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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.

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at **www.ird.govt.nz/public-consultation**

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

You can also subscribe at **www.ird.govt.nz/public-consultation** to receive regular email updates when we publish new draft items for comment.

Ref	Draft type	Title	Comment deadline
ED0202	Operational statement	Non-disclosure right for tax advice documents	28 April 2018
ED0203	Operational statement	Commissioner's statement on using a kilometre rate for business running of a motor vehicle	30 April 2018

IN SUMMARY

New legislation

Binding rulings

Questions we've been asked

IN SUMMARY (continued)

NEW LEGISLATION

This section of the *TIB* covers new legislation, changes to legislation including general and remedial amendments, and Orders in Council.

ORDER IN COUNCIL

CRS REPORTABLE JURISDICTIONS AMENDMENT REGULATIONS

Croatia and Indonesia were made reportable jurisdictions on 26 February 2018, by the following Order in Council: the *Tax Administration (Reportable Jurisdictions for the Application of CRS Standard) Amendment Regulations 2018 (LI 2018/27).*

Reportable jurisdictions are relevant to the Common Reporting Standard (CRS rules) enacted in New Zealand last year as part of New Zealand's implementation of the G20/OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters, or AEOI. Reportable jurisdictions are territories to which Inland Revenue (IRD) will provide certain information on non-residents supplied to the IRD by financial institutions in accordance with the CRS rules.

An initial list of 58 reportable jurisdictions was established by the *Tax Administration (Reportable Jurisdictions for Application of CRS Standard) Regulations 2017* made under section 226D of the Tax Administration Act 1994 (the Act). The Order in Council establishing the initial list of 58 reportable jurisdictions and the Order in Council adding Croatia and Indonesia can be found at **legislation.govt.nz**.

Application date

Croatia and Indonesia are reportable jurisdictions for reporting periods beginning on or after 1 July 2017. Section 226D(2) of the Act 1994 allows for the retroactive application of these regulations.

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently. The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates their tax liability based on it.

For full details of how binding rulings work, see *Binding rulings: How to get certainty on the tax position of your transaction (IR715)*. You can download this publication free from our website at **www.ird.govt.nz**

Note (not part of the Ruling):

These Rulings are a reissue of BR Pub 14/01 to 14/05 and apply from the beginning of the first day of the 2017/18 income year (ie the date of the expiry of the previous Rulings).

These five Public Rulings, BR Pub 18/01 to BR Pub 18/05, deal with the ability of a New Zealand resident partner of an Australian limited partnership to claim foreign tax credits for Australian income tax and dividend withholding tax paid by an Australian limited partnership. The Rulings do not consider any other situations involving foreign income and foreign tax paid. The Rulings discuss Australian limited partnerships that are corporate limited partnerships for Australian tax purposes and are treated under Australian tax law as companies while in New Zealand they retain partnership and flow through tax treatment.

A foreign tax credit will be available to the New Zealand partners of an Australian limited partnership for Australian income tax or dividend withholding tax that is paid by the limited partnership in certain situations (detailed below). The amount and timing of the tax credit is determined under subpart LJ of the Income Tax Act 2007.

Public Ruling - BR Pub 18/01: Income tax – Australian source income earned by Australian limited partnership and foreign tax credits

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

Taxation Laws

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

This ruling is on ss BH 1, HG 2, LJ 1 and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement).

Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) or s YD 2 (residence of companies) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

The Arrangement to which this Ruling applies

The Arrangement is as follows:

- Australian source income is earned by an Australian limited partnership that is income to the New Zealand partners under ss HG 2 and CB 35.
- Australian income tax is paid on that income.

To avoid doubt, the Arrangement does not include arrangements where subpart BG applies to void the arrangement.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are allowed a foreign tax credit for the Australian income tax paid. The foreign tax credit arises under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement, and ss BH 1 and LJ 1. Under s HG 2 the tax credit claimed by the New Zealand partners must be in proportion to their partnership share of the income earned by the partnership.

The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2017/18 income year to the last day of the 2021/22 income year.

This Ruling is signed by me on 22 February 2018.

Susan Price
Director, Public Rulings

Public Ruling - BR Pub 18/02: Income tax – distributions made by Australian limited partnership and foreign tax credits

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

Taxation Laws

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

This ruling is on ss BH 1, HG 2, LJ 1 and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement).

Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) or s YD 2 (residence of companies) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Dividend withholding tax** means the amount withheld from a dividend to discharge the liability to pay tax on dividends under s 128B of the Income Tax Assessment Act 1936 (Aust).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

The Arrangement to which this Ruling applies

The Arrangement is as follows:

- An Australian limited partnership makes a distribution to its partners and the New Zealand partners are not liable for New Zealand income tax on their partnership share of that distribution.
- Australian income tax in the form of dividend withholding tax is deducted from the payments made to the New Zealand resident partners.

To avoid doubt, the Arrangement does not include arrangements where subpart BG applies to void the arrangement.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are not allowed a foreign tax credit for the Australian dividend withholding tax withheld on the distribution made by the limited partnership.

The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2017/18 income year to the last day of the 2021/22 income year.

This Ruling is signed by me on 22 February 2018.

Susan Price
Director, Public Rulings

Public Ruling - BR Pub 18/03: Income tax – distributions made by Australian unit trust to Australian limited partnership and foreign tax credits

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

Taxation Laws

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

This ruling is on ss BH 1, HG 2, LJ 1 and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement).

Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

The Arrangement to which this Ruling applies

The Arrangement is as follows:

- A distribution, which is a dividend under s CD 1, is made by a unit trust to an Australian limited partnership.
- The limited partnership pays Australian income tax on that distribution.

To avoid doubt, the Arrangement does not include arrangements where subpart BG applies to void the arrangement.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are allowed a foreign tax credit for the Australian income tax paid. The foreign tax credit arises under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement, and ss BH 1 and LJ 1. Under s HG 2 the tax credit claimed by the New Zealand partners must be in proportion to their partnership share of the income earned by the partnership.

The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2017/18 income year to the last day of the 2021/22 income year.

This Ruling is signed by me on 22 February 2018.

Susan Price
Director, Public Rulings

Public Ruling - BR Pub 18/04: Income tax – franked dividend received by Australian limited partnership and foreign tax credits

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

Taxation Laws

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

This ruling is on ss BH 1, HG 2, LJ 1 and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement).

Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Franking credit** for Australian tax purposes is defined in s 205-15 of the Income Tax Assessment Act 1997 (Aust).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

The Arrangement to which this Ruling applies

The Arrangement is as follows:

- An Australian limited partnership receives a dividend that has a franking credit attached.
- The New Zealand partners are liable to tax on their partnership share of the dividend received by the limited partnership under ss HG 2 and CD 1. The dividend income derived by the New Zealand partners excludes the amount of franking credits used to reduce the amount of Australian income tax payable.

To avoid doubt, the Arrangement does not include arrangements where subpart BG applies to void the arrangement.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are not allowed a foreign tax credit for the franking credit attached to the dividend received by the limited partnership.

The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2017/18 income year to the last day of the 2021/22 income year.

This Ruling is signed by me on 22 February 2018.

Susan Price
Director, Public Rulings

Public Ruling - BR Pub 18/05: Income tax – tax paid by an Australian limited partnership as a "head company" and foreign tax credits

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

Taxation Laws

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

This ruling is on ss BH 1, HG 2, LJ 1 and articles 1(2) and 23(3) of the Schedule to the Double Taxation Relief (Australia) Order 2010 (the Australia and New Zealand Double Tax Agreement).

Definitions

For this ruling:

- **Limited partnership** means a partnership that does not meet the definition of company under s YA 1 and is defined as a corporate limited partnership and treated as a company for Australian income tax purposes under Division 5A of the Income Tax Assessment Act 1936 (Aust).
- **New Zealand partner** means a partner that is resident in New Zealand under s YD 1 (residence of natural persons) or s YD 2 (residence of companies) and is not treated as non-resident under a double tax agreement.
- **Australian income tax** means income tax paid to the Australian Government at the company tax rate (as set out in s 23(2) of the Income Tax Rates Act 1986 (Aust)).
- **Partnership share** is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

The Arrangement to which this Ruling applies

The Arrangement is as follows:

- An Australian limited partnership is a head company under s 703-15(2) of the Income Tax Assessment Act 1997 (Aust).
- The limited partnership pays income tax in Australia on all the taxable income of the consolidated group.
- The taxable income of the consolidated group in Australia includes income, such as business income earned by Australian subsidiary companies that does not form part of the New Zealand partners' partnership share of the partnership income under ss HG 2 and CB 35.

The Arrangement excludes situations where one or more of the group entities are in a loss position.

To avoid doubt, the Arrangement does not include arrangements where subpart BG applies to void the arrangement.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- New Zealand partners in the limited partnership are allowed a foreign tax credit for the Australian income tax paid on the income the limited partnership earns directly (and not through the subsidiary companies). The foreign tax credit arises under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement, ss BH 1 and LJ 1. Under s HG 2 the tax credit claimed by the New Zealand partners must be in proportion to their partnership share of the income the partnership earns directly.

The period or income year for which this Ruling applies

This ruling will apply from the first day of the 2017/18 income year to the last day of the 2021/22 income year.

This Ruling is signed by me on 22 February 2018.

Susan Price
Director, Public Rulings

Commentary on Public Rulings BR Pub 18/01 – 18/05

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in the five Public Rulings BR Pub 18/01 – BR Pub 18/05 ("the Rulings").

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

Summary

1. Foreign tax credits for Australian tax paid by Australian limited partnerships are available to New Zealand resident partners, in proportion to their partnership share, when all the following are met:
    - the Australian limited partnership is treated as a company for Australian income tax purposes but not for New Zealand tax purposes;
    - the income on which the tax was paid is assessable in New Zealand; and
    - the Australian tax paid was paid on the income that is assessable in New Zealand.

Background

2. The question being considered is whether a foreign tax credit is available to New Zealand residents that earn Australian source income through a limited partnership registered in a state of Australia (that is an Australian limited partnership).
3. BR Pub 18/01 to BR Pub 18/05 are reissues of BR Pub 14/01 to BR Pub 14/05 published in *Tax Information Bulletin* Vol 26, No 6 (July 2014). BR Pub 14/01 to BR Pub 14/05 were reissues of BR Pub 10/01 to BR Pub 10/05 and expired on the last day of the 2016/17 income year.
4. The relevant Australian limited partnerships are those that are treated as corporate limited partnerships for Australian income tax purposes, under s 94D of the Income Tax Assessment Act 1936 (Aust), but do not meet the definition of "company" in s YA 1 of the New Zealand Income Tax Act 2007. The Australian law on limited partnerships registered in Australia and the Australian tax treatment must be considered before looking at the relevant foreign tax credit legislation in New Zealand.

Australian partnerships

5. There are three types of Australian partnerships. The three types are:
    - (ordinary) partnerships;[1]
    - limited partnerships; and
    - incorporated limited partnerships.
6. The three different types of partnerships are taxed differently under Australian income tax law.

(Ordinary) partnerships

7. The first, and most common, type of Australian partnership is an ordinary partnership. The regulation of ordinary partnerships in Australia falls under state law which includes the:
    - Partnership Act 1958 (Victoria);
    - Partnership Act 1892 (New South Wales);
    - Partnership Act 1891 (Queensland);
    - Partnership Act 1963 (Australian Capital Territory);
    - Partnership Act 1891 (South Australia);

[1] Referred to as "partnerships" in Australian state legislation.

- Partnership Act 1891 (Tasmania);
- Partnership Act 1997 (Northern Territory); and
- The Partnership Act 1895 (Western Australia).

8. These Acts provide that an ordinary partnership is the relation between people carrying on a business in common with a view of profit. The partners are jointly and severally liable for the legal actions and debts of the partnership, have management control, share the profits of the partnership in predefined proportions, and have apparent authority as agents of the partnership to bind all the other partners in contracts with third parties. An ordinary partnership is not a separate legal entity.

Limited partnerships

9. The second type of Australian partnership is a limited partnership. Limited partnerships in Australia can be formed and registered only under:
    - Part 3, ss 49 – 79 Partnership Act 1958 (Victoria);
    - Part 3, ss 50A – 81A Partnership Act 1892 (New South Wales);
    - Chapter 3, ss 48 – 69 Partnership Act 1891 (Queensland);
    - Part 3, ss 47-84 – Partnership Act 1891 (South Australia);
    - Part 3, ss 50 – 101 Partnership Act 1891 (Tasmania); and
    - Limited Partnership Act 2016 (Western Australia).
10. The state laws require a limited partnership to satisfy the general law requirements of a partnership (set out at [8] above), as far as they are consistent with the requirements for a limited partnership discussed below. The partnership laws of the Australian Capital Territory and the Northern Territory do not allow for limited partnerships; they only allow for incorporated limited partnerships.
11. The provisions, listed above, provide that a limited partnership is one where there are both general partners and limited partners. The general partners have the rights and obligations as in an ordinary partnership. The limited partners are not jointly and severally liable for the debts of the partnership and their exposure is limited to their partnership investments, and a corresponding share of the profits. The limited partners also cannot participate in the management of the partnership or act as an agent for the partnership. Despite the limited liability of the limited partner(s), a limited partnership does not have a separate legal identity (unless it is an incorporated limited partnership).

Incorporated limited partnerships

12. The third type of Australian partnership is an incorporated limited partnership. An incorporated limited partnership is a type of limited partnership, but because of its incorporation it is treated differently under Australian law. Incorporated limited partnerships can be formed in all Australian states and territories. An incorporated limited partnership is a partnership that must have at least one general partner and one limited partner. Under the relevant state laws, the partnership is a separate legal entity with the powers and capacity of a natural person subject to the limitations in the partnership agreement. As discussed below, an incorporated limited partnership is not a partnership under New Zealand's Income Tax Act 2007 because it is a separate legal entity under Australian state laws. As a result, incorporated limited partnerships are not covered by these Rulings.

Australian tax treatment of Australian limited partnerships

13. A "limited partnership" is defined in s 995-1 of the Income Tax Assessment Act 1997 (Aust)[2] as:
    (a) an association of persons (other than a company) carrying on business as partners or in receipt of ordinary income or statutory income jointly, where the liability of at least one of those persons is limited; or
    (b) an association of persons (other than one referred to in paragraph (a)) with legal personality separate from those persons that was formed solely for the purpose of becoming a VCLP, an ESVCLP, an AFOF or a VCMP and to carry on activities that are carried on by a body of that kind.[3]

[2] The definition in the Income Tax Assessment Act 1936 (Aust) is the same and referenced to that in the Income Tax Assessment Act 1997 (Aust).

[3] A VCLP is a venture capital limited partnership and defined in s 118-405(2) of the Income Tax Assessment Act 1997 (Aust); an ESVCLP is an early stage venture capital limited partnership and defined in s 118-407(4) of the 1997 Act; an AFOF is an Australian venture capital fund of funds defined in s 118-410(3) of the 1997 Act and a venture capital management partnership is defined in s 94D(3) of the 1936 Act. In all cases these types of limited partnership must have been registered under Part 2 of the Venture Capital Act 2002 (Aust).

BINDING RULINGS

Corporate limited partnerships

14. Section 94D of the Income Tax Assessment Act 1936 (Aust), Corporate Limited Partnerships, provides that a limited partnership is a corporate limited partnership if:

- the year of income is the 1995-96 or later year of income; or
- the partnership was formed on or after 19 August 1992; or
- the partnership was formed before 19 August 1992 and either it does not pass the continuity of business test set out in Division 5A at s 94E, or there has been a change in composition of the partnership after 19 August 1992 and no election has been made by the partners under s 94F that the partnership not be treated as a corporate limited partnership; and
- the limited partnership is not either a foreign hybrid limited partnership[4] in relation to the particular year of income, or a VCLP, an ESVCLP, an AFOF or a VCMP.

15. These rulings only apply to limited partnerships that are also corporate limited partnerships under s 94D of the Income Tax Assessment Act 1936 (Aust). Corporate limited partnerships do not have identities separate from their members. Section 94D excludes certain limited partnerships (VCLP, ESVCLP, AFOF, venture capital management partnerships, and foreign hybrid limited partnerships (defined in footnote 3 below)) from being corporate limited partnerships.

16. Division 5A concerns the taxation of limited partnerships. Nothing in Division 5A of the Income Tax Assessment Act 1936 (Aust) overrides the state partnership laws by recharacterising limited partnerships as companies. Division 5A simply treats a limited partnership that also meets the test for a corporate limited partnership as a company for certain Australian income tax purposes. In particular, subdivision C of Division 5A provides:

- company includes a reference to a corporate limited partnership (s 94J);
- partnership does not include a reference to a corporate limited partnership (s 94K);
- dividend includes a reference to a distribution made by a corporate limited partnership (s 94L).

17. This is discussed in the explanatory memorandum to the Taxation Laws Amendment Act (No. 6) 1992 (Aust) that accompanied the introduction of subdivision C Division 5A:

> Under the existing law, limited partnerships are treated as partnerships for taxation purposes. However, the structure of a limited partnership is comparable to that of a limited liability company in that there are "limited partners" who are similar to shareholders in a company; they do not take part in the management of the business, and their liability generally is limited to the extent of their investment.
>
> Limited partners are not at risk beyond the limit of their liability. Generally, their liability is limited to their investment. They are not required to make good losses of their partnership, nor are they liable to meet the obligations of the partnership. If limited partners are treated in the same way as partners in any other partnership, however, they may benefit from distributions of losses that exceed their limited liability. Those losses could be used to reduce taxable income, and so tax paid, even though the loss is not one that exposes the partner to any risk of having to meet obligations or make good losses.
>
> State legislation enabling the formation of limited partnerships currently exists in New South Wales, Victoria, Western Australia, Queensland and Tasmania.
>
> **Explanation of proposed amendments**
>
> The Bill will amend the Principal Act to introduce taxation arrangements in new Division 5A of Part III of the Act for taxing limited partnerships …
>
> **The object of this new Division is to ensure that limited partnerships will be treated as companies for taxation purposes. This is not confined to the payment of income tax by limited partnerships, but includes all other purposes under income tax law, including the payment of tax by partners in limited partnerships; for instance, imputation and the taxation of dividends to shareholders** … [Emphasis added]

Australian tax consolidated groups

18. The introduction of Australia's consolidation rules reinforced that corporate limited partnerships are to be treated as companies for Australian income tax law. The explanatory memorandum to the New Business Tax System (Consolidation) Act (No. 1) 2002 (Aust) makes it clear that corporate limited partnerships can also be head companies within that regime because they are sufficiently equivalent to a company for Australian income tax purposes.

> 3.29 To qualify as a head company, an entity must be a company as defined in s 995-1 of the ITAA 1997.
>
> 3.30 A corporate limited partnership will also satisfy this requirement. This is consistent with the objective of ensuring consolidated groups generally receive a tax treatment like ordinary companies because these partnerships are effectively treated as companies for income tax purposes.

[4] A foreign hybrid limited partnership is formed outside Australia as defined in ss 830-10(1) and (2) of Income Tax Assessment Act 1997 (Aust).

BINDING RULINGS

19. The effect of becoming a head company in an Australian consolidated group is that all the income of the group is deemed to have been earned by the head company and not by the individual companies in the group: s 701-1 of the Income Tax Assessment Act 1997 (Aust).

Application of the Legislation

Australian limited partnerships under New Zealand income tax law

Legislation

20. As these rulings focus on the ability of New Zealand partners to claim foreign tax credits for tax paid or deducted by an Australian limited partnership, the key provisions in the Act are:
    - the definitions of "company", "partnership", and "limited partnership" in s YA 1;
    - section HG 2, which sets out that partnerships are transparent;
    - section CB 35, which sets out that income arising from subpart HG is assessable income to the partner;
    - section BH 1, which sets out the relationship between the Double Taxation Relief (Australia) Order 2010 and subpart LJ. The Schedule to the Double Taxation Relief (Australia) Order 2010 contains the Convention between Australia and New Zealand for the avoidance of double taxation with respect to taxes on income and fringe benefits and the prevention of fiscal evasion (signed 29 June 2009, entered into force 18 March 2010) (the Australia and New Zealand Double Tax Agreement); and
    - subpart LJ, which determines the amount and timing of a foreign credit.
21. In addition to the above provisions, articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement provide New Zealand partners in an Australian limited partnership with relief for Australian income tax and dividend withholding tax paid by the limited partnership.
22. These provisions are discussed below.

Limited partnerships

23. Section YA 1 sets out the definition of a company:

    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:

    …

    (ac) includes a listed limited partnership:

    (ad) includes a foreign corporate limited partnership:

    (b) includes a unit trust:

    …
24. A listed limited partnership and a foreign corporate limited partnership are also defined in s YA 1. In essence, they are defined respectively as a New Zealand or overseas limited partnership that is listed on a recognised exchange, and an overseas limited partnership that is treated as a separate legal entity under the partnership laws of the country concerned.
25. Unless an Australian limited partnership is listed on a recognised exchange or the underlying state partnership laws give it a separate legal personality, it will not meet the definition of a company in New Zealand. This is irrespective of whether it is treated as a company for Australian income tax purposes.
26. Section YA 1 defines:
    - "partnership" in paragraph (d) as meaning a limited partnership; and
    - "limited partnership" as including an overseas limited partnership as defined in s 4 of the Limited Partnerships Act 2008 but excluding a listed limited partnership or a foreign corporate limited partnership.
27. Section 4 of the Limited Partnerships Act 2008 defines an overseas limited partnership as:

    a partnership formed or incorporated outside New Zealand with —

    (a) 1 or more general partners who are liable for all of the debts and liabilities of the partnership; and

    (b) 1 or more limited partners who have only limited liability for the debts and liabilities of the partnership

28. Therefore, an Australian limited partnership that:

- meets the definition of an "overseas limited partnership" under s 4 of the Limited Partnerships Act 2008, and
- is not listed on a recognised exchange, and
- is not treated as a separate legal entity in Australia under Australian state partnership laws,

will be treated as a partnership under New Zealand tax law.

Partners in limited partnerships

29. The tax treatment of New Zealand partners in Australian limited partnerships that meet the definition of "partnership" in s YA 1 is set out in s HG 2(2):

> … for a partner in their capacity of partner of a partnership, the amount of income, tax credit, rebate, gain, expenditure, or loss that they have from a particular source, or of a particular nature, is calculated by multiplying the total income, tax credit, rebate, gain, expenditure, or loss of the partners of the partnership from the particular source or of the particular nature by the partner's partnership share in the partnership's income.

30. "Partnership share" is defined in s YA 1 as meaning for a particular right, obligation, or other property, status or thing, the share that a partner has in the partnership.

31. The effect of s HG 2(2) and the definition of "'partnership share" is that the assessable income of partners in a partnership includes their "partnership share" of the partnership income. Section CB 35 also confirms that this is assessable income of the partner:

> A person who is a partner has an amount of income to the extent to which an amount of income results from the application of subpart HG (Joint venturers, partners, and partnerships) to them and their partnership.

32. Section HG 2(2) also makes reference to tax credits. Section LA 10 provides that an amount is a tax credit of a person if it is their tax credit under a provision of Part L. Foreign tax credits arise under subpart LJ so are tax credits under s LA 10. Under s HG 2(2), therefore, partners are entitled to foreign tax credits in proportion to their partnership share.

Foreign tax credits

33. The Australian tax considered in these rulings is income tax and dividend withholding tax. Section BH 1(4) means the Australia and New Zealand Double Tax Agreement has an overriding effect as to New Zealand income tax, including the income and tax credit sections of the Income Tax Act 2007. The income and tax credit sections, therefore, must be read together with the relevant Australia and New Zealand Double Tax Agreement articles. Where there is any inconsistency between the two, the domestic law must be read subject to the Australia and New Zealand Double Tax Agreement. The combined effect of the Australia and New Zealand Double Tax Agreement, and s BH 1 and subpart LJ of the Income Tax Act 2007 is that a New Zealand tax resident is allowed a tax credit for Australian income tax and dividend withholding tax. Articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement provide a New Zealand partner in an Australian limited partnership with relief for income tax or dividend withholding tax that the limited partnership pays in Australia. The relief is in the form of a tax credit in New Zealand under subpart LJ. Subpart LJ calculates the amount of the tax credit on the basis of a segment of foreign-sourced income under ss LJ 1(1), LJ 1(2)(a), and LJ 2(1):

> **LJ 1 What this subpart does**
>
> **When tax credits allowed**
>
> (1) This subpart provides the rules for dividing assessable income from foreign-sourced amounts into segments and allows a tax credit for **foreign income tax paid in relation to a segment of that income**.
>
> **Limited application of rules**
>
> (2) The rules in this subpart apply only when—
>
> (a) a person resident in New Zealand derives assessable income that is sourced from outside New Zealand; and
>
> …
>
> **LJ 2 Tax credits for foreign income tax**
>
> **Amount of credit**
>
> (1) A person described in section LJ 1(2)(a) has a tax credit for a tax year for an amount of **foreign income tax paid on a segment of foreign-sourced income**, determined as if the segment were the net income of the person for the tax year. The amount of the New Zealand tax payable is calculated under section LJ 5. [Emphasis added].

34. A "segment of foreign-sourced income" is defined in s LJ 4 as:

> an amount of assessable income derived from 1 foreign country that comes from 1 source or is of 1 nature.

35. Therefore three key elements must be satisfied for a New Zealand resident partner of an Australian limited partnership to be allowed a foreign tax credit under articles 1(2) and 23(3) of the Australia and New Zealand Double Tax Agreement, and ss BH 1, LJ 1 and HG 2 of the Income Tax Act 2007:
    - A person resident in New Zealand must derive assessable income sourced from outside New Zealand.
    - Foreign income tax must be paid.
    - That foreign income tax must be paid on that foreign-sourced assessable income.
36. It follows that a foreign tax credit is not available where:
    - There is no assessable income calculated under New Zealand tax law.
    - No foreign income tax has been paid.
    - The foreign income tax has not been paid on income that is assessable in New Zealand.
37. The foreign income tax could be Australian income tax or dividend withholding tax as appropriate.

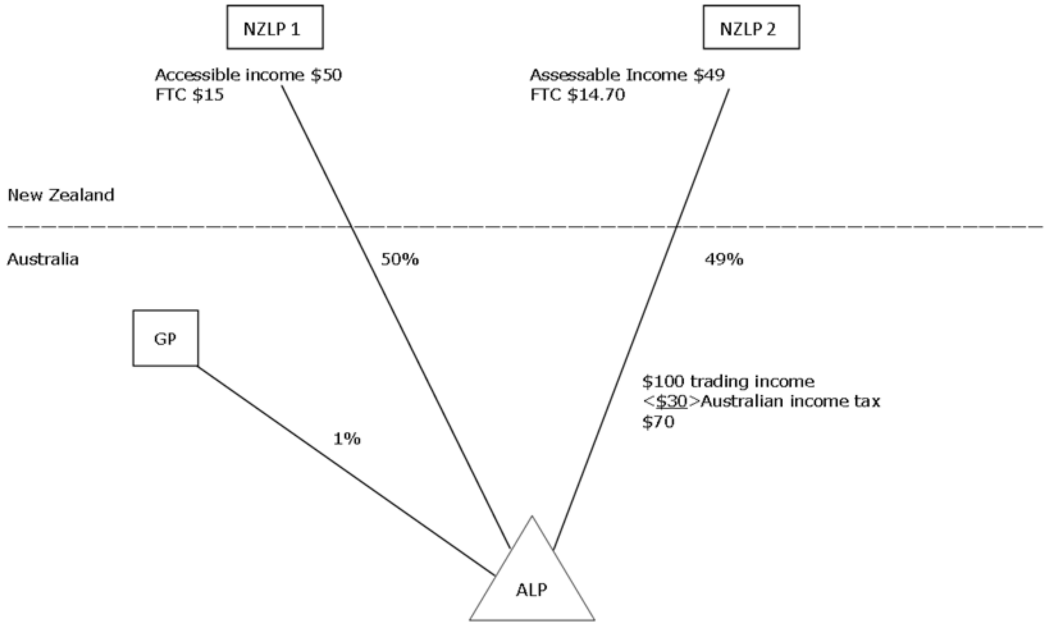
Examples

38. The following examples are included to assist in explaining the application of the law.
39. This section of the commentary discusses the specific factual scenarios related to each of the five public rulings. In all cases they involve Australian tax being paid, but the issue is whether a foreign tax credit is available to the New Zealand partners. Whether a foreign tax credit is available turns on whether the three key elements set out above at [35] are satisfied.
40. In all five examples the Australian limited partnership ("ALP") has three partners:
    - one general partner ("GP") based in Australia having a 1% partnership share; and
    - two New Zealand resident limited partners ("NZLP 1" and "NZLP 2") with 50% and 49% partnership shares respectively (the 50% and 49% partners). In examples 1, 2 and 5, NZLP 1 and NZLP 2 may be either a company or a natural person but in examples 3 and 4 are natural persons only.
41. The partners in examples 3 and 4 are limited to natural persons. If the partners were New Zealand resident companies the dividends would generally be exempt income under s CW 9(1), and so foreign tax credits would not be available.

    [As an aside, dividends received by a company in New Zealand are not exempt if one of the exclusions in s CW 9(2) applies. The exclusions in s CW 9(2) include dividends paid in relation to rights that are:
    - a direct income interest in a foreign company that is a non-attributing interest in a FIF because it falls within one of the relevant exclusions in s CW 9(2)(a); or
    - a fixed-rate foreign equity (s CW 9(2)(b)); or
    - rights to a deductible foreign equity distribution (s CW 9(2)(c)).

    The Commissioner acknowledges that a New Zealand partner could hold a non-attributing interest in a FIF through an ALP, and any dividends received by a corporate partner in such circumstances would not be exempt income. If a partner's interest is an attributing interest in a FIF, s LJ 2(6) and (7) specify which amount of income is to be used for the foreign tax credit provisions.]
42. The Australian limited partnership is treated as a corporate limited partnership for Australian income tax law but is treated as a partnership for New Zealand income tax law (as discussed above).
43. To avoid currency exchange issues, the reference to "$" is not a reference to any particular currency; it is used simply for illustrative purposes.

Example 1: Australian source income



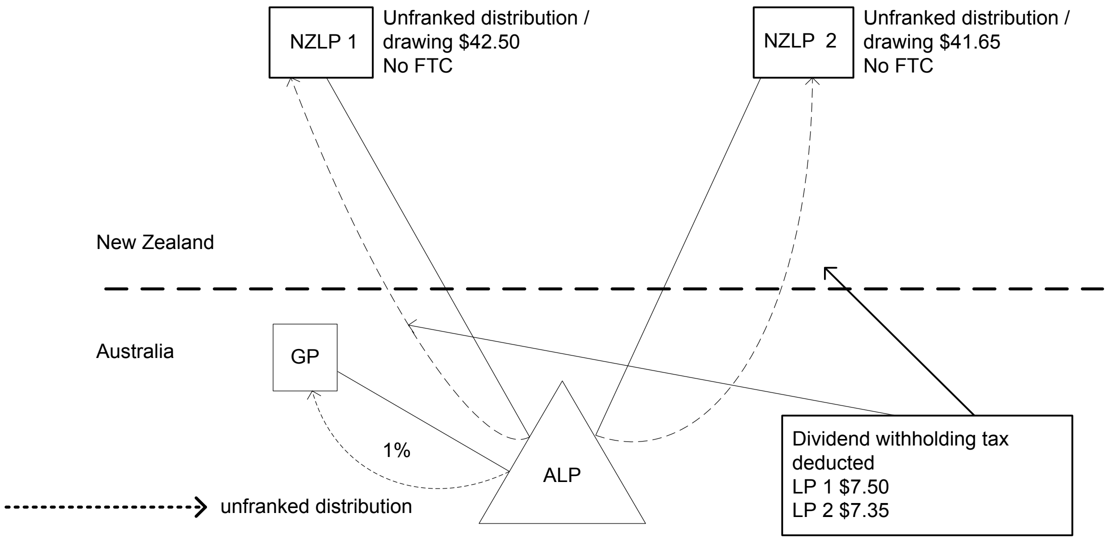
44. ALP earns trading income in Australia of $100 and pays Australian income tax of $30 on it.

45. The trading income is partnership income to the partners, so they must include their partnership share in their New Zealand taxable income. The Australian income tax is allowed as a foreign tax credit in the same proportion as the partner's partnership share. This is because the three key elements are met:

- The partnership income is assessable to the partners under ss HG 2 and CB 35.
- The ALP has paid Australian income tax on the income.
- The Australian income tax was paid on the trading income of the ALP (which is the income that is assessable in New Zealand).

46. In the specific example, the 50% partner – NZLP 1 – has assessable income of $50 and a foreign tax credit of $15 and the 49% partner – NZLP 2 – has assessable income of $49 and a foreign tax credit of $14.70. These are their respective partnership shares of the trading income and the Australian income tax paid.

Example 2: Distribution made by Australian limited partnership



47. The ALP makes an unfranked distribution to the partners of $100. For Australian income tax purposes, this distribution is treated as a dividend and Australian dividend withholding tax of 15% is deducted. The net amount distributed is then $85 in total.

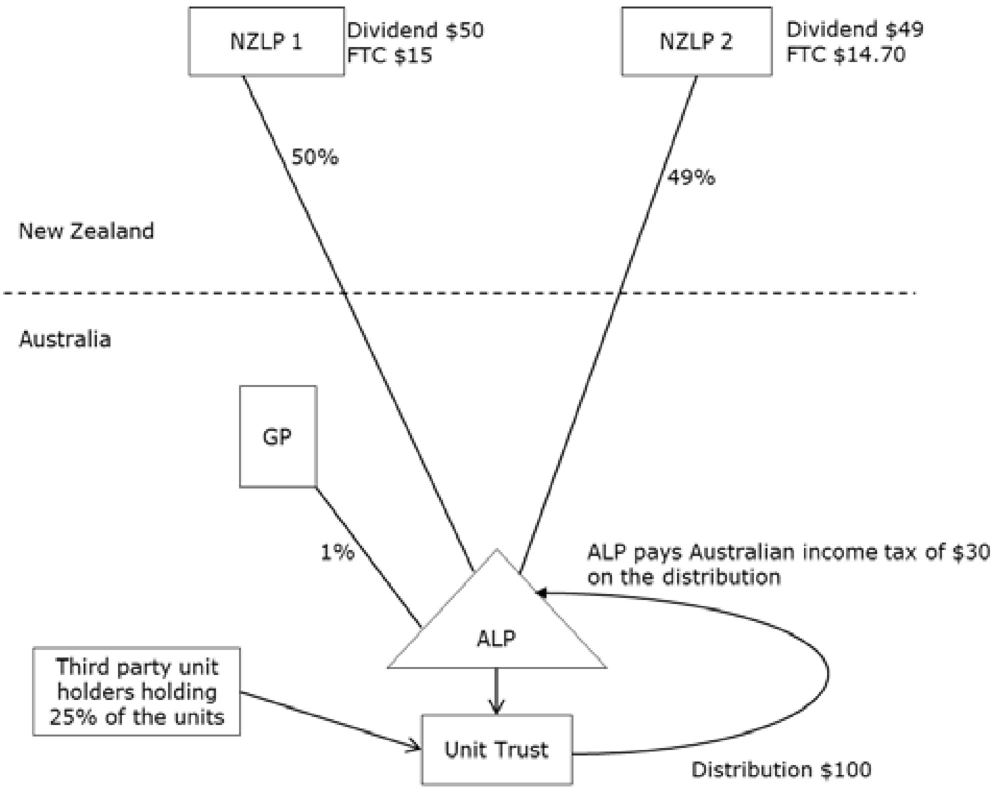
48. In this situation only the second of the three elements has been met. While the Australian income tax – dividend withholding tax of 15% – has been paid, it has not been paid on New Zealand assessable income. This is because, for New Zealand income tax purposes, the distribution from a partnership would be drawings and not subject to New Zealand income tax.

49. Therefore, no foreign tax credit is available to the New Zealand partners.

50. Example 2, therefore, differs from example 1. In example 1, the partners are treated (under s HG 2) as deriving the income derived by the partnership. As a result, the partners in example 1 are treated as directly deriving the income. The income is taxable in the hands of the partners, and a foreign tax credit is available.

51. In example 2, the payment to the partners is a drawing down of the partners' capital: *Case F123* (1984) 6 NZTC 60,117. The payment does not relate to any income derived by the partnership that has flowed through to the partners under s HG 2. As the payment is drawings it is not taxable in the hands of the partners, and so no foreign tax credit is available.

Example 3: Distribution made from unit trust



52. In example 3, the ALP owns units in a unit trust and the New Zealand partners are natural persons. As noted above at [8] and [10], one of the requirements for an ALP is that it is carrying on a business. The above ALP is in the business of managing various investments (including its investment in the unit trust). As seen above at [23], a unit trust is included in the definition of "company" for New Zealand income tax purposes. The unit trust distributes income of $100 to the ALP and the ALP pays income tax on the distribution of $30.[5]

53. The payment of the distribution from the unit trust to the ALP is a purely domestic transaction in Australia, so article 1(2) of the DTA does not affect Australia's taxation rights on that transaction. This means that Australia is allowed to tax the ALP in example 3 to the extent allowed under its taxation laws (and so is not limited by the dividend article in the DTA to 15%). In accordance with the Australia and New Zealand Double Tax Agreement, New Zealand is required to provide relief in the form of foreign tax credits for the income tax paid in Australia by the ALP on the income that is assessable in New Zealand.

54. Under New Zealand income tax law the distribution from an Australian unit trust is treated as a dividend under s CD 1.

55. In this case all three elements are met:

- The dividend will be assessable income to the partners under ss CD 1 and HG 2.
- Australian income tax has been paid.
- The Australian income tax was paid on the distribution.

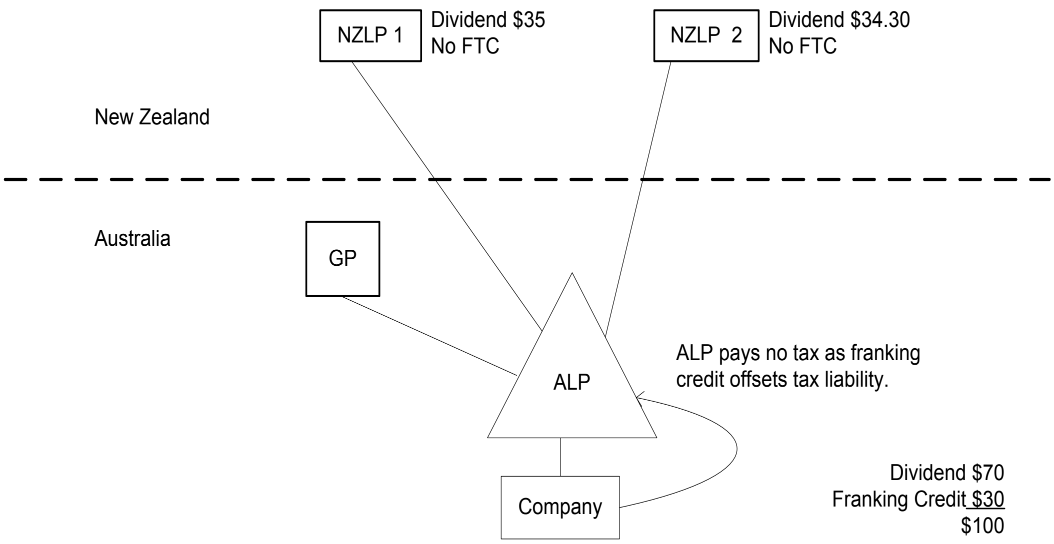
[5] Under Australian tax law, a distribution from a unit trust is taxed as a distribution from a trust or as a dividend from a company (depending on the circumstances of the unit trust). The reference in this example to a distribution includes both situations.

56. Therefore a foreign tax credit will be allowed in proportion to the partner's partnership share of partnership income. Under subpart LJ, the foreign tax credit is limited to the notional tax liability that the taxpayer would have paid on the relevant segment of income in New Zealand.[6] In the current example the relevant partners are natural persons, so the tax credit is limited to their marginal tax rate (being 30% in this example). This means that the 50% partner – NZLP 1 – has dividend income of $50 and a foreign tax credit of $15, while the 49% partner – NZLP 2 – has dividend income of $49 and a foreign tax credit of $14.70.

57. If no Australian income tax is paid on the distribution, the New Zealand partners will not be entitled to a foreign tax credit. This example only deals with the situation where the ALP pays Australian income tax on the same segment of income that is taxable to the New Zealand partners (ie, the distribution). The example does not consider whether a foreign tax credit arises where the Australian unit trust pays tax on the income it derives.

58. Example 3 differs from example 2. The difference between the two examples is that there is assessable income in New Zealand in example 3. Specifically, the payment to the partners in example 2 is a drawing down of the partners' capital and so is not assessable income in New Zealand. In contrast, in example 3 the partners are deemed to derive directly the dividend income derived by the partnership under s HG 2. The dividend is assessable income of the partners in New Zealand.

Example 4: Franked dividend received by Australian limited partnership



59. The ALP is treated as owning a subsidiary company under Australian tax law. The company pays a $70 franked dividend to the ALP. The New Zealand partners of the ALP are natural persons. The underlying basis of the franking credit was income tax the subsidiary company had paid previously on its trading income. While dividends received by the ALP are subject to tax in Australia, the attached franking credit offsets any tax liability on this dividend so the ALP does not pay tax on that income.

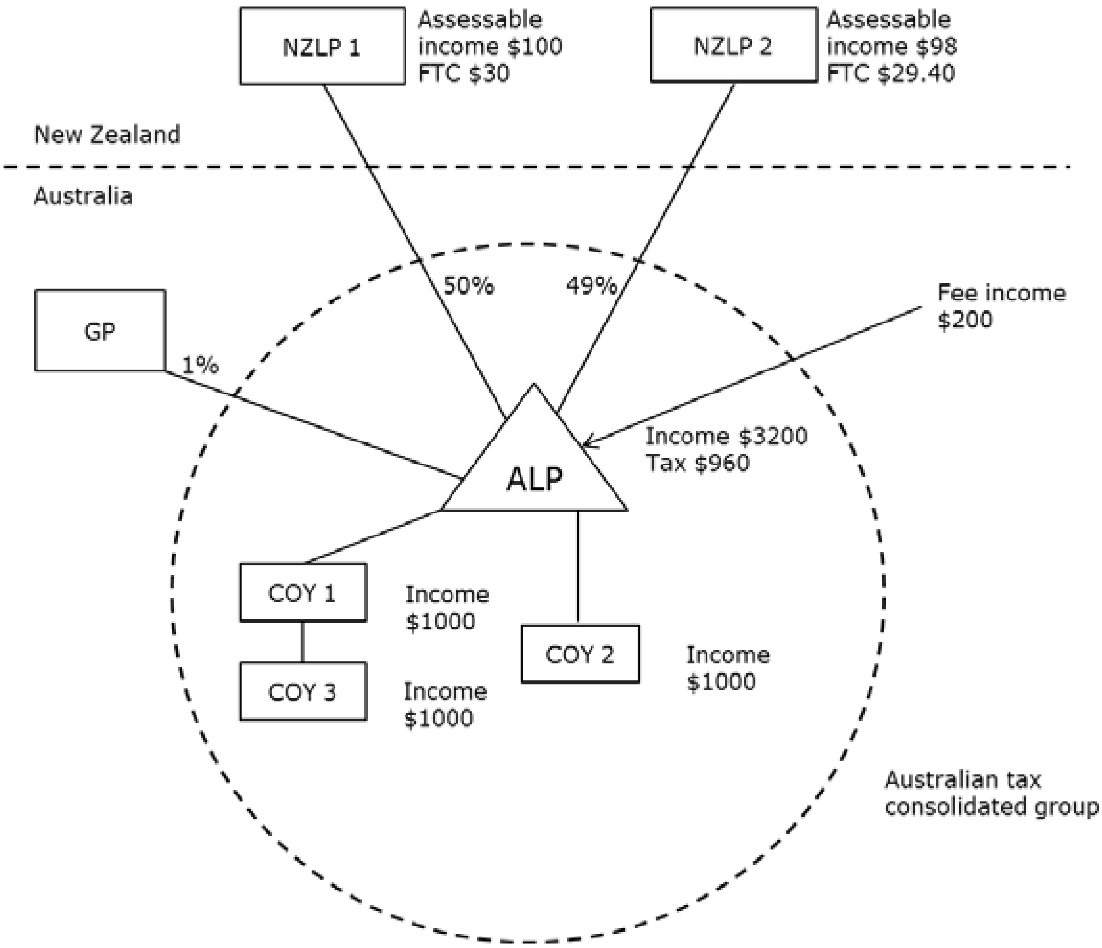
60. In this case, only the first element is satisfied. The dividend is assessable income to the partners under ss CD 1 and HG 2(2). The second and third elements are not satisfied because no Australian income tax has been paid on the dividend by the ALP. In Australia, a franking credit reduces the amount of income tax that a taxpayer has to pay: s 4-10 of the Income Tax Assessment Act 1997 (Aust.). As a result, under the arrangement the ALP had a nil income tax liability for the relevant period, and so paid no income tax. Whatever income tax may have been paid by the subsidiary, the tax was not paid on the segment of income that the New Zealand partners are liable for income tax on (namely the dividend income).

61. In terms of New Zealand assessable income, however, there is dividend income of $35 and $34.30 to the 50% partner and 49% partner respectively. The dividend income derived by the New Zealand partners excludes the amount of franking credits used to reduce the amount of Australian income tax payable.

[6] Under s LJ 5, the foreign tax credit is limited by the notional tax liability on the segment of foreign-sourced income determined as if that segment were the person's net income for the tax year. The notional tax liability may be modified as necessary by s LJ 5(4). This means that the amount of the foreign tax credit cannot exceed the amount of tax that would have been payable on the income had a foreign tax credit not been available.

62. The Commissioner acknowledges that there may be situations where an ALP has insufficient franking credits to reduce the Australian income tax liability to nil. The ALP may then be required to pay the residual income tax liability. The second element would be satisfied in that situation to the extent of the residual income tax paid. In other words, where a dividend is only partially franked or not franked at all, then a foreign tax credit may arise for the income tax actually paid.

Example 5: Tax paid by Australian limited partnership as "head company" of an Australian tax consolidated group



63. The ALP, as the head company for a consolidated group of companies (COY 1, COY 2 and COY 3), pays tax on all the taxable income of the consolidated group in Australia. This example excludes situations where one or more of the group entities are in a loss position.

64. The taxable income of the consolidated group is $3,200 and the income tax paid is $960. The group income includes income from the subsidiary companies of $3,000 and the fee income derived by the ALP of $200.

65. Under s HG 2(1) the New Zealand partners are treated as deriving the fee income derived by the ALP. The fee income is treated as assessable income of the partners sourced from outside New Zealand (satisfying the first element). The ALP has paid income tax on the fee income (satisfying the second and third elements). As a result, the three elements are met and a foreign tax credit will be available to the partners of the ALP but only to the extent that the tax paid relates to the fee income.

66. As noted above, the first element requires the New Zealand resident partner to derive assessable income sourced from outside New Zealand. The New Zealand partner, therefore, must derive income according to New Zealand tax law. In the case of the income from the Australian consolidated group of companies that income is not derived by the ALP for New Zealand tax purposes.

67. The New Zealand partners must return their share of the income derived directly by the ALP. That is, $100 and $98 for the 50% partner and 49% partner respectively. The New Zealand partners do not need to return income that was derived by the subsidiary companies.

68. A foreign tax credit will be available for the Australian income tax paid on the income earned directly by the ALP (subject to subpart LJ). In this case the foreign tax credit of $30 will be allowed to the 50% partner – NZLP 1 – and $29.40 to the 49% partner – NZLP 2.

References

Expired Rulings

BR Pub 10/01 "Australian source income earned by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/02 "Distributions made by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/03 "Distributions made by Australian unit trust to Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/04 "Franked dividend received by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 10/05 "Tax paid by an Australian limited partnership as a "head company" and foreign tax credits" *Tax Information Bulletin* Vol 23, No 1 (February 2011): 4-14.

BR Pub 14/01 "Australian source income earned by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/02 "Distributions made by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/03 "Distributions made by Australian unit trust to Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/04 "Franked dividend received by Australian limited partnership and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

BR Pub 14/05 "Tax paid by an Australian limited partnership as a "head company" and foreign tax credits" *Tax Information Bulletin* Vol 26, No 6 (July 2014): 10-25.

Subject references

Foreign tax credit

Limited partnership

Legislative references

Double Taxation Relief (Australia) Order 2010.

Income Tax Act 2007, ss BB 1, BH 1, CB 35, CD 1, HG 2, LJ 1–LJ 4, YA 1 "company", "foreign corporate limited partnership", "limited partnership", "listed limited partnership", "partnership" and "partnership share", YD 1, YD 2.

Income Tax Assessment Act 1936 (Aust), Division 5A, ss 94D, 94E, 94F, 94J, 94K, 94L, 128B.

Income Tax Assessment Act 1997 (Aust), ss 4-10, 4-15, 205-15, 701-1, 703-15(2), 995-1 "limited partnership".

Income Tax Rates Act 1986 (Aust), s 23(2).

Limited Partnerships Act 2008, s 4.

Limited Partnership Act 2016 (Western Australia).

Partnership Act 1963 (Australian Capital Territory).

Partnership Act 1892 (New South Wales), Part 3, ss 50A–81A.

Partnership Act 1997 (Northern Territory).

Partnership Act 1891 (Queensland), Chapter 3, ss 48–69.

Partnership Act 1891 (South Australia), Part 3, ss 47-84.

Partnership Act 1891 (Tasmania), Part 3, ss 50 – 101.

Partnership Act 1958 (Victoria), Part 3, ss 49-79.

Partnership Act 1895 (Western Australia).

Other references

New Business Tax System (Consolidation) Act (No. 1) 2002 (Aust), explanatory memorandum.

Taxation Laws Amendment Act (No. 6) 1992 (Aust), explanatory memorandum.

Appendix – Legislation

New Zealand Tax Legislation

Australia and New Zealand Double Tax Agreement

Article 1

Persons covered

1. This Convention shall apply to persons who are residents of one or both of the Contracting States.
2. In the case of an item of income (including profits or gains) derived by or through a person that is fiscally transparent with respect to that item of income under the laws of either State, such item shall be considered to be derived by a resident of a State to the extent that the item is treated for the purposes of the taxation law of such State as the income of a resident.

Article 23

Elimination of double taxation

1. …
2. ...
3. Where, in accordance with paragraph 2 of Article 1, an item of income is taxed in a Contracting State in the hands of a person that is fiscally transparent under the laws of the other State, and is also taxed in the hands of a resident of that other State as a participant in such person, that other State shall provide relief in respect of taxes imposed in the first-mentioned State on that item of income in accordance with the provisions of this Article.

Income Tax Act 2007

BH 1 Double tax agreements

Meaning

(1) Double tax agreement means an agreement that—

(a) has been negotiated for 1 or more of the purposes set out in subsection (2); and

(b) has been agreed between—

(i) 1 or more governments of territories outside New Zealand and the government of New Zealand; or

(ii) the Taipei Economic and Cultural Office in New Zealand and the New Zealand Commerce and Industry Office; and

(c) has entered into force as a result of a declaration by the Governor-General by Order in Council under subsection (3).

Purposes

(2) The following are the purposes for which a double tax agreement may be negotiated:

(a) to provide relief from double taxation:

(b) to provide relief from tax:

(c) to tax the income derived by non-residents from any source in New Zealand:

(d) to determine the income to be attributed to non-residents or their agencies, branches, or establishments in New Zealand:

(e) to determine the income to be attributed to New Zealand residents who have special relationships with non-residents:

(f) to prevent fiscal evasion:

(g) to facilitate the exchange of information:

(h) to assist in recovering unpaid tax.

Entry into force

(3) An agreement to which subsection (1)(a) and (b) apply comes into force as declared by the Governor-General by Order in Council and on the date determined under the agreement.

Overriding effect

(4) Despite anything in this Act, except subsection (5) or (5B) or section BG 1 (Tax avoidance), 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.

CB 35 Amounts of income for partners

A person who is a partner has an amount of income to the extent to which an amount of income results from the application of subpart HG (Joint venturers, partners, and partnerships) to them and their partnership.

HG 2 Partnerships are transparent

Look-through in accordance with share

(1) For the purposes of a partner's liabilities and obligations under this Act in their capacity of partner of a partnership, unless the context requires otherwise,—

(a) the partner is treated as carrying on an activity carried on by the partnership, and having a status, intention, and purpose of the partnership, and the partnership is treated as not carrying on the activity or having the status, intention, or purpose:

(b) the partner is treated as holding property that a partnership holds, in proportion to the partner's partnership share, and the partnership is treated as not holding the property:

(c) the partner is treated as being party to an arrangement to which the partnership is a party, in proportion to the partner's partnership share, and the partnership is treated as not being a party to the arrangement:

(d) the partner is treated as doing a thing and being entitled to a thing that the partnership does or is entitled to, in proportion to the partner's partnership share, and the partnership is treated as not doing the thing or being entitled to the thing.

No streaming

(2) Despite subsection (1), for a partner in their capacity of partner of a partnership, the amount of income, tax credit, rebate, gain, expenditure, or loss that they have from a particular source, or of a particular nature, is calculated by multiplying the total income, tax credit, rebate, gain, expenditure, or loss of the partners of the partnership from the particular source or of the particular nature by the partner's partnership share in the partnership's income.

…

LJ 1 What this subpart does

When tax credits allowed

(1) This subpart provides the rules for dividing assessable income from foreign-sourced amounts into segments and allows a tax credit for foreign income tax paid in relation to a segment of that income.

Limited application of rules

(2) The rules in this subpart apply only when—

(a) a person resident in New Zealand derives assessable income that is sourced from outside New Zealand; and

(b) foreign income tax is not paid in a country or territory listed in schedule 27 (Countries and types of income with unrecognised tax) to the extent to which the foreign income tax is paid on the types of income listed in the schedule.

(3) …

Source of dividends

(4) If a company is not resident in New Zealand, and is resident in another territory or is resident in another territory for the purposes of a double tax agreement between New Zealand and the territory, and foreign income tax is imposed by the territory on a dividend paid by the company, a dividend paid by the company has a source in the territory.

…

Relationship with section YD 5

(6) Section YD 5 (Apportionment of income derived partly in New Zealand) applies to determine how an amount is apportioned to sources outside New Zealand.

LJ 2 Tax credits for foreign income tax

Amount of credit

(1) A person described in section LJ 1(2)(a) has a tax credit for a tax year for an amount of foreign income tax paid on a segment of foreign-sourced income, determined as if the segment were the net income of the person for the tax year. The amount of the New Zealand tax payable is calculated under section LJ 5.

Limitation on amount of credit

(2) The amount of the person's credit in subsection (1) must not be more than the amount of New Zealand tax payable by the person in relation to the segment calculated under section LJ 5(2), modified as necessary under section LJ 5(4).

Amount adjusted

(3) The amount of the person's credit in subsection (1) may be reduced or increased if either section LJ 6 or LJ 7 applies.

…

LJ 3 Meaning of foreign income tax

For the purposes of this Part, foreign income tax means –

(a) an amount of a tax of another country meeting the requirements of section YA 2(5) (Meaning of income tax varied):

(b) in relation to a double tax agreement providing relief from tax or double taxation, an amount of tax to which the double tax agreement applies.

LJ 4 Meaning of segment of foreign-sourced income

For the purposes of this Part, a person has a segment of foreign-sourced income equal to an amount of assessable income derived from 1 foreign country that comes from 1 source or is of 1 nature.

Section YA 1

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:

…

foreign corporate limited partnership means an entity or group of persons that—

(a) meets the definition of **overseas limited partnership** in section 4 of the Limited Partnerships Act 2008; and

(b) is treated as a separate legal entity under the laws (other than taxation laws) of the country, territory, or jurisdiction where it is established

limited partnership—

(a) means a limited partnership registered under the Limited Partnerships Act 2008; and

(b) includes an "overseas limited partnership" as defined in section 4 of that Act; and

(c) despite paragraph (a) or (b), does not include a listed limited partnership or a foreign corporate limited partnership

listed limited partnership means an entity or group of persons that is listed on a recognised exchange, and that entity or group of persons—

(a) is a limited partnership registered under the Limited Partnerships Act 2008; or

(b) meets the definition of overseas limited partnership in section 4 of that Act

partnership means—

(a) a group of 2 or more persons who have, between themselves, the relationship described in section 4(1) of the Partnership Act 1908:

(b) a joint venture, if the joint venturers all choose to be treated as a partnership for the purposes of this Act and the Tax Administration Act 1994:

(c) co-owners of property, other than persons who are co-owners only because they are shareholders of the same company, or settlors, trustees, or beneficiaries of the same trust, if the co-owners all choose to be treated as a partnership for the purposes of this Act and the Tax Administration Act 1994:

(d) a limited partnership

partnership share means, for a particular right, obligation, or other property, status, or thing, the share that a partner has in the partnership

New Zealand partnership legislation

Partnership Act 1908

4 Definition of partnership

(1) Partnership is the relation which subsists between persons carrying on a business in common with a view to profit.

(2) But the relation between members of any company or association registered as a company under the Companies Act 1993 or any other Act of the Parliament of New Zealand for the time being in force and relating to the registration of joint stock, trading, or mining companies, or formed or incorporated by or in pursuance of any other Act of the Parliament of New Zealand or letters patent, or Royal Charter, is not a partnership within the meaning of this Act.

Limited Partnership Act 2008

Section 4:

overseas limited partnership means a partnership formed or incorporated outside New Zealand with—

(a) 1 or more general partners who are liable for all of the debts and liabilities of the partnership; and

(b) 1 or more limited partners who have only limited liability for the debts and liabilities of the partnership

Australian Tax Legislation

Income Tax Assessment Act 1936

94D(1) [Interpretation]

For the purposes of this Division, a limited partnership is a corporate limited partnership in relation to a year of income of the partnership if:

(a) the year of income is the 1995-96 year of income or a later year of income; or

(b) the partnership was formed on or after 19 August 1992; or

(c) both:

  (i) the partnership was formed before 19 August 1992; and

  (ii) the partnership does not pass the continuity of business test set out in section 94E; or

(d) all of the following apply:

  (i) the partnership was formed before 19 August 1992;

  (ii) a change in the composition of the partnership occurs during the period:

    (A) beginning on 19 August 1992; and

    (B) ending at the end of the year of income;

  (iii) the partners do not elect, in accordance with section 94F, that the partnership is not to be treated as a corporate limited partnership in relation to the year of income.

94D(2) [Exceptions]

However, a partnership that is a VCLP, an ESVCLP, an AFOF or a venture capital management partnership cannot be a corporate limited partnership.

BINDING RULINGS

Income Tax Assessment Act 1997

Section 995-1

limited partnership means:

(a) an association of persons (other than a company) carrying on business as partners or in receipt of *ordinary income or *statutory income jointly, where the liability of at least one of those persons is limited; or

(b) an association of persons (other than one referred to in paragraph (a)) with legal personality separate from those persons that was formed solely for the purpose of becoming a *VCLP, an *ESVCLP, an *AFOF or a *VCMP and to carry on activities that are carried on by a body of that kind.

Income Tax Rates Act 1986

23(2) [Companies generally]

The rate of tax in respect of the taxable income of a company is:

(a) if the company is a base rate entity for a year of income – 27.5%; or

(b) otherwise – 30%

if subsections (3) to (5) and section 23A do not apply to the company.

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 18/02: Income tax – insurance – term life insurance policy taken out by employee with employer paying the premiums on employee's behalf

This Question We've Been Asked (QWBA) considers the income tax treatment of term life insurance policies where an **employee** takes out the policy and their **employer** pays the premiums for them.

This QWBA replaces QB 15/05: "Income Tax – Insurance – Term life insurance policy taken out by employee with employer paying the premiums on employee's behalf" *Tax Information Bulletin* Volume Twenty Seven, No 6 (July 2015).

All legislative references are to the Income Tax Act 2007.

Question

What is the income tax treatment of a term life insurance policy that is:

- taken out by an employee (the employee is the policy holder), and
- the premiums are paid by the employer on the employee's behalf?

Answer

The employer will generally be entitled to a deduction for the premiums paid.

The amount of the premiums will be treated as salary or wages and, therefore, subject to PAYE. Fringe Benefit Tax will not apply.

Lump sum claims paid under a term life insurance policy will not be taxable income of the employee (or the employee's estate).

Explanation

1. Inland Revenue undertook a review of all Public Information Bulletins (see **www.ird.govt.nz/technical-tax/pib-review/**). During that review two items on the income tax treatment of insurance in an employment context were identified as being out of date. The two items are "Staff insurance schemes" (*Public Information Bulletin* No 70 (December 1972): 11) and "Life and accident insurance policies" (*Public Information Bulletin* No 106 (July 1980): 2). Those PIBs covered a number of different scenarios. Those items were replaced with a series of Questions We've Been Asked (QWBAs) covering common scenarios.
2. Since those QWBAs were published changes have been made to the Income Tax Act to simplify the treatment of employer provided insurance. Those changes came into effect on 30 March 2017. It has, therefore, been decided to update and replace the affected QWBAs.
3. This QWBA considers the situation where an employee takes out a term life insurance policy and the employer pays the premiums. The previous version of this QWBA was QB 15/05: "Income Tax – Insurance – Term life insurance policy taken out by employee with employer paying the premiums on employee's behalf" *Tax Information Bulletin* Volume Twenty Seven, No 6 (July 2015). This QWBA does not cover the situation where an employer takes out a life insurance policy for the employee's benefit. For discussion of that situation, see QB 18/03.
4. Term life insurance pays out the sum insured (as a lump sum claim) if the life insured dies during the term of the policy.

Deductibility of premiums

5. A person is allowed a deduction for an amount of expenditure or loss to the extent that it is incurred by them in the course of carrying on a business for the purpose of deriving assessable (or excluded) income (s DA 1). Section DA 2 sets out some limitations on deductibility. For example, expenditure that is capital in nature, or expenditure incurred in deriving exempt income, is not deductible (s DA 2(1) and (3)).

6. In most cases, salary and wage costs will be deductible because they will satisfy the nexus test in s DA 1 and none of the general limitations will apply. The payment of a life insurance premium for an employee is a business cost just like salary or wages. Therefore, provided the costs of an employee's salary or wages are deductible, the costs of paying the insurance premiums will be too.

Amount of premium paid taxable in the hands of the employee

7. An employee's income includes "expenditure on account" of that employee (s CE 1(1)(b)). Expenditure on account of an employee means a payment **made by an employer** relating to expenditure **incurred by an employee** (or to be incurred by an employee) (s CE 5(1)). This is subject to certain exceptions (in s CE 5(3)), none of which are relevant here. In particular, the exclusion in s CE 5(3)(a) will not apply as the expenditure would not be deductible to the employee in the absence of the employment limitation (being a payment made to secure a capital benefit).
8. In the situation covered by this QWBA, the employee has a legal obligation to the insurance company to pay the insurance premiums. Therefore, the amount of the insurance premiums has been incurred by the employee. The employer is paying the premiums to the insurance company. Therefore, the payment of the insurance premiums is expenditure on account of the employee and is the employee's income.
9. A payment of expenditure on account of an employee is part of the employee's "salary or wages" (s RD 5(2)). A payment of salary or wages is a "PAYE income payment" (s RD 3). Therefore, the PAYE rules apply and the amounts are subject to PAYE. The amount of the premiums needs to be grossed up before PAYE is calculated. That is, the amount of the premium paid is the amount net of tax.
10. As the payment of the premium is assessable income to the employee, the fringe benefit tax rules will not apply (s CX 4).
11. There are also other potential implications of having the gross amounts of the premiums included in an employee's salary or wages. For example, there are various circumstances where obligations, eligibility, or entitlements may be calculated based on an employee's salary or wages (for example Kiwisaver and Working for Families Tax Credits).

Income tax treatment of claims paid

12. The claim proceeds received by an employee (or their estate) under a term life insurance policy are not income. An amount is income if it comes within a provision of Part C of the Act (s CA 1(1)). There are no specific provisions that tax claim payments under term life insurance policies.
13. An amount is also income if it is income under ordinary concepts (s CA 1(2)). A lump sum claim payment under a life insurance policy is not income under ordinary concepts.
14. The following example is included to assist in explaining the application of the law.

Example

Sally takes out a term life insurance policy with XYZ Insurance Ltd (XYZ). The sum insured is payable to Sally's family in the event of her death. Sally's employer, Flamingo Plumbing Ltd (FPL), pays the premiums to XYZ on Sally's behalf. FPL and Sally want to know the income tax implications of this.

FPL is allowed a deduction for the amounts of premium paid to XYZ. The amounts of premium paid will be treated as part of Sally's salary or wages. These amounts are, therefore, subject to PAYE. Any lump sum claim paid under the policy to Sally (or her estate) will not be subject to income tax.

References

Subject references

Expenditure on account of an employee
Life insurance

Legislative references

Income Tax Act 2007: ss CA 1, CE 1(1), CE 5, CX 4, DA 1, DA 2, RD 2, RD 3, RD 5(2) and the definitions of "expenditure on account of an employee" and "salary or wages" in s YA 1

Other references

"Staff insurance schemes" *Public Information Bulletin* No 70 (December 1972): 11

"Life and accident insurance policies" *Public Information Bulletin* No 106 (July 1980): 2

QB 15/05: "Income Tax – Insurance – Term life insurance policy taken out by employee with employer paying the premiums on employee's behalf" *Tax Information Bulletin* Volume Twenty Seven, No 6 (July 2015)

QB 18/03: Income tax – insurance – term life insurance policy taken out by employer for the benefit of an employee

This Question We've Been Asked (QWBA) considers the income tax treatment of term life insurance policies where an **employer** takes out the policy for the benefit of an employee.

This QWBA replaces QB 15/06: "Income Tax – Insurance – Term life insurance policy taken out by employer for the benefit of an employee" *Tax Information Bulletin* Volume Twenty Seven, No 6 (July 2015).

This QWBA applies from 30 March 2017.

All legislative references are to the Income Tax Act 2007.

Question

What is the income tax treatment of a term life insurance policy that is:

- taken out by an employer (the employer is the policy holder), and
- an employee (or their spouse, civil union partner, de facto partner or child) is the beneficiary?

This item applies to both individual term life policies and group life policies where the employees (or associates) are the beneficiaries of the policy.

Answer

The employer will generally be entitled to a deduction for the premiums paid.

The premiums paid will not be subject to PAYE.

The premiums paid will be subject to fringe benefit tax (FBT).

Lump sum claims paid on death under a term life insurance policy will not be taxable income of the employee (or the employee's estate).

Explanation

1. Inland Revenue undertook a review of all Public Information Bulletins (see **www.ird.govt.nz/technical-tax/pib-review/**). During that review, two items on the income tax treatment of insurance in an employment context were identified as being out of date. The two items are "Staff insurance schemes" (*Public Information Bulletin* No 70 (December 1972): 11) and "Life and accident insurance policies" (*Public Information Bulletin* No 106 (July 1980): 2). Those PIBs covered a number of different scenarios. Those items were replaced with a series of Questions We've Been Asked (QWBAs) covering common scenarios.
2. Since those QWBAs were published changes have been made to the Income Tax Act to simplify the treatment of employer provided insurance. Those changes came into effect on 30 March 2017. It has, therefore, been decided to update and replace the affected QWBAs.
3. This QWBA considers the situation where a term life insurance policy is taken out by an employer for the benefit of an employee (or their spouse, civil union partner, de facto partner or child). The previous version of this QWBA was QB 15/06: "Income Tax – Insurance – Term life insurance policy taken out by employer for the benefit of an employee" *Tax Information Bulletin* Volume Twenty Seven, No 6 (July 2015). This QWBA does not cover the situation where an employee takes out a term life insurance policy and the employer pays the premiums. For discussion of that situation, see QB 18/02.
4. Term (or temporary) life insurance pays out the sum insured (as a lump sum claim) if the life insured dies during the term of the policy.

Deductibility of premiums

5. A person is allowed a deduction for an amount of expenditure or loss to the extent that it is incurred by them in the course of carrying on a business for the purpose of deriving assessable (or excluded) income (s DA 1). Section DA 2 sets out some limitations on deductibility. For example, expenditure that is capital in nature, or expenditure incurred in deriving exempt income, is not deductible (s DA 2(1) and (3)).

6. In most cases, salary and wage costs will be deductible because they will satisfy the nexus test in s DA 1 and none of the general limitations will apply. The payment of a life insurance premium for the benefit of an employee (or their family) is a business cost just like the employee's salary or wages. Therefore, provided the costs of an employee's salary or wages are deductible, the costs of paying the insurance premiums will be too.

When amount of premium is subject to FBT

7. An employee's income includes "expenditure on account" of that employee (s CE 1(1)(b)). Expenditure on account of an employee means a payment **made by an employer** relating to expenditure **incurred by an employee** (or to be incurred by an employee) (s CE 5(1)). In this case the employer has the legal obligation to pay the premium (as they have contracted with the insurance company to take out the policy). Consequently, the payment of the premium is not expenditure on account of an employee and is not subject to PAYE. It is, therefore, necessary to consider whether FBT applies.
8. Under s CX 2, a "fringe benefit" is a benefit that is provided by an employer to an employee in connection with their employment and comes within one of ss CX 6, CX 9, CX 10, or CX 12–CX 16, or is an unclassified benefit under s CX 37. Some benefits are also excluded from being fringe benefits by specific provisions in subpart CX. None of those exclusions are relevant here.
9. It is the provision of the policy rather than any payment under the policy that is the relevant "benefit" for FBT purposes. The provision of a life insurance policy is an economic benefit to an employee as they received cover under the policy without the need to pay for it themselves.
10. Section CX 16 specifically includes life insurance policies as fringe benefits. It applies when an employer pays a "specified insurance premium". The definition of "specified insurance premium" includes a premium paid for the benefit of an employee on an insurance policy to the extent to which the insurance policy is for life insurance on the life of the employee or their spouse, civil union partner, or de facto partner, or on their joint lives, or on the life of their child (s CX 16(3)(a)). Section CX 16 will, therefore, apply to premiums paid for term life insurance.
11. There are no provisions in subpart CX that would exclude a term life insurance policy from being subject to FBT. Therefore, a term life insurance policy will be subject to FBT under s CX 16.
12. Where an employer provides a fringe benefit to a person associated with an employee, s GB 32 treats the benefit as if it were provided by the employer to the employee. This is subject to the shareholder-employee exemption in s GB 32(2) and the look-through company exemption in s GB 32(2B). Therefore, subject to those exemptions, premiums paid on term life insurance policies taken out by an employer for the benefit of an employee's spouse, civil union partner, de facto partner or child will also be subject to FBT.

Income tax treatment of claims paid

13. The claim proceeds received by an employee (or their estate) under a term life insurance policy are not income. An amount is income if it comes within a provision of Part C of the Act (s CA 1(1)). There are no specific provisions that tax payments under term life insurance policies.
14. An amount is also income if it is income under ordinary concepts (s CA 1(2)). A lump sum claim payment under a life insurance policy is not income under ordinary concepts.

Application date

15. This QWBA reflects changes to ss CE 5 and CX 16, which came into force on 30 March 2017. The QWBA, therefore, applies from that date. For the position prior to 30 March 2017, see QB 15/06: "Income Tax – Insurance – Term life insurance policy taken out by employer for the benefit of an employee" (*Tax Information Bulletin* Volume Twenty Seven, No 6 (July 2015).
16. The following example is included to assist in explaining the application of the law.

Example

Red Herring Fishing Ltd (RHF) takes out a term life insurance policy for one of its employees, Jared Stone. The policy is for a term of two years. The only benefit payable under the policy is if death occurs during the policy term. In such a case, the sum insured is paid to the employee's estate. RHF pays the premiums. RHF and Jared want to know the income tax implications of this arrangement.

RHF is allowed a deduction for the amounts of premium paid. The amounts of premium paid are subject to FBT under s CX 16. Any lump sum claim paid under the policy will not be subject to income tax.

References

Subject references

Expenditure on account of an employee
FBT
Fringe benefit
Life insurance

Legislative references

Income Tax Act 2007: ss CA 1, CE 1(1), CE 5, CX 2, CX 4, CX 16, DA 1, DA 2, GB 32, RD 3, RD 5(2), and the definition of "expenditure on account of an employee" in s YA 1

Other references

"Life and accident insurance policies" *Public Information Bulletin* No 106 (July 1980): 2

"Staff insurance schemes" *Public Information Bulletin* No 70 (December 1972): 11

QB 15/06: "Income Tax – Insurance – Term life insurance policy taken out by employer for the benefit of an employee" *Tax Information Bulletin* Volume Twenty Seven, No 6 (July 2015).

QB 18/04: Income tax – insurance – personal sickness and accident insurance taken out by employee with employer paying the premiums on employee's behalf

This Question We've Been Asked (QWBA) considers the income tax treatment of personal sickness and accident insurance policies where an **employee** takes out the policy and their **employer** pays the premiums for them.

This QWBA replaces QB 15/09: "Income Tax – Insurance – Personal sickness and accident insurance taken out by employee with employer paying the premiums on employee's behalf" *Tax Information Bulletin* Volume Twenty Seven, No 10 (November 2015).

All legislative references are to the Income Tax Act 2007.

Question

What is the income tax treatment of a personal sickness or accident insurance policy that is:

- taken out by an employee (the employee is the policy holder), and
- the premiums are paid by the employer on the employee's behalf?

Answer

The employer will generally be entitled to a deduction for the premiums paid.

The amount of the premiums paid for income protection insurance will not be subject to PAYE. The amount of premiums paid for other personal sickness or accident insurance policies will be treated as salary or wages and, therefore, subject to PAYE. Fringe Benefit Tax will not apply.

Claim amounts paid (or that an employee is otherwise entitled to) under income protection insurance policies will be income under s CE 11. Claim amounts paid (or that an employee is otherwise entitled to) under other personal sickness or accident policies will be income only if they are income under ordinary concepts (s CA 1(2)). Claim amounts that are not income under ordinary concepts will not be subject to tax.

Claim amounts that are income under s CE 11 or s CA 1(2) will be exempt income if they are payments:

- made to a person because they (or another person) are incapacitated for work; and either
  - paid by a friendly society (s CW 34(2)(a)); or
  - **not** calculated according to a loss of earnings (s CW 34(2)(c)).

If the claim payment does not meet these criteria, it will be assessable income.

Explanation

Scope

1. This QWBA considers the income tax treatment of personal sickness or accident insurance policies. Some personal sickness or accident insurance policies include elements of income protection insurance. There are specific provisions in the Act that apply only to income protection insurance, so income protection insurance may have a different tax treatment to other personal sickness or accident insurance.
2. This QWBA does not consider the treatment of claim payments to or from sickness, accident, or death benefits funds.
3. This QWBA also does not consider the treatment of weekly compensation purchased under s 223 of the Accident Compensation Act 2001.

Background

4. Inland Revenue undertook a review of all Public Information Bulletins (see **www.ird.govt.nz/technical-tax/pib-review/**). During that review two items on the income tax treatment of insurance in an employment context were identified as being out of date. The two items are "Staff insurance schemes" (*Public Information Bulletin* No 70 (December 1972): 11) and "Life and accident insurance policies" (*Public Information Bulletin* No 106 (July 1980): 2). Those PIBs covered a number of different scenarios. Those items were replaced with a series of QWBAs covering common scenarios.
5. Since those QWBAs were published changes have been made to the Income Tax Act to simplify the treatment of employer provided insurance. Those changes came into effect on 30 March 2017. It has, therefore, been decided to update and replace the affected QWBAs. The previous version of this QWBA was QB 15/09: "Income Tax – Insurance – Personal sickness and accident insurance taken out by employee with employer paying the premiums on employee's behalf" *Tax Information Bulletin* Volume Twenty Seven, No 10 (November 2015). Although no material changes have been made to QB 15/09, it was considered that it would be useful to update and republish it with the related QWBAs (QB 18/02, QB 18/03 and QB 18/05).
6. This QWBA considers the situation where an employee takes out a personal sickness or accident insurance policy and the employer pays the premiums. This QWBA does not cover the situation where an employer takes out a sickness or accident insurance policy for the employee's benefit (see QB 18/05 for discussion of that situation).
7. There are many different types of insurance policies that could be sickness or accident insurance (or could include an element of personal sickness or accident insurance). These include medical insurance, income protection insurance, accident insurance, and trauma or critical illness policies. Claim payments under these insurance policies can be periodic or lump sum and can be calculated in a variety of ways.
8. Where only part of a policy comes within a particular definition, it may be necessary to apportion premiums between different types of insurance. Similarly where a claim payment under a policy is made for more than one thing, apportionment of the receipt may be required.

Deductibility of premiums for employer

9. A person is allowed a deduction for an amount of expenditure or loss to the extent that it is incurred by them in the course of carrying on a business for the purpose of deriving assessable (and/or excluded) income (s DA 1). Section DA 2 sets out some limitations on deductibility. For example, expenditure that is capital in nature, or expenditure incurred in deriving exempt income, is not deductible (s DA 2(1) and (3)).
10. In most cases, salary and wage costs will be deductible because they will satisfy the nexus test in s DA 1 and none of the general limitations will apply. The payment of a sickness or accident insurance premium for an employee that is paid in connection with the employee's employment is a business cost just like salary or wages. Therefore, provided the costs of an employee's salary or wages are deductible, the costs of paying the insurance premiums will be too.

Whether amount of premium paid is taxable in the hands of the employee

11. An employee's income includes "expenditure on account" of that employee (s CE 1(1)(b)). Expenditure on account of an employee means a payment **made by an employer** relating to expenditure **incurred by an employee** (or to be incurred by an employee) (s CE 5(1)). This is subject to certain exceptions (in s CE 5(3)).
12. The only potentially relevant exclusion in this context is s CE 5(3)(j). Section CE 5(3)(j) applies to premiums for income protection insurance that an employer is liable to make a contribution towards for the benefit of an employee. Where a personal sickness or accident policy is also (or also includes) income protection insurance, s CE 5(3)(j) may be relevant.

13. In the situation covered by this QWBA, the **employee** has a legal obligation to the insurance company to pay the insurance premiums. Therefore, the amount of the insurance premiums is incurred by the employee. The **employer** is paying the premiums to the insurance company. Therefore, the payment of the insurance premiums meets the definition of expenditure on account of the employee under s CE 5(1).

14. To the extent that the premium paid is:
    - for "income protection insurance"; and
    - the employer has a liability to pay (or make a contribution towards) that premium,

    then the payment of the premium will not be expenditure on account of the employee. Premiums paid for income protection insurance are not subject to PAYE (s CE 5(3)(j)).

15. In all other cases the payment of the premium will be expenditure on account of the employee. A payment of expenditure on account of an employee is part of the employee's "salary or wages" (s RD 5(2)). A payment of salary or wages is a "PAYE income payment" (s RD 3). Therefore, the PAYE rules apply and the amounts are subject to PAYE. The amount of the premiums needs to be grossed up before PAYE is calculated. That is, the amount of the premium paid is the amount net of tax.

16. As the payment of the premium is assessable income to the employee, the FBT rules will not apply (s CX 4).

17. There are also other potential implications of having the gross amounts of the premiums included in an employee's salary or wages. For example, there are various other circumstances where obligations, eligibility, or entitlements may be calculated based on an employee's salary or wages (for example KiwiSaver and Working for Families Tax Credits).

Income tax treatment of claims paid

18. Whether a claim payment made under an insurance policy is taxable will depend on what it is paid for. Some claim payments will not be income (under a specific provision or ordinary concepts) and, therefore, will not be taxable. Claim payments that are "income" may be either taxable or exempt income depending on the circumstances. The following discussion is intended to assist with determining how a claim payment under an insurance policy should be treated.

Is the payment to the employee income?

19. If a personal sickness or accident insurance policy is (or includes) income protection insurance, s CE 11 may apply. Claim payments made under a policy of income protection insurance where an employer is liable to pay or contribute to the premiums are income to the employee under s CE 11.

20. There are no specific provisions that apply to make claim payments under other personal sickness or accident insurance policies income. Therefore, claim payments under these insurance policies will be income only if they are income under ordinary concepts (s CA 1(2)).

21. Whether a claim payment under an insurance policy is income or not will depend on the relationship between the payer and the recipient and the purpose of the payment (*Reid v CIR* (1985) 7 NZTC 5,176). Where a claim payment is made to replace income which the recipient would otherwise have earned or where the purpose of the payments is to provide the recipient with amounts to meet their living expenses, the payments are likely to be income. Claim payments that are regular or recurring are much more likely to be income (*Reid*). However, a one-off claim payment may still be income (*FCT v Hyteco Hiring Pty Ltd* 92 ATC 4,694).

22. Therefore, the claim payments that are most likely to be income are payments that are intended to compensate an insured person for lost income (whether periodic, or lump sum) and other regular or periodic payments intended to help the insured person meet their living expenses. Other lump sum and reimbursing claim payments are unlikely to be income (for example, a lump sum payment made to compensate a person for the loss of a limb, or a payment reimbursing medical expenses).

23. Claim payments that are not "income" (either under s CE 11 or s CA 1(2)) will not be taxable. If a claim payment is "income", it is necessary to consider whether it is assessable income or exempt income.

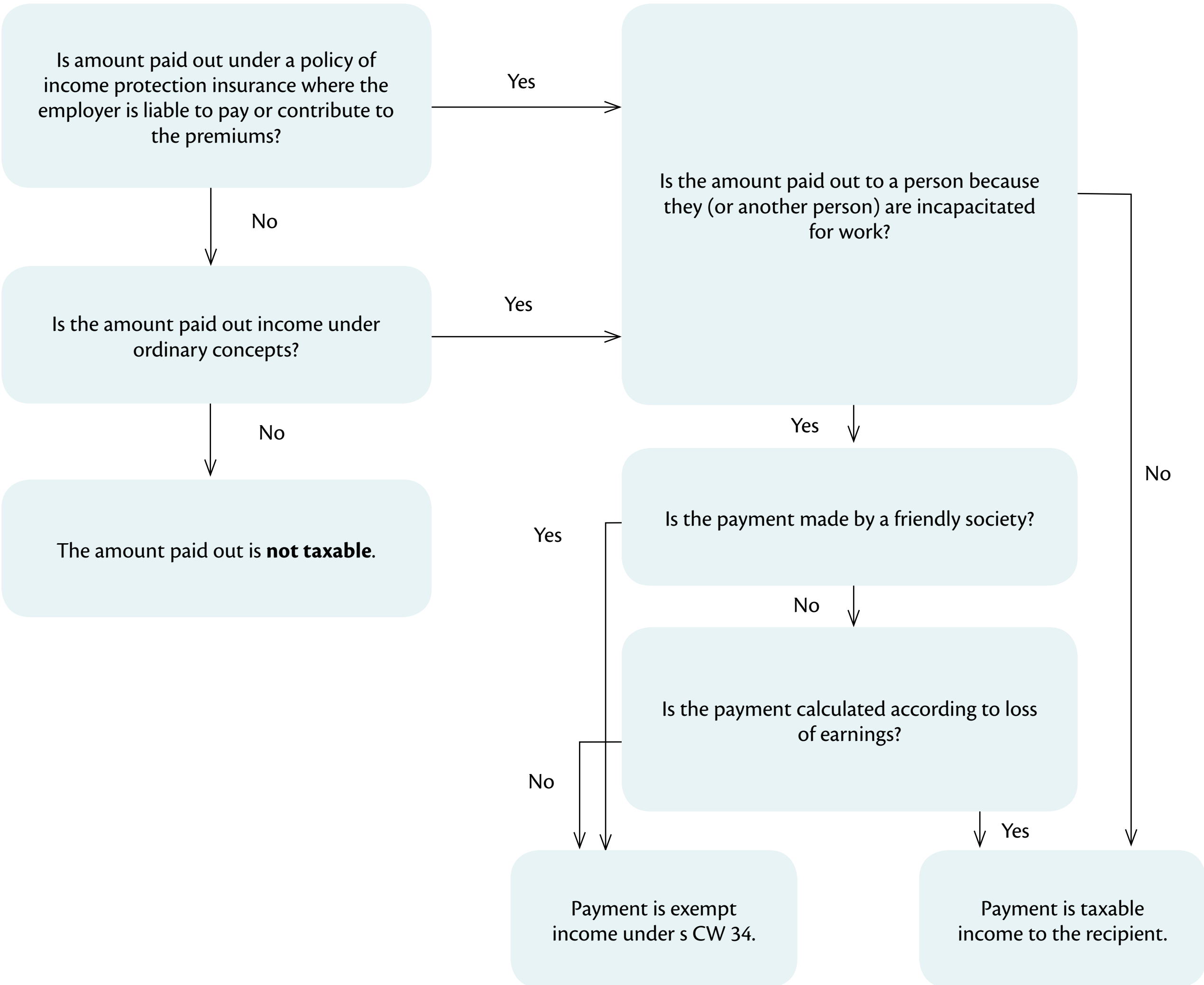
Is the claim payment exempt income of the employee?

24. The relevant exemption provision is s CW 34. A claim payment of income made under a policy of personal sickness or accident insurance will be exempt under s CW 34 if:
    - it is made to a person because they (or another person) are incapacitated for work; and either
      - the payment is made by a friendly society; or
      - the payment is **not** calculated according to loss of earnings.

25. If the claim payment does not meet these criteria, it will be assessable income.

26. The following diagram sets out the process for determining how a claim amount paid under a policy should be treated. Each claim payment needs to be considered separately. As noted above, where a single claim payment is made for more than one thing, apportionment may be required:

Treatment of claim payment made to a person under a policy of personal sickness or accident insurance



27. The following examples are included to assist in explaining the application of the law.

Example 1 – Income protection insurance

Joan takes out an income protection insurance policy for herself. Joan's employment contract contains a clause that, if Joan takes out an income protection insurance policy, her employer will pay the premiums. Joan's policy provides that, if Joan is unable to work due to sickness or accident, she will be paid 75% of her lost earnings. Joan and her employer want to know the income tax implications of this.

Joan's employer is allowed a deduction for the amounts of premium paid to the insurer. There is no PAYE payable on the amount of premiums as they are excluded from being "expenditure on account" under s CE 5(3)(j). If Joan becomes unable to work and her policy pays out, these claim amounts will be Joan's assessable income. The claim payments will not be exempt under s CW 34 as they will be calculated according to the earnings that Joan has lost.

Example 2 – Accident insurance

Dennis takes out an accident insurance policy and, as part of his remuneration package, his employer agrees to pay the premiums. Under the policy Dennis will receive a fixed lump sum payment on the occurrence of certain specified events if caused by an accident. Dennis' accident insurance policy will also reimburse medical expenses incurred as a result of an accident up to a maximum of $50,000. Dennis' employer is allowed a deduction for the premiums and Dennis is subject to PAYE on the amounts of the premiums paid.

The following year Dennis has an accident while using his axe at home and loses a toe. His policy pays out a fixed amount of $1,000 for the loss of his toe and also reimburses Dennis $10,000 for his medical expenses. Dennis wants to know whether to include these amounts in his income.

The sum for the loss of his toe and the reimbursements of Dennis' medical expenses are not income. The claim amounts are not income under ordinary concepts. They are not periodic or regular payments. Also, they are not paid to compensate Dennis for lost income nor are they payments on which Dennis can rely for his living expenses.

References

Subject references

Expenditure on account of an employee

Income protection insurance

Personal sickness or accident insurance

Legislative references

Income Tax Act 2007: ss CA 1, CE 1(1), CE 5, CX 4, DA 1, DA 2, RD 2, RD 3, RD 5(2) and the definitions of "expenditure on account of an employee" and "salary or wages" in s YA 1

Case references

FCT v Hyteco Hiring Pty Ltd 92 ATC 4,694

Reid v CIR (1985) 7 NZTC 5,176

Other references

"Staff insurance schemes" *Public Information Bulletin* No 70 (December 1972): 11

"Life and accident insurance policies" *Public Information Bulletin* No 106 (July 1980): 2

QB 15/09: "Income Tax – Insurance – Personal sickness and accident insurance taken out by employee with employer paying the premiums on employee's behalf" *Tax Information Bulletin* Volume Twenty Seven, No 10 (November 2015).

QB 18/05: Income tax – insurance – personal sickness and accident insurance taken out by employer for the benefit of an employee

This Question We've Been Asked (QWBA) considers the income tax treatment of personal sickness and accident insurance policies where an **employer** takes out the policy for the benefit of an employee.

This QWBA replaces QB 15/10: "Income Tax – Insurance – Personal sickness and accident insurance taken out by employer for the benefit of an employee" *Tax Information Bulletin* Volume Twenty Seven, No 10 (November 2015).

This QWBA applies from 30 March 2017.

All legislative references are to the Income Tax Act 2007.

Question

What is the income tax treatment of a personal sickness or accident insurance policy that is:

- taken out by an employer (the employer is the policy holder), and
- an employee (or their spouse, civil union partner, de facto partner or child) is the beneficiary?

This item applies to both individual personal sickness or accident insurance policies and group policies where the employees (or associates) are the beneficiaries of the policy.

Answer

The employer will generally be entitled to a deduction for the premiums paid.

The premiums paid will not be subject to PAYE.

The premiums paid will be subject to FBT unless they are premiums paid for income protection insurance where:

- the employer has a liability to pay (or contribute to) the premiums; and
- a claim payment under the insurance policy would be assessable income of the employee.

Claim amounts paid (or that an employee is otherwise entitled to) under income protection insurance policies will be income under s CE 11. Claim amounts paid (or that an employee is otherwise entitled to) under other personal sickness or accident policies will be income only if they are income under ordinary concepts (s CA 1(2)). Claim amounts that are not income under ordinary concepts will not be subject to tax.

Claim amounts that are income under s CE 11 or s CA 1(2) will be exempt income if they are payments:

- made to a person because they (or another person) are incapacitated for work; and either
  - paid by a friendly society (s CW 34(2)(a)); or
  - not calculated according to a loss of earnings (s CW 34(2)(c)).

If the claim payment does not meet these criteria, it will be assessable income.

Explanation

Scope

1. This QWBA considers the income tax treatment of personal sickness or accident insurance policies. Some personal sickness or accident insurance policies include elements of income protection insurance. There are specific provisions in the Act that apply only to income protection insurance, so income protection insurance may have a different tax treatment to other personal sickness or accident insurance.
2. This QWBA does not consider the treatment of claim payments to or from sickness, accident, or death benefits funds.
3. This QWBA also does not consider the treatment of weekly compensation purchased under s 223 of the Accident Compensation Act 2001.

Background

4. Inland Revenue undertook a review of all Public Information Bulletins (see **www.ird.govt.nz/technical-tax/pib-review/**). During that review, two items on the income tax treatment of insurance in an employment context were identified as being out of date. The two items are "Staff insurance schemes" (*Public Information Bulletin* No 70 (December 1972): 11) and "Life and accident insurance policies" (*Public Information Bulletin* No 106 (July 1980): 2). Those PIBs covered a number of different scenarios. Those items were replaced with a series of Questions We've Been Asked (QWBAs) covering common scenarios.
5. Since those QWBAs were published changes have been made to the Income Tax Act to simplify the treatment of employer provided insurance. Those changes came into effect on 30 March 2017. It has, therefore, been decided to update and replace the affected QWBAs.
6. This QWBA considers the situation where a personal sickness or accident insurance policy is taken out by an employer for the benefit of an employee. The previous version of this QWBA was QB 15/10: "Income Tax – Insurance – personal sickness and accident insurance taken out by employer for the benefit of an employee" *Tax Information Bulletin* Volume Twenty Seven, No 10 (November 2015). See QB 18/04 for discussion of situations where the employee takes out the policy and the employer pays the premiums.
7. There are many different types of insurance policies that could be sickness or accident insurance (or could include an element of personal sickness or accident insurance). These include medical insurance, income protection insurance, accident insurance, and trauma or critical illness policies. Claim payments under these insurance policies can be periodic or lump sum and can be calculated in a variety of ways.
8. Where only part of a policy comes within a particular definition, it may be necessary to apportion premiums between different types of insurance. Similarly where a claim payment under a policy is made for more than one thing, apportionment of the receipt may be required.

Deductibility of premiums for employer

9. A person is allowed a deduction for an amount of expenditure or loss to the extent that it is incurred by them in the course of carrying on a business for the purpose of deriving assessable (and/or excluded) income (s DA 1). Section DA 2 sets out some limitations on deductibility. For example, expenditure that is capital in nature, or expenditure incurred in deriving exempt income, is not deductible (s DA 2(1) and (3)).
10. In most cases, salary and wage costs will be deductible because they will satisfy the nexus test in s DA 1 and none of the general limitations will apply. The payment of a sickness or accident insurance premium for an employee that is paid in connection with the employee's employment is a business cost just like salary or wages. Therefore, provided the costs of an employee's salary or wages are deductible, the costs of paying the insurance premiums will be too.

When amount of premium is subject to FBT

11. An employee's income includes "expenditure on account" of that employee (s CE 1(1)(b)). Expenditure on account of an employee means a payment **made by an employer** relating to expenditure **incurred by an employee** (or to be incurred by an employee) (s CE 5(1)). In this case the employer has the legal obligation to pay the premium (as they have contracted with the insurance company to take out the policy). Consequently, the payment of the premium is not expenditure on account of an employee and is not subject to PAYE. It is, therefore, necessary to consider whether FBT applies.
12. Under s CX 2, a "fringe benefit" is a "benefit" that is provided by an employer to an employee in connection with their employment (s CX 2(1)(a)) and comes within either one of ss CX 6, CX 9, CX 10, or CX 12 to CX 16 (specified benefits) or is an unclassified benefit under s CX 37 (s CX 2(1)(b)). Some benefits are also excluded from being fringe benefits by specific provisions in subpart CX (see s CX 2(1)(c)).
13. The Commissioner's view is that the provision of an accident or sickness insurance policy where the employee is a beneficiary is a "benefit" to the employee. It provides an economic advantage to the employee as it gives the employee benefits (coverage under the policy) to which they would otherwise not be entitled. Provided the benefit is provided to an employee in connection with their employment, s CX 2(1)(a) is satisfied. It is, therefore, necessary to consider whether the policy is a specified benefit under one of ss CX 6, CX 9, CX 10, or CX 12 to CX 16, or whether an unclassified benefit arises (s CX 37). It is also necessary to consider whether any exclusion could apply.
14. The only potentially relevant specific provision is s CX 16. Section CX 16 applies when an employer pays a "specified insurance premium" or makes a contribution to the insurance fund of a friendly society for the benefit of an employee (s CX 16(1)). The relevant parts of the definition of "specified insurance premium" are s CX 16(3)(b) and (c):

    CX 16 Contributions to life or health insurance

    ...

    Meaning of specified insurance premium

    (3) In this section, specified insurance premium means a premium paid for the benefit of an employee on an insurance policy to the extent to which the insurance policy is for—

    …

    (b) accident or medical insurance referred to in section EY 8(3) on the life of the employee or their spouse, civil union partner, or de facto partner, or on their joint lives, or on the life of their child:

    (c) insurance against accident, disease, or sickness, whether fatal or not, suffered by the employee, their spouse, civil union partner, or de facto partner, or their child.

15. Personal sickness and accident policies are policies that insure against accident, disease, or sickness. Therefore, the policies covered by this QWBA will come within s CX 16 and s CX 2(1)(b) will be satisfied.
16. Where an employer provides a fringe benefit to a person associated with an employee, s GB 32 may treat the benefit as if it were provided by the employer to the employee. This is subject to the shareholder-employee exemption in s GB 32(2) and the look-through company exemption in s GB 32(2B). Therefore, subject to those exemptions, premiums paid on policies of personal sickness and accident insurance taken out by an employer for the benefit of an employee's spouse, civil union partner, de facto partner or child will also be subject to FBT.

Exclusion from FBT

17. The only potentially relevant exclusion is s CX 31. Section CX 31 provides:

    > An employer who satisfies a liability to pay, or contribute to the payment of, a premium for income protection insurance for the benefit of an employee does not provide a fringe benefit to the employee if a payment of the insurance to the employee would be assessable income of the employee.

18. Section CX 31 will exclude from FBT such income protection insurance:
    - provided by an employer;
    - for the benefit of an employee;
    - where the employer satisfies a liability to pay (or contribute to) the premiums; and
    - a pay-out under the insurance policy would be assessable income of the employee (this requirement is considered below).
19. Where a personal sickness or accident policy is also (or also includes) income protection insurance and all of the above requirements are met, the provision of the income protection insurance will not be a fringe benefit. In all other cases, FBT will apply. Where only part of a policy is income protection insurance, apportionment may be required.

Income tax treatment of claims paid

20. Whether a claim payment made under an insurance policy is taxable will depend on what it is paid for. Some claim payments will not be income (under a specific provision or ordinary concepts) and, therefore, will not be taxable. Claim payments that are "income" may be either assessable or exempt income depending on the circumstances. The following discussion is intended to assist with determining how a claim payment under an insurance policy should be treated.

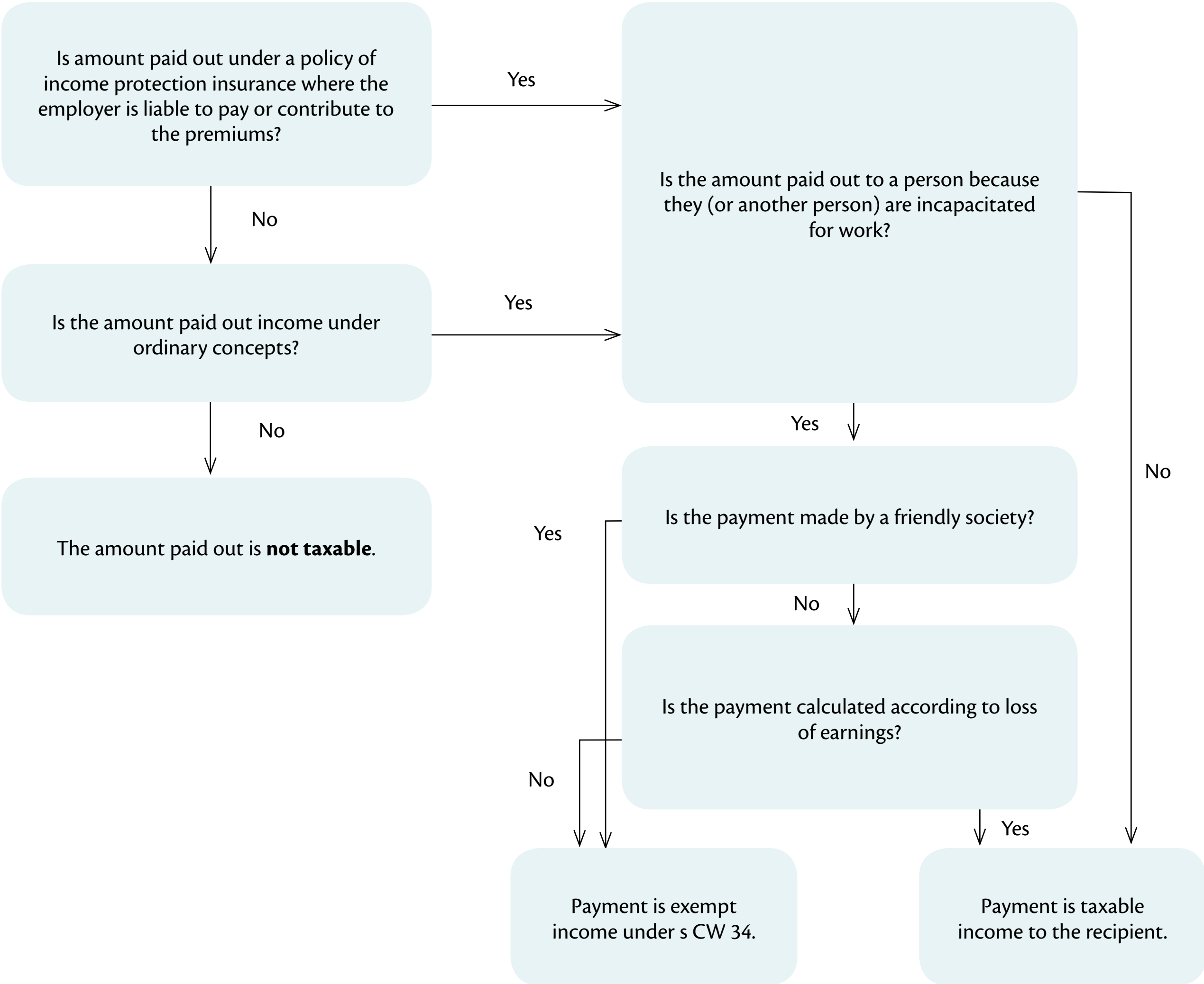
Is the payment to the employee income?

21. If a personal sickness or accident insurance policy is (or includes) income protection insurance, s CE 11 may apply. Claim payments made under a policy of income protection insurance where an employer is liable to pay or contribute to the premiums are income to the employee under s CE 11.
22. There are no specific provisions that apply to make claim payments under other personal sickness or accident insurance policies income. Therefore, claim payments under these policies will be income only if they are income under ordinary concepts (s CA 1(2)).
23. Whether a claim payment under an insurance policy is income or not will depend on the relationship between the payer and the recipient and the purpose of the payment (*Reid v CIR* (1985) 7 NZTC 5,176). Where a claim payment is made to replace income which the recipient would otherwise have earned or where the purpose of the payments is to provide the recipient with amounts to meet their living expenses, the payments are likely to be income. Claim payments that are regular or recurring are much more likely to be income (*Reid*). However, a one-off claim payment may still be income (*FCT v Hyteco Hiring Pty Ltd* 92 ATC 4,694).
24. Therefore, the claim payments that are most likely to be income are payments that are intended to compensate an insured person for lost income (whether periodic, or lump sum) and other regular or periodic payments intended to help the insured person meet their living expenses. Other lump sum and reimbursing payments are unlikely to be income (for example, a lump sum payment made for the loss of a limb, or a payment reimbursing medical expenses).
25. Claim payments that are not "income" (either under s CE 11 or s CA 1(2)) will not be taxable. If a claim payment is "income", it is necessary to consider whether it is assessable income or exempt income.

Is the claim payment exempt income of the employee?

26. The relevant exemption provision is s CW 34. A claim payment of income made under a policy of personal sickness or accident insurance will be exempt under s CW 34 if:
    - It is made to a person because they (or another person) are incapacitated for work; and either
      - the payment is made by a friendly society; or
      - the payment is **not** calculated according to a loss of earnings.
27. If the claim payment does not meet these criteria, it will be assessable income.
28. The following diagram sets out the process for determining how a claim amount paid out under a policy should be treated. Each claim payment needs to be considered separately. As noted above, where a single claim payment is made for more than one thing, apportionment may be required:

Treatment of claim payment made to a person under a policy of personal sickness or accident insurance



Application date

29. This QWBA reflects changes to s CX 16, which came into force on 30 March 2017. The QWBA, therefore, applies from that date. For the position prior to 30 March 2017, see QB 15/10: "Income Tax – Insurance – Personal sickness and accident insurance taken out by employer for the benefit of an employee" *Tax Information Bulletin* Volume Twenty Seven, No 10 (November 2015).

30. The following example is included to assist in explaining the application of the law.

Example

Keith's employer takes out medical insurance policies for each of its senior staff. The policies pay out various amounts if the insured person contracts a disease or becomes sick. Keith's employer is allowed a deduction for the premiums. The premiums are subject to FBT because a fringe benefit arises under s CX 16.

Keith contracts influenza and is hospitalised. Keith receives a $10,000 claim payment as a reimbursement of his hospital expenses. Keith wants to know whether to include the $10,000 in his income.

The $10,000 is not income. The amount is not income under ordinary concepts. It is a one-off payment. Also, it is not paid to compensate Keith for lost income.

References

Subject references

Expenditure on account of an employee
FBT
Fringe benefit
Income protection insurance
Life insurance
Personal sickness or accident insurance

Legislative references

Income Tax Act 2007: ss CA 1, CE 1(1), CE 5, CE 11, CX 2, CX 16, CX 31, DA 1, DA 2, GB 32, RD 3, RD 5(2) and the definition of "expenditure on account of an employee" in s YA 1

Other references

"Life and accident insurance policies" *Public Information Bulletin* No 106 (July 1980): 2

"Staff insurance schemes" *Public Information Bulletin* No 70 (December 1972): 11

QB 15/10: "Income Tax – Insurance – personal sickness and accident insurance taken out by employer for the benefit of an employee" *Tax Information Bulletin* Volume Twenty Seven, No 10 (November 2015).

Case references

FCT v Hyteco Hiring Pty Ltd 92 ATC 4,694
Reid v CIR (1985) 7 NZTC 5,176

QB 18/06: Can a registered person issue a combined tax invoice and credit or debit note?

This question we've been asked (QWBA) is about whether a registered person can issue a combined tax invoice and credit or debit note.

It was the subject of question 13 in "Questions and answers about GST" in *Public Information Bulletin* (May 1986), which is cited in several tax commentaries about prompt payment discounts. This QWBA replaces the *Public Information Bulletin* item.

Key terms

A **tax invoice** is a document the supplier gives to the recipient that shows the details of the goods and services supplied.

A **credit note** is used when the amount payable for a supply is reduced after the tax invoice has been issued.

Similarly, a **debit note** is used when the amount payable for a supply is increased after the tax invoice has been issued.

A **prompt payment discount** is a reduction in the amount payable for the goods and services if the recipient pays the amount before a certain date.

Question

Can a registered person issue a combined tax invoice and credit or debit note?

Answer

A registered person may issue a combined tax invoice and credit or debit note if each relates to different supplies of goods and services. Tax invoices and credit or debit notes may not be combined if they relate to the same supply.

Explanation

1. Tax invoices, credit notes and debit notes perform different functions when goods and services are supplied. Tax invoices are usually issued when goods and services are supplied by a registered person. If some of those goods are subsequently returned, the supply changes, or the price of the goods and services changes after the relevant tax invoice is issued, a credit note or debit note needs to be issued. The question is whether a tax invoice and a credit or debit note can be combined into a single document.

Tax invoices

2. Generally, when a registered person makes a supply they need to issue a tax invoice showing the details of the supply to the recipient. Importantly, the tax invoice sets out the GST charged on the supply. This will be the amount of output tax that the supplier has to account for and that the recipient of the supply may be able to claim as input tax. Multiple supplies may be combined in a single tax invoice. Section 24 details what must be shown on a tax invoice. Examples of tax invoices are given in Inland Revenue's guides *GST guide: Working with GST (IR375)* (July 2017): 9, and *Smart business: A guide for businesses and non-profit organisations (IR320)* (April 2017): 46–47. Further information on tax invoices can also be found at **www.ird.govt.nz/gst/work-out/work-out-records/records-tax/**.

Credit and debit notes

3. Supplies can change for various reasons such as when:
   - the supply of goods and services is cancelled;
   - the nature of the supply of goods and services is fundamentally varied or altered;
   - the previously agreed amount payable for the supply of goods and services changes; or
   - some or all of the goods and services supplied are returned to the supplier.
4. If the supplier has provided a tax invoice to the recipient of the supply, and the amount of tax charged (as shown on the tax invoice) is reduced, the supplier must issue a credit note to the recipient. Section 25(3)(a) details what must be shown on the credit note. An example of a credit note is given in Inland Revenue's *GST guide: Working with GST (IR375)* (July 2017): 18. On the other hand, if the amount of tax charged (as shown on the tax invoice) is increased, the supplier must issue a debit note to the recipient. The requirements for a debit note, set out in s 25(3)(b), are essentially the same as those for a credit note. Further information on credit and debit notes can be found at **www.ird.govt.nz/gst/work-out/work-out-records/records-credit/** and **www.ird.govt.nz/gst/work-out/work-out-records/records-debit/**.
5. The obligation to issue a credit or debit note is only triggered if a tax invoice has been provided. This reflects the purpose of credit or debit notes. If aspects of the supply have changed, resulting in the tax charged on the supply being incorrect, then the credit or debit note will indicate any necessary adjustment to the tax charged. Under ss 25(4) and 25(5) respectively, the adjustment is required to be made in the taxable period in which the credit or debit note is issued.
6. If no tax invoice has been issued before the supply changes, then no credit note or debit note can be issued under s 25(3)(a) or (b). However, the supplier still needs to issue a tax invoice under s 24(1). In this case, the tax invoice should contain the details of the changed supply.

Tax invoices and credit or debit notes may be combined

7. While a credit or debit note must be issued *after* a tax invoice for a particular supply, a tax invoice for one supply and a credit or debit note for *another* supply can be in a single document. The relevant statutory provisions do not prohibit a tax invoice or a credit or debit note from containing other particulars besides those specified. Therefore, for separate supplies of goods and services, a tax invoice for one supply and a credit or debit note for another supply may be combined into a single document. This might occur in situations where supplies are invoiced monthly, for example, telephone and electricity supplies.
8. The tax invoice for one month's supply may be combined with a credit or debit note relating to a previous month's supply. A tax invoice, a credit note, and a debit note could all be combined in one document as long as they all related to different supplies.
9. Similarly, a "buyer created" tax invoice for one supply may be combined with a "buyer created" credit or debit note for another supply.

Prompt payment discounts

10. Prompt payment discounts are different. Typically, a prompt payment discount is shown on the tax invoice as a reduction in the amount payable (including GST) if the amount is paid before a certain date. In that case, a lesser amount is stated to be payable.
11. However, a credit note is not required when a recipient of a supply takes advantage of a prompt payment discount offered by the supplier for early payment of the amount payable. Provided the terms of the prompt payment discount are clearly shown on the face of the tax invoice, s 25(3)(e) does not require the supplier to issue a credit note.

Examples

The following examples are included to assist in explaining the application of the law. Sample documents are included to show some of the different ways of setting out the legally required information.

Example 1 - Goods returned after the tax invoice is issued

Jane regularly buys her office supplies from Office to Go. In August 2017, she buys $150.00 (excl. GST) of office supplies and Office to Go issues her with a tax invoice. Jane subsequently returns $15.00 (excl. GST) of damaged goods. When Office to Go invoices Jane for supplies made to her in September 2017, it combines the tax invoice with a credit note for the $15.00 (excl. GST) of damaged goods from August. The document is labelled "Statement of Account/Tax Invoice/Credit Note/Debit Note".

Provided all the requirements of ss 24(3) or 24(4) (whichever applies), and s 25(3)(a) are met, the document is both a tax invoice for the September 2017 supplies and a credit note for the damaged August 2017 supplies that Jane returned.

OFFICE TO GO

2B Pencil Street
Wellington 6011
Phone: (04) 1234 567
E-mail: sales@officetogo.co.nz

Statement of Account/Tax Invoice/Credit Note/Debit Note

To: Jane Smith
123 Main Street
Wellington 6011

GST number: 123-456-789
Date: 2 Oct 2017
Invoice INV1005

Quantity	Description of goods and services	Unit price (excl. GST)	Total (excl. GST)	GST	Total (incl. GST)
100	Blue ballpoint pens	$1.80	$180.00	$27.00	$207.00
2	**Credit:** To reduce INV0904 from $150.00 (excl. GST) to $135.00 (excl. GST) accounting for refund on 2 x electric pencil sharpeners returned due to mechanical defects - unit price of $7.50 (excl. GST)	-$7.50	-$15.00	-$2.25	-$17.25
	Includes GST of:			$24.75	
	Total amount due:				**$189.75**

Example 2 – Goods returned before the tax invoice is issued

Suppose, instead, that Jane returns the damaged goods to Office to Go before it issues a tax invoice for the goods supplied in August 2017. Office to Go wants to know if it can issue a combined tax invoice and credit note at the end of August 2017, with the tax invoice being for $150.00 (excl. GST) of goods initially supplied and the credit note being for the $15.00 (excl. GST) of goods returned. The correct position is for Office to Go to issue a tax invoice showing the goods actually supplied in August 2017 and a total of $135.00 (excl. GST). A tax invoice showing $150.00 (excl. GST) of goods supplied would not reflect the actual supply once Jane has returned the damaged goods.

Example 3 – Combined tax invoice and debit notes

JIn January 2018, Jane enters into a 12 month contract with Office to Go, under which Office to Go agrees to sell A4 paper to Jane at the discounted price of $5.00 (excl. GST) per ream, on the condition that Jane buys 1,000 or more reams of paper by 31 December 2018. If Jane fails to meet this purchase target, the contract provides that the price for all A4 paper purchased under the contract will be increased to $6.00 (excl. GST) per ream. The contract states that if the price is increased due to the purchase target not being met, Jane will make a further payment, being the difference between the discounted price and the actual price on all A4 paper purchased under the contract.

By 31 December 2018, Jane has failed to meet the purchase target, making only six purchases of A4 paper over the year, totalling 850 reams. The price of these 850 reams of A4 paper therefore increases from $5.00 (excl. GST) to $6.00 (excl. GST) per ream. As a result, Office to Go issues debit notes in relation to the tax invoices issued for the six A4 paper purchases Jane made earlier in the year, and which understated the actual price of A4 paper supplied and the GST charged on those supplies. For convenience, Office to Go combines these debit notes with the tax invoice it issues in January 2019 in respect of other purchases that Jane has made in December 2018.

OFFICE TO GO

2B Pencil Street
Wellington 6011
Phone: (04) 1234 567
E-mail: sales@officetogo.co.nz

Statement of Account/Tax Invoice/Credit Note/Debit Note

To: Jane Smith
123 Main Street
Wellington 6011

GST number: 123-456-789
Date: 7 Jan 2019
Invoice: INV3007

Quantity	Description of goods and services	Unit price (excl. GST)	Total (excl. GST)	GST	Total (incl. GST)
10	Rubbish bins	$15.00	$150.00	$22.50	$172.50
	Includes GST of:			$22.50	
	Total:				**$172.50**

The following debit notes issued because customer ineligible for A4 paper discount applied to purchases between 1/1/2018 and 31/12/2018, having not met agreed purchase target of 1000+ reams by 31/12/2018.

Tax invoice affected	Units supplied	Original price @ $5.00 per unit (excl. GST)	Altered price @ $6.00 per unit (excl. GST)	Price increase (excl. GST)	GST on increase	Total (incl. GST)
INV1034	200	$1,000.00	$1,200.00	$200.00	$30.00	$230.00
INV1130	200	$1,000.00	$1,200.00	$200.00	$30.00	$230.00
INV2405	150	$750.00	$900.00	$150.00	$22.50	$172.50
INV2603	150	$750.00	$900.00	$150.00	$22.50	$172.50
INV2650	100	$500.00	$600.00	$100.00	$15.00	$115.00
INV2702	50	$250.00	$300.00	$50.00	$7.50	$57.50
		GST on price increases:			$127.50	
		Total:				**$977.50**

	Total amount due for payment:		**$1,150.00**

Example 4 – Prompt payment discount

Power To Us Ltd offers customers a 5% prompt payment discount if they pay their monthly bill before the 20th of the following month. The details of the available discount are clearly shown on the tax invoice. John pays the lesser 95% amount owing on his August bill on September 15.

Because the prompt payment discount offer was clearly detailed on the August tax invoice, s 25(3)(e) states that Power To Us Ltd does not have to issue a credit note to John.

References

Subject references

Tax invoices
Credit notes
Debit notes
Prompt payment discounts

Legislative references

Goods and Services Tax Act 1985 – ss 24 and 25

Other references

GST guide: Working with GST (IR375) (July 2017): 9, 18

Smart business: A guide for businesses and non-profit organisations (IR320) (April 2017): 46–47

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.

Special Determination S36A: Application of the financial arrangements rules to a public-private partnership agreement

This Determination may be cited as *Special Determination S36A: Application of the financial arrangements rules to a public-private partnership agreement.*

1. Explanation (which does not form part of the determination)

1.1 This determination varies and replaces *Special Determination S36: Application of the financial arrangements rules to a public-private partnership agreement* following a change of partners.

1.2 This determination relates to an arrangement (the Project) involving the finance, design, construction and on-going provision of operation and maintenance services in respect of the Facilities by a limited partnership (the Partnership) under a public-private partnership agreement (the Project Agreement) with the Crown. The Holding Partnership will be the sole limited partner in the Partnership, holding 100% of the Partnership.

1.3 At the time that the Project Agreement was entered into, the limited partners in the Holding Partnership were Limited Partner A and Limited Partner B. On 30 March 2017, Limited Partner B sold their interest to Limited Partner C. Limited Partner A and Limited Partner C are both limited partnerships with multiple limited partners, some of whom are exempt from income tax. Each limited partner of Limited Partner A and Limited Partner C that is not exempt from income tax are together referred to as the Taxable Limited Partners. This determination only applies to the Taxable Limited Partners and does not apply to those limited partners that are exempt from income tax.

1.4 The Project Agreement comprises three basic components for each Facility:

- A design and construction phase (the D&C Phase) under which the Partnership agrees to design and construct the Facility for the Crown in consideration for a fixed lump-sum payment (the D&C Payment), payable on completion of the D&C Phase;
- A Facility Lease entered into by the Partnership and the Crown, under which the Partnership pays an amount representing the rental under the Facility Lease to the Crown (the Rental Prepayment); and
- An operations and maintenance phase (the O&M Phase) under which, in consideration for quarterly payments (the Unitary Charge), the Partnership will provide operation and maintenance services to the Crown over a term beginning once the Facility is ready for operation and ending 25 years after completion of the last-completed Facility.

1.5 The Partnership will enter into:

- A Construction Agreement with a contractor (the Contractor), under which the Contractor will design and construct each Facility in consideration for monthly and milestone payments; and
- An Operation and Maintenance Contract (the O&M Contract) with a service provider (the Service Provider), under which the Service Provider will provide the on-going operation and maintenance (and other) services in consideration for monthly payments.

1.6 The Partnership will raise external debt from a range of third party financiers (the Senior Debt).

1.7 The Partnership may raise subordinated debt from the Holding Partnership, which may in turn raise subordinated debt from Limited Partner A and Limited Partner C (Subordinated Debt).

1.8 The Partnership will enter into Interest Rate Swaps in respect of the Senior Debt.

1.9 The Facility Lease, O&M Phase of the Project Agreement, Construction Agreement and O&M Contract are all excepted financial arrangements. The D&C Phase of the Project Agreement, Senior Debt, Subordinated Debt and Interest Rate Swaps are financial arrangements to which the Partnership is a party. The Project, including all of these agreements, is a wider financial arrangement.

1.10 *Special Determination S37A: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement* applies to the D&C Payment under the D&C Phase.

1.11 This determination applies from 30 March 2017 and prescribes:

- the amount of consideration that is solely attributable to each Facility Lease;
- how the financial arrangements rules apply to the O&M Phase of the Project Agreement, the Construction Agreement and the O&M Contract for each Facility; and
- the method for spreading the payments made under the Senior Debt, Subordinated Debt and Interest Rate Swaps.

2. Reference

2.1 This determination varies and replaces *Special Determination S36: Application of the financial arrangements rules to a public-private partnership agreement*.

2.2 This determination is made under ss 90AC(1)(bb), 90AC(1)(d) and 90AC(1)(h) of the Tax Administration Act 1994.

3. Scope of determination

3.1 This determination applies to the Partnership in respect of the Project (which is set out in detail in the Private Ruling), including the following arrangements:

- The D&C Phase of the Project Agreement, under which the Partnership agrees to design and construct each Facility for the Crown and will receive a fixed lump-sum payment (the D&C Payment) for each Facility once the Facility is ready for operation (which is the subject of *Special Determination S37A: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement*).
- The O&M Phase of the Project Agreement, under which the Partnership will provide on-going operation and maintenance services to the Crown for 25 years following completion of the last-completed Facility to the Crown in consideration for quarterly payments.
- The Facility Lease for each Facility, under which the Partnership will lease the Facility from the Crown for a period ending 25 years following completion of the last-completed Facility and will make the Rental Prepayment to the Crown. The Rental Prepayment will be equal to and will offset the D&C Payment.
- A Construction Agreement with the Contractor, under which the Contractor will design and construct the Facility in consideration for payments under the Construction Agreement.
- An O&M Contract with the Service Provider following completion of the last-completed Facility, under which the Service Provider will provide the on-going operation and maintenance (and other) services in consideration for payments under the O&M Contract.
- Senior Debt, under which the Partnership will borrow an agreed sum from external lenders for a term of 5 years from financial close of the Project (Financial Close). The Senior Debt will be a capitalising, interest only senior debt facility that converts to an amortising senior tranche on the Conversion Date. It is expected that the Senior Debt will be refinanced within 5 years of Financial Close and every 5 years thereafter over the term of the Project. Under IFRS (as the standards apply at the date of this Determination), the Senior Debt (and any subsequent re-financings) will initially be recognised at fair value plus integral fees, and subsequently measured using the amortised cost using the effective interest method (regardless of whether hedge accounting is applied). The Senior Debt will not be treated as a hedge of another financial arrangement.
- Subordinated Debt, under which Limited Partner A and Limited Partner C may lend to the Holding Partnership and the Holding Partnership may lend to the Partnership.
- Interest Rate Swaps, under which the Partnership will pay a fixed rate of interest to the swap counterparties, and receive a floating rate in return.

3.2 This determination is made subject to the following conditions:

- Limited Partner A and Limited Partner C use IFRS to prepare financial statements and to report for financial arrangements. Any Taxable Limited Partner that does not use IFRSs to prepare financial statements and to report for financial arrangements will use the same spreading method as Limited Partner A or Limited Partner C as appropriate.
- The Taxable Limited Partners will each recognise income derived from the Crown during the D&C Phase and the O&M Phase of the Project Agreement, and will deduct expenditure incurred in relation to the Facility Lease, Construction Agreement and O&M Contract, in each case, under the relevant provisions of the Income Tax Act 2007 (outside of the financial arrangements rules).

- The Taxable Limited Partners each do not use the fair value method for the Senior Debt if the Senior Debt is treated as a hedge of another financial arrangement under IFRS and uses for the other financial arrangement a method that is neither the IFRS financial reporting method nor the method required under *Determination G29: Agreements for Sale and Purchase of Property Denominated in Foreign Currency: Exchange Rate to Determine the Acquisition Price and method for spreading income and expenditure*.
- The Taxable Limited Partners will each recognise income in respect of the D&C Payment in the manner prescribed by *Special Determination S37A: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement*.
- The continued application of the Private Ruling.
- The final executed documentation is not materially different from the draft documentation that Inland Revenue received on 24 October 2014, 16 January 2015, 12 April 2015 and 23 April 2015.

4. Principle

4.1 Each Facility Lease is an excepted financial arrangement under s EW 5(9). Any amount that is solely attributable to an excepted financial arrangement described in ss EW 5(2) to (16) is not an amount that is taken into account under the financial arrangements rules (s EW 6(2)). This determination specifies the amounts that are solely attributable to a Facility Lease that are not taken into account under the financial arrangements rules.

4.2 The O&M Phase, Construction Agreements and O&M Contracts are "short-term agreements for sale and purchase" as defined in s YA 1, and are excepted financial arrangements under s EW 5(22), provided that payment under the Construction Agreements and O&M Contracts is required within 93 days of an invoice being rendered. Any amount that is solely attributable to an excepted financial arrangement described in ss EW 5(17) to (25) that is part of a financial arrangement is an amount that is taken into account under the financial arrangements rules (s EW 6(3)). This determination specifies that no amounts payable to or by the Partnership in respect of the O&M Phase, Construction Agreements and O&M Contracts are required to be spread under the financial arrangements rules.

4.3 The D&C Phase, Senior Debt, Subordinated Debt and Interest Rate Swaps are "financial arrangements" under s EW 3. This determination specifies that the payments made to or by Limited Partner A and Limited Partner C, in proportion to their share in Holding Partnership, under the Senior Debt, Subordinated Debt and Interest Rate Swaps must be spread under the financial arrangements rules in accordance with this determination.

4.4 This determination does not deal with the treatment of the D&C Payment which is subject to a separate determination (*Special Determination S37A: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement*).

5. Interpretation

In this determination, unless the context otherwise requires:

- All legislative references in this determination are to the Income Tax Act 2007, unless otherwise stated.
- Capitalised terms have the same meaning as set out in the Project Agreement.
- **IFRS** means International Financial Reporting Standards as defined in s YA 1.
- **Private Ruling** means Private Ruling BR Prv 18/01 issued on 26 January 2018, and includes any Ruling issued to replace that Ruling, provided that the change to the Ruling does not affect the application of this determination.

6. Method

6.1 The Rental Prepayment paid in respect of a Facility Lease, and the property interest granted to the Partnership under a Facility Lease, are solely attributable to the Facility Lease and are not taken into account under the financial arrangements rules.

6.2 The Taxable Limited Partners are not required to spread any amounts under the financial arrangements rules in respect of the:

- O&M Phase of the Project Agreement;
- Construction Agreement;
- O&M Contract.

6.3 The IFRS financial reporting method in s EW 15D may be used to allocate income and expenditure (other than "non-integral fees" as defined in s YA 1) over the term of the Senior Debt and none of the restrictions for application of the IFRS financial reporting method contained in s EW 15D(2B) apply.

6.4 The IFRS financial reporting method in s EW 15D may be used to allocate income and expenditure (other than "non-integral fees" as defined in s YA 1) in respect of any subsequent refinancing of the Senior Debt over the term of the relevant refinancing, provided that the terms of any such refinancing are materially similar to the terms of the Senior Debt. This determination paragraph does not affect each Taxable Limited Partner's obligation to perform a base price adjustment under s EW 31 at the time of each refinancing.

6.5 The IFRS financial reporting method in s EW 15D may be used to allocate income and expenditure (other than "non-integral fees" as defined in s YA 1) over the term of the Subordinated Debt provided that none of the restrictions for the application of this reporting method in s EW 15D(2B) apply and provided that each Taxable Limited Partner uses the same IFRS method to allocate both income and expenditure under the Subordinated Debt for financial reporting purposes.

6.6 None of the mandatory spreading methods in ss EW 15H or EW 15I apply to the Interest Rate Swaps. Over the term of the Interest Rate Swaps, income or expenditure may be allocated using either:

- the expected value method in s EW 15F (other than for "non-contingent fees" as defined in s YA 1) provided that the swaps are not treated as a hedge of other financial arrangements for which the "fair value method" is used; or
- the IFRS financial reporting method in s EW 15D (other than for "non-integral fees" as defined in s YA 1) provided that the swaps are not treated as a hedge of other financial arrangements for which a method other than the IFRS financial reporting method is used;

provided that each Taxable Limited Partner uses the same method for the entire term of the Interest Rate Swaps.

6.7 This determination does not affect each Taxable Limited Partner's obligation to perform base price adjustments under s EW 31 in respect of the Interest Rate Swaps.

7. Example

This example illustrates the application of the method set out in this determination.

This example is based on the following parameters:

Commencement of D&C Phase	1 May 2015
Completion of D&C Phase	16 September 2017
Completion of O&M Phase	21 December 2041
D&C Payment from the Crown	$1,000
Aggregate payments to the Contractor	($850)
Facility Lease prepayment	($1,000)
Quarterly payments from the Crown during the O&M Phase	$30
Quarterly payments to the Service Provider	($15)
Annual interest on the Senior Debt	($85)
Annual net payments in respect of the Interest Rate Swaps	($7)

The Taxable Limited Partners are not required to spread any amounts under the financial arrangements rules in respect of the Facility Lease, O&M Phase of the Project Agreement, Construction Agreement and O&M Contract.

The amounts that must be spread under the financial arrangement rules are:

- Interest on the Senior Debt calculated in accordance with the IFRS financial reporting method in s EW 15D;
- Interest on the Subordinated Debt calculated in accordance with the IFRS financial reporting method in s EW 15D;
- Payments in respect of the Interest Rate Swaps calculated in accordance with the expected value method in s EW 15F or the IFRS financial reporting method in s EW 15D; and
- Amounts in respect of the D&C Payment as specified in *Special Determination S37A: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement.*

This Determination is signed by me on the 26th day of January 2018.

Fiona Heiford
Manager (Taxpayer Rulings)

Special Determination s37A: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement

This Determination may be cited as *Special Determination S37A: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement.*

1. Explanation (which does not form part of the determination)

1.1 This determination varies and replaces *Special Determination S37: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement* following a change of partners.

1.2 This determination relates to an arrangement (the Project) involving the finance, design, construction and on-going provision of operation and maintenance services in respect of the Facilities by a limited partnership (the Partnership) under a public-private partnership agreement (the Project Agreement) with the Crown. The Holding Partnership will be the sole limited partner in the Partnership, holding 100% of the Partnership.

1.3 At the time that the Project Agreement was entered into, the limited partners in the Holding Partnership were Limited Partner A and Limited Partner B. On 30 March 2017, Limited Partner B sold their interest to Limited Partner C. Limited Partner A and Limited Partner C are both limited partnerships with multiple limited partners, some of whom are exempt from income tax. Each limited partner of Limited Partner A and Limited Partner C that is not exempt from income tax are together referred to as the Taxable Limited Partners. This determination only applies to the Taxable Limited Partners and does not apply to those limited partners that are exempt from income tax.

1.4 The Project Agreement comprises three basic components for each Facility:

- A design and construction phase (the D&C Phase) under which the Partnership agrees to design and construct the Facility for the Crown in consideration for a fixed lump-sum payment (the D&C Payment), payable on completion of the D&C Phase;
- A Facility Lease entered into by the Partnership and the Crown, under which the Partnership pays an amount representing the rental under the Facility Lease to the Crown (the Rental Prepayment); and
- An operations and maintenance phase (the O&M Phase) under which, in consideration for quarterly payments (the Unitary Charge), the Partnership will provide operation and maintenance services to the Crown over a term beginning once the Facility is ready for operation and ending 25 years after completion of the last-completed Facility.

1.5 The Partnership will enter into:

- A Construction Agreement with a contractor (the Contractor), under which the Contractor will design and construct each Facility in consideration for monthly and milestone payments; and
- An Operation and Maintenance Contract (the O&M Contract) with a service provider (the Service Provider) in respect of each Facility, under which the Service Provider will provide the on-going operation and maintenance (and other) services in consideration for monthly payments.

1.6 The Partnership will raise external debt from a range of third party financiers (the Senior Debt).

1.7 The Partnership may raise subordinated debt from the Holding Partnership, which may in turn raise subordinated debt from Limited Partner A and Limited Partner C (Subordinated Debt).

1.8 The Partnership will enter into Interest Rate Swaps in respect of the Senior Debt.

1.9 The Facility Lease, O&M Phase of the Project Agreement, Construction Agreement and O&M Contract are all excepted financial arrangements. The D&C Phase of the Project Agreement, Senior Debt, Subordinated Debt and Interest Rate Swaps are financial arrangements to which the Partnership is a party. The Project, including all of these agreements, is a wider financial arrangement.

1.10 *Special Determination S36A: Application of the financial arrangements rules to a public-private partnership agreement* applies to arrangements in the wider financial arrangement, excluding the D&C Payments.

1.11 This determination applies from 30 March 2017 and prescribes the portion of each D&C Payment treated as income under the financial arrangement rules (the Interest Component) and the method for spreading that income.

2. Reference

2.1 This determination varies and replaces *Special Determination S37: Application of the financial arrangements rules to the D&C Phase of a public-private partnership agreement.*

2.2 This determination is made under ss 90AC(1)(bb), 90AC(1)(d) and 90AC(1)(i) of the Tax Administration Act 1994.

3. Scope of determination

3.1 This determination applies to the Partnership in respect of the Project (which is set out in detail in the Private Ruling), including the D&C Phase of the Project Agreement for each Facility, under which the Partnership agrees to design and construct the Facility for the Crown and will receive a fixed lump-sum payment (the D&C Payment) once the Facility is ready for operation.

3.2 This determination is made subject to the following conditions:

- The design and construction costs of each Facility are agreed between the Partnership and the Crown on an arm's length basis and set out in the Base Case for the relevant Facility under the Project Agreement as referenced in the definition of "Design and Construction Payment" in clause 1.1 of the Project Agreement.
- Limited Partner A and Limited Partner C use IFRS to prepare financial statements and to report for financial arrangements. Any Taxable Limited Partner that does not use IFRSs to prepare financial statements and to report for financial arrangements will use the same spreading method as Limited Partner A or Limited Partner C as appropriate.
- The continued application of the Private Ruling.
- The final executed documentation is not materially different from the draft documentation that Inland Revenue received on 24 October 2014, 16 January 2015, 12 April 2015 and 23 April 2015.

4. Principle

4.1 During the D&C Phase of the Project Agreement, the Partnership will receive consideration from the Crown (in the form of the D&C Payment) for each Facility and will in turn provide consideration to the Crown (in the form of the completion of each Facility that is part of the Project and the transfer of its rights, set out in clause 12.2(c) of the Project Agreement, in each Facility). The D&C Phase of the Project Agreement for each facility is a "financial arrangement" under s EW 3 and an "agreement for the sale and purchase of property or services" under s YA 1.

4.2 The Partnership and the Crown have agreed that each D&C Payment includes capitalised interest (clause 13.6(c) of the Project Agreement). The Interest Component of each D&C Payment will be income under the financial arrangements rules under subpart EW.

4.3 During the D&C Phase for each Facility the Partnership has variable expenditure commitments that will accrue. The capitalised interest component of each D&C Payment is intended to offset the expected funding costs incurred on these commitments.

4.4 The Interest Component is calculated with reference to expected funding costs. No adjustment is made for variances between actual and expected costs as the D&C Payment for each Facility, including capitalised interest, is agreed in advance.

4.5 The Interest Component of each D&C Payment needs to be spread over the term of the D&C Phase for the Facility to which it relates.

5. Interpretation

In this determination, unless the context otherwise requires:

- All legislative references in this determination are to the Income Tax Act 2007, unless otherwise stated.
- Capitalised terms have the same meaning as set out in the Project Agreement.
- **IFRS** means International Financial Reporting Standards as defined in s YA 1.
- **Private Ruling** means Private Ruling BR Prv 18/01 issued on 26 January 2018, and includes any Ruling issued to replace that Ruling, provided that the change to the Ruling does not affect the application of this determination.

6. Method

Calculation of Interest Component

6.1 The value of the completion of a Facility and transfer of the Partnership's rights to the Crown, set out in clause 12.2(c) of the Project Agreement, is the agreed design and construction costs of the relevant Facility (excluding Fitout) set out in the Base Case for the relevant Facility under the Project Agreement.

6.2 The D&C Payment less the agreed design and construction costs of the Facility (excluding Fitout) set out in the Base Case for the relevant Facility under the Project Agreement is the Interest Component that is income under the financial arrangements rules.

6.3 The Private Ruling rules on the portion of the D&C Payment that is not income under the financial arrangements rules, and that portion is not considered in this determination.

Spreading of Interest Component

6.4 The method for determining the amount of income that is to be allocated to each income year is as follows:

(a) The expected design and construction costs of the Facility (excluding Fitout) as set out in the Base Case for the relevant Facility are treated as having been incurred at the beginning of each of the income years that make up the D&C Phase for each Facility (the Annual Expenditure). No adjustment will be made to the Annual Expenditure in any income year to reflect actual expenditure in that year.

(b) The interest allocated to each income year is then calculated in accordance with the following formula:

Interest = OB × R

Where:

OB is the sum of the Annual Expenditure for that income year, plus the Annual Expenditure and interest attributable to any previous income year.

R is the internal rate of return (based on annual rests) calculated using the notional cash flows in paragraph (a) above at the beginning of each income year as outflows, and the D&C Payment at the end of the D&C Phase as the only inflow.

7. Example

This example illustrates the application of the method set out in this determination.

The Partnership and the Crown agree to the D&C Payment under the Base Case sheet that the D&C Payment equals $60,000.

The Base Case sets out that the agreed design and construction costs of the Facility (excluding Fitout) are to be $55,500.

The value of the "completion of the relevant Facility and the transfer of the rights set out in clause 12.2(c)" of the Project Agreement, as set out in clause 13.4(a) of the Project Agreement, is equal to $55,500.

The Interest Component of the D&C Payment is $4,500 by implication of the valuation under this determination.

The Taxable Limited Partners will each spread the Interest Component over the term of the D&C Phase of the Project Agreement, as follows.

The Annual Expenditure incurred and treated as having been incurred at the beginning of the relevant income year is as follows:

Year	Actual D&C Costs
1	($2,500)
2	($35,000)
3	($18,000)
D&C Payment	$60,000
	($55,500)

Based on receipt of the $60,000 D&C Payment in Year 3, the Project has an internal rate of return of 4.62%.

The Interest Component is therefore spread as follows:

Year	Actual D&C costs	Cumulative	Interest income
1	($2,500)	($2,500)	$115
2	($35,000)	($37,615)	$1,737
3	($18,000)	($57,352)	$2,648
		$60,000	
	($55,500)		$4,500

This Determination is signed by me on the 26th day of January 2018.

Fiona Heiford
Manager (Taxpayer Rulings)

2018 International tax disclosure exemption ITR29

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. 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.

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 2018. This exemption may be cited as "International Tax Disclosure Exemption ITR29"("the 2018 disclosure exemption") and the full text appears at the end of this item.

Scope of exemption

The scope of the 2018 disclosure exemption is the same as the 2017 disclosure exemption.

Application date

This exemption applies for the income year corresponding to the tax year ended 31 March 2018.

Summary

In summary, the 2018 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 an amount of FIF income or loss.
- 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 2018 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 which New Zealand does not have a double tax agreement in force as at 31 March 2018.

The 40 countries or territories that New Zealand does have a double tax agreement in force as at 31 March 2018 are listed below.

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

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 40 countries or territories listed in this 2018 disclosure exemption.

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, if a person acquired the interest before 1 April 2014 and treated the interest as a FIF interest in a return of income filed before 20 May 2013 and for all subsequent income years
- an entitlement to benefit from a foreign superannuation scheme, if a person's interest in the scheme was first acquired whilst the person was tax resident of New Zealand
- an entitlement to benefit from a foreign life insurance policy
- an interest in an entity specified in schedule 25, part A of the ITA

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 IR871 form that can be found on Inland Revenue's website **www.ird.govt.nz** (keywords: other exemptions or 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)
- a beneficial interest in a foreign superannuation scheme which was first acquired whilst the person was not a tax resident of New Zealand and which has not been treated as an attributing interest in a FIF by a person
- certain foreign pensions or annuities (see Inland Revenue's guide *Overseas pensions and annuity schemes (IR257)* 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 of the ITA 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. Even after four years a person must continue to apply the FIF rules if they hold any of the shares they held at the time of opting out.

Format of disclosure

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

- IR443 form for the deemed rate of return method
- IR445 form for the fair dividend rate method (for widely-held entities)
- IR446 form for the comparative value method (for widely-held entities)
- IR447 form for the fair dividend rate method (for individuals or non-widely-held entities)
- IR448 form for the comparative value method (for individuals or non-widely-held entities)
- IR449 form for the cost method
- IR458 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 IR445 and IR446 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 of the TAA. In order to be exempt from the general requirements, the alternative disclosure must be made electronically.

The IR447, IR448 and IR449 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 IR458 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 (IR458)* form. This form, which involves uploading a prescribed spreadsheet, can cater for up to 500 individual disclosures.

The IR458 form must be completed online at **www.ird.govt.nz** (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 IR458 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 ITR29".

1. Reference

This exemption is made under section 61(2) of the Tax Administration Act 1994 ("TAA"). 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 TAA to make disclosure of their interests, for the income year ended 31 March 2018.

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 ("ITA") 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 2018 in one of the 40 countries or territories as set out in the commentary.

The relevant definition of "associated persons" is contained in subpart YB of the ITA.

Otherwise, unless the context requires, expressions used have the same meaning as in section YA 1 of the ITA.

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 due to the application of the de minimis exemption in section CQ 5(1)(d) or section DN 6(1)(d) of the ITA , is not required to comply with section 61(1) of the TAA 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 TAA 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 TAA 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 2018.

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 2018, is not required to comply with section 61(1) of the TAA 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 ITA ; 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 ITA.

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

This exemption is signed on the 2 March 2018.

Dr Peter G Loerscher
Principal Advisor (International Tax)

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, 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.

Order under s 36 of the Insolvency Act 2006 adjudicating Judgment Debtor bankrupt

Case	The Commissioner of Inland Revenue v Wilson [2018] NZHC 236
Decision date	27 February 2018
Act(s)	Insolvency Act 2006 ss 13, 17, 36 and 37; High Court Rules r 24.10
Keywords	Bankruptcy notice, adjudication, discretion, refusal to adjudicate

Summary

The Commissioner of Inland Revenue ("the Judgment Creditor") applied for an order adjudicating Mr Ronald Wilson ("the Judgment Debtor") bankrupt. The Judgment Debtor opposed the application on the ground that it would be just and equitable for the High Court to exercise its discretion under s 37(c) of the Insolvency Act 2006 ("the Act") to refuse to adjudicate him bankrupt. The High Court held that the grounds for refusal of such an order were not made out and accordingly made an order under s 36 of the Act adjudicating the Judgment Debtor bankrupt.

Impact

This decision confirms the High Court's discretion to refuse to adjudicate a debtor bankrupt even where the statutory requirements for adjudication are met; and provides some guidance on the general principles applicable to the exercise of that discretion.

Facts

Mr Wilson was a trustee of the Il Mondo Trust ("the Trust"). In the monthly periods ending 30 November 2001, 31 January 2002, 31 March 2002, 31 May 2002, 31 January 2003, 31 March 2003 and 31 July 2003 the Judgment Creditor assessed the Judgment Debtor with GST owing by the Trust (as trustee, the Judgment Debtor was personally liable for the debt). The total amount of GST assessed was $17,693.65 as at 31 July 2003 and by June 2015 the amount owing had grown to $137,303.10 ("the debt").

On 17 June 2015, the Judgment Creditor obtained judgment against the Judgment Debtor in the Rotorua District Court for the debt and on 8 October 2015 at the Judgment Creditor's request, the High Court issued a bankruptcy notice based on the debt. On 5 November 2015, the bankruptcy notice was served on the Judgment Debtor and on 17 November 2015 the Judgment Debtor applied to the High Court for orders setting aside the bankruptcy notice and approving the terms of the payment proposal he had previously offered to the Judgment Creditor. The Judgment Creditor declined the payment proposal on 8 December 2015.

On 22 April 2016, the High Court, invoking its inherent jurisdiction, approved the Judgment Debtor's payment proposal and held that as such the bankruptcy notice would be deemed to have been complied with. The High Court also held that costs were to lie where they fall (*Wilson v Commissioner of Inland Revenue* [2016] NZHC 87, (2016) 27 NZTC 22-047 at [64]).

The Judgment Creditor appealed the substantive decision and the Judgment Debtor cross-appealed the costs order. On 31 March 2017, the Court of Appeal issued its judgment finding in favour of the Judgment Creditor and dismissing the cross-appeal (*Commissioner of Inland Revenue v Wilson* [2017] NZCA 100, (2017) 28 NZTC 23-009 at [45]-[47]). The Court of Appeal determined that on the correct interpretation of s 29(1)(b)(iii) of the Act, the High Court does not have statutory jurisdiction to approve a payment proposal and it does not have an inherent jurisdiction to approve such a proposal either (At [26]-[30] and [38]).

The Judgment Creditor's application for adjudication was heard by the High Court on 7 December 2017.

Decision

Prejudiced by delay

The High Court found the Judgment Debtor's debt arose for no other reason than that he failed to pay the Trust's GST bill promptly. The High Court found there was a strong public interest in making an adjudication order in this case.

The High Court rejected the Judgment Debtor's evidence that the Judgment Creditor made no attempt to resolve the debt between 2008 and 2014; finding that in fact, during this time the Judgment Creditor had issued 90 statements of account to the Trust notifying it of its debt.

The High Court noted that the Judgment Debtor had no reason not to pay the debt and never made any voluntary payments towards it. The High Court further noted that if the Judgment Debtor seriously contended his preference was to have been adjudicated bankrupt in 2005, one would have expected him to avail himself of his entitlement to voluntary bankruptcy.

Unreasonable rejection of payment proposal

The relevant principle that had to be considered here was what the circumstances in which the debt was incurred were and whether those circumstances suggest the Judgment Creditor was unreasonable in pursuing adjudication. The High Court noted the GST obligation to which the debt attaches relates to an assessment from almost 15 years ago and no voluntary payments towards that amount had been made.

The High Court held the Judgment Creditor was not unreasonable in pursuing adjudication, noting her role in protecting the integrity of the tax system and promoting voluntary compliance and her ability to reject a payment proposal if accepting the proposal may give the impression of an unfair tax system with voluntary compliance being merely optional.

Pointless to adjudicate

The High Court noted the Official Assignee's powers upon adjudication extend beyond assets owned personally by a debtor. It held evidence regarding a potential income stream into the Judgment Debtor's bank account (undeclared at the time the payment proposals were made) together with his association to other trusts and a company, provided good justification for making an order for adjudication. The public interest in adjudication further provided strong justification for such an order.

Adjudication is oppressive

The High Court relied on *Re Marra, ex parte Commissioner of Inland Revenue* (2004) 21 NZTC 18,494 (HC) at [17], in noting the Judgment Creditor has a duty to protect the integrity of the tax system and that it cannot be oppressive conduct to pursue taxpayers who fail or refuse to comply with their legitimately incurred tax liabilities.

High Court confirms the use of the Mannix Rule

Case	Emborion International Limited v Commissioner of Inland Revenue [2018] NZHC 178
Decision date	19 February 2018
Act(s)	High Court Rules 2016; New Zealand Bill of Rights Act 1990; Interpretation Act 1999
Keywords	Representation, Mannix, costs, heard on the papers

Summary

Emborion International Ltd ("Emborion") applied to the High Court seeking orders regarding representation during the conduct of the proceeding and substantive hearing, that this matter be heard on the papers and that the Commissioner of Inland Revenue ("the Commissioner") meet all of Emborion's legal fees and court costs. The Commissioner opposed Emborion's applications. In the High Court, van Bohemen J dismissed all of Emborion's applications.

Impact

The decision confirms the application of the decision in *Re G J Mannix* [1984] 1 NZLR 309 ("*Re G J Mannix*").

Facts

Emborion has challenged the Commissioner's assessment in the Taxation Review Authority ("TRA").

On 1 November 2016, Moore J granted the Commissioner's application to transfer the matter to the High Court on the grounds, inter alia, that the proceedings are moderately complex, that they involve a tax arrangement orchestrated by John George Russell, and that three other proceedings involving similar issues with companies associated with Mr Russell have been transferred from the TRA to the High Court. By Minute dated 12 April 2017, Moore J refused Emborion's subsequent application to recall his decision to transfer the dispute to the High Court.

On 31 January 2018, Emborion lodged an application signed by Glenda Rogers (Emborion's sole director) seeking orders that the dispute be heard on the papers and that the Commissioner meet all of Emborion's legal fees and court costs, alongside a memorandum for the case management conference also signed by Mrs Rogers, which set out the issues involved in the dispute and proposed a timetable for the proceeding.

On 2 February 2018, the Commissioner filed a memorandum in response, stating that whether Mrs Rogers has standing to file documents on behalf of Emborion. Further, the Commissioner opposed Emborion's application to have the dispute heard on the papers but largely agreed with the issues identified and the timetabling proposed.

On 13 February 2018, the Commissioner filed a further Notice of Opposition to Emborion's application that the dispute be heard on the papers and that the Commissioner pay Emborion's legal fees and court costs.

Decision

Representation of Emborion

The Court could see no reason to depart from the decision in *Re G J Mannix*, namely that a company must be represented by a barrister or solicitor and the New Zealand Bill of Rights Act 1990 and Interpretation Act 1999 do not make companies into natural persons. Accordingly the Court confirmed that Emborion may not be represented in this proceeding except by a barrister or solicitor.

Regarding Mrs Roger's standing to file documents in the proceeding, the Court was prepared to grant Emborion some latitude as the agreed timetable requires some action in the coming weeks. Regardless, the Court stated that if Emborion intends to pursue its challenge, it should obtain professional legal advice as soon as possible.

Lastly, the Court made it very clear that even though Mr Russell's participation in this conference was not objected to, if Mr Russell should attend any future conferences, he will not be able to address the Court on behalf of the company.

Emborion's application for the proceeding to be determined on the papers

The Court dismissed Emborion's application to have the matter determined on the papers. First, the Court found that the high level of disagreement of the points at issue between the Commissioner and Emborion would make it a difficult matter for a judge to determine on the papers. Secondly, as it was proposed that the hearing would take five days and the Commissioner will likely wish to cross examine Mr Russell, it would again make it difficult to be satisfactorily determined on the papers.

Additionally, the Court also dismissed Emborion's application to have its legal fees and court costs met by the Commissioner. Costs will only be determined once the outcome of a matter is known.

Schedule 5 of the High Court Rules

The Court noted that the parties are largely in agreement on the matters to be considered under Schedule 5 of the High Court Rules. A timetable was accordingly set down for the matter.

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