside New Zealand*
>
> (5) A person treated as a New Zealand resident only under subsection (3) stops being a New Zealand resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period.
>
> *Person treated as non-resident from first of 325 days*
>
> (6) The person is treated as not resident from the first of the 325 days until they are treated again as resident under this section.

161. It should be noted that the 183-day rule operates in conjunction with the permanent place of abode test in s YD 1(2). The permanent place of abode test applies despite anything else in s YD 1. Therefore, if a person has a permanent place of abode in New Zealand, they will be resident in New Zealand even if they have not been present here for more than 183 days in total in any 12-month period. Because the tests operate in conjunction with one another, a person who has acquired a permanent place of abode in New Zealand (ie, someone who has moved here from overseas) may have their residence back-dated to a time before that under the 183-day rule and s YD 1(4). This could occur, for example, if the person came to New Zealand for a holiday or job interview prior to moving here, or it could occur because they did not acquire a permanent place of abode immediately upon moving to New Zealand, but some time later.

162. The 183-day rule does not focus on any particular income year, or indeed any particular 12-month period. It does not need to span the date as at which residence is being assessed, and the days of presence do not need to be consecutive. If a person was present in New Zealand for more than 183 days in total in **any** 12-month period, that person will be treated as resident in New Zealand from the first of those days of presence until they lose residence. To lose residence

they would need to satisfy the 325-day rule (discussed below from [172]) and also not have a permanent place of abode here.

Examples illustrating the 183-day rule

The following examples deal **only** with the 183-day rule. They do not consider the permanent place of abode test, the 325-day rule, any DTA implications, or any potential application of the transitional resident rules.

Example 9

Facts

163. Amy arrived in New Zealand on 1 October 2012 and stayed here until 1 March 2013, a total of 152 days of presence in New Zealand. Amy was then absent from New Zealand for 200 days. She then returned to New Zealand on 18 September 2013, and stayed here for a further seven months. It is assumed that Amy was resident outside New Zealand prior to 1 October 2012 and that she has never previously been resident in New Zealand.

Result

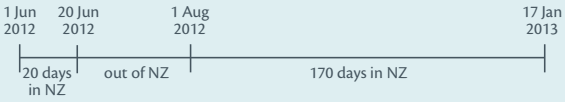
164. Amy is resident in New Zealand from 18 September 2013.

Explanation

165. Amy was not personally present in New Zealand for more than 183 days in any 12-month period commencing prior to 18 September 2013. Because of her absence between 2 March 2013 and 17 September 2013, Amy was only in New Zealand for 165 days in the 12-month period commencing on 1 October 2012 (152 days from 1 October 2012 to 1 March 2013 plus 13 days from 18 September 2013 to 30 September 2013).

166. However, Amy was present in New Zealand for seven months (213 days), in the 12-month period commencing on 18 September 2013. Therefore, Amy is resident from the first day of presence in that period (ie, from 18 September 2013). Amy will continue to be resident in New Zealand until she ceases to be resident under the 325-day rule (assuming she has no permanent place of abode here).

Example 10



Facts

167. Ben arrived in New Zealand on 1 June 2012 and stayed here until 20 June 2012, a total of 20 days. Ben returned to New Zealand on 1 August 2012 and stayed here until 17 January 2013, a total of 170 days. It is assumed that Ben was not resident in New Zealand prior to 1 June 2012.

Result

168. Ben is resident in New Zealand from 1 June 2012.

Explanation

169. Ben was personally present in New Zealand for more than 183 days (ie, 190 days), during the 12-month period commencing on 1 June 2012. Ben will continue to be resident in New Zealand until he ceases to be resident under the 325-day rule (assuming he has no permanent place of abode here).

Non-resident seasonal workers

170. Despite the 183-day rule, a person who is a "non-resident seasonal worker" is treated as non-resident during the time that they are employed under the recognised seasonal employment scheme (s YD 1(11)). The recognised seasonal employer policy is published by the Department of Labour under s 13A of the Immigration Act 1987 (see: **www.dol.govt.nz/initiatives/strategy/rse**).

171. The non-resident seasonal worker rule does not override the permanent place of abode test, so in the event that a non-resident seasonal had or acquired a permanent place of abode in New Zealand they would be resident here.

The 325-day rule

Description of the rule

172. Section YD 1(5) provides that a person who is resident only under the 183-day rule (ie, they do not have a permanent place of abode in New Zealand) stops being resident here if they are personally absent from New Zealand for more than 325 days in total in a 12-month period. Section YD 1(6) then provides that the person will be treated as non-resident from the first of those 325 days.

173. The 325-day rule is satisfied if a person is absent from New Zealand for 325 days or more in total in any 12-month period; it does not relate to income years. The days of absence do not need to be consecutive.

174. The 325-day rule only applies to make someone non-resident if they do not have a permanent place of abode in New Zealand. If someone has a permanent place of abode here, they will remain resident even if they are absent from New Zealand for more than 325 days in a 12-month period.

175. A person who is absent from New Zealand for more than 325 days and who does not have a permanent place of abode in New Zealand immediately prior to their departure will have their non-residence back-dated to the first day of the period of absence. However, a person who is absent from New Zealand for more than 325 days and who has a permanent place of abode in New Zealand at the time of their departure will only have their non-residence back-dated to the day after the day they lose their permanent place of abode in New Zealand. In this situation it is not necessary to commence the day counting again after the person loses their permanent place of abode. If the person is absent for, say, 100 days before losing their permanent place of abode, those 100 days will be taken into account for the purposes of the 325-day rule. When the person is finally absent for more than 325 days they will cease to be resident from day 101 (ie, the day after the day on which they lost their New Zealand permanent place of abode).

176. The combined effect of the 325-day rule and the permanent place of abode test is that after 325 days of absence from New Zealand in a 12-month period, a person ceases to be resident in New Zealand from the first of those days of absence on which they do not have a permanent place of abode here. Once a person ceases to be resident, they will remain non-resident until they either acquire a permanent place of abode here or satisfy the 183-day rule.

Examples illustrating the 325-day rule

The following examples deal only with the 325-day rule. They do not consider the permanent place of abode test, the 183-day rule, any DTA implications, or any potential application of the transitional resident rules.

Example 11

Facts

177. Jeremy left New Zealand on 1 May 2013 and returned again on 1 August 2013, a total of 91 days of absence. Jeremy stayed in New Zealand until 20 August 2013, a total of 20 days of presence. Jeremy remained absent until 1 February 2014, a total of 164 days. Jeremy stayed in New Zealand from 1 February 2014 until 16 February 2014, a total of 16 days. After leaving again on 16 February 2014, Jeremy returned to New Zealand on 30 April 2014, after a period of absence of 72 days. It is assumed that Jeremy does not have a permanent place of abode in New Zealand and that Jeremy was resident in New Zealand prior to his departure on 1 May 2013 by virtue of the 183-day rule.

Result

178. Jeremy is non-resident from 2 May 2013.

Explanation

179. Jeremy was absent for 327 days in total in the 12-month period commencing on 1 May 2013 (91 days commencing on 2 May 2013 and ending on 31 July 2013, 164 days commencing on 21 August 2013 and ending on 31 January 2014, and 72 days commencing on 17 February 2014 and ending on 29 April 2014). Jeremy is therefore non-resident from the first day of absence in that period (ie, 2 May 2013). Jeremy will remain non-resident until he acquires a permanent place of abode here or until he is present here for more than 183 days in any period of 12 months.

Example 12

Facts

180. Claire leaves New Zealand on 1 April 2014 and returns on 1 August 2015. Claire has a permanent place of abode in New Zealand at all times during this period; she owns a house here, has strong economic and personal ties with New Zealand, and remains in the employment of her New Zealand employer.

Result

181. Claire remains resident in New Zealand at all times during her absence.

Explanation

182. Although Claire is absent from New Zealand for more than 325 days (ie, 365 days) in the 12-month period commencing on 2 April 2014, she remains resident here because she has a permanent place of abode in New Zealand at all times during her absence.

Example 13

Facts

183. James was seconded to the Australian office of his employer for six months, and left New Zealand on 1 May 2014. James had always lived in New Zealand (with his parents), had a boyfriend here, and intended to return after the six-month period. James left most of his personal property, including his car, with his parents. After he had been in Australia for three months, James was offered a permanent job there, which he accepted. James stayed in Australia, and arranged to have his personal property transported to Australia and his New Zealand bank accounts closed. James asked his parents to sell his car, and he ended his relationship with his boyfriend. James intends to remain in Australia indefinitely.

Result

184. James lost his New Zealand permanent place of abode on 1 August 2014, when he resigned from his substantive position in New Zealand and accepted the permanent job in Australia. Although it was in the following weeks that James made arrangements to have his property transported to Australia, closed his New Zealand bank accounts, and ended his relationship, the decision to resign from his position in New Zealand and accept the permanent position in Australia is the time from which it is apparent that James had formed the intention to remain in Australia indefinitely. Accordingly, James ceased to be resident in New Zealand from this time.

Explanation

185. James was personally absent from New Zealand for more than 325 days in the 12-month period commencing on 2 May 2014.

186. However, James did not lose his New Zealand permanent place of abode when he originally departed on 1 May 2014 because he had a place of abode available to him (his parents' house, where he had lived prior to his departure), he retained close personal and employment ties with New Zealand, and he intended to return after a brief period of absence. James lost his New Zealand permanent place of abode on 1 August 2014 when he resigned from his job in New Zealand and accepted the job in Australia, from which point he had decided to stay there indefinitely.

187. Although James was absent from New Zealand for more than 325 days in a 12-month period commencing on 2 May 2014, he did not cease to be resident in New Zealand until 1 August 2014 when he lost his New Zealand permanent place of abode.

Relationship between the permanent place of abode test and the day-count rules

Overlap of the rules

188. As noted above, if a person is personally present in New Zealand for more than 183 days in a 12-month period they are resident here, and treated as such from the first of those days of presence. The person then remains resident until they cease to be resident under the 325-day rule. The combined effect of the 325-day rule and the permanent place of abode test is that a person who is absent from New Zealand for more than 325 days in total in any 12-month period is treated as non-resident from the first of those days of absence, or from the first day during the period of absence on which they no longer have a permanent place of abode here, whichever is later.

189. The effect of the back-dating of both the 183-day and 325-day rules means that where a person has travelled in and out of New Zealand there may be an overlap between those rules. This is because a person who is resident under the 183-day rule may have been temporarily absent from New Zealand at some time before the 183-day rule was satisfied. If the person then satisfies the 325-day rule, they will cease to be resident in New Zealand from the first of those days of absence (assuming they have no permanent place of abode in New Zealand), even though that day falls before the final day which is taken into account for the purposes

of the 183-day rule. In this situation the period of absence taken into account for the purposes of the 325-day rule overlaps with the period of presence taken into account for the purposes of the 183-day rule. This may result in the person being treated as a New Zealand resident for a period of less than 183 days, even though they were present here for more than 183 days in a 12-month period.

190. The two rules may also overlap in the converse situation. A person who ceases to be resident under the 325-day rule may have been temporarily present in New Zealand at some time before the 325-day rule was satisfied. If the person then satisfies the 183-day rule by being present in New Zealand for more than 183 days in a 12-month period, the person will become resident in New Zealand from the first of those days of presence, even though that day falls before the final day which is taken into account for the purposes of the 325-day rule. This may result in the person being treated as non-resident for a period of less than 325 days even though they were absent for more than 325 days in a 12-month period.

191. Where there is an overlap between a period taken into account for the purposes of the 183-day rule and a period taken into account for the purposes of the 325-day rule, the later period operates to confer residence or non-residence, respectively, from the first day of that period.

Examples illustrating the relationship between the 183-day and 325-day rules

The following examples deal only with the relationship between the 183-day and 325-day rules. They do not consider the permanent place of abode test, any DTA implications, or any potential application of the transitional resident rules.

Example 14

Facts

192. Henry left New Zealand on 1 May 2013 and returned on 1 January 2014, after 244 days of absence. Henry left New Zealand again on 1 February 2014 after 32 days of presence here. Henry returned on 28 April 2014, after 85 days of absence, and remained in New Zealand from that point onwards. It is assumed that Henry did not have a permanent place of abode in New Zealand until after he returned on 28 April 2014. It is also assumed that Henry was resident in New Zealand under the 183-day rule prior to his departure on 1 May 2013.

Result

193. Henry is treated as non-resident from 2 May 2013 until 31 December 2013. Henry is treated as resident in New Zealand again from 1 January 2014.

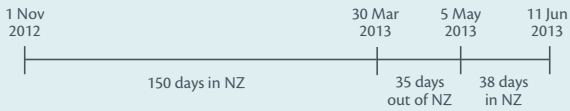
Explanation

194. Henry was personally absent from New Zealand for 329 days in total in the 12-month period commencing on 2 May 2013 (ie, for 244 days from 2 May 2013 to 31 December 2013, and for 85 days from 2 February 2014 to 27 April 2014). Henry is therefore treated as non-resident in New Zealand from the first day of absence, ie, 2 May 2013.

195. Henry was personally present in New Zealand for more than 183 days in the 12-month period commencing on 1 January 2014 (ie, for 32 days from 1 January 2014 to 1 February 2014, and 248 days from 28 April 2014 to 31 December 2014 – a total of 280 days). Henry is therefore treated as resident from the first of those days of presence, ie, 1 January 2014.

196. The period taken into account for the purposes of the 183-day rule cuts into the period taken into account for the purposes of the 325-day rule. Therefore, Henry is only treated as non-resident from the commencement of the period of absence (ie, 2 May 2013) until the day before the beginning of the period taken into account for the purposes of the 183-day rule (ie, 31 December 2014).

Example 15



Facts

197. Belinda arrived in New Zealand on 1 November 2012 and stayed here for 150 days, until 30 March 2013. Belinda left New Zealand on 30 March 2013 and returned on 5 May 2013, a period of absence of 35 days (ie, from 31 March 2013 to 4 May 2013). Belinda was present in New Zealand from 5 May 2013 to 11 June 2013, a total of 38 days. Belinda left the country again on 12 June 2013 and has remained outside New Zealand since that time. It is assumed that Belinda was resident outside New Zealand before she arrived on 1 November

2012, and that she did not at any time have a permanent place of abode in New Zealand.

Result

198. Belinda is treated as resident in New Zealand from 1 November 2012 to 30 March 2013. Belinda is treated as non-resident from 31 March 2013.

Explanation

199. Belinda was present in New Zealand for 188 days in the 12-month period commencing on 1 November 2012 (ie, for 150 days from 1 November 2012 to 30 March 2013, and for 38 days from 5 May 2013 to 11 June 2013). Belinda is treated as resident from the first of those days of presence, ie, 1 November 2012.

200. Belinda was absent from New Zealand for 327 days in the 12-month period commencing on 31 March 2013 (ie, for 35 days from 31 March 2013 until 4 May 2013, and for 292 days from 12 June 2013 to 30 March 2014). Belinda is treated as non-resident from the first of those days of absence, ie, 31 March 2013.

201. The period taken into account for the purposes of the 325-day rule cuts into the period taken into account for the purposes of the 183-day rule. As a result, Belinda is only treated as resident from the commencement of the period of presence (ie, 1 November 2012) until the day before the beginning of the period taken into account for the purposes of the 325-day rule (ie, 30 March 2013).

Government service rule

202. There is a special residence rule for people absent from New Zealand in the service of the New Zealand government (s YD 1(7)). This rule provides that any person who is absent from New Zealand in the service, in any capacity, of the government of New Zealand is treated as a New Zealand resident during the period of absence.

203. Section s YD 1(7) states:

> *Government servants*
>
> (7) Despite subsection (5), a person who is personally absent from New Zealand in the service, in any capacity, of the New Zealand Government is treated as a New Zealand resident during the absence.

204. Section YD 1(7) overrides the 325-day rule. Therefore, a person absent from New Zealand in the service of the government is resident here irrespective of the length of their absence from New Zealand or whether they have a permanent place of abode in New Zealand. The provision applies while they remain in that service.

205. The purpose of s YD 1(7) is for New Zealand to retain the taxing rights to the income of people absent from New Zealand but who remain closely connected to New Zealand because they are representatives and servants of the New Zealand government abroad. The section is consistent with the longstanding tax treaty practice of countries retaining exclusive rights to tax the personal services-type income of their government representatives and servants abroad. This treaty practice conforms to the rules of international courtesy and mutual respect between countries, and is also consistent with the provisions of the Vienna Conventions on Diplomatic and Consular Relations[7]. This international approach to taxing government servants explains the reason for s YD 1(7), as without the provision the employment income of New Zealand government servants abroad may not be taxed at all.

206. For the government service rule in s YD 1(7) to apply the person needs to be "personally absent from New Zealand in the service of the New Zealand Government". To meet this requirement, the Commissioner considers the person must have been present in New Zealand in the service of the New Zealand government before their departure. Further, based on the wording of s YD 1(7), and taking into account the purpose of the rule, the Commissioner considers that being in the service of the New Zealand government should be the reason for the person departing from New Zealand. For example, s YD 1(7) will apply to an existing government employee being sent from New Zealand to pursue their duties for the New Zealand government abroad, or a government employee departing from New Zealand to undertake study overseas for their government department. This is because there is a sufficient connection between the person's absence from New Zealand and their service to the New Zealand government.

207. In the Commissioner's view, the government service rule in s YD 1(7) does not apply to treat people as New Zealand residents if they accept "local office" positions with the New Zealand government when they are

[7] The *Vienna Convention on Diplomatic Relations* 500 UNTS 95 (opened for signature 18 April 1961, ratified by New Zealand on 23 September 1970) and the *Vienna Convention on Consular Relations* 596 UNTS 261 (opened for signature 24 April 1963, signed by New Zealand on 10 September 1974).

abroad. For example, a person who is living in Paris and is recruited by the New Zealand embassy in Paris would not be treated as a New Zealand resident under s YD 1(7). It also does not apply if a person leaves New Zealand to take up a "local office" New Zealand government position overseas but they are not already in the service of the New Zealand government when they leave.

208. Employees of government departments (or their departmental agencies), and members of the New Zealand Defence Force and New Zealand Police, who are posted overseas from New Zealand will be considered to be absent from New Zealand in the service of the New Zealand government. This includes government servants who are pursuing studies overseas for the New Zealand government.

209. Employees of State-owned enterprises and contractors to the New Zealand government are not considered to be in the service of the New Zealand government as they are not so closely connected to the New Zealand government. They are not treated as New Zealand residents under s YD 1(7).

210. Employees of other public bodies will be subject to s YD 1(7) if their employing body is so closely controlled by the Government that it is an agent or instrument of the New Zealand government. Control is measured by how much independence and discretion the body can insist on, not by how much control is actually enjoyed by the body. When the nature and degree of control exercised by the government is uncertain, or a public body has a substantial measure of independent discretion, the courts have indicated a reluctance to recognise the public body as an agent of the government.

211. Most public bodies listed as government agents in the Crown Entities Act 2004 are sufficiently controlled by the government to satisfy the common law test of control, and will therefore be agents of the government. Similarly, wholly owned subsidiaries of those government agents will also likely be sufficiently controlled to satisfy the test. This means employees of those bodies will probably be considered to be in the service of the New Zealand government. However, decisions need to be made on a body-by-body basis, taking into account the particular facts and governing rules for each body.

212. Bodies such as autonomous government entities, independent government entities, school boards of trustees and tertiary education institutions will most likely be too independent and enjoy too much discretion to be agents of the government. This means that employees of these bodies will not be in the service of the New Zealand government.

213. If a person ceases to be in the service of the New Zealand government while overseas, they will be non-resident from the date they cease their service, provided that they have satisfied the 325-day rule and do not have a permanent place of abode in New Zealand.

214. Section YD 1(7) does not apply to a spouse/partner or child accompanying someone in the service of the government on overseas postings. Their residence status needs to be determined independently under s YD 1.

215. Some DTAs that New Zealand is a party to have a specific article that allocates taxing rights in relation to remuneration for services rendered by government servants. Accordingly, when a person who is treated as a New Zealand resident under s YD 1(7) is serving in a country with which New Zealand has a DTA, the provisions of that DTA need to be considered.

Examples illustrating the government service rule

The following examples deal **only** with the government service rule. They do not consider the permanent place of abode test or any DTA implications.

Example 16

Facts

216. Aroha is an employee of a government department, living and working in Wellington. The government department needs Aroha to work overseas for four years. She will continue to be employed and paid by the government department during her absence. Aroha's husband and children will accompany her overseas.

Result

217. Aroha is treated as a New Zealand resident under s YD 1(7), and will continue to be for as long as she is absent from New Zealand in the service of the New Zealand government. Aroha's husband and children are not absent on government service so s YD 1(7) does not apply to them.

Explanation

218. Section YD 1(7) provides that despite the 325-day rule, a person who is absent from New Zealand in the service of the New Zealand government is treated as a New Zealand resident during the absence.

219. Aroha is absent from New Zealand in the service of the government. The reason for Aroha's absence from New Zealand is to carry out her duties for the government department that she works for. As such, she is treated as a New Zealand resident under s YD 1(7), and will continue to be for as long as she is absent from New Zealand in the service of the New Zealand government.

220. Each person's tax residence needs to be determined individually. Aroha's husband and children are not absent on government service so s YD 1(7) does not apply to them.

Example 17

Facts

221. Justine, a New Zealand expatriate, has been living and working in London for five years for an American bank. Justine is non-resident for New Zealand tax purposes. She hears that a New Zealand government department is looking for a person to work in its London office. She applies for the position and is successful.

Result

222. Justine will not become a New Zealand resident merely because she has started working for the New Zealand government in London.

Explanation

223. Justine is not absent from New Zealand in order to carry out her duties for the New Zealand government. She had been living away from New Zealand prior to her appointment to the position; the performance of her duties was not the reason for her absence from New Zealand.

Transitional resident rules

224. New migrants and returning New Zealanders may be transitional residents under s HR 8(2). If a person is a transitional resident they are entitled to tax exemptions for certain income.

225. Under s HR 8(2), a person will be a transitional resident if:

- they are a New Zealand resident through acquiring a permanent place of abode here, or through the 183-day rule;
- for a continuous period of at least 10 years immediately before acquiring a permanent place of abode or satisfying the 183-day rule (ignoring the rule in s YD 1(4)) they did not meet those requirements, and were not resident in New Zealand;
- they have not previously been a transitional resident; and
- they have not ceased to be a transitional resident.

226. A person meeting the requirements for transitional residence will be a transitional resident (unless they elect not to be) from the first day that they are tax resident in New Zealand (under either the permanent place of abode test or the 183-day rule). If the person becomes a New Zealand tax resident under the 183-day rule, their tax residence will be back-dated under s YD 1(4) to the first of the 183 days of presence in New Zealand, and their transitional residence will start from that date. They will remain a transitional resident until the earliest of the following:

- the end of the 48th month after the month in which they acquired a permanent place of abode in New Zealand or satisfied the 183-day rule (ignoring the back-dating rule in s YD 1(4)), whichever is earlier,
- the date on which they stop being a New Zealand resident, or
- the date on which they stop being a transitional resident because they elect not to be one (under s HR 8(4) or (5)).

227. The transitional resident rules provide a temporary tax exemption (s CW 27) for all foreign-sourced income except for:

- employment income in connection with employment or service performed while the person is a transitional resident; and
- income from a supply of services.

228. The transitional resident rules also ensure that other provisions in the Act apply to produce a result for income tax purposes that is the same as if the transitional resident were non-resident (for example the CFC rules, the FIF rules, the financial arrangements (FA) rules, the trust rules and the non-resident withholding tax (NRWT) rules) (see s HR 8(1)).

229. Transitional residents and the spouses/partners of transitional residents are not entitled to working for families tax credits under the family scheme (ss MC 5, MD 7, and HR 8(5)).

230. The transitional resident rules apply to people who satisfy the requirements to be a transitional resident on or after 1 April 2006, for the 2005-06 and subsequent income years.

231. For further information about the transitional resident rules, and examples of how they apply, see "Temporary exemption from tax on foreign income for new migrants and certain returning New Zealanders" *Tax Information Bulletin* Vol 18, No 5 (June 2006) at 103, and "Temporary exemption for transitional residents" *Tax Information Bulletin* Vol 19, No 3 (April 2007) at 83.

232. However, it is noted that those TIB items are not accurate in two respects. Firstly, *Tax Information Bulletin* Vol 18, No 5 (June 2006) states that the period of transitional residence starts on the **first day of the month in which the person migrates** to New Zealand. However, as noted in *Tax Information Bulletin* Vol 19, No 3 (April 2007) and discussed above, the starting point for transitional residence is aligned with the start of a person's tax residence in New Zealand (including when the period of tax residence is back-dated under s YD 1(4), for example where a person has visited New Zealand prior to moving here).

233. Secondly, *Tax Information Bulletin* Vol 19, No 3 (April 2007) states that transitional residence lasts for 48 months after **migration**. However, as noted at [226], it in fact lasts till the end of the 48th month after the month in which the person acquired a permanent place of abode in New Zealand (which will not necessarily be at the time of migration here) or satisfied the 183-day rule. To the extent that the TIB items on transitional residence suggest otherwise, they should not be relied on.

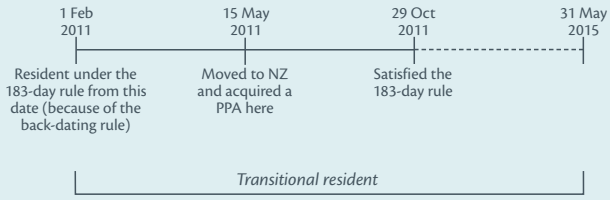
Example illustrating the transitional resident rules

The following example deals **only** with the transitional resident rules. It does not consider the 183-day and 325-day rules, the permanent place of abode test, or any DTA implications.

Though the application of the 183-day rule is not considered in the example, it is referred to in the explanation. This is because it is necessary to know the time from which a person becomes tax resident in New Zealand, and whether they satisfied the 183-day rule or the permanent place of abode test first, in order to establish the period during which the person will be a transitional resident.

Example 18

(This example is taken from "Temporary exemption for transitional residents" *Tax Information Bulletin* Vol 19, No 3 (April 2007), though it has undergone some minor editing and the explanation for the result is slightly expanded.)



Robert's transitional resident status starts from the first day of his NZ tax residence (1 Feb 2011). It ends at the end of the 48th month after the month in which he satisfied either the PPA test or 183-day rule (whichever is earlier). Robert satisfied the PPA test before he satisfied the 183-day rule, so his transitional resident status runs until the end of the 48th month after May 2011 (the month he acquired a PPA).

Facts

234. Robert visited New Zealand on 1 February 2011 for a job interview. On 15 May 2011 he relocated here permanently and acquired a permanent place of abode at that time. On 29 October 2011 he satisfied the 183-day rule and was deemed to be tax resident in New Zealand from 1 February 2011 because of the back-dating rule in s YD 1(4). He has never been tax resident in New Zealand before, and has not elected not to be a transitional resident.

Result

235. Robert would qualify for transitional residence. His status as a transitional resident would run from 1 February 2011 to 31 May 2015, provided he remains resident here and does not make an election not to be a transitional resident.

Explanation

236. Robert is resident in New Zealand from 1 February 2011, under the 183-day rule and s YD 1(4). Robert has never been a tax resident or transitional resident in New Zealand before, and he has not elected to not be a transitional resident. He therefore satisfies the requirements of s HR 8(2).

237. Although Robert is treated as tax resident in New Zealand from 1 February 2011 (because of the back-dating rule in s YD 1(4)), he did not meet the requirements of either s YD 1(2) or (3) (ignoring the back-dating rule) for being a resident until 15 May 2011, when he moved here and acquired a permanent place of abode here. Robert acquired a permanent place of abode in New Zealand before he satisfied the 183-day rule. His status as a transitional resident would therefore run from 1 February 2011 (the date from which Robert is tax resident in New Zealand) to 31 May 2015 (the end of the 48th month after the month in which he acquired a permanent place of abode in New Zealand).

Changes in residence

238. The residence of a person **may** change during an income year if:

- the person acquires a permanent place of abode in New Zealand during the year,
- the first day of more than 183 days of presence in New Zealand in any 12-month period falls within the year,
- the person ceases to have a permanent place of abode in New Zealand, or
- the first day of more than 325 days of absence from New Zealand in any 12-month period falls within the year.

239. Some of the more significant income tax considerations that may be relevant when the residence status of a person changes during an income year are set out below. A change in residence may also have implications for the application of a DTA. Further, if a person is a settlor or beneficiary of a trust and their residence status changes there may be tax implications—see from [456].

(a) Taxation of foreign-sourced income

240. If the person derived income from sources outside New Zealand during the income year, that income will (subject to the transitional resident rules) be assessable income for New Zealand tax purposes if it was derived while the person was resident here (s BD 1(5)). Therefore, where a person's residence status changes during an income year, the amount of any foreign-sourced income derived by the person while they were resident in New Zealand must be determined. To do so, the total foreign-sourced income derived will need to be reasonably apportioned to the periods of residence and non-residence.

(b) Foreign dividend payments [applicable up until 31 March 2013]

241. If the person derived dividends from a New Zealand resident company that has elected under s OC 1 to be a foreign dividend payment account company, any foreign dividend payment (FDP) credits attached to dividends derived by the person are creditable, whether or not the person was resident when the dividends were derived. If the dividends were derived while the person was non-resident, the FDP credits can be credited against any non-resident withholding tax liability in respect of the dividend. Any excess credits are creditable against any other tax liability of the person to the extent of that liability, with any further excess credits being refundable.

(c) The financial arrangements rules

242. The financial arrangements rules are a timing regime that spreads income and expenditure under a financial arrangement over the term of the arrangement. If a person becomes a New Zealand resident during an income year and is a party to a financial arrangement, they may become subject to the financial arrangements rules. Where this is the case, they are treated as having assumed the accrued obligation to pay consideration under the financial arrangement immediately after the time at which they became resident, and as having paid the market value that a contract to assume the obligation had at that time (s EW 37(2)). The deemed acquisition price will then be taken into account in any subsequent base price adjustment required under s EW 29. To the extent that the exemption from the financial arrangements rules for non-residents (s EW 9) previously applied, that exemption will cease to apply when the person becomes resident.

243. If the person ceases to be a New Zealand resident during an income year and is a party to a financial arrangement, they must calculate a base price adjustment for the financial arrangement as at the date of ceasing to be resident (s EW 29). If the base price adjustment is positive, it will be income derived by the person in the year for which the calculation is made (s EW 31(3)). If the base price adjustment is negative, it will be expenditure incurred by the person in the year for which the calculation is made, and a deduction may be allowed for that expenditure under s DB 6, s DB 7, s DB 8 or s DB 11 (s EW 31(4)). An exception exists if the person is a cash basis person and they cease to be a New Zealand resident before the first day of the fourth income year following the income year in which they first became a New Zealand resident. In that case, they do not need to calculate a base price adjustment for a financial arrangement that they were a party to both before becoming and after ceasing to be a New Zealand resident (s EW 30(1)).

244. A financial arrangement will be an excepted financial arrangement for a transitional resident if no other party is a New Zealand resident and the financial arrangement is not for a purpose of a business carried on in New Zealand by a party to the arrangement (s EW 5(17)).

(d) Provisional tax

245. If the person ceases to be a New Zealand resident during the income year, they may cease to be a provisional taxpayer for the purposes of the provisional tax rules (being the provisions listed in s RC 2).

Conversely, if the person becomes a New Zealand resident during the income year, they may become a provisional taxpayer and liable to pay provisional tax in accordance with the provisional tax rules regime (s RC 3).

Relevance of double taxation agreements

246. New Zealand is party to DTAs with a number of countries. Where someone is tax resident in both New Zealand and a country with which we have a DTA, the DTA will determine what taxing rights each country has.

247. For a list of countries that New Zealand has DTAs with see **www.ird.govt.nz/international/residency/dta/**

Dual residence

248. Dual residence occurs when an individual is resident in two countries under the laws of each of those countries. This can easily arise, as different countries have different tests of residence, or they may use more than one residence test. One situation where dual residence is likely to arise in practice is where one country has a personal presence test and another relies on more permanent connections focusing on other factors, such as the location of a person's home or their domicile. For example, if country A deems a person resident after they have been present there for 183 days, and country B employs a test based on other factors, a person normally resident in country B who is present in country A for a six-month period may be resident in both countries. Consequently, if both countries tax on a worldwide basis an element of double taxation may occur.

249. The New Zealand residence rules for individuals are intended to make it relatively easy to become resident here, and more difficult to lose residence. As such, dual residence may occur quite easily in the New Zealand context. Individuals who become resident in New Zealand under the 183-day rule may also be resident in another country under a test based on other factors, such as domicile. Conversely, individuals leaving New Zealand may remain resident here under the permanent place of abode test, while at the same time becoming resident in another country under a personal presence rule.

250. Where there is a DTA between New Zealand and another country, dual residence issues will be resolved by application of the residence article in the DTA. The object of that article is to ensure that taxpayers are precluded from having dual residence for DTA purposes. Where a taxpayer is resident under the domestic laws of New Zealand and the treaty partner, dual residence is avoided for the purposes of the DTA by applying a series of "tie-breaker" tests to allocate residence to one of the countries. Once residence has been allocated in this manner, the tax liability of the person, in relation to the items covered by the DTA, is determined on the basis of that residence status. Section BH 1(4) states:

> *Overriding effect*
>
> (4) Despite anything in this Act, except subsection (5), or in any other Inland Revenue Act or the Official Information Act 1982 or the Privacy Act 1993, a double tax agreement has effect in relation to—
>
> (a) income tax:
>
> (b) any other tax imposed by this Act:
>
> (c) the exchange of information that relates to a tax, as defined in paragraphs (a)(i) to (v) of the definition of tax in section 3 of the Tax Administration Act 1994.

251. The Court of Appeal in *CIR v ER Squibb & Sons (NZ) Ltd* (1992) 14 NZTC 9,146 at 9,154 said this means that "wherever and to the extent that there is any difference between the domestic legislation and the double tax agreement provision, the agreement has overriding effect". This means that the domestic legislation must be read together with the relevant DTA articles.

252. When a person who is tax resident in New Zealand under domestic law is deemed to be resident in another country for the purposes of a DTA, the person remains liable to New Zealand income tax on their worldwide income on the basis of their residence here. However, the liability is modified by any restrictions imposed by the DTA on New Zealand's right to tax persons who are deemed to be resident in the other country for the purposes of the DTA. For example, if the person receives dividends from a New Zealand resident company, the dividend resident withholding tax (RWT) would be calculated on the basis of the normal rate, but would be subject to the limitation imposed by the DTA on New Zealand's right to tax dividends derived by someone deemed to be resident of the DTA partner for DTA purposes. In most cases, the amount of tax that could be levied in New Zealand could not exceed 15 per cent of the gross amount of the dividend.

253. It is emphasised that the DTA residence articles are only relevant for the purposes of the DTAs. Someone who is resident in two countries under the domestic tax laws of those countries remains resident in both countries for other tax purposes, for example, goods and services tax.

Residence article

254. The residence article in many of New Zealand's DTAs closely follows the residence article contained in the OECD's *Model Tax Convention on Income and on Capital* (the OECD Model Convention). The residence article (art 4) of the OECD Model Convention, as it relates to individuals, provides:

> 1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.
> 2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> *a)* he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
>
> *b)* if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
>
> *c)* if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
>
> *d)* if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

255. As can be seen, the article applies when a person is a resident of both countries (Contracting States) under para [1]. This does not include any person who is liable to tax in a State in respect only of income from sources in that State. When the article applies, the person's residence status for the purposes of the Convention is determined by applying a series of "tie-breaker" tests. The "tie-breaker" tests in the relevant DTA are applied in order, until residence can be determined under one of them.

256. The DTA residence "tie-breaker" tests only potentially apply where the person concerned is resident of both countries under para [1] of art 4. Therefore, if a person comes to New Zealand from, say, Canada, becomes resident in New Zealand and ceases to be resident in Canada (and thus ceases to be liable to tax in Canada by reason of any of the listed criterion or similar criterion), it is clear that the person is resident in New Zealand for both the purposes of the Act and the DTA with Canada. The residence allocation rules will not be relevant in these circumstances because the person would not be a resident of Canada under para [1] of art 4. The DTA will still be relevant in terms of allocating taxing rights for any Canadian-sourced income.

Interpretation of terms used in the residence article

257. The terms "permanent home", "personal and economic relations" (or "centre of vital interests") and "habitual abode" are not defined in any of New Zealand's DTAs.

258. The "general definitions" article of New Zealand's DTAs typically provides that in applying the DTA, "unless the context otherwise requires", any term not defined in the DTA has the meaning which it has under the laws of that State relating to the taxes to which the DTA applies.

259. The OECD commentary on art 3 (the "General definitions" article) of the OECD Model Convention states that the paragraph of the article concerning undefined terms was amended in 1995 to conform more closely to the general understanding of member States. The commentary notes that for the purposes of this paragraph of the article, the meaning of any undefined term may be ascertained by reference to the meaning it has for the purposes of any relevant provision of the domestic law (whether a tax law or not) of a Contracting State. This means that the meaning of an undefined term in a DTA may be ascertained by reference to domestic laws generally, not just tax laws (though any tax law meaning will prevail).

260. But, as noted, reference to any meaning that those terms may have under domestic law is only relevant if the context does not require otherwise. One of the general rules of treaty interpretation in art 31 of the Vienna Convention on the Law of Treaties[8], which New Zealand has ratified, is that a special meaning shall be given to a term if it is established that the parties so intended (para [4] of art 31).

261. If a DTA between New Zealand and another country uses the wording of a particular article in the OECD

[8] *Vienna Convention on the Law of Treaties* 1155 UNTS 331 (opened for signature 23 May 1969, ratified by New Zealand on 4 August 1971).

Model Convention (or very similar wording), the Commissioner considers that it can be inferred that the OECD commentary on that article reflects the meaning the parties intended to be given to any undefined terms in that article. The Commissioner considers that in such circumstances the OECD commentary will be a significant aid to interpreting the relevant undefined terms. In such a case, the Commissioner considers that the context requires that the undefined term not simply be regarded as having the meaning (if any) that it has under domestic law, which is the default position under the "general definitions" article.

262. The OECD commentary on the residence article gives guidance on the meanings to be given to the above undefined terms ("permanent home", "personal and economic relations" (or "centre of vital interests") and "habitual abode"). New Zealand's DTAs generally follow, or closely follow, the wording in the OECD Model Convention. Therefore, the Commissioner considers that the OECD commentary on those terms will be a significant aid to interpreting their meaning, and any case law (New Zealand or foreign) that considers the meaning of the undefined term in a DTA context should also be considered.

Permanent home test

263. The first test in the residence articles in New Zealand's DTAs gives preference to the country in which the person "has a permanent home available to [them]". There are three elements to the test: there must be a home, it must be permanent, and it must be available for use.

264. It is evident from the OECD commentary that the concept of "home" is used in its physical sense (the commentary states that any form of home may be taken into account, ie, a house, apartment, rented or furnished room).

265. The OECD commentary states that for a home to be permanent "the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration" (OECD commentary on art 4 at [12]). The test is therefore an objective one, and it is necessary to consider the conditions under which the person retained the home and then conclude from that whether the home has the quality of permanence.

266. The OECD commentary on art 4 of the OECD Model Convention emphasises that the permanence of the home is essential, and states that this means that "the person has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purposes of a stay which, owing to the reasons for it, is necessarily of short duration" (OECD commentary on art 4 at [13]). The OECD commentary gives as examples travel for pleasure, business travel, educational travel, attending a course at a school, etc.

267. The home must be available for the person's use. Availability in this context is not based on mere occupation, or immediate availability for occupation. "Available" is a broad term that includes several concepts including factual availability and legal availability (ie, legal rights and controls over the property). Determining whether a home is available involves assessing factors such as whether:[9]

- the home is capable of being used by the person;
- the person has the right to determine occupancy and possession of the property;
- the person has the power to dispose of the property.

268. Applying these factors, the Commissioner considers that when a home is let out on an arm's length basis to an unassociated person it will generally be unavailable to the landlord as a permanent home. As a result, the Commissioner considers a house that is let under the Residential Tenancies Act 1986 (including one let on a periodic tenancy) will generally be unavailable to the landlord as a permanent home. If the house is let to an associated person or friend it might still be available to the owner as a permanent home.

269. The Commissioner is of the view that owning or personally renting accommodation is not fundamental to a person having a permanent home available to them. For example, a person may have a permanent home where accommodation is owned or leased by an employer, spouse/partner, company or trust (not controlled by the person), or where the person is able to live somewhere rent-free. If a person owns or personally rents a home that will be a relevant consideration, but if a home is arranged or retained in some other way (by or through a third party, for example) this will not of itself be determinative of whether the person has a permanent home. This is consistent with the view expressed in G A Harris, *New Zealand's International Taxation*, Auckland, OUP, 1990. To the extent that Case 12/2011 may arguably suggest otherwise, the Commissioner does not agree.

270. If it is apparent that a person who is dual resident has a permanent home available in one country or jurisdiction that will be an end to the matter

[9] See *Case 12/2011* [2011] NZTRA 08, (2011) 25 NZTC 1-012 and *Case J41*.

unless the person can establish that they also have a permanent home available in the other country or jurisdiction. Where a person has a permanent home available in both countries, the next test will generally be the personal and economic relations test. [The DTA between New Zealand and Malaysia, signed on 19 March 1976, differs in that if residence cannot be resolved under the permanent home test, the next test is the habitual abode test, followed by the personal and economic relations test.]

271. Where a person does not have a permanent home available to them in either country, the next test for consideration will generally be the habitual abode test. However, this is not the case under New Zealand's DTAs with Australia[10], Thailand[11], the Republic of South Africa[12], the United Arab Emirates[13], Spain[14] and Papua New Guinea[15]. Under those DTAs where a person does not have a permanent home available to them in either country the next test is the personal and economic relations test, followed by the habitual abode test.

Personal and economic relations (centre of vital interests) test

272. Generally the next test in the residence articles in New Zealand's DTAs gives preference to the country "with which [the person's] personal and economic relations are closer (centre of vital interests)".

273. In applying this test, the person's personal and economic relations with both New Zealand and the other country must be considered, and the country with which these relations are closer (or in other words, their centre of vital interests) must be determined. The OECD commentary on art 4 of the OECD Model Convention indicates that the following types of factors may be taken into account in applying the test (at [15]):

> … regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.

274. It is clear from the commentary that the "personal relations" referred to are wider than immediate family relations. Social relations are also taken into account, as are political, cultural and other activities. Sporting activities, for example, would fall into this latter category. Overall, a wide range of personal connections is taken into account.

275. The importance of the location of a person's family depends on the person's circumstances (ie, for some people the location of family is going to be significant, for others not so). In many circumstances personal relations will be more significant than economic relations because the location of a person's family is often highly significant. However, the issue needs to be determined on the specific facts relating to the person.

276. In *Hertel v MNR* 93 DTC 721 at 723, Sobier TCCJ commented that:

> In determining the centre of vital interests, it is not enough to simply weigh or count the number of factors or connections on each side. The **depth of the roots** of one's centre of vital interests is more important than their number.

277. Assessing the depth of a person's roots requires weighing up the circumstances as a whole to determine which locality is of greater significance to the person. Some commentators have suggested that greater weight is to be given to personal relations. However, the Commissioner considers that the better view is that the "centre of vital interests" concept is a composite one, and does not give preference to either personal or economic relations. The OECD commentary states that "considerations based on the personal acts of the individual must receive special attention". The Commissioner considers that "personal acts" encompasses acts concerning both economic relations (such as seeking employment in a country) and personal relations (such as activities related to a person's family).

278. If a person's economic and personal relations are overall evenly balanced between New Zealand and another country (though personal relations are stronger with one country and economic relations with the other),

[10] Signed on 26 June 2009.
[11] Signed on 22 October 1998.
[12] Signed on 6 February 2002.
[13] Signed on 22 September 2003.
[14] Signed on 28 July 2005.
[15] Signed on 29 October 2012.

the person will have no centre of vital interests, as the factors are regarded as being of equal weight. In this situation, the next test will need to be considered.

279. A person's historical association with a country is relevant when considering the personal and economic relations test. If a person has always lived and worked in one country and retains a home, family and possessions there, it is likely that their personal and economic relations will be closer with that country even if a new home is established in another country (see *Gaudreau v R* 2005 DTC 66 (TCC) and *Yoon v R* 2005 DTC 1109). For example, a university lecturer going overseas on sabbatical leave for 12 months who has lived and worked in New Zealand for a significant time, and who retains their home and possessions in New Zealand, will have closer personal and economic relations with New Zealand than with the other country.

280. The focus of the test is on determining the country with which the person has closer personal and economic relations (their centre of vital interests). If such a determination cannot be made under the personal and economic relations test, the next test needs to be considered. Generally, the next test will be the habitual abode test.

Habitual abode test

281. Generally, the habitual abode test applies in two situations:

- if a person has a permanent home available in both countries, and the country with which their personal and economic relations are closer (their centre of vital interests) cannot be established; or
- if a person has no permanent home available in either country[16].

282. The focus of the test is on whether the person has a habitual abode in New Zealand and/or the other country. As stated by the Canadian Federal Court of Appeal in *Lingle v R* 2010 FCA 152, the concept of a habitual abode:

> ... involves notions of frequency, duration and regularity of stays of a quality which are more than transient. To put it differently, the concept refers to a stay of some substance in the jurisdiction as a matter of habit, so that the conclusion can be drawn that this is where the taxpayer normally lives.

A person will have a habitual abode in a country if they live there habitually or normally. A person may habitually live in more than one country; the enquiry is not about assessing the country in which the person's abode is more habitual, but about whether they have a habitual abode in New Zealand and/or the other country.

283. The OECD commentary on art 4 of the OECD Model Convention indicates that the test is applied by taking into account all of a person's stays in a country, not only those at a home the person owns or rents there. For example, if a person has permanent homes available in both New Zealand and Australia, all stays in New Zealand, whether at their permanent home or elsewhere, are considered in determining whether the person has a habitual abode here.

284. It is important to consider the particular circumstances of the person when determining whether they have a habitual abode in a country. In assessing whether a stay is more than transient, the reasons for the stay are relevant. For example, where a person spends approximately 100 days in New Zealand in a year because they return to New Zealand every weekend, this may suggest that the person has a habitual abode here. On the other hand, three stays of approximately 30 days duration each in a year, for a course of medical treatment, may indicate that those stays are transient and not by themselves indicative of a habitual abode here.

285. The OECD commentary also indicates that the test is not applied by focusing only on the income year concerned. The OECD commentary states that:

> ... [t]he comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual and to determine also the intervals at which the stays take place".

286. It is important to note though, that the focus is on where the person normally lives **during the period of dual residence**. In obvious cases there is no need to consider other periods. However, a wider view (ie, looking beyond the period of dual residence) may assist in cases where it is unclear, or when determining whether the stays in a particular country are either transient or of substance. The Commissioner considers that the appropriate length of time outside of the period of dual residence to consider will be just the amount that is necessary to determine whether the person had a habitual abode in New Zealand during the period of dual residence. The Commissioner now

[16] As noted at [271], the DTAs between New Zealand and Australia (signed on 26 June 2009), Thailand (signed on 22 October 1998), South Africa (signed on 6 February 2002), the UAE (signed on 22 September 2003), Spain (signed on 28 July 2005) and PNG (signed on 29 October 2012) are exceptions to this. Under those DTAs, where a person does not have a permanent home available to them in either country the next test for consideration will be the personal and economic relations test.

considers that the period looked at in applying the habitual abode test in the matter that became Case 12/2011 was inappropriately long. In any event, it is noted that the TRA's discussion of how the habitual abode test would apply to the facts of that case (which was along the lines of submissions made by counsel) was *obiter*, the TRA having already found the taxpayer to be solely resident in New Zealand at all material times under the earlier tie-breaker tests.

Nationality and mutual agreement

287. When a person has a habitual abode in both countries, or in neither of them, residence is generally determined under New Zealand's DTAs on the basis of nationality or citizenship. In cases where nationality is stated to be the test, the concept of nationality (for individuals) is generally defined in relation to New Zealand to be a person who is a New Zealand citizen. A New Zealand citizen is someone who has citizenship here under the Citizenship Act 1977.

288. If the residence issue cannot be resolved under the tie-breaker tests, the residence article provides that the question may be resolved by mutual agreement between the competent authorities of the Contracting States.

Examples illustrating the DTA residence tie-breaker tests

The following examples deal **only** with the DTA residence tie-breaker tests. They do not consider the domestic residence tests in detail, any DTA implications, or any potential application of the transitional resident rules.

Example 19

Facts

289. Stacey, who is employed as a university lecturer, travels to the United Kingdom for 15 months sabbatical leave at a United Kingdom university. While on leave, Stacey remains in the employment of a New Zealand university, and is required to work for the university on her return to New Zealand. Stacey and her partner let their house in New Zealand out to tenants while they are in the United Kingdom. The tenancy is a periodic tenancy under the Residential Tenancies Act 1986, so is terminable with a 42-day notice period if Stacey requires it as her principal place of residence. The tenants are not associated with or friends of Stacey or her partner. Stacey's partner travels with her to the United Kingdom. Stacey remains a member of a number of local clubs and organisations in New Zealand, and keeps most of her personal property, including investments, in New Zealand (looked after and managed by family members). While in the United Kingdom, Stacey and her partner rent a house near the university where Stacey spends her sabbatical leave. For the purposes of this example it is assumed that Stacey is resident for tax purposes in the United Kingdom under the relevant United Kingdom legislation.

Result

290. Stacey is resident in both New Zealand and the United Kingdom under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and the United Kingdom, she is deemed to be a resident of the United Kingdom.

Explanation

291. Stacey is resident in New Zealand under s YD 1 of the Act because she has a permanent place of abode here. As noted above, it is assumed that she is also resident for tax purposes in the United Kingdom under the relevant United Kingdom legislation.

292. The question of Stacey's residence for the purposes of the DTA is resolved by the permanent home test. Stacey does not have a permanent home available in New Zealand because she and her partner have rented out their New Zealand home on arm's length terms to tenants who are not associated with them or friends of theirs. Stacey has a permanent home in the United Kingdom as she has rented a house there for 15 months. Although Stacey's stay in the United Kingdom is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary.

293. As Stacey has a permanent home in the United Kingdom and does not have one in New Zealand, she is deemed to be a resident of the United Kingdom for the purposes of the DTA.

Example 20

Facts

294. Luke owns a house in New Zealand and one in Malaysia. He has extensive business interests in both New Zealand and Malaysia. Luke regularly spends short periods in New Zealand, and these add up to approximately five months of the year. Luke's visits to New Zealand are primarily for business purposes, but he also spends time catching up with family here. Luke works and lives in Malaysia for

the remainder of the time, where he also occupies a number of positions of responsibility in the community. Luke is married, and his wife and children live in Malaysia. For the purposes of this example it is assumed that Luke is resident for tax purposes in Malaysia under the relevant Malaysian legislation.

Result

295. Luke is resident in both New Zealand and Malaysia under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Malaysia, Luke is treated solely as a Malaysian resident.

Explanation

296. Luke is resident in New Zealand under s YD 1 of the Act as he has a permanent place of abode here. As noted above, it is assumed that he is also resident for tax purposes in Malaysia under the relevant Malaysian legislation.

297. Luke has permanent homes available to him in both New Zealand and Malaysia because his houses in both countries are continuously available to him for use. As Luke has a permanent home available to him in both countries, the next question is whether he has a habitual abode in either country. [As noted at [270], the order of the tie-breaker tests in the DTA between New Zealand and Malaysia, signed on 19 March 1976, differs from that in New Zealand's other DTAs. Under New Zealand's other DTAs, if a person has a permanent home available in both countries, the personal and economic relations test would be applied next.] Luke has a habitual abode in Malaysia because he habitually lives there for seven months of the year. Luke also has a habitual abode in New Zealand because he habitually spends approximately five months of the year here. The reasons for Luke's stays in New Zealand (business and visiting family) suggest that the stays are more than transient in nature.

298. As Luke has a habitual abode in both New Zealand and Malaysia, it is necessary to determine whether his personal and economic relations are closer with Malaysia or with New Zealand. [Again, note the difference in the order of the tie-breaker tests in the DTA between New Zealand and Malaysia, signed on 19 March 1976, compared to New Zealand's other DTAs.] Luke has close economic relations with both countries due to his extensive business interests in both countries. Luke also has personal relations with both countries. These personal relations are considered to be stronger with Malaysia, given that Luke's wife and children live there, and also that he is involved in the community there. As such, weighing up the circumstances as a whole, Luke's personal and economic relations are closer with Malaysia. Luke is therefore treated solely as a Malaysian resident for the purposes of the DTA.

Example 21

Facts

299. Megan, who normally resides in Canada, is seconded to New Zealand by her Canadian employer for a period of 18 months. While in New Zealand, Megan works for the New Zealand subsidiary of her Canadian employer. While she is in New Zealand, Megan lets her house in Canada out for a fixed-term of 18 months. The tenant is not associated with or a friend of Megan's. Megan lives in rented accommodation in New Zealand. Megan leaves most of her personal property in Canada, and most of her investments are in Canada. For the purposes of this example it is assumed that Megan is resident for tax purposes in Canada under the relevant Canadian legislation.

Result

300. Megan is resident in both New Zealand and Canada under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Canada, Megan is deemed to be a resident only of New Zealand.

Explanation

301. Megan is resident in New Zealand under s YD 1 as she is present here for more than 183 days in a 12-month period. As noted above, it is assumed that she is also resident in Canada under the relevant Canadian legislation.

302. Megan has a permanent home available to her in New Zealand as she has rented accommodation here for 18 months. Although Megan's stay in New Zealand is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary. Megan does not have a permanent home available to her in Canada as her house there is rented out on arm's length terms to a tenant who is not associated with her or a friend of hers. As Megan has a permanent home available to her in New Zealand but not in Canada, she is deemed to be a resident only of New Zealand for the purposes of the DTA.

Example 22

Facts

303. Jonty grew up in South Africa, and moved to Canada with his parents when he was 16 years old (when his father was temporarily transferred there for work). After three years, his parents moved back to South Africa. By this time, Jonty had started university in Canada and decided to stay there. Jonty graduated and had been working in Canada for two years when he was offered a two-year secondment to New Zealand by his Canadian employer. While in New Zealand, Jonty is employed by the New Zealand subsidiary of his Canadian employer. Jonty retains his bank accounts in Canada and opens new ones in New Zealand. He does not transfer his Canadian superannuation into his New Zealand superannuation fund, as he may well return to Canada at the end of his secondment. Jonty lived in a rented flat in Canada, which he gave up when he moved to New Zealand. Jonty has to travel between Auckland and Wellington, on a roughly week-about basis, for work, and he lives in his employer's serviced apartments in both cities. Jonty has very little personal property. What he does have he either brings with him to New Zealand or sells before leaving Canada. At the end of the two-year secondment, Jonty's position in New Zealand is extended for another 18 months. During the three and a half years that Jonty lives in New Zealand, he returns to Canada once, for a three-week holiday. For the purposes of this example it is assumed that Jonty is resident for tax purposes in Canada under the relevant Canadian legislation.

Result

304. Jonty is resident in both New Zealand and Canada under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Canada, Jonty is deemed to be a resident only of New Zealand.

Explanation

305. Jonty is resident in New Zealand under s YD 1 of the Act as he is personally present here for more than 183 days in a 12-month period. As noted above, it is assumed that he is also resident for tax purposes in Canada under the relevant Canadian legislation. Jonty does not have a permanent home available to him in Canada because he gave up his rented flat there. Jonty does not have a permanent home available in New Zealand because his homes here (a series of serviced apartments) are not permanent.

306. As Jonty does not have a permanent home available in either country, the question is whether Jonty has a habitual abode in either country.

307. Jonty has a habitual abode in New Zealand because he habitually or normally lives here during the period of dual residence. The period of dual residence is sufficiently long that it is not necessary to look beyond that period to determine whether Jonty's time in New Zealand is transient or of substance. It is apparent that for the three and a half years of dual residence Jonty has a habitual abode in New Zealand. Jonty clearly does not have a habitual abode in Canada during the period of dual residence – he returned there only once in that time, for a holiday of short duration. Consequently, Jonty is deemed to be a resident only of New Zealand for the purposes of the DTA.

PART 2: RESIDENCE OF COMPANIES

Overview

308. Section YD 2 of the Act sets out when a company is a New Zealand resident, stating (relevantly) that:

> **YD 2 Residence of companies**
>
> *Four bases for residence*
>
> (1) A company is a New Zealand resident for the purposes of this Act if—
>
> (a) it is incorporated in New Zealand:
>
> (b) its head office is in New Zealand:
>
> (c) its centre of management is in New Zealand:
>
> (d) its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.
>
> *International tax rules*
>
> (2) Despite subsection (1), for the purpose of the international tax rules, a company is treated as remaining resident in New Zealand if it becomes a foreign company but is resident in New Zealand again within 183 days afterwards.
>
> ...

309. A company may easily satisfy more than one, or even all, of these tests. Such a company will clearly be resident in New Zealand. However, it is noted that the tests are alternatives, and a company only needs to satisfy one of them to be resident here.

310. A "foreign company" is a company not resident in New Zealand and not treated as resident in New Zealand under a DTA (s YA 1). Section YD 3 sets out different tests to determine the country in which a

foreign company is treated as resident for the purposes of the "international tax rules" (as defined in s YA 1). This is discussed briefly from [429].

311. The discussion of the residence rules for companies is structured as follows:

Company definition

312. "Company" is defined in s YA 1. The relevant definition for the purposes of the residence rules is:

> **YA 1 Definitions**
>
> In this Act, unless the context requires otherwise—
>
> ...
>
> **company—**
>
> (a) means a body corporate or other entity that has a legal existence separate from that of its members, whether it is incorporated or created in New Zealand or elsewhere:
>
> (ab) does not include a partnership:
>
> (abb) does not include a look-through company, except in the PAYE rules, the FBT rules, the NRWT rules, the RWT rules, the ESCT rules, the RSCT rules, and for the purposes of subpart FO (Amalgamation of companies):
>
> (ac) includes a listed limited partnership:
>
> (ad) includes a foreign corporate limited partnership:
>
> (b) includes a unit trust:
>
> (c) includes a group investment fund that is not a designated group investment fund, but only to the extent to which the fund results from investments made into it that are—
>
> (i) not from a designated source, as defined in section HR 3(5) (Definitions for section HR 2: group investment funds); and
>
> (ii) not made before 23 June 1983, including an amount treated as invested at that date under the definition of pre-1983 investment in section HR 3(8):
>
> (d) includes an airport operator:
>
> (e) includes a statutory producer board:
>
> (f) includes a society registered under the Incorporated Societies Act 1908:
>
> (g) includes a society registered under the Industrial and Provident Societies Act 1908:
>
> (h) includes a friendly society:
>
> (i) includes a building society:
>
> ...

313. As the definition extends to any entity with a legal existence separate from that of its members, this would include a wide range of entities established under the laws of other countries that, although not companies in the strict sense, are equivalent to companies. If any such entity satisfied any of the company residence tests in s YD 2, it would be a New Zealand resident company and would therefore be liable for tax here on its worldwide income.

314. Usually a look-through company is treated as being transparent, but for some tax purposes it is still treated as a company. For example, a look-through company is not transparent for the purposes of the NRWT rules and the RWT rules. In those circumstances the residence of the owners of the company is not relevant. This means that someone paying passive income to a look-through company that meets the requirements of subpart HB can assume that they are making a payment to a NZ resident company and not to the owners of the company. The company can be assumed to be a New Zealand resident company because to qualify as a look-through company in the first place the company needs to be a New Zealand resident under s YD 2 and any applicable DTA.

Place of incorporation test

315. Section YD 2(1)(a) provides that a company is a New Zealand resident if it is incorporated in New Zealand. This is an objective and easily ascertainable test of corporate residence: a company is resident if it has been through a process of incorporation in New Zealand. A company incorporated under the Companies Act 1993 would be resident here.

316. The place of incorporation test obviously cannot apply to companies that are not capable of being incorporated. For example, there is no incorporation procedure for unit trusts in New Zealand, so they could not be resident here under s YD 2(1)(a). However, companies that cannot be incorporated may be resident in New Zealand under one of the other tests in s YD 2.

Head office test

317. Section YD 2(1)(b) provides that a company is a New Zealand resident if its head office is in New Zealand.

318. The word "office" is defined in the *Oxford English Dictionary* (online ed, 3rd edition, Oxford University Press, 2013, accessed 3 March 2014) (relevantly) as meaning:

> **office,** ***n.***
>
> **6.**
>
> **a.** A room, set of rooms, or building used as a place of business for nonmanual work; a room or department for clerical or administrative work.
>
> Also (in extended use): the staff of such a room, department, etc.

319. The Commissioner therefore considers that "office" in the context of the head office test means a physical place from where the business is conducted; a place where the administration and management (in the broadest sense) of a business is carried out. The head office of a company is the office that is above all others: the place of administration and management that is superior to all others. It is the office from which the business of the company is directed and carried on. An office will be superior to other offices of the company if individuals working in those other offices are responsible to individuals located in that office. The focus of the test is therefore on a physical place, in the sense of a building, from which the overall operations of the company are directed and carried on.

320. In determining whether a company has its head office in New Zealand the following factors may be relevant:

- The location of senior management staff. If senior management operate from an office in New Zealand, this would be a strong indicator that the New Zealand office is the company's head office.
- Where the major strategic and policy decisions are made. If individuals working in other offices act in accordance with decisions and policy made at a particular office, that office is likely to be the head office.
- Whether specialised functions, for example of an advisory nature, are carried out in a particular office. If a number of specialised functions are carried out in a particular office this may indicate that the office is the head office, although the significance of this factor will depend on the overall structure of the company.
- Whether the staff of the company consider that an office is the head office.

321. Weighing up these factors should identify whether a company's head office is in New Zealand. Usually there will not be uncertainty as to the location of a company's head office. If a company is engaged in carrying on business activities, identifying the company's highest office should not be difficult. An example where it could be more difficult is where a company is merely a passive investment vehicle. The passive nature of the company's activities may make identifying its highest office difficult, or the company may simply have no office.

Centre of management test

Description of the test

322. Section YD 2(1)(c) provides that a company is a New Zealand resident if its centre of management is in New Zealand. The focus of the test is on the centre of management of the company as a whole, not the management of only part of a company's operations. In determining where the centre of management of a company as a whole is, acts of management at various levels may be relevant (see: *Vinelight Nominees Limited and Weyand Investments Limited v CIR* [2013] NZCA 655).

323. The test is a *de facto* test: that is, the focus is on where the company's centre of management is as a matter of fact *(NZ Forest Products Finance NV v CIR* (1995) 17 NZTC 12,073). The test is not limited to consideration of the company's formal management structures, such as those set out in corporate governance documents. The test focuses on how the company is managed in reality, even if that conflicts with the governance documents or formal structures.

324. Therefore, if the senior executives of a company established in a foreign country manage the company on the basis of instructions from persons located in New Zealand, without exercising their independent minds as to how the company should be managed, the centre of management of the company will be in New Zealand rather than in the foreign country. This is the case even if the persons giving instructions from New Zealand are not officers of the company under the company's constitution. That said, there may well be persons who influence the decisions made by the executives managing a company, or who provide guidance to them. This will not amount to *de facto* management of the company if those charged with the management are in fact exercising that management

function independently, not merely doing the bidding of others who are in reality managing the company.

Centre of management of the entire company

325. The centre of management test focuses on the centre of management of the entire company. Therefore, if a company that operates in several countries has a centre of management in New Zealand, but that centre of management only relates to the company's New Zealand operations, the company will not be resident here under the centre of management test.

326. In some cases, multinational companies conduct business in New Zealand directly through a branch rather than through a locally established subsidiary. The local branch may have its own executives and, occasionally, its own board of directors. In this situation, although the company has significant links with New Zealand, it will not be resident here under the centre of management test. The management of the branch does not constitute the centre of management of the company as a whole, only the centre of management of a part of the company.

327. On the other hand, companies incorporated outside New Zealand, that conduct operations outside New Zealand, may have their centre of management in New Zealand. Such companies will be resident in New Zealand under the centre of management test despite their close connections with other countries.

Comparison between the centre of management test and the head office test

328. It may well be that a company satisfies both the head office and centre of management tests, as the centre of management of a company will commonly be located in its head office. However, the focus of the two tests is different. The head office test concentrates on a physical place, ie, on an office that constitutes a company's highest office. By contrast, the focus of the centre of management test is not on identifying the quality of a particular office, but rather on the broader question of whether the management of a company is centred in New Zealand. A company does not need to have an office in New Zealand to satisfy the centre of management test.

329. A company may have no office (and therefore obviously no head office) in New Zealand, but its centre of management may be here because the management decisions are effectively undertaken from New Zealand. In this situation, the company will be resident under the centre of management test, even though the head office test is not satisfied.

Director control test

Description

330. Section YD 2(1)(d) provides that a company is a New Zealand resident if its directors, in their capacity as directors, exercise control of the company in New Zealand. A company that satisfies this test is resident whether or not the directors' decision-making is confined to New Zealand.

Definition of director

Section YA 1 definition

331. The relevant definition of "director" in s YA 1 provides that:

> **YA 1 Definitions**
>
> In this Act, unless the context requires otherwise—
>
> …
>
> **director—**
>
> (a) means—
>
> (i) a person occupying the position of director, whatever title is used:
>
> (ii) a person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act:
>
> (iii) a person treated as being a director by any other provision of this Act:
>
> (iv) in the case of an entity that does not have directors and that is treated as, or assumed to be, a company by a provision of this Act, any trustee, manager, or other person who acts in relation to the entity in the same way as a director would act, or in a similar way to that in which a director would act, were the entity a company incorporated in New Zealand under the Companies Act 1993:
>
> …

332. This extended definition of director ensures that *de facto* directors are included when considering whether a company is a New Zealand resident under the director control test.

Persons carrying out director's duties

333. A person is treated as a director if they occupy the position of director, whether or not that title is used. That is, any person carrying out the duties of a director is a director.

Persons giving directions or instructions to nominated directors

334. A person is treated as a director if those occupying the position of directors of a company are accustomed to act in accordance with the person's directions or instructions. For example, if the directors of

a company incorporated in Hong Kong were accustomed to act in accordance with instructions from a New Zealand resident individual, that individual would be a director of the company. The company may therefore potentially be a New Zealand resident under the director control test, as control of the company by a director is exercised from here. [See further from [353] as to the considerations to have regard to when there is exercise of directorial control both in New Zealand and elsewhere.]

335. In practical terms, it will be necessary to consider a pattern of decision-making to determine whether the nominated directors are accustomed to act in accordance with another person's directions or instructions (whether formal or otherwise).

336. The Commissioner considers that the directions or instructions do not need to be given directly to the person occupying the position of directors. For example, where there is a chain of companies that have directors who are accustomed to act in accordance with the directions or instructions of another person, the chain must be traced through to establish on whose directions or instructions the directors are accustomed to act. That person will be considered a director under the Act. For example, if the directors of company X are accustomed to act under instructions from the directors of company Y, and the directors of company Y act under instructions from a New Zealand resident A, then A will be a director of both X and Y under the definition of "director" in s YA 1.

Companies without conventional directors

337. The definition of "director" in the Act extends to entities that do not have directors in the conventional sense. In the case of an entity that is treated as or assumed to be a company under the Act, a person who acts in the same or in a similar way to that in which a director would act is treated as a director. A person will fall within this part of the definition if they are involved in making the types of decisions that a director of a company would normally make. These would include major strategic and policy decisions.

338. Therefore, the manager of a unit trust would be a director because they are involved in making the major decisions in relation to the unit trust: for example, the decisions in relation to the management of the unit trust's investments, the marketing of interests in the unit trust, and the distribution policy of the unit trust. If the manager exercises control of the unit trust from New Zealand, the unit trust will be a New Zealand resident.

Companies as directors

339. The definition of director in the Act is broad enough to encompass both natural persons and companies that are appointed as or that act as directors. This may result in a New Zealand resident company being treated as a director of a company established in another jurisdiction (see Example 23 below).

Control by directors

340. The director control test focuses on where the directors exercise their directorial control of the company from, ie, the place from which the strategic and policy decisions are made. A company will be resident in New Zealand under this test if directors are effectively controlling the company from New Zealand, ie, if the central and directing mind of the company is here.

341. The test is only satisfied if directors acting in their capacity as directors exercise control from New Zealand. If directors control a company from New Zealand in their capacity as shareholders, but not in their capacity as directors, the company will not be resident here under the director control test.

De facto *test*

342. The director control test is satisfied if control of a company is exercised in New Zealand, whether or not decision-making by directors is confined to New Zealand. The test is one of *de facto* control. That is, the question is whether control of the company by directors is actually exercised from New Zealand.

343. There are a number of ways in which directors may exercise control of a company. For example, control may be exercised through:

- decisions made in the course of formal directors' meetings;
- decisions made in the course of a telephone / video link up etc between directors;
- the signing of resolutions outside directors' meetings;
- informal decisions made by directors, acting in their capacity as directors, outside the course of the directors' meetings.

344. The method by which directors exercise control of a company may vary considerably from case to case. Each case must be considered on its facts to determine the place from which the directors actually exercise control of the company.

345. The significance of the location of directors' meetings will vary from case to case. If directors exercise control only in the course of directors' meetings, then

the location of the meetings will be of paramount importance. On the other hand, if control is exercised outside the directors' meetings, and the meetings are merely to formalise decisions that have already been made, the location of the meetings will be of little significance.

346. The fact that directors of a company exercise directorial functions from New Zealand does not necessarily mean that control of the company by its directors is exercised from New Zealand. For example, if the directors ordinarily exercise their powers in the course of directors' meetings held in Australia, the fact that New Zealand directors occasionally sign resolutions in New Zealand or occasionally participate in telephone conferences from New Zealand does not mean that the directors are exercising control of the company from New Zealand. See *Case 11/2011* (2011) 25 NZTC 1-011, [2011] NZTRA 07.

347. If the nominated directors do not exercise control of a company, but rather *de facto* directors exercise control from New Zealand, the company will be resident in New Zealand even though the *de facto* directors are not directors under the company's constitution.

348. Determining whether the nominated directors exercise true control requires consideration of how the company is, in reality, controlled. The fact that the nominated directors may be accustomed to act in accordance with the directions or instructions of another person does not necessarily mean that they are not exercising true control of the company (though it will mean that the person in accordance with whose directions or instructions they are accustomed to act would also be a director under the definition in s YA 1). If the nominated directors exercise their independent minds in undertaking their directorial functions, rather than acting as mere pawns or "rubber stamping" the decisions of others, they will be exercising true control of the company.

349. In considering whether the nominated directors are truly exercising directorial control, the remuneration provided to them may be a relevant consideration. If their remuneration does not reflect their apparent duties and responsibilities, the nominated directors may not be carrying the burden of decision-making responsibility. It is also appropriate to consider who the nominated directors are. In tax havens, for example, directors commonly have several hundred directorships. Such a situation may suggest that the directors are not actively involved in making decisions, and that their directorial functions are exercised in accordance with outside instructions without the independent thought required for them to be considered to be exercising true control of the company. The circumstances of the exercise of the directorial functions would need to be considered closely to determine whether the nominated directors are in fact exercising the directorial function independently, or merely doing the bidding of others who are in reality controlling the company.

Distinction between de facto *control, influence and the provision of services*

350. In practice, it may be difficult to determine whether the nominated directors of a company are acting under directions or instructions from another person or are merely influenced but not controlled by another person. A majority shareholder, for example a parent company, will normally influence to some extent the actions of the company in which it is a shareholder. However, if the majority shareholder only exercises the powers that such a shareholder would have in general meetings, for example, to appoint and dismiss members of the board, and to approve and initiate changes to the financial structure of the company—then that shareholder will not be controlling the company in terms of the director control test.

351. By contrast, if the majority shareholder assumes the functions of the company's board, or if that board merely "rubber stamps" decisions made by the majority shareholder without independent consideration being given to the decisions, the majority shareholder will be a director of the company under the definition in the Act. This is consistent with the common law approach—see for example *Unit Construction Co Ltd v Bullock* [1959] 3 All ER 831 (UKHL). If this is the case, and if the majority shareholder exercises control of the company from New Zealand, the company will be resident here under the director control test. In considering whether someone has *de facto* control over a company, the degree of autonomy exercised by the members of the company's board in relation to matters like investment, production, marketing, finance and procurement must be considered. If the board cannot make decisions about matters of this type without prior approval from the major shareholder, then the majority shareholder is likely to be in *de facto* control of the company.

352. In relation to companies that are subsidiaries, the *de facto* exercise of control by the parent company must be distinguished from the mere provision of advisory services. Often, large corporate organisations establish centralised advisory departments to provide administrative, financial, accounting, and

other services for companies that are members of the organisation. When a parent company provides services of this nature to a subsidiary, it is not in control of the subsidiary under the director control test merely because of the provision of those services.

Exercise of powers in New Zealand and in another country

353. In cases where a company has both New Zealand and foreign directors, the functions performed by the New Zealand directors from New Zealand must be considered to determine whether they constitute the exercise of control of the company by its directors from New Zealand. If the powers of all directors are equal, the issue may be resolved by simply looking to where the majority exercise their control. For example, if a company has directors with equal powers, three of whom live in Australia and two in New Zealand, and control is exercised through directors' meetings held in Australia and through occasional teleconferences between the Australian and New Zealand directors, the company would not be resident in New Zealand under the director control test. In these circumstances, when the directors exercise their powers concurrently from New Zealand and Australia, the majority of the directors are located in Australia. Consequently, on a simple majority approach, control of the company by its directors is not exercised from New Zealand.

354. However, a simple majority approach is not appropriate where any of the directors have exclusive special powers that enable them to control the company. Nor is it appropriate where any of the directors are otherwise in *de facto* control of the company, for example, because the other directors are merely nominees. In these circumstances, it is necessary to determine whether the controlling directors exercise control of the company from New Zealand.

Residence of directors

355. The residence status of a company's directors is not relevant in determining whether the director control test has been satisfied. The focus of the test is on whether the directors exercise control of the company from New Zealand. In cases where the simple majority approach outlined at [353] is appropriate, the question is not whether a simple majority of the directors are resident in New Zealand but rather whether a simple majority of the directors exercise their directorial powers from New Zealand.

Continuing test

356. The director control test will be satisfied if the directors exercise control of a company from New Zealand on a continuing basis. If control is ordinarily exercised from New Zealand, but is occasionally exercised from outside New Zealand, the company will be resident in New Zealand on the basis that the directors exercise control from here.

Control of the entire company

357. A company will not be resident here under the director control test unless the control exercised by directors from New Zealand is control of the company as a whole. Therefore, if New Zealand directors exercise control only in relation to the New Zealand operations of the company, and directors elsewhere exercise control of the company as a whole, the company will not be resident here under the director control test.

Comparison between the director control test and the head office and centre of management tests

358. The centre of management test focuses on the management of the company as a whole. Acts of management at various levels may be relevant to determining where the centre of management is. This differs from the director control test, which concentrates on the directorial control of the company, ie, the place from which the strategic and policy decisions are made. In some cases there may not be a clear distinction between aspects of the management of the company and the directorial decision making and control because, for example, the directors are involved in managing the company.

359. The head office of a company may also be the place from which the directors exercise control of the company. However, the two tests are different in nature. The head office test focuses on a physical place, ie, on the office from which the business of the company is directed and carried on. In contrast, the director control test looks to the place from which the directors ultimately control the company.

Examples illustrating the company residence tests

Example 23

Facts

360. Company A is incorporated in Hong Kong and carries on a business manufacturing clothes there. A's operations are all managed from Hong Kong. A has no office in New Zealand. All meetings of the board of directors are held in Hong Kong, but the Hong Kong directors always act on the instructions of company A's New Zealand parent company, and unquestioningly implement the decisions made by the parent company.

Result

361. Company A is resident in New Zealand under the director control test.

Explanation

362. A is incorporated in Hong Kong and therefore is not resident in New Zealand under the incorporation test.

363. The centre of A's operations is in Hong Kong, and A has its centre of management there. A has no office in New Zealand. As such, A is not resident in New Zealand under either the head office or the centre of management tests.

364. The Hong Kong directors of A act on the instructions of the New Zealand parent company. The New Zealand parent is therefore a director of A (under paragraph (a)(ii) of the definition of "director" in s YA (1)). The New Zealand parent is exercising *de facto* control of A, because the Hong Kong directors implement the decisions of the parent company without question. The Hong Kong directors are not exercising true directorial control of A. A is resident in New Zealand because the parent company is a director of A and exercises directorial control of A from New Zealand. The Hong Kong directors of A do not exercise true directorial control, so this is not a situation where it is necessary to weigh up the level of control exercised from New Zealand and from elsewhere.

Example 24

Facts

365. B is a holding company incorporated in Singapore. B has an office in Singapore and the company's operations are managed from this office. B has no office in New Zealand. B has five directors: three are resident in Australia, and two in New Zealand. The powers of the directors are equal. The board of directors meets six-monthly in Singapore to review decisions made by its subsidiaries. The directors regularly hold video conferences to discuss particular issues, and investment decisions are made in the course of these conferences.

Result

366. B is not resident in New Zealand.

Explanation

367. B is incorporated in Singapore and is therefore not resident in New Zealand under the incorporation test.

368. B has no office in New Zealand and is therefore not resident here under the head office test.

369. B is managed from Singapore and therefore has its centre of management in Singapore rather than in New Zealand.

370. Although the board of directors meets only in Singapore, control of the company is also exercised outside the board meetings during the video conferences between the New Zealand and Australian directors. The New Zealand directors therefore occasionally exercise their directorial functions from New Zealand. However, as the powers of each director are equal, B is not controlled by its directors from New Zealand, as the majority of directors are in Australia. B is therefore not resident in New Zealand under the director control test.

Example 25

Facts

371. C is an Australian incorporated bank. C conducts business in New Zealand through a branch. The New Zealand branch has its own executives and board of directors who operate from the bank's Wellington office. The worldwide operations of C are conducted from the Australian office, and all of the major decisions concerning C are made by the Australian directors in Australia. The New Zealand executives and board are only responsible for managing C's New Zealand operations.

Result

372. C is not resident in New Zealand.

Explanation

373. C is incorporated in Australia and therefore is not resident in New Zealand under the incorporation test.

374. C's head office is not in New Zealand. The Wellington office is the company's highest New Zealand office but it is not the highest office of the company as a whole. C's Australian office is its head office.

375. The centre of C's management is in Australia. The New Zealand branch management is only responsible for managing C's New Zealand operations. Therefore, C does not have its centre of management in New Zealand.

376. The Australian directors exercise control of C from Australia. The director control test is only satisfied if the directors exercise control of the company as a whole in New Zealand. However, in this case the control exercised by the New Zealand directors relates only to C's New Zealand branch. Therefore, C is not resident by virtue of the director control test.

Example 26

Facts

377. D is a unit trust that has been established under the Unit Trusts Act 1960 (NZ). D invests primarily in shares issued by New Zealand and overseas publicly listed companies. The manager of D is a New Zealand incorporated company. The manager makes all of the major decisions relating to marketing interests in D, investments, distributions, etc. These decisions are all made from New Zealand.

Result

378. D is a company under the extended definition of "company" in the Act. D is resident in New Zealand under the director control test.

Explanation

379. D is not incorporated. The incorporation test is therefore not applicable. The fact that D's manager is incorporated in New Zealand is irrelevant to D's residence status.

380. D's manager is a director of D under para (a)(iv) of the extended definition of "director" in s YA 1 of the Act because D's manager acts in the same way a director of a company incorporated under the Companies Act 1993 would act, ie, it makes all the major decisions in relation to investments.

381. The manager exercises control from New Zealand. Therefore, D is resident in New Zealand because its director exercises control of D from New Zealand.

Example 27

Facts

382. E is incorporated in Australia and is a 100 per cent owned subsidiary of an Australian company. The Australian parent is in the business of manufacturing a number of products. E's business mainly involves the marketing of those products in New Zealand. The management of E takes place from its Auckland office. E does not have an office in Australia, but it has several branch offices in New Zealand outside Auckland. The overall strategic control of the company by its directors is exercised from Australia.

Result

383. E is resident in New Zealand under the head office and centre of management tests.

Explanation

384. E is not resident in New Zealand under the director control test because its directors exercise control from Australia.

385. E's Auckland office constitutes its head office because it is the office from which the business of the company is managed and carried on. E is therefore resident in New Zealand under the head office test.

386. The management of E takes place from the Auckland office. E is therefore also resident in New Zealand because its centre of management is here.

Example 28

Facts

387. F is a company incorporated in the Cook Islands, and is used as a financing vehicle for a group of companies based in New Zealand. G, which is also incorporated in the Cook Islands, is the sole nominated director of F. With respect to the affairs of both F and G, the directors of G act on instructions received from a New Zealand resident company (NZ Co) that is a member of the group, without discussing or considering those instructions. Both F and G are managed from the Cook Islands. Neither F nor G has an office in New Zealand.

Result

388. Both F and G are resident in New Zealand under the director control test.

Explanation

389. F and G are both incorporated in the Cook Islands. Therefore, they are not resident in New Zealand under the incorporation test.

390. F and G are both managed from the Cook Islands. Therefore, they are not resident in New Zealand under the centre of management test. Further, as neither F nor G has an office in New Zealand, they are not resident here under the head office test.

391. The nominated directors of G act in accordance with instructions from NZ Co in relation to G's affairs. NZ Co is therefore a director of G. NZ Co exercises *de facto* control of G because the directors of G act on NZ Co's instructions without discussing or considering those instructions. The directors of G are not exercising true directorial control of G. As NZ Co exercises control of G from New Zealand, G is resident here under the director control test.

392. The nominated director of F (ie, G) acts in accordance with instructions from the nominated directors of G, who in turn act in accordance with instructions from NZ Co. The nominated director of F therefore acts in accordance with instructions from NZ Co, making NZ Co a director of F. NZ Co exercises *de facto* control of F because the directors of G (which is the director of F) act on NZ Co's instructions with respect to the affairs of F (as with the affairs of G) without discussing or considering those instructions. G, the nominated director of F, is not exercising true directorial control. F is resident in New Zealand because NZ Co is a director of F and exercises directorial control of F from New Zealand. G does not exercise true directorial control, so this is not a situation where it is necessary to weigh up the level of control exercised from New Zealand and from elsewhere.

Changes in company residence

393. As a company will be resident in New Zealand if it has its head office or centre of management here, or its directors exercise control of the company here, a company's residence may change if the location of its head office, centre of management, or place of directorial control changes. For example, a company that is resident in New Zealand under the centre of management test may cease to be resident here if it moves its centre of management to Australia, or a company that is not resident in New Zealand may become resident here if it shifts its head office here. A company may also transfer its place of incorporation from New Zealand to overseas.

394. Some of the more significant income tax consequences that may arise when the residence of a company changes between New Zealand and another country are set out below. A change in residence may also have implications for the application of a DTA. Further, if a company is a settlor or beneficiary of a trust and its residence status changes there may be tax implications – see from [456].

(a) Company migration rules

395. A company that ceases to be a New Zealand resident is an "emigrating company", and under the company migration rules it is treated for tax purposes as if, immediately before emigrating, it had disposed of its property at market value, liquidated, and distributed the full amount available for distribution as dividends (s FL 1).

(b) Taxation of foreign-sourced income

396. A company will be assessable for income tax on foreign-sourced income it derives while resident in New Zealand (s BD 1(5)(c)). In the case of a change in residence, therefore, the foreign-sourced income derived by a company while it was resident in New Zealand must be calculated, or a reasonable apportionment of the total foreign-sourced income must be made to the periods of residence and non-residence.

(c) Company imputation

397. A company that is resident in New Zealand (an imputation credit account (ICA) company) will generally be required to establish and maintain an imputation credit account (s OB 1). [It is noted that some companies are specifically excluded from being ICA companies—see [416] below]. A company that is resident in Australia may, in some circumstances, elect to establish and maintain an imputation credit account in New Zealand (s OB 2; see also definition of "Australian ICA company" in s YA 1). Otherwise, companies that are not resident in New Zealand are not permitted to establish an imputation credit account. A company that becomes resident in New Zealand during an imputation year therefore needs to establish and maintain an imputation credit account. Conversely, a company that ceases to be resident in New Zealand during an imputation year loses the right to maintain an imputation credit account (unless it becomes an Australian ICA company). When a company becomes a New Zealand resident during an imputation year, it is not entitled to credit to its imputation credit account any income tax paid in respect of income derived when it was resident outside New Zealand (s OB 4(3)(b)).

398. In the converse situation, where a company ceases to be a New Zealand resident, the company is required to debit its imputation credit account by the amount of any credit existing in the account immediately before the company stopped being an ICA company (ie, when it ceased being resident) (s OB 56(1)), or to pay further income tax for a debit balance in its imputation credit account when it ceased being an ICA company (s OB 66). A company that ceases to be an ICA company is also required to furnish an imputation return within two months from the day on which it ceased to be an ICA company (s 70(2) of the Tax Administration Act 1994).

(d) Controlled foreign company regime

399. A change of residence between New Zealand and another country may also have implications in relation to the CFC regime. Under s EX 24(1), when a company becomes a "foreign company" (being a company that is not resident in New Zealand, or is treated as not resident in New Zealand under a DTA) a new accounting period of the company starts on that day. The result is that if the company becomes a CFC because of its change in residence, only income derived after the company became a CFC will be attributed under the CFC regime to residents holding interests in the company.

400. In the converse situation, a new accounting period starts on the day when a company ceases to be a foreign company (s EX 24(2)). The effect is that if the company was a CFC before it ceased to be a foreign company, only income derived before the company ceased to be a foreign company will be attributed to residents under the CFC regime.

(e) The financial arrangements rules

401. When a company becomes a New Zealand resident during an income year and the company is a party to a financial arrangement, the company may become subject to the financial arrangements rules (note, it may be that they were already within the rules, ie, if they had previously carried on business in New Zealand through a fixed establishment and were a party to a financial arrangement for the purposes of that business). Where a company enters the financial arrangements rules as a result of becoming a resident in New Zealand, the company is treated as having assumed the accrued obligation to pay consideration under the financial arrangement immediately after the time at which it became resident, and as having paid the market value that a contract to assume the obligation had at that time (s EW 37(2)). The deemed acquisition price will then be taken into account in any subsequent base price adjustment required under s EW 29. To the extent that the exemption from the financial arrangements rules for non-residents (s EW 9) previously applied, that exemption will cease to apply when the company becomes resident.

402. When a company ceases to be resident in New Zealand and the company is a party to a financial arrangement, it must calculate a base price adjustment for the financial arrangement as at the date of ceasing to be resident (s EW 29). If the base price adjustment is positive it will be income derived by the company in the year for which the calculation is made (s EW 31(3)). If the base price adjustment is negative it will be expenditure incurred by the company in the year for which the calculation is made, and a deduction will be allowed for that expenditure (s EW 31(4)). An exception exists if a cash basis person ceases to be a New Zealand resident before the first day of the fourth income year following the income year in which they first became a New Zealand resident. In that case, they do not need to calculate a base price adjustment for a financial arrangement that they were a party to both before becoming and after ceasing to be a New Zealand resident (s EW 30(1)). Also, a party to a financial arrangement who ceases to be a New Zealand resident does not need to calculate a base price adjustment for a financial arrangement to the extent to which the arrangement relates to a business the party carries on through a fixed establishment in New Zealand (s EW 30(2)).

403. When a company ceases to be a New Zealand resident, the financial arrangements rules will cease to apply to the company except to the extent to which the company is a party to a financial arrangement for the purpose of a business carried on through a fixed establishment in New Zealand (s EW 9).

(f) Grouping of losses

404. A change in residence between New Zealand and another country may also affect the grouping of tax losses under subpart IC of the Act. Section IC 5 stipulates that for a company to be able to make its tax losses available to another company in the group, the company with the losses must (among other things) meet the residence requirements of s IC 7. Section IC 7 requires that, for the commonality period, the company with the available losses must be either incorporated in New Zealand or carrying on business through a fixed establishment here. In addition, the company must not be treated as not being resident in New Zealand under a DTA for the purposes of the DTA, and must not be liable to income tax in another

country because of domicile, residence, or place of incorporation. However, losses not available for grouping may be available for carry forward under s IA 3.

(g) Provisional tax

405. When a company becomes a New Zealand resident during an income year it may become a provisional taxpayer that is subject to the provisional tax regime contained in subpart RC. When a company ceases to be a New Zealand resident it may cease to be a provisional taxpayer (s RC 3).

Dual resident companies

Dual residence

406. In some cases a company may be resident in both New Zealand, under s YD 2, and another country, under the domestic tax law of that country. Dual residence has a number of implications in relation to the application of the Act and New Zealand's DTAs.

407. When a company is resident in New Zealand and in a country with which we have a DTA, the DTA will generally allocate residence to one of the countries for the purpose of determining how income and gains covered by the DTA are taxed. The objective here is to decide which country has the primary taxing right and to therefore reduce the incidence of double taxation.

408. In the context of the Act, dual residence has implications in the following areas: imputation, the dividend withholding payment regime, the CFC and FIF regimes, and the grouping of losses.

Dual residence and double taxation agreements

409. Double taxation may arise where a company is resident in both New Zealand and another country if each country taxes the worldwide income of the company. This issue may be resolved where there is a DTA between New Zealand and the other country. The DTA will generally allocate residence to one of the countries for the purposes of the DTA. In determining the treatment of income covered by the DTA, the company is then treated as being resident only in the country to which residence has been allocated.

410. Where a New Zealand resident company (under s YD 2) is deemed to be resident in another country for the purposes of a DTA, New Zealand's right to tax foreign-sourced income may be restricted, and limitations may be imposed on New Zealand's right to tax New Zealand-sourced income. As discussed in relation to individuals at [252] and [253], the company will remain liable to New Zealand income tax on income treated (under s YD 4) as having a source in New Zealand (s BD 1(5)). However, the liability is modified by any restrictions imposed by the DTA on New Zealand's right to tax persons who are deemed to be resident in the other country for the purposes of the DTA. Therefore, the residence rules contained in s YD 2 cannot always be read in isolation. When a company satisfies the domestic tax residence requirements in both New Zealand and another country, the impact of the DTA (if there is one) must be considered.

411. New Zealand's DTAs contain a number of different rules for allocating company residence for DTA purposes. As is the case with individuals, these rules do not apply for non-treaty purposes. Under these rules, which vary from one DTA to another, residence may be allocated according to the company's "place of effective management", its "day-to-day management", the "centre of its administrative or practical management" and the location of its "head office". In the case of some of New Zealand's DTAs it may fall to the competent authorities of the Contracting States to settle the question by mutual agreement (in some instances with regard to specified factors).

412. As noted at [261] in relation to individuals, if a DTA between New Zealand and another country uses the wording of a particular article in the OECD Model Convention (or very similar wording), the Commissioner considers that it can be inferred that the OECD commentary on that article reflects the meaning the parties intended to be given to any undefined terms in that article. In such circumstances the OECD commentary will be a significant aid to interpreting the relevant undefined terms. In such a case, the Commissioner considers that the context requires the meaning of the undefined terms to be considered without reference to any meaning those terms may have under domestic law.

413. There is only one residence tie-breaker test for dual-resident non-individuals in the OECD Model Convention. That tie-breaker allocates residence, for DTA purposes, to the State in which the person's "place of effective management" is situated. Where New Zealand's DTAs adopt this test, the Commissioner considers that reference should be made to the OECD commentary on the meaning of this term.

414. Where New Zealand's DTAs adopt residence allocation tests for non-individuals other than "place of effective management", it may be necessary to have recourse to the domestic law meaning (if any) of any undefined term in that test.

Dual residence and imputation

415. Section OB 1 provides that, subject to a number of special exclusions, a company that is resident in New Zealand must establish and maintain an imputation credit account for each tax year. Imputation credit account companies (ICA companies) may attach imputation credits to dividends they pay (s OB 60).

416. Several categories of company are specifically excluded from being ICA companies and, therefore, from passing on imputation credits to their shareholders (s OB 1(2)). Among these are companies that are resident in New Zealand but are treated as not being resident in New Zealand under a DTA. The situation contemplated is a dual resident company that, for the purposes of a DTA, is deemed not to be resident in New Zealand and so is not liable for New Zealand tax on all or part of its income. To ensure that dual resident companies cannot be used to undermine the international tax regime by obtaining the benefit of the imputation regime even though treated as not resident here, companies in this category are not able to pass on imputation credits. This is consistent with the anti-stapled stock provisions, contained in s GB 37, which also prevent companies from avoiding the international tax regime while at the same time being able to pass on imputation credits.

Dual residence and the controlled foreign company and foreign investment fund regimes

417. The CFC and FIF regimes are contained in subpart EX. When a resident has an interest in a CFC, income and losses of the CFC may be attributed to the resident for income tax purposes. When a resident has an interest in a FIF, the annual change in value of the interest is taken into account for income tax purposes.

418. The CFC and FIF regimes both apply in relation to foreign companies. A foreign company is one that is not resident in New Zealand, or is treated under a DTA as not being resident in New Zealand. Companies that are dual resident under domestic law, but treated as resident outside of New Zealand for DTA purposes, may be brought within the CFC and FIF regimes. In the case of the CFC regime, this will occur if the closely held ownership test is satisfied. In the case of the FIF regime, it will occur if none of the exceptions apply. This is to ensure that dual resident companies cannot be structured with a view to defeating the CFC and FIF regimes.

Dual residence and the grouping of losses

419. Section IA 3(2) allows companies within the same group of companies (as defined in s IC 3) to group their income and losses (see also subpart IC). This is subject to the requirements of s IC 5, which include that the company with the available losses must meet the residence requirements of s IC 7. Section IC 7 provides that for the commonality period (s IC 6) the company with the losses must be either incorporated in New Zealand or carrying on a business here through a fixed establishment. The company must also not be treated as not resident in New Zealand under a DTA, for the purposes of the DTA, and must not be liable by the law of another country or territory to income tax there through domicile, residence, or place of incorporation. Therefore a dual resident company cannot make its tax losses available to another company in the same group either by election or subvention payment under s IC 5(2).

Examples illustrating dual residence and the grouping of losses

Example 29

Facts

420. H is incorporated in New Zealand and managed from Australia. H is a member of a group of New Zealand and Australian companies. H incurs a loss of $1 million during the income year ending 31 March 2012.

Result

421. H's loss cannot be grouped with income earned by other New Zealand resident companies in the group.

Explanation

422. H is resident in both New Zealand and Australia under the domestic law of both countries. However, under the DTA between New Zealand and Australia, H is treated as a resident only of Australia, as its place of effective management is Australia. As such, the requirements of s IC 7 are not satisfied, and H cannot make its tax losses available to other New Zealand companies in the group.

Example 30

Facts

423. I is incorporated in Hong Kong and controlled by its directors from New Zealand. I is a 100 per cent owned subsidiary of a UK company. J is a New Zealand incorporated company that is controlled by its directors from New Zealand and has its centre of management here. J is also a 100 per cent subsidiary of the UK company. During the income year ending 31 March 2012, I incurs a

loss of $1 million and J earns assessable income of $2 million.

Result

424. I's $1 million loss cannot be grouped with J's $2 million income.

Explanation

425. I is resident in New Zealand because control by its directors is exercised from New Zealand. However, it is not incorporated in New Zealand or carrying on business in New Zealand through a fixed establishment here. As such, s IC 7(1) prevents I's losses from being grouped with J's income.

Example 31

Facts

426. K is a United States incorporated and managed company. K operates directly in New Zealand through several branch offices, and a significant amount of business is transacted through these offices. L is a New Zealand incorporated company that is controlled by its directors here and has its centre of management here. L is a 100 per cent owned subsidiary of K. During the income year ending 31 March 2012, K's New Zealand branch operations sustain a loss of $1 million and L earns assessable income of $2 million.

Result

427. The $1 million loss incurred by K's New Zealand branch operations can be grouped with L's $2 million income provided the other requirements of subpart IC are satisfied.

Explanation

428. Though it is not incorporated in New Zealand, K is carrying on a business in New Zealand through a fixed establishment here (ie, it has a fixed place of business here through which substantial business is carried on). Section IC 7(1) therefore does not prevent its New Zealand losses from being grouped. If K's New Zealand branch operations had been profitable, those profits would have been liable to tax here under the DTA between New Zealand and the United States, as profits of an enterprise attributable to a permanent establishment.

Residence of foreign companies

429. As noted at [310], a "foreign company" is a company not resident in New Zealand, and not treated as resident in New Zealand under a DTA (s YA 1). Section YD 3 sets out different tests to determine the country in which a foreign company is treated as resident for the purposes of the international tax rules.

430. Section YD 3 provides:

> **YD 3 Country of residence of foreign companies**
>
> *When this section applies*
>
> (1) This section applies for the purposes of the international tax rules to determine the country in which a foreign company is treated as resident for an accounting period.
>
> *Liability to income tax*
>
> (2) The company is treated as resident in a country if, at any time during the accounting period, it is liable to income tax in the country because any of the following is located in the country—
>
> (a) its domicile:
>
> (b) its residence:
>
> (c) its place of management:
>
> (d) any other criterion of a similar nature.
>
> *Further rule: first application*
>
> (3) Subsection (4) applies if the application of subsection (2) for an accounting period means that—
>
> (a) the company is resident in 2 or more countries:
>
> (b) the company is not resident in any country.
>
> *Applying New Zealand rules*
>
> (4) The company is treated as resident in the country in which—
>
> (a) it is incorporated:
>
> (b) it has its head office:
>
> (c) it has its centre of management:
>
> (d) its directors, in their capacity as directors, exercise control of the company, even if the directors' decision-making also occurs outside the country.
>
> *Further rule: second application*
>
> (5) The company is treated as resident in the country in which its centre of management is located for the accounting period if no 1 country of residence is identified under subsection (4).
>
> *Final rule*
>
> (6) The Commissioner must determine the country of residence if no 1 country of residence is identified under subsection (5).

431. Section YD 3(2) provides that a foreign company will be treated as resident in a country if, at any time during the accounting period, it is liable to income tax in the country because its domicile, residence, place of management or any other criterion of a similar nature is located in the country. If subs (2) results in the company being resident in multiple countries,

or not in any country, the company will be treated (under subs (4)) as resident in the country in which it is incorporated, has its head office or centre of management, or in which its directors, in their capacity as such, exercise control of the company (even if the directors' decision-making also occurs outside the country). If the application of subs (4) results in no one country of residence being identified, the company will be treated (under subs (5)) as resident in the country in which its centre of management is located for the accounting period. Finally, if the application of subs (5) results in no one country of residence being identified, subs (6) provides that the Commissioner must determine the country of residence.

PART 3: RESIDENCE AND TRUSTS

Introduction

432. Trusts are not treated as separate entities for income tax purposes. Consequently, there are no rules in the Act governing the residence of trusts. The residence of the persons connected with the trust, ie, the settlor, trustee and beneficiary, determines the treatment of trust income.

433. The trust rules in the Act modify the general position that New Zealand residents are assessable on worldwide income and non-residents are assessable only on New Zealand-sourced income. In most cases the residence of the trustee is not relevant in determining the treatment of foreign-sourced trustee income; rather, the residence of the settlor is relevant. Therefore, if the tax residence of a settlor of a trust changes, there may be tax implications in relation to the treatment of trustee income. Beneficiary income is taxed according to the normal rules about residence and source, though there is a special rule in relation to beneficiaries who cease to be resident in New Zealand and become resident again within five years (see [454]).

434. This part provides an overview of the implications of the residence status of settlors, trustees and beneficiaries for the taxation of income derived by trustees of a trust. Before discussing the relevance of the residence of the persons connected with the trust, [436]–[438] set out when income will be beneficiary income and when it will be trustee income.

Table – How trust income is taxed

435. The following table shows how trust income is taxed, depending on whether it is beneficiary income or trustee income, and on the residence of the persons connected with the trust.

How trust income is taxed

Beneficiary income

[See [438] as to when amounts will be beneficiary income]

NB Trustees are liable as agent for the income tax liability of a beneficiary for their beneficiary income and taxable distributions derived	**Beneficiary resident in NZ** • All beneficiary income is included as assessable income	**Beneficiary not resident in NZ** • Only NZ-sourced beneficiary income is included as assessable income

NB There is a special rule in relation to beneficiaries who cease to be resident in NZ and become resident again within five years – see [454]

Trustee income

[See [437] as to when amounts will be trustee income]

A settlor of the trust was resident (and not a transitional resident) in NZ at some point during the income year	**No settlor of the trust was resident** (and not a transitional resident) in NZ at any point during the income year[1]	
• NZ-sourced income is included as assessable income • Foreign-sourced income is included as assessable income[2]	• NZ-sourced income is included as assessable income	
	A trustee resident in NZ	• Foreign-sourced income is exempt[3]
	No trustee resident in NZ	• Foreign-sourced income is not included as assessable income

[1] And the trust was not, at any time in the income year, a superannuation fund, or a testamentary trust or an inter vivos trust of which any settlor was resident in NZ when they died.

[2] With the exceptions noted at [444].

[3] With the exception noted at [442].

Trustee income and beneficiary income

436. The income derived from property held in trust is taxed as either beneficiary income or trustee income. Only trustees can claim deductions for expenditure or losses incurred in deriving the income.

437. Trustee income is the income derived by the trustee of a trust, to the extent to which it is not beneficiary income (s HC 7(1)). Certain beneficiary income derived by a minor will also be treated as if it were trustee income for the purposes of determining the relevant tax rate, paying the tax, and providing returns of income (s HC 7(2)).

438. Section HC 6 provides that an amount will be beneficiary income to the extent to which either it vests absolutely in interest in a beneficiary of the trust in the income year, or it is paid to a beneficiary of the trust during the income year or by the later of:

- a date within six months of the end of the income year, or
- the earlier of:
  - the date on which the trustee files a return of income for the year, or
  - the date by which they must file a return for the year.

Settlor residence

Settlor residence and liability of trustee

439. Trustees are liable to tax on New Zealand-sourced trustee income as if they were an individual beneficially entitled to that income (s HC 24). This is the case whether or not the trustee or any settlor is resident in New Zealand. However, the residence of the settlor of the trust is relevant in determining whether foreign-sourced trustee income is liable to tax in New Zealand.

440. The residence of the settlor is determined under the rules contained in either s YD 1 or s YD 2, depending on whether the settlor is a natural person or a company.

441. A foreign-sourced amount derived by a New Zealand resident trustee will be exempt income (s HC 26) if:

- no settlor of the trust is at any time during the relevant income year a New Zealand resident (who is not a transitional resident); and
- the trust is not:
  - a superannuation fund, or
  - a testamentary trust or an *inter vivos* trust of which any settlor was resident in New Zealand when they died (whether or not they died during the relevant income year).

442. There is another situation in which foreign-sourced amounts derived by a New Zealand resident trustee will not be exempt income under s HC 26. A New Zealand "resident foreign trustee"[17] of a foreign trust[18] must disclose to the Commissioner certain information relating to the trust (s 59B of the TAA 1994), and maintain certain financial and other records in relation to the trust (ss 22(2)(fb) and (m), 22(2C) and 22(7)(d) of the TAA 1994). Foreign-sourced amounts derived by the trustee may not be exempt income under s HC 26 if the trustee is convicted of a knowledge offence under s 143A of the TAA 1994 in connection with information relating to the income year in which the foreign-sourced amount is derived. This will be the case if the trustee is not a "qualifying resident foreign trustee" (defined in s 3(1) of the TAA 1994). However, if the offence committed is an offence under s 143A(1)(b) of the TAA 1994 (knowingly not providing certain information to the Commissioner) and the required information is subsequently provided to the Commissioner, the foreign-sourced income will be exempt under s HC 26(1).

443. A foreign-sourced amount derived by a non-resident trustee will, subject to the exceptions noted at [444], be assessable income of the trustee (under s HC 25) if, at any time in the income year:

- a settlor of the trust is a New Zealand resident (who is not a transitional resident); or
- the trust is a superannuation fund; or
- the trust is a testamentary trust or an *inter vivos* trust of which:
  - a trustee is resident in New Zealand; and
  - any settlor was resident in New Zealand when they died (whether or not they died during the relevant income year).

444. The two exceptions to this (contained in s HC 25(3) and (4)) are where the trustee is resident outside New Zealand for the entire income year and either:

- no settlement has been made on the trust after 17 December 1987, and the trustee has not made an election referred to in s HZ 2 (an election under the Income Tax Act 1976 on or before 31 May 1989 to pay tax on trustee income); or
- any settlement made on the trust after 17 December 1987 was made only by a settlor who was not

[17] Defined in s 3(1) of the Tax Administration Act 1994 (the TAA 1994).

[18] Defined in s HC 11.

resident in New Zealand at any time from 17 December 1987 up to (and including) the date of settlement.

Settlor residence and liability of settlor

445. Under s HC 29, a settlor may be liable as agent of the trustee for income tax payable by the trustee on trustee income derived in an income year. This will be the case where the settlor has made a settlement to or for the benefit of a trust after 17 December 1987 (whether or not they settled property on the trust on or before that date), and the trustee derives trustee income in an income year in which the settlor is resident in New Zealand. Where there is more than one settlor to whom s HC 29 applies, the liability is joint and several. However, this rule does not apply:
    - to income tax that the trustee is liable for under s HC 32 (which relates to the trustee's liability as agent for the tax liability of a beneficiary for their beneficiary income and taxable distributions derived);
    - if the trust has a resident trustee for the whole income year, or if the first settlement was made during the income year, from the day of that settlement until the end of the income year;
    - where the trust is a charitable trust or a superannuation fund;
    - to the extent to which the trustee income is derived from the settlor remitting an amount under a financial arrangement to which either s EW 31 or s EZ 38 (which relate to base price adjustments) applies;
    - if the settlor is a natural person who was not resident at the time of any settlement on the trust, and had not after 17 December 1987 previously been resident in New Zealand (unless they have made an election under s HC 33 to satisfy the income tax liability of the trustee); or
    - to the extent to which the settlor can establish to the satisfaction of the Commissioner that, having regard to the settlements made by that settlor and by other settlors, another settlor should be liable.

446. It is noted that where s HC 29 applies, the settlor is liable for tax on trustee income as agent for the trustee. Therefore, the trustee will remain liable for the tax on the trustee income. The provisions of subpart HD, dealing with the liability for tax of principals and agents, are relevant.

Trustee residence

447. As noted at [438], s HC 6 provides that an amount will be beneficiary income to the extent to which either it vests absolutely in interest in a beneficiary of the trust in the income year, or it is paid to a beneficiary of the trust during the income year or by the later of:
    - a date within six months of the end of the income year, or
    - the earlier of:
        - the date on which the trustee files a return of income for the year, or
        - the date by which they must file a return for the year.

448. The trustee of a trust is liable as agent for the income tax liability of the beneficiary for their beneficiary income and taxable distributions derived (s HC 32). This liability, therefore, depends on the residence of the beneficiary. If the beneficiary is resident in New Zealand, the trustee is liable for tax as agent of the beneficiary on worldwide beneficiary income. If the beneficiary is resident outside New Zealand, the trustee is liable for tax as agent only in respect of New Zealand-sourced beneficiary income.

449. The residence of the trustee is generally not relevant in determining the treatment of trustee income: New Zealand-sourced trustee income is always subject to tax, and foreign-sourced trustee income is subject to tax on the basis of the residence of the settlor (see [439]–[443]). As noted at [444], there are two exceptions to this general principle where the trustee is resident outside New Zealand for the entire income year.

450. The trustee's non-residence may also be relevant if they derive certain passive income having a New Zealand source. If the trustee derives non-resident passive income as defined in s RF 2, NRWT will be payable on that amount.

451. The residence of the trustee is determined under the rules contained in either s YD 1 or s YD 2, depending on whether the trustee is a natural person or a company. When a trust has co-trustees, the trustees are treated as a notional single person (s HC 2). Where one of the co-trustees is resident, then all of the co-trustees as the notional single person under s HC 2 are resident in that capacity. If all of the co-trustees are non-resident, then the notional single person under s HC 2 will be non-resident.

Beneficiary residence

452. Beneficiaries are required to include in their assessable income all beneficiary income that they derive in an income year (ss HC 17 and CV 13). The normal rules about residence and source apply to determine which items of beneficiary income are included in the beneficiary's assessable income.

453. When the beneficiary is resident in New Zealand the beneficiary will be required to include all beneficiary income in their assessable income (s BD 1). When the beneficiary is resident outside New Zealand, only New Zealand-sourced beneficiary income is included in assessable income. In this situation there will be an NRWT liability if the New Zealand-sourced income is non-resident passive income. Income derived by a beneficiary from a trust will have a source in New Zealand to the extent to which the income of the trust fund has a source in New Zealand (s YD 4(13)). As noted at [448], the trustee of a trust is liable as agent for the income tax liability of the beneficiary for their beneficiary income and taxable distributions derived (s HC 32).

454. There is a special rule in relation to beneficiaries who cease to be resident in New Zealand and who become resident again within five years of ceasing to be resident. In this situation, the beneficiary is treated as deriving income to the extent to which they would have been treated as deriving beneficiary income or taxable distributions from a foreign trust or a non-complying trust if they had remained in New Zealand during the period of their absence (ss CV 15 and HC 23). Any such income is treated as derived on the day on which the beneficiary becomes resident again (s CV 15).

455. The residence of a beneficiary is determined under the rules contained in either s YD 1 or s YD 2, depending on whether the beneficiary is a natural person or a company.

Changes in residence

456. As noted at [439], the residence of settlors of trusts is relevant in determining whether a foreign-sourced amount of trustee income is liable to tax in New Zealand. If at any time in an income year a settlor of a trust is resident in New Zealand (and is not a transitional resident) foreign-sourced trustee income derived in that year will be taxed in New Zealand (subject to the exceptions noted at [444] in relation to foreign-sourced amounts derived by non-resident trustees).

457. Therefore, if the tax residence of any settlor of a trust changes, there could be tax implications. If there are no New Zealand resident settlors of a trust and then a settlor becomes resident in New Zealand (and is not a transitional resident) foreign-sourced amounts derived by a trustee in the year that the settlor became resident will generally be assessable. If a settlor ceases to be New Zealand resident and there are no other New Zealand resident settlors of the trust, foreign-sourced amounts derived by a trustee in the following year will be exempt (provided that no settlor is resident in New Zealand at any point in that income year).

458. If a settlor becomes resident in New Zealand, a settlor, trustee or beneficiary of the trust may be able to make an election (under s HC 33) to satisfy the trustee's income tax liability in respect of the trustee income they have derived (see [459]). The person making the election is liable for the income tax payable by the trustee, other than income tax that the trustee is liable for as agent (HC 33(2)). Whether an election is made within the relevant 12-month period will determine the assessability of various distributions from the trust, and the rate at which they are taxed. If an election is made, the trust will be treated as noted at [460] and distributions will be taxed as noted at [461]. If an election is not made, the trust will be treated as noted at [462] and distributions will be taxed as noted at [463].

459. A settlor, trustee or beneficiary of a trust may elect to satisfy the income tax liability of the trustee if a settlor of the trust is a natural person who:

- becomes a New Zealand resident (and is not a transitional resident); or
- stops being a transitional resident and continues to be a New Zealand resident (either of these days is the "transition date")

provided that the trust would be a foreign trust in relation to a distribution if a distribution were made immediately before the settlor became resident (ss HC 30 and HC 33).

460. This election can be made at any time within 12 months of the transition date. If an election is made, the trust is treated:

- as a foreign trust to the extent to which distributions consist of amounts derived by the trustee before the date of the election;
- as a complying trust to the extent to which distributions consist of amounts derived by the trustee on or after the date on which the election is made if the requirements of s HC 10(1)(a) are met for the trustee income derived after the date of the election; and
- as a non-complying trust for distributions that do not consist of amounts derived by the trustee before the date of the election, if the election is made but the requirements of s HC 10(1)(a) are not met.

461. If an election is made, distributions of income from the foreign trust portion will be assessable to beneficiaries at their normal rates. Distributions of amounts other than beneficiary income from the complying trust portion are not assessable to the beneficiary, as tax will already have been borne by the person who made the s HC 33 election.

462. If a s HC 33 election is not made within the 12-month period, the trust is treated:

- as a foreign trust to the extent to which distributions consist of amounts derived by the trustee before the date of the election; and
- as a non-complying trust to the extent to which distributions consist of amounts derived by the trustee after the time for making the election has expired.

463. If an election is not made, distributions of income from the foreign trust portion will be assessable to beneficiaries at their normal rates. Distributions of income (other than beneficiary income) and capital gains from the non-complying trust portion will be assessable at the rate of 45 per cent.

464. As noted at [454], there is also a special rule in relation to beneficiaries who cease to be resident in New Zealand and who become resident again within five years of ceasing to be resident.

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"Temporary exemption for transitional residents" *Tax Information Bulletin* Vol 19, No 3 (April 2007)
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Residence; Permanent place of abode; 183-day rule; Non-resident seasonal workers; 325-day rule; Government service rule; Transitional residents; Double tax agreements; Permanent home; Personal and economic relations; Centre of vital interests; Habitual abode; Place of incorporation; Head office; Centre of management; Director control; Settlor residence; Trustee residence; Beneficiary residence
Legislative references
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Valabh Committee, *International Tax Reform: Full Imputation Part II* (Consultative Committee on Full Imputation and International Tax Reform, July 1988)

APPENDIX – LEGISLATION

Income Tax Act 2007

A1. Section BD 1 provides:

> **BD 1 Income, exempt income, excluded income, non-residents' foreign-sourced income, and assessable income**
>
> *Amounts of income*
>
> (1) An amount is income of a person if it is their income under a provision in Part C (Income).
>
> *Exempt income*
>
> (2) An amount of income of a person is **exempt income** if it is their exempt income under a provision in subpart CW (Exempt income) or CZ (Terminating provisions).
>
> *Excluded income*
>
> (3) An amount of income of a person is **excluded income** if—
>
> (a) it is their excluded income under a provision in subpart CX (Excluded income) or CZ; and
>
> (b) it is not their non-residents' foreign-sourced income.
>
> *Non-residents' foreign-sourced income*
>
> (4) An amount of income of a person is **non-residents' foreign-sourced income** if—
>
> (a) the amount is a foreign-sourced amount; and
>
> (b) the person is a non-resident when it is derived; and
>
> (c) the amount is not income of a trustee to which section HC 25(2) (Foreign-sourced amounts: non-resident trustees) applies.
>
> *Assessable income*
>
> (5) An amount of income of a person is **assessable income** in the calculation of their annual gross income if it is not income of any of the following kinds:
>
> (a) their exempt income:
>
> (b) their excluded income:
>
> (c) their non-residents' foreign-sourced income.

A2. Section CW 27 provides:

> **CW 27 Certain income derived by transitional resident**
>
> Income derived by a person who is a transitional resident is exempt income if the income is a foreign-sourced amount that is none of the following:
>
> (a) employment income of a type described in section CE 1 (Amounts derived in connection with employment) in connection with employment or service performed while the person is a transitional resident:
>
> (b) income from a supply of services.

A3. Section HR 8 provides:

HR 8 Transitional residents

Provisions under which transitional resident treated as non-resident

(1) When a foreign-sourced amount is derived by a transitional resident, the following provisions apply to produce a result for income tax purposes that is the same as if the transitional resident were non-resident:

(a) sections CD 45, CE 2, CF 3, CQ 2, CQ 5 and CW 27 (which relate to income):

(b) sections DN 2 and DN 6 (which relate to deductions):

(c) sections EW 5, EW 37, EW 41, EX 16, EX 41, and EX 64 (which relate to the financial arrangements rules and to the CFC and FIF rules):

(d) sections HC 25, HC 26, and HC 30 (which relate to the trust rules):

(e) sections MC 5, MC 10, MD 7, and MF 5 (which relate to tax credits):

(f) sections RE 2, RE 5 and RF 12 (which relate to the RWT and NRWT rules):

(g) section YD 1 (Residence of natural persons):

(h) section 41 of the Tax Administration Act 1994.

Meaning of transitional resident

(2) A person is a **transitional resident** if—

(a) they are resident in New Zealand through acquiring a permanent place of abode as described in section YD 1(2) or through the 183-day rule set out in section YD 1(3); and

(b) for a continuous period (the **non-residence period**) of at least 10 years immediately before they meet the requirements of section YD 1(2) or (3), ignoring the rule in section YD 1(4), (Residence of natural persons) for becoming resident in New Zealand, they—

(i) did not meet the requirements of that section:

(ii) were not resident in New Zealand; and

(c) they were not a transitional resident before the non-residence period; and

(d) they have not ceased to be a transitional resident after the end of the non-residence period.

Natural persons

(3) A natural person who meets the requirements of subsection (2) and does not make an election under subsection (4) is a transitional resident for a period—

(a) beginning from the first day of the residence required by subsection (2)(a); and

(b) ending on the day that is the earlier of—

(i) the day before the person stops being a New Zealand resident:

(ii) the last day of the 48th month after the month in which they meet the requirements of section YD 1(2) or (3), ignoring the rule in section YD 1(4).

Choosing not to be transitional resident

(4) A person who would otherwise be a transitional resident in an income year may choose by notice to the Commissioner or by notice under subsection (5) not to be a transitional resident for a period—

(a) beginning on or after the start of the income year; and

(b) ending immediately before the person stops meeting the requirements of subsection (2).

Applying for tax credits

(5) An application under section 41 of the Tax Administration Act 1994 by a person who is eligible to be a transitional resident for a tax credit under subparts MA to MF and MZ (which relate to tax credits for families) for an income year is treated for the period of the application as—

(a) a notice of election under subsection (4) by the person if they have not made one; and

(b) a notice of election under subsection (4) by a spouse, civil union partner, or *de facto* partner of the person.

Election irrevocable

(6) An election under subsection (4) is irrevocable.

Notice of election

(7) A notice under subsection (4) to stop being a transitional resident must be received by the Commissioner by—

(a) the time within which the person's return of income must be filed under section 37 of the Tax Administration Act 1994; or

(b) if the person or their tax agent applies for it, a further time allowed by the Commissioner.

A4. Section YD 1 provides:

YD 1 Residence of natural persons

What this section does

(1) This section contains the rules for determining when a person who is not a company is a New Zealand resident for the purposes of this Act.

Permanent place of abode in New Zealand

(2) Despite anything else in this section, a person is a New Zealand resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere.

183 days in New Zealand

(3) A person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.

Person treated as resident from first of 183 days

(4) If subsection (3) applies, the person is treated as resident from the first of the 183 days until the person is treated under subsection (5) as ceasing to be a New Zealand resident.

Ending residence: 325 days outside New Zealand

(5) A person treated as a New Zealand resident only under subsection (3) stops being a New Zealand resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period.

Person treated as non-resident from first of 325 days

(6) The person is treated as not resident from the first of the 325 days until they are treated again as resident under this section.

Government servants

(7) Despite subsection (5), a person who is personally absent from New Zealand in the service, in any capacity, of the New Zealand Government is treated as a New Zealand resident during the absence.

Presence for part-days

(8) For the purposes of this section, a person personally present in New Zealand for part of a day is treated as—

(a) present in New Zealand for the whole day; and

(b) not absent from New Zealand for any part of the day.

[subss (9) and (10) have been repealed]

Treatment of non-resident seasonal workers

(11) Despite subsection (3), a non-resident seasonal worker is treated for the duration of their employment under the recognised seasonal employment scheme as a non-resident.

A5. Section YD 2 provides:

YD 2 Residence of companies

Four bases for residence

(1) A company is a New Zealand resident for the purposes of this Act if—

(a) it is incorporated in New Zealand:

(b) its head office is in New Zealand:

(c) its centre of management is in New Zealand:

(d) its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.

International tax rules

(2) Despite subsection (1), for the purpose of the international tax rules, a company is treated as remaining resident in New Zealand if it becomes a foreign company but is resident in New Zealand again within 183 days afterwards.

Cook Islands National Superannuation Fund trustee

(3) Despite subsection (1), the trustee of the Cook Islands National Superannuation Fund, established by the Cook Islands National Superannuation Fund Deed under the Cook Islands National Superannuation Scheme Act 2000 (Cook Islands), is not a New Zealand resident.

A6. Section YD 3 provides:

YD 3 Country of residence of foreign companies

When this section applies

(1) This section applies for the purposes of the international tax rules to determine the country in which a foreign company is treated as resident for an accounting period.

Liability to income tax

(2) The company is treated as resident in a country if, at any time during the accounting period, it is liable to income tax in the country because any of the following is located in the country—

(a) its domicile:

(b) its residence:

(c) its place of management:

(d) any other criterion of a similar nature.

Further rule: first application

(3) Subsection (4) applies if the application of subsection (2) for an accounting period means that—

(a) the company is resident in 2 or more countries:

(b) the company is not resident in any country.

Applying New Zealand rules

(4) The company is treated as resident in the country in which—

(a) it is incorporated:

(b) it has its head office:

(c) it has its centre of management:

(d) its directors, in their capacity as directors, exercise control of the company, even if the directors' decision-making also occurs outside the country.

Further rule: second application

(5) The company is treated as resident in the country in which its centre of management is located for the accounting period if no 1 country of residence is identified under subsection (4).

Final rule

(6) The Commissioner must determine the country of residence if no 1 country of residence is identified under subsection (5).

A7. Section YA 1 provides (relevantly):

YA 1 Definitions

In this Act, unless the context requires otherwise,—

...

company—

(a) means a body corporate or other entity that has a legal existence separate from that of its members, whether it is incorporated or created in New Zealand or elsewhere:

(ab) does not include a partnership:

(abb) does not include a look-through company, except in the PAYE rules, the FBT rules, the NRWT rules, the RWT rules, the ESCT rules, the RSCT rules, and for the purposes of subpart FO (Amalgamation of companies):

(ac) includes a listed limited partnership:

(ad) includes a foreign corporate limited partnership:

(b) includes a unit trust:

(c) includes a group investment fund that is not a designated group investment fund, but only to the extent to which the fund results from investments made into it that are—

(i) not from a designated source, as defined in section HR 3(5) (Definitions for section HR 2: group investment funds); and

(ii) not made before 23 June 1983, including an amount treated as invested at that date under the definition of pre-1983 investment in section HR 3(8):

(d) includes an airport operator:

(e) includes a statutory producer board:

(f) includes a society registered under the Incorporated Societies Act 1908:

(g) includes a society registered under the Industrial and Provident Societies Act 1908:

(h) includes a friendly society:

(i) includes a building society:

(j) is further defined in section EX 30(7) (Direct income interests in FIFs) for the purposes of that section

...

New Zealand resident—

(a) means a person resident in New Zealand under—

(i) section EY 49 (Non-resident life insurer becoming resident):

(ii) sections YD 1 to YD 3 (which relate to residence):

(b) is defined in section MA 8 (Some definitions for family scheme) for the purposes of subparts MA to MF and MZ (which relate to tax credits for families)

...

non-resident seasonal worker means a non-resident person employed under the recognised seasonal employment scheme to undertake work in New Zealand

...

recognised seasonal employment scheme means the recognised seasonal employer policy published by the Department of Labour under section 13A of the Immigration Act 1987

director—

(a) means—

(i) a person occupying the position of director, whatever title is used:

(ii) a person in accordance with whose directions or instructions the persons occupying the position of directors of a company are accustomed to act:

(iii) a person treated as being a director by any other provision of this Act:

(iv) in the case of an entity that does not have directors and that is treated as, or assumed to be, a company by a provision of this Act, any trustee, manager, or other person who acts in relation to the entity in the same way as a director would act, or in a similar way to that in which a director would act, were the entity a company incorporated in New Zealand under the Companies Act 1993:

(b) is defined in section HD 15(9) (Asset stripping of companies) for the purposes of that section

Goods and Services Tax Act 1985

A8. Section 2 provides (relevantly)[19]:

2 Interpretation

(1) In this Act, other than in section 12, unless the context otherwise requires,—

...

resident means resident as determined in accordance with sections YD 1 and YD 2 (excluding section YD 2(2)) of the Income Tax Act 2007:

provided that, notwithstanding anything in those sections,—

[19] It is noted that if enacted the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill 2013, introduced on 22 November 2013, will amend the definition of "resident" in the GSTA 1985. The proposed amendment would result in the back-dating rules in s YD 1(4) and (6) being ignored in determining the residence or non-residence of natural persons for GST purposes.

(a) a person shall be deemed to be resident in New Zealand to the extent that that person carries on, in New Zealand, any taxable activity or any other activity, while having any fixed or permanent place in New Zealand relating to that taxable activity or other activity:

(b) a person who is an unincorporated body is deemed to be resident in New Zealand if the body has its centre of administrative management in New Zealand

...

unincorporated body means an unincorporated body of persons, including a partnership, a joint venture, and the trustees of a trust

LEGISLATION AND DETERMINATIONS

This section of the *TIB* covers items such as recent tax legislation and depreciation determinations, livestock values and changes in FBT and GST interest rates.

2014 INTERNATIONAL TAX DISCLOSURE EXEMPTION ITR25

Introduction

Section 61 of the Tax Administration Act 1994 ("TAA") requires taxpayers to disclose interests in foreign entities.

Section 61(1) of the TAA states that a person who has a control or income interest in a foreign company or an attributing interest in a foreign investment fund ("FIF") at any time during the income year must disclose the interest held.[1] However, section 61(2) of the TAA allows the Commissioner of Inland Revenue to exempt any person or class of persons from this requirement if disclosure is not necessary for the administration of the international tax rules (as defined in section YA 1) contained in the Income Tax Act 2007 ("the ITA").

To balance the revenue forecasting and risk assessment needs of the Commissioner with the compliance costs of taxpayers providing the information, the Commissioner has issued an international tax disclosure exemption under section 61(2) of the TAA that applies for the income year corresponding to the tax year ended 31 March 2014. This exemption may be cited as "International Tax Disclosure Exemption ITR25" ("the 2014 disclosure exemption") and the full text appears at the end of this item.

Scope of exemption

The scope of the 2014 disclosure exemption is the same as the 2013 disclosure exemption.

Application date

This exemption applies for the income year corresponding to the tax year ended 31 March 2014.

Summary

In summary, the 2014 disclosure exemption **removes** the requirement of a resident to disclose:

- an interest of less than 10% in a foreign company if it is not an attributing interest in a FIF or if it falls within the $50,000 de minimis exemption (see section CQ 5(1)(d) and section DN 6(1)(d) of the ITA). The de minimis exemption does not apply to a person that has opted out of the de minimis threshold by including in the income tax return for the income year a FIF income or loss. Please note that a person opting out of the de minimis threshold needs to include FIF income or loss in any of the four subsequent income years even if the total cost of all attributing interests is $50,000 or less.
- if the resident **is not** a widely-held entity, an attributing interest in a FIF that is an income interest of less than 10%, if the foreign entity is incorporated (in the case of a company) or otherwise tax resident in a treaty country or territory, and the fair dividend rate or comparative value method of calculation is used.
- If the resident **is** a widely-held entity, an attributing interest in a FIF that is an income interest of less than 10% if the fair dividend rate or comparative value method is used for the interest. The resident is instead required to disclose the end-of-year New Zealand dollar market value of all such investments split by the jurisdiction in which the attributing interest in a FIF is held or listed.

The 2014 disclosure exemption also removes the requirement for a non-resident or transitional resident to disclose interests held in foreign companies and FIFs.

Commentary

Generally, residents who hold an income interest or a control interest in a foreign company, or an attributing interest in a FIF are required to disclose these interests to the Commissioner. These interests are considered in further detail below.

Attributing interest in a FIF

A resident is required to disclose an attributing interest in a FIF if FIF income or a FIF loss arises through the use of one of the following calculation methods:

- attributable FIF income, deemed rate of return or cost methods; or
- fair dividend rate or comparative value methods, if the resident is a "widely-held entity" or
- fair dividend rate or comparative value methods, if the resident is not a widely-held entity and the country in which the attributing interest is incorporated or otherwise tax resident in a country or territory with

[1] In the case of partnerships, disclosure needs to be made by the individual partners in the partnership. The partnership itself is not required to disclose.

which New Zealand **does not** have a double tax agreement[2] in force as at 31 March 2014.

The 38 countries or territories that New Zealand does have a double tax agreement in force as at 31 March 2014 are listed below.

Australia	India	Russian Federation
Austria	Indonesia	Singapore
Belgium	Ireland	South Africa
Canada	Italy	Spain
Chile	Japan	Sweden
China	Korea (Republic of)	Switzerland
Czech Republic	Malaysia	Taiwan
Denmark	Mexico	Thailand
Fiji	Netherlands	Turkey
Finland	Norway	United Arab Emirates
France	Papua New Guinea*	United Kingdom
Germany	Philippines	United States of America
Hong Kong	Poland	

*The Papua New Guinea double tax agreement applies for withholding taxes from 1 March 2014 and for all other provisions from 1 April 2014.

No disclosure is required by non-widely-held taxpayers for attributing interests in FIFs that are income interests of less than 10% and are incorporated or otherwise tax resident in a tax treaty country or territory, if the fair dividend rate or comparative value methods of calculation are used.

A "widely-held entity" for the purposes of this disclosure is an entity which is a:

- portfolio investment entity (this includes a portfolio investment-linked life fund); or
- widely-held company; or
- widely-held superannuation fund; or
- widely-held group investment fund ("GIF").

Portfolio investment entity, widely-held company, widely-held superannuation fund and widely-held GIF are all defined in section YA 1 of the ITA.

The disclosure required, by widely-held entities, of attributing interests in FIFs which use the fair dividend rate or the comparative value method of calculation is that, for each calculation method, they disclose the end-of-year New Zealand dollar market value of investments split by the jurisdiction in which the attributing interest in a FIF is held, listed, organised or managed. In the event that tax residence is not easily determined, a further option of a split by currency in which the investment is held will also be accepted as long as it is a reasonable proxy—that is at least 90–95% accurate—for the underlying jurisdiction in which the FIF is held, listed, organised or managed. For example, investments denominated in euros will not be able to meet this test and so euro-based investments will need to be split into the underlying jurisdictions.

FIF interests

The types of interests that fall within the scope of section 61(1) of the TAA are:

- rights in a foreign company or anything deemed to be a company for the purposes of the ITA (eg, a unit trust)
- an entitlement to benefit from a foreign superannuation scheme
- an entitlement to benefit from a foreign life insurance policy
- an interest in an entity specified in schedule 25, part A of the ITA (no entities were listed when the *Tax Information Bulletin* Vol 26, No 3 went to press).

However, the following interests are exempt (under sections EX 31 to EX 43 of the ITA) from being an attributing interest in a FIF and do not have to be disclosed:

- an income interest of 10% or more in a CFC (although separate disclosure is required of this as an interest in a foreign company)
- certain interests in Australian resident companies listed on an approved index of the Australian Stock Exchange and required to maintain a franking account (refer to the IR 871 form that can be found on Inland Revenue's website **www.ird.govt.nz** (search keywords: other exemptions, IR871))
- an interest in an Australian unit trust that has an New Zealand RWT proxy with either a high turnover or high distributions
- an interest of 10% or more in a foreign company that is treated as resident, and subject to tax, in Australia (although separate disclosure is required of this as an interest in a foreign company)
- an interest in a superannuation scheme that qualifies for the new resident's accrued superannuation entitlement exemption

[2] For the avoidance of doubt, the term "double tax agreement" does not include tax information exchange agreements or collection agreements and is limited to the double tax agreements negotiated with the 38 countries or territories listed in this 2014 disclosure exemption.

- certain foreign pensions or annuities (see Inland Revenue's guide *Overseas pensions and annuity schemes (IR 257)* for more information)
- an interest in certain venture capital investments in New Zealand resident start-up companies that migrate to a grey-list country
- an interest in certain grey-list companies owning New Zealand venture capital companies
- an interest in certain grey-list companies resulting from shares acquired under a venture investment agreement
- an interest in certain grey-list companies resulting from the acquisition of shares under an employee share scheme
- an interest held by a natural person in a foreign entity located in a country where exchange controls prevent the person deriving any profit or gain or disposing of the interest for New Zealand currency or consideration readily convertible to New Zealand currency.

De minimis

Interests in foreign entities held by a natural person not acting as a trustee also do not have to be disclosed if the total cost of the interests remains under $50,000 at all times during the income year. This disclosure exemption is made because no FIF income under section CQ 5 of the ITA or FIF loss under section DN 6 arises in respect of these interests. This de minimis exemption does not apply to a person who has opted out of the de minimis threshold by including in the income tax return for the year a FIF income or loss. Please note that a person opting out of the de minimis threshold needs to include FIF income or loss in any of the four subsequent income years even if the total cost of all attributing interests is $50,000 or less.

Format of disclosure

The forms for the disclosure of FIF interests are as follows:

- IR 443 form for the deemed rate of return method
- IR 445 form for the fair dividend rate method (for widely-held entities)
- IR 446 form for the comparative value method (for widely-held entities)
- IR 447 form for the fair dividend rate method (for individuals or non-widely-held entities)
- IR 448 form for the comparative value method (for individuals or non-widely-held entities)
- IR 449 form for the cost method
- IR 458 electronic form for the attributable FIF income method (this form can also be used to make electronic disclosures for all other methods).

It is now possible to download a spreadsheet as a working paper or complete the disclosures online. If you're downloading the spreadsheet you will be able to save it as a working paper on your computer and when completed submit the form by using Inland Revenue's online services.

You will still be able to complete the disclosure online without downloading a spreadsheet by directly entering the disclosure online.

The IR 445 and IR 446 forms, which reflect the disclosure for fair dividend rate and comparative value for *widely-held entities*, must be filed online. As discussed above this disclosure is by country rather than by individual investment as is the general requirement of section 61. In order to be exempt from the general requirements, the alternative disclosure must be made electronically.

The IR 447, IR 448 and IR 449 forms, applying to the fair dividend rate and comparative value methods for *individuals or non widely-held entities* as well as the cost method for all taxpayers, may be completed online.

As noted above, all of the above disclosures can now be filed using the IR 458 electronic disclosure.

The online forms can be found at **www.ird.govt.nz** "Get it done online", "Foreign investment fund disclosure".

Income interest of 10% or more in a foreign company

A resident is required to disclose an income interest of 10% or more in a foreign company. This obligation to disclose applies to all foreign companies regardless of the country of residence. For this purpose, the following interests need to be considered:

a) an income interest held directly in a foreign company

b) an income interest held indirectly through any interposed foreign company

c) an income interest held by an associated person (not being a controlled foreign company) as defined by subpart YB of the ITA.

To determine whether a resident has an income interest of 10% or more for CFCs, sections EX 14 to EX 17 of the ITA should be applied. To determine whether a resident has an income interest of 10% or more in any entity that is not a CFC, for the purposes of this exemption, sections EX 14 to EX 17 should be applied to the foreign company as if it were a CFC.

Format of disclosure

Disclosure of all interests in a controlled foreign company is required using a Controlled foreign companies disclosure (IR 458) form. This form, which involves uploading a prescribed spreadsheet, can cater for up to 500 individual disclosures.

The IR 458 form must be completed online at **www.ird.govt.nz** (search keyword: ir458). Please note that electronic filing is a mandatory requirement for CFC disclosure.

Overlap of interests

It is possible that a resident may be required to disclose an interest in a foreign company which also constitutes an attributing interest in a FIF. For example, a person with an income interest of 10% or greater in a foreign company that is not a CFC is strictly required to disclose both an interest held in a foreign company and an attributing interest in a FIF.

To meet disclosure requirements, only one form of disclosure is required for each interest. If the interest is an attributing interest in a FIF, then the appropriate disclosure for the calculation method, as discussed previously, must be made.

In all other cases, where the interest in a foreign company is not an attributing interest in a FIF, the IR4 58 for controlled foreign companies must be filed.

Interests held by non-residents and transitional residents

Interests held by non-residents and transitional residents in foreign companies and FIFs do not need to be disclosed.

This would apply for example to an overseas company operating in New Zealand (through a branch) in respect of its interests in foreign companies and FIFs; or to a transitional resident with interests in a foreign company or an attributing interest in a FIF.

Under the international tax rules, non-residents and transitional residents are not required to calculate or attribute income under either the CFC or FIF rules. Therefore disclosure of non-residents' or transitional residents' holdings in foreign companies or FIFs is not necessary for the administration of the international tax rules and so an exemption is made for this group.

PERSONS NOT REQUIRED TO COMPLY WITH SECTION 61 OF THE TAX ADMINISTRATION ACT 1994

This exemption may be cited as "International Tax Disclosure Exemption ITR25".

1. Reference

This exemption is made under section 61(2) of the Tax Administration Act 1994. It details interests in foreign companies and attributing interests in FIFs in relation to which any person is not required to comply with the requirements in section 61 of the Tax Administration Act 1994 to make disclosure of their interests, for the income year ended 31 March 2014.

2. Interpretation

For the purpose of this disclosure exemption:

- to determine an income interest of 10% or more, sections EX 14 to EX 17 of the Income Tax Act 2007 apply for interests in controlled foreign companies. In the case of attributing interests in FIFs, those sections are to be applied as if the FIF were a CFC, and
- double tax agreement means a double tax agreement in force as at 31 March 2014 in one of the 38 countries or territories as set out in the commentary.

The relevant definition of "associated persons" is contained in subpart YB of the Income Tax Act 2007.

Otherwise, unless the context requires, expressions used have the same meaning as in section YA 1 of the Income Tax Act 2007.

3. Exemption

i) Any person who holds an income interest of less than 10% in a foreign company, including interests held by associated persons, that is not an attributing interest in a FIF, or that is an attributing interest in a FIF in respect of which no FIF income or loss arises under either section CQ 5(1)(d) or section DN 6(1)(d) of the Income Tax Act 2007, is not required to comply with section 61(1) of the Tax Administration Act 1994 for that interest and that income year.

ii) Any person who is a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct interest of 10% or more in a foreign company that is not a foreign PIE equivalent, and uses the fair dividend rate or comparative value calculation method for that interest, is not required to comply with section 61(1) of the Tax Administration Act 1994 in respect of that interest and that income year, if the person discloses the end-of-year New Zealand dollar market value of investments, in an electronic format prescribed by the Commissioner, split by the jurisdiction in which the attributing interest in a FIF is held or listed.

iii) Any person who is not a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct income interest of 10% or more, and uses the fair dividend rate or comparative value calculation method is not required to comply with section 61(1) of the Tax Administration Act 1994 in respect of that interest and that income year, to the extent that the FIF is incorporated or tax resident in a country or territory with which New Zealand has a double tax agreement in force at 31 March 2014.

iv) Any non-resident person or transitional resident who has an income interest or a control interest in a foreign company or an attributing interest in a FIF in the income year corresponding to the tax year ending 31 March 2014, is not required to comply with section 61(1) of the Tax Administration Act 1994 in respect of that interest and that income year if either or both of the following apply:

- no attributed CFC income or loss arises in respect of that interest in that foreign company under sections CQ 2(1)(d) or DN 2(1)(d) of the Income Tax Act 2007; and/or
- no FIF income or loss arises in respect of that interest in that FIF under sections CQ 5(1)(f) or DN 6(1)(f) of the Income Tax Act 2007.

This exemption is made by me acting under delegated authority from the Commissioner of Inland Revenue pursuant to section 7 of the Tax Administration Act 1994.

This exemption is signed on the 13th of March.

Peter Loerscher
Principal Advisor (International Tax)

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out the answers to some day-to-day questions people have asked. They are published here as they may be of general interest to readers.

QB 14/01: INCOME TAX – ADJUSTMENTS FOR TRADING STOCK (INCLUDING RAW MATERIALS) TAKEN FOR OWN USE OR CONSUMPTION

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

This question we've been asked is about s GC 1.

This item replaces the item "Value of produce used" published in *Public Information Bulletin* No 29 (February 1966), at p 7, which relates to assessing a farmer for produce taken from his or her farm for own consumption. The current relevance of this item was identified during a review of *Public Information Bulletins* and *Tax Information Bulletins* published before 1996. For more information about the review, see "Review of Public Information Bulletins" T*ax Information Bulletin* Vol 23, No 1 (February 2011), at p 116.

This QWBA applies for the 2015 and subsequent income years.

The QWBA applies to the situation where the goods being taken for private use or consumption are, in relation to a sole trader's business, trading stock of that business. This situation should be distinguished from the situation where goods of a type normally acquired as trading stock of the business are acquired for private use or consumption, and are either acquired concurrently with trading stock or from normal suppliers of trading stock (see Example 3 below). While this item refers to sole traders, the Commissioner considers the same principles apply to partners in a partnership.

This item does not consider fringe benefit tax (FBT) or the dividend rules. Different rules may apply to employers and companies. If an employer or company were to provide trading stock for free or at a subsidised rate to an employee or shareholder for the employee's or shareholder's own use or consumption then FBT or dividend issues could arise. This item also does not discuss goods and services tax (GST), but if you are a GST-registered person you may need to make a GST adjustment for any trading stock taken.

Question

1. What is the income tax treatment when a sole trader takes trading stock (including raw materials) for own use or consumption?

Answer

2. A sole trader is required to account for any items of trading stock taken for own use or consumption at the market value of the trading stock.

Explanation

3. The taking of trading stock for own use or consumption means the trading stock has not otherwise been sold in the normal course of the sole trader's business. As a result, the sole trader has not derived assessable business income from disposing of the trading stock. However, the costs incurred in acquiring, growing or manufacturing the trading stock would have been included in the sole trader's deductible business expenses. Therefore, an adjustment to the sole trader's assessable business income is needed to reflect the fact the sole trader has taken some trading stock. This adjustment is provided for in s GC 1. Section GC 1 applies when:

   (1) ... a person disposes of trading stock for—

   (a) no consideration:

   (b) an amount that is less than the market value of the trading stock at the time of disposal.

4. When s GC 1 applies:

   (2) The person is treated as deriving an amount equal to the market value of the trading stock at the time of disposal.

5. "Trading stock" is defined in s YA 1 for the purposes of s GC 1 as:

   trading stock—

   (a) ...

   (b) in sections ... GC 1 to GC 3 (which relate to the sale of trading stock for inadequate consideration)—

   (i) includes anything produced or manufactured:

   (ii) includes anything acquired for the purposes of manufacture or disposal:

   (iii) includes livestock:

   (iv) includes timber or a right to take timber:

   (v) includes land whose disposal would produce income under any of sections CB 6 to CB 15 (which relate to income from land):

(vi) includes anything for which expenditure is incurred and which would be trading stock if possession of it were taken:

(vii) does not include a financial arrangement to which the financial arrangements rules or the old financial arrangements rules apply:

(c) for the purposes of section GC 1 (Disposals of trading stock at below market value), has an expanded meaning as set out in section GC 1(4):

(d) ...

6. This definition of "trading stock" includes not only finished and partially finished goods but also (under paragraph (ii)) raw materials. Also, the definition is extended by s GC 1(4) to include an interest in trading stock:

(4) In this section, trading stock includes an interest in trading stock.

7. It is also important to note that s GC 1 requires the market value to be determined "at the time of disposal".

8. The following questions arise in relation to trading stock taken for own use or consumption and s GC 1:

- What is the "market value" of trading stock taken for own use?
- Is taking trading stock a disposal?
- Does the "mutuality principle" apply?

These questions are discussed below.

What is the "market value" of trading stock taken for own use?

9. "Market value" is a flexible concept and has not been legislatively defined, so it bears its ordinary meaning. The *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) defines the ordinary meaning of "market value" as:

> **market value** ▶ ***n.*** the amount for which something can be sold on a given market.

10. "Market value" is a term that appears throughout the Act, with its meaning determined according to the surrounding circumstances. It was considered by the courts, particularly in respect of its ordinary meaning, in *Hatrick v CIR* [1936] NZLR 641 at 661:

> The test has been variously phrased, but in essence it calls for an enquiry as to the value at which a willing but not over anxious vendor would sell and a willing but not over anxious purchaser would buy.

11. The ordinary meaning of "market value" is the current selling value in the ordinary course of business in the relevant taxpayer's own selling market. This is shown in *Australasian Jam Co Pty Ltd v FCT* (1953) 88 CLR 23 at 31, where Fullagar J said:

> But it is not to be supposed that the expression "market selling value" contemplates a sale on the most disadvantageous terms conceivable. **It contemplates, in my opinion, a sale or sales in the ordinary course of the company's business** – such sales as are in fact effected. Such expression in such provisions must always be interpreted in a common sense way with due regard to business realities ...
>
> [Emphasis added]

12. Accordingly, market value will be ascertained for the purposes of s GC 1 with reference to the market or markets into which the sole trader would have otherwise sold the particular trading stock in the ordinary course of their business. In instances where trading stock is sold in different markets (eg, retail and trade) the relevant market will depend on the individual circumstances of the sole trader's business. If the trading stock is committed for sale to, or is predominately available to, a particular identifiable market, then that is the relevant market. Otherwise, trading stock available for sale in any one of several markets should be valued using a weighted average.

13. As stated, the market value at which the trading stock needs to be accounted for is the amount the particular trading stock would have fetched in the relevant market or markets in the ordinary course of the sole trader's business. Therefore, this amount will also reflect normal business decisions to clear or exit stock lines for a variety of reasons, including seasonal factors, end of shelf-life, and fashion or technological changes.

14. Accordingly, it may be that the market value of trading stock taken for own use or consumption is at or below its cost (including having nil value). In the latter situation, the income adjustment under s GC 1 will be less than the deduction allowed for the costs of acquiring, growing or manufacturing the trading stock.

15. The High Court noted the possibility of this outcome in *Foodstuffs (Wellington) Co-operative Society Ltd v CIR* (2010) 24 NZTC 23,959 where the court considered whether s GD 1 of the Income Tax Act 1994 (a predecessor of s GC 1) applied. Simon France J in *Foodstuffs* considered there may be instances where the section "has no bite":

> [30] ... The farmer could be analysed in another way – he or she has acquired trading stock for which a deduction has been claimed; if he or she chooses to destroy the stock, it is to be deemed to be done at market value. **What that market value is will depend on the reason why it is destroyed. If, for example, it is destroyed because the stock is worthless, or because no buyer can be found, then presumably the market value is nil so s GD 1 has no bite.** If, however, it is healthy stock the farmer chooses to use for his

> own provision, then s GD 1(1)(a) and (b) are applicable without needing to describe the farmer as a private transferee of his or her own trading stock.
>
> [Emphasis added]

The view that no issue arises under the section because the trading stock has a nil market value was also accepted by the Commissioner in respect of perishable food that had passed its use-by date (*Foodstuffs* at [18]).

16. Another possible situation is where the trading stock taken for own use or consumption is raw materials of the taxpayer's business and those raw materials are not normally sold in the course of that business (eg, where a café owner takes some raw materials from the café kitchen). The market value of the raw materials cannot be readily ascertained because they are not normally sold in the course of the business. In that situation there must be some next best way of estimating the market value of the raw materials. The Commissioner accepts that in most cases the next best way of estimating market value is to look at the value at which those raw materials are being traded in an arm's length transaction in other markets. This is likely to be the market in which the sole trader acquired the raw materials. That is, the next best way of ascertaining market value in this situation is to use the current replacement price of the raw materials. Where the raw materials are perishables or otherwise have a short useful life and are being taken shortly after acquisition, the current replacement price in many cases will often be the original cost.

17. Therefore, it is important that sole traders maintain accurate records of the quantity and market value of trading stock taken at the time of taking the trading stock to avoid difficulties in determining at a later stage the market value of the items. This is especially relevant for trading stock that is subject to fluctuations in market value (eg, livestock or the fresh produce of market gardeners).

Is taking trading stock a disposal?

18. Section GC 1 applies when there is a disposal of trading stock. Ordinarily, "disposal" means the process of disposing or "to get rid of" something (see *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011)). This raises the question of whether you can dispose of something to yourself (see also the discussion of the mutuality principle from paragraph 22 below). This question is important in the context of s GC 1 as to whether there is a disposal within the meaning of s GC 1 when a sole trader simply takes trading stock rather than sells it to another party. The answer is that s GC 1 applies in these circumstances.

19. The question arose in *Foodstuffs* and Simon France J concluded that s GD 1 of the Income Tax Act 1994 did not require "disposal" to be read narrowly and adopted a meaning for the term of simply to have "got rid" of something. His Honour stated:

> [12] The shares are trading stock, they have been disposed of, and the taxpayer received no money for them. That is the essence of the Commissioner's argument. Prior to cancellation the shares were worth $2.3 million; the cancellation was a disposal and $2.3 million is the deemed income.
>
> [13] I do not consider there is any doubt that on its face cancellation of the shares falls within the concept of "disposal". **The holder of the shares has got rid of them; it has disposed of them. Nothing in the Act suggests that disposal is generally to be read narrowly.**
>
> [Emphasis added]

20. Simon France J concluded further that there was no requirement for there to be a purchaser of the trading stock before the section could apply:

> [28] **I do not see that it matters that there is not a purchaser or transferee concerning whom an equivalent adjustment is required.** The purchaser is irrelevant to the need to adjust the accounts of the owner of the trading stock which has disposed of its property. The taxpayer bought the shares, chose to treat them as trading stock, chose to bring them within its "revenue account property" and claimed the deduction for the purchase price. When the taxpayer then chooses to dispose of the trading stock, there must be an adjustment to its tax position regardless of whether the method of disposal has further implications for a different taxpayer.
>
> ...
>
> [30] **The fact that in many of these situations the transaction is analysed or rationalised in terms of creating a transferor and transferee (the farmer as trading stock owner and the same farmer as private consumer) does not mean that every s GD 1 situation must be capable of such analysis to properly come within s GD 1.**
>
> [Emphasis added]

21. Also, as can be seen from the court's reference to a farmer (*Foodstuffs* at [30] quoted above) it accepted the view that the section applied where a farmer consumes their own stock. The court considered the section applied by creating the fiction of the farmer as a sole trader and the farmer as a private person who is the nominal transferee of the livestock at market value (*Foodstuffs* [17] and [18]).

Does the "mutuality principle" apply?

22. Another question that may arise in this context is one involving the application of the "mutuality principle". This principle can be described as "a man could not make a profit by trading with himself". The principle was established in the leading case of *New York Insurance Company v Styles* (1889) 14 App Cas 381 (HL). It has been applied in a New Zealand context in *New Zealand Plumbers' Merchants Society Ltd v CIR* (1986) 8 NZTC 5,136 (CA) at 5,139.

23. Requiring a sole trader to account for trading stock taken for own use or consumption at market value (rather than cost price) appears to require a taxpayer to account for a profit from trading with themselves.

24. However, mutuality does not apply in this context to override the clear words of the legislation that require an adjustment at market value. This issue arose in *Sharkey v Wernher* [1956] AC 58 (HL) where their Lordships approved *Watson Brothers v Hornby* [1942] 2 All ER 506, and Viscount Simonds stated (at 70):

> This decision [in *Watson Brothers v Hornby*], which your Lordships were told has ever since been adopted as the basis of assessment by the Revenue in similar cases, involves two things, first, **that the taxpayer may in certain cases be subject to a sort of dichotomy for income tax purposes and be regarded as selling to himself in one capacity what he has produced in another, and, secondly, that he is regarded as selling what he sells at market price.**
>
> [Emphasis added]

25. In *CIR v Farmers' Trading Company Ltd* [1982] 1 NZLR 449 the Court of Appeal confirmed that the conclusion reached in *Sharkey v Wernher* represented well-settled law. The court stated (at 462):

> Questions as to the treatment of stock in the accounts of a trader also arise wherever there is a transfer of assets between trading account and private account. In that situation it is well settled that an assessment must be made of the value of the assets at the time they were committed to or withdrawn from the income earning activity as the case may be, and that the value must be reflected in the accounts for income tax purposes (*Sharkey v. Wernher* [1956] A.C. 58; *Bernard Elsey Pty Ltd v Federal Commissioner of Taxation* (1969) 121 CLR 119; and 5 NZTBR *Case 49*).

Examples

26. The following examples use simple facts to help explain the application of the principles discussed above and the consequential tax adjustments that arise.

Example 1: Market value adjustment determined at the time of disposal

27. Peter is a livestock farmer and has a 30 June balance date. He is planning a large family gathering early in July 2015 to celebrate his daughter's 21st birthday. As part of this planning, Peter arranges for one of his cattle beasts to be slaughtered to provide food for the celebration. This occurs on 28 June 2015.

28. "Trading stock" is defined in s YA 1 as including livestock for the purposes s GC 1. Therefore, the cattle beast is treated under s GC 1 as having been disposed of at market value on 28 June 2015. Peter must return as income in his 2015 tax return the market value of the animal at the time because he is treated for income tax purposes as having disposed of it in the ordinary course of his farming business. Even though the meat was not consumed until July 2015, the time of disposal is the date on which the animal was taken from trading stock in June 2015, and not the later date of consumption.

29. The market value of the animal Peter must return as income in his 2015 tax return will be the current value of the cattle beast in June 2015 in the market in which he would have sold the animal in the ordinary course of his farming business. Peter could use the market value of similar animals he had sold at the time or rely on published schedules of livestock and sale yard prices.

Example 2: Market value adjustment reflects normal business trading, raw materials and using averages for small value items

30. John owns a retail bakery. The bakery sells sweet and savoury baked goods that are prepared fresh each day. Due to the amount of time John spends at the bakery he often finds it easier and more convenient to eat or take home food items acquired as trading stock for the business. The items of trading stock are:

- Freshly baked goods that would have been sold in the course of the day's trading.
- Stale and left-over baked goods that would have been unsaleable.
- Ingredients that would have been used as raw materials in the bakery (eg, flour).

31. "Trading stock" is defined in s YA 1 for the purposes of s GC 1 as including anything produced or manufactured and anything acquired for the

purposes of manufacture or disposal. This means all of the food items taken by John are treated as "trading stock".

32. John is aware that he needs to make income tax adjustments for the trading stock that he takes or consumes. Accordingly, starting on 1 April 2014 he keeps a record of the food items he takes or consumes and determines their market value. He determines the market value of the items of freshly baked goods as equal to the amount they would have usually sold for in the course of his bakery business. He determines the market value of the stale and left-over goods as nil as they could not be sold in the business and would otherwise have been dumped. This value reflects normal business trading.

33. The ingredients he takes are not usually sold in the course of the bakery business. Therefore, John needs to estimate their market value. In this case, John determines that the best way to estimate this value would be to use the current replacement cost of the ingredients. He realises that this would usually mean using the amount it would cost him to replace them. However, as the ingredients are perishables taken by him shortly after their acquisition, the cost price of each item is likely to still represent their current replacement cost. Accordingly, he uses the ingredient's cost price as his estimate of their market value.

34. John's situation involves numerous small value items of trading stock. The need to maintain these records on an on-going basis places a significant compliance burden on him. Instead, John maintains (and retains) these records for part of an income year that is a suitably representative period. From these records he determines that, on average, the market value of all trading stock he takes or consumes in a typical week is $50. Throughout the balance of the income year the amount of trading stock John consumes or takes remains consistent with the period for which he kept records. As a result, John makes an adjustment using the average of $50 per week. He makes an adjustment in his 2015 income tax return of $2,600.

35. Subsequently, the Commissioner audits John's 2015 income tax return. In respect of the $2,600 adjustment, she establishes that John has made an estimate of the adjustment required by s GC 1 using records for a suitably representative period and that he has retained these records with his business records. The Commissioner would not seek to alter John's estimate of the adjustment required under s GC 1 after considering the following factors:

- the resources available to the Commissioner;
- what the Commissioner would consider to be a typical amount for these types of adjustments;
- John's good compliance history; and
- the compliance costs involved for John to now obtain actual records for the entire year.

36. The above result is based on the stated facts. The outcome would likely be different and the Commissioner would seek further evidence if:

- John had not kept good records;
- his previous tax compliance history had been poor;
- the amount of the adjustment appeared unreasonable;
- the amounts involved were significantly greater; or
- the number of transactions was significantly less.

Example 3: Goods acquired for private purposes

37. The following two scenarios involving a builder and a farmer illustrate different aspects of the same point concerning whether goods have been acquired as trading stock or for private purposes. Whether goods have been acquired as trading stock or for private purposes will be a question of fact that needs to be decided on a case by case basis. The Commissioner strongly recommends that a record is kept or invoices are notated at the time of purchase where goods are acquired for private purposes through the taxpayer's business.

38. During the 2015 income year, a builder constructs their private residence. The materials for this construction project are purchased on trade terms through the business's normal suppliers of trading stock. The builder pays for the materials through the business bank account with the costs charged to personal drawings in their 2015 financial accounts. The costs of the materials are not included in the builder's business purchases for the year as business expenses.

39. A farmer buys 20 steer calves for $300 each in October 2014. Two of the calves are surplus to the farming operation's requirements and the farmer intends holding them for private consumption in the future. The two calves are identified at the

time of purchase and their cost is charged to the farmer's drawings for the 2015 income year. In May and October 2016 the farmer kills the two animals identified on purchase and puts the meat in the freezer.

40. The builder and farmer have both purchased goods to be used for private purposes. The builder has acquired building materials privately from normal suppliers of trading stock. The farmer has acquired livestock privately from a normal supplier of trading stock, concurrently with acquiring trading stock.

41. In both scenarios, there was never any intention or need for those goods to be used in their businesses. Section GC 1 has no application in this situation because in these circumstances it is clear the goods have not at any time formed part of the trading stock of the relevant business. For income tax purposes, the costs of the goods purchased privately have been correctly accounted for by being debited to the taxpayers' current accounts as personal drawings.

References

Legislative references
Income Tax Act 2007, ss GC 1(1)–(4) and YA 1
Income Tax Act 1994, s GD 1(1)
Subject references
Income tax; Market value; Own consumption; Own use; Private consumption; Private use; Trading stock
Related rulings or statements
"Review of Public Information Bulletins" Tax Information Bulletin Vol 23, No 1 (February 2011), at 116
"Value of produce used" *Public Information Bulletin* No 29 (February 1966), at 7
Case references
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Watson Brothers v Hornby [1942] 2 All ER 506

Other references
Concise Oxford English Dictionary (12th ed, Oxford University Press, New York, 2011)

ITEMS OF INTEREST

STATUS OF HISTORICAL INLAND REVENUE INTERNAL CIRCULARS

Background

1. Over the years Inland Revenue has produced a number of internal technical circulars and other publications ("Circulars"). These include, but are not limited to:
   - Information Circulars (1952–1973)
   - Operation(s) Circulars (1984–1996)
   - Technical Policy Circulars (1983–1989)
   - GST Circulars (1986–1987)
   - Targeted Circulars (1990–1997)
   - Technical Bulletins (1955–1967)
   - FBT Circulars (1985)
   - Technical Rulings Supplements (approx. 1977–1983).
2. The Circulars were written as guidance for Inland Revenue staff at the time they were produced, although they were also occasionally made available to taxpayers and tax professionals.
3. Inland Revenue has recently carried out a review of the content of *Public Information Bulletins* (PIBs)—see *Tax Information Bulletin*, Vol 25, No 10 (November 2013) or **www.ird.govt.nz/technical-tax/pib-review/**
4. In the course of the PIB review, it became apparent that in some cases Circulars have been cited by commentators and may have or are being relied on by advisers as representing Inland Revenue's practice or interpretation of the law.

Circulars cannot be relied on

5. The Circulars have not been updated or reviewed since publication. They cannot be relied on as representing current Inland Revenue practice or interpretation of the law.
6. Inland Revenue's current practice and interpretation is to be found in its publically published web information and materials such as public binding rulings, interpretation statements and standard practice statements, Inland Revenue guides, *Agents Answers* and *Business Tax Update*. For more information on this topic see the Commissioner's Statement "Status of Commissioner's Advice" at **www.ird.govt.nz/technical-tax/commissioners-statements/status-of-commissioners-advice.html**
7. If you have any doubts as to the applicable law you should seek to clarify this with us or seek professional advice.

References

Related Statements
"Status of the Commissioner's Advice" *Tax Information Bulletin* Vol 24, No 10 (December 2012)

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, Court of Appeal, Privy Council and the Supreme Court.

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.

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.

OVERSEAS CONTRACTOR FOUND TO HAVE A PERMANENT PLACE OF ABODE IN NEW ZEALAND

Case	TRA 43/11; [2013] NZTRA 10
Decision date	5 December 2013
Act(s)	Income Tax Act 1994, Income Tax Act 2004
Keywords	Resident, permanent place of abode

Summary

This was a case about tax residency and whether the disputant continued to be a New Zealand tax resident in the four years after he left New Zealand to work overseas. The Commissioner of Inland Revenue ("the Commissioner") considered that the disputant was a New Zealand tax resident for the first four years he was working overseas because he had a permanent place of abode in New Zealand. The disputant argued that he did not have a permanent place of abode in New Zealand during this period.

The Taxation Review Authority ("TRA") found for the Commissioner and also found that the disputant was liable for a shortfall penalty in each of the tax years in question for taking an unacceptable tax position.

Impact of decision

The decision is consistent with the Commissioner's view that in evaluating whether a person has a permanent place of abode, it is necessary to consider all the relevant circumstances, and that there must be a dwelling that can be the person's place of abode. It is also consistent with the Commissioner's view that someone with strong ties to New Zealand can have a permanent place of abode in New Zealand despite a lengthy absence (the taxpayer was absent for up to four years in the years in dispute in this case).

The Commissioner considers that the result in this case turns largely on the particular facts.

The Commissioner has been asked for her views about two particular aspects of this case. The Commissioner's comments on those aspects are as follows:

- A person with dependent children in New Zealand will not necessarily have a permanent place of abode in New Zealand if they have a close relationship with their children and make regular trips back to see them. Such connections need to be viewed in light of the totality of all of the taxpayer's circumstances. It was the totality of the circumstances in TRA 43/11 that led Judge Sinclair to conclude that the taxpayer had a permanent place of abode in New Zealand in the years in question; no one factor was determinative.
- Paying child support or other financial support to people in New Zealand may be relevant, as with any other economic connections to New Zealand. In TRA 43/11, Judge Sinclair noted that the taxpayer paid child support and contributed to other expenses for his children in New Zealand. An aspect of this case was the fact that the level of financial assistance was substantial.

The Commissioner has published an Interpretation Statement on tax residence, which covers how to determine if someone has a permanent place of abode in New Zealand for the purposes of section YD 1 (see *IS 14/01: Tax residence* at **www.ird.govt.nz/technical-tax/interpretations/2014/**). Taxpayers and their agents should refer to this statement for the Commissioner's view on the tax residence rules.

Facts

The disputant is a former New Zealand soldier who left New Zealand in July 2003 to work as a security contractor. He worked in Papua New Guinea and Iraq during the tax years in question (the tax years ending 31 March 2004 to 2007 inclusive). During those years, the disputant did not pay income tax on his foreign earnings.

The Commissioner assessed the disputant as a New Zealand resident under section OE 1(1) of the Income Tax Act 1994 and Income Tax Act 2004 on the basis that he had a permanent place of abode in New Zealand. The

disputant challenged this assessment, submitting he had been (and remained) a non-resident from the date he left New Zealand (July 2003).

Decision

Residency

The TRA noted that the phrase "permanent place of abode" is not defined in the legislation, and that case law provides guidance when determining whether a person has a permanent place of abode in New Zealand. The TRA observed that the test is an objective test and considers the totality of the circumstances.

Here the TRA examined, in considering the overall circumstances, the following points:

- place of abode (ie, whether the disputant had an available dwelling in New Zealand);
- intention to be away permanently;
- employment;
- other ties with New Zealand (including time spent in the country, family relationships, investments, other property, and tax affairs); and
- connections outside New Zealand.

Place of abode

The disputant held an investment property in New Zealand owned through an LAQC in which he held shares with his ex-wife. The property was tenanted. However, both the disputant and his ex-wife recognised the property was beneficially the disputant's and that it was only held by the LAQC for tax reasons. The TRA found that it was unlikely the ex-wife would have refused to cooperate with the disputant if the disputant had wanted to obtain possession of it, and so accordingly it was available to him as a dwelling.

The TRA found that the fact the property was an investment property and was tenanted did not outweigh it being available to the disputant as a dwelling. The TRA observed that Judge Barber had decided in *Case Q55* (1998) 15 NZTC 5,313 that an investment property could be regarded as a potential place of abode. The TRA considered that in the present case, notice could have been served on the tenants at any time if the disputant had wished to return to live in the property. As noted above, the TRA considered it unlikely that the disputant's ex-wife would have refused to cooperate.

The TRA considered it important that the property was situated in a locality where the disputant had continuing family and economic ties.

Intention

The TRA found that, while no contemporaneous documents were produced to show the disputant's intention to leave New Zealand permanently, the length of time he spent out of New Zealand supported the disputant's assertion that this was his intention. However, such an intention is not determinative.

Employment

The TRA accepted the disputant's employment involved carrying out security work in hot spots around the world and so had no association with New Zealand. His contract in Papua New Guinea had been for 12 months and there was no evidence of any right of renewal. His contracts in Iraq were 13 months each. There was no certainty of renewal at the end of each contract, though in the relevant period his contract had been renewed (as it had in the years after the relevant period).

Continuity and duration of presence in New Zealand

The TRA noted the disputant was not continuously absent from New Zealand, but returned to visit family every five to six months, spending on average 42 days a year in New Zealand during the relevant period.

Family ties

The TRA considered that the disputant's continuing relationships with his children and ex-wife were significant factors in favour of him having a permanent place of abode in New Zealand. The disputant tried to speak to his children every Sunday while in Iraq. He would spend time with his ex-wife and children while visiting New Zealand, and had holidays with the children in other countries. He also continued to pay child support and a substantial amount of other expenses for the children. This ongoing relationship distinguished this case from *Case U17* (1998) 19 NZTC 9,174, in which the taxpayer was estranged from his children.

The disputant also maintained a close relationship with his ex-wife, who was in effect his financial advisor and business partner. She held powers of attorney for him and managed his affairs in New Zealand.

Economic ties

The majority of the disputant's income continued to be spent in New Zealand on child support, expenses for the children, and on his property investments. The disputant continued to invest in New Zealand after he left the country. The TRA noted that in *Case U17*, the taxpayer also kept assets in New Zealand. In that case the taxpayer also invested further in New Zealand, subsequent to his departure from New Zealand, to provide for his family and to finance his business in Singapore. However, the TRA considered that the disputant's property investments were more closely linked with New Zealand than that in *Case U17* because of the disputant's on-going business relationship with his ex-wife.

The TRA did not place any weight on the fact the disputant maintained bank accounts for mortgage payments on his properties, that he had a superannuation fund and life insurance policy, or that he had tax obligations in New Zealand relating to his business interests. Nor did it place any particular weight on the fact the disputant transferred the ownership in his vehicles to his ex-wife two years after he left New Zealand. However, the TRA did observe that the taxpayer not selling his vehicles at the time of his departure did not support the view that he had at that time formed an intention to leave permanently.

Connections outside New Zealand

The TRA did not place any weight on the fact the disputant had not established roots in Iraq and thought that understandable given the country's security situation and the nature of the disputant's employment.

Conclusion

The TRA found that looking at the circumstances overall, the disputant continued to have a strong and enduring relationship with New Zealand. In particular, he had an available dwelling and maintained close family and financial ties to the country. Accordingly, the TRA held that the disputant was a resident of New Zealand for tax purposes for the years in dispute.

Shortfall penalties

Counsel for the disputant submitted that the line in terms of whether someone has a permanent place of abode is not clearly defined, and that it takes judgment and discernment to weigh the particular facts. The TRA accepted that it requires judgement and discernment to get residency status correct. However, it considered that the arguments supporting the disputant's position were not substantial when the circumstances were considered in their totality.

In arguing that the disputant's position was "about as likely as not to be correct", counsel for the disputant also referred to the Commissioner's public statements that an absence of three years would generally be enough for a person to be a non-resident. However, the TRA found there to be no evidence the disputant knew of those statements and relied upon them.

Accordingly, the TRA found that the tax position taken by the disputant was not "about as likely as not to be correct".

The disputant was liable to pay a shortfall penalty for taking an unacceptable tax position in each of the relevant years, reduced by 50% for previous behaviour.

The disputant has appealed this decision.

APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE TAXATION REVIEW AUTHORITY

Case	Harris v Commissioner of Inland Revenue
Decision date	13 February 2014
Act(s)	Tax Administration Act 1994
Keywords	Judicial review, error of law, *Tannadyce v Commissioner of Inland Revenue*

Summary

The applicant sought judicial review of the Taxation Review Authority's decision, in a preliminary hearing, that the Commissioner of Inland Revenue's Statement of Position ("SOP") was within the response period as stipulated in section 89AB9(5) of the Tax Administration Act 1994. The application for judicial review claimed that the Taxation Review Authority had erred in law in coming to that decision. Justice Woolford declined the application both as a matter of discretion, and on its merits.

Facts

The Commissioner of Inland Revenue ("the Commissioner"), in response to the plaintiff's SOP dated 20 November 2009, issued her SOP on 19 January 2010 (the date on or before she was required to issue her SOP), via facsimile to the plaintiff's agent at 11.07 pm and posted the same evening at 11.25 pm.

The plaintiff applied for judicial review of the Taxation Review Authority's ("TRA") decision on a preliminary point that the Commissioner's SOP was issued within the response period (two months) set out in section 89AB(5) of the Tax Administration Act 1994 ("TAA"). The application alleged that the findings of the TRA were the result of errors of law and should be judicially reviewed. The plaintiff sought a ruling that the Commissioner did not issue her SOP within the response period.

The plaintiff first filed a notice of appeal in the High Court on 30 August 2012 against the decision of the TRA, but withdrew the appeal two months later when he accepted that no appeal right on a preliminary point was available under section 26A of the Taxation Review Authorities Act 1994 ("TRAA").

Decision

Discretion

(i) Tannadyce

Woolford J began by considering the decision in *Tannadyce v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153, and observed that the Supreme Court had concluded that judicial review should only be available where the statutory procedures for tax disputes could never be invoked. His Honour noted that, in the present case, the statutory procedures had already been invoked and are on-going, with a date for the substantive hearing not having been set yet.

Woolford J further noted that the hearing of the preliminary point, before the substantive hearing, did not preclude the plaintiff from including the preliminary point in any future appeal under section 26A of the TRAA should the TRA's substantive decision be adverse to the plaintiff. He concluded that the plaintiff would be able to have his day in court, just not yet.

(ii) Withdrawn appeal

Woolford J also concluded, after reviewing the plaintiff's withdrawn notice of appeal, that the application for judicial review was the appeal recast into allegations that the TRA erred in law.

(iii) Objective of legislation

His Honour observed that the statutory procedures (disputes and challenges) are designed to resolve disputes in a just, expeditious and economical way. This legislation would be frustrated if judicial review were available in respect of all preliminary points decided prior to the substantive hearing.

Woolford J therefore declined the application for judicial review as a matter of discretion.

Error of law

In addition, his Honour concluded that the TRA had not made an error of law.

The Court dismissed the plaintiff's submission that the previous version of section 14(7) of the TAA applied because the dispute had commenced before the amendment to section 14(7) and the previous version did not allow the Commissioner to issue her SOP by facsimile without the plaintiff's consent. Woolford J, in agreeing with the TRA's finding, noted that section 14 applies when the TAA requires the Commissioner to give a notice, thus the amended section 14(7) applies to both existing and new disputes.

His Honour observed that section 14(7) (both in its previous and present forms) is a procedural provision that does not give rise to a right or duty in terms of section 17 of the Interpretation Act 1999.

Secondly, the Court rejected the plaintiff's submission that the High Court Rules ("HCRs") apply in relation to the service of the Commissioner's SOP, which should therefore be treated as being served on the subsequent working day (rule 6.6(3)) because it was served after 5 pm. The plaintiff based this submission on the fact that he made an application to the High Court for an extension of time to issue his SOP under section 89M(11) of the TAA. By agreeing in a joint memorandum in that application to file the Commissioner's SOP on 19 January 2010, the plaintiff submitted that the issuance of the Commissioner's SOP was governed by the HCRs. The Court considered rule 6.1 of the HCRs and concluded that as the TAA, not the HCRs, governed the issuance of a SOP, thus the plaintiff's submission was flawed.

Finally, the Court disagreed with the plaintiff's submission that, based on section 11 of the Electronic Transactions Act 2002, the faxed SOP should have been taken to be received on 20 January 2010 as it was the date the facsimile came to the attention of the plaintiff. The Court held, drawing an analogy to receipt by post, that the SOP should be treated as having been served at 11.07 pm when it was facsimiled.

In conclusion, the Court dismissed the plaintiff's application both as a matter of discretion and on its merits.

SUPREME COURT GRANTS LEAVE TO APPEAL IN PAYE TRUST CASE

Case	Jennings Roadfreight Limited (in liquidation) v Commissioner of Inland Revenue
Decision date	14 February 2014
Act(s)	Tax Administration Act 1994
Keywords	Section 167(1), Schedule 7 of the Companies Act, trust, liquidation

Summary

The Supreme Court has granted leave to Jennings Roadfreight Limited (in liquidation) to appeal the decision of the Court of Appeal.

Facts

Jennings Roadfreight Limited (in liquidation) applied to the Supreme Court for leave to appeal the decision of the Court of Appeal, which overturned the decision of the High Court, and concluded after consideration of the legislative scheme and history and applicable case law that an established section 167(1) trust will not be extinguished upon liquidation (Commissioner of Inland Revenue v Jennings Roadfreight Limited (in liq) [2013] NZCA 455).

Decision

The Supreme Court granted leave to appeal.

The approved grounds for appeal are whether:

a) the trust arising under section 167(1) of the Tax Administration Act 1994 continues in existence upon the liquidation of a company, in respect of funds held in the company's account; or

b) the trust is extinguished upon the liquidation, so that the funds held are dealt with in accordance with Schedule 7 of the Companies Act 1993.

REGULAR CONTRIBUTORS TO THE TIB

Office of the Chief Tax Counsel

The Office of the Chief Tax Counsel (OCTC) produces a number of statements and rulings, such as interpretation statements, binding public rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The OCTC also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal and Technical Services

Legal and Technical Services contribute the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters.

Legal and Technical Services also contribute to the "Your opportunity to comment" section.

Policy Advice Division

The Policy Advice Division advises the government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as Orders in Council.

Litigation Management

Litigation Management manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

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