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TAX INFORMATION Bulletin

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Inland Revenue
Te Tari Taake

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Ref	Draft type	Title	Comment deadline
PUB00497	Interpretation statement	Student Loans – Overseas borrowers and their obligations	18 July 2025

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IN SUMMARY

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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.

NAMV 2025: National Average Market Values of Specified Livestock Determination 2025

Issued: 26 May 2025

Note to this determination

This note does not form part of the national average market values of specified livestock determination 2025 (the determination) but is produced to aid Inland Revenue staff, taxpayers and their agents in their understanding of how the values contained in the determination are arrived at and how they should be used.

Section EC 15 of the Income Tax Act 2007 (the Act) requires that the Commissioner of Inland Revenue (the Commissioner) make a determination declaring the national average market values (NAMV) for an income year for each class of specified livestock set out in Schedule 17 of the Act. Historically, this determination has been published in May each year.

NAMVs are declared for an income year and used by taxpayers, that are in the business of livestock farming, to value any specified livestock that they have on hand where the taxpayer has elected to use the herd scheme to value that livestock in the income year.

As the name of this determination suggests, NAMVs provide the **national average** market value for the specified livestock classes. They may therefore not always reflect the market value of the livestock of a particular taxpayer, or even of a particular region. Because of this, the values are not intended to be used for any other purpose than that for which they are produced; valuing the livestock of taxpayers that are in the business of livestock farming, who have elected to value their livestock under the herd scheme in the income year for which the determination relates.

To ascertain the national average **market value** of the various classes of livestock, the Commissioner contracts with a number of highly experienced livestock valuers situated throughout the country.[1] Each valuer is asked to provide the market value of the various specified livestock classes located in a specified region. There is generally more than one valuer contracted for each region. The market valuations required are for "good quality on-farm animals (capital stock) on 30th April".

From these values, the Commissioner then calculates the **national average market value** for each livestock class. For the sheep, beef, dairy cattle and deer (red, wapiti and elk) classes a weighted average is used against the values produced by each valuer. The weighted averages are calculated based on the total livestock numbers for a type of livestock in a particular region compared to the national herd numbers for that type of livestock.[2] Because of their comparatively low numbers, a straight average is used for the remaining livestock types (except "other deer"). The value of "other deer" is taken as the mid-point between the "trophy market" values and the "meat market" values.

National Average Market Values of Specified Livestock Determination 2025

This determination may be cited as "The National Average Market Values of Specified Livestock Determination 2025".

This determination is made in terms of section EC 15 of the Income Tax Act 2007 and shall apply to specified livestock on hand at the end of the 2024-2025 income year.

For the purposes of section EC 15 of the Income Tax Act 2007 the national average market values of specified livestock, for the 2024-2025 income year, are as set out in the following table.

1 Thirty-eight valuations were obtained for the 2025 determination.

2 Numbers are based on data collated by Statistics New Zealand.

National Average Market Values of Specified Livestock

Type of Livestock	Classes of Livestock	Average Market Value per Head $
Sheep	Ewe hoggets	147.00
	Ram and wether hoggets	145.00
	Two-tooth ewes	201.00
	Mixed-age ewes (rising three-year and four-year old ewes)	178.00
	Rising five-year and older ewes	148.00
	Mixed-age wethers	111.00
	Breeding rams	310.00
Beef cattle	*Beef breeds and beef crosses:*	
	Rising one-year heifers	944.00
	Rising two-year heifers	1521.00
	Mixed-age cows	1865.00
	Rising one-year steers and bulls	1181.00
	Rising two-year steers and bulls	1741.00
	Rising three-year and older steers and bulls	2172.00
	Breeding bulls	3534.00
Dairy cattle	*Friesian and related breeds, Jersey and other dairy breeds:*	
	Rising one-year heifers	1007.00
	Rising two-year heifers	1826.00
	Mixed-age cows	2111.00
	Rising one-year steers and bulls	967.00
	Rising two-year steers and bulls	1600.00
	Rising three-year and older steers and bulls	2048.00
	Breeding bulls	2290.00
Deer	*Red deer, wapiti, elk, and related crossbreeds:*	
	Rising one-year hinds	293.00
	Rising two-year hinds	507.00
	Mixed-age hinds	602.00
	Rising one-year stags	359.00
	Rising two-year and older stags (non-breeding)	767.00
	Breeding stags	3330.00
	Other breeds:	
	Rising one-year hinds	166.00
	Rising two-year hinds	286.00
	Mixed-age hinds	338.00
	Rising one-year stags	213.00

	Rising two-year and older stags (non-breeding)	362.00
	Breeding stags	1171.00
Goats	*Angora and angora crosses (mohair producing):*	
	Rising one-year does	145.00
	Mixed-age does	139.00
	Rising one-year bucks (non-breeding)/wethers	90.00
	Bucks (non-breeding)/wethers over one year	83.00
	Breeding bucks	488.00
	Other fibre and meat producing goats (Cashmere or Cashgora producing):	
	Rising one-year does	69.00
	Mixed-age does	106.00
	Rising one-year bucks (non-breeding)/wethers	68.00
	Bucks (non-breeding)/wethers over one year	75.00
	Breeding bucks	652.00
	Milking (dairy) goats:	
	Rising one-year does	145.00
	Does over one year	215.00
	Breeding bucks	403.00
	Other dairy goats (culls)	59.00
Pigs	Breeding sows less than one year of age	274.00
	Breeding sows over one year	370.00
	Breeding boars	393.00
	Weaners less than 10 weeks of age (excluding sucklings)	132.00
	Growing pigs 10 to 17 weeks of age (porkers and baconers)	207.00
	Growing pigs over 17 weeks of age (baconers)	319.00

This determination was signed by me on the 26th day of May 2025.

Stephen Donaldson

Technical Lead, Legal Services, Technical Standards

Inland Revenue

References

Legislative References

Income Tax Act 2007: s EC 15, Schedule 17

OS 19 04 (KM 2025): Kilometre rates for the business use of vehicles for the 2025 income year

The rates set out below apply for the 2024-2025 income year for business motor vehicle expenditure claims. The Tier 1 and Tier 2 rates reflect an overall increase in vehicle running costs in the income year, largely due to fuel costs. The Commissioner uses third-party data to set the appropriate kilometre rates for the income year.

From the 2024-2025 income year, the Commissioner has conducted a review of the published vehicle kilometre rates, due to a significant difference in vehicle running costs between the different vehicle types (Petrol, Diesel, Petrol Hybrid and Electric). Traditionally the Commissioner has set a single Tier One rate, however, due to the significant difference in running costs a Tier One rate has been set for each vehicle category to ensure the rates accurately reflect reasonable expenditure related to the business use of that particular vehicle.

The table of rates for the 2024-2025 income year

The Tier One rate is a combination of your vehicle's fixed and running costs. Use it for the business portion of the first 14,000 kilometres travelled by the vehicle in an income year. This includes private use travel.

The Tier Two rate is for running costs only. Use it for the business portion of any travel over 14,000 kilometres in an income year.

Vehicle type	Tier 1 rate per km	Tier 2 rate per km
Petrol	$1.17	$0.37
Diesel	$1.26	$0.35
Petrol Hybrid	$0.86	$0.21
Electric	$1.08	$0.19

Guidance to the use of the kilometre rates

This note provides some clarification to the use of the Commissioner's vehicle kilometre rates. For more detailed information, please also read Operational Statement 19/04a, "Commissioner's statement on using a kilometre rate for business running of a motor vehicle – deductions" and 19/04b, "Commissioner's statement on using a kilometre rate for employee reimbursement of a motor vehicle". Please be aware that the Commissioner is in the process of reviewing and updating these operational statements.

Use of the rates for business vehicles

In situations where a business intends to claim expenses for a motor vehicle that is used for both business and non-taxable (private) purposes, they must calculate the proportion of business use. They can do this by either deducting the business portion of their actual motor vehicle costs (the cost method) or using the kilometre rates set annually by the Commissioner (the kilometre rate method).

The above rates are applicable when using the kilometre rate method for calculating business use of the vehicle during the 2024-2025 income year and provide a reasonable estimate of the related expenditure for the use of the vehicle that can be claimed as a deduction in that year.

Use of the rates for Employee reimbursement for use of a vehicle

The Commissioner's motor vehicle kilometre rates are set primarily to provide an alternative method for calculation of claims for vehicle expenditure by business customers. They relate to the prior income year to assist with calculating deductible expenditure for return filing for that year. However, the Commissioner understands that some employers may use the motor vehicle kilometre rates as a reasonable estimate of expenditure likely to be incurred by employees when providing reimbursements for the business use of private motor vehicles.

The requirement that reimbursement must be a "reasonable estimate of expenditure" does not necessarily mean the kilometre rates can or should be used. There are other methods of determining reasonable expenditure of an employee's business use of a vehicle. However, the use of the kilometre rates for determining a "reasonable estimate of expenditure" is accepted by the Commissioner, but employers need to be aware of factors that may mean this is no longer reasonable.

The kilometre rates are set for a particular year based on factors that impact expenditure in that period. Reimbursement of expenditure is likely to occur in the current income year where factors may suggest these rates are no longer a reasonable estimate of the expenditure incurred. Further, the use of these rates may not be practical based on an employer not knowing each vehicle type employees are using. In these circumstances the Commissioner accepts a reasonable estimate that may be a blended average of the published kilometre rates, in order to reduce any compliance costs. However, employers need to consider that this is still appropriate in the circumstances and timing of any reimbursement payment.

To assist understanding of what is a "reasonable estimate" of expenditure, some examples are provided below.

Examples:

Example one – business vehicle (petrol) greater than 14,000 kms travelled - logbook maintained:

The business taxpayer uses their petrol car for both business and private purposes.

The previous logbook test period calculates that 60% of the travel is for business purposes.

The car travelled a total of 20,000 kilometres for the 2024-2025 income year.

Deduction

Tier 1 14,000 x $1.17 x 60% = 9,828.00

Tier 2 6,000 x $0.37 x 60% = 1,332.00

Total deduction = $11,160.00

Example two – reimbursement payment to employee for business use of their own electric vehicle – logbook maintained

A business makes a reimbursement payment to an employee that has a logbook recorded that they travelled 5,000km for business use in their own electric vehicle in the 2025-2026 income year. The employer considers that the Commissioner's kilometre rates for the 2024-2025 are still a reasonable estimate of expenditure that has been incurred by the employee and decides to use these rates to calculate the reimbursement payment.

Reimbursement payment

Tier 1 5,000 x $1.08 = $5,400

However, the employer is not required to calculate the reimbursement based on the Commissioner's published kilometre rates and may consider a better reasonable estimate is available from third-party published running costs, actual expenditure or other reasonable sources.

Example three – reimbursement payment to employee for business use of their own vehicle (unknown type) – no logbook maintained

A business makes a reimbursement payment to an employee that has used their own vehicle for business use in the 2025-2026 income year. No logbook has been maintained, but evidence is provided of ad hoc short distances travelled for business purposes. The employer has many employees and does not track, nor have records of, the type of vehicle the employee uses.

In this instance the employer is only required to determine a reasonable estimate of the expenditure incurred by the employee for the business use of their vehicle. The employer considers that the Commissioner's kilometre rates for 2024-2025 are still a reasonable estimate of expenditure that has been incurred by the employee and decides to use an estimate based on these rates to calculate the reimbursement payment. The employer uses an average of the four Tier 1 rates (as the employee has only travelled for business a total of 1,000km in the year) and applies a rate of $1.09 per km for the reimbursement payment (1.17 + 1.26 + 1.08 + 0.86/4).

The Commissioner does not expect the employer to have additional compliance costs and track vehicle types where that is not practical. However, the employer is not required to calculate the reimbursement based on the Commissioner's published kilometre rates and may consider a better reasonable estimate is available from third-party published running costs, actual expenditure or other reasonable sources.

Approved

Stephen Donaldson

Technical Lead, Legal Services

Date: 30 May 2025

2025 Consumers Price Index adjustment to standard-cost amounts for household services (childcare, boarding services, or short-stay accommodation)

In accordance with Section 91AA of the Tax Administration Act 1994, the Commissioner advises adjustments to have been made to the standard-cost amounts for the 2025 income year (1 April 2024 to 31 March 2025), as follows:

Determination DET 09/02 (CPI 2025) Childcare household service

– Hourly standard-cost (per child)	$ 4.56
– Annual fixed administration and record keeping standard-cost	$ 446.00

Determination DET 19/01 (CPI 2025) Household boarding service providers

– Weekly standard-cost (per boarder)	$ 237.00

Determination DET 19/02 (CPI 2025) Short-stay accommodation

– daily standard-cost (for each guest)	
Owned dwelling	$ 63.00
Rented dwelling	$ 57.00

These amounts reflect the annual movement of the Consumers Price Index for the twelve months to March 2025, which showed an increase of 2.5%.

2025 CPI adjustment to Operational Statement OS 19/03: Square metre rate for the dual use of premises

This update to OS 19/03 shows the annual adjustment to the square metre rate for the dual use of premises.

In accordance with Section DB 18AA of the Income Tax Act 2007, the Commissioner advises that the square metre rate for the 2025 income year (1 April 2024 to 31 March 2025) is set at $55.60. The amount reflects the June 2019 Household Economic Survey utility costs information sourced from Statistics New Zealand (adjusted for inflation) and the annual movement of the Consumers Price Index for the twelve months to March 2025, which showed an increase of 2.5%.

See the related operational statement for further information on the use of square metre rate.

Det 25/02: Determination of expenditure incurred relating to payments made by New Zealand Clinical Research to volunteers

Issued | Tukuna: 29 April 2025

This determination applies to payments made by New Zealand Clinical Research Group (NZCR) to people who volunteer to participate in clinical medical trials run by NZCR. The determination applies for the period 1 April 2025 onwards and applies to set an amount of expenditure, up to a maximum of $150.00, for which each payment made by NZCR to participants is a reimbursement of actual expenses incurred by the volunteer.

All references to legislation are to the Income Tax Act 2007.

Application | Whakapānga

1. This determination is made under section RD 8(3) and shall apply to amounts paid to volunteers who undertake voluntary activities, to participate in clinical medical trials, for New Zealand Clinical Research Group (NZCR).
2. This determination may be cited as "Determination DET 2025/02: Determination of expenditure incurred relating to payments made by New Zealand Clinical Research Group to volunteers."
3. This determination shall apply for the period 1 January 2025 onwards.
4. For the purposes of section CW 62B, "volunteer" means a person who freely undertakes an activity in New Zealand:
   - Chosen either by themselves or by a group of which they are a member; and
   - That provides a benefit to a community or another person; and
   - For which there is no purpose or intention of private pecuniary profit for the person.
5. Also, for the purposes of this determination, an "honorarium" means an amount that a person receives for providing services that:
   - Is paid at a rate that is less than the market rate for providing the services; and
   - Is an amount for which, in the normal course, no payment is fixed for the services provided.

Scope of definition

6. Honoraria paid to NZCR volunteers are "schedular payments" under section RD 8. Schedule 4, Part B requires PAYE to be deducted from honoraria at the applicable rate.
7. Under section RD 3(1), a schedular payment is included in the definition of "PAYE income payment". Consequently, any person who makes a schedular payment must deduct tax from it at the time it is made, unless an exemption applies.
8. Section CW 62B provides that an amount that is a reimbursement payment to cover expenses incurred by a volunteer when undertaking a voluntary activity, is exempt from income tax.
9. Section RD 8(3) allows the Commissioner to determine an amount or proportion of any schedular payment that is considered to be expenditure incurred that is exempt from income tax. If the Commissioner has made such a determination, the person making the schedular payment is only required to deduct tax from the amount that exceeds the determined expenditure amount.

Determination | Marohitanga

10. When any NZCR volunteer receives a schedular payment for providing services to NZCR in carrying out any NZCR clinical trial, that payment, up to a maximum of $150.00 per trip, shall be regarded as being a reimbursement payment for actual expenditure incurred in undertaking that activity.
11. However, if that volunteer receives any additional reimbursement (in addition to the amount received from NZCR) for expenditure they have incurred, the amount exempted under this determination shall be reduced by that additional reimbursement.
12. Any payment a NZCR volunteer receives, for providing services to NZCR in carrying out any NZCR clinical trial, up to and including $150.00 is exempt income.
13. Any amounts received more than $150.00 is subject to withholding tax.

This determination was signed by me on 29 April 2025.

Rob Falk

Technical Specialist

Legal Services | Kaihautū Hangarau, Ratonga Ture

Inland Revenue | Te Tare Taake

Det 25/03: Determination of amount of a particular payment (being per diem allowances paid in the screen production industry) that shall be regarded as expenditure incurred relating to those payments

Issued | Tukuna: 11 June 2025

The Screen Production Industry pays per diem allowances to resident and non-resident contractors and resident and non-resident entertainers (contractor/entertainer) working on screen productions in New Zealand. These allowances are to cover the additional costs of food as well as other minor incidental expenses incurred in New Zealand by the contractor/entertainer while they are working away from their town of normal residence.

This determination applies to per diem payments. It sets out the amount regarded as expenditure incurred in the production of particular schedular payments when those payments are per diem allowances paid to contractors/entertainers working in the Screen Production Industry in New Zealand.

Sections RA 5 & RD 10(1) of the Income Tax Act 2007 require anyone who makes a PAYE income payment to deduct tax when making it.

Under section RD 3(1-4) of the Income Tax Act 2007 a schedular payment is included in the definition of "PAYE income payments". Consequently, any person who makes a schedular payment must deduct tax from it at the time it is made, unless an exemption applies.

As per diems paid to resident and non-resident contractors and entertainers come within the definition of PAYE income payments, tax must be deducted from such payments.

Section RD 8(3) allows the Commissioner to determine an amount or proportion of any PAYE income payment that is considered expenditure incurred in the production of that payment. If the Commissioner has made such a determination, the amount determined is not subject to income tax and the person paying the particular schedular payment or class of schedular payments is only required to deduct tax from the amount of the PAYE income payment that exceeds this threshold (section RD 11(4) of the Income Tax Act 2007).

All references to legislation are to the Income Tax Act 2007.

Application | Whakapānga

Scope of Determination

1. Where any resident or contractor/entertainer receives a per diem allowance in relation to services provided to a screen production and that allowance is a schedular payment. The sum of $100 per day shall be regarded as expenditure incurred in the production of the payment. If the total amount of the payment is less than $100 per day, the total amount of the payment shall be regarded as expenditure incurred in the production of the payment.
2. However, where the contractor/entertainer is also provided with some or all of the goods and services for which the allowance is paid, either by the payer or another party acting on the payer's behalf, then no amount will be exempted by operation of this Determination from the application of the Income Tax Act 2007.
3. Under section RD 3(1), a schedular payment is included in the definition of "PAYE income payment". Consequently, any person who makes a schedular payment must deduct tax from it at the time it is made, unless an exemption applies.
4. Sections RA (5) & RD 10(1) of the Income Tax Act 2007 require anyone who makes a PAYE income payment to deduct tax when making it
5. The Screen Production Industry pays per diem allowances to contractors/entertainers. These allowances are intended to cover the costs of food as well as other incidental expenses likely to be incurred while to contractor/entertainer is working in New Zealand on screen productions and is away from their town normal residence.
6. The per diems paid to contractors/entertainers come within the definition of PAYE income payments and so tax must be deducted from such payments

LEGISLATION AND DETERMINATIONS

7. Section RD 8(3) allows the Commissioner to determine an amount or proportion of any schedular payment that is not subject to income tax as it is considered to be expenditure incurred in deriving that income. Consequently, the person making the schedular payment is only required to deduct tax from the amount that exceeds the determined expenditure amount.
8. This determination will apply to payments made on or after 1 July 2025.

Determination | Marohitanga

9. Where any resident or non-resident contractor, or resident or non-resident entertainer receives a per diem allowance in relation to services provided to a screen production while working away from their town of normal residence and that allowance is a schedular payment, the sum of $100 per day shall be regarded as expenditure incurred in the production of the payment. If the total amount of the payment is less than $100 per day, the total amount of the payment shall be regarded as expenditure incurred in the production of the payment
10. However, where the contractor/entertainer is also provided with the goods and services for which the allowance is paid, either by the payer or another party acting on the payer's behalf, then no amount will be exempted by operation of this Determination from the application of the Income Tax Act 2007.

This Determination is signed on the 11th day of June 2025

Rob Falk

Technical Specialist

Legal Services | Kaihautū Hangarau, Ratonga Ture

Inland Revenue | Te Tare Taake

Examples

These examples apply to per diems which come within the definition of "schedular payment" in the Income Tax Act 2007.

Example 1

A contractor/entertainer working away from their home receives a per diem allowance of $100. The allowance is to reimburse the contractor/entertainer for the additional costs they have incurred for goods and services they have received which are not also provided by the payer or another entity acting on the payer's behalf. The payer does not have to deduct tax because the total payment does not exceed $100 per day. The contractor/ entertainer does not have to keep receipts.

Example 2

A contractor/entertainer working away from their home receives a per diem allowance of $100. The contractor/ entertainer is also provided with all meals while working, either on the set, or at some other location. The payer has to deduct tax from the per diem allowance of $100 as one of the matters for which the allowance is being paid is actually provided by the payer. The contractor/entertainer should keep receipts to show the incidental expenditure incurred and claim a deduction for those expenses when they file their tax return.

Example 3

A contractor/entertainer working away from their home receives a per diem allowance of $100. The contractor/entertainer is also able to obtain food from a particular café adjacent to the set. The café is directly reimbursed by the production company. In this situation, the cost of the food is met by the payer of the per diem and it is being physically provided on its behalf. The payer has to deduct tax from the per diem allowance of $100 as one of the matters for which the allowance is being paid is being provided by the payer. The contractor/entertainer should keep receipts to show the incidental expenditure incurred and claim a deduction for those expenses when they file their tax return.

Example 4

Contractor/entertainer receives a per diem allowance of $120. This is more than the threshold provided in the determination. Therefore, the payer should deduct tax from $20 of each daily payment.

BINDING RULING

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**

Product Ruling | Whakataunga Whakaputanga – BR Prd 25/03

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

Name of person who applied for the Ruling | Ingoa o te tangata i tono i te Whakatau

This Ruling has been applied for by Extraordinary Pay Limited (Extraordinary).

Taxation Laws | Ture Tāke

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

This Ruling applies in respect of ss BG 1, CE 1(1), CX 2, CX 19C, RD 2 and RD 3.

The Arrangement to which this Ruling applies | Te Whakaritenga i pāngia e tēnei Whakataunga

The Arrangement is Extraordinary's provision of services to its customers (Employers) to help an Employer subsidise certain public transport fares for its Employees. The Employee can agree to a temporary reduction in salary in exchange for their public transport fares being subsidised. Alternatively, the Employee can have their public transport fares subsidised as part of their employment compensation package without the need to agree to a temporary reduction in salary. In either case, under the Arrangement, the Employee is provided with an Extraordinary Card which can only be used to top up one of four specific Public Transport Cards (described below from [15]) which Employees use to pay for public transport.

The Arrangement does not include the use of the Extraordinary Card to acquire any other products or services in any other situation. Accordingly, this Ruling does not consider or rule on the tax consequences (if any) arising from the use of the Extraordinary Card to acquire other products or services.

Further details of the Arrangement are set out in the paragraphs below.

Parties to the Arrangement

1. The parties to the Arrangement are as follows:
    - Extraordinary is a New Zealand resident (by incorporation) that provides services to employers to track, manage and report, and facilitate non-payroll employee costs and payments (Extraordinary Services). Extraordinary is GST-registered.
    - Employer is a New Zealand resident employer that has contracted with Extraordinary to obtain Extraordinary Services that involve providing Employees who participate in the Arrangement with an Extraordinary Card that Employees can use ultimately to pay for public transport fares.
    - Employee is a New Zealand resident employee of the Employer who participates in the Arrangement and has either agreed to a temporary reduction in their gross annual earnings under a salary sacrifice agreement or agreed to receive the subsidised public transport fares as part of their employment compensation package.

Overview of Extraordinary's services

2. Extraordinary provides services to assist employers to track, manage, report and facilitate non-payroll employee costs and payments.

3. Broadly, Extraordinary's business involves the provision of Extraordinary Services, which include the following:

   - Extraordinary provides employers with access to a web platform (the Extraordinary Platform) that employers can use to allocate certain entitlements to employees (employer-allocated contributions). Employees can redeem these entitlements to pay for specified goods or services. These employer-allocated contributions enable employees to enter into certain pre-authorised transactions. When an employee does so, their employer-allocated contributions are debited and a bank account nominated or held by Extraordinary on behalf of an employer and funded by that employer (Customer Account) is credited against those transactions.
   - Extraordinary facilitates the use of the employer-allocated contributions by providing employees with a method of using these entitlements. Specifically, this service involves issuing an Extraordinary Card (which can be added to a person's digital wallet) and providing access to the Extraordinary Platform through a phone application and web-login, which can be used to review available balances of employer-allocated contributions (an employee's Cardholder Account).

4. In addition to funding employer-allocated contributions by depositing amounts into a Customer Account, an employer will pay fees to Extraordinary for Extraordinary Services.

5. The Extraordinary Card is a Prepaid Mastercard issued by Change Labs New Zealand Pty Ltd subject to the Extraordinary Prepaid Mastercard® (Terms and Conditions) (Extraordinary Card Terms, as posted on the Extraordinary Pay website in January 2025).

6. While the Extraordinary Card can, by default, be used as a Mastercard Prepaid Card, on issue, it is subject to technical restrictions that mean it can only be used to enter into pre-authorised transactions where:

   - a relevant amount of employer-allocated contributions (on the employee's Cardholder Account) is available; and
   - the Customer Account holds sufficient funds to credit the transaction.

7. Through the Extraordinary Platform, an employer can add employer-allocated contributions to an employee's Cardholder Account under specific categories. Each specific category of employer-allocated contributions is subject to particular restrictions such that different categories of employer-allocated contributions can only be used for certain types of transactions. Once employer-allocated contributions are added, an employee can only use the Extraordinary Card to complete a transaction if:

   - the transaction is consistent with the restrictions associated with a category of employer-allocated contributions;
   - there are sufficient employer-allocated contributions available to the employee under that category to complete the transaction; and
   - the Customer Account contains sufficient funds to be credited against the transaction when it is entered into.

8. The restrictions on categories of employer-allocated contributions are effected by limiting transactions to specific Merchant Category Codes (MCCs). MCCs are four-digit codes that are assigned by credit card networks consistent with the International Organization for Standardization's International Standard 18245.

9. In addition to restrictions based on a particular category of transaction, employers can restrict transactions to particular merchants through the Extraordinary Platform. These restrictions are effected by limiting transactions to specific Terminal ID numbers (TIDs).

10. The consequence of these restrictions is that the Extraordinary Card is only accepted by specific merchants in relation to each category of employer-allocated contributions.

Public Transport employer-allocated contributions

11. The scope of this Ruling is limited to provision of employer-allocated contributions made to a participating Employee's Cardholder Account through the Extraordinary Platform under the category "Public Transport". The category "Public Transport" is restricted to transactions that include the following identifiers:

    - the MCC relating to the provision of public transportation services; and
    - the specific TIDs associated with adding funds to four specific public transport cards used in New Zealand (as summarised at [15]).

BINDING RULING

12. The consequence of these restrictions is that employer-allocated contributions made to an Employee's Cardholder Account under the "Public Transport" category can only be used through the Extraordinary Card to add funds to one of four specific Public Transport Cards (described from [15]).
13. This Ruling does not consider or rule on the tax consequences (if any) in respect of any other products or services that are able to be obtained through the use of an Extraordinary Card.

Public Transport Cards

14. Public Transport Authorities (comprising regional councils, unitary authorities and Auckland Transport) are responsible for procuring, providing and managing public transport services in a region or district within New Zealand.
15. Some Public Transport Authorities make electronic ticketing cards available, which can be loaded with funds and used to pay public transport fares in particular regions or districts. Four electronic ticketing cards in use in New Zealand are:
    - the AT HOP Card, as defined in Auckland Transport's Public transport payments terms of use (last updated 17 November 2024);
    - the Snapper Card, as the "Cards" defined in Snapper's Terms and Conditions (last updated 28 August 2024);
    - the Metrocard, as defined in the Metrocard terms and conditions (as at 25 March 2025); and
    - the Bee Card, as defined in the Bee Scheme Terms and Conditions (last updated February 2025).
16. Collectively, these cards are referred to as "Public Transport Cards".
17. Funds loaded on Public Transport Cards can be used to pay for transportation services, collectively referred to as "Applicable Public Transport Services".
18. Applicable Public Transport Services are:
    - Bus services provided on motor vehicles (as defined in s 2(1) of the Land Transport Act 1998). These vehicles cannot be reserved for use by a single person or a self-selected group of people. None of these services is a shuttle service as defined in s 5 of the Land Transport Management Act 2003.
    - Train services provided on rail vehicles (as defined in s 4(1) of the Railways Act 2005).
    - Ferry services provided on ferries involving personal transport across water.
19. The cost of Applicable Public Transport Services which can be obtained using one of the Public Transport Cards is set at a particular dollar figure per journey which can vary depending on different factors. These factors can include:
    - the method of payment (eg, a Public Transport Card, cash, or contactless (via a credit or debit card));
    - whether the journey crosses a specified the geographic boundary such as a fare zone or similar concept (and if so, how many boundaries);
    - whether any concessions apply (eg, for children or students); and
    - which timeframe (on-peak or off-peak) the services are acquired within.

Employment benefit scheme

20. An Employer will engage with Extraordinary by entering into the Extraordinary Customer Agreement (provided to Inland Revenue on 16 May 2025) (Customer Agreement). In consideration for Extraordinary Services, the Employer may pay various fees, including monthly service fees and a "load fee" relating to employer-allocated contributions made available to the Employee. The Employer will also deposit amounts into the Customer Account, which will fund transactions that the Employee enters into when using an Extraordinary Card and employer-allocated contributions.
21. Extraordinary will also provide the Employer with the following template documents to use when an Employee participates in the Arrangement:
    a) Employer Public Transport Scheme – Salary Sacrifice Policy and Employer Public Transport Scheme – Salary Sacrifice Agreement (latest version provided to Inland Revenue on 16 May 2025) (the Extraordinary Salary Sacrifice Agreement); and
    b) Employer Subsidised Public Transport Scheme – Policy and Employer Subsidised Public Transport Scheme – Agreement (latest version provided to Inland Revenue on 16 May 2025) (the Extraordinary Public Transport Benefit Agreement).

22. An Employee who wishes to participate in the Arrangement and enter into the employment benefit scheme will complete an election form to seek approval from the Employer. As part of this process, the Employee will select an amount of employer-allocated contributions relating to Applicable Public Transport Services they wish to receive.
23. If the Employee is already employed by the Employer, the Employer and Employee may agree to reduce the Employee's annualised gross salary or wages for a period of 12-months under a salary sacrifice agreement (using the template documents referred above at [21a] - the Extraordinary Salary Sacrifice Agreement) in exchange for the Employee's participation in the Arrangement. The salary sacrifice period (12 months) will coincide with the Employee's access to the employment benefit scheme facilitated by Extraordinary. The amount of gross salary sacrificed will be equal to the total amount of employer-allocated contributions to be provided. The Extraordinary Salary Sacrifice Agreement will be entered into before the income that is to be sacrificed is earned.
24. Alternatively, an Employer and Employee may enter into the Arrangement without entering into a salary sacrifice agreement. In this case, they use the template documents as set out above at [21b] (the Extraordinary Public Transport Benefit Agreement).
25. As part of the approval process, a participating Employee will:
    - make a declaration that the Employee intends to mainly use public transport services purchased using an Extraordinary Card for the purpose of commuting between their home and workplace, including if they cease employment with the Employer; and
    - agree that they will only use the Extraordinary Card to top up their own Public Transport Card and that they will spend all employer-allocated contributions on public transport for themselves.
26. After the approval process, the Employee can request an Extraordinary Card and activate their Cardholder Account. During this process the Employee agrees to comply with the terms of the Customer Agreement and the Extraordinary Card Terms that relate to Cardholder obligations.
27. Extraordinary will associate an Extraordinary Card to the Employee's Cardholder Account and issue it to the Employee.
28. The Employer will then add employer-allocated contributions under the Public Transport category to the Employee's Cardholder Account.
29. Over the course of the employment benefit scheme, the Employer will regularly make the amounts of employer-allocated contributions available to a participating Employee.
30. The Employee can use their Extraordinary Card and their employer-allocated contributions to the Public Transport category to add funds to their Public Transport Card (as defined at [15]).
31. The Employee can only use the employer-allocated contributions to the Public Transport category to top up their Public Transport Card. Further, they will only use amounts funded on their Public Transport Card to purchase Applicable Public Transport Services for themselves personally.
32. Participating Employees are required to cancel their participation in the scheme if they will no longer use public transport mainly for commuting between home and work. The Employee will not be entitled to receive the benefit from the date of cancellation.
33. Where a participating Employee has entered into the Extraordinary Salary Sacrifice Agreement:
    - the salary sacrifice and benefit may be temporarily suspended if a participating Employee is absent from work for reasons such as parental leave, unpaid leave or a career break; and
    - if the participating Employee's participation in the scheme is cancelled they are restricted from rejoining the scheme within the 12-month period under the Extraordinary Salary Sacrifice Agreement and they do not have any automatic contractual right or expectation that their salary will be reinstated within the salary sacrifice period.
34. If the Employee ceases employment with the Employer while they are within the employment benefit scheme facilitated by Extraordinary, the Employee loses access to the Extraordinary Card and forfeits all unused employer-allocated contributions (including those intended for Applicable Public Transport Services).
35. If the Customer Agreement is terminated, deposited amounts held in the Customer Account will be paid back to the Employer (less any fees payable to Extraordinary under the Customer Agreement). Any unused employer-allocated contributions are lost.

Conditions stipulated by the Commissioner | Here i āta whakaritea e te Kaikōmihana

This Ruling is made subject to the following conditions:

(a) The Extraordinary Card Terms are not materially different from the terms and conditions as posted on the Extraordinary Pay website in January 2025.

(b) If the Employee uses the Extraordinary Card to add funds to a Public Transport Card, the Employee does not apply to cancel the Public Transport Card and seek a refund of the amounts loaded onto that Public Transport Card using the Extraordinary Card.

(c) The maximum value of employer-allocated contributions that the Employer can assign to the Employee in the Public Transport category will be reasonable, based on the Employee's expected actual public transport costs for commuting between work and home, and take account of any fare caps associated with the Public Transport Cards.

(d) The Extraordinary Platform and the Extraordinary Card will be restricted so that employer-allocated contributions under the Public Transport category can only be used through the Extraordinary Card to add funds to one of the four specific Public Transport Cards (as set out from [15]).

(e) The Public Transport category of employer-allocated contributions is the only category of employment-allocated contributions that can be used to add stored value to the Public Transport Cards.

(f) The terms and conditions relating to the Public Transport Cards referred to as part of the Arrangement are not materially different to the terms and conditions referred above in the Arrangement.

(g) The finalised documents entered into by Extraordinary, Employers and Employees will be materially the same as the following documents, as applicable:

 (i) the Customer Agreement (provided to Inland Revenue on 16 May 2025);

 (ii) the Employer Public Transport Scheme – Salary Sacrifice Policy and Employer Public Transport Scheme – Salary Sacrifice Agreement (latest version provided to Inland Revenue on 16 May 2025) (the Extraordinary Salary Sacrifice Agreement); and

 (iii) the Employer Subsidised Public Transport Scheme – Policy and Employer Subsidised Public Transport Scheme – Agreement (latest version provided to Inland Revenue on 16 May 2025) (the Extraordinary Public Transport Benefit Agreement).

How the Taxation Laws apply to the Arrangement | Ko te pānga o ngā Ture Tāke ki te Whakaritenga

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

(a) Employer-allocated contributions made available to the Employee through the Extraordinary Platform under the Public Transport category to subsidise Applicable Public Transport Services are not amounts of income derived by the Employee under s CE 1(1).

(b) Employer-allocated contributions made available to the Employee through the Extraordinary Platform under the Public Transport category to subsidise Applicable Public Transport Services are excluded from being a fringe benefit provided by the Employer under s CX 19C and are therefore not a fringe benefit under s CX 2.

(c) The Extraordinary Salary Sacrifice Agreement is a valid salary sacrifice agreement and an amount of sacrificed salary is not a PAYE income payment under s RD 3 or the PAYE rules (as defined in s RD 2).

(d) Section BG 1 does not apply to the Arrangement.

Period or income year for which this Ruling applies | Te wā, te tau moni whiwhi rānei i pāngia ai e tēnei Whakataunga

This Ruling will apply for the period beginning on 30 January 2025 and ending on 15 May 2028.

This Ruling is signed by me on the 16th day of May 2025.

Dinesh Gupta

Tax Counsel Lead | Rōia Kaihautū Tāke

Tax Counsel Office | Te Tari Tohutohu Tāke

INTERPRETATION STATEMENTS

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

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

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

Some interpretation statements may be accompanied by a fact sheet summarising and explaining the main points. Any fact sheet should be read alongside its corresponding interpretation statement to completely understand the guidance. Fact sheets are not binding on the Commissioner. Check **taxtechnical.ird.govt.nz/publications** for any fact sheets accompanying an interpretation statement.

IS 25/16: Tax residence

Issued | Tukuna: 16 May 2025

This interpretation statement explains the tax residence rules in the Income Tax Act 2007. It covers the tax residence of natural persons (individuals) and companies, and the residence implications in relation to trusts.

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

REPLACES | WHAKAKAPIA

- This interpretation statement updates and replaces **IS 16/03: Tax residence**

Introduction | Whakataki

Overview

1. This interpretation statement explains the tax residence rules in the Income Tax Act 2007 (the Act).
2. The analysis in this statement is in three parts:
    - **Part 1: Tax residence of natural persons (individuals)**, from page 7, which covers:
        - how to determine whether a natural person (individual) is tax resident in New Zealand;
        - the relationship between the New Zealand domestic tax residence rules and the residence articles contained in New Zealand's double taxation agreements (DTAs); and
        - the transitional resident rules – under which new migrants and returning New Zealanders may be entitled to temporary tax exemptions for certain foreign-sourced income.
    - **Part 2: Tax residence of companies**, from page 73, which covers:
        - how to determine whether a company is tax resident in New Zealand; and
        - the consequences of a company being a dual resident.
    - **Part 3: Tax residence and trusts**, from page 104, which covers residence and the taxation regime for trusts. How trust income is taxed depends on whether it is beneficiary income or trustee income, and on the residence of persons connected with the trust – the trustee, settlors and beneficiaries.

Relevance of tax residence

3. The concept of tax residence is a central feature of the Act and the Goods and Services Tax Act 1985 (the GSTA 1985). Tax residence may also be relevant for student loan borrowers who are away from New Zealand. The relevance of tax residence in New Zealand is explained below.

Income Tax Act 2007

Scope of taxation in New Zealand – main relevance of tax residence

4. Under the Act, the main relevance of tax residence is that it determines whether a person is assessable for tax on worldwide income or only on New Zealand-sourced income (s BD 1(5)).
5. New Zealand residents are assessable on worldwide income (other than exempt income and excluded income), though their liability may be modified if they are tax resident in more than one country and there is a DTA in place between the countries. They may be entitled to a credit for foreign tax paid on foreign-sourced income or gains (see further from [36]).
6. Non-residents are assessable only on New Zealand-sourced income (other than exempt income and excluded income).
7. If you are tax resident in more than one country, you may need a tax residency certificate from Inland Revenue to prove your tax residency status to an overseas tax authority. See Inland Revenue's website: **Certificates of residency** for information on how to get a tax residency certificate.

Working in New Zealand during a short-term visit

8. Income a non-tax resident derives from performing personal or professional services in New Zealand during a visit to New Zealand will be exempt income if certain criteria are met (s CW 19).[1] The visit generally cannot be for more than 92 days – though this may be extended to 183 days if there is a DTA between New Zealand and the other country. If the visit is for more than 92 days (or 183 days, as relevant), all income derived from the time of arrival is subject to tax in New Zealand.

Working for Families tax credits

9. Tax residence is also relevant to a person's eligibility for Working for Families tax credits, including Best Start (which is a payment for families with a newborn baby).
10. However, there are further additional residence requirements that either the principal caregiver or the dependent child must meet for the purposes of Working for Families tax credits (ss MC 5 and MD 7). These relate to:
    - being "New Zealand resident" as defined in s MA 8 – which means ordinarily and lawfully resident, other than only because of holding a temporary entry class visa;
    - presence in New Zealand; and
    - the transitional residence status of the principal caregiver and their spouse or partner (see from [152]).

Foreign superannuation schemes

11. Tax residence is also relevant to the rules for the taxation of interests in foreign superannuation schemes. In particular, it is relevant in the following situations:
    - Since 1 April 2014, lump sum withdrawals or transfers from foreign superannuation schemes are generally taxed on an amount that approximates the gains made during the period the person is a New Zealand resident under either one of two new methods: the schedule method or the formula method. Both methods require the person to determine the length of their "assessable period" (s CF 3(8)). The duration of a person's tax residence is relevant to determining the length of the assessable period.
    - However, there is an exemption period for lump sum foreign superannuation withdrawals or transfers for people who acquired the interest in the scheme when they were non-resident[2] (see ss CW 28B and CF 3). The exemption period runs until the end of the 48th month after the month in which the person satisfied the residence requirements in the Act (see s CF 3(6)). This is similar to the temporary exemption for transitional residents.[3] However, unlike the transitional resident rules, there is no minimum period of non-residence required to qualify for the exemption period.
    - Since 1 April 2014, the foreign investment fund (FIF) rules generally no longer apply to interests in foreign superannuation schemes. However, one situation where the FIF rules continue to apply is where a person acquires an interest in the foreign superannuation scheme while they are a New Zealand resident (see the definition of "FIF superannuation interest" in s YA 1).

1 These rules do not apply to non-resident public entertainers. There are specific rules that may be relevant to entertainers: see IS 19/03: Income tax – Exempt income of non-resident entertainers.

2 Provided they have not had such an exemption period before acquiring the interest.

3 Discussed from [152].

Goods and Services Tax Act 1985

12. Under the GSTA 1985, residence is relevant for determining the place of supply of goods and services. In particular, under s 8(2) of the GSTA 1985 supplies by:
    - residents are deemed to be made in New Zealand; and
    - non-residents are generally deemed to be made outside New Zealand
13. The term "resident" in the GSTA 1985 means resident as determined in accordance with the tax residence rules in the Income Tax Act (ss YD 1 and YD 2), but excluding s YD 2(2), and ignoring the back-dating rules in s YD 1(4) and (6). However, the definition of resident in the GSTA 1985 also provides that a person is deemed to be resident in New Zealand:
    - to the extent they carry on a taxable activity or any other activity in New Zealand while having any fixed or permanent place in New Zealand relating to that activity; and
    - if the person is an unincorporated body (which includes a partnership, a joint venture, and the trustee of a trust) that has its centre of administrative management here.
14. Supplies by non-residents may be treated as being supplied in New Zealand under s 8(3), (4) and (4B) of the GSTA 1985.

Student Loan Scheme Act 2011

15. Tax residence under the Act may also be relevant for the purposes of the Student Loan Scheme Act 2011 (the Student Loan Scheme Act).
16. In some circumstances, student loan borrowers who are not physically in New Zealand may be treated as being physically in New Zealand. Being physically in New Zealand, or treated as such, is relevant to whether a borrower is "New Zealand-based" or "overseas-based" for the purposes of the Student Loan Scheme Act.[4] Whether a borrower is New Zealand-based or overseas-based determines whether their loan is interest-free and what their repayment obligations are.
17. In some situations where borrowers who are not physically in New Zealand may be treated as being physically in New Zealand, there is a requirement that the borrower is tax resident in New Zealand. This is the case, for example, where there is an unplanned absence from New Zealand or an unexpected delay in returning to New Zealand.
18. In addition, tax residence may be relevant to a New Zealand-based borrower's filing requirements under the Student Loan Scheme Act.

Absentees

19. An "absentee" is defined in s YA 1[5] as someone who has not been tax resident in New Zealand during any part of the tax year. Absentees are, therefore, non-resident – though a non-resident may not be an absentee (for example, in the year they become non-resident they will not be an absentee).
20. There are a number of tax consequences arising from being an absentee – the main ones being that an absentee cannot receive tax credits for charitable or other public benefit gifts (s LD 2) and does not qualify for the child taxpayer exemption (s CW 55BB).

Analysis | Tātari

21. As noted at [2], The analysis in this interpretation statement is in three parts:
    - **Part 1: Tax residence of natural persons (individuals)** – from page 7.
    - **Part 2: Tax residence of companies** – from page 73.
    - **Part 3: Tax residence and trusts** – from page 104.

4 The terms "New Zealand-based" and "overseas-based" are defined in ss 4(1), 22 and 23 of the Student Loan Scheme Act.

5 Other than for the purposes of subpart HD (Agents).

Part 1: Tax residence of natural persons (individuals)

Overview

When an individual is a New Zealand tax resident

22. An individual is a New Zealand tax resident if they:
    - have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere (s YD 1(2)) (the permanent place of abode rule); or
    - have been personally present in New Zealand for more than 183 days in total in any 12-month period (s YD 1(3)) (the 183-day rule); and:
        - have not ceased to be tax resident under the 325-day rule (see [27] and [28]); and
        - are not treated as being non-resident because they are employed under the recognised seasonal employment scheme (see from [131]); or
    - are personally absent from New Zealand in the service of the New Zealand Government (see from [147]).
23. The permanent place of abode rule is the overriding tax residence test for individuals. This means that if a person has a permanent place of abode in New Zealand, they are tax resident here regardless of any of the other rules.
24. The courts have described a permanent place of abode in New Zealand as being a place where a taxpayer habitually resides from time to time even if they spend periods of time overseas. A person must have a place of abode (that is, a dwelling) in New Zealand to potentially have a permanent place of abode here, but they do not need to own the place of abode and it does not need to be vacant or able to be occupied immediately.
25. If a person is tax resident under the 183-day rule, they are treated as resident from the first of those 183 days (s YD 1(4)), unless they acquired a permanent place of abode in New Zealand earlier than the first of those 183 days – in which case they are resident from the date they acquired a permanent place of abode.
26. The permanent place of abode test is most relevant to people leaving New Zealand. People moving to New Zealand typically become resident under the 183-day rule (because residence under that test back-dates to the first counted day of presence) and do not need to consider the permanent place of abode test. However, in some situations someone moving to New Zealand could establish a permanent place of abode in New Zealand before the first day of presence counted for the 183-day rule. For example, a person who establishes a new family home in New Zealand, but the person moves between two countries for some time while finishing up a work contract and does not spend more than 183 days in New Zealand before they establish a permanent place of abode here. Also, there may be situations where someone does not move to New Zealand as such, but lives between New Zealand and another country or countries. In that situation, New Zealand residence could be triggered under either the permanent place of abode test or the 183-day rule.

When an individual ceases to be a New Zealand tax resident

27. An individual who is tax resident in New Zealand **only** because of the 183-day rule (that is, they do not have a permanent place of abode in New Zealand) will cease to be tax resident if
    - they are personally absent from New Zealand for more than 325 days in total in a 12-month period (s YD 1(5)) (the 325-day rule); and
    - they are not absent from New Zealand in the service of the New Zealand Government (see from [147]).
28. If a person ceases to be tax resident under the 325-day rule, they are treated as not resident from the first of those 325 days (s YD 1(6)), provided they did not have a permanent place of abode in New Zealand at any time during the 325-day period. Because the permanent place of abode rule is the overriding tax residence test for individuals, someone cannot cease to be tax resident any earlier than the day after the day they cease having a permanent place of abode in New Zealand.

Personal presence in or absence from New Zealand

29. The 183-day and 325-day rules refer to a person being personally present in or personally absent from New Zealand.
30. "New Zealand" is defined in s YA 1 as including the continental shelf. It also includes the water and airspace above any part of the continental shelf beyond New Zealand's "territorial sea"[6] to the extent to which exploration or exploitation of that part of the continental shelf or its natural resources may be undertaken there.
31. However, s 13 of the Legislation Act 2019 provides that when "New Zealand" is used as a territorial description it means the islands and territories within the Realm of New Zealand, excluding the Cook Islands, Niue, Tokelau and the Ross Dependency.
32. This means physical presence in or absence from New Zealand is limited to the main islands and closer offshore islands of the Realm of New Zealand.
33. Presence in New Zealand embassies or New Zealand consulate offices overseas is not personal presence in New Zealand.

How part days of presence or absence are treated

34. In applying the 183-day and 325-day rules, a person who is personally present in New Zealand for part of a day is treated as present in New Zealand for the whole day and not absent for any part of the day (s YD 1(8)). For example, if someone arrived in New Zealand at 3pm on 28 July, that day would be counted as a full day of presence. Similarly, if someone left New Zealand at 6am on 10 May, that day would be counted as a full day of presence.
35. If someone is unsure about their departure and arrival dates, they can contact Immigration New Zealand to obtain those dates, in order to apply the day-count tests. Search for "request my information" on **immigration.govt.nz**.

If someone is tax resident in more than one country

If New Zealand has a DTA with the other country

36. If someone is tax resident both in New Zealand and another country under the domestic law of each country, and there is a DTA between the countries, a series of "tie-breaker" tests is applied to allocate tax residence to one of the countries for the purposes of the DTA. That allocated tax residence is then relevant to what taxing rights each of the countries has in relation to matters covered by the DTA. See further from [187].
37. If both countries have some right to tax a particular item of income or gain that a person has, the person may be entitled to a credit for foreign tax paid on foreign-sourced income or gains. For further information, see **IS 16/05**: **Income tax – Foreign tax credits – How to claim a foreign tax credit where the foreign tax paid is covered by a Double Tax Agreement**.

If New Zealand does not have a DTA with the other country

38. If someone is tax resident both in New Zealand and another country under the domestic law of each country, and there is not a DTA between the countries, they are assessable in New Zealand on their worldwide income (other than exempt income and excluded income) but may be entitled to a credit for foreign tax paid on foreign-sourced income or gains. For further information, see **IS 14/02**: **Income tax – Foreign tax credits – What is a tax of substantially the same nature as income tax imposed under s BB 1?**

Transitional residence – temporary tax exemptions for new migrants and returning New Zealanders

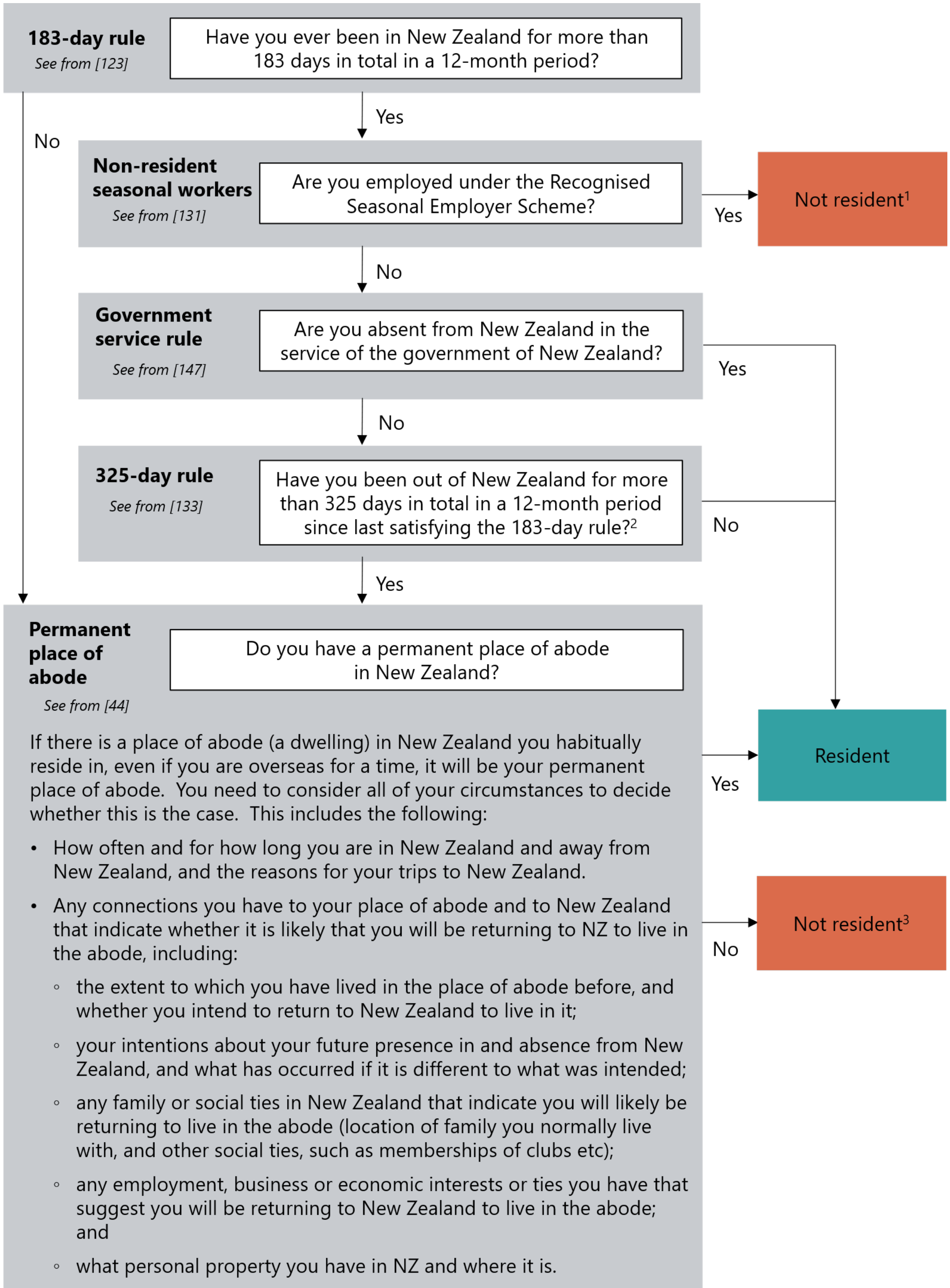
39. New migrants and returning New Zealanders who have been non-resident for at least 10 years may be eligible to be transitional residents. Transitional residents are entitled to temporary tax exemptions for certain foreign-sourced income. However, neither they nor their spouse or partner can receive Working for Families tax credits (including Best Start).
40. It is important to note that if a person who is a transitional resident applies for Working for Families tax credits (including Best Start), or if their spouse or partner does, this application is treated as an election for both parties to no longer be transitional residents. This deemed election cannot be reversed. Therefore, careful consideration should be given (and professional advice sought if necessary) to a decision to apply for Working for Families tax credits during the transitional residence period.
41. Transitional residents may receive FamilyBoost tax credits (which provide caregivers with financial assistance for early childhood education costs). Applying for FamilyBoost is not treated as an election to no longer be a transitional resident.
42. The rules for transitional residence are discussed from [152].

6 As defined in s 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.

Flowchart – How to determine whether an individual is tax resident in New Zealand

43. Figure | Hoahoa 1 contains a flowchart that sets out what needs to be considered to determine whether an individual is tax resident in New Zealand.

Figure | Hoahoa 1: How to determine whether an individual is tax resident in New Zealand



[1] Unless you have a permanent place of abode in New Zealand (this would not be common).

[2] The back-dating of the 183-day and 325-day rules means travel in and out of New Zealand may result in an overlap between those rules.

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

Permanent place of abode

44. The permanent place of abode test is set out in s YD 1(2), which says:

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

45. The permanent place of abode test applies "despite anything else" in s YD 1. This makes the permanent place of abode test the overriding residence rule for individuals. This means a person is a New Zealand resident if they have a permanent place of abode in New Zealand, irrespective of any of the other rules.

46. The term "permanent place of abode" is not defined in the Act.

47. *CIR v Diamond* [2015] NZCA 613 (CA) is the leading New Zealand case discussing the meaning of permanent place of abode. The permanent place of abode test has been considered in New Zealand in different factual contexts in *Van Uden v CIR* [2018] NZCA 487 (CA), and in several Taxation Review Authority cases. There is also Australian case law on the meaning of permanent place of abode – most notably *FCT v Applegate* 79 ATC 4307 (FCAFC), as the New Zealand legislative history shows that Parliament intended to adopt the test as articulated in *Applegate*.[7]

48. The following discussion of what it means to have a permanent place of abode, and the relevant factors to weigh up in determining whether someone has a permanent place of abode in New Zealand draws on the principles from the case law.

Meaning of permanent place of abode

49. The Court of Appeal has described "permanent place of abode" as meaning **a place where a taxpayer habitually resides from time to time even if they spend periods of time overseas** (*Diamond* and *Van Uden*).

50. Permanent means the opposite of temporary, and the Court of Appeal observed in *Diamond* that something is permanent when it is "continuing or designed to continue indefinitely without change" (at [para 48]). However, it is clear from the New Zealand case law that the person does not need to intend to live somewhere for the rest of their life for it to be their permanent place of abode (*Case H97* (1986) 8 NZTC 664 (TRA), *Case J98* (1987) 9 NZTC 1,555 (TRA), *Case Q55* (1993) 15 NZTC 5,313 (TRA)).

51. A person can be resident in New Zealand under the permanent place of abode test even if they also have a permanent place of abode outside New Zealand. The focus is not on determining which place the person has the strongest connections to, but on whether their place of abode here is a permanent place of abode. See further from [103].

A dwelling is required

52. A person must have a place of abode (that is, a dwelling) in New Zealand to potentially have a permanent place of abode here. This is because, as pointed out by the Court of Appeal in *Diamond* (at [48]), "abode" means a "habitual residence, house or home or place in which the person stays, remains or dwells".

53. A person needing to have a dwelling in New Zealand to potentially have a permanent place of abode here does not mean the person needs to own the dwelling. For example, the property might be rented, held in a family trust, or owned by a family company or other family member.

54. A place of abode does not need to be vacant or able to be occupied immediately by a person to be a permanent place of abode for them. Someone who is temporarily overseas may lease their property to a third party or enable someone else to use it during their absence. A place of abode can be a person's permanent place of abode even if it is rented to or used by someone else while the person is overseas. If the person habitually resides in the property, despite being absent from New Zealand for a time, the property can still be their permanent place of abode, irrespective of whether the property is occupied by someone else for limited periods. See, for example, *Case Q55*, *Case F138* (1984) 6 NZTC 60,237 (TRA), *Case J98* and *Case J41* (1987) 9 NZTC 1,240 (TRA).

7 As noted in *Diamond*.

55. However, simply having a dwelling in New Zealand is not sufficient. The dwelling must be the person's permanent place of abode. The discussion from [58] explains how to determine whether this is the case.

When the test needs to be considered

56. The permanent place of abode test is usually considered when someone who has habitually resided at a dwelling in New Zealand has left New Zealand for a time. In that situation, the question is whether they can be regarded as **continuing to habitually reside** at their place of abode in New Zealand, despite a period or periods of absence, such that it can still be considered to be a permanent place of abode for them. The factors discussed from [68] help determine that question.

57. The permanent place of abode test can also be relevant when someone who was not a New Zealand tax resident, and who has not become resident under the 183-day rule, establishes a place of abode here. The question in that scenario is whether, and at what point, the person can be considered to have **begun habitually residing** at their abode here, such that it can be considered to be their permanent place of abode (irrespective of whether they also have a permanent place of abode outside New Zealand). The permanent place of abode test may also be relevant in other contexts, such as if someone moves between New Zealand and another country or countries. See further [26] and [82].

How to determine whether someone has a permanent place of abode in New Zealand

An overall assessment of the circumstances is required

58. Deciding whether someone habitually resides at a dwelling here such that it is a permanent place of abode for them requires an overall assessment of the person's circumstances and the nature and quality of the use the person habitually makes of the place of abode. It is not just the situation during the person's absence from New Zealand that is relevant. The situation before and after periods of absence from New Zealand should be considered in assessing how close the person's connection with their place of abode is (*Diamond*, *Van Uden* and *Case Q55*).

Factors to consider

59. In determining whether a person habitually resides at a place of abode in New Zealand such that it is a permanent place of abode for them, it is necessary to consider the:
   - continuity and duration of the person's presence in New Zealand (discussed from [68]); and
   - durability of the person's association with the place of abode and how close their connection with it is (discussed from [76]).

   (See *Diamond*, *Applegate*, *Van Uden*, Case *H97*, *Case J98* and *Case Q55*).

Connections are relevant only if they indicate a particular dwelling is a person's permanent place of abode

60. It does not matter how strong a person's ties to New Zealand are if those ties do not indicate that the particular dwelling in question is the person's permanent place of abode. For example, if a person has strong connections to New Zealand, but the only dwelling they have here is a property they have never lived in and never intend to live in, that property could not be their permanent place of abode. They clearly could not be regarded as habitually residing there.

61. In *Diamond*, the taxpayer had never resided, or intended to reside, in his dwelling in New Zealand. The dwelling had only ever been used as an investment property. In those circumstances, the court considered the dwelling could not be the taxpayer's permanent place of abode, irrespective of any of the ties he had to New Zealand. Because there was simply no question about whether the taxpayer habitually resided in the dwelling before he left New Zealand (he did not), there could be no question about whether he *continued* to habitually reside there during the tax years in question (the first 4 years of his absence from New Zealand). Therefore, the court did not need to analyse and weigh up the nature and extent of each of the connections the taxpayer had to New Zealand. No matter how strong the taxpayer's connections to New Zealand were, because he did not have any residential connections to the dwelling at all, none of his connections to New Zealand could indicate that the dwelling was a permanent place of abode for him. On any overall assessment of the taxpayer's circumstances, the property was not a permanent place of abode for him before or after his departure.

When a place of abode is a person's permanent place of abode

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

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

64. Paragraphs [76] – [102] discuss the relevant factors to consider in assessing the continuity and duration of the person's presence in New Zealand and the durability of the person's association with the place of abode and how close their connection with it is. It is important to understand that those factors are not of equal weight, and the significance of each of them depends on the person's particular circumstances. The question is whether, having regard to the overall picture, there is a place of abode in New Zealand in which the person habitually resides, such that it can be regarded as a permanent place of abode for them.

65. A person's connections to the location in New Zealand where their place of abode is situated are relevant in objectively assessing whether a particular place of abode is a permanent place of abode for them. The strength of such connections may indicate that the abode is a place where the person habitually resides, even though they are away for a time, and a place to which the person will likely return to live on an enduring basis.

66. A person may also have connections to New Zealand generally, such as keeping a New Zealand bank account, having membership in professional or trade associations, or maintaining medical insurance with a New Zealand company (see further from [94]). Such connections could be relevant to any location in New Zealand and are not by their nature tied to any specific dwelling or location. General connections to New Zealand are relevant only to the extent that they provide some indication about whether the person is likely to return to New Zealand to live in their abode here, such that it can be regarded as a permanent place of abode for them.

67. The factors that need to be considered are discussed next.

Continuity and duration of presence in New Zealand

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

69. This is not to say that periods of presence in or absence from New Zealand are the overriding consideration. However, when a person is absent from New Zealand for an extended period, it is less likely that their place of abode here continues to be a permanent place of abode for them, even though they may still have connections with New Zealand. The longer the period of absence, the less likely that the abode can be considered a place in which they habitually reside.

70. Where a person is absent from New Zealand, a point would eventually be reached where it would no longer be reasonable to consider that a place of abode they have in New Zealand is still a permanent place of abode for them. Such an assessment would be made taking all material facts into account. This would include whether the person has maintained connections in New Zealand that indicate they will be returning to live at the place of abode on a durable basis.

71. The longer a person is away from New Zealand, the fewer ties to New Zealand they are likely to retain and the weaker their ties to New Zealand are likely to get. This would typically support a conclusion that their dwelling here is no longer a permanent place of abode for them. That said, there may be situations in which a person lives in another country for an extended time but still maintains strong ties to New Zealand. Depending on the circumstances, the person may continue to have a permanent place of abode here. As discussed from [103], a person may have more than one permanent place of abode. However, for the person to continue to have a permanent place of abode in New Zealand, the ties they have to New Zealand would need to indicate that they continue to habitually reside at their place of abode in New Zealand, despite a period or periods of absence, and that it is a place to which the person will likely return to live on an enduring basis. The longer a person is away from New Zealand without returning from time to time and residing in their abode here, the less likely that will be the case.

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

73. The duration of presence factor focuses on the length of the person's presence or presences in New Zealand. The continuity of presence factor refers to whether the person is present in New Zealand for continuous or interrupted periods.

74. The more continuous the periods a person is at their place of abode in New Zealand, the stronger the indication that their place of abode here is their permanent place of abode. This is because they are actually living here, rather than merely visiting for brief periods. Likewise, the more continuous the periods of absence from New Zealand are, the more that might indicate the person's place of abode here is no longer a permanent place of abode for them. This can be compared with a situation where someone frequently returns to New Zealand.

75. However, while frequent trips back to New Zealand are a factor that might help determine whether a person's place of abode here is a permanent place of abode for them, this is not necessarily the case, and such trips must be viewed in context. For example, regular visits may be explicable because the person is returning to see children who live here with an ex-spouse, or to visit extended family. The weight to be given to frequent visits should be considered in light of all the circumstances (including whether they stay at their abode on those visits) and the reasons for their trips to New Zealand.

Durability of association with a place of abode

76. Consideration of the durability of a person's association with a place of abode involves an examination of the extent and strength of the attachments the person has established and maintained in New Zealand. The strength of such connections may indicate whether the place of abode is a place the person habitually resides, even though they are away for a time.

77. The case law establishes that factors to be considered when assessing whether a person has a durable association with a place of abode, such that it can be regarded as a permanent place of abode for them, include:

- the nature and quality of the use of the dwelling and the person's connection with the dwelling (discussed from [78]);
- the person's intentions (discussed from [84]);
- the person's family and social ties (discussed from [89]);
- the person's employment, business interests and economic ties (discussed from [94]);
- the person's personal property (discussed from [99]); and
- any other factors that shed light on whether the place of abode is a permanent place of abode for the person (discussed from [101]).

(See, for example, *Applegate*, *Van Uden*, *Case Q55*, *Case F138*, *Case J98*, and *Case U17* (1999) 19 NZTC 9,174 (TRA)).

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

78. The nature and quality of the use of a dwelling a person has in New Zealand, and the connection the person has with the dwelling, are fundamental to determining whether the dwelling is a permanent place of abode for them. If the person owns a house or apartment in New Zealand they have previously lived in, for example, this would likely be a stronger indication of an enduring connection with the place of abode than, say, the ability to reside at a parent's house that had previously been lived in.

79. A situation that often arises is where a young person lives away from the family home some of the time, for example during university terms, but returns to the family home during holidays. If the young person goes overseas after their studies, there is often a question about whether the family home is a permanent place of abode for them. In such circumstances, it may well be that while the person had more than one residence in New Zealand before they left, the family home remained a permanent place of abode for them. It could therefore be that although they no longer have the abode that was their student accommodation once they leave New Zealand (for example, because they gave up the lease) the family home continues to be a permanent place of abode for them after their departure from New Zealand. As in any other circumstances, this depends on the nature and quality of the use the person habitually makes of that abode. In this context, it would be relevant to consider how often and for how long the person returned to the family home (both before they left New Zealand and after their departure), the extent to which they are financially independent, and their intended future use of the abode (which may change over time). Whether the family home is the person's permanent place of abode is

a question of fact and requires an overall assessment of the circumstances and the nature and quality of the use the person habitually makes of the abode.

80. As noted at [56], the permanent place of abode test is usually considered in a situation where someone who has habitually resided at a dwelling in New Zealand has left New Zealand for a time. In that situation, the question is whether they can be regarded as continuing to habitually reside at their place of abode in New Zealand, despite a period or periods of absence, such that it can be considered to be a permanent place of abode for them. It is clear from *Diamond* that a property that a person has never lived in, never intended to live in, and that has only ever been used as an investment could not be a permanent place of abode for the person.

81. However, there may potentially be circumstances where a place of abode that a person has not yet lived in, but intends to live in in the future, is their permanent place of abode. While this would only be in limited situations, the Commissioner considers that it could occur. For example, if the person's permanent place of abode had been the family home, and the family shifted during the person's absence from New Zealand, the new family home could be their permanent place of abode even though they had not yet lived in it. The Court of Appeal in *Diamond* did not consider this type of scenario, but the Commissioner considers that such an approach would be consistent with the court's approach and reasoning. The totality of the circumstances must be considered. In the absence of changed circumstances, in such a scenario the new family home could be viewed as essentially being a substitute for the previous family home, which was the person's permanent place of abode. If a person habitually resides in the family home, despite a period of absence from New Zealand, the Commissioner considers that a shift in the location of the family home would not alter the conclusion that the person continues to have a permanent place of abode in New Zealand.

82. On the other hand, someone who lived overseas and bought a house in New Zealand would not have a permanent place of abode here merely by virtue of that, even if they intended to live there in the future. That said, there are circumstances where a house someone has bought in New Zealand may become a permanent place of abode for the person either at some stage before they move here permanently or even if they do not ever move here to live all the time. For example, if they started coming to New Zealand and residing in the house at regular intervals or for significant enough periods, it may become their permanent place of abode at some stage, even if they also have a permanent place of abode elsewhere. As discussed from [103], the permanent place of abode test is not about comparing the relative strength of a person's connections with different places of abode, if they have more than one place of abode. However, it is always necessary to consider the circumstances as a whole, including the continuity and duration of the person's presences in New Zealand, the nature of the person's visits to New Zealand and the reasons for them, what occurs over time (that is, the pattern over several years), and all the other relevant factors and connections discussed in this statement.

83. The extent to which a person has lived in a dwelling is a relevant consideration in assessing whether the dwelling is a permanent place of abode for them.

Intention

84. Determining whether a person's place of abode in New Zealand is a permanent place of abode for them is an objective enquiry (*Case H97*, *Case J98* and *Case Q55*). However, a person's intention can also be considered in such an enquiry (*Case F138*, *Case F139* (1984) 6 NZTC 60,245 (TRA), *Case H97* and *Case Q55*).

85. A person's intentions about their presence in or absence from New Zealand and about a place of abode they have here are important factors, though a person's intentions are not the central consideration. It is necessary to consider not only what was intended, but what in fact occurred (*Case F139* and *Case H97*).

86. In cases where a person is overseas, the intention to return to New Zealand to live may be indicative of their place of abode here continuing to be a permanent place of abode for them – a place in which they habitually reside, despite a period overseas.

87. However, it is important to balance consideration of a person's intentions with all other relevant factors. For example, if a person has departed from New Zealand for an extended period, but intends to ultimately return, that intention alone will not establish that the person's place of abode here remains a permanent place of abode for them. On the other hand, if a person has departed for a relatively short period of fixed duration, the intention to return will be a strong indicator that the person's place of abode here continues to be a permanent place of abode for them.

88. A person's intention is subjective. However, the weight a person's stated intention is given depends on the extent to which the circumstances support that stated intention.

Family and social ties

89. The location of a person's family may be a factor of some importance. For example, if a person is absent from New Zealand, but their immediate family (for example, spouse or partner and dependent children) remain here, that will tend to support a conclusion that the person's place of abode here continues to be a permanent place of abode for them.

90. Once again, however, family ties must be considered in relation to all the other relevant factors. If a person is absent from New Zealand for a relatively short period, the fact their family accompanies them overseas will not mean the person does not have a permanent place of abode in New Zealand.

91. The weight to be attached to family ties may vary from individual to individual, and in light of the nature and quality of the relationships. In determining the weight to be given to any family ties, it is important to bear in mind the person's particular circumstances.

92. For example, in some circumstances it might be relevant that a person has dependent children in New Zealand, and in other circumstances this would not be a relevant consideration. For instance, if someone's spouse or partner and children remain in the family home in New Zealand while the person is overseas for a time, those family connections are relevant, and indicate that the abode continues to be a permanent place of abode for the person. On the other hand, if someone has dependent children in New Zealand but they are estranged from them (as in *Case U17*) or they have agreed for their children to remain in New Zealand with an ex-spouse (as in *Diamond*), the fact the children are here does not provide any indication about whether the person's place of abode here continues to be a permanent place of abode for them. While in the latter situation the person has important, close family ties to New Zealand, and may well make regular trips back to New Zealand to see their children, those connections need to be viewed in light of all the other circumstances and do not necessarily suggest that any place of abode the person has in New Zealand continues to be a permanent place of abode for them. Of course, if the person returns to New Zealand from time to time to visit family and they stay at their place of abode here, the fact they habitually stay at their abode is a relevant consideration.

93. Other social ties, such as membership of sporting and cultural associations, may also be relevant in establishing whether a person's place of abode here continues to be a permanent place of abode for them – a place they habitually reside. Such ties are not necessarily of much weight by themselves, but may suggest the person will be returning to New Zealand to live (and in particular to the location in which their place of abode is), and, together with other ties to that location or place of abode, may be indicative of the person's place of abode here continuing to be a permanent place of abode for them.

Employment, business interests and economic ties

94. If a person is absent from New Zealand but retains employment, business, trade or professional ties with New Zealand, that may be relevant to the extent it indicates the person is likely to or intends to return to live in their place of abode here.

95. For example, university lecturers who take sabbatical leave overseas generally continue to be employed and paid by the university during their absence. The continued employment ties in such a situation are important in determining whether the person's place of abode in New Zealand remains a permanent place of abode for them. The weight to be given to employment ties depends on their strength – for example, whether employment is guaranteed after the absence or is likely still to be open to the person, and the reasons for the employment arrangements being as they are.

96. Memberships of trade and professional associations may provide some indication as to whether a person is likely to or intends to return to live in their place of abode in New Zealand so should be taken into account, but by themselves do not carry much weight.

97. The person's overall economic connections with New Zealand will be relevant only to the extent they indicate the person is likely to or intends to return to New Zealand and live in their place of abode here. Such connections are often of no assistance in determining this. There are numerous reasons a person might retain a bank account or credit card facility in New Zealand or have insurance coverage from New Zealand, superannuation in New Zealand, or investments here or managed from here. Unless, in the particular circumstances, these factors indicate the person habitually resides in their place of abode here, they will not be relevant.

98. The Commissioner considers that paying child support for children in New Zealand is not relevant, as it does not provide any indication about whether the person is likely to return to New Zealand to live in their abode here, such that it can be regarded as a permanent place of abode for them.

Personal property

99. If the person has personal property (for example, furniture or a vehicle) in New Zealand, this could be taken into account to the extent it indicates they are likely to or intend to return to live in their abode here.

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

Other factors

101. Other factors, such as whether the person receives New Zealand social welfare assistance, or whether they regularly spend their holidays in New Zealand, may also be relevant, but again, only to the extent that they indicate the person is likely to or intends to return to live in their place of abode here.

102. There is no exhaustive list of factors to be taken into account. Any factor showing a person has a durable connection to their place of abode in New Zealand may be relevant, as it may assist in drawing the inference that the person intends to continue to habitually reside in their place of abode in New Zealand, such that it can be regarded as a permanent place of abode for them.

A person may have a permanent place of abode elsewhere

103. Section YD 1(2) provides that a natural person is a New Zealand resident if they have a permanent place of abode in New Zealand, "even if they also have a permanent place of abode elsewhere". Therefore, it is clear from s YD 1(2) that a person may have more than one permanent place of abode.

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

105. That said, factors that suggest a person has a durable connection to their place of abode in New Zealand must be weighed against contrary factors that indicate the person no longer habitually resides at their place of abode here. Such contrary factors could include evidence of the person's connections to a foreign country or to a place of abode in that country – for example, the purchase of a home in another country, or family, social or other ties to another country.

106. If a person has established strong connections to another country, it is less likely they will return to their place of abode in New Zealand, so it is less likely they can be regarded as continuing to habitually reside there. Conversely, the lack of strong connections to another country makes it more likely the person will return to their place of abode in New Zealand, so more likely they can be regarded as still habitually residing there (see, for example, *Case H97*).

107. However, there may be situations where a person has permanent places of abode in more than one country and moves between those countries. The fact a person has established strong connections in another country does not preclude them having a permanent place of abode in New Zealand.

108. There may also be situations where a person has no permanent place of abode anywhere. Lack of strong connections in another country will therefore not necessarily mean a person's place of abode in New Zealand is their permanent place of abode. For example, in *Case 10/2013* (2013) 26 NZTC 2-009 (TRA)[8] Judge Sinclair did not place any particular weight on the taxpayer not having established roots in Iraq, noting that this was not surprising given the security issues in that country and the nature of the taxpayer's employment.

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

8 The Taxation Review Authority decision in the *Diamond* case, which was ultimately decided by the Court of Appeal.

Summary – permanent place of abode

110. The above discussion about determining whether a person has a permanent place of abode in New Zealand can be summarised as follows:

- A place of abode is a person's permanent place of abode if it is a place where they habitually reside from time to time even if they spend periods overseas. To be a permanent place of abode, the abode must be a place where the person habitually resides on an enduring, rather than temporary, basis.
- A person must have a place of abode (that is, a dwelling) in New Zealand to potentially have a permanent place of abode here. This does not mean the person needs to own the dwelling. However, simply having a dwelling is not sufficient – the dwelling must be the person's permanent place of abode.
- Deciding whether a dwelling is someone's permanent place of abode requires an overall assessment of the person's circumstances and the nature and quality of the use the person habitually makes of the place of abode.
- In determining whether a place of abode is a person's permanent place of abode, it is necessary to consider the continuity and duration of the person's presence in New Zealand and the durability of the person's association with their place of abode here and how close their connection with it is.
- To determine whether a person has a durable association with their place of abode, the person's overall connections with their place of abode and with New Zealand must be weighed up. It is then necessary to evaluate the extent to which those connections indicate the person has an enduring relationship with their place of abode here, such that it can be considered to be their permanent place of abode.
- It does not matter how strong a person's ties to New Zealand are if those ties do not indicate the dwelling in question is a permanent place of abode for the person. For example, if a person has strong connections to New Zealand, but the only dwelling they have here is a property that they have never lived in and never intend to live in, that property could not be a permanent place of abode for them.

Acquiring and losing a permanent place of abode

111. When a person becomes a New Zealand resident for tax purposes, the time that their tax residence starts must be identified. Individuals can become resident as a result of the operation of the permanent place of abode test or the 183-day rule (discussed from [123]).

112. When a person satisfies the 183-day rule, their tax residence is back-dated (under s YD 1(4)) to the first day of the 183 days that they were present in New Zealand in the 12-month period. In most situations where a person becomes tax resident in New Zealand, it is the 183-day rule and s YD 1(4) that establish when their residence starts.

113. However, a person could become resident under the permanent place of abode test from a time before the first day of their presence in New Zealand under the 183-day rule. This could occur, for example, if someone moved to New Zealand but regularly travelled in and out of the country on business and did not trigger the 183-day rule for some time. In those circumstances, the date at which the person acquired a permanent place of abode in New Zealand would need to be determined, as their New Zealand tax residence could start from that point.

114. When a person leaves New Zealand, the time when their New Zealand tax residence ends must also be identified. A person does not cease to be tax resident until they have been absent from New Zealand for more than 325 days in a 12-month period **and** no longer have a permanent place of abode here.

115. The date that a person ceases to have a permanent place of abode in New Zealand is therefore relevant if it occurs sometime after the 325 days of absence. The date a person ceases to have a permanent place of abode here is also relevant if it occurs during the 12-month period in which they satisfy the 325-day rule. In this situation, the interaction between the permanent place of abode test in s YD 1(2) and the back-dating rule in s YD 1(6) (see [133]) results in the person ceasing to be tax resident in New Zealand from the day after the day they cease having a permanent place of abode in New Zealand.

116. The time at which a person acquires or ceases to have a permanent place of abode is determined by an evaluation of the circumstances of each case. The objective is to determine the point in time at which the person:

- acquires a permanent place of abode in New Zealand by being present here and establishing an enduring connection with a place of abode here; or
- ceases to have a permanent place of abode in New Zealand by ceasing to habitually reside at a place of abode here.

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

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

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

Examples illustrating the concept of "permanent place of abode"

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

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

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

Example | Tauira 1 – Three-year secondment overseas

Facts: Cate, who is normally resident in New Zealand, is seconded to Canada in connection with her employment for a fixed period of 3 years. Cate intends to return to New Zealand after the period of secondment, and the terms of her secondment are such that her job is available for her to return to. Cate's partner and children accompany her to Canada.

The family home in New Zealand is owned by a family trust, of which Cate's parents and their solicitor's trustee company are trustees. Cate, her partner and their children, together with Cate's siblings and their families, are the trust's beneficiaries. The house is rented out while the family is in Canada.

Cate and her family leave their furniture and most of their other personal belongings in storage in New Zealand during their absence. Cate retains her New Zealand investments and her connections with several professional and sporting associations here. Cate and her family return to New Zealand each year to spend Christmas with family and have a summer holiday here.

Result: Cate would have a permanent place of abode in New Zealand when she leaves for Canada. During the period of her absence, her place of abode here may cease to be her permanent place of abode. This depends on what eventuates. Cate should assess her overall circumstances throughout the period of her absence from New Zealand to ascertain whether she continues to have a permanent place of abode here.

Explanation: Cate has a place of abode in New Zealand that she habitually resided in before leaving for Canada. The question is whether, during her absence from New Zealand, that house continues to be a place Cate habitually resides.

Although Cate will be absent from New Zealand for 3 years, this is not of itself inconsistent with her place of abode here remaining a permanent place of abode – a place she habitually resides. All the relevant factors must be weighed up. In this case, Cate has retained ties with New Zealand: she still has most of her personal property here, maintains membership of several professional and sporting associations, and has investments here. Cate also retains employment ties with New Zealand, as her secondment is in connection with her New Zealand employment. Cate has a definite intention to return to New Zealand at the end of the 3-year secondment and to resume living in the family home here. Although the house is owned in trust, Cate's parents are trustees and the family members are all beneficiaries. It is reasonable to infer that the trustees will enable the family to resume living in the family home on their return. At the time she leaves New Zealand, the strength of Cate's enduring connections with New Zealand and with her place of abode here are sufficient to establish that her home here continues to be a permanent place of abode.

If, at the time she left New Zealand, Cate's circumstances had been different, she may not have had a permanent place of abode in New Zealand from the time of her departure. For example, Cate would not have had a permanent place of abode in New Zealand from the time she left if she had not intended to return to New Zealand after the secondment, she did not have a guaranteed position available for her to return to, and she and her family had taken most of their furniture and other belongings with them.

However, whatever Cate's circumstances at the time of her departure, realistically those circumstances are unlikely to remain exactly as they were. Over the period of her secondment in Canada, decisions Cate makes and events that occur might lead to a conclusion that her place of abode here ceases to be her permanent place of abode from a particular time or might support a conclusion that it remains her permanent place of abode. For example, Cate and her family might decide they love Canada and want to stay, and Cate or her partner might secure work and visas to enable them to do that, and they may take their belongings out of storage and move them to Canada. In those circumstances, Cate would cease having a permanent place of abode in New Zealand from that point. On the other hand, Cate might not enjoy living in Canada, and might try to renegotiate her secondment arrangements to return to New Zealand earlier, or at least form the definite intention to return as soon as possible.

Further to the need to consider the circumstances as they evolve, another relevant factor is whether Cate and her family stay in their place of abode here on their trips back each summer (for example, because the property is rented to students during the university year, but able to be used by them between December and February). In those circumstances, Cate's place of abode here may well continue to be her permanent place of abode throughout the 3-year period.

It is always necessary to make an overall assessment of a person's circumstances and the nature and quality of the use they make of their place of abode in New Zealand in deciding whether it continues to be a permanent place of abode for them. Life events and changes in circumstances may mean someone ceases to have a permanent place of abode in New Zealand, so it is necessary to periodically consider the situation throughout the period of someone's absence.

Example | Tauira 2 – Potential to live with parents on return does not mean a person will have a permanent place of abode in New Zealand

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

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

Explanation: Mike terminated the lease on the flat he lived in before he left New Zealand. Therefore, it does not continue to be a place he habitually resides from that point.

Although Mike could return to live with his parents when he comes back to New Zealand, the fact he lived independently from his parents for a couple of years before leaving New Zealand means he no longer habitually resided at their house before his departure from New Zealand.

Therefore, it is irrelevant that Mike intends to return to New Zealand after his OE or that he has stored his personal effects here and has family ties here.

If Mike had never lived independently from his parents before going overseas, his parents' house might continue to be his permanent place of abode when he left New Zealand. While, when he leaves New Zealand, Mike does not know when he will return, he is going on an OE and does not have the intention of leaving New Zealand permanently. Mike has left his personal effects at his parents' house, has family ties here, and intends to return to New Zealand after his OE. In this scenario, because Mike had lived with his parents before going overseas, their house might continue to be his permanent place of abode because it is the place he habitually resides, despite a period of absence from New Zealand. However, this is a question of fact and requires an overall assessment of the circumstances, including the extent to which Mike is financially independent, and whether he intends to return to his parent's house to live more than temporarily. Even if Mike's parent's house is still his permanent place of abode at the time he leaves New Zealand, there could come a point at which it ceases to be, because he no longer habitually resides there – this depends on what ultimately occurs. It is always necessary to make an overall assessment of a person's circumstances and the nature and quality of the use they make of their place of abode in New Zealand when deciding whether it continues to be a permanent place of abode for them.

Example | Tauira 3 – Permanent places of abode in New Zealand and elsewhere

Facts: Li is a New Zealand citizen who has extensive business interests in New Zealand and Australia. Li owns a house in each country, neither of which is rented out, and both of which are available for his use. Li spends most of his time in Australia, but he regularly travels to New Zealand in connection with his business here. In total, Li spends up to 5 months of the year in New Zealand, staying in his house here most of the time he is here (except when his business requires him to be elsewhere in New Zealand). These trips vary in length from 2 days up to several weeks. Li has significant investments in New Zealand, and he is a member of cultural and sporting associations here. Li's immediate family lives in Australia.

Result: Li has a permanent place of abode in New Zealand.

Explanation: Li has a place of abode in New Zealand that he habitually resides in. He spends up to 5 months of the year in New Zealand, and for most of that time (whenever possible) he resides in his house here. Li's presence in New Zealand is generally for short periods – that is, his presence here is not of a continuous nature. However, Li resides in his house here for long enough each year that there is no question he habitually resides there, so it is a permanent place of abode for him.

In addition, Li has substantial connections with New Zealand, and those connections are maintained through regular trips to New Zealand. Those factors further bolster the conclusion that his place of abode here is a permanent place of abode.

Although he also has a place of abode in Australia, Li usually or typically lives in both of his places of abode on an enduring, rather than temporary, basis. A person with a permanent place of abode in New Zealand is tax resident under the permanent place of abode test even if they also have a permanent place of abode elsewhere.

Example | Tauira 4 – Sale of former permanent place of abode but having another dwelling in New Zealand

Facts: Ronan is a software developer who has lived in Wellington for 12 years and has a partner there. He and his partner own the apartment they live in and another similar apartment in a nearby building that they rent out. Ronan accepts a 2-year contract in Dublin.

For the first year of his contract, Ronan returns to Wellington every few months to see his partner, after which she decides to take a year of unpaid leave and join him in Ireland for the remainder of his contract.

At that time, they sell the apartment they had lived in, given that they will be down to one income and wish to travel a little in Europe in the second year of Ronan's contract. They sold the apartment they lived in rather than the investment property because it was not subject to a lease so was easier to sell promptly.

The couple intend to return to Wellington after Ronan's contract – they have many friends there and Ronan's partner's family live there. In addition to the investment property he owns with his partner, Ronan has a sizeable New Zealand share portfolio.

Result: Ronan has a permanent place of abode in New Zealand during the first year of his absence.

Explanation: In the first year of Ronan's absence, there is a place of abode in New Zealand that he habitually resided in before leaving for Ireland – the apartment he and his partner owned and in which they lived. Although Ronan was away from New Zealand, it remained his permanent place of abode for the first year of his absence. His partner continued to live there, and Ronan returned to see her every few months. The apartment would have been furnished with Ronan and his partner's belongings, and Ronan intended to return to New Zealand to live after his 2-year contract. In addition, Ronan has several enduring connections with New Zealand, and Wellington in particular – he has lived in Wellington for 12 years and intends to return there with his partner after his 2-year contract, he has family ties there (his partner's family), and he has substantial investments in New Zealand. These factors support a conclusion that he was likely to continue living in the apartment in Wellington on his intended return to New Zealand, so it remained a place in which he habitually resided, despite a period of absence.

In the second year of Ronan's absence from New Zealand, after the sale of the apartment in which he had lived, Ronan ceased having a permanent place of abode in New Zealand. Once the apartment was sold, Ronan no longer has an abode in New Zealand in which he habitually resides. Although Ronan and his partner own an investment property that is very similar to the apartment in which they lived, and they may indeed decide to live in it on their return to New Zealand, Ronan has never lived in that property, and it has only ever been used as an investment property. Therefore, it is irrelevant in respect of the second year of his absence that Ronan intends to return to New Zealand after his contract finishes or that he has numerous ties to New Zealand generally and Wellington more specifically – none of those ties indicate that the investment property is Ronan's permanent place of abode.

Example | Tauira 5 – Spouses departing New Zealand and ceasing to have a permanent place of abode in New Zealand at different times

Facts: Melanie and her husband and four young children live in Tauranga. Melanie gets a lucrative job offer in London and the family decide to move there. They have no intention to return to New Zealand to live in the foreseeable future and intend the move to be permanent. As such, the couple decide to sell their family home.

Melanie moves to London in October to start her new job. Her husband stays behind in Tauranga until December so the children can finish the school year and to arrange the sale of their home. Once Melanie arrives in London, she enrols the children in schools there from the start of the following year. Melanie and her husband retain a one-bedroom rental property in Tauranga, which they have owned for several years. They leave their share portfolio to be managed by their New Zealand broker. They have life insurance policies with a New Zealand insurance company and retain those policies. The family home is sold in November. The sale settles in mid-December, at the end of the school year, at which time Melanie's husband and children move to London as planned.

Result: Melanie does not have a permanent place of abode in New Zealand from the date of her departure in October. Her husband does not have a permanent place of abode from when the sale of the family home settles in mid-December.

Explanation: Although Melanie, at least initially, continues to have strong connections to New Zealand, her place of abode here is no longer her permanent place of abode. In the 2 months after she leaves New Zealand, her husband and children remain here, living in their family home. However, this is so the children can finish the school year here and Melanie's husband can arrange the sale of the family home. In the circumstances, it does not indicate that the family home continues to be Melanie's permanent place of abode – she no longer habitually resides there. Melanie has no intention to return to live in New Zealand in the foreseeable future, nor to live in the home again, and the sale of the home shortly after her departure supports this. The retention of some investments and insurance in New Zealand is not by itself significant, and does not indicate that the home continued to be Melanie's permanent place of abode until it was sold.

Melanie has never resided at the rental property that she and her husband own – it was acquired solely as an investment and has always been used as such. It is not a place they habitually live. Therefore, it would not be Melanie's permanent place of abode even if she maintained strong ties to New Zealand after her departure.

Melanie's husband continues to habitually reside in the family home until the sale settles in mid-December. Therefore, it remains his permanent place of abode until that time.

If some time after Melanie left New Zealand but before the family home was sold, circumstances changed such that Melanie ended up forgoing the job opportunity in London and returning to New Zealand to the family home to live, the home would become her permanent place of abode once again from that time. This would not alter the fact that on her departure the family home ceased to be her permanent place of abode.

Example | Tauira 6 – Family home relocation during a person's absence from New Zealand

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

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

Explanation: Cameron has a place of abode in New Zealand that he habitually resides in – being the family home. Cameron lived in the original family home in Christchurch before going to Japan. He had a durable association with the home in Christchurch, and it continued to be his permanent place of abode despite his absence. Once the family home shifts because the family move to Dunedin, Cameron has a durable association with the new family home there through his wife and children living there and his intention to live there on his return. This association establishes that the new family home is Cameron's permanent place of abode. Although Cameron has not previously lived in Dunedin, his family home has been established there during his absence, and he will join his family there on his return. Cameron habitually resides in the family home with his wife and children, and the fact the family home has shifted during Cameron's absence does not alter that. The new family home can be viewed as essentially being a substitute for the previous family home, which was clearly Cameron's permanent place of abode.

Example | Tauira 7 – Fly-in fly-out worker with family in New Zealand

Facts: Charlie and his wife own a house in Auckland, where they live with their children and where he is a member of several local clubs. Charlie starts working as a fly-in-fly-out (FIFO) miner in Moranbah in Queensland (Australia). He works for periods of 8 weeks at a time, between which he returns to his home in Auckland for a week off.

Charlie's wages are paid into an Australian bank account, in Australian dollars, and most of his wages are automatically transferred from there into the New Zealand bank account he holds jointly with his wife.

Charlie's employer provides him with accommodation at the mine site.

On his week off when he returns to New Zealand, Charlie maintains his sporting and social ties.

Result: Charlie has a permanent place of abode in New Zealand.

Explanation: Charlie has a place of abode in New Zealand that he habitually resides in – the house that he and his wife own and that is their family home. Although Charlie is absent from New Zealand for the bulk of each year, his absences are solely because of the nature of his job, and there is no question that his home in Auckland continues to be a place he habitually resides, so it is a permanent place of abode for him.

Example | Tauira 8 – No dwelling in New Zealand that could be a permanent place of abode, and insufficient connections even if, on alternate facts, there was a dwelling

Facts: Daniel is an engineer who has lived in Napier all his life. He accepts a 2-year contract working on an oil rig in Malaysia for periods of 4 weeks at a time. When he takes up the job, he terminates the lease on the flat he has lived in for the last year.

Between his stints on the rig, Daniel has two weeks off. He has a periodic lease on an apartment in Malaysia, and for most of his weeks off he stays there.

At other times he travels elsewhere, sometimes returning to New Zealand to visit family and friends here. When he is back in New Zealand, Daniel stays at his parents' house in Napier.

Daniel's wages are paid into his Malaysian bank account, in American dollars.

He has no plans to return to New Zealand permanently – his intention is to work and live in Malaysia indefinitely. Daniel's employer has sponsored his Malaysian work permit and will continue to do so as long as he stays with the company.

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

Explanation: Daniel terminated the lease on the flat he lived in before he left New Zealand. Therefore, it does not continue to be a place he habitually resides from that point.

Although Daniel might potentially be able to return to live with his parents when he comes back to New Zealand, the fact he lived independently from his parents for at least a year before leaving New Zealand means he no longer habitually resided at their house before his departure from New Zealand. The fact that he stays at his parents' house during some of his time off, when he returns to New Zealand to catch up with friends and family, does not suggest he habitually resides there.

Even if Daniel had recently graduated from his university degree before leaving New Zealand, so had lived with his parents immediately before going overseas, his parents' house would not be his permanent place of abode once he leaves New Zealand. This is because Daniel has not retained sufficient connections with New Zealand for his parents' house here to remain his permanent place of abode. Although Daniel periodically visits his parents and friends in Napier, he has no other significant ties here, does not intend to return to New Zealand permanently, and intends to work and live in Malaysia indefinitely. Daniel's employer will continue to sponsor his work permit, which indicates that this intention would seem to be reasonably held. In this scenario, Daniel would have lived with his parents before leaving New Zealand because he was still studying. However, by the time he left New Zealand he would have completed his degree and been financially independent. That, together with the fact Daniel has no intention to return to New Zealand permanently and intends to work and live in Malaysia indefinitely, indicate that Daniel would no longer be said to habitually reside at his parents' home.

Example | Tauira 9 – Members of a family may acquire (or cease to have) a permanent place of abode in New Zealand at different times

Facts: In 1982, Edward, a United Kingdom citizen, moved to New Zealand with his wife Amelia, a New Zealander. They both had a permanent place of abode here from that time. They married in 1985, and Edward was granted a permanent residence visa.

In 1995, the couple and their two daughters moved to Singapore because of a job opportunity for Edward.

In 2000, Edward and Amelia purchased a small lifestyle property just out of Auckland to use as a holiday home. They stayed at the property when they were back in New Zealand for holidays – about 2 or 3 months a year. Other family members in New Zealand also used the property for holidays.

In 2002, Amelia moved back to New Zealand to care for her mother who was terminally ill. Edward and Amelia decided their daughters should attend school in New Zealand, so the children moved here in January 2003 and went to boarding school. Amelia lived in the property that had previously been used as a holiday home, and the children lived there during school holidays.

In 2003, Edward came to New Zealand regularly to see Amelia and the children – about 2½ months in total over that year.

After Amelia's mother passed away in 2004, Amelia stayed in New Zealand as one of the children had been injured in a car accident. From that point, Edward re-arranged his work commitments so he could come to New Zealand not just for holidays, but more frequently, to support Amelia and the children. From that point, Edward spent about 4 months of each year in New Zealand with Amelia and the children.

It became clear the daughter's injuries would require long-term treatment, including surgeries and rehabilitation. At that point Edward decided to live in New Zealand all the time. He did so from 2006, giving up his lease in Singapore and bringing the rest of his personal effects from there to the family home in New Zealand.

Result: Edward has a permanent place of abode in New Zealand from 2004, when he re-arranged his work commitments so he could come to New Zealand more frequently – from which time he spent about 4 months of each year here.

Explanation: Edward had a place of abode in New Zealand from 2000, when he and Amelia purchased the property they used as a holiday house. However, the house was not Edward's permanent place of abode at that time, as he did not habitually reside there on a permanent basis, but rather for temporary periods during holidays in New Zealand.

The permanent place of abode test needs to be considered on an individual basis. The fact Amelia and the children moved back to New Zealand in 2002 and 2003, respectively, does not mean the house here became Edward's permanent place of abode by virtue of the family living there. This is because Edward continued to live in Singapore, where he had lived since 1995, he did not habitually reside in the New Zealand house on a permanent basis. He came back only for relatively short holidays, and he had no intention to do otherwise at that time.

It was after his daughter's accident, when Edward re-arranged his work commitments so he could come to New Zealand more frequently – spending about 4 months of each year here – that he established a permanent place of abode here. From that point, Edward started habitually residing in the family home more than just temporarily for relatively short holidays, though he continued to also habitually reside in his residence in Singapore. From that point, the nature and quality of the Edward's use of the property changed. The house here therefore became Edward's permanent place of abode from that point.

The day-count rules

119. In addition to the permanent place of abode test, there are day-count rules in the Act, under which a person can become tax resident in New Zealand or cease to be tax resident in New Zealand. These rules are referred to as the 183-day rule and the 325-day rule.

120. These rules are set out in s YD 1 as follows:

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

The part-day rule

121. For the purposes of the 183-day and 325-day rules, if a person is present in New Zealand for part of a day, that day counts as a full day of presence and does not count at all towards days of absence. This is provided for in s YD 1(8) which states:

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

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

The 183-day rule

Overview of the rule

123. Section YD 1(3) provides that a person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.

124. If the 183-day rule is satisfied, s YD 1(4) then provides that the person is treated as resident from the first of those 183 days, until they are treated as ceasing to be resident under subs (5) (the 325-day rule).

125. The 183-day rule is satisfied if a person is present in New Zealand for more than 183 days in total in **any 12-month period**. The rule does not relate to an income year, a calendar year, or any other particular 12-month period. The 12-month period does not need to include the date as at which residence is being assessed, and the days of presence do not need to be consecutive.

Relationship between the 183-day rule and the permanent place of abode test

126. The 183-day rule operates in conjunction with the permanent place of abode test in s YD 1(2). But the permanent place of abode test is the overriding test.

127. Therefore, if a person has a permanent place of abode in New Zealand, they are resident in New Zealand even if they have not been present here for more than 183 days in total in any 12-month period.

128. Because the tests operate in conjunction with one another, a person who has acquired a permanent place of abode in New Zealand (for example, someone who has moved here from overseas) may have their residence back-dated to a time before that under the 183-day rule and s YD 1(4). This could occur, for example, if the person came to New Zealand for a holiday or job interview before moving here or because the person did not acquire a permanent place of abode immediately on moving to New Zealand, but some time later.

129. If a person has been present in New Zealand for more than 183 days in total in **any** 12-month period, that person is tax resident in New Zealand from the first of those days of presence (or from when they acquired a permanent place of abode here – whichever is earlier) until they cease to be tax resident.

130. A person who is tax resident under the 183-day rule ceases to be tax resident if they satisfy all of the following:

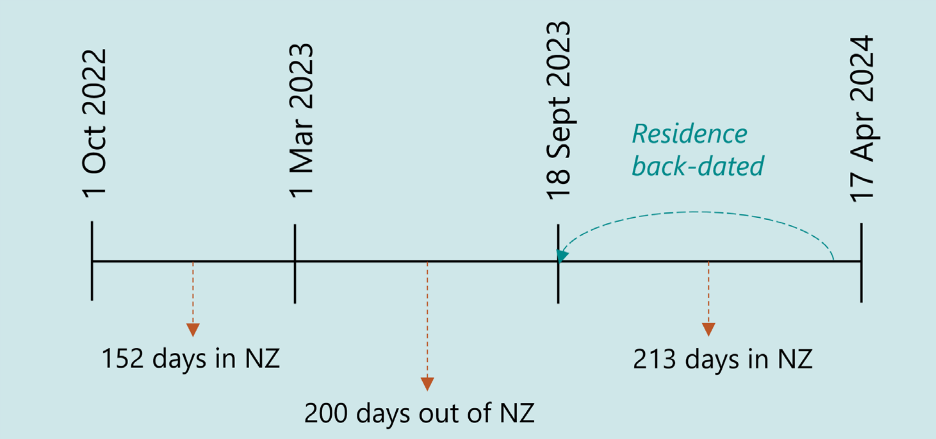
- They satisfy the 325-day rule (discussed from [133]).
- They do not have a permanent place of abode here (discussed from [44]).
- They are not absent from New Zealand in the service of the New Zealand Government (discussed from [147]).

Examples illustrating the 183-day rule

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

Example | Tauira 10 – The 183-day rule

Facts: Amy arrived in New Zealand on 1 October 2022 and stayed here until 1 March 2023, a total of 152 days of presence in New Zealand. Amy was then absent from New Zealand for 200 days. She then returned to New Zealand on 18 September 2023, and stayed here for a further 7 months – departing on 17 April 2024. It is assumed Amy was not resident in New Zealand before 1 October 2022 and that she had not been present in New Zealand before that date.



Result: Amy is resident in New Zealand from 18 September 2023.

Explanation: Amy was not personally present in New Zealand for more than 183 days in any 12-month period starting before 18 September 2023. Because of her absence from 2 March 2023 to 17 September 2023, Amy was in New Zealand for only 165 days in the 12-month period starting on 1 October 2022 (152 days from 1 October 2022 to 1 March 2023 plus 13 days from 18 September 2023 to 30 September 2023).

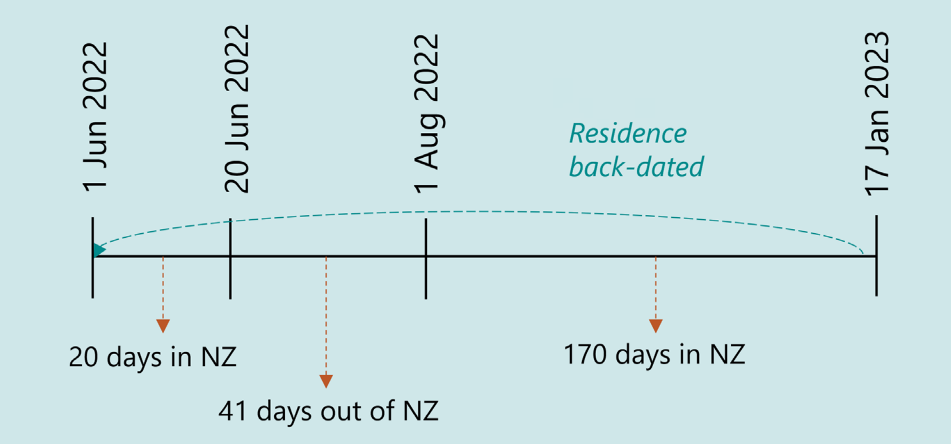
However, Amy was present in New Zealand for 7 months (213 days), in the 12-month period starting on 18 September 2023. Therefore, Amy is resident from the first day of presence in that period (that is, from 18 September 2023).

While Amy was not present in New Zealand for more than 183 days in a 12-month period until 19 March 2024 (her 184th day of presence since her arrival on 18 September 2023), the back-dating rule back-dates her New Zealand tax residence to the first of the days of presence in the 12-month period in which she exceeded 183 days of presence (the period starting on 18 September 2023).

Amy will continue to be resident in New Zealand until she ceases to be resident under the 325-day rule (assuming she has no permanent place of abode here).

Example | Tauira 11 – The 183-day rule

Facts: Ben arrived in New Zealand on 1 June 2022 and stayed here until 20 June 2022, a total of 20 days. Ben returned to New Zealand on 1 August 2022 and stayed here until 17 January 2023, a total of 170 days. It is assumed Ben was not resident in New Zealand before 1 June 2022 and that he had not been present in New Zealand before that date.



Result: Ben is resident in New Zealand from 1 June 2022.

Explanation: Ben was personally present in New Zealand for more than 183 days (190 days), during the 12-month period starting on 1 June 2022.

While Ben was not present in New Zealand for more than 183 days in a 12-month period until 11 January 2023 (his 184th day of presence since his first arrival on 1 June 2022), the back-dating rule back-dates his New Zealand tax residence to the first of the days of presence in the 12-month period in which he exceeded 183 days of presence (the period starting on 1 June 2022).

Ben will continue to be resident in New Zealand until he ceases to be resident under the 325-day rule (assuming he has no permanent place of abode here).

Exception to 183-day rule – non-resident seasonal workers

131. Despite the 183-day rule, a person who is a "non-resident seasonal worker" is treated as non-resident during the time they are employed under the recognised seasonal employer (RSE) scheme (s YD 1(11)). The RSE scheme allows businesses in the horticulture and viticulture industries to recruit workers from Pacific Island countries for seasonal work. For more information about the RSE scheme, search for "recognised seasonal employer scheme" on **immigration.govt.nz**.
132. The non-resident seasonal worker rule does not override the permanent place of abode test. Therefore, if a non-resident seasonal worker acquires a permanent place of abode in New Zealand, they will be resident here.

The 325-day rule

Overview of the rule

133. Section YD 1(5) provides that a person who is resident **only under the 183-day rule** stops being resident here if they are personally absent from New Zealand for more than 325 days in total in a 12-month period.
134. If the 325-day rule is satisfied, s YD 1(6) then provides that the person is treated as non-resident from the first of those 325 days.
135. The 325-day rule is satisfied if a person is absent from New Zealand for more than 325 days in total in **any 12-month period**. The rule does not relate to an income year, a calendar year, or any other particular 12-month period. The 12-month period does not need to include the date as at which residence is being assessed, and the days of absence do not need to be consecutive.

Relationship between the 325-day rule and the permanent place of abode test

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

137. A person who is absent from New Zealand for more than 325 days in a 12-month period and who does not have a permanent place of abode in New Zealand immediately before their departure, has their non-residence back-dated to the first day of the period of absence.

138. However, a person who is absent from New Zealand for more than 325 days in a 12-month period and who has a permanent place of abode in New Zealand at the time of their departure cannot have their non-residence back-dated to any earlier than the day after the day they cease having a permanent place of abode in New Zealand. In this situation, if the person has not returned to New Zealand in the interim, it is not necessary to start the day counting again after the person ceases having a permanent place of abode in New Zealand. If the person is absent for, say, 100 days before ceasing to have a permanent place of abode in New Zealand, those 100 days are taken into account for the purposes of the 325-day rule. When the person is finally absent for more than 325 days, they will cease to be resident from (and including) day 101 (that is, the day after the day on which they ceased having a permanent place of abode in New Zealand).

139. The combined effect of the 325-day rule and the permanent place of abode test is that after 325 days of absence from New Zealand in a 12-month period, a person ceases to be resident in New Zealand from the first of those days of absence on which they do not have a permanent place of abode here.

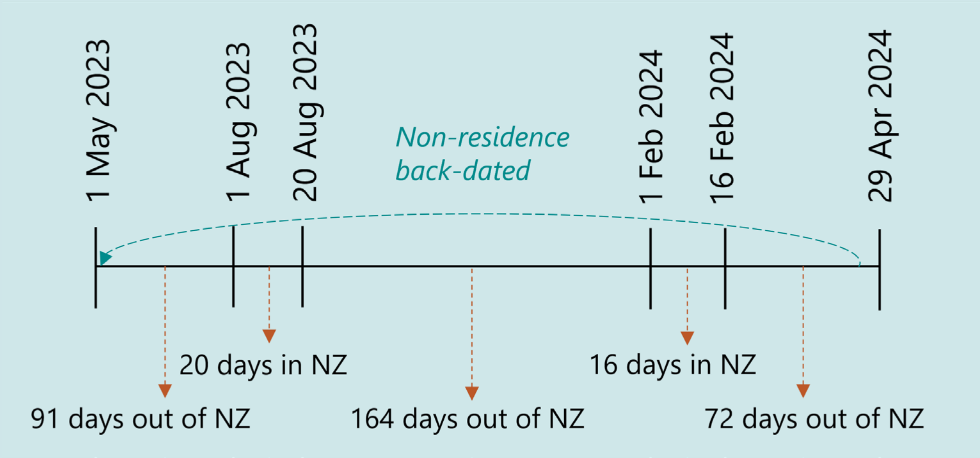
140. Once a person ceases to be resident, they remain non-resident until they either acquire a permanent place of abode in New Zealand or satisfy the 183-day rule.

Examples illustrating the 325-day rule and its relationship with the permanent place of abode test

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

Example | Tauira 12 – The 325-day rule

Facts: Jeremy left New Zealand on 1 May 2023 and returned on 1 August 2023, a total of 91 days of absence. Jeremy stayed in New Zealand until 20 August 2023, a total of 20 days of presence. Jeremy remained absent until 1 February 2024, a total of 164 days. Jeremy came back to New Zealand from 1 February 2024 until 16 February 2024, a total of 16 days. After leaving again on 16 February 2024, Jeremy returned to New Zealand on 29 April 2024, after a period of absence of 72 days. It is assumed Jeremy did not have a permanent place of abode in New Zealand from the time he first left (1 May 2023) and that Jeremy was resident in New Zealand as at that date by virtue of the 183-day rule.



Result: Jeremy is non-resident from 2 May 2023.

Explanation: Jeremy was absent for 327 days in total in the 12-month period starting on 2 May 2023 (91 days starting on 2 May 2023 and ending on 31 July 2023, 164 days starting on 21 August 2023 and ending on 31 January 2024, and 72 days starting on 17 February 2024 and ending on 28 April 2024). Therefore, Jeremy is non-resident from the first day of absence in that period (that is, 2 May 2023).

While Jeremy was not absent from New Zealand for more than 325 days in a 12-month period until 27 April 2024 (his 326th day of absence since his first day of absence of 2 May 2023), the back-dating rule back-dates his New Zealand tax non-residence to the first of the days of absence in the 12-month period in which he exceeded 325 days of absence (the period starting on 2 May 2023).

Jeremy will remain non-resident until he acquires a permanent place of abode here or until he is present here for more than 183 days in any period of 12 months.

Example | Tauira 13 – Relationship between the 325-day rule and the permanent place of abode test

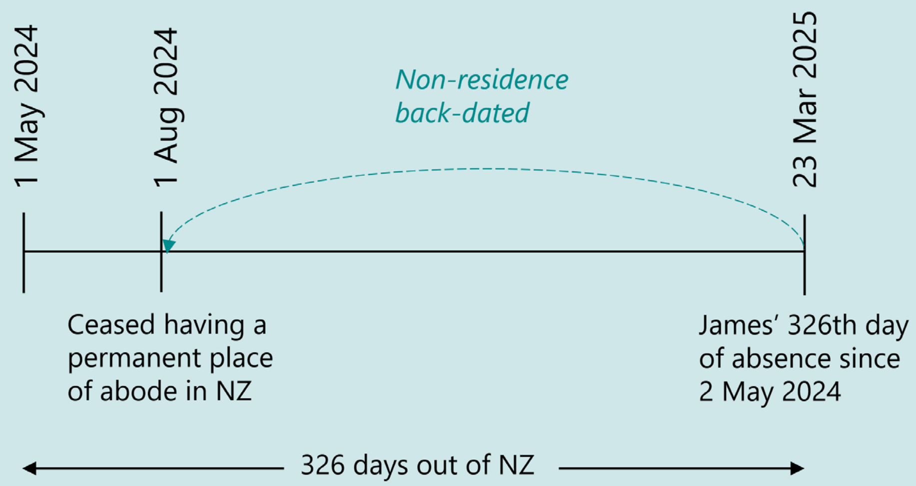
Facts: Claire leaves New Zealand on 1 April 2024 and returns on 1 August 2025. Claire has a permanent place of abode in New Zealand at all times during this period – she owns a house here, has strong economic and personal ties here, and remains in the employment of her New Zealand employer.

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

Explanation: Although Claire is absent from New Zealand for more than 325 days (that is, 365 days) in the 12-month period starting on 2 April 2024, she remains resident here because she has a permanent place of abode in New Zealand at all times during her absence.

Example | Tauira 14 – Relationship between the 325-day rule and the permanent place of abode test

Facts: James was seconded to the Australian office of his employer for 6 months and left New Zealand on 1 May 2024. James had always lived in New Zealand (with his parents), had a boyfriend here, and intended to return after the 6-month period. James left most of his personal property, including his car, with his parents. After he had been in Australia for 3 months, James was offered a permanent job there. On 1 August 2024 he accepted the job and resigned from his position in New Zealand. James stayed in Australia, and arranged to have his personal property transported to Australia. James asked his parents to sell his car, and he ended his relationship with his boyfriend. James intends to remain in Australia indefinitely. He did not return to New Zealand at all until he had a holiday here in July 2025.



Result: James is non-resident from 2 August 2024.

Explanation: James was personally absent from New Zealand for more than 325 days in the 12-month period starting on 2 May 2024.

However, James did not cease having a permanent place of abode in New Zealand when he originally departed on 1 May 2024 because he had a place of abode available to him (his parents' house, where he had lived before his departure), he retained close personal and employment ties here, and he intended to return after a brief period of absence. James ceased having a permanent place of abode in New Zealand on 1 August 2024 when he resigned from his job in New Zealand and accepted the job in Australia, from which point he had decided to stay there indefinitely. Although it was in the following weeks that James arranged to have his property transported to Australia and ended his relationship, the decision to resign from his position in New Zealand and accept the permanent position in Australia is the time from which it is apparent that James had formed the intention to remain in Australia indefinitely. Accordingly, James ceased to have a permanent place of abode in New Zealand on 1 August 2024.

Because the permanent place of abode test is the overriding test, a person cannot have their non-residence back-dated under the back-dating rule to any earlier than the day after the day they cease having a permanent place of abode in New Zealand.

Therefore, while James met the requirement of being absent from New Zealand for more than 325 days in a 12-month period on 23 March 2025 (his 326th day of absence since his first day of absence of 2 May 2024), his tax non-residence cannot be backdated to the first of the counted 325 days (2 May 2024). It can be back-dated only to the first of the 325 counted days on which he no longer had a permanent place of abode in New Zealand (2 August 2024).

Therefore, James ceased being tax resident in New Zealand on 2 August 2024 – the day after the day he ceased having a permanent place of abode in New Zealand.

James will remain non-resident until he acquires a permanent place of abode in New Zealand again or until he is present here for more than 183 days in any period of 12 months.

Relationship between the 183-day rule and the 325-day rule – overlap of the day count rules

141. As noted at [129], if a person is personally present in New Zealand for more than 183 days in a 12-month period they are resident here and are treated as such from the first of those days of presence. The person then remains resident until they cease to be resident under the 325-day rule.[9]

142. The combined effect of the 325-day rule and the permanent place of abode test is that a person who is absent from New Zealand for more than 325 days in total in any 12-month period is treated as non-resident from the first of those days of absence or from the first day during the period of absence on which they no longer have a permanent place of abode here, whichever is later.

143. The effect of the back-dating of both the 183-day and 325-day rules means that where a person has travelled in and out of New Zealand there may be an overlap between those rules.

144. This is because a person who is resident under the 183-day rule may have been temporarily absent from New Zealand at some time before the 183-day rule was satisfied. If the person then satisfies the 325-day rule, they will cease to be resident in New Zealand from the first of those days of absence (assuming they have no permanent place of abode in New Zealand), even though that day falls before the final day that is taken into account for the purposes of the 183-day rule. In this situation, the period of absence taken into account for the purposes of the 325-day rule overlaps with the period of presence taken into account for the purposes of the 183-day rule. This may result in the person being treated as a New Zealand resident for a period of less than 183 days, even though they were present here for more than 183 days in a 12-month period.

9 As noted at [136], the 325-day rule can apply to make someone non-resident only if they do not have a permanent place of abode in New Zealand.

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

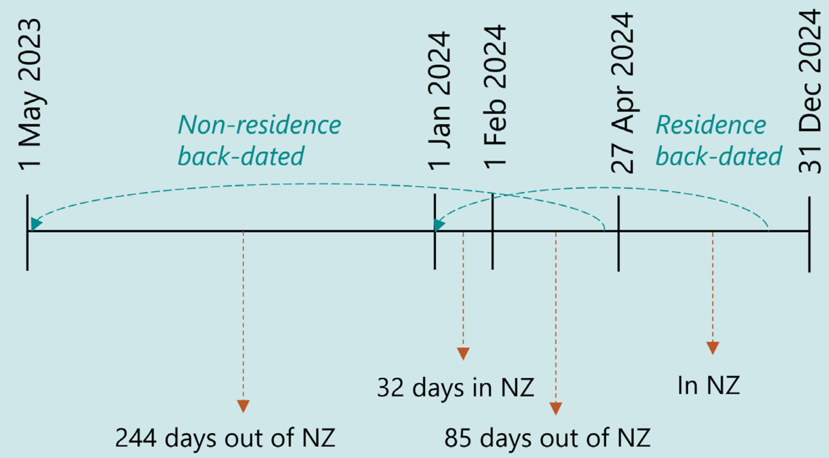
146. Where a period taken into account for the purposes of the 183-day rule and a period taken into account for the purposes of the 325-day rule overlap, the later period operates to confer residence or non-residence, respectively, from the first day of that period.

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

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

Example | Tauira 15 – Relationship between the 183-day rule and the 325-day rule

Facts: Henry left New Zealand on 1 May 2023 and returned on 1 January 2024, after 244 days of absence. Henry left New Zealand again on 1 February 2024 after 32 days of presence here. Henry returned on 27 April 2024, after 85 days of absence, and remained in New Zealand from that point. It is assumed Henry did not have a permanent place of abode in New Zealand until after he returned on 27 April 2024. It is also assumed Henry was resident in New Zealand under the 183-day rule before his departure on 1 May 2023.



Result: Henry is treated as non-resident from 2 May 2023 until 31 December 2023. Henry is treated as resident in New Zealand again from 1 January 2024.

Explanation: Henry was personally absent from New Zealand for 329 days in total in the 12-month period starting on 2 May 2023 (that is, for 244 days from 2 May 2023 to 31 December 2023, and for 85 days from 2 February 2024 to 26 April 2024). Therefore, Henry is treated as non-resident in New Zealand from the first day of absence (that is, 2 May 2023.

While Henry was not absent from New Zealand for more than 325 days in a 12-month period until 23 April 2024 (his 326th day of absence since his first day of absence of 2 May 2023), the back-dating rule back-dates his New Zealand tax non-residence to the first of the days of absence in the 12-month period in which he exceeded 325 days of absence (the period starting on 2 May 2023).

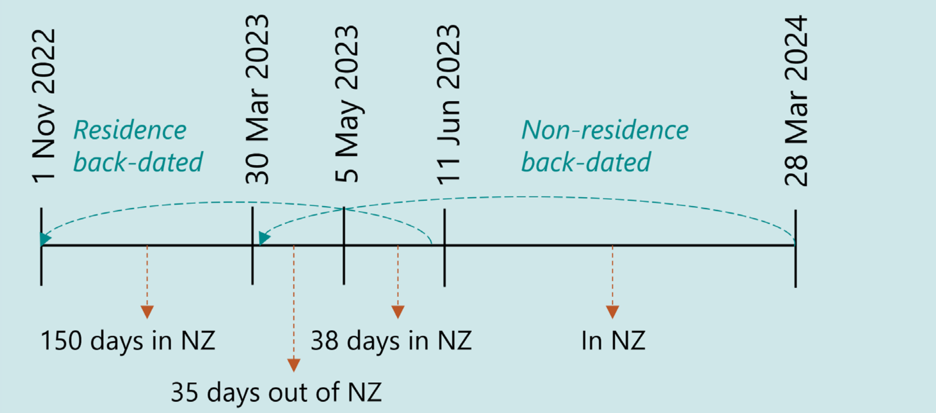
Henry was personally present in New Zealand for more than 183 days in the 12-month period starting on 1 January 2024 (that is, for 32 days from 1 January 2024 to 1 February 2024, and 249 days from 27 April 2024 to 31 December 2024 – a total of 281 days). Therefore, Henry is treated as resident from the first of those days of presence (that is, 1 January 2024).

While Henry was not present in New Zealand for more than 183 days in a 12-month period until 25 September 2024 (his 184th day of presence since his first day of presence of 1 January 2024), the back-dating rule back-dates his New Zealand tax residence to the first of the days of presence in the 12-month period in which he exceeded 183 days of presence (the period starting on 1 January 2024).

The period taken into account for the purposes of the 183-day rule cuts into the period taken into account for the purposes of the 325-day rule. Therefore, Henry is treated as non-resident only from the start of the period of absence (that is, 2 May 2023) until the day before the beginning of the period taken into account for the purposes of the 183-day rule (that is, 31 December 2023).

Example | Tauira 16 – Relationship between the 183-day rule and the 325-day rule

Facts: Belinda arrived in New Zealand on 1 November 2022 and stayed here for 150 days, until 30 March 2023. Belinda left New Zealand on 30 March 2023 and returned on 5 May 2023, a period of absence of 35 days (that is, from 31 March 2023 to 4 May 2023). Belinda was present in New Zealand from 5 May 2023 to 11 June 2023, a total of 38 days. Belinda left the country again on 12 June 2023 and has remained outside New Zealand since that time. It is assumed Belinda was resident outside New Zealand before she arrived on 1 November 2022 and that she did not at any time have a permanent place of abode in New Zealand.



Result: Belinda is treated as resident in New Zealand from 1 November 2022 to 30 March 2023. Belinda is treated as non-resident from 31 March 2023.

Explanation: Belinda was present in New Zealand for 188 days in the 12-month period starting on 1 November 2022 (that is, for 150 days from 1 November 2022 to 30 March 2023, and for 38 days from 5 May 2023 to 11 June 2023). Therefore, Belinda is treated as resident from the first of those days of presence (that is, 1 November 2022).

While Belinda was not present in New Zealand for more than 183 days in a 12-month period until 7 June 2023 (her 184th day of presence since her first day of presence of 1 November 2022), the back-dating rule back-dates her New Zealand tax residence to the first of the days of presence in the 12-month period in which she exceeded 183 days of presence (the period starting on 1 November 2022).

Belinda was absent from New Zealand for 328 days in the 12-month period starting on 31 March 2023 (that is, for 35 days from 31 March 2023 until 4 May 2023, and for 293 days from 12 June 2023 to 30 March 2024). Therefore, Belinda is treated as non-resident from the first of those days of absence (that is, 31 March 2023).

While Belinda was not absent from New Zealand for more than 325 days in a 12-month period until 28 March 2024 (her 326th day of absence since her first day of absence of 31 March 2023), the back-dating rule back-dates her New Zealand tax non-residence to the first of the days of absence in the 12-month period in which she exceeded 325 days of absence (the period starting on 31 March 2023).

The period taken into account for the purposes of the 325-day rule cuts into the period taken into account for the purposes of the 183-day rule. Therefore, Belinda is treated as resident only from the start of the period of presence (that is, 1 November 2022) until the day before the beginning of the period taken into account for the purposes of the 325-day rule (that is, 30 March 2023).

Government service rule

147. There is a special residence rule for people who are overseas in the service of the New Zealand Government (s YD 1(7)).
148. Under this rule, a person who is absent from New Zealand in the service of the New Zealand Government cannot lose New Zealand tax residence under the 325-day rule for ending residence.
149. This means that a person who is tax resident in New Zealand when they commence being in the service of the New Zealand Government overseas will continue to be tax resident in New Zealand under domestic law so long as they remain in the service of the government, irrespective of the length of their absence. The rule can apply whether or not the person is in New Zealand when they commence being in the service of the New Zealand Government.
150. If there is a DTA between New Zealand and the other country, the government service article in the DTA will also need to be considered to determine how taxing rights are allocated.
151. The government service rule in the Act and DTA government service article are discussed in **IS 25/17**: **Tax residence – government service rule**.

Transitional residence – temporary tax exemptions for new migrants and returning New Zealanders

Requirements for transitional residence

152. New migrants and returning New Zealanders may be eligible to be transitional residents under s HR 8(2). If a person is a transitional resident they are entitled to tax exemptions for certain income for a period, even though they are tax resident in New Zealand.
153. Under s HR 8(2), a person is a transitional resident if they:
    - are a New Zealand resident through acquiring a permanent place of abode here, or through the 183-day rule;
    - did not, for a continuous period of at least 10 years immediately before acquiring a permanent place of abode or satisfying the 183-day rule (ignoring the back-dating rule in s YD 1(4)), meet those requirements, and were not resident in New Zealand;
    - have not previously been a transitional resident; and
    - have not ceased to be a transitional resident (which may be because they have elected not to be one or because the period for transitional residence has expired – see [162]).
154. The transitional resident rules apply to people who satisfy the requirements to be a transitional resident on or after 1 April 2006, for the 2005–06 and subsequent income years.

Income that is exempt during the transitional residence period

155. The transitional resident rules provide a temporary tax exemption (s CW 27) for all foreign-sourced income except for:
    - employment income in connection with employment or service performed while the person is a transitional resident; and
    - income from a supply of services.
156. The transitional resident rules also ensure that certain other provisions in the Act apply to produce a result for income tax purposes that is the same as if the transitional resident were non-resident (for example the controlled foreign company (CFC) rules, the FIF rules, the financial arrangements rules (the FA rules), the trust rules and the non-resident withholding tax (NRWT) rules) (see s HR 8(1)).

Transitional residence and various family-related tax credits

157. Transitional residents cannot receive Working for Families tax credits (including Best Start) and maintain their transitional residence status. In addition, the spouse or partner of a transitional resident cannot receive Working for Families tax credits. (See ss MC 5, MD 7 and HR 8(5)).
158. It is important to note that if a person who is eligible to be a transitional resident applies for Working for Families tax credits (including Best Start), that application is treated as an election for both the person and their spouse or partner to not be transitional residents. This deemed election **cannot** be reversed. Therefore, whether to apply for Working for Families tax credits during the transitional residence period should be carefully considered, and professional advice sought if necessary.

159. Transitional residents may receive FamilyBoost tax credits (which provide financial assistance to caregivers for early childhood education costs). Applying for FamilyBoost is not treated as an election to no longer be a transitional resident, as FamilyBoost is not part of the Working for Families tax credit regime.

Start date of transitional residence

160. A person meeting the requirements for transitional residence will be a transitional resident, unless they elect not to be, from the first day they are tax resident in New Zealand (under either the permanent place of abode test or the 183-day rule). What is relevant is when the person becomes tax resident under New Zealand domestic law. It is not relevant whether their tax residence tie-breaks under a DTA to another jurisdiction for the purposes of the DTA.

161. The back-dating rule in s YD 1(4) is **not ignored** in identifying the start date of transitional residence. Therefore, the start date of a person's transitional residence period is the earlier of the day they acquire a permanent place of abode in New Zealand or the first day of presence counted for the 183-day rule.

End date of transitional residence

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

163. Because transitional residence may run until the end of the 48th month in which the person acquired a permanent place of abode in New Zealand or satisfied the 183-day rule (ignoring the back-dating rule), in some situations a person may be a transitional resident for considerably longer than 48 months. For example, if a person arrives in New Zealand on 1 January 2024 and does not have a permanent place of abode in New Zealand until 1 August 2024, their transitional residency (assuming they meet all the requirements) would run from 1 January 2024 to 31 July 2028, a period of 55 months. This is because the person would satisfy the 183-day rule on 2 July 2024 (their 184th day of presence in New Zealand). The last day of the 48th month after the month in which the person's non-residence period ends (July 2024) is 31 July 2028.

164. A person can elect not to be a transitional resident by notifying the Commissioner of this, effective from a date the person nominates. This could be done when filing a tax return or by sending a message through MyIR. As noted at [158], if a person who is eligible to be a transitional resident applies for Working for Families tax credits (including Best Start), this is treated as an election for both the person and their spouse or partner not to be a transitional resident.

165. There has been some uncertainty about when transitional residence ends if it ends due to a person (or their spouse or partner)[10] applying for Working for Families tax credits. The Commissioner considers that in these circumstances transitional residence ends the day before the date their Working for Families tax credit application applies from (that is, the date from which they are eligible for the tax credit). This is based on the words in s HR 8(5) that the application is treated "for the period of the application" as a notice of election for the person (or their spouse or partner) not to be a transitional resident. This is illustrated in Example | Tauira 18 below.

Further information about the transitional resident rules

166. **Transitional residency flowchart for individual New Zealand tax residents – IR1249** will help you determine whether you qualify to be a transitional resident.

167. For further information about the transitional resident rules and examples of how they apply, see **Temporary exemption from tax on foreign income for new migrants and certain returning New Zealanders**,[11] and **Temporary exemption for transitional residents.**[12]

168. However, it is noted that those items are not accurate in two respects. Firstly, the item in *Tax Information Bulletin* Vol 18, No 5 (June 2006) states that the period of transitional residence starts on the first day of the month in which the person migrates to New Zealand. However, as noted at [160], transitional residence starts on the first day the person is tax resident in New Zealand.

10 If the spouse or partner is eligible to be a transitional resident.

11 *Tax Information Bulletin* Vol 18, No 5 (June 2006): 103.

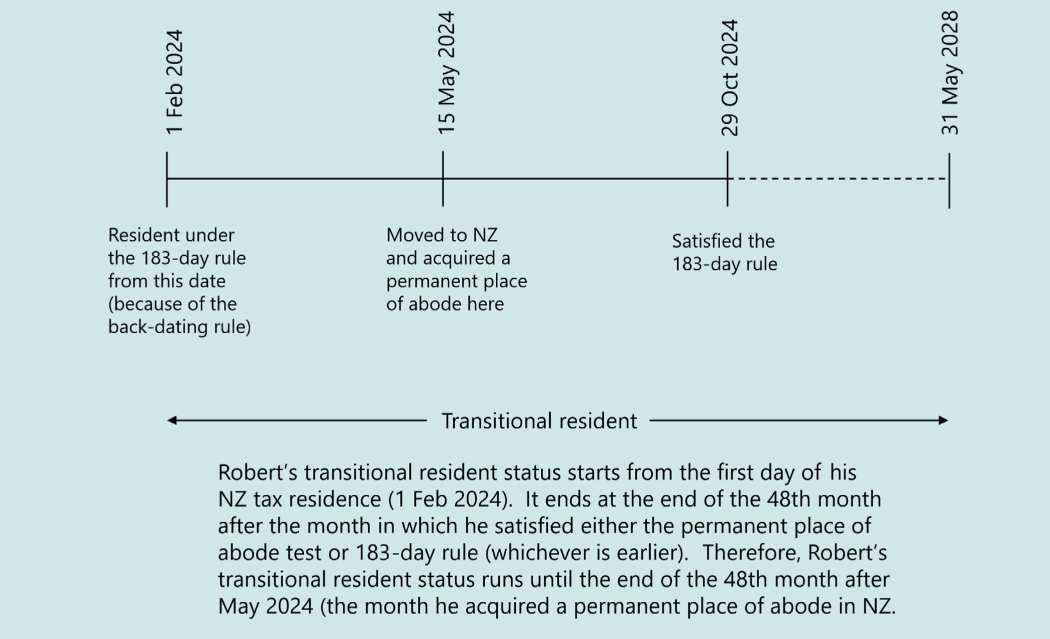
12 *Tax Information Bulletin* Vol 19, No 3 (April 2007): 83.

169. Secondly, the item in *Tax Information Bulletin* Vol 19, No 3 (April 2007) states that transitional residence lasts for 48 months after migration. However, as noted at [162], it lasts (presuming it is not opted out of) until the end of the 48th month after the month in which the person acquired a permanent place of abode in New Zealand (which will not necessarily be at the time of migration here) or satisfied the 183-day rule, whichever is earlier.

Examples illustrating the transitional resident rules

Example | Tauira 17 – Calculating the transitional residence period

Facts: Robert visited New Zealand on 1 February 2024 for a job interview, and stayed here until 16 February 2024. On 15 May 2024 he relocated here permanently and acquired a permanent place of abode at that time. On 29 October 2024 he satisfied the 183-day rule and was deemed to be tax resident in New Zealand from 1 February 2024 because of the back-dating rule in s YD 1(4). He has never been tax resident in New Zealand before and has not elected not to be a transitional resident.



Result: Robert qualifies for transitional residence. His status as a transitional resident would run from 1 February 2024 to 31 May 2028, provided he remains resident here and does not make an election not to be a transitional resident.

Explanation: Robert is resident in New Zealand from 1 February 2024, under the 183-day rule and s YD 1(4). Robert has never been a tax resident or transitional resident in New Zealand before and has not elected to not be a transitional resident. Therefore, he satisfies the requirements of s HR 8(2).

Although Robert is treated as tax resident in New Zealand from 1 February 2024 (because of the back-dating rule in s YD 1(4)), he did not meet the requirements of either s YD 1(2) or s YD 1(3) (ignoring the back-dating rule) for being a resident until 15 May 2024, when he moved here and acquired a permanent place of abode here. Robert acquired a permanent place of abode in New Zealand before he satisfied the 183-day rule. Therefore, his status as a transitional resident would run from 1 February 2024 (the date from which Robert is tax resident in New Zealand) to 31 May 2028 (the end of the 48th month after the month in which he acquired a permanent place of abode in New Zealand).

Example | Tauira 18 – Date transitional residence ends when an application for Working for Families tax credits is made

Facts: Jane returned to New Zealand on 10 May 2023 and met the criteria to be a transitional resident. Jane gave birth to her daughter on 25 June 2023 and made an application for Working for Families tax credits on 1 July 2023. The Working for Families account was registered on 21 July 2023 with the first payment made on 22 July 2023. Payments were backdated to the date of Jane's daughter's birth.

Result: Jane was a transitional resident from 10 May 2023 to 24 June 2023.

Explanation: Under s HR 8(3), the start date of transitional residence is the first day of residence. This is 10 May 2023 when Jane returned to New Zealand.

The end date of transitional residence is the earliest of the dates specified in s HR 8(3). Relevantly for Jane, the earliest date is the day she nominates under s HR 8(4) not to be a transitional resident.

Section HR 8(5) states that an application under s 41 of the Tax Administration Act 1994 for an income year is treated "for the period of the application" as a notice of election under s HR 8(4) not to be a transitional resident.

The period of the application for Working for Families starts from 25 June 2023 (being the date of Jane's daughter's birth), as Jane is eligible for Working for Families from that date. Therefore, Jane's transitional residence ends the day before, on 24 June 2023.

Changes in tax residence

170. The tax residence of a person may change during an income year if the:
    - person acquires a permanent place of abode in New Zealand during the year;
    - person ceases to have a permanent place of abode in New Zealand;
    - first day of more than 183 days of presence in New Zealand in any 12-month period falls within the year;
    - first day of more than 325 days of absence from New Zealand in any 12-month period falls within the year; or
    - person ceases to be absent from New Zealand in the service of the New Zealand Government.
171. If a person's circumstances change during an income year and this may affect their tax residence, they should get in touch with Inland Revenue to let us know. This can be done by filling in **IR886**: **New Zealand tax residence questionnaire**, and sending it to us (through myIR or by post). If a person has derived income in the year their tax residence changes, they will need to file a tax return in New Zealand. A taxpayer may wish to consult a tax professional if they are in doubt about their situation.
172. A person's transitional residence status may also change during an income year.
173. Some of the more significant income tax considerations that may be relevant when the residence or transitional residence status of a person changes during an income year are set out from [175] to [186]. A change in residence may also have implications for the application of a DTA. Further, if a person is a settlor or beneficiary of a trust and their residence status changes there may be tax implications – see from [428].
174. Because of the back-dating rules that apply to the 183-day and 325-day rules, a change of residence during a particular income year may not be confirmed until the subsequent income year. Unless there has been a permanent or long-term move to or from New Zealand, this may cause uncertainties if a return needs to be filed in the interim (that is, if it is not known whether the 183-day or 325-day rule will end up being met). Care should be taken in these circumstances if a taxpayer is not certain about whether their residence status will change.

Taxation of foreign-sourced income, and expenditure incurred in deriving it

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

177. Expenditure incurred by a non-resident in deriving foreign-sourced income is not deductible. Therefore, if a person ceases to be resident in New Zealand during an income year and they incur expenditure in deriving foreign-sourced income, any of that expenditure incurred from the point they cease to be resident is not deductible.

The financial arrangements rules

178. The FA rules are a timing regime that spreads income and expenditure under a financial arrangement over the term of the arrangement.

179. If a person becomes a New Zealand resident who is not a transitional resident during an income year and is a party to a financial arrangement, they may become subject to the FA rules.

180. Where this is the case, they are treated as having assumed the accrued obligation to pay consideration under the financial arrangement immediately after the time at which they became a resident who is not a transitional resident, and as having paid the market value that a contract to assume the obligation had at that time (s EW 37(2)). The deemed acquisition price is then taken into account in any subsequent base price adjustment required by s EW 29.

181. To the extent that the exemption from the FA rules for non-residents (s EW 9) previously applied, that exemption ceases to apply when the person becomes resident.

182. If a person ceases to be a New Zealand resident during an income year and is a party to a financial arrangement, they must calculate a base price adjustment for the financial arrangement as at the date of ceasing to be resident (s EW 29). If the base price adjustment is positive, it is income derived by the person in the year for which the calculation is made (s EW 31(3)). If the base price adjustment is negative, it is expenditure incurred by the person in the year for which the calculation is made, and a deduction may be allowed for that expenditure under s DB 6, s DB 7, s DB 8 or s DB 11 (s EW 31(4)).

183. An exception to this is if the person is a cash basis person and they cease to be a New Zealand resident before the first day of the fourth income year following the income year in which they first became a New Zealand resident. In that case, they do not need to calculate a base price adjustment for a financial arrangement they were a party to both before becoming and after ceasing to be a New Zealand resident (s EW 30(1)).

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

Provisional tax

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

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

Relevance of double taxation agreements

187. New Zealand is party to DTAs with numerous countries. If someone is tax resident in both New Zealand and a country with which New Zealand has a DTA, the DTA determines what taxing rights each country has.

188. For a list of countries with which New Zealand has DTAs, see **Tax treaties** on Inland Revenue's website.

Dual tax residence

189. Dual residence occurs when an individual is tax resident in two countries under the laws of each of those countries. This can easily arise, as different countries have different tax residence tests and may use more than one residence test.

190. One situation where dual residence is likely to arise in practice is where one country has a personal presence test and another relies on more permanent connections focusing on factors such as the location of a person's home or their domicile. For example, if country A deems a person to be tax resident after they have been present there for 183 days, and country B has a test based on other factors, a person normally resident in country B who is present in country A for a 6-month period may be tax resident in both countries. Consequently, if both countries tax on a worldwide basis an element of double taxation may occur.

191. The New Zealand residence rules for individuals are intended to make it relatively easy to become tax resident here, and more difficult to cease being tax resident. Therefore, dual residence may occur quite easily in the New Zealand context. Individuals who become tax resident in New Zealand under the 183-day rule may also be tax resident in another country under a test based on other factors, such as domicile. Conversely, individuals leaving New Zealand may remain tax resident

here under the permanent place of abode test, while at the same time becoming tax resident in another country under a personal presence rule.

192. Where there is a DTA between New Zealand and another country, dual residence issues are resolved by applying the residence article in the DTA. The object of the residence article is to ensure taxpayers are precluded from having dual residence for DTA purposes.

193. Where a taxpayer is tax resident under the domestic laws of New Zealand and the DTA partner, dual residence is avoided for the purposes of the DTA by applying a series of tie-breaker tests to allocate tax residence to one of the countries. That allocated tax residence is then relevant to what taxing rights each of the countries has in relation to matters covered by the DTA.

194. Section BH 1(4) states that DTAs have overriding effect:

> **BH 1 Double tax agreements**
>
> …
>
> Overriding effect
>
> (4) Despite anything in this Act, except subsection (5), or in any other Inland Revenue Act or the Official Information Act 1982 or the Privacy Act 1993, a double tax agreement has effect in relation to—
>
> (a) income tax:
>
> (b) any other tax imposed by this Act:
>
> (c) the exchange of information that relates to a tax, as defined in paragraphs (a)(i) to (v) of the definition of tax in section 3 of the Tax Administration Act 1994.

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

196. When a person who is tax resident in New Zealand under domestic law is deemed to be resident in another country for the purposes of a DTA, the person remains liable to New Zealand income tax on their worldwide income on the basis of their tax residence here under domestic law. However, the liability is modified by any restrictions the DTA imposes on New Zealand's right to tax persons who are deemed to be resident in the other country for the purposes of the DTA.

197. For example, if the person receives a dividend from a New Zealand resident company, the resident withholding tax (RWT) on the dividend would be calculated on the basis of the normal rate, but would be subject to the limitation the DTA imposes on New Zealand's right to tax dividends derived by someone deemed to be resident of the DTA partner for DTA purposes. In most cases, the amount of tax that could be levied in New Zealand could not exceed 15% of the gross amount of the dividend.[13]

198. Another example is someone who is tax resident in New Zealand under domestic law but deemed to be tax resident in another country for the purposes of a DTA, and who has a bond portfolio. As the person remains tax resident in New Zealand under domestic law, the FA rules apply and must be used to calculate the person's income in respect of the portfolio, with the DTA rates then being applied to that income. Because the person is tax resident in New Zealand under domestic law, the income is not "non-resident passive income", so the withholding tax limitation in s DA 2(5) does not apply to deny the person the ability to claim any relevant deductions for expenditure incurred in deriving the income (for example, portfolio management fees).

199. The DTA residence articles are relevant **only for the purposes of the DTAs**. Someone who is resident in two countries under the domestic tax laws of those countries remains resident in both countries for other tax purposes (for example, GST).

13 For these purposes, the gross amount of the dividend is the net dividend plus withholding tax deducted. Imputation credits should be ignored.

Residence article

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

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

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

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

Interpretation of terms used in the residence article

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

204. The "general definitions" article of New Zealand's DTAs typically provides that in applying the DTA, "unless the context otherwise requires", any term not defined in the DTA has the meaning it has under the laws of that state for the purposes of the taxes to which the DTA applies, with any meaning under the tax laws of that state prevailing over any meaning of the term under other laws of that state. (See also OECD Commentary on art 3 at para 13.1).

205. This means the meaning of an undefined term in a DTA may be ascertained by reference to domestic laws generally, not just tax laws – though any tax law meaning will prevail.

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

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

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

Permanent home

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

210. It is clear from the OECD commentary that the concept of "home" is used in its physical sense. The commentary states that any form of home may be taken into account – that is, a house, apartment, rented or furnished room (OECD commentary on art 4 at para 13).

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

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

213. The home must be available for the person's use. Availability in this context is not based on mere occupation or immediate availability for occupation. "Available" is a broad term that includes several concepts including factual availability and legal availability (that is, legal rights and controls over the property). Determining whether a home is available involves assessing factors such as whether the:[14]

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

214. Applying these factors, the Commissioner considers that a home will generally be unavailable to the landlord as a permanent home when:

- it is let out on an arm's length basis to a non-associated person;
- it is let out under a tenancy to which the Residential Tenancies Act 1986 applies (including one let on a periodic tenancy).

215. If the house is let to an associated person or friend it may still be available to the owner as a permanent home, if the Residential Tenancies Act 1986 does not apply to the tenancy.

216. The Commissioner is of the view that owning or personally renting accommodation is not fundamental to a person having a permanent home available to them. For example, a person may have a permanent home where accommodation is owned or leased by an employer, a spouse or partner, a company or a trust (not controlled by the person), or where the person is able to live somewhere rent-free. If a person owns or personally rents a home that is a relevant consideration, but if a home is arranged or retained in some other way (by or through a third party, for example) this is not of itself determinative of whether the person has a permanent home. This is consistent with the view expressed in G A Harris' 1990 *New Zealand's International Taxation*. To the extent that *Case 12/2011* 25 NZTC 1-012 (TRA) may arguably suggest otherwise, the Commissioner does not agree.

217. If it is apparent that a person who is dual resident has a permanent home available in one country or jurisdiction that puts an end to the matter unless the person can establish that they also have a permanent home available in the other country or jurisdiction.

14 See *Case 12/2011* (2011) 25 NZTC 1-012 (TRA) and *Case J41*.

218. If a person has a permanent home available in both countries, the next test is generally the personal and economic relations test. The DTA between New Zealand and Malaysia[15] differs in that if residence cannot be resolved under the permanent home test, the next test is the habitual abode test, followed by the personal and economic relations test.

219. Where a person does not have a permanent home available to them in either country, the next test for consideration is generally the habitual abode test. However, this is not the case under New Zealand's DTAs with Australia,[16] Thailand,[17] the Republic of South Africa,[18] the United Arab Emirates,[19] Spain[20] and Papua New Guinea.[21] Under those DTAs, where a person does not have a permanent home available to them in either country the next test is the personal and economic relations test, followed by the habitual abode test.

Personal and economic relations (centre of vital interests)

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

221. In applying this test, the person's personal and economic relations with both New Zealand and the other country must be considered, and the country with which these relations are closer (or, in other words, their centre of vital interests) must be determined.

222. The OECD commentary on art 4 of the OECD Model Convention indicates that the following types of factors may be taken into account in applying the test (at para 15):

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

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

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

225. In *Hertel v MNR* 93 DTC 721 (TCC) at 723, Sobier TCCJ commented that:

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

226. Assessing the depth of a person's roots requires weighing up the circumstances as a whole to determine which locality is of greater significance to the person. Some commentators have suggested that greater weight should be given to personal relations. However, the Commissioner considers that the better view is that the "centre of vital interests" concept is a composite one and does not give preference to either personal or economic relations. The OECD commentary states (at para 15) that "considerations based on the personal acts of the individual must receive special attention". The Commissioner considers that "personal acts" encompasses acts concerning both economic relations (such as seeking employment in a country) and personal relations (such as activities related to a person's family).

227. If a person's economic and personal relations are overall evenly balanced between New Zealand and another country (though personal relations are stronger with one country and economic relations with the other), the person has no centre of vital interests, as the factors are regarded as being of equal weight. In this situation, the next test needs to be considered.

15 Signed on 19 March 1976.
16 Signed on 26 June 2009.
17 Signed on 22 October 1998.
18 Signed on 6 February 2002.
19 Signed on 22 September 2003.
20 Signed on 28 July 2005.
21 Signed on 29 October 2012.

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

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

Habitual abode

230. Generally, the habitual abode test applies if a person:

- has a permanent home available in both countries, and the country with which their personal and economic relations are closer (their centre of vital interests) cannot be established; or
- has no permanent home available in either country.[22]

231. The focus of the test is on whether the person has a habitual abode in New Zealand or the other country or both. As stated by the Canadian Federal Court of Appeal in *Lingle v R* 2010 FCA 152 (at para [6]), the concept of a habitual abode:

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

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

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

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

235. The focus is on where the person normally lives **during the period of dual residence**. In obvious cases there is no need to consider other periods. However, a wider view (that is, looking beyond the period of dual residence) may assist in cases where it is unclear or when determining whether the stays in a particular country are transient or of substance.

236. As the OECD commentary on art 4 states:

> 19.1 Subparagraph *b)* does not specify over what length of time the determination of whether an individual has an habitual abode in one or both States must be made. The determination must cover a sufficient length of time for it to be possible to ascertain the frequency, duration and regularity of stays that are part of the settled routine of the individual's life. Care should be taken, however, to consider a period of time during which there were no major changes of personal circumstances that would clearly affect the determination (such as a separation or divorce). The relevant period for purposes of the determination of whether an individual has an habitual abode in one or both States will not always correspond to the period of dual residence, especially where the period of dual residence is very short. …

22 As noted at [219], the DTAs between New Zealand and Australia, Thailand, the Republic of South Africa, the United Arab Emirates, Spain, and Papua New Guinea are exceptions to this.

237. The Commissioner considers that where it is appropriate to consider a period outside the period of dual residence, the appropriate length of time outside the period of dual residence to consider is just the amount necessary to determine whether the person had a habitual abode in New Zealand during the period of dual residence. The Commissioner now considers that the period looked at in applying the habitual abode test in the matter that became *Case* 12/2011 was inappropriately long.[23]

238. The OECD commentary on art 4 gives the following example of a situation where the period of dual residence is short, so it would be appropriate to consider a longer period than the period of dual residence:

> 19.1 … Assume that an individual resident of State C moves to State D to work at different locations for a period of 190 days. During that 190-day period, he is considered a resident of both States C and D under their respective domestic tax laws. The individual lived in State C for many years before moving to State D, remains in State D for the entire period of his employment there and returns to State C to live there permanently at the end of the 190-day period. During the period of his employment in State D, the individual does not have a permanent home available to him in either State C or State D. In this example, the determination of whether the individual has an habitual abode in one or both States would appropriately consider a period of time longer than the 190-day period of dual-residence in order to ascertain the frequency, duration and regularity of stays that were part of the settled routine of the individual's life.

239. In the Commissioner's view, in the above example, where the period of dual residence is only about half a year, it is not necessary to look beyond about a year either side of the period of dual residence to be able to ascertain whether the individual had a habitual abode in either or both of the states. Of course, the period that would appropriately be looked at depends on the particular facts of any situation, including how transient or settled the routine of the individual's life was both in and beyond the period of dual residence.

Nationality

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

Mutual agreement

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

23 In any event, it is noted that the Taxation Review Authority's discussion of how the habitual abode test would apply to the facts of that case (which was along the lines of submissions made by counsel) was *obiter* – the authority having already found the taxpayer to be solely resident in New Zealand at all material times under the earlier tie-breaker tests.

Examples illustrating the DTA residence tie-breaker tests

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

Example | Tauira 19 – The permanent home test

Facts: Stacey, who is employed as a university lecturer, travels to the United Kingdom for 15 months' sabbatical leave at a United Kingdom university. While on leave, Stacey remains in the employment of a New Zealand university. She is required to work for the university on her return to New Zealand.

Stacey's partner travels with her to the United Kingdom.

Stacey and her partner let their house in New Zealand to tenants while they are in the United Kingdom. The tenancy is a periodic tenancy under the Residential Tenancies Act 1986, so is terminable with a 63-day notice period if Stacey requires it as her principal place of residence. The tenants are not associated with or friends of Stacey or her partner.

While in the United Kingdom, Stacey and her partner rent a house near the university where Stacey spends her sabbatical leave.

Stacey remains a member of several local clubs and organisations in New Zealand and keeps most of her personal property, including investments, in New Zealand (looked after and managed by family members).

For the purposes of this example, it is assumed Stacey is resident for tax purposes in the United Kingdom under the relevant United Kingdom legislation.

Result: Stacey is resident in both New Zealand and the United Kingdom under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and the United Kingdom, she is deemed to be a resident of the United Kingdom from the time the tenancy in the United Kingdom starts until it ends and Stacey returns to New Zealand.

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

The question of Stacey's residence for the purposes of the DTA is resolved by the permanent home test. Stacey does not have a permanent home available in New Zealand because she and her partner have rented out their New Zealand home on arm's length terms to tenants who are not associated with them or friends of theirs.

Stacey has a permanent home in the United Kingdom as she has rented a house there for 15 months. Although Stacey's stay in the United Kingdom is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary.

As Stacey has a permanent home in the United Kingdom and does not have one in New Zealand, she is deemed to be a resident of the United Kingdom for the purposes of the DTA from the time the tenancy in the United Kingdom starts until it ends and Stacey returns to New Zealand.

Example | Tauira 20 – The permanent home, habitual abode, and personal and economic relations tests

Facts: Luke owns a house in New Zealand and one in Malaysia. He has extensive business interests in both countries.

Luke regularly spends short periods in New Zealand, and these add up to about 5 months of the year. Luke's visits to New Zealand are primarily for business purposes, but he also spends time catching up with family here.

Luke works and lives in Malaysia for the remainder of the time, where he also occupies positions of responsibility in the community. Luke is married, and his wife and children live in Malaysia.

For the purposes of this example, it is assumed Luke is resident for tax purposes in Malaysia under the relevant Malaysian legislation.

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

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

Luke has permanent homes available to him in both New Zealand and Malaysia because his houses in both countries are continuously available to him for use.

As Luke has a permanent home available to him in both countries, the next question is whether he has a habitual abode in either country. (As noted at [217], the order of the tie-breaker tests in the DTA between New Zealand and Malaysia differs from that in New Zealand's other DTAs. Under New Zealand's other DTAs, if a person has a permanent home available in both countries, the personal and economic relations test is applied next.)

Luke has a habitual abode in Malaysia because he habitually lives there for about 7 months of the year. Luke also has a habitual abode in New Zealand because he habitually spends about 5 months of the year here. The reasons for Luke's stays in New Zealand (business and visiting family) suggest the stays are more than transient in nature.

As Luke has a habitual abode in both New Zealand and Malaysia, it is necessary to determine whether his personal and economic relations are closer with Malaysia or with New Zealand. (Again, note the difference in the order of the tie-breaker tests in the DTA between New Zealand and Malaysia compared to New Zealand's other DTAs.)

Luke has close economic relations with both countries due to his extensive business interests in both countries. Luke also has personal relations with both countries. These personal relations are considered to be stronger with Malaysia, given that Luke's wife and children live there and he is involved in the community there. Therefore, weighing up the circumstances as a whole, Luke's personal and economic relations are closer with Malaysia. Therefore, Luke is treated solely as a Malaysian resident for the purposes of the DTA.

Example | Tauira 21 – The permanent home test

Facts: Megan, who normally resides in Canada, is seconded to New Zealand by her Canadian employer for 18 months. While in New Zealand, Megan works for the New Zealand subsidiary of her Canadian employer.

While she is in New Zealand, Megan lets her house in Canada out for a fixed-term of 18 months. The tenant is not a friend of or associated with Megan.

Megan lives in rented accommodation in New Zealand.

Megan leaves most of her personal property in Canada, and most of her investments are in Canada.

For the purposes of this example, it is assumed Megan is resident for tax purposes in Canada under the relevant Canadian legislation.

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

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

Megan has a permanent home available to her in New Zealand as she has rented accommodation here for 18 months. Although Megan's stay in New Zealand is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary.

Megan does not have a permanent home available to her in Canada as her house there is rented out on arm's length terms to a tenant who is not associated with her or a friend of hers.

As Megan has a permanent home available to her in New Zealand but not in Canada, she is deemed to be a resident only of New Zealand for the purposes of the DTA.

Example | Tauira 22 – The permanent home and habitual abode tests

Facts: Jonty grew up in South Africa, and moved to Canada with his parents when he was 16 (when his father was temporarily transferred there for work). After 3 years, his parents moved back to South Africa. By this time, Jonty had started university in Canada and decided to stay there. Jonty graduated and had been working in Canada for 2 years when he was offered a 2-year secondment to New Zealand by his Canadian employer.

While in New Zealand, Jonty is employed by the New Zealand subsidiary of his Canadian employer.

Jonty retains his bank accounts in Canada and opens new ones in New Zealand. He does not transfer his Canadian superannuation into his New Zealand superannuation fund, as he may return to Canada at the end of his secondment.

Jonty lived in a rented flat in Canada, which he gave up when he moved to New Zealand.

Jonty has to travel between Auckland and Wellington, on a roughly week-about basis, for work, and he lives in his employer's serviced apartments in both cities.

Jonty has very little personal property. What he does have he either brings with him to New Zealand or sells before leaving Canada.

At the end of the 2-year secondment, Jonty's position in New Zealand is extended for another 18 months.

During the 3½ years Jonty lives in New Zealand, he returns to Canada once, for a 3-week holiday.

For the purposes of this example, it is assumed Jonty is resident for tax purposes in Canada under the relevant Canadian legislation.

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

Explanation: Jonty is resident in New Zealand under s YD 1 as he is personally present here for more than 183 days in a 12-month period. As noted above, it is assumed he is also resident for tax purposes in Canada under the relevant Canadian legislation.

Jonty does not have a permanent home available to him in Canada because he gave up his rented flat there. Jonty does not have a permanent home available in New Zealand because his homes here (a series of serviced apartments) are not permanent.

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

Jonty has a habitual abode in New Zealand because he habitually or normally lives here during the period of dual residence. The period of dual residence is sufficiently long that it is not necessary to look beyond that period to determine whether Jonty's time in New Zealand is transient or of substance. It is apparent that for the 3½ years of dual residence Jonty has a habitual abode in New Zealand.

Jonty clearly does not have a habitual abode in Canada during the period of dual residence – he returned there only once in that time, for a holiday of short duration. Consequently, Jonty is deemed to be a resident only of New Zealand for the purposes of the DTA.

Part 2: Tax residence of companies

Overview

242. Under s YD 2, a company is a New Zealand tax resident if:

- it is incorporated in New Zealand;
- its head office is in New Zealand;
- its centre of management is in New Zealand; or
- its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.

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

244. A "foreign company" is a company that is not tax resident in New Zealand under s YD 2 or is treated under a DTA as not being tax resident in New Zealand (s YA 1). There are different tests to determine the country in which a foreign company is treated as tax resident for the purposes of the "international tax rules" (as defined in s YA 1). This is discussed briefly from [363].

Company definition

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

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

246. As the definition extends to any entity with a legal existence separate from that of its members, this includes a wide variety of entities established under the laws of other countries that, although not companies in the strict sense, are equivalent to companies. If any such entity satisfied any of the company residence tests in s YD 2, it would be a New Zealand tax resident company so would be liable for tax here on its worldwide income. Similarly, if a trust settled in another jurisdiction falls within the definition of "unit trust" in the Act, it will be a company for the purposes of applying the New Zealand company residence tests.

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

Place of incorporation test

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

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

Head office test

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

251. The word "office" is defined in *The Oxford English Dictionary* (online ed, 3rd edition, Oxford University Press, 2013, accessed 20 August 2024) (relevantly) as meaning:

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

252. The Commissioner therefore considers that "office" in the context of the head office test means a physical place from where the business is conducted – a place where the administration and management (in the broadest sense) of a business is carried out.

253. The head office of a company is the office that is above all others – the place of administration and management that is superior to all others. It is the office from which the business of the company is directed and carried on.

254. An office is superior to other offices of the company if individuals working in those other offices are responsible to individuals located in that office. The focus of the test is therefore on a physical place, in the sense of a building, from which the company's overall operations are directed and carried on.

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

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

256. Weighing up these factors should identify whether a company's head office is in New Zealand. Usually, the location of a company's head office will be certain. If a company is engaged in carrying on business activities, identifying the company's highest office should not be difficult. An example where it could be more difficult is where a company is merely a passive investment vehicle. The passive nature of the company's activities may make identifying its highest office difficult, or the company may simply have no office. Another example where it may be difficult to identify a head office, or where there may not be one, is where a senior team carries out the administration and management of the business from different offices and members meet virtually.

257. The test must be applied in respect of the particular company being considered. If the company is part of a group of companies, while there may be some level of direction given by other companies in the group (for example, if a regional or headquarter office is operated by another company in the group), that in itself does not amount to that office being the head office of the company being considered.

Centre of management test

Description of the test

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

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

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

Centre of management of the entire company

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

262. If management of a company is carried out by persons in different countries, it may be necessary to consider the functions carried out in each country to determine where the company's centre of management is.

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

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

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

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

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

Director control test

Description

267. Section YD 2(1)(d) provides that a company is a New Zealand tax resident if its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision-making also occurs outside New Zealand.

Definition of director

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

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

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

Persons carrying out director's duties

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

Persons giving directions or instructions to nominated directors

271. A person is also treated as a director if those occupying the position of directors of a company are accustomed to act in accordance with the person's directions or instructions. For example, if the directors of a company incorporated in Hong Kong are accustomed to act in accordance with instructions from a New Zealand resident individual, that individual would be a director of the company. The company may therefore potentially be a New Zealand tax resident under the director control test, as control of the company by a director is exercised from here. The discussion from [291] explains the considerations to have regard to when there is exercise of directorial control both in New Zealand and elsewhere.
272. In practical terms, it is necessary to consider a pattern of decision-making to determine whether the nominated directors are accustomed to act in accordance with another person's directions or instructions (whether formal or otherwise).
273. The Commissioner considers that the directions or instructions do not need to be given directly to the persons occupying the position of directors. For example, where a chain of companies has directors who are accustomed to act in accordance with the directions or instructions of another person, the chain must be traced through to establish on whose directions or instructions the directors are accustomed to act. That person will be considered a director under the Act. For example, if the directors of company X are accustomed to act under instructions from the directors of company Y, and the directors of company Y act under instructions from a New Zealand resident A, then A is a director of both X and Y under the definition of director in s YA 1.

Companies without conventional directors

274. The definition of director in the Act extends to entities that do not have directors in the conventional sense. In the case of an entity that is treated as or assumed to be a company under the Act, a person who acts in the same way or a similar way as a director would act is treated as a director. A person falls within this part of the definition if they are involved in making the types of decisions a director of a company would normally make. These decisions would include major strategic and policy decisions.
275. Therefore, the manager of a unit trust is a director because they are involved in making the major decisions in relation to the unit trust (for example, the decisions in relation to the management of the unit trust's investments, the marketing of interests in the unit trust, and the distribution policy of the unit trust). If the manager exercises control of the unit trust from New Zealand, the unit trust is a New Zealand tax resident.

Companies as directors

276. The definition of director in the Act is broad enough to encompass both natural persons and companies that are appointed as or that act as directors.[24] This may result in a company that is a New Zealand tax resident being treated as a director of a company established in another jurisdiction (see Example | Tauira 23). This could be relevant in considering whether directorial control of the foreign company is exercised in New Zealand.
277. Where there is a company that is a director, the location from which the company's representatives (eg, employees, executives or other designated representatives) exercise control will be relevant.

Control by directors

278. The director control test focuses on where the directors exercise their directorial control of the company from – that is, the place from which the strategic and policy decisions are made. A company is resident in New Zealand under this test if directors are effectively controlling the company from New Zealand – that is, if the central and directing mind of the company is here.
279. The test is satisfied only if directors acting in their capacity as directors exercise control from New Zealand. If directors control a company from New Zealand in their capacity as shareholders, but not in their capacity as directors, the company is not tax resident here under the director control test.

De facto test

280. The director control test is satisfied if control of a company is exercised in New Zealand, whether or not decision-making by directors is confined to New Zealand. The test is one of *de facto* control – that is, the question is whether control of the company by directors is actually exercised from New Zealand.
281. Directors may exercise control of a company in several ways. For example, control may be exercised through:
    - decisions made during formal directors' meetings;
    - decisions made during a telephone call or video conference between directors;
    - the signing of resolutions outside directors' meetings; or
    - informal decisions made by directors, acting in their capacity as directors, outside the course of the directors' meetings.
282. The method by which directors exercise control of a company may vary considerably from case to case. Each case must be considered on its facts to determine the place from which the directors actually exercise control of the company.
283. The significance of the location of directors' meetings (or the location from which directors attend the meetings, if they attend online) will vary from case to case. If directors exercise control only during directors' meetings, then the location of the meetings (or the location from which directors attend) is of paramount importance. On the other hand, if control is exercised outside of directors' meetings, and the meetings are merely to formalise decisions that have already been made, the location of the meetings (or the location from which directors attend) is of little significance.

24 While only a natural person may be appointed as a director of a company under the Companies Act 1993, the laws of other countries may allow a company to be appointed as or act as a director.

284. The fact directors of a company exercise directorial functions from New Zealand does not necessarily mean control of the company by its directors is exercised from New Zealand. For example, if the directors ordinarily exercise their powers in Australia, the fact they occasionally travel to New Zealand and make directorial decision from here does not mean the directors are exercising control of the company from New Zealand. All of the circumstances would be relevant to consider in terms of what is ordinarily the case.

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

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

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

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

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

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

290. In relation to companies that are subsidiaries, the *de facto* exercise of control by the parent company must be distinguished from the mere provision of advisory services. Often, large corporate organisations establish centralised advisory departments to provide administrative, financial, accounting, and other services for companies that are members of the organisation. When a parent company provides services of this nature to a subsidiary, it is not in control of the subsidiary under the director control test merely because of the provision of those services.

Exercise of powers in New Zealand and in another country

291. In cases where a company has directors both in New Zealand and overseas, the functions performed by directors from New Zealand must be considered to determine whether they constitute the exercise of control of the company by its directors from New Zealand.

292. If the powers of all directors are equal (both legally and in fact), the issue may potentially be resolved by simply looking to where the majority exercise their control. For example, consider the situation of a company that has directors with equal powers, three of whom live in Australia and undertake their directorial functions only from Australia, and two of whom live in New Zealand and physically attend directors' meetings in Australia and also attend online meetings from New Zealand. If control of the company is exercised through the directors' meetings held in Australia and through the online meetings between the Australian and New Zealand directors, the company is not tax resident in New Zealand under the director control test. In these circumstances, when the directors exercise their powers concurrently from New Zealand and Australia, the majority of the directors are located in Australia. Consequently, on a simple majority approach, control of the company by its directors is not exercised from New Zealand.

293. In applying such an approach, it may be necessary to consider where each director ordinarily makes their directorial decisions. For example, during the COVID-19 pandemic, a relevant consideration was travel restrictions that resulted in directors exercising their functions from New Zealand when that would not ordinarily be the case or would not ordinarily be the case to the extent it was during that period.

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

295. Where a simple majority approach is appropriate, it may be that it does not resolve the matter, for example because there is an equal number of directors exercising control from New Zealand as there are directors exercising control from outside New Zealand. In such a situation, the circumstances would need to be closely considered to determine whether directorial control could nonetheless be considered to be exercised from New Zealand. For example, consideration may need to be given to whether some directors are accustomed to act in accordance with directions or instructions of others, or if the director with the casting vote (eg, the chairperson) exercises their decision-making from New Zealand and how regularly decision making comes down to the casting vote.

Continuing test

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

Tax residence of directors

297. The tax residence status of a company's directors is not relevant in determining whether the director control test has been satisfied. The focus of the test is on whether the directors exercise control of the company from New Zealand.

Control of the entire company

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

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

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

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

Examples illustrating the company tax residence tests

Example | Tauira 23 – Company tax resident under the director control test

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

Result: Company A is tax resident in New Zealand under the director control test.

Explanation: Company A is incorporated in Hong Kong, so is not tax resident in New Zealand under the incorporation test.

The centre of Company A's operations is in Hong Kong, and Company A has its centre of management there. Company A has no office in New Zealand. Therefore, Company A is not tax resident in New Zealand under either the head office test or the centre of management test.

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

Example | Tauira 24 – Company not tax resident in New Zealand

Facts: Company B is a holding company incorporated in Singapore. Company B has an office in Singapore and its operations are managed from this office. Company B has no office in New Zealand. Company B has five directors – three live in Australia and two in New Zealand. The powers of the directors are equal. The board of directors meets 6-monthly in Singapore to review decisions made by the company's subsidiaries. The directors regularly hold online meetings to discuss issues, with the New Zealand-based directors attending from New Zealand and the Australian-based directors attending from Australia. Investment decisions are made during these meetings.

Result: Company B is not tax resident in New Zealand.

Explanation: Company B is incorporated in Singapore, so is not tax resident in New Zealand under the incorporation test.

Company B has no office in New Zealand, so is not tax resident here under the head office test.

Company B is managed from Singapore, so has its centre of management in Singapore rather than in New Zealand.

Although the board of directors meets only in Singapore, control of the company is also exercised outside the board meetings during the online meetings between the New Zealand and Australian directors. Therefore, there is some exercise of directorial functions from New Zealand. However, as the powers of each director are equal, Company B is not controlled by its directors from New Zealand, as the majority of directors are in Australia. Therefore, Company B is not tax resident in New Zealand under the director control test.

Example | Tauira 25 – Company not tax resident in New Zealand

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

Result: Company C is not tax resident in New Zealand.

Explanation: Company C is incorporated in Australia, so is not tax resident in New Zealand under the incorporation test.

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

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

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

Example | Tauira 26 – Unit trust tax resident in New Zealand under the director control test

Facts: D is a unit trust. D invests primarily in shares issued by New Zealand and overseas publicly listed companies. The manager of D is a New Zealand incorporated company. The manager makes all major decisions relating to marketing interests in D, investments, distributions, and so on. These decisions are all made from New Zealand.

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

Explanation: D is not incorporated. Therefore, the incorporation test is not applicable. The fact D's manager is incorporated in New Zealand is irrelevant to D's tax residence status.

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

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

Example | Tauira 27 – Company tax resident in New Zealand under the head office and centre of management tests

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

Result: Company E is tax resident in New Zealand under the head office and centre of management tests.

Explanation: Company E is not tax resident in New Zealand under the director control test because its directors exercise control from Australia.

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

The management of Company E takes place from the Auckland office. Therefore, Company E is also tax resident in New Zealand because its centre of management is here.

Example | Tauira 28 – Companies tax resident in New Zealand under the director control test

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

Result: Both Company F and Company G are tax resident in New Zealand under the director control test.

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

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

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

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

Example | Tauira 29 – Foreign-incorporated, sole-director personal services company, not tax resident in New Zealand

Facts: Company H is incorporated in the United States of America. It is a personal services company through which Hugh, who works in the film industry, contracts. Hugh is the sole director of Company H. Company H secures a 12-month contract to provide services in New Zealand for a film being made here. Company H has no office in New Zealand. There are no directorial decisions or acts of management of the company as a whole made during the period of the contract, while Hugh is in New Zealand. Any control or management decisions made from New Zealand during the period of the contract relate only to the New Zealand operations of the company.

Result: Company H is not tax resident in New Zealand.

Explanation: Company H is incorporated in the United States of America, so is not tax resident in New Zealand under the incorporation test.

Company H is not tax resident under the head office test, as it does not have an office in New Zealand, so cannot have its head office here.

Company H is not tax resident under either the centre of management test or the director control test, as there are no directorial decisions or acts of management relating to the company as a whole made in New Zealand during the period of the contract. Any control or management decisions made from New Zealand during the period of the contract relate only to the New Zealand operations of the company.

Company H is a non-resident contractor. For information about the withholding tax obligations in relation to non-resident contractors see Inland Revenue's website (Non-resident contractors) and IS 10/04: **Non-resident contractor schedular payments.**

Changes in company tax residence

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

302. Some of the more significant income tax consequences that may arise when the tax residence of a company changes between New Zealand and another country are set out from [303] to [327]. A change in tax residence may also have implications for the application of a DTA. Further, if a company is a settlor or beneficiary of a trust and its residence status changes there may be tax implications – see from [428].

Company migration rules

303. A company that ceases to be a New Zealand tax resident is an "emigrating company", and under the company migration rules it is treated for tax purposes as if, immediately before emigrating, it had disposed of its property at market value, liquidated, and distributed the full amount available for distribution as dividends (ss FL 1 and FL 2). The company migration rules may also apply to companies that are still tax resident under New Zealand domestic law but become DTA non-resident, if certain "triggering events" occur (see s FL 3 and *Tax Information Bulletin* Vol 35, No 6 (July 2023): 54 at 59 for more information).

Taxation of foreign-sourced income

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

Company imputation

305. A company that is tax resident in New Zealand is generally required to establish and maintain an imputation credit account (ICA) (s OB 1). Such a company is known as an "ICA company" (defined in s YA 1). Some companies are specifically excluded from being ICA companies, including companies that are tax resident in New Zealand but treated as not being tax resident in New Zealand under a DTA[25] – see [353].

306. A company that is tax resident in Australia may, in some circumstances, elect to establish and maintain an ICA in New Zealand (s OB 2). Such a company is known as an "Australian ICA company" (see para (a) of the definition in s YA 1). Otherwise, companies that are not tax resident in New Zealand are not permitted to establish an ICA.

307. If a company that is tax resident in New Zealand under domestic law stops being a company that is required by s OB 1 to maintain an ICA because its tax residence tie-breaks to Australia under the DTA between New Zealand and Australia, the company continues to be required to maintain an ICA (see s OB 2(3B)). Such a company is also an Australian ICA company (see para (b) of the definition of "Australian ICA company" in s YA 1).

308. Australian ICA companies also fall within the definition of ICA company.

309. A company that becomes an ICA company during an imputation year:
    - needs to establish and maintain an ICA; and
    - is not entitled to credit to its ICA any income tax paid in respect of income derived when it was resident outside New Zealand (s OB 4(3)(b)).

310. A company that ceases to be an ICA company during an imputation year:
    - loses the right to maintain an ICA; and
    - is required to debit its ICA by the amount of any credit existing in the account immediately before the company stopped being an ICA company (that is, when it ceased being resident) (s OB 56), or to pay further income tax for a debit balance in its ICA when it ceased being an ICA company (s OB 66).

25 Except companies treated as not being tax resident in New Zealand under the Australia–New Zealand DTA – see [307].

311. A company that ceases to be an ICA company is also required to furnish an annual ICA return within 2 months from the day on which it ceased to be an ICA company (s 70(2) of the Tax Administration Act 1994).

Controlled foreign company regime

312. A change of tax residence between New Zealand and another country may also have implications in relation to the CFC regime. Under s EX 24(1), when a company becomes a "foreign company" (being a company that is not tax resident in New Zealand or is treated as not tax resident in New Zealand under a DTA)[26] a new accounting period of the company starts on that day. The result is that if the company becomes a CFC because of its change in tax residence, only income derived after the company became a CFC is attributed under the CFC regime to tax residents holding interests in the company.

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

The financial arrangements rules

314. When a company becomes a New Zealand tax resident during an income year and the company is a party to a financial arrangement, the company may become subject to the FA rules. Note, it may be that the company was already within the FA rules because prior to becoming a New Zealand tax resident it carried on business in New Zealand through a fixed establishment and was a party to a financial arrangement for the purposes of that business.

315. Where a company enters the FA rules as a result of becoming a tax resident in New Zealand, the company is treated as having:
  - assumed the accrued obligation to pay consideration under the financial arrangement immediately after the time at which it became tax resident; and
  - paid the market value that a contract to assume the obligation had at that time (s EW 37(2)).

316. The deemed acquisition price will then be taken into account in any subsequent base price adjustment required under s EW 29.

317. To the extent that the exemption from the FA rules for non-residents (s EW 9) previously applied, that exemption ceases to apply when the company becomes tax resident.

318. When a company ceases to be tax resident in New Zealand and the company is a party to a financial arrangement, generally it must calculate a base price adjustment for the financial arrangement as at the date of ceasing to be resident (s EW 29). If the base price adjustment is positive, it is income derived by the company in the year for which the calculation is made (s EW 31(3)). If the base price adjustment is negative, it is expenditure incurred by the company in the year for which the calculation is made, and a deduction is allowed for that expenditure (s EW 31(4)).

319. Two exceptions to this may be relevant:
  - If a cash basis person ceases to be a New Zealand tax resident before the first day of the fourth income year following the income year in which they first became a New Zealand tax resident, they do not need to calculate a base price adjustment for a financial arrangement they were a party to both before becoming and after ceasing to be a New Zealand tax resident (s EW 30(1)).
  - A party to a financial arrangement who ceases to be a New Zealand tax resident does not need to calculate a base price adjustment for a financial arrangement to the extent to which the arrangement relates to a business the party carries on through a fixed establishment in New Zealand (s EW 30(2)).

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

26 Section YA 1.

Grouping of losses

321. A change in tax residence between New Zealand and another country may also affect the grouping of tax losses under subpart IC.

322. Historically, for a company to be able to make its tax losses available to another company in the group, the company with the losses had to (among other things) meet certain tax residence requirements. In particular, the company could not group losses if it was:
    - treated as not being tax resident in New Zealand under a DTA for the purposes of the DTA; or
    - liable to income tax in another country because of domicile, residence, or place of incorporation.

323. Those tax residence requirements were repealed with effect on 15 March 2017. As a result, a company that is both New Zealand tax resident and tax resident in another jurisdiction may be able to offset its losses against the profits of another company in the same group of companies for New Zealand tax purposes. The company still needs to satisfy other requirements, including that for the commonality period it is either incorporated in New Zealand or carrying on a business through a fixed establishment in New Zealand (see ss IC 5 and IC 7). The restriction for dual resident companies was previously in place because of the risk of such companies claiming a deduction for the same expense in more than one jurisdiction. That risk was effectively removed by the hybrid and branch mismatch rules introduced in 2018, hence the loosening of the loss grouping (and consolidation) rules.[27]

324. The historical residence requirements are still relevant for a commonality period that started before 15 March 2017 and continued after 15 March 2017, for losses incurred after the 1990–91 tax year. In that situation, the historical tax residence requirements would apply up to 15 March 2017 and cease from that date. As such, a dual resident company may offset a tax loss that arose before 15 March 2017 (so long as it was incurred after the 1990–91 tax year), provided the period of dual residence started after 15 March 2017. (See ss IC 5(8) and IZ 7B.)

325. Losses not available for grouping may be available for carry forward under s IA 3.

326. See further: *Commentary on the Taxation (Annual Rates for 2022-23, Platform Economy, and Remedial Matters) Bill (No 2)*, from page 63.

Provisional tax

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

Dual tax resident companies

Dual tax residence

328. A company may be tax resident in both New Zealand under s YD 2 and in another country under the domestic tax law of that country. Dual residence has several implications in relation to the application of the Act and New Zealand's DTAs.

329. For income tax purposes, dual tax residence has implications in a number of areas, including: imputation, the dividend withholding payment regime, the CFC and FIF regimes, the grouping of losses, and the hybrid rules.

Dual tax residence and double taxation agreements

330. Double taxation may arise where a company is tax resident in both New Zealand and another country if each country taxes the worldwide income of the company. This double taxation may be resolved where there is a DTA between New Zealand and the other country.

General position

331. If there is a DTA, it generally allocates tax residence to one of the countries for the purposes of the DTA. In determining the treatment of income covered by the DTA, the company is then treated as being tax resident in only the country to which tax residence has been allocated. This gives that country the primary taxing right, so reduces the incidence of double taxation.

27 See: BEPS – Hybrid and mismatch rules *Tax Information Bulletin* Vol 31, No 3 (April 2019): 38 for further details of the hybrid and branch mismatch rules.

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

333. The DTA residence article will not apply to allocate residence if the person (in this case the company) is not liable to tax in both countries by reason of domicile, residence, place of management or any other criterion of a similar nature (see para 1 of art 4, set out at [200]). So, for example, this may mean the DTA does not engage for a US LLC that is a disregarded entity in the US and becomes tax resident in New Zealand (which could happen, for example, because the director/shareholder moves to New Zealand and the company becomes tax resident here under one of the tests in s YD 2 – eg, the centre of management test or the director control test). This should be borne in mind, and tax advice should be sought prior to any person involved with a company migrating to another country or operating from another country for any extended period, to ensure there are no unintended tax consequences.

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

> **Note**: DTAs may be modified by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting – the multilateral Instrument (the **MLI**).
>
> See from [338].

335. As noted at [207] in relation to individuals, if a DTA between New Zealand and another country uses the wording of a particular article in the OECD Model Convention (or very similar wording), the Commissioner considers it can be inferred that the OECD commentary on that article reflects the meaning the parties intended to be given to any undefined terms in that article. In such circumstances the OECD commentary is a significant aid to interpreting the relevant undefined terms. In such a case, the Commissioner considers that the context requires the meaning of the undefined terms to be considered without reference to any meaning those terms may have under domestic law.

336. Until 21 November 2017, the residence tie-breaker test for dual-resident non-individuals in the OECD Model Convention was the state in which the person's "place of effective management" is situated. Where New Zealand's DTAs adopt this test, the Commissioner considers that reference should be made to the former (2014) OECD commentary on the meaning of this term.

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

If the DTA is modified by the MLI

338. As noted at [334], the relevant DTA may be modified by the MLI. If the other country has ratified the MLI, the MLI positions of New Zealand and the other country need to be considered.

339. If the MLI applies to modify the residence article in respect of companies (generally art 4(3) of New Zealand's DTAs), the competent authorities of both countries must endeavour to determine the company's residence by mutual agreement having regard to "its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors".

340. To obtain a determination of residence by the competent authorities under the above conventions, an application is required[28] (see **Tax treaties: Australia** on Inland Revenue's tax policy website).

28 Other than in the case of some Australian–New Zealand dual resident companies – see from [343].

341. If the authorities cannot agree, or no application has been made, **the company is not entitled to access the reliefs and exemptions available under the DTA**, except as the competent authorities agree.[29]

342. Note that art 4 of the MLI does not affect existing provisions of a "covered tax agreement" (defined in art 2 of the MLI) that deal with the tax residence of a company that is participating in a dual-listed company arrangement (see art 4(2)). This means it will not affect (for example) paras 5 and 6 of art 4 of the Australia–New Zealand DTA.

New Zealand and Australia's administrative approach to article 4 of the MLI

343. New Zealand and Australia have agreed a joint administrative approach to art 4 of the MLI. This approach was agreed as a measured risk-based approach to provide certainty and minimise compliance costs for taxpayers. It was agreed against the backdrop of the single economic market agenda between Australia and New Zealand, which seeks to create a seamless trans-Tasman business environment, and the fact the respective tax systems and administrations are comparable and both countries are committed to adopting measures to address risks associated with base erosion and profit shifting.

344. In short, under the administrative approach, if an eligible taxpayer reasonably self-determines its place of effective management to be located in:
   - Australia, it is deemed to be a resident of Australia for the purposes of the Australia–New Zealand DTA; and
   - New Zealand, it is deemed to be a resident of New Zealand for the purposes of the Australia–New Zealand DTA.

345. Eligibility criteria must be met for a taxpayer to use the administrative approach, including that:
   - the taxpayer is an ordinary company incorporated under the Companies Act 1993 (in New Zealand) or the Corporations Act 2001 (in Australia);
   - the taxpayer's group annual accounting income is less than 250 million AUD or 260 million NZD for the most recent reporting period; and
   - the taxpayer's gross passive income is less than 20% of its total assessable income for the most recent income tax year.

346. There are also eligibility criteria in relation to the taxpayer or any member of the group not being subject to certain compliance activity.

347. If the administrative approach is used, there are conditions that must be satisfied on an ongoing basis, relating to:
   - the taxpayer and members of the group not being involved in certain tax avoidance and other arrangements; and
   - the taxpayer notifying the relevant revenue authority, in the event of new compliance activity, that the administrative approach has been used to determine tax residence for DTA purposes.

348. If there is a material change, the taxpayer must re-assess their eligibility, and approach either competent authority if the administrative approach no longer applies to their circumstances.

349. The full details of the eligibility criteria and on-going conditions are on Inland Revenue's website: **Australia and New Zealand's administrative approach to MLI Article 4(1)**.

350. If a taxpayer is uncertain whether they satisfy the eligibility criteria or uncertain as to the self-determination of their place of effective management, it is recommended they engage with either competent authority about their circumstances.

351. If a taxpayer does not meet the eligibility criteria to use the administrative approach, an application will need to be lodged. See **Tax treaties: Australia** on Inland Revenue's tax policy website.

Dual tax residence and imputation

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

353. Several categories of company are excluded from being ICA companies and, therefore, from passing on imputation credits to their shareholders (s OB 1(2)). Among these are companies that are tax resident in New Zealand but are treated as not being tax resident in New Zealand under a DTA. This ensures dual resident companies that are treated as not resident here cannot be used to undermine the international tax regime by obtaining the benefit of the imputation regime.

354. As discussed at [307], there is an exception to this for companies that cease to be required by s OB 1 to maintain an ICA because their tax residence tie-breaks to Australia under the Australia–New Zealand DTA. In this situation, the company continues to be required to maintain an ICA.

29 Note, this applies just to the company in question. The recipient of a payment from the company (eg, a dividend) may be entitled to treaty relief.

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

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

356. The CFC and FIF regimes both apply in relation to foreign companies. A foreign company is one that is not tax resident in New Zealand, or is treated under a DTA as not being tax resident in New Zealand. As such, companies that are dual resident under domestic law, but treated as tax resident outside of New Zealand for DTA purposes, may be brought within the CFC and FIF regimes. In the case of the CFC regime, this occurs if the closely held ownership test is satisfied. In the case of the FIF regime, it occurs if none of the exemptions applies.[30] This ensures dual resident companies cannot be structured with a view to defeating the CFC and FIF regimes.

Dual tax residence and the grouping of losses

357. Section IA 3(2) allows companies within the same group of companies to group their income and losses (see also subpart IC, and the definition of "group of companies" in s IC 3).

358. As discussed from [321], historically one of the requirements for this was that the company with the available losses must meet certain tax residence requirements, including that it not be treated as non-tax resident in New Zealand under a DTA and that it not be liable by the law of another country or territory to income tax there through domicile, residence, or place of incorporation. Therefore, a dual resident company was not able to make its tax losses available to another company in the same group.

359. As discussed from [323], those tax residence requirements were repealed with effect on 15 March 2017. But the historical residence requirements are still relevant for a commonality period that started before 15 March 2017 and continued after 15 March 2017, for losses incurred after the 1990–91 tax year.

Potential for dual tax residence if persons involved with a company migrate to or operate from another country

360. There is the potential for dual residence to arise if persons involved with a company (eg, directors) migrate to another country or operate from another country for an extended period. This may be the case whether or not there are trading operations or investments in the other country.

361. This is particularly important to bear in mind if persons involved with a company are considering migrating to or regularly operating from Australia – given the close relationship between Australia and New Zealand and the ease of migration and travel between the countries.

362. Tax advice should be sought prior to any person involved with a company migrating to another country or operating from another country for any extended period, to ensure there are no unintended tax consequences.

Tax residence of foreign companies

363. As noted at [244], a "foreign company" is a company that is not tax resident in New Zealand under s YD 2 or is treated under a DTA as not being tax resident in New Zealand (s YA 1).[31] Section YD 3 sets out different tests to determine the country in which a foreign company is treated as tax resident for the purposes of the "international tax rules" (which are defined in s YA 1 as including the rules relating to CFCs, FIFs and foreign tax credits).

364. If a company is dual tax resident under the domestic law of New Zealand and another country with which New Zealand does not have a DTA, the company would not be a "foreign company" so the tests in s YD 3 would not apply. The company would therefore not be within the CFC or FIF regimes.

30 See ss EX 31 to EX 43.

31 However, a company will be treated as remaining tax resident in New Zealand for the purposes of the international tax rules if it becomes a foreign company but is tax resident in New Zealand again within 183 days (s YD 2(2)).

365. Section YD 3 provides:

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

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

367. If subs (2) results in the company being tax resident in multiple countries, or not in any country, the company is treated (under subs (4)) as tax resident in the country in which it is incorporated, has its head office or centre of management, or in which its directors, in their capacity as such, exercise control of the company (even if the directors' decision-making also occurs outside the country).

368. If the application of subs (4) results in no one country of tax residence being identified, the company is treated (under subs (5)) as tax resident in the country in which its centre of management is located for the accounting period.

369. Finally, if the application of subs (5) results in no one country of tax residence being identified, subs (6) provides that the Commissioner must determine the country of tax residence.

Part 3: Tax residence and trusts

Introduction

370. Trusts are not treated as separate entities for income tax purposes, so there are no rules in the Act governing the tax residence of trusts. The tax residence of the persons connected with the trust (that is, the trustees, settlors and beneficiaries) is relevant to the tax treatment of trust income and distributions. The tax residence rules for individuals and companies apply (as relevant) to the trustees, settlors and beneficiaries.

371. The trust rules in the Act modify the general position that New Zealand tax resident trustees are assessable on worldwide income and non-residents are assessable on only New Zealand–sourced income. In general, the tax residence of the trustees alone does not determine the treatment of foreign-sourced amounts trustees derive – the tax residence of the settlors is also relevant. Therefore, if the tax residence of the settlors of a trust changes, there may be tax implications for the treatment of income derived by a trustee. The trust rules allow trustees, settlors and beneficiaries to make elections to change the way income derived by a trustee would otherwise be taxed according to residence.

372. Beneficiary income and taxable distributions are taxed according to the normal residence and source rules, but there is a specific rule for beneficiaries who cease to be tax resident in New Zealand and become tax resident again within 5 years (see [426]).

373. This part provides an overview of:

- how beneficiaries are taxed;
- how trust income is taxed, including the implications of the residence status of settlors and trustees for the taxation of income trustees derive; and
- the impact of changes in the tax residence of persons connected with a trust – the trustee, settlors and beneficiaries.

374. For more detailed information about the taxation of trusts, see **IS 24/01**: **Taxation of trusts**, **IS 19/04**: **Income tax – distributions from foreign trusts** and **Overview: trusts** on Inland Revenue's tax technical website.

Disclosure rules

375. In general, trustees of trusts need to comply with either the foreign exemption trust disclosure rules or the domestic trust disclosure rules. Those rules may require annual returns to be filed and certain information to be disclosed to the Commissioner. The tax residence of settlors and trustees is relevant to those rules. **IS 24/01** explains the foreign exemption trust disclosure rules (at [13.7] to [13.28]). The domestic disclosure rules are explained in more detail in **OS 22/02**: **Reporting requirements for domestic trusts**.

Table – How beneficiary income and trustee income are taxed

376. Table | Tūtohi 1 shows how income trustees derive can be beneficiary income or trustee income and how the income is taxed. Beneficiaries may also derive income from a foreign trust or a non-complying trust in the form of taxable distributions, as discussed from [384].

Table | Tūtohi 1 – How beneficiary income and trustee income are taxed

<table>
<tr><th colspan="2">Beneficiary income</th></tr>
<tr><td>Beneficiary tax resident in New Zealand
• All beneficiary income is included as assessable income except minor and close company beneficiary income.
• Transitional residents do not include most foreign-sourced amounts.</td><td>Beneficiary not tax resident in New Zealand
• Only New Zealand–sourced beneficiary income is included as assessable income.</td></tr>
<tr><td colspan="2">Notes:
• Beneficiaries who ceased to be tax resident in New Zealand and become tax resident again within 5 years must include beneficiary income and taxable distributions received from foreign and non-complying trusts while non-resident.
• Trustees are generally liable as agent for the income tax liability of a beneficiary for their beneficiary income and any taxable distributions they derive.</td></tr>
<tr><th colspan="2">Trustee income</th></tr>
<tr><td colspan="2">New Zealand–sourced income is included in assessable income whether or not the trustee is tax resident in New Zealand. If a non-resident trustee only has non-resident withholding income and it has been taxed correctly, the tax withheld is a final tax.</td></tr>
<tr><td colspan="2">Note: Trustee income also includes minor beneficiary income, close company beneficiary income and certain property settlements.</td></tr>
<tr><td>Foreign-sourced income is included in assessable income if:
• the trustee was not tax resident when the income was derived; and
• a settlor of the trust was tax resident (and not a transitional resident) in New Zealand at any point during the income year.
In general, this rule does not apply if:
• no settlement has been made on the trust after 17 December 1987; or
• a settlement has been made but the settlor was non-resident between 17 December 1987 and the date of the settlement.</td><td>Foreign-sourced income is exempt if:
• the trustee was tax resident when the income was derived; and
• no settlor of the trust was tax resident (and not a transitional resident) in New Zealand at any point during the income year;
provided that:
• if no settlor exists in the income year, the last surviving settlor was not a tax resident at the time of ceasing to exist;
• the trust is not at any time in the income year a superannuation fund, or a testamentary or inter vivos trust of which any settlor was tax resident in New Zealand when they died;
• no s HC 33 election has been made; and
• the registration and reporting obligations for foreign exemption trusts have been met.</td></tr>
</table>

Trustee income, beneficiary income, and taxable distributions

Trustee income

377. Income a trustee derives from property held in trust is taxed as either beneficiary income or trustee income. Only trustees can claim deductions for expenditure or losses incurred in deriving the income (s DV 9).

378. Trustee income is the income the trustee of a trust derives, to the extent to which it is not beneficiary income (s HC 7(1)). This means amounts a trustee derives can be wholly beneficiary income, wholly trustee income or a mixture of both.

379. Beneficiary income is also treated as if it were trustee income for the purposes of paying tax and providing returns of income if it was derived by a:
   - minor to whom s HC 35 applies (s HC 7(2)); or
   - close company to which s HC 38 applies (s HC 7(2B)).

380. Section HC 7(3) extends trustee income to include the market value of any property settlement a trust receives that is excluded from corpus under ss HC 4(3) to (5). The amount is reduced by the market value that the trustee treats as beneficiary income or as a taxable distribution in the income year. Section CV 13(b) includes such amounts in the income of the trustee.

381. Trustee income is taxed at 33% or 39% from the 2024–25 income year. Trustee income that is minor or close company beneficiary income is taxed at 39%.

Beneficiary income

382. Section HC 6 provides that an amount a trustee derives in an income year is beneficiary income to the extent to which either it vests absolutely in interest in a beneficiary of the trust in the income year, or it is paid to a beneficiary of the trust during the income year or by the later of:
   - a date within 6 months of the end of the income year; or
   - the earlier of the date:
     - on which the trustee files a return of income for the year; or
     - by which they must file a return for the year.

383. Beneficiary income derived by a New Zealand resident is taxed at the beneficiary's marginal rate. However, as noted at [379], minor and close company beneficiary income is treated as trustee income. It is excluded income for the beneficiary.

Taxable distributions

Classifications of trusts

384. The tax treatment of distributions to beneficiaries of amounts that are **not** beneficiary income depends in part on the classification of the trust. For income tax purposes, trusts are classified as:
   - complying trusts – essentially trusts where tax has always been paid in New Zealand on the worldwide income a trustee derives, whether by obligation or election, and the tax obligations relating to the trustee's income tax liability have been satisfied;
   - foreign trusts – essentially trusts that have not had a New Zealand tax resident settlor (including a settlor who is a transitional resident) at any time since 17 December 1987; and
   - non-complying trusts – trusts that are neither complying nor foreign trusts.

385. It is possible for a trust to be both a complying trust and a foreign trust. This type of trust is referred to as a dual status trust. This could occur, for example, where a New Zealand tax resident trustee of a foreign trust derives only New Zealand–sourced income as trustee income and satisfies their tax obligations relating to the trustee's income tax liability.

The taxation of distributions

386. In addition to the classification of the trust being relevant, the taxation of distributions also depends on whether the distribution is accumulated trustee income, capital gains or corpus, whether the source of the amount is in New Zealand or foreign, and the tax residence of the beneficiary.

387. In general, distributions to New Zealand tax resident beneficiaries of a trust, other than distributions of beneficiary income, are:

- exempt income, where the distribution comes from a complying trust or dual status trust;
- a taxable distribution, where the distribution consists of:
  - accumulated trustee income or certain capital gains derived through a transaction with an associated person, distributed by a foreign trust; or
  - accumulated trustee income or capital gains distributed by a non-complying trust; or
- a non-taxable distribution, where the distribution consists of:
  - capital gains of a foreign trust (other than certain capital gains derived through a transaction with an associated person); or
  - corpus of a foreign or non-complying trust.

388. As noted at [384], distributions a trustee makes from a dual status trust are treated as being from a complying trust. If a trust that was a dual status trust loses its status as a complying trust, it remains a foreign trust if it still meets the requirements to be one.

389. Ordering rules treat distributions as comprising of taxable amounts before non-taxable amounts.

390. Taxable distributions from a foreign trust to a New Zealand tax resident beneficiary are taxed at the beneficiary's marginal rate.

391. The tax on New Zealand–sourced non-resident passive income distributed to a non-resident beneficiary, such as interest and dividends, may be a final tax if the beneficiary has no other income sourced in New Zealand, but is otherwise an interim tax. Other New Zealand–sourced income, such as rental income, is taxed at the non-resident beneficiary's marginal rate. DTAs may affect New Zealand's taxing rights. Foreign-sourced amounts distributed to a non-resident are not subject to tax in New Zealand.

392. New Zealand–sourced taxable distributions from a non-complying trust are taxed at 45% whether the beneficiary is tax resident or non-resident. Foreign-sourced amounts distributed to a New Zealand tax resident are also taxed at 45%. However, foreign-sourced amounts distributed to non-resident beneficiaries as either beneficiary income or taxable distributions are not subject to tax in New Zealand.

393. Where a foreign trust or non-complying trust distributes accumulated trustee income that has been taxed, economic double taxation arises as the income is taxed to the trustee and then to the beneficiary.

394. Table | Tūtohi 2 summarises the tax treatment where the amount distributed is New Zealand–sourced, whether the beneficiary is a New Zealand tax resident or not.

Table | Tūtohi 2 – Tax treatment of New Zealand–sourced distributions from a trust

Type of distribution from the trust	Complying trust	Foreign trust	Non-complying trust
Accumulated trustee income	Not taxable	Taxed at the beneficiary's marginal tax rate	Taxed at 45%
Non-associated capital gains and profits	Not taxable	Not taxable	Taxed at 45%
Associated capital gains and profits	Not taxable	Taxed at the beneficiary's marginal tax rate	Taxed at 45%
Corpus	Not taxable	Not taxable	Not taxable

Settlor tax residence

Settlor tax residence and liability of trustees

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

396. Either s YD 1 or s YD 2 determines a settlor's tax residence, depending on whether the settlor is a natural person or a company. In general, a settlor is a person who transfers value to a trust.

Foreign-sourced amounts may be exempt

397. A foreign-sourced amount derived by a New Zealand tax resident trustee and included in trustee income for the income year is exempt income (s HC 26) if the following are all satisfied:
   - No settlor of the trust is at any time in the income year a New Zealand tax resident (who is not a transitional resident) or, if no settlor exists in the income year, the last surviving settlor was a non-resident when that settlor ceased to exist.
   - No election under s HC 33 has been made for the trust.[32]
   - The trust is not a:
     - superannuation fund; or
     - testamentary trust or an *inter vivos* trust of which any settlor was tax resident in New Zealand when they died (whether or not they died during the relevant income year).
   - The requirements in s HC 26(1)(c) or s HC 26(1)(d), as applicable, are met (these deal with registration and reporting obligations of foreign exemption trusts).
   - The amount is not beneficiary income derived by a minor that is treated as if it were trustee income.

398. Provided registration and reporting requirements are met, foreign-sourced income derived by a New Zealand tax resident trustee of a foreign trust is exempt. The exemption continues during the period a settlor of a foreign trust is a transitional resident. Where an election is made under s HC 33, the tax obligations of the trustee are determined as if the trustee and a settlor of the trust are New Zealand tax residents so the exemption does not apply.

Foreign-sourced amounts may be taxable

399. A foreign-sourced amount derived by a non-resident trustee as trustee income that would be assessable income if derived by a person tax resident in New Zealand will, subject to the exceptions noted at [401], be assessable income of the trustee (under s HC 25) if, at any time in the income year:
   - a settlor of the trust is a New Zealand tax resident (who is not a transitional resident); or
   - the trust is a superannuation fund; or
   - the trust is a testamentary trust or an *inter vivos* trust of which:
     - a trustee is tax resident in New Zealand; and
     - any settlor was tax resident in New Zealand when they died (whether or not they died during the relevant income year) or the last surviving settlor was tax resident in New Zealand when that settlor ceased to exist.

400. Section HC 25(2) applies so foreign-sourced amounts are assessable if any one of the settlors of the trust (if there is more than one settlor) is tax resident in New Zealand at any time during an income year. An entire year of tax residence is not required. The amount must be one that would be assessable income if derived by a person tax resident in New Zealand, so it excludes, for example, some capital gains.

32 Under s HC 33, a trustee, settlor or beneficiary can make an election to satisfy the income tax liability of a trustee.

401. The two exceptions to this (in s HC 25(3) and (4)) are where the trustee is tax resident outside New Zealand for the entire income year and either:
   - no settlement has been made on the trust after 17 December 1987, and the trustee has not made an election referred to in s HZ 2 (an election under the Income Tax Act 1976 on or before 31 May 1989 to pay tax on trustee income); or
   - any settlement made on the trust after 17 December 1987 was made only by a settlor who was not resident in New Zealand at any time from 17 December 1987 up to (and including) the date of settlement.

402. The second exception does not apply if the settlement is made by a transitional resident as they are tax resident in New Zealand.

403. Where the trustees are non-resident and foreign-sourced amounts are assessable as trustee income under s HC 25(2), the trustees are treated as tax resident in New Zealand under other provisions for the purpose of calculating the taxable income of the trustees. These provisions are:
   - ss EW 9 and EW 11, which state the situations where the FA rules will or will not apply;
   - s LJ 2, which states when a person can claim a tax credit for foreign income tax paid;
   - s OE 1, which states when a person can choose to be a branch equivalent tax account person; and
   - the international tax rules, which are defined in s YA 1 as including the rules relating to CFCs, FIFs and foreign tax credits.

Settlor residence and liability of settlor

404. Under s HC 29, a settlor may be liable as agent of the trustee for income tax payable by the trustee on trustee income derived in an income year. This section facilitates the collection of tax on trustee income in cases where it may be difficult due to the trustee being non-resident.

405. This provision may apply where the:
   - settlor has made a settlement to or for the benefit of a trust after 17 December 1987 (whether or not they settled property on the trust on or before that date); and
   - trustee derives trustee income in an income year in which the settlor is resident in New Zealand.

406. Where there is more than one settlor to whom s HC 29 applies, the liability is joint and several.

407. However, the rule does not apply:
   - to income tax that the trustee is liable for under s HC 32, which relates to the trustee's liability as agent for the tax liability of a beneficiary for their beneficiary income and taxable distributions derived;
   - if the trust has a New Zealand tax resident trustee for the whole income year, or if the first settlement was made during the income year, from the day of that settlement until the end of the income year;
   - where the trust is a tax charity or superannuation fund;
   - to the extent to which the trustee income is derived from the settlor remitting an amount under a financial arrangement to which either s EW 31 or s EZ 38, which relate to base price adjustments, applies;
   - if the settlor is a natural person who was not tax resident at the time of any settlement on the trust, and had not after 17 December 1987 previously been tax resident in New Zealand (unless they have made an election under s HC 33 to satisfy the income tax liability of the trustee); or
   - to the extent to which the settlor can establish through full disclosure to the Commissioner of settlements made that, having regard to the settlements made by that settlor and by other settlors, another settlor should be liable.

408. Where s HC 29 applies, the settlor is liable for tax on trustee income as agent for the trustee. Therefore, the trustee remains liable for the tax on the trustee income. The provisions of subpart HD, dealing with the liability for tax of principals and agents, are relevant.

Trustee tax residence

409. The tax residence of the trustee is determined under the rules in either s YD 1 or s YD 2, depending on whether the trustee is a natural person or a company. Section YD 1(12) clarifies that a natural person includes a natural person who is acting in the capacity of trustee. Similarly, s YD 2(1B) clarifies that a company includes one that is acting in the capacity of trustee.

410. When a trust has multiple trustees, the trustees are treated as a notional single person when considering tax residence (s HC 2).[33] Where one of the trustees is tax resident, all the trustees as the notional single person under s HC 2 are tax resident in that capacity. If all the trustees are non-resident, then the notional single person under s HC 2 is non-resident as long as no election has been made under s HC 33.

411. As noted at [395], trustees are liable to tax on trustee income as if they were an individual beneficially entitled to that income (s HC 24). New Zealand–sourced income derived by the trustee is assessable whether or not the trustee, or any settlor, is tax resident in New Zealand. The tax treatment of foreign-sourced amounts depends on the tax residence of settlors.

412. As noted at [382], s HC 6 provides that an amount a trustee derives in an income year will be beneficiary income to the extent to which either it vests absolutely in interest in a beneficiary of the trust in the income year, or it is paid to a beneficiary of the trust in the relevant timeframes. A trustee who allocates all income derived during the year to beneficiaries has no trustee income.

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

414. The trustee's tax residence (without reference to the settlor's tax residence) is relevant if they derive passive income such as interest and dividends. If the trustee is not tax resident and derives "non-resident passive income" as defined in s RF 2, NRWT is payable on that amount. This may be a final tax if the non-resident trustee has no other income sourced in New Zealand. If the trustee is tax resident, RWT is deducted from passive income paid to them, unless they have RWT-exempt status. If an election has been made under s HC 33(1), non-resident passive income derived by a non-resident trustee is excluded as non-resident passive income from the effective date of the election and RWT should be deducted.

415. The tax residence of a trustee, whether an individual or a group of persons as a notional single person, is relevant for the purpose of applying the tie-breaker tests in DTAs. Many countries, such as Australia, tax trusts based on the tax residence of trustees, so dual resident situations can arise. For example, if a trust had two New Zealand tax resident trustees and one becomes tax resident in Australia, the notional single person is still tax resident in New Zealand due to one trustee being tax resident here, and the trust is also tax resident in Australia by virtue of one trustee being tax resident there.

416. In the case of the Australia–New Zealand DTA, under art 4(3), as modified by art 4(1) of the MLI,[34] the competent authorities of both countries must endeavour to determine the tax residence of the trust by mutual agreement having regard to "its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors".

417. In a trust situation, **an application is required** to obtain a determination of tax residence by the competent authorities under the above conventions (see **Tax treaties: Australia** on Inland Revenue's tax policy website).

418. If the authorities cannot agree, or no application has been made, the trustees are not entitled to access the reliefs and exemptions available under the DTA, such as reduced rates on non-resident withholding income.

> **Note:** The administrative approach for certain dual resident companies, agreed by the competent authorities of Australia and New Zealand,[35] **does not apply to trusts**.

33 They are also treated as a notional single person in their capacity as trustees and are jointly and severally liable to satisfy obligations imposed by s BB 2, such as filing returns.

34 Each DTA is different and other DTAs and the MLI positions of different countries (if they have ratified the MLI) need to be examined individually.

35 Discussed from [343].

419. The tie-breaker provisions apply only for the purposes of a DTA. Even if a trust's tax residence tie-breaks to Australia, for example, it may still have obligations as a tax resident of New Zealand, such as under the disclosure rules.

Beneficiary tax residence

420. The normal rules about tax residence and source apply to determine which items of beneficiary income and taxable distributions are included in a beneficiary's assessable income.

421. Beneficiaries are required to include in their assessable income all beneficiary income and taxable distributions they derive in an income year (ss HC 17 and CV 13) except where the income is derived by a:

- minor to which s HC 35 applies; or
- close company to which s HC 38 applies.

422. Where either of the above exceptions applies, the income is excluded income of the minor (s CX 58) or close company (s CX 58B), as relevant, and treated as trustee income under s HC 35 or s HC 38 to which a tax rate of 39% applies.

423. When a beneficiary is tax resident in New Zealand, the beneficiary is required to include all beneficiary income and taxable distributions in their assessable income (s BD 1). Taxable distributions from non-complying trusts are taxed at 45%.

424. When a beneficiary is not tax resident in New Zealand, only New Zealand–sourced beneficiary income and taxable distributions are included in assessable income. In this situation, there is an NRWT liability if the New Zealand–sourced income is non-resident passive income. This may be a final tax if the non-resident beneficiary has no other income sourced in New Zealand. Income derived by a beneficiary from a trust will have a source in New Zealand to the extent to which the income of the trust fund has a source in New Zealand (s YD 4(13)).

425. As noted at [413], the trustee of a trust is generally liable as agent for the income tax liability of the beneficiary for their beneficiary income and taxable distributions derived (s HC 32).

426. There is a specific rule for beneficiaries who cease to be tax resident in New Zealand and who become tax resident again within 5 years of the date of the end of their residence. In this situation, the beneficiary is treated as deriving income to the extent to which they would have been treated as deriving beneficiary income or taxable distributions from a foreign trust or a non-complying trust if they had remained in New Zealand during the period of their absence. Any such income is treated as derived on the day on which the beneficiary becomes resident again (ss CV 15 and HC 23).

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

Changes in tax residence

428. The following discussion considers the implications in some situations of settlors, trustees and beneficiaries changing tax residence.

Inbound settlor of a foreign trust and a tax resident trustee

429. If a non-resident settlor of a foreign trust with a tax resident trustee becomes tax resident in New Zealand (and is not a transitional resident), foreign-sourced amounts derived by a trustee in the year the settlor becomes tax resident are generally assessable. This is because the exemption in s HC 26 no longer applies. The trust becomes a non-complying trust.

430. However, it is possible for an election to be made for the trust to be treated as a complying trust for some distributions. This is done through a settlor, trustee or beneficiary of a trust electing to satisfy the income tax liability of the trustee. This applies if a settlor of the trust is a natural person who:

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

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

431. If such an election is made, the person making the election is liable for the income tax payable by the trustee, other than income tax that the trustee is liable for as agent of a beneficiary (s HC 33(2)).

432. The election must be made before the election expiry date – being the first anniversary of the transition date. If an election is made, the trust is treated as a:

- foreign trust to the extent to which distributions consist of an amount derived by the trustee before the date of the election and that do not give rise after the transition date to an income tax liability that is paid before the distribution is made;
- complying trust to the extent to which distributions consist of an amount derived by the trustee:
  - before the date of the election and give rise on or after the transition date to an income tax liability that is paid before the distribution is made; or
  - on or after the date of the election, if the requirements of s HC 10(1)(a) are met for the trustee income derived after the date of the election; and
- non-complying trust to the extent to which the distribution consists of an amount that would not be included in the above.

433. This treatment means, for example, foreign-sourced trustee income accumulated while the trust is a foreign trust can be distributed to a non-resident or transitional resident beneficiary tax free. It also means accumulated trustee income derived after the election can be distributed tax free if the tax obligations in relation to trustee income have been met. Conversely, if an amount is derived after the date of the election and the requirements of s HC 10(1)(a) are not met, the distribution is treated as coming from a non-complying trust. If it is a New Zealand–sourced amount, it is taxed at 45% whether or not the beneficiary is a tax resident.

434. If an election is not made within the 12-month period, the trust is treated as a:

- foreign trust to the extent to which distributions consist of an amount derived by the trustee before the election expiry date and which does not give rise on or after the transition date to an income tax liability;
- complying trust to the extent to which the distribution consists of an amount derived by the trustee that gives rise on or after the transition date to an income tax liability meeting the requirements of s HC 30(4B) or s HC 10(1)(ab); or
- non-complying trust to the extent to which distributions consist of an amount derived by the trustee that gives rise on or after the transition date to an income tax liability that is not satisfied before the distribution is made.

435. An income tax liability that meets the requirements of s HC 30(4B) can be treated as coming from a complying trust if:

- the income tax liability is satisfied before the distribution is made, other than for the trust as a complying trust under an election under s HC 33;
- the income tax liability gives rise to a tax shortfall for the trustee for an income year ending before the distribution is made; and
- where a shortfall penalty arises for the tax shortfall, the shortfall penalty is satisfied before the distribution is made.

436. This provision allows for errors to be corrected before distributions are made so the tax treatment for a non-complying trust does not apply.

437. Retrospective elections are permitted if the requirements of s HC 10(1)(ab) are met so that complying trust status can apply to a distribution, but the period for making such an election is limited to 4 years before the start of the electing year. The ability to make retrospective elections assists migrants who were not aware of the impact of a foreign trust not making an election by the election expiry day. It is not compulsory to make an election. Some trusts may prefer not to do so depending on the circumstances.

438. If a settlor of a dual status trust becomes tax resident, the trust remains a complying trust. No election is required.

Outbound settlor of a complying trust and a tax resident trustee

439. If a New Zealand tax resident settlor of a trust ceases to be New Zealand tax resident and there are no other New Zealand tax resident settlors of the trust, foreign-sourced amounts derived by a tax resident trustee in the following year are exempt (provided that no settlor is tax resident in New Zealand at any point in that income year and the registration and reporting obligations for a foreign exemption trust are met).

440. The change in residence could mean the trust loses its status as a complying trust if there are no other tax resident settlors and the trustee, for example, derives foreign-sourced income that is exempt. However, this will not happen if the trustee elects to continue being taxed on worldwide income retained as trustee income and indicates that by ticking the relevant box in their return, **Income tax return: Estate or trust – IR6**. If the trustee is not required to file a return, they must notify the Commissioner in the return for foreign exemption trusts.

441. A retrospective election can also be made under s HC 33 to maintain complying trust status, but only up to 4 years before the income year in which the election is made. It may be necessary to pay shortfall penalties and use of money interest.

Outbound trustees of a complying trust and a resident settlor

442. If a New Zealand trustee becomes non-resident, the trust's status as a complying trust may be lost if there are no other New Zealand tax resident trustees and the trustee derives non-resident passive income or non-residents' foreign-sourced income. An election can be made under s HC 33 to continue paying tax on worldwide income. The effect of the election is that the trustee is treated as tax resident. This means resident withholding tax will apply to any passive income sourced in New Zealand, instead of non-resident withholding tax.

443. If no trustees remain tax resident in New Zealand, the settlor may become liable as agent of the trustee.

444. In addition, if no trustees remain tax resident in New Zealand, the settlor needs to make a disclosure about the trust within 3 months on **Settlors of trusts disclosure – IR462**. This requirement also applies even if an election is made.

445. If a trustee departs from New Zealand but a New Zealand tax resident trustee remains, the trust may become a dual resident depending on where the departing trustee becomes tax resident. When dual residency arises, the trustees should consider making an application to the competent authorities of both countries to determine tax residence for the purposes of the applicable DTA.[36] Failure to do so may result in DTA relief, such as reduced withholding tax rates, not being available.

446. Given trans-Tasman mobility, dual residency commonly occurs when a New Zealand tax resident trustee moves to Australia. Tax advice should be sought prior to any trustee moving overseas, to ensure there are no unintended tax consequences for the trust.

Inbound trustees and a non-resident settlor of a foreign trust

447. If a non-resident trustee of a foreign trust becomes tax resident, foreign-sourced income derived by the trustee is exempt if the trustee meets their obligations under the foreign exemption trust disclosure rules.

448. It also changes how passive income is taxed. If the trustee receives non-resident withholding income, they are taxed at the resident withholding tax rate.

Outbound beneficiaries

449. If a New Zealand tax resident beneficiary becomes non-resident, they must continue to pay tax on New Zealand–sourced beneficiary income and New Zealand–sourced taxable distributions from a foreign or non-complying trust unless a DTA provides relief. Where the non-resident has income, the applicable return is **Income tax return: Non-resident individual taxpayers – IR3NR**. However, if the only income is non-resident withholding income, no return is required and the amount withheld is a final tax assuming the withholding is correct.

450. Trustees need to deduct non-resident withholding tax if the distributions include non-resident withholding income such as interest or dividends. Where applicable, they may arrange for the payer of the amounts to deduct the withholding.

451. As noted at [426], there is also a specific rule in relation to beneficiaries who cease to be tax resident in New Zealand and who become tax resident again within 5 years of ceasing to be tax resident and receive distributions from a foreign trust or non-complying trust.

Inbound beneficiaries

452. A non-resident beneficiary who becomes tax resident may be eligible to be a transitional resident. This means foreign-sourced distributions from a foreign trust or non-complying trust would be exempt for the period of transitional tax residence.

36 See [417].

References | Tohutoro

Legislative references | Tohutoro whakatureture

Citizenship Act 1977

Companies Act 1993

Corporations Act 2001 (Cth)

Goods and Services Tax Act 1985

Sections 2 ("resident") and 8

Income Tax Act 2007

Sections BB 2, BD 1, BH 1, CF 3, CV 13, CV 15, CW 19, CW 27, CW 28B, CW 55BB, CX 58, CX 58B, DA 2, DB 6, DB 7, DB 8, DB 11, DV 9, EW 5, EW 9, EW 11, EW 29, EW 30, EW 31, EW 37, subpart EX, EX 24, EX 31 to EX 43, EZ 38, FL 1, FL 2, FL 3, subpart HB, HC 2, HC 4, HC 6, HC 7, HC 10, HC 17, HC 23, HC 24, HC 25, HC 26, HC 29, HC 30, HC 32, HC 33, HC 35, HC 38, subpart HD, HR 8, HZ 2, IA 3, subpart IC, IC 3 ("group of companies"), IC 5, IC 7, IZ 7B, LD 2, LJ 2, MA 8 ("New Zealand resident"), MC 5, MD 7, OB 1, OB 2, OB 4, OB 56, OB 60, OB 66, OE 1, subpart RC, RC 2, RC 3, RF 2 ("non-resident passive income"), YA 1 ("absentee", "Australian ICA company", "company", "director", "FIF superannuation interest", "foreign company", "ICA company", "international tax rules" and "New Zealand"), YD 1, YD 2, YD 3 and YD 4

Legislation Act 2019

Section 13 ("New Zealand")

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IS 25/17: Tax residence – government service rule

Issued | Tukuna: 16 May 2025

This interpretation statement explains the government service rule in the Income Tax Act 2007 and discusses the articles of double tax agreements that may need to be considered if the government service rule applies.

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

REPLACES | WHAKAKAPIA

- **IS 16/03**: **Tax residence** (discussion of the government service rule)
- **CS 21/02**: **Government service rule**

Summary | Whakarāpopoto

1. The concept of tax residence is a central feature of taxation. Among other matters, tax residence is relevant to whether a person is, on the face of it, assessable for tax on worldwide income or on only New Zealand–sourced income.
2. However, if someone is tax resident in more than one country, there may be a double tax agreement (DTA) between New Zealand and the other country that needs to be considered, as it may allocate taxing rights over certain income between the two countries.
3. The first matter to consider is whether a person is tax resident in New Zealand under New Zealand's domestic law (the ITA). If they are, but are also tax resident under the domestic law of another country with which New Zealand has a DTA, it is then necessary to consider how the DTA applies to allocate taxing rights between the countries.
4. An individual is generally a New Zealand tax resident under the ITA if they:
   - have a permanent place of abode in New Zealand (the permanent place of abode test);
   - have been personally present in New Zealand for more than 183 days in total in any 12-month period (the 183-day rule); or
   - are personally absent from New Zealand in the service of the New Zealand Government (the government service rule).
5. An individual may cease to be tax resident under the ITA if they are personally absent from New Zealand for more than 325 days in total in a 12-month period (the 325-day rule). However, the 325-day rule does not apply if the person is tax resident in New Zealand because they have a permanent place of abode here or because they are absent from New Zealand in the service of the New Zealand Government.
6. This means a person who is overseas in the service of the New Zealand Government cannot cease to be a New Zealand tax resident under the ITA during the period of their service, irrespective of the length of time they are away from New Zealand.
7. For the government service rule to potentially apply, the person must be a New Zealand tax resident under the 183-day rule when they commence being in the service of the New Zealand Government outside New Zealand (whether or not they were previously in the service of the New Zealand Government in New Zealand).
8. The person does not have to have been in the service of the New Zealand Government before their departure from New Zealand. Nor does being in the service of the New Zealand Government need to be the reason for the person departing New Zealand.
9. This means the government service rule applies to treat a person as continuing to be tax resident in New Zealand under the ITA, irrespective of the length of their absence, if they are in the service of the New Zealand Government because they:
   - go abroad to pursue duties for the New Zealand Government, whether or not they were an existing government employee; or
   - are overseas and accept a position with the New Zealand Government abroad before ceasing to be tax resident in New Zealand.

10. Being in the service of the New Zealand Government includes being an employee of a New Zealand government department or a departmental agency, a member of the New Zealand Defence Force or New Zealand Police, or an employee of another public body if that body is so closely controlled by the government that it is an agent or instrument of the New Zealand Government (this would include most public bodies listed as Crown agents in the Crown Entities Act 2004).
11. Employees of state-owned enterprises and contractors to the New Zealand Government are not considered to be in the service of the New Zealand Government.
12. The government service rule applies to the individual only. It does not apply to a spouse, partner or child of someone in the service of the New Zealand Government overseas.
13. As noted above, if someone is tax resident in more than one country under domestic law, there may be a DTA between New Zealand and the other country that needs to be considered.
14. DTAs New Zealand is a party to have a specific article that allocates taxing rights in relation to remuneration for services rendered by government servants (the government service article).
15. Under the DTA government service article, New Zealand generally has sole taxing rights for salaries, wages, and other similar remuneration paid to an individual in respect of services rendered to New Zealand. However, the other country has sole taxing rights for those amounts if the services are rendered in the other country and the individual is a tax resident of that other country under the DTA residence "tie-breaker" tests[1] and:
    - is a national of that other country; or
    - did not become a tax resident of that other country solely for the purpose of rendering the services.
16. While a person may have many reasons for taking up a role abroad, the Commissioner's position in relation to the second point above is that it will apply, giving the other country sole taxing rights, if it can be demonstrated that government service was not the primary reason for or cause of the person becoming tax resident in the other country.
17. If a person overseas in the service of the New Zealand Government has other income sources[2] and is tax resident in both New Zealand and the other country under the domestic law of each country, the DTA will set out the taxing rights of each country for each source of income.
18. If a person is a member of a diplomatic mission or consular post for New Zealand overseas, the government service DTA article does not apply to them. A separate article covers them.
19. If someone is tax resident in New Zealand and also in a country New Zealand does not have a DTA with, they are assessable in New Zealand on their worldwide income[3] but may be entitled to a credit for foreign tax paid on foreign-sourced income or gains.
20. In some circumstances, student loan borrowers who are not physically in New Zealand may apply to be treated as being physically in New Zealand. This is relevant to whether their loan is interest-free and what their repayment obligations are. One of the circumstances where an application for this treatment can be made is where the principal reason the borrower is not or will not be physically in New Zealand is because they are overseas in the service of the New Zealand Government. The Commissioner must consider it fair and reasonable to apply this treatment in the circumstances. An application to be treated as being physically in New Zealand for student loan purposes can be made through myIR.
21. If someone is overseas in the service of the New Zealand Government they may be eligible to become a KiwiSaver member and may also be able to get the government KiwiSaver contribution.
22. There may be other entitlements available to someone who is overseas in the service of the New Zealand Government, such as paid parental leave, ACC cover, and Working for Families tax credits, including Best Start. Relevant requirements for eligibility for any entitlements will need to be met.

1 These are explained in IS 25/16: Tax residence.

2 Other than their salary, wages or similar remuneration in respect of services rendered to New Zealand.

3 Other than exempt income and excluded income.

Introduction | Whakataki

23. The concept of tax residence is a central feature of taxation. Under the ITA, the main relevance of tax residence is that it determines whether a person is, on the face of it, assessable for tax on worldwide income or only on New Zealand–sourced income. In particular (s BD 1(5)):
    - New Zealand tax residents are assessable on worldwide income[4] (though they may be entitled to a credit for foreign tax paid on foreign-sourced income or gains); and
    - non-tax residents are assessable on only New Zealand–sourced income (other than exempt income and excluded income).
24. If someone is tax resident in more than one country under domestic law, there may be a DTA between New Zealand and the other country that needs to be considered. DTAs set out what taxing rights each country has in relation to matters covered by the DTA. For a list of countries that New Zealand has DTAs with see Inland Revenue's website: **Tax treaties**.
25. One of the tax residence rules in the ITA that may apply to individuals is the government service rule. Under this rule, a person is tax resident if they are absent from New Zealand in the service of the New Zealand Government. This interpretation statement explains the government service rule in the ITA and discusses the DTA articles that may need to be considered if the Government service rule applies.

Analysis | Tātari

Overview of the tax residence rules for individuals

26. The following discussion gives an overview of the tax residence rules in the ITA, but the focus is on the government service rule. For more information on the other tax residence rules in the ITA and the various DTA tie-breaker tests, see **IS 25/16: Tax residence**.

When an individual is a New Zealand tax resident

27. An individual is a New Zealand tax resident under the ITA if they:
    - have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere (s YD 1(2)); or
    - have been personally present in New Zealand for more than 183 days in total in any 12-month period (s YD 1(3)); and
        - have not ceased to be tax resident under the 325-day rule (see [28]); and
        - are not treated as being non-tax resident because they are employed under the Recognised Seasonal Employer Scheme; or
    - are personally absent from New Zealand in the service of the New Zealand Government.

When an individual ceases to be a New Zealand tax resident

28. An individual who is tax resident in New Zealand **only** because of the 183-day rule ceases to be tax resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period (s YD 1(5)).

The Government service rule

29. If a person does not have a permanent place of abode in New Zealand, they generally cease to be a New Zealand tax resident once they have been absent from New Zealand for more than 325 days in a 12-month period. However, the 325-day rule **does not apply** if the person is absent from New Zealand in the service of the New Zealand Government.
30. This means a person who is overseas in the service of the New Zealand Government cannot cease to be a New Zealand tax resident under the ITA during the period of their service, irrespective of the length of time they are away from New Zealand.

4 Other than exempt income and excluded income.

31. The government service rule is set out in s YD 1(7):

> **YD 1 Residence of natural persons**
>
> …
>
> *Government servants*
>
> (7) Despite subsection (5), a person who is personally absent from New Zealand in the service, in any capacity, of the New Zealand Government is treated as a New Zealand resident during the absence.

Purpose of the government service rule

32. The purpose of s YD 1(7) is for New Zealand to retain the taxing rights for income of persons who start working for the New Zealand Government overseas while they are still tax resident in New Zealand (whether or not they were previously in the service of the New Zealand Government in New Zealand), because such people remain closely connected to New Zealand by virtue of being representatives and servants of the New Zealand Government abroad.

When the government service rule applies

33. Section YD 1(7) applies "despite subsection (5)" (the 325-day rule). Therefore, a person who is absent from New Zealand in the service of the government cannot cease being tax resident under the 325-day rule so long as they remain in that service, irrespective of the length of their absence from New Zealand.

34. The effect of s YD 1(7) is to extend the tax residence of a person in circumstances where they would otherwise become non-tax resident under the 325-day rule. The 325-day rule applies where a person is tax resident only under the 183-day rule. As noted at [32], the purpose of s YD 1(7) is for New Zealand to retain the taxing rights to income the New Zealand Government pays to persons who start working for the New Zealand Government overseas while they are still tax resident in New Zealand. Therefore, the Commissioner considers that for s YD 1(7) to potentially apply, the person must be a New Zealand tax resident under the 183-day rule in s YD 1(3) when they commence being in the service of the New Zealand Government outside of New Zealand (whether or not they were previously in the service of the New Zealand Government in New Zealand).

35. Note that someone departing from New Zealand may be tax resident here under both the 183-day rule and the permanent place of abode test. In this situation, the person will remain tax resident under the 183-day rule, irrespective of the length of their absence from New Zealand, so long as they have a permanent place of abode in New Zealand. This is because a person is tax resident in New Zealand under the 183-day rule if they have been in New Zealand for more than 183-days in **a** 12-month period – that is, any 12-month period. The rule does not relate to an income year, a calendar year, or any other particular 12-month period (eg, the most recent 12-month period). Once a person is resident under the 183-day rule they cannot cease being tax resident under that rule until the 325-day rule applies.[5] And the 325-day rule cannot apply until the person is tax resident **only under** the 183-day rule (ie, when the person no longer has a permanent place of abode in New Zealand). Therefore, if a person commences being in the service of the New Zealand Government after their departure from New Zealand, whether the government service rule in the ITA applies will depend on the timing of them commencing the service, ceasing to have a permanent place of abode in New Zealand, and being absent for more than 325-days.

36. For example, if a person commences service for the New Zealand Government after more than 325-days of absence from New Zealand but before they cease having a permanent place of abode here, the government service rule will apply once they cease having a permanent place of abode in New Zealand. At the time they cease having a permanent place of abode in New Zealand they are then tax resident in New Zealand only under the 183-day rule. They have been absent from New Zealand for more than 325-days in a 12-month period, but the government service rule prevents the 325-day rule applying to end their tax residence in New Zealand. They will continue to be tax resident in New Zealand so long as they remain in the service of the New Zealand Government.

37. The Commissioner does not consider that the person needs to have been in the service of the New Zealand Government before their departure from New Zealand for the government service rule to apply. Nor does he consider that being in the service of the New Zealand Government needs to be the reason for the person departing New Zealand.

5 Section YD 1(4).

38. This means s YD 1(7) applies to treat a person as continuing to be tax resident in New Zealand under the ITA, irrespective of the length of their absence, if they are in the service of the New Zealand Government because they:
    - go abroad to pursue duties for the New Zealand Government (which would include undertaking study overseas for a government department), whether or not they were an existing government employee; or
    - are overseas and accept a position with the New Zealand Government abroad before ceasing to be tax resident in New Zealand under the 325-day rule.

Scope of government service

39. Being in the service of the New Zealand Government would include being:
    - an employee of a New Zealand government department or a departmental agency;
    - a member of the New Zealand Defence Force or New Zealand Police; or
    - an employee of another public body if that body is so closely controlled by the government that it is an agent or instrument of the New Zealand Government.[6]
40. In determining whether a public body is so closely controlled by the government that it is an agent or instrument of the New Zealand Government, control is measured by how much independence and discretion the body can insist on, not by how much control the body actually enjoys. When the nature and degree of control the government exercises is uncertain, or a public body has a substantial measure of independent discretion, the courts have been reluctant to recognise the public body as an agent of the government.
41. Most public bodies listed as Crown agents in the Crown Entities Act 2004 are sufficiently controlled by the government to satisfy the common law test of control, so will therefore be agents of the government. Similarly, wholly-owned subsidiaries of those Crown agents are also likely to be sufficiently controlled to satisfy the test. This means employees of those bodies will likely be considered to be in the service of the New Zealand Government. However, decisions need to be made on a body-by-body basis, taking into account the particular facts and governing rules for each body.
42. Bodies such as autonomous Crown entities, independent Crown entities, school boards of trustees and tertiary education institutions will most likely be too independent and enjoy too much discretion to be agents of the government. This means employees of these bodies will likely not be in the service of the New Zealand Government.
43. Employees of state-owned enterprises and contractors to the New Zealand Government are not considered to be in the service of the New Zealand Government.

Ceasing to be in the service of the New Zealand Government

44. If a person ceases to be in the service of the New Zealand Government while overseas, they become non-tax resident from the day after the date they cease their service, provided they do not have a permanent place of abode in New Zealand and have been absent from New Zealand for more than 325-days in a 12-month period (and have not satisfied the 183-day rule since then).

The government service rule applies only to the individual, not accompanying family members

45. Section YD 1(7) does not apply to a spouse/partner or child of someone in the service of the New Zealand Government overseas. The tax residence status of any family members needs to be determined independently under s YD 1. See IS 25/16.

Implications of any DTA, if the government service rule applies and the person is dual tax resident

46. Someone may be tax resident in New Zealand under the government service rule and also be tax resident in the country in which they are performing the services. In this situation, the tax implications depend on whether there is a DTA between New Zealand and the other country and, if so, how that DTA allocates taxing rights to each country.

6 This is consistent with the approach in various contexts to considering what the scope of the government or Crown is. See further: Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021), from 18.4.3.

If New Zealand has a DTA with the other country

47. The following discussion explains the DTA articles that may be relevant if New Zealand has a DTA with the other country. If there is no DTA in place, see [55].

DTA article – government service

48. DTAs New Zealand is a party to have a specific article that allocates taxing rights in relation to remuneration for services rendered by government servants (other than members of diplomatic missions and consular posts, who are covered by a separate article – see [54]). When a person who is treated as a New Zealand tax resident under s YD 1(7) is undertaking that service in a country with which New Zealand has a DTA and they are also tax resident in the other country, the provisions of the DTA need to be considered.

49. Under the DTA government service article, New Zealand generally has sole taxing rights for salaries, wages, and other similar remuneration paid to an individual in respect of services rendered to New Zealand. However, the other country has sole taxing rights for those amounts if the services are rendered in the other country and the individual is a tax resident of that other country under the DTA residence tie-breaker tests[7] and:

- is a national of that other country; or
- did not become a tax resident of that other country solely for the purpose of rendering the services.

50. While a person may have many reasons for taking up a role abroad, the Commissioner's position in relation to the second point above is that it applies, giving the other country sole taxing rights, if it can be demonstrated that government service was not the primary reason for or cause of the person becoming tax resident in the other country.

51. The term "national" is defined differently in the various DTAs New Zealand is a party to. In some DTAs national is defined, in relation to individuals, as someone possessing the nationality or citizenship of a contracting state. In some DTAs it is defined by reference to only nationality or only citizenship. The definition in the particular DTA needs to be considered. If the concept of "nationality" is relevant, determining whether a person is a national of a particular state is generally within the jurisdiction of that state.[8] Nationality is usually acquired either by birth (which may include birth to a parent who is a national) or by naturalisation.

Allocation of taxing rights for other income sources

52. As noted at [49], the government service article allocates taxing rights for salaries, wages, and other similar remuneration in respect of the government services rendered. If the person has other income sources and is tax resident in both New Zealand and the other country under the domestic law of each country, the DTA determines what taxing rights each country has in relation to each source of income.

53. If both countries have some right to tax a particular item of income or gain that a person has, the person may be entitled to a credit for foreign tax paid on foreign-sourced income or gains. For further information, see **IS 16/05**: **Income tax – foreign tax credits – how to claim a foreign tax credit where the foreign tax paid is covered by a double tax agreement**.

DTA article – members of diplomatic missions and consular posts

54. New Zealand's DTAs have a separate article concerning members of diplomatic missions and consular posts. This article ensures that members of diplomatic missions and consular posts receive no less favourable treatment under the DTA than they are entitled to under international law or special international agreements.

If New Zealand does not have a DTA with the other country

55. If someone is tax resident in New Zealand and also in a country New Zealand does not have a DTA with, they are assessable in New Zealand on their worldwide income (other than exempt income and excluded income) but may be entitled to a credit for foreign tax paid on foreign-sourced income or gains. For further information, see **IS 14/02**: **Income tax – foreign tax credits – what is a tax of substantially the same nature as income tax imposed under s BB 1?**

7 These are explained in IS 25/16.

8 However, there are some international treaties that have provisions with respect to nationality, which may be relevant.

Student loans

56. In some circumstances, student loan borrowers who are not physically in New Zealand may apply to be treated as being physically in New Zealand.

57. Being physically in New Zealand, or treated as such, is relevant to whether a borrower is "New Zealand-based" or "overseas-based" for the purposes of the Student Loan Scheme Act 2011 (the SLSA).[9] Whether a borrower is New Zealand-based or overseas-based determines whether their loan is interest-free and what their repayment obligations are.

58. One circumstance in which the Commissioner may treat a borrower as being physically in New Zealand is where the borrower is overseas in the service of the New Zealand Government. The test that is relevant for this treatment being applied differs from the government service rule in the ITA. In particular, being overseas in the service of the New Zealand Government must be the principal reason the borrower is not or will not be physically in New Zealand. Also, it is for the Commissioner to determine whether he considers it fair and reasonable to apply this treatment.[10]

59. An application to be treated as being physically in New Zealand for student loan purposes can be made through myIR. There is information about eligibility requirements and the documentation required to support an application on Inland Revenue's website: **Can I keep my student loan interest-free overseas?**

KiwiSaver

60. The KiwiSaver Act 2006 applies to someone who is a KiwiSaver member who is an employee of the State services serving outside New Zealand. Such a person would also be able to receive the government KiwiSaver contribution, provided the other eligibility requirements for that (in s MK 2) are met.

61. If someone is overseas in the service of the New Zealand Government and they are not yet a KiwiSaver member, they may be eligible to become a member if they are:[11]
    - an employee of the State services;[12]
    - serving outside New Zealand in a jurisdiction where offers of KiwiSaver scheme membership are lawful;
    - employed on New Zealand terms and conditions; and
    - a New Zealand citizen or entitled under the Immigration Act 2009 to be in New Zealand indefinitely.

Other entitlements that may be available

62. There may be other entitlements available to someone who is overseas in the service of the New Zealand Government, such as paid parental leave, ACC cover, and Working for Families tax credits, including Best Start. Relevant requirements for eligibility for any entitlements will need to be met, which may depend on the particular circumstances.

INTERPRETATION STATEMENTS

9 The terms "New Zealand-based" and "overseas-based" are defined in ss 4(1), 22 and 23 of the SLSA.

10 Section 25(1)(a) of the SLSA.

11 Section 6(1) of the KiwiSaver Act 2006.

12 Within the meaning of the Public Service Act 2020.

Examples illustrating the government service rule and implications of any DTA

Example | Tauira 1 – Government employee appointed to an overseas position with the department

Facts: Aroha is an employee of a New Zealand government department, living and working in Wellington. Aroha is appointed to a position with the government department in Canada for four years.

Aroha's husband and children accompany her to Canada. It is assumed Aroha ceases having a permanent place of abode in New Zealand from the time of her departure.

Aroha becomes tax resident in Canada under Canadian domestic law. She is a national of New Zealand only.

Aroha has a student loan in New Zealand and applies to be treated as physically in New Zealand while she is overseas, to keep her student loan interest free.

Result: Aroha will not cease to be tax resident once she exceeds 325 days of absence from New Zealand. Once she satisfies the 325-day rule, she will nonetheless continue to be a New Zealand tax resident under s YD 1(7). She will remain tax resident in New Zealand for as long as she is absent from New Zealand in the service of the New Zealand Government.

The government service article of the DTA between New Zealand and Canada allocates taxing rights for Aroha's salary to New Zealand.

The Commissioner approves Aroha's application to be treated as physically in New Zealand (to keep her student loan interest-free), subject to the condition that she remains in her role at the government department.

The government service rule does not apply to Aroha's husband and children.

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

Aroha is absent from New Zealand in the service of the New Zealand Government. She was tax resident in New Zealand under the 183-day rule in s YD 1(3) when she started the position in Canada. Therefore, even though she will be absent for more than 325-days in a 12-month period, she will continue to be treated as a New Zealand tax resident under s YD 1(7), for as long as she is absent from New Zealand in the service of the New Zealand Government.

At the time Aroha becomes tax resident in Canada, it is necessary to consider whether the DTA between New Zealand and Canada changes the allocation of taxing rights. The government service article of the DTA allocates taxing rights for Aroha's salary to New Zealand. If Aroha's tax residence tie-breaks to Canada under the DTA, it would be necessary to consider the carve-out in the government service article. This example does not consider the residence tie-breaker tests. However, even if Aroha's tax residence does tie-break to Canada, the carve outs in the government service article would not apply to allocate taxing rights for Aroha's salary to Canada, because taking up the New Zealand Government role was the reason for Aroha becoming tax resident in Canada and she is not a national of Canada.

If Aroha has other income sources while she is tax resident in both New Zealand and Canada under domestic law, the DTA will determine what taxing rights each country has in relation to each source of income.

Aroha's application to be treated as physically in New Zealand while she is overseas (to keep her student loan interest-free) is approved by the Commissioner, subject to the condition that she remains in her role at the government department. This is because the principal reason Aroha is not physically in New Zealand is because she is overseas in the service of the New Zealand Government, and the Commissioner considers that in the circumstances it is fair and reasonable to treat Aroha as being physically in New Zealand in the circumstances.[13]

Aroha's husband and children are not absent in the service of the New Zealand Government, so s YD 1(7) does not apply to them. Each person's tax residence needs to be determined individually. The other tax residence rules need to be considered for Aroha's husband and children (see IS 25/16).

13 See s 25(1)(a) of the SLSA.

Example | Tauira 2 – Non-tax resident expatriate starting a New Zealand Government role overseas

Facts: Justine, a New Zealand expatriate, has been living and working in London for 5 years for an American bank. Justine is not a New Zealand tax resident. She hears that a New Zealand government department is looking for a person to work in its London office. She applies for the position and is successful.

Result: Justine will not become a New Zealand tax resident merely because she has started working for the New Zealand Government in London.

Explanation: Section YD 1(7) operates to extend the tax residence of a person in circumstances where they would otherwise become non-tax resident under the 325-day rule. It does not operate to make a non-tax resident become tax resident because they take a New Zealand Government position overseas.

For s YD 1(7) to potentially apply, the person must be a New Zealand tax resident under the 183-day rule in s YD 1(3) when they commence being in the service of the New Zealand Government outside of New Zealand (whether or not they were previously in the service of the New Zealand Government in New Zealand).

Justine was not tax resident in New Zealand when she started her role for the New Zealand Government in London. Therefore, s YD 1(7) cannot apply to her.

Example | Tauira 3 – New Zealand tax resident starting a New Zealand Government role while overseas

Facts: After finishing university, Louis is travelling in Europe. He has no plans to return to New Zealand in the foreseeable future. While he is away, he applies for a job at the New Zealand embassy in Paris. He is offered the job before he is due to leave France, and decides to stay in France to take up the role. He intends to stay in the role for about a year to save money for further travel.

At the time he takes up the role, Louis is a New Zealand tax resident under the 183-day test, as he has not yet been away from New Zealand for more than 325-days. He does not have a permanent place of abode in New Zealand from the time he left on his travels.

Louis becomes tax resident in France under French domestic law. He is a national of New Zealand only.

Louis has a student loan in New Zealand.

Result: Louis will not cease to be tax resident once he exceeds 325-days of absence from New Zealand. Once he satisfies the 325-day rule, he will nonetheless continue to be a New Zealand tax resident under s YD 1(7). He will remain tax resident for as long as he is absent from New Zealand in the service of the New Zealand Government.

The government service article of the DTA between New Zealand and France allocates taxing rights for Louis' salary to New Zealand.

Louis' student loan will be interest-bearing while he is overseas.

Explanation: Louis is absent from New Zealand in the service of the New Zealand Government. He was a tax resident in New Zealand under the 183-day rule in s YD 1(3) when he started the government job overseas. Therefore, even once he has been absent for more than 325-days in a 12-month period, he will continue to be treated as a New Zealand tax resident under s YD 1(7) for as long as he is absent from New Zealand in the service of the New Zealand Government.

At the time Louis becomes tax resident in France, it is necessary to consider whether the DTA between New Zealand and France changes the allocation of taxing rights. The government service article of the DTA allocates taxing rights for Louis' salary to New Zealand. If Louis' tax residence tie-breaks to France under the DTA, it would be necessary to consider the carve-out in the government service article. This example does not consider the residence tie-breaker tests. However, even if Louis' tax residence does tie-break to France under the DTA, the carve outs in the government service article would not apply to allocate taxing rights for his salary to France, because taking up the New Zealand Government role was the reason for him becoming tax resident in France and he is not a national of France.

If Louis has other income sources while he is tax resident in both New Zealand and France under domestic law, the DTA will determine what taxing rights each country has in relation to each source of income.

If Louis applied to keep his student loan interest-free while he is overseas in the service of the New Zealand Government, this would not be approved by the Commissioner. This is because being overseas in the service of the New Zealand Government is not the principal reason Louis is not physically in New Zealand – he was overseas travelling before taking up the role and did not plan to return to New Zealand in the foreseeable future.

Example | Tauira 4 – New Zealand tax resident starting a New Zealand Government role while overseas in a country of which he is a national

Facts: The facts are the same as in Example | Tauira 3, except that:

- Louis is a national of both New Zealand and France; and
- it is assumed that at the time Louis becomes tax resident in France his tax residence tie-breaks to France under the DTA between New Zealand and France.

Result: The result is the same as in Example | Tauira 3, except that once Louis becomes tax resident in France, the government service article of the DTA between New Zealand and France allocates taxing rights for Louis' salary to France.

Explanation: Louis is absent from New Zealand in the service of the government. He was a tax resident in New Zealand under the 183-day rule in s YD 1(3) when he started the New Zealand Government job overseas. Therefore, even once he has been absent for more than 325-days in a 12-month period, he will continue to be treated as a New Zealand tax resident under s YD 1(7), for as long as he is absent from New Zealand in the service of the New Zealand Government.

At the time Louis becomes tax resident in France, it is necessary to consider whether the DTA between New Zealand and France changes the allocation of taxing rights. Because Louis' tax residence tie-breaks to France under the DTA (as noted above this is assumed to be the case for this example), it is necessary to consider the carve-out in the government service article. The first carve out in the government service article would apply, because Louis is a national of France. Therefore, from the time Louis becomes tax resident in France, the Government service article of the DTA allocates taxing rights for Louis' salary to France.

If Louis has other income sources while he is tax resident in both New Zealand and France under domestic law, the DTA will determine what taxing rights each country has in relation to each source of income.

Example | Tauira 5 – New Zealand tax resident starting a New Zealand Government role overseas and subsequently starting a different New Zealand Government role overseas

Facts: Jack is living in New Zealand when he applies for and is appointed to a position for the New Zealand Government in Japan.

Jack leaves New Zealand to start the role in Japan. It is assumed he ceases having a permanent place of abode in New Zealand from the time of his departure.

Jack becomes tax resident in Japan under Japan's domestic law. He is a national of New Zealand only.

After being in Japan for 5 years, Jack applies for and is appointed to a different role for the New Zealand Government in Japan. Jack resigns from his previous role. He takes a holiday between the date his resignation is effective and the date he starts in the new role.

Jack has a student loan in New Zealand and at the time he leaves he applies to be treated as physically in New Zealand while he is overseas, to keep his student loan interest free.

Result: Jack will not cease to be tax resident once he exceeds 325-days of absence from New Zealand, during the period he is employed in each of his two roles for the New Zealand Government in Japan. Once he satisfies the 325-day rule during his employment in his first role for the New Zealand Government, he will nonetheless continue to be a New Zealand tax resident under s YD 1(7). As Jack moved from one New Zealand Government role to another (even though he took a holiday between his resignation from his first role and his start date for the new role), there is no break in him being in the service of the New Zealand Government. Therefore, the government service rule in s YD 1(7) continues to apply when Jack moves from one role to the next. Jack will remain tax resident in New Zealand for as long as he is absent from New Zealand in the service of the New Zealand Government.

The government service article of the DTA between New Zealand and Japan allocates taxing rights for Jack's salary for each of the two roles he has in Japan to New Zealand.

The Commissioner approves Jack's application to be treated as physically in New Zealand (to keep his student loan interest-free), subject to the condition that he remains in his role for the New Zealand Government. At the time he takes up the new role, Jack would need to reapply for this treatment.

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

During the 5 years Jack is employed in the first role in Japan, he is absent from New Zealand in the service of the government. He was tax resident in New Zealand under the 183-day rule in s YD 1(3) when he started the position in Japan. Therefore, even though he is absent for more than 325-days in a 12-month period, he continues to be treated as a New Zealand tax resident under s YD 1(7) for the period he was absent from New Zealand in that role.

Jack continues to be a New Zealand tax resident under the government service rule in s YD 1(7) in the period he is employed in the second role he has for the New Zealand Government in Japan. As Jack moved from one New Zealand Government role to another (even though he took a holiday between his resignation from his first role and his start date for the new role), there is no break in him being in the service of the New Zealand Government. Therefore, the government service rule in s YD 1(7) continues to apply to prevent Jack from ceasing to be resident under the 325-day rule.

At the time Jack becomes tax resident in Japan, it is necessary to consider whether the DTA between New Zealand and Japan changes the allocation of taxing rights. The government service article of the DTA allocates taxing rights for Jack's salary for each of the two roles to New Zealand. Even if, during the period of his employment in each of the roles he had in Japan, Jack's tax residence had tie-broken to Japan under the DTA, the carve outs in the government service article would not have applied to allocate taxing rights for Jack's salary to Japan. This is because taking up the first New Zealand Government role was the reason for Jack becoming tax resident in Japan and he is not a national of Japan.

If Jack has other income sources while he is tax resident in both New Zealand and Japan under domestic law, the DTA will determine what taxing rights each country has in relation to each source of income.

Jack's application to be treated as physically in New Zealand (to keep his student loan interest-free) is approved by the Commissioner, subject to the condition that he remains in his role for the New Zealand Government. This is because the principal reason Jack is not physically in New Zealand is because he is overseas in the service of the New Zealand Government, and the Commissioner considers that in the circumstances it is fair and reasonable to treat Jack as being physically in New Zealand.[14] At the time he takes up the new role, Jack would need to reapply for this treatment and the Commissioner would reassess at that time whether the principal reason for Jack not being in New Zealand is because he is overseas in the service of the New Zealand Government.

14 See s 25(1)(a) of the SLSA.

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Immigration Act 2009

Income Tax Act 2007

Sections BD 1, MK 2 and YD 1

KiwiSaver Act 2006

Section 6

Public Service Act 2020

Student Loan Scheme Act 2011

Sections 4(1) ("New Zealand-based" and "overseas-based"), 22, 23 and 25

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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 25/16: Income tax – How do the income tax rules apply when a close company provides short-stay accommodation?

Issued | Tukuna: 23 May 2025

This question we've been asked (QWBA) explains how the income tax rules apply when a close company provides short-stay accommodation (eg, through Airbnb, Bookabach, Booking.com or Holiday Houses). It explains when and how the mixed-use asset rules and the standard tax rules apply, and when shareholders or employees will receive income from their use of the property.

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

Question | Pātai

How do the income tax rules apply when a close company provides short-stay accommodation?

Answer | Whakautu

The income tax consequences for a close company that provides short-stay accommodation depend on whether the mixed-use asset rules or the standard tax rules apply:

- **When the mixed-use asset rules apply, the company will have taxable income from the rental of its dwelling for short-stay accommodation. The company will have exempt income when the dwelling is used by an associated person such as a shareholder, or by a person for less than 80% of the market value rent. The mixed-use asset rules set out which expenses are deductible, and how mixed-use expenses are apportioned. A close company cannot choose to opt out of these rules.**
- **The standard tax rules apply when a close company is not required to apply the mixed-use asset rules. Under the standard tax rules, the company will have taxable income from the rental of its dwelling for short-stay accommodation and can claim deductions for costs incurred in this activity.**

There are also income tax consequences for shareholders or employees who have use of the dwelling without paying market rent. Shareholders are treated as receiving non-cash dividends and employees (including shareholder-employees) are treated as receiving employment income.

Key terms | Kīanga tau tāpua

Close company means a company with five or fewer shareholders that are individuals or trustees, the total of whose voting interests in the company is more than 50% (treating all natural persons associated at the time as 1 person).

Guest means a person provided with short-stay accommodation in return for payment.

Mixed-use asset means an asset that is used both privately and to earn income and is also not used for at least 62 days in the year. This would include many holiday homes.

Short-stay accommodation means accommodation provided for up to four consecutive weeks in a dwelling that is not the guest's ordinary residence. It does not include accommodation provided to residential tenants, boarders or care home residents, and it does not include student or emergency accommodation.

Explanation | Whakamāramatanga

1. Short-stay accommodation may be provided by different entities such as individuals, trusts or companies. Different tax rules can apply depending on the entity used. This QWBA applies where a close company provides short-stay accommodation. It does not apply to a look-through company or qualifying company as these types of companies are subject to different rules.

> For information on how the income tax rules apply where an individual or trust provides short-stay accommodation, see the following items:
>
> - QB 25/01: Income tax – Which rules apply if I rent out my home, part of my home, or a separate dwelling on my property as short-stay accommodation?
> - QB 25/02: Income tax – Which rules apply if I have a dwelling I sometimes rent out as short-stay accommodation and also sometimes use privately?
> - QB 25/03: Income tax – How do the mixed-use asset rules apply if I provide short-stay accommodation?
> - QB 25/04: Income tax – How do the standard tax rules apply if I provide short-stay accommodation?
> - QB 25/05: Income tax – If property held in a trust is rented out for short-stay accommodation, who declares the income and what deductions can be claimed?

2. This QWBA explains:
   - whether the company or the shareholders are providing short-stay accommodation;
   - the income tax treatment of flat-rate credits received from an electronic marketplace operator (and how this affects deductibility of expenses);
   - when and how the mixed-use asset rules apply to a close company;
   - how the standard tax rules apply to a close company; and
   - when shareholders or employees are treated as deriving income from their use of a dwelling owned by the company.

Whether the company or the shareholders are providing short-stay accommodation

3. This QWBA applies to a company that derives income from providing short-stay accommodation. This will occur when:
   - the company owns a dwelling and hires a person (such as a property manager or an employee) to manage the short-stay accommodation activity; or
   - the shareholders own a dwelling and lease it to the company to provide short-stay accommodation. In this scenario, the company derives the income from the short-stay accommodation. The lease payments for the company's use of the dwelling are the shareholders' taxable income.

4. When the company owns a dwelling and leases it to a shareholder who separately provides the short-stay accommodation activity, the shareholder is the person who derives the income from the short-stay accommodation activity. The company will derive taxable income from any lease payments for the shareholder's use of the dwelling (s CC 1).[1] These shareholders should refer to the items that apply to individuals, as set out at [1].

The income tax treatment of flat-rate credits received from an electronic marketplace operator

5. Specific GST rules apply where short-stay accommodation is listed on an electronic marketplace (eg, Airbnb, Bookabach, Booking.com or Holiday Homes). Where a company who lists accommodation is not GST-registered, the marketplace operator will pay a flat-rate credit of 8.5% of the value of the supply of short-stay accommodation. GST-registered companies are not entitled to the flat-rate credit.

6. The receipt of a flat-rate credit is income as it is an amount the company derives in relation to providing short-stay accommodation. The company can treat the flat-rate credit as:
   - excluded income (which is not subject to income tax); or
   - assessable income (which is subject to income tax).

1 When a company or shareholder lease a dwelling from the other for providing short-stay accommodation, adequate rent must be paid. Generally, adequate rent will be the market rent for the dwelling at the relevant time (s GC 5).

7. This choice will affect the amount of income tax deductions that can be claimed. If the company opts to treat flat-rate credits as:
   - excluded income, expenses that relate to rental income from an electronic marketplace are deductible on a GST-exclusive basis and expenses that relate to rental income from other sources are deductible on a GST-inclusive basis.
   - assessable income, all expenses that relate to rental income are deductible on a GST-inclusive basis.
8. If the company is GST registered, expenses are deductible on a GST-exclusive basis.

When and how the mixed-use asset rules apply to a close company

9. The mixed-use asset rules may apply to a close company that owns a dwelling used for providing short-stay accommodation.[2] The mixed-use asset rules apply where, in an income year, a dwelling is:
   - used privately; and
   - used to earn income; and
   - not used for 62 days or more during the income year.
10. If the above requirements are not met, the close company will be subject to the standard tax rules discussed from [35].
11. A dwelling is used privately when:
    - a natural person associated with the company (such as a shareholder) uses the dwelling (whether or not they pay any rent); or
    - any person rents the dwelling for “mates' rates” that are less than 80% of the market value rent.
12. A person is associated with the company under these rules if their shareholding in the company gives them a right to use the dwelling. There is no requirement that the shareholder needs to hold a minimum percentage of the shares in the company to be an associate under these rules.
13. A dwelling is not used privately on days a shareholder is required to stay at the dwelling to undertake repairs for damage caused by paying guests.
14. A dwelling is not used on days no one is staying in the dwelling (including when the dwelling is advertised as available but has not been rented).
15. It is important to note that a close company cannot choose to opt-out of the mixed-use asset rules. Also, a dwelling can move in and out of the mixed-use asset rules from one year to the next, depending on its use, so a company needs to reconsider whether these rules apply in each income year.

How the mixed-use asset rules apply to a close company

16. For detailed information on how to apply the mixed-use asset rules, see QB 25/03. The following is a summary of how these rules apply to a close company that provides short stay accommodation.

Taxable income

17. Where the mixed-use asset rules apply, rental income is generally taxable. However, the following amounts are not included as taxable income:
    - Amounts the company receives from renting the dwelling for private use (to associated persons such as the company's shareholders, or to anyone for less than 80% of the market value rent). These amounts are exempt income.
    - Flat-rate credits received from an electronic marketplace operator, if the company has opted to treat them as excluded income (see from [5]).

Available deductions

18. General deductibility principles are explained from [38]. The mixed-use asset rules set out how to calculate the proportion of expenses the company can deduct against its income from providing short-stay accommodation.

2 The mixed-use asset rules do not apply to companies that are not close companies.

19. Expenses that relate solely to renting out the dwelling for deriving income (not including any private use) are generally fully deductible. However, under the mixed-use asset rules, an expense may be fully deductible only if it:[3]
    - is not a capital expense;
    - relates solely to the use of the dwelling to derive taxable income (not including exempt income from private use); and
    - is either reasonably incurred to meet a regulatory requirement to be able to use the dwelling to derive income or is one where no shareholder or associate of the company would be reasonably expected to receive a personal benefit from the expense.
20. These types of expenses may include:
    - advertising costs, including any commission or fee paid by the company to an advertising platform or transaction facilitator (this does not include any service fee the guests pay the platform);
    - fees paid to a property manager who manages the listing, bookings and dealing with guests;
    - supplies used solely by guests (other than for private use periods);
    - cleaning costs for the periods used by guests (other than for private use periods);
    - any additional insurance premium or rates paid (over what the normal premium or rates would be) due to the dwelling being used for short-stay accommodation.
21. Any expenses that relate solely to the private use of the dwelling (which includes use by shareholders or use by anyone who pays less than 80% of the market rent) are not deductible.
22. Expenses that relate both to income-earning and private use of the dwelling are partly deductible, such as:
    - repairs and maintenance of the dwelling (other than for capital improvements);
    - house and contents insurance premiums;
    - rates; and
    - utilities such as power and internet.
23. Interest has special rules as discussed from [31].
24. Where a property manager is involved in general maintenance work on the dwelling, their fee is fully deductible if there is no private use of the dwelling. However, if there is private use, then part of this fee needs to be apportioned.
25. In some cases, expenses may be able to be split between a component that is solely related to income earning activity, and a component that is for mixed income earning and private use. For example, expenses like power may have both a fixed charge and actual usage charge. Mixed expenses usually need to be apportioned. However, where actual usage charges can be identified for a period when the dwelling was used only for deriving income, the company may choose not to apportion the expense for that period – it is fully deductible. The fixed-charge component will still need to be apportioned if there is private use as it is necessary to maintain a power connection, which both paying guests and associates use. Alternatively, it may be easier to simply apportion the total expense for the year between private use and income earning use.
26. Where apportionment is required, the mixed-use asset rules provide that the deductible proportion is based on the number of income earning nights relative to the total number of nights the dwelling is used during the year (ie, income earning nights plus private use nights). That is:

    income earning nights / (income earning nights + private use nights)

27. This apportionment ignores the nights that no-one uses the dwelling, even if it is advertised as being available. This apportionment methodology differs to the standard tax apportionment rules, discussed from [48].
28. If the company's deductible expenses for the year exceed the income, expenditure quarantine rules may potentially apply to limit the deductions that can be claimed in that income year. Any excess deductions are carried forward to future years.[4]
29. For a more detailed discussion on how to apportion expenses under the mixed-use asset rules, and on how the expenditure quarantine rules apply, see QB 25/03.

3 Section DG 7

4 Sections DG 15 to DG 19.

30. Example | Tauira 1 illustrates how the mixed-use asset rules apply to a close company.

Example | Tauira 1 – Mixed-use asset rules apply to a close company

Marama and Max are equal shareholders in Stay@Hahei Ltd, which owns a house in the Coromandel used for providing short-stay accommodation. A property manager was engaged to manage the short-stay accommodation.

In the 2024 income year, the house was rented to non-associates at market rates for 200 nights. Marama and Max didn't use the house at all. In February 2024, the house was rented to Max's friend, Luke. Luke paid $40 a night for 25 nights. The market value rent during that period was $150 a night.

The mixed-use asset rules apply in the 2024 income year, because:

- Stay@Hahei Ltd is a close company;
- the house was used for income earning purposes when it was rented for 200 nights;
- the house was used privately when Luke stayed 25 nights and paid less than 80% of the market value rent; and
- the house was not used for more than 62 days of the year.

The amount received from Luke is exempt income because Luke paid less than 80% of the market value rent. This means that any expenses incurred solely in relation to that period are not deductible.

Stay@Hahei Ltd's deductible expenses are apportioned based on the income earning use of the house compared with total use. Unused days are ignored. Luke's use of the house is not an income earning use because any income from private use is exempt.

The apportionment of expenses should be made on the following basis:

$$200/(200 + 25) = 89\%$$

Therefore, Stay@Hahei Ltd can:

- fully deduct expenses that are only incurred for income-earning use (such as advertising fees);
- deduct 89% of its expenses that are partly used for income-earning and partly for private use in the 2024 income year; and
- not deduct any expenses incurred solely in relation to Luke's use of the house, which counts as private use.

Treatment of interest

31. When a close company is subject to the mixed-use asset rules, those rules override the company's general ability to deduct interest under s DB 7. Instead, special rules for the treatment of interest apply. These rules also apply to the company's shareholders and any other companies in the same group of companies.

32. In summary, the company needs to compare the value of the asset (the property) with the company's "debt value" (which takes account of all of the company's debt). If the asset value is more than the debt value, all the company's interest cost is apportioned. If it is the other way around, there is a formula to identify the portion of interest that needs to be apportioned.

33. The mixed-use asset rules are also more complicated if the company is in a group of companies. For more information, see the **Special report on mixed-use assets**.

34. Example | Tauira 2 illustrates the treatment of interest under the mixed-use asset rules.

Example | Tauira 2 – Treatment of interest under mixed-use asset rules

Stay@Hahei Ltd from Example | Tauira 1 owns a single asset, the Coromandel property. The property has a rateable value of $700,000. Stay@Hahei Ltd has interest expenditure of $6,000.

Scenario One

Stay@Hahei has total debt of $100,000. Because the debt value is less than the asset value, all of the interest expenditure is apportioned using the same apportionment formula (89%) as in Example | Tauira 1.

Stay@Hahei Ltd can claim a deduction for interest of $5,340 (that is, 89% of $6,000).

Scenario Two

If the total debt value was $800,000, the apportionment would only apply to part of the interest expenditure. That is calculated using the following equation:

$$\text{interest expenditure} \times \text{asset value} / \text{debt value}$$

This calculation would be: 6,000 × 700,000 / 800,000 = $5,250.

Stay@Hahei Ltd would then apportion this amount using the 89% apportionment formula and could claim a deduction for interest of $4,672.50.

How the standard tax rules apply

35. If the company is not subject to the mixed-use asset rules (for example, there is no private use, or the dwelling is unused for less than 62 days in the income year) then the standard tax rules apply.

Taxable income

36. Under the standard tax rules, all income a company derives from providing short-stay accommodation is taxable. If the company is carrying on a business, the income is taxable as business income under s CB 1. Otherwise, the income is taxable under general provisions such as s CC 1.

37. As noted earlier, if the company is not GST registered it can choose whether any flat-rate credits received from an electronic marketplace operator are taxable or excluded income (see from [6]).

Deductible expenses

38. Generally, a company can claim a deduction for expenses incurred in deriving income from providing short-stay accommodation.[5] However, some limits apply such as the limitation on capital expenses.

39. The limitation on deductibility for private expenditure does not apply to companies because companies do not incur private expenses. However, for expenses to be deductible, the company must still incur the expense in deriving its income or in carrying on business for the purpose of deriving its income.

40. For companies, interest is generally deductible under the standard income tax rules.[6]

41. A company that uses a dwelling to derive income from providing short-stay accommodation may deduct expenses related to the property such as rates, insurance, (non-capital) repairs and maintenance, and other expenses related to the short-stay accommodation activity such as advertising costs, property manager fees and cleaning costs that relate to periods the property was used to derive income.

42. A company may also claim depreciation of chattels in a dwelling used in deriving income from short-stay accommodation.

43. Companies must claim deductions based on the actual costs incurred (that is, they cannot use the standard-cost method).[7] More information on how to apply the actual cost method to the depreciation of chattels in the context of short-stay accommodation is provided in QB 25/04.

5 Sections DA 1 and DA 2.

6 The interest limitation rules ceased to apply from 1 April 2025 but still apply for previous periods.

7 Determination DET 19/02: Standard-cost household service for short-stay accommodation does not apply to companies.

44. A company may incur expenses in relation to a shareholder or employee. For example, the company may provide the use of a dwelling to a shareholder or employee for their personal use for no payment. Expenses related to this may be deductible to the company if they are salary, wages or fringe benefits of an employee, but are not deductible if they are dividends paid to a shareholder.[8] Whether an amount is a deemed dividend or employment income is discussed in more detail from [56].

When expenses need apportioning

45. Companies are able to claim deductions for interest under s DB 7 without satisfying the usual deductibility requirements. For other expenses, the use of the dwelling needs to be considered in each income year as its use may change from one year to the next. If the dwelling is used solely to earn rental income from providing short-stay accommodation, the relevant relationship with income will be satisfied and expenses are fully deductible. However, the extent to which expenses are deductible depends on whether there are non-income earning uses of the dwelling.

46. There may be non-income earning use when the dwelling is used by a shareholder without paying rent. When the shareholder's use is a non-cash dividend, related expenses are not deductible to the company. However, when the dwelling is used by an employee (including a shareholder-employee), related expenses will be considered to be an employment expense, so expenses remain deductible (see from [56] for a discussion on when an amount is a non-cash dividend and when it is employment income).

47. Even where there is non-income earning use of a dwelling, some expenses are still fully deductible because they relate only to an income producing activity, such as:
    - advertising costs, including any commission or fee paid by the company to an advertising platform or transaction facilitator (this does not include any service fee the guests pay the platform);
    - fees paid to a property manager who manages the listing, bookings and dealing with paying guests;
    - supplies used solely by paying guests;
    - cleaning costs for the rental periods;
    - any additional insurance premium or rates paid (over what the company would otherwise pay) because the dwelling is being rented out.

48. General expenses that need apportioning where there is some non-income earning use of the dwelling include:
    - repairs and maintenance (other than for capital improvements);
    - house and contents insurance premiums and rates (excluding any additional premium or rates imposed because the property is used for short-stay accommodation as these amounts are fully deductible); and
    - utilities such as power and internet.

49. Where a property manager is involved in general maintenance work on the dwelling, their fee is fully deductible if there is no non-income earning use of the dwelling. However, if there is non-income earning use, such as shareholders using the dwelling without paying rent, then part of the property manager's fee needs to be apportioned for the non-income earning use of the dwelling.

50. In some cases, expenses may be able to be split between a component that is solely related to income earning activity, and a component that is for mixed income earning and private use. For example, expenses like power may have both a fixed charge and actual usage charge. Mixed expenses usually need to be apportioned. However, where actual usage charges can be identified for a period when the dwelling was used only for deriving income, the company may choose to not apportion the expense for that period – it is fully deductible. The fixed-charge component will still need to be apportioned if there is non-income earning use by shareholders, as it is necessary to maintain a power connection, which both paying guests and those shareholders use. Alternatively, it may be easier to simply apportion the total expense for the year between income earning and non-income earning use.

51. Similarly, where any consumables are available for guests as well as shareholders to use (eg, tea, coffee, olive oil, shampoo, and soap) those consumables are only partly deductible in relation to the use by paying guests.

8 Although costs incurred in authorising, allocating or processing a payment of a dividend are deductible to a company under s DB 63.

52. To work out what proportion of expenses can be claimed, the company can deduct expenses for the periods where the dwelling is rented out to paying guests or is otherwise available to be rented out (ie, it is advertised as available and is not being used by shareholders). Deductions cannot be claimed for periods where the dwelling is not available to be rented out or is used by shareholders for no payment. The company will need to keep track of the number of nights the dwelling is rented out or is available to be rented out. This method of apportionment differs to that discussed earlier in relation to the mixed-use asset rules.

53. Example | Tauira 3 illustrates what deductions may be available when a dwelling is used both by paying guests and shareholders for no payment.

Example | Tauira 3 – Apportionment of expenses

Short Stay Vacay Ltd owns a beachside cottage near Nelson, which is used for short-stay accommodation. The cottage was rented to guests for 320 days in the 2024 income year. Siena and Arlo are equal shareholders of Short Stay Vacay Ltd and are not employees of the company. They used the cottage for 30 days in January without paying any rent.

Because the cottage was not vacant for 62 days or more, the standard rules will apply rather than the mixed-use asset rules.

During the 2024 income year, Short Stay Vacay Ltd paid the following expenses:

- cleaning and laundry expenses after paying guests used the cottage;
- fees for advertising the cottage on various booking sites;
- consumables including tea, coffee, and toiletries;
- monthly power bills, including both a usage component and a fixed monthly service fee; and
- rates of $5,000 per year (the local council charges standard rates regardless of what the cottage is used for).

Siena is the account holder for the cottage's internet account. Siena ended up paying this bill from her personal account, and Short Stay Vacay Ltd reimbursed her later in the year.

The expenses Short Stay Vacay Ltd incurred are deductible as follows:

- The cleaning and laundry expenses and fees for advertising the cottage are fully deductible, as they were incurred solely in deriving income.
- The consumables used and the usage portion of the power bill for the month that Siena and Arlo used the cottage are not deductible, as they were not incurred in deriving income.
- The rates need to be apportioned, as they were only partially incurred in deriving income. A reasonable basis for apportionment is on a time basis: 1/12 of the rates are non-deductible, and 11/12 are deductible. The amount of the rates payments that can be claimed is $5,000 * 11/12 = $4,583.
- The cost of reimbursing Siena for the internet bill also needs to be apportioned on the same basis.

Residential rental ring-fencing rules

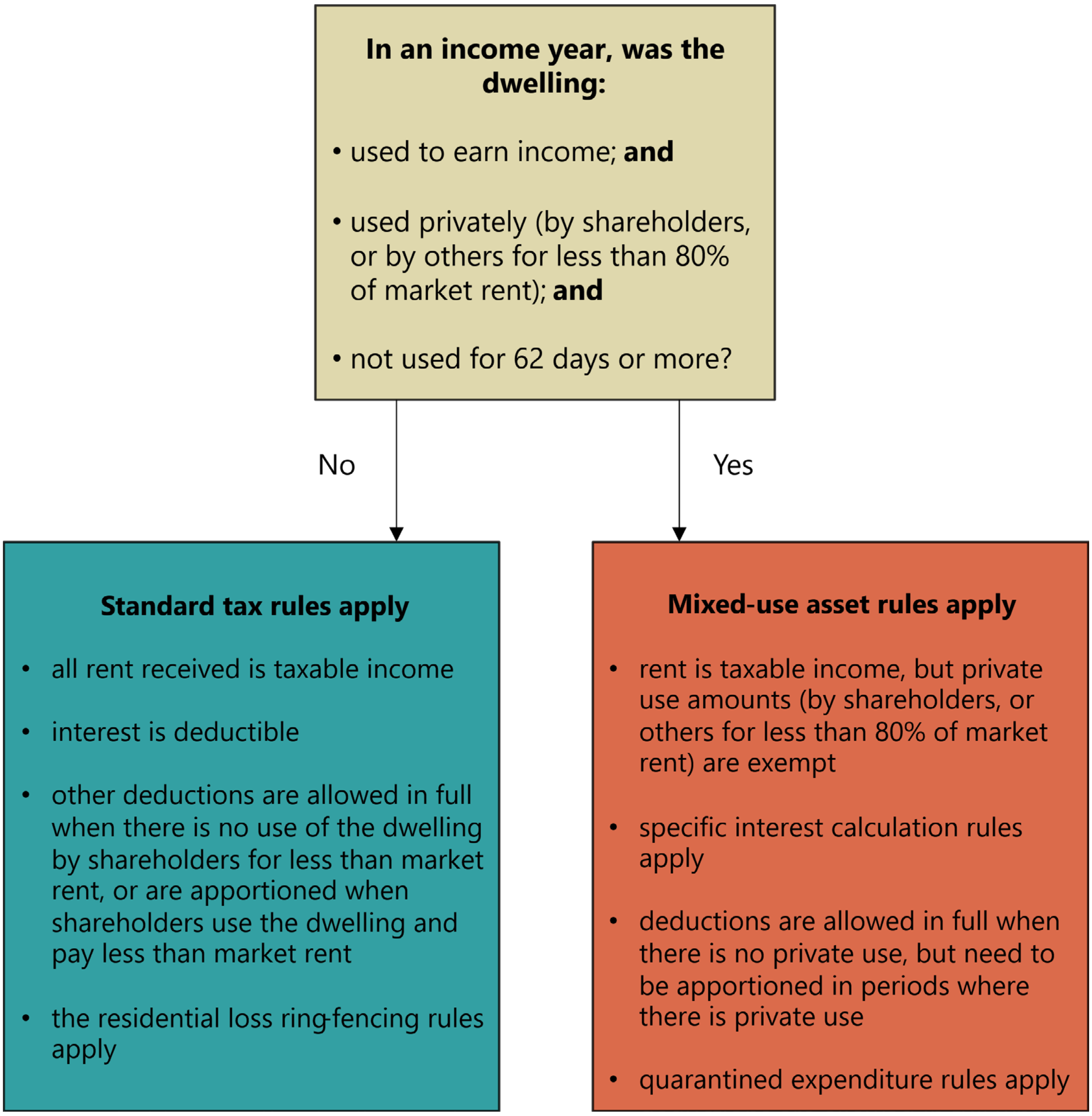
54. The residential rental ring-fencing rules apply to a close company. Under the residential rental ring-fencing rules, expenses incurred on a residential property may be deducted in an income year only to the extent that income is earned from the property in that income year.[9] If the allowable deductions for the year exceed the income, the excess deductions must be carried forward to future income years; they cannot be used to offset other income. For information on how these rules apply, see *Ring-fencing of residential property deductions* **TIB vol 31, No 8** from page 53.

9 Or a portfolio of properties, if there is one.

Summary

55. Figure | Hoahoa 1 summarises how the mixed-use asset rules and the standard tax rules apply to a close company.

Figure | Hoahoa 1 – How the tax rules apply to a close company providing short-stay accommodation



Income that shareholders or employees derive for the use of the dwelling

56. Where shareholders or employees have use of a dwelling a company owns, they may be treated as receiving non-cash dividends or employment income. This is the case regardless of whether the standard tax rules or the mixed-use asset rules apply to the company.

Non-cash dividends

57. A dividend derived by a shareholder is their income. A dividend includes any transfer of value from the company to the shareholder that arises because of the shareholding relationship.[10] A transfer of value includes both money and money's worth, so it does not have to be paid in cash.

58. In some cases, a transfer of value does not arise when a company provides services to the shareholder (unless a close company provides services that are the benefit of expenditure of the company).[11] However, this does not apply in the context of the provision of the use of a property. "Services" are defined in s YA 1 as anything that is not goods, money or

10 Sections CD 1, CD 4, CD 5, CD 6.

11 Section CD 5(3) and CD 5(4).

a chose in action. A chose in action includes the right to use property. When a company allows shareholders the use of property that it owns, the company is providing the shareholders with a right to use property, which is a chose in action, and not a service for these purposes.

59. There are specific rules to calculate the amount of a dividend where a company makes property available to a person.[12] A company makes property available to a shareholder when it allows the shareholder to use property that the company owns for the shareholder's private purposes. The amount of the dividend is the price ordinarily charged as part of its business, reduced by any amount the shareholder pays.
60. Therefore, a shareholder receives a non-cash dividend when they have use of a dwelling the company owns, to the extent that the value of the accommodation provided to the shareholder exceeds the amount the shareholder pays. The shareholder needs to include this amount as income in their income tax return.
61. A non-cash dividend is treated as being paid by the company six months after the end of the company's income year (or on an earlier date notified by the company). The company can attach an imputation credit (reflecting tax it has paid) to this dividend at the time it is treated as being paid. However, it is not possible to attach an imputation credit after that period has passed.
62. For more information on non-cash dividends and which regime applies to shareholder-employees, see **IS 21/05**: **Non-cash dividends.**
63. Example | Tauira 4 illustrates a situation where shareholders derive non-cash dividends.

Example | Tauira 4 – Shareholders derive non-cash dividends

Siena and Arlo from Example | Tauira 3 had used the cottage for 30 days in January 2024 without paying any rent.

The market rate for the cottage for that period was $200 per night (taking into account usual discounted rates for longer rental periods).

Siena and Arlo's use of the cottage is a transfer of value arising because of their shareholding in Short Stay Vacay Ltd. The market value of the use of the cottage will be a non-cash dividend of $6,000 ($3,000 each). Siena and Arlo will need to return this dividend in their income tax returns.

Employment income

64. Sometimes a company may employ its shareholders or others as employees to manage the short-stay accommodation services for the company (eg, assisting with booking queries, providing property access and help to guests, cleaning and providing fresh linen). Where a company employs a shareholder or other employee to manage the short-stay accommodation, the employee will derive employment income for providing these services.[13] The company is still the entity providing short-stay accommodation and is still the entity deriving the income from that activity.
65. The company may decide to provide an employee with the use of the dwelling for their personal use. Where a company provides accommodation to an employee who is also a shareholder, this benefit will usually be taxed as employment income rather than a deemed dividend. Employment income can include non-cash benefits, such as the provision of accommodation. Employment costs, including providing an employee with accommodation, are costs related to employment, and remain deductible to the company.
66. The market value of accommodation a company provides to an employee is taxable income of the employee if the company provided it in relation to their employment.[14] The meaning of "accommodation" includes the use of a house or part of a house.[15] The value of accommodation that an employer provides to an employee in connection with their employment or service is not a fringe benefit.[16] Where a shareholder-employee receives employment income under s CE 1B, the amount is not treated as a dividend.[17]

12 Section CD 39.
13 The amount of employment income paid by a close company to shareholders may be subject to excessive remuneration rules in s GB 25.
14 Section CE 1B.
15 Section YA 1 definition of "accommodation".
16 Section CX 28.
17 Section CD 32.

67. When a company provides an employee with accommodation, and the employee uses part of the accommodation wholly or mainly for work purposes related to their employment, the amount of employment income they receive may be apportioned for that business use. This apportionment could apply if the employee is required to stay at the property to undertake significant repair work on rooms that were damaged by guests (which the employee cannot use). It would not apply if, for example, an employee stays for a weekend and tidies up the property while there (as part of the accommodation is not provided wholly or mainly for work purposes).
68. Example | Tauira 5 illustrates a situation where a shareholder-employee's use of a dwelling is treated as employment income.

Example | Tauira 5 – Shareholder-employee's use of a house owned by the company

B&B Holidays Ltd owns several houses in a popular holiday area and undertakes the activity of providing short-stay accommodation. Georgie is a shareholder of B&B Holidays Ltd. B&B Holidays Ltd employs Georgie to manage bookings, prepare and clean the properties and deal with guests, and pays her market rates for these services.

If Georgie has occasional use of one of the company's houses without paying market rent and undertakes a few small jobs such as tidying up the property while she is there, she will be treated as receiving employment income equal to the short-stay accommodation market rental value for the whole house for that period. Part of the property is not used wholly or mainly for work purposes related to her employment.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Income Tax Act 2007, ss CB 1, CC 1, CD 1, CD 4, CD 5, CD 6, CD 32, CD 39, CE 1B, CX 28, DA 1, DA 2, DB 7, DG 7, GB 25, GC 5, s YA 1 (“accommodation”, “services”).

Other references | Tohutoro anō

DET 19/02: Standard-cost household service for short-stay accommodation providers *Tax Information Bulletin* Vol 31, No 6 (July 2019): 67
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QB 25/04: Income tax – How do the standard tax rules apply if I provide short-stay accommodation?
taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2025/qb-25-04

QB 25/05: Income tax – If property held in a trust is rented out for short-stay accommodation, who declares the income and what deductions can be claimed?
taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2025/qb-25-05

Ring-fencing of residential property deductions *Tax Information Bulletin* Vol 31, No 8 (September 2019)
taxtechnical.ird.govt.nz/tib/volume-31---2019/download-tib-vol31-no8

Special report on mixed-use assets (Inland Revenue, August 2013)
taxpolicy.ird.govt.nz/publications/2013/2013-sr-mixed-use-assets

LEGAL DECISION – CASE SUMMARIES

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.

CSUM 25/08: Absence of evidence makes it impossible to prove nexus with the expenditure and the claimed deductions

Decision date: 16 January 2025

Case

The Disputant v The Commissioner of Inland Revenue **[2025] NZTCRA 01 (TCRA)**

Legislative References

Income Tax Act 2007, ss BD2, DA 1, DA 2, HG 1

Tax Administration Act 1994, ss 42(4), s 138G, s 138E(1)(e)(iv), s 149A(2)

Case Law References

Commissioner of Inland Revenue v Banks [1978] 2 NZLR 472 (CA)

Buckley & Young Ltd v Commissioner of Inland Revenue [1978] 2 NZLR 485 (CA)

Case V17 (2002) 20 NZTC 10,192 (TC)

Accent Management Ltd v Commissioner of Inland Revenue (2005) 22 NZTC 19,027 (HC)

Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue [2008] NZSC 115, [2009] 2 NZLR 289 (SC)

PL Brown Farms Ltd v Commissioner of Inland Revenue [2014] NZHC 1601 (HC)

Commissioner of Inland Revenue v Trustpower Limited [2015] NZCA 253 (CA)

Trustpower Limited v Commissioner of Inland Revenue [2016] NZSC 91 (SC)

Forum

The Taxation and Charities Review Authority

Revenue Type(s)

Income Tax

Result

The Disputant's challenge to the income tax assessments for the years 2013, 2014 and 2015 were dismissed, and the Commissioner's assessments were upheld without alteration.

Summary

The Taxation and Charities Review Authority (**TCRA**) upheld the income tax assessments by the Commissioner of Inland Revenue (the **Commissioner**) because the evidence failed to establish a material link between the disputed expenditure and the receipt or expectation of income.

The Disputant had business interests with a Mr A which concerned an intended business of exporting dairy products to Asia through various corporate entities (the **dairy business**). The Disputant paid money to Mr A related to the expenses of the dairy business and sought to deduct those payments against his other income. The Disputant alleged that the legal fees Mr A and/or the other corporate entities in the dairy business paid him, proved a connection with the expenses he had paid to Mr A. The Disputant's position was that he was engaged in legal practice and other business activities, and the expenses at issue were simply part of his other business activities and were deductible on ordinary principles.

The Commissioner's position was, the Disputant is not entitled to deduct the payments he paid to Mr A because the expenses were not related to earning his taxable income; and regardless the payments were capital expenses which are not deductible.

The Disputant also claimed there was a "loose agreement" for an unincorporated joint venture with himself and Mr A which used corporate entities as vehicles to develop the joint enterprise. The Commissioner said the Disputant had raised this too late in the process to be considered by the TCRA.

The TCRA found that there was no evidence as to what Mr A did with the money the Disputant paid him; there was no evidence to suppose Mr A paid the money to a third party to create a source of income for the Disputant from some other entity. The TCRA could only conclude that the Disputant had paid Mr A.

The Disputant failed to prove that the legal fees paid to him by Mr A and/or companies involved in the dairy business were connected with the expenses he had paid to Mr A. This was because there was no contract or other arrangement that would establish a nexus of that kind.

The TCRA found the "loose agreement" failed to advance his case as the evidence failed to show what the terms of the "loose agreement" were, who was involved in it or how the Disputant was to receive income from it. The Disputant needed to show that as part of this unincorporated joint venture, he was personally involved in sharing expenses and/or income in some way and show a nexus with the expenditure he claims to deduct. The evidence did not support that. Instead, the paucity of evidence left the TCRA with no foundation to conclude there was a joint venture of any kind. Furthermore, the Disputant failed to prove that he met the general permission under either section DA 1(1)(a) or (b) of the Income Tax Act 2007 (**ITA**).

Facts

The Disputant was a lawyer who operated his legal practice personally; it was not an incorporated law firm. While practising, the Disputant developed business interests with Mr A which concerned the dairy business. The Disputant was a director and shareholder of two of the entities involved, **Entity 1** and **Entity 2**.

Trading as the Disputant's Legal Practice, the Disputant agreed to provide legal services to Mr A under a letter of engagement dated 22 January 2008 which contemplated legal advice and services being provided in respect of Entity 1 and another entity called ABD. It did appear that the relevant services were provided to Mr A under the letter of engagement including during the 2013, 2014 and 2015 tax years. However, Entity 1 was not incorporated until 24 March 2011 (Entity 2 was incorporated on 17 July 2015). There was no evidence of a separate letter of engagement for either entity, but the Disputant did invoice Entity 1 and Entity 2 and one other entity for legal services and the use of an office space.

The Disputant's Case

The Disputant paid Mr A money relating to expenses of the dairy business during the 2013 to 2015 tax years and deducted those payments against his other income. The Disputant said he was entitled to claim the deductions because he had an unincorporated joint venture with Mr A. The "loose agreement" they had was to use corporate entities as vehicles to develop a joint enterprise. The Disputant's position was that the payments to Mr A were to:

a) obtain business clients;
b) research market demands and packaging;
c) arrange finance and contracts;
d) manage customs and GST issues;
e) manage supply issues;
f) manage logistics and importation; and
g) manage market regulatory issues.

The Disputant claimed that his legal practice was only a trading name and that he personally was the entity engaged to provide legal services and engage in other business. As such, the expenses in issue were simply part of his non-legal business activity and were deductible on ordinary principles.

The Disputant also put forward the argument that as he had been held personally liable for approximately $900,000 (settled for a payment of $350,000) in a High Court liquidation matter where he was sued by one of the companies involved in the joint venture with Mr A. This was proof of the nexus between his non-legal business and his other income.

The Commissioner's Case

The Commissioner said there was no adequate nexus between the derivation of his own income and the disputed expenditure. Everything turned on s DA 1 of the ITA which required a nexus with income before expenditure is deductible (general permission) and whether either of the qualifying conditions were met. The Commissioner's position was that the capital limitation in s DA 2(1) of the ITA prevents deductibility because the expenditure was capital in nature.

The Commissioner did not dispute the payments claimed were paid and the amounts correctly quantified. The Commissioner's position was that on the facts:

a) The Disputant did not derive any income from the dairy business;
b) The structure of the dairy business was that a company would earn income, and that was a separate entity from the Disputant;
c) It was the companies, not the Disputant that entered into contracts for the supply of products, so the Disputant could not have earned income from the dairy business under those arrangements;
d) The Disputant had admitted his expectation of income was to earn dividends from the companies after they earned income from the contracts and proposed contracts; and
e) The expenditure was to establish a business, not operational matters and accordingly capital in nature.

Furthermore, the onus is on the Disputant to prove that the assessments were wrong and by how much they were wrong. It is not sufficient to establish that some of the expenditure was not capital but rather a necessity to establish with reasonable clarity that at least a probable amount was not capital.

As to the unincorporated joint venture, the Commissioner said this argument was affected by s 138G of the Tax Administration Act 1994 (**TAA**), which provides that after a "disclosure notice" is issued only the "issues and propositions of law that are disclosed in the Commissioner's and disputant's statements of position" may be advanced. There was also no evident legal effect of the unincorporated joint venture status and no documentation to substantiate the characterisation.

Issues

The issue before the TCRA was confined to whether payments made to Mr A were deductible. The TCRA had to determine:

a) The nature of the disputed payments;

b) he reasons for the payments; and

c) Then apply the relevant legal tests to determine whether the Disputant was entitled to claim deductions. The key tests were first (1) whether the payments were made in deriving the Disputant's income, or in the course of carrying on a business to derive his income (general permission). If one or other of those bases for entitlement to deduct are established, then (2), whether deduction is none-the-less prohibited as the payments were capital in nature.

There was also the ancillary issue of whether there was a joint venture particularly as the Commissioner contends the Disputant had raised this too late in the process for it to be considered by the TCRA.

Decision

Nexus

The TCRA held that the evidence did not establish a material link between the disputed expenditure and the receipt or expectation of income. While the evidence was sufficient to conclude that the Disputant had paid Mr A the disputed expenditure, there was no contract or other arrangements whereby Mr A would pay him income because of those payments (the evidence to the extent it exists was to the contrary). Furthermore, there was no evidence as to what Mr A did with the money and accordingly there was no evidence to suppose Mr A paid the money to a third party to create a source of income for the Disputant from some other entity.

The TCRA held:

> I must necessarily conclude that on the evidence produced I cannot reach conclusions as to where the expenditure went or in what proportions, aside from it being paid to Mr A. There is no evidence, nor can I reasonably infer that Mr A was a potential source of income for The Disputant because of the expenditure.

The disputed transactions

The Disputant had placed some reliance on a judgment in a liquidation proceeding. The TCRA held that the evidence in that proceeding did not assist the TCRA in deciding this matter.

The TCRA said the only thing that is clear is that the Disputant breached his duties as a director of a company and was found liable to pay damages; there is no link in the evidence between that company and the expenditure in issue here.

Capital Limitation

For the Disputant, to overcome the capital limitation, he needed to prove what the nature of the expenditure was and quantify the revenue expenditure.

The TCRA concluded that:

> The evidence simply does not address those issues in a way that permits any meaningful evaluation. The principles in the *Buckley & Young* case must apply, there can be no deduction without quantification of how much expenditure was of a revenue nature.

An unincorporated joint venture

The TCRA was satisfied on the facts that there was no joint venture.

The TCRA held that if it had been satisfied that there was a joint venture, then allowing deductions to the appropriate extent established on the evidence would be necessary. However, the evidence was not sufficient to support the existence of a joint venture. The evidence did not establish with any particularity what the relationships between the entities were, and their connection with the Disputant and Mr A, other than some information regarding shareholding and in some cases details of directors. There was no evidence of any contracts or agreements between any of the other entities, this included between Mr A and the Disputant regarding the sharing of profits or costs. The Disputant also did not provide evidence that the necessary steps to create a group of companies for tax purposes was taken (or that it could have been taken).

The TCRA held that the absence of evidence is an important and determinative issue that makes it impossible for the Disputant to succeed. The TCRA said:

> I am conscious that The Disputant represents himself. While he was a lawyer, tax disputes are not a matter where his key areas of expertise lay. Accordingly, I have been conscious of the potential for The Disputant not to appreciate the importance of providing some aspects of relevant evidence. However, The Disputant has been through the tax dispute process before these proceedings commenced. The Disputant has been repeatedly required to provide all relevant information, and the dispute process has clearly focused his attention on the material issues. Indeed, when The Disputant produced information shortly before the hearing the Commissioner's counsel explored those issues with him in cross-examination. Accordingly, I am satisfied that any absence of evidence is not the result of confusion or lack of understanding. I have no reason to think that The Disputant has not had an informed opportunity to present any information that may support his case.

Conclusion

The Disputant's challenge to the assessments was dismissed, and the assessments upheld without alteration.

CSUM 25/09: Lack of complete financial records secures TCRA win for the Commissioner in major income suppression case

Decision date: 13 December 2024

Case:

Disputant 1, Disputant 2, Disputant 3, Disputant 4, Disputant 5, Disputant 6 v The Commissioner of Inland Revenue [2024] NZTRA 004

Legislative References

Tax Administration Act 1994, ss 15B, 22, 89AB(5), 89C(eb), 89D(1)(b), 89N, 89P, 108, 114, 138E(1)(e)(iv), 141(1), 141E(1), 143B(1), 148(1) and 149A(2)

Evidence Act 2006, section 92

Lawyers and Conveyances Act (Lawyers: Conduct and Client Care) Rules 2008, rule 13.8

Case Law References

Buckley & Young Ltd v Commissioner of Inland Revenue [1978] 2 NZLR 485 (CA)

*Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Reven*ue [2008] NZSC 115, [2009] 2 NZLR 289 (SC)

R v Soutar [2009] NZCA 227 (CA)

R v Dewar [2008] NZCA (CA)

Jones v Dunkel (1959) 101 CLR 298 (High Court of Australia)

Edwards v Commissioner of Inland Revenue [2016] NZHC 1795 (HC)

Great North Motor Co Ltd (in receivership) v Commissioner of Inland Revenue [2017] NZCA 328 (CA)

Babington v Commissioner of Inland Revenue [1957] NZLR 861 (New Plymouth SC)

Cross & Goulding v Commissioner of Inland Revenue [1987] 1 NZLR 498 (1987) 9 NZTC 6,101, (CA)

Tannadyce Investments Ltd v Commissioner of Inland Revenue [2011] NZSC 158 [2012] 2 NZLR 153 (SC)

Case Y14 (2008) 23 NZTC 13,137 (TRA)

Legal terms

Suppressed income, income tax, underreported income, contemporaneous documentation, unexplained sources of income, unexplained deposits

Summary

The Commissioner of Inland Revenue (**CIR**) assessed the 6 Disputants (four brothers and their two brothers-in-law) on numerous deposits into bank accounts they controlled. The Disputants were involved, in different ways, with two companies involved in exporting vehicle parts from New Zealand to the United Arab Emirates (**UAE**). A related company received the vehicle parts in the UAE and sold them there. Funds were remitted to the Disputants from the UAE. The CIR considered these deposits were taxable and the Disputants had underreported their income for tax purposes.

The Disputants contended that the funds came from private and non-taxable sales of land and timber and related loan instruments in Afghanistan and Pakistan. They claimed the funds were correctly remitted to private bank accounts and were correctly not returned as income by two New Zealand based companies and themselves.

The Taxation and Charities Review Authority (**TCRA**) dismissed the Disputants challenges to the CIR's assessments and upheld the assessments without alteration. The TCRA concluded that the best measure of the Disputant's probable income were the deposits into the various bank accounts they each controlled. The discrepancy between the amounts they had reported and what was deposited into the accounts were both so great that it was not plausible that the Disputants were unaware of the true source of funds. As such, any material lack of knowledge is implausible.

The TCRA was satisfied that it was probable that each of the Disputants were aware of their true income, knew that it was not all reported to the CIR and intended to evade the assessment or payment of tax by filing returns that were false and misleading. The assessments by the CIR stand.

Impact

The judgment upheld well established principles and made distinct rulings in relation to ss 89C, 89M and 108 of the Tax Administration Act 1994 (**TAA**) and Inland Revenue's Disputes Review Unit (**DRU**) as follows:

- A challenge proceeding is not a judicial review, and the authorities give no encouragement to judicial review processes as a preliminary or parallel process with a challenge proceeding.
- Section 89C(eb) is not grounds for, or part of, a challenge proceeding.
- There is nothing in s 89M or related provisions in the TAA that requires an independent reviewer.
- It is apparent that from the terms of s 89M(4), that it is not necessary to provide evidential material with a SOP; it is sufficient to outline the facts and evidence.
- The first limb of the time bar exceptions is s 108(2)(a), based on a return being fraudulent or misleading. The second limb is s 108(2)(b), based on failing to mention income of a particular nature or source. It is important to recognise that the second limb does not require the return to be fraudulent or misleading. It is enough that the return omitted the income of that nature or source.
- The TAA does not establish any procedural step in a dispute that the DRU is required or directed to undertake. The TAA does not refer to the DRU by name or identity. The published guidelines relating to the administration and decision-making in disputes do not and cannot override the provisions in the TAA or other tax legislation. The TCRA has no jurisdiction to review the CIR's practice statements, only the effect of legislation.

Facts

This is an income suppression case. Between 1 April 2006 and 31 March 2018, the CIR considered identified 237 disputed deposits were taxable and the Disputants had, through the filing of falsified income tax returns, intentionally suppressed their income. The Disputants returned minimal income and claimed working for family tax credits (**WfFTC**).

The CIR issued amended assessments for the years in dispute to include, as income, the disputed deposits. The Disputants were also paid WfFTC for the children in their care and because of the amendments, the CIR issued amended assessments to include the amounts of WfFTC each of the six Disputants were required to repay.

The primary determination the TCRA had to make was whether the Disputants had proved that all the disputed funds were from the sale of family assets or otherwise were non-taxable; and, if not, whether part of the funds were not subject to tax.

The Disputants contended that the funds came from private and non-taxable sales of land and timber and related loan instruments in Afghanistan and Pakistan (disputed transactions) – transactions which were private capital sales and not taxable in New Zealand. The CIR considered the explanations as to how the money from the transactions were remitted from Afghanistan a false narrative constructed for this case and concluded that the disputed funds were likely derived from the Disputants' offshore business activity.

In addition to the central issue, the TCRA was also required to determine five ancillary issues: issuing assessments without the CIR issuing a **NOPA** (Notice of Proposed Adjustment), tax evasion shortfall penalties and the abuse of process, the validity of the CIR's **SOP** (Statement of Position) and the failure to refer the SOPs to the DRU. These are discussed below.

Decision

The TCRA in summary concluded

The TCRA concluded that the evidence does not establish on the balance of probabilities, in relation to the income tax assessments and WfFTC, that any of the assessments were wrong. Furthermore, that for any of the assessments, the TCRA could not find with reasonable clarity that some lesser amount of taxable income was a more accurate amount to assess for tax.

The TCRA held that the explanations provided by the Disputants to establish their propositions about their taxable income were false, and the best available measure of taxable income was the receipts the CIR had assessed.

Ancillary issues:

Assessment without the CIR issuing a NOPA – s 89C(eb)

The TCRA was tasked with determining whether the disputed assessments were invalid on the grounds that the CIR failed to issue a NOPA before issuing assessments.

The material exception relied on by the CIR is s 89C(eb) that applies if the CIR "has reasonable grounds to believe that the taxpayer has been involved in fraudulent activity". The CIR said s 89D(1)(b) provides that the remedy for a breach of s 89C is the taxpayer may issue a NOPA and that s 138E(1)(e)(iv) excludes s 89C from challenges. The Disputants said the CIR incorrectly relied on section 89C(eb), which is not able to be cured by s 114. Section 114 provides that an assessment made by the CIR is not invalidated through failure to comply with a provision of the tax legislation.

The TCRA was satisfied that it is sensible to recognise the exception in s 89C(eb) applied and the CIR was not required to issue a NOPA before issuing the assessment. Due to the shortfall penalties assessments, the issue has essentially been determined and the TCRA concluded that all 6 Disputants had intended to evade tax which is fraudulent.

Independent reviewer

The Disputants argued that the CIR's review of their SOPs was inadequate as the case officer could not undertake the review which required "independent consideration". They alleged that the team leader of the investigator working on the investigation lacked sufficient independence and did not have enough time (three days) for an adequate review.

The TCRA held:

> There is nothing in s 89M or related provisions in the TAA that requires an independent reviewer. Indeed, it could raise questions of unauthorised delegation. The structure of the TAA is that assessments, NOPAs, SOPs and other similar processes with legal significance are issued by the CIR or an authorised delegate. There is no justification in the legislation for challenging the appropriateness of the person leading the team of investigators making decisions regarding the issue of SOPs in this matter. On the contrary, it would appear to be an unexceptional and appropriate approach. There has been no suggestion that the prescribed form was not used, or that the issuer of the SOPs lacked delegated authority.

Time bar constraints

Section 108(1) enacts the time bar, which is relevantly four years after the end of a tax year in which the taxpayer provides a tax return, and an assessment has been made. An exception is contained in s 108(2), which the CIR relied on. The first limb of the exceptions is s 108(2)(a), based on a return being fraudulent or misleading. The second limb is s 108(2)(b), based on failing to mention income of a particular nature or source. It is important to recognise that the second limb does not require the return to be fraudulent or misleading. It is enough that the return omitted the income of that nature or source.

The TCRA concluded that for each Disputant of which the time bar issue was relevant, each of the relevant returns was false and misleading and they did not mention income from Company 3 (or other material sources). The TCRA held that it necessarily follows that on all the evidence, it is satisfied that the exception to the time bar in s 108(2)(a) applies, as does the exception in s 108(2)(b). Therefore, none of the assessments against Disputant 1 through to Disputant 6 were subject to the time bar.

Tax evasion shortfall penalties – Abuse of process

As the criminal proceedings brought against the Disputants were stayed, the Disputants with little specificity said the assessments were an abuse of process and lacked validity. The Disputants contended the assessments were demonstratively unfair and the application of s 89C(eb) by immediate assessments is obviously flawed. They argued that crippling late payment and interest charges could not be mitigated, when they resulted from the assessments made without the full tax dispute process. They said it was necessary to follow the tax dispute process until the conference stage to avoid unfairness and the CIR chose to delay the tax dispute process until the prosecution of the Disputants was stayed.

The TCRA was tasked with determining whether that was correct, and if so, the consequences.

For all Disputants, the TCRA held that there was no element of invalidity or abuse that could be regarded as vitiating its conclusions regarding the assessments made and it appears this ground is an invitation to change the effects of legislated processes that are outside the TCRA's jurisdiction. The TCRA concluded that that cannot be a justification for failing to determine whether the assessments are correct, being the issue that is within the TCRA's jurisdiction.

The TCRA noted that the Disputants appeared to complain that the "Commissioner delayed the tax disputes process until after his prosecution collapsed". The TCRA held that the prosecutions were stayed because the tax disputes process had advanced sufficiently to be inconsistent with the right to silence that applied to the defendants in a prosecution.

Completing the SOPs in time

The Disputants say the CIR's SOPs did not issue in time. The Disputants issued their SOPs on 21 or 22 November 2019. That triggered a two month response time under s 89AB(5), ending on 21 January 2020. The Commissioner issued SOPs on 17 January 2020 with paper copies delivered on 17 January 2020. Accordingly, those processes were within the mandated response period. However, evidence the CIR relied on was not provided to the Disputants until after 23 January 2020.

The TCRA held that it was apparent that under s 89M(4), it is not necessary to provide evidential material with a SOP; it is sufficient to outline the facts and evidence. The Disputants did not deny the SOPs achieved that, and the TCRA was satisfied that they do. Accordingly, there was no basis to identify any lack of validity of the SOPs.

SOP's and the Disputes Review Unit

The Disputants said the assessments they challenge are invalid because the truncated disputes process by the CIR meant that the SOPs were not referred to the DRU in Inland Revenue before the assessments were made and the DRU wasn't able to consider the issues before the assessments were issued. They argued that consideration of a taxpayer's SOP, where the dispute will not be considered by the DRU, cannot be satisfactorily completed by a case officer simply issuing an SOP; a suitably independent case officer should undertake a review with the aim of reproducing the independence of the DRU.

The TCRA noted that:

a) The DRU is part of Inland Revenue.

b) The DRU is not a statutory body, its officers are part of the Public Service, and operate under delegations like any structure created as part of Inland Revenue.

c) Accordingly, as the DRU is intended to be independent of the investigators and other decision-makers within Inland Revenue, it is not separate from Inland Revenue or able to act in any truly independent way, its decisions are necessarily the decisions of the CIR under delegation.

d) The TAA does not establish any procedural step in a dispute that the DRU is required or directed to undertake. The TAA does not refer to the DRU by name or identity.

The TCRA held that the published guidelines relating to the administration and decision-making in disputes do not and cannot override the provisions in the TAA or other tax legislation. The TCRA has no jurisdiction to review the CIR's practice statements only the effect of legislation. The CIR's evidence and the relevant documents show that the team leader approved a request that none of the disputes in these proceedings be referred to the DRU. To the extent the TCRA has any jurisdiction in relation to that decision and its consequences, it turns on whether the subsequent processes were lawful. The TCRA held:

> The Disputants had not identified any element of invalidity in the statutory process under s 89P. I have not identified any element of the statutory process that was not met when reviewing the oral evidence and documents. Accordingly, I find no merit in this aspect of the Disputants' claims the assessments are invalid.

TECHNICAL DECISION SUMMARIES

Technical decision summaries (TDS) are summaries of technical decisions made by the Tax Counsel Office. As this is a summary of the original technical decision, it may not contain all the facts or assumptions relevant to that decision. A TDS is made available for information only and is not advice, guidance or a "Commissioner's official opinion" (as defined in s 3(1) of the Tax Administration Act 1994). **You cannot rely on this document as setting out the Commissioner's position more generally or in relation to your own circumstances or tax affairs**. It is not binding and provides you with no protection (including from underpaid tax, penalty or interest).

TDS 25/13: Income tax – land transferred within a consolidated tax group

Decision date | Rā o te Whakatau: 24 January 2025

Issue date | Rā Tuku: 19 May 2025

Subjects | Kaupapa

Intragroup land transactions, consolidation rules, distribution in kind

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Taxpayer (Holding Company) was part of a tax consolidated group (the Group). The Group consisted of the Holding Company, an active company (Company A), and several non-active sister companies. Company A had available pre-consolidation losses to carry forward.
2. The Holding Company was the parent company which wholly-owned Company A and the sister companies within the Group.
3. A single shareholder (Person A) wholly-owned the Holding Company directly through shares and, indirectly, held 100% of the shareholding in the subsidiaries which, with the Holding Company, collectively formed the Group.
4. Company A held land used in its business on capital account. Person A decided to reduce risk by diversifying their investments and seeking investment opportunities in other industries. To raise these investment funds, Person A decided that some of the land owned by Company A should be sold to realise capital gains. There was an initial sale of land (Initial Sale Land) by Company A to the Holding Company at cost, and the Holding Company sold that land to a third party purchaser at market value. The Holding Company would then be liquidated to distribute the sales proceeds and shares in Company A and the sister companies to Person A.
5. Company A intended to sell another portion of the land (Further Sale Land) it held to the other companies in the Group at cost, and those companies would immediately sell the Further Land to third parties at market value. The Further Sale Land (which was already divided into separate lots) had been split between a number of sister companies to market and sell the land to third parties.
6. Person A's purpose for liquidating the Holding Company was to transfer the capital gain from selling the Initial Sale Land and the shares in the sister companies out of the Holding Company to themselves through their 100% shareholding. The sister companies would subsequently also be liquidated to transfer the capital gains from selling the Further Sale Land through to Person A via their now direct 100% shareholding interest.
7. A further portion of the land owned by Company A (the Retained Land) would be sold at cost to several new sister companies, which were yet to be incorporated. These new sister companies would be directly and wholly-owned by Person A and would join the Group prior to the sale of the Retained Land. The new sister companies would hold the Retained Land long term and would lease it back to Company A for its trading activities.

Issues | Take

8. The main issues considered in this ruling were:
   - whether ss CA 1(2) and CB 6 applied to the sale of the land;
   - whether ss FC 1 and FC 2 applied to the intragroup land sales; and
   - whether s BG 1 applied to the arrangement.

Decisions | Whakatau

9. TCO concluded:
   - Sections CA 1(2) and CB 6 do not apply to the sale of the land to the third parties and, therefore, the proceeds from the sales were not taxable.
   - The provisions in ss FC 1 and FC 2 do not apply to the intragroup transactions, and the land could be sold to the sister companies for a non-market value. The sister companies (as consolidated group companies) are treated as a single economic entity that could not make a distribution in kind to itself.
   - Section BG 1 does not apply to negate or vary these conclusions.

Reasons for decisions | Pūnga o ngā whakatau

Preliminary issue | Take tōmua: Is a consolidated group a "person"

10. "Person" is defined for all legislation in s 13 of the Legislation Act 2019 to include a body corporate. A "company" as a body corporate is a "person".
11. The preliminary issue was whether a consolidated group is also a "person" when applying the other provisions of the Income Tax Act 2007, including ss CA 1(2) and CB 6.
12. Section 10 of the Legislation Act 2019 requires the meaning of legislation to be ascertained from its text and in light of its purposes and its context.
13. Subpart FM is part of the "consolidation rules" as that term is defined in s FM 2(2). Section FM 2(1) states that unless a provision of the Act expressly provides otherwise or the context requires another result, the Act applies to companies which are part of a consolidated group as if they were a single company.
14. Based on s FM 2(1), TCO concluded that a consolidated group, treated as a single company, was a person for the purposes of the Act and not the individual member companies. This was unless the specific provision being considered expressly provided otherwise, or there were strong contextual reasons requiring another result.

Issue 1 | Take tuatahi: Whether ss CA 1(2) and CB 6 applied to the sale of land

15. Company A sold the Initial Sale Land to the Holding Company and proposes to sell the Further Sale Land to the sister companies. The Holding Company immediately on-sold the Initial Sale Land to third parties. The sister companies will immediately, upon acquiring the Further Sale Land, begin the process of marketing and selling that land to third parties.
16. The issue is whether the proceeds derived or to be derived by the Holding Company and the sister companies from selling the Initial Sale Land and the Further Sale Land to the third parties will give rise to income for the Group under s CB 6 (Disposal: land acquired for purpose or with intention of disposal) or s CA 1(2) (Amounts that are income).
17. The facts show that the Holding Company and the sister companies will acquire the Initial Sale Land and the Further Sale Land, as relevant, with a purpose or intention of disposing of it. If those companies are the persons regulated by s CB 6 and it is their purpose or intention that must be tested for the purposes of that section, those land transactions would give rise to income under s CB 6. Also, the speculative nature of that activity would mean that the Holding Company and the sister companies would otherwise have income under ordinary concepts under s CA 1(2).
18. Despite this, as above, s FM 2(1) (Consolidation rules) states the Act is intended to apply to member companies of a consolidated group as if they were a single company unless another provision expressly provides otherwise, or the context requires another result. For this purpose, ss CB 6 and CA 1(2) do not expressly provide they do not apply to a person that is a single company made up of the members of a consolidated group.

19. Also, the context does not require another result. Section CB 6 is directed to transactions that involve a degree of trading in land. Section CA 1(2) is intended to include income amounts derived by a person from activities they carry on that are of an income producing character. Those purposes will not be frustrated by treating consolidated group companies as a single company, as it recognises that intragroup transactions in economic terms amount to the common owner(s) trading with themselves. Also, single company treatment will not frustrate the purpose of s CB 6 where land has been appropriated to revenue account by transferring it intragroup subject to a change of intention in how the land will be used (rather than just promptly on selling it without more which was the situation here). If the land were appropriated to revenue account, the rule in *Sharkey v Wernher* would treat the land as having been disposed of and reacquired by the Group at the time it was appropriated to revenue account.[1] This would crystallise any capital gain at that point with the land afterwards being held on revenue account.
20. Therefore, the Group is the person that will be regulated by ss CB 6 and CA 1(2) when the Initial Sale Land and the Further Sale Land is sold to the third parties.
21. For the purposes of ss CA 1(2) and CB 6, the Group first acquired the Initial Sale Land and the Further Sale Land through Company A which had a purpose or intention of holding that land and using it as an income producing asset in its business. TCO concluded that the rule in *Sharkey v Wernher* did not apply to the land. Therefore, it is Company A's purpose or intention (as representative of the Group) on originally acquiring the Initial Sale Land and the Further Sale Land that is to be tested under s CB 6 and not the Holding Company's or the sister companies' subsequent purpose or intention. Thus, the Group will not have income under s CB 6 when it sells the Initial Sale Land and the Further Sale Land to the third parties. Neither will the Group have income under s CA 1(2) for those transactions as the Group's activities in holding, using and disposing of the Initial Sale Land and the Further Sale land did not amount to activities of an income producing character.
22. Consequently, the Group, the Holding Company, and the sister companies, as applicable, will not have income under ss CB 6 and CA 1(2) from the proceeds of selling the Initial Sale Land and the Further Sale Land to the third parties.
23. Company A held the Initial Sale Land, the Further Sale Land on capital account at all times before transferring that land.

Issue 2 | Take tuarua: Whether ss FC 1 and FC 2 applied to the intragroup land sales

24. Company A will sell the Initial Sale Land, the Further Sale Land and the Retained Land to the Holding Company, the existing sister companies and the new sister companies, respectively at cost. The issue is whether ss FC 1 and FC 2 will apply to deem those transfers to have occurred at market value.
25. Section FC 1(1)(d) applies where property is transferred on a distribution in kind by a company in a transfer of company value caused by a shareholding in the company under s CD 6. Section FC 2 treats the transfer of property in those circumstances as a disposal by the transferor, and an acquisition by the transferee, on the date of the transaction at the market value for the transferor.
26. A distribution in kind however does not include a sale. As such, ss FC 1 and FC 2 do not apply to a non-market sale of company property to a shareholder of the company or their associate. The sale transaction itself creates an identifiable taxable event at the value allocated to the property by the sale and purchase agreement. This creates no mischief as the amount by which the transaction with the shareholder or their associate is below market price will prima facie fall within the dividend concept under s CD 5(1)(b). However, that transfer of value will occur incidentally as part of the sale of the property rather than the sale of the property being included or involved in the making of a distribution.
27. Company A would transfer the Initial Sale Land, the Further Sale Land and the Retained Land to Company A and the sister companies by way of sale. Therefore, ss FC 1 and FC 2 will not apply to any of the land sales by Company A.
28. TCO would have also reached this conclusion based on the application of the consolidation rules. Company A, the Holding Company, the existing sister companies and the new sister companies will all be members of the same consolidated group when the Initial Sale Land, the Further Sale Land and the Retained Land are transferred. As the consolidation rules require the Holding Company, Company A, and the sister companies to be treated as a single company, that single company cannot make an in kind distribution of company property to itself. Therefore, again, ss FC 1 and FC 2 will not apply.

1 *Sharkey v Wernher* [1956] AC 58 (HL)

Issue 3 | Take tuatoru: Whether s BG 1 applies to the arrangement

29. Section BG 1(1) provides that a "tax avoidance arrangement" is void as against the Commissioner. Section GA 1 enables the Commissioner to make an adjustment to counteract a tax advantage obtained from or under a tax avoidance arrangement.

30. The Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289 considered it desirable to settle the approach to applying s BG 1. This approach is referred to as the Parliamentary contemplation test, which is an intensely fact-based inquiry. *Ben Nevis* has been followed in subsequent judicial decisions.

31. TCO's approach in making this decision is consistent with interpretation statement: **IS 23/01: Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007** (3 February 2023) (IS 23/01). IS 23/01 will not be replicated in this TDS but in summary the steps are as follows:
    - Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement's tax effects.
    - Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
        - Identifying and understanding Parliament's purpose for the specific provisions that are used or circumvented by the arrangement.
        - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts. Artificiality and contrivance are significant factors.
        - Considering the implications of the preceding steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
    - If the arrangement has a tax avoidance purpose or effect that is not the sole purpose or effect of the arrangement, consider the merely incidental test. The merely incidental test considers many of the same matters that are considered under the Parliamentary contemplation test.

32. Considering all the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) TCO has concluded as follows.

33. Company A will transfer the Initial Sale Land and the Further Sale Land to the Holding Company and the sister companies, and the Retained Land to new sister companies, at cost by way of an actual sale. The Holding Company, Company A, and all the sister companies were all members of the Group. The Group had held the Initial Sale Land, the Further Sale Land and the Retained Land at all times on capital account.

34. The Holding Company and the sister companies will then on-sell the Initial Sale Land and the Further Sale Land to the third parties, realising genuine capital gains. The Holding Company and the sister companies will then be liquidated to distribute those capital gains to Person A.

35. The Holding Company and the original sister companies have been members of the Group for a substantial period of time and well before the Arrangement commenced. The new sister companies are yet to be incorporated, but this will occur, and they will join the Group before they receive the Retained Land, which they will acquire without a purpose or intention of disposal. The Group will continue to use the Retained Land in its business carried on by Company A, which will continue in existence.

36. The tax outcomes of the above steps and transactions are that the Group continued to benefit from being able to use Company A's available pre-consolidation losses while at the same time being able to distribute genuine realised capital gains to Person A tax free. Importantly, these tax benefits are underpinned to a certain extent by real commercial purposes (i.e., the restructure of Person A's investments and meeting relevant regulatory requirements). The tax effects are otherwise consistent with Parliament's purpose for the use of:
    - the consolidation rules (i.e., treating the Group as a single economic entity with its sole shareholder, Person A); and
    - the loss rules (recognising that Person A has continuously owned the Group companies and has ultimately borne Company A's pre-consolidation losses).

37. Consequently, viewed as a whole, TCO considered that the real commercial outcomes of the Arrangement are consistent with its legal form. The Arrangement did not involve any artificiality or contrivance beyond what Parliament has contemplated in the context of the consolidation rules. Also, none of the other factors that could indicate there is a tax avoidance arrangement point in that direction.

38. TCO considered that the facts, features and attributes that Parliament's purpose for the specific provisions at issue expect to be present are all in fact present in the Arrangement as a matter of commercial and economic reality.
39. TCO also considered that the Arrangement is commercially explicable and is not artificial or contrived in the context of Parliament's purpose for the consolidation rules. The legal form of the Arrangement also corresponded to its commercial and economic reality.
40. Therefore, TCO considered it could rule that s BG 1 did not apply to negate or vary the other conclusions reached in the ruling.

TDS 25/14: Business restructure

Decision date | Rā o te Whakatau: 18 December 2024

Issue date | Rā Tuku: 6 June 2025

Subjects | Kaupapa

The restructure of a business to change the ownership structure.

Taxation laws | Ture tāke

All legislative references in this summary are to the Income Tax Act 2007 (Act) unless otherwise stated.

Facts | Meka

1. The Arrangement is the restructure of a business operated by Company A under licence. Ownership of Company A was shared between two classes of shares – Class A and Class B. Company A was a New Zealand (NZ) tax resident and was not treated as tax resident of any other jurisdiction under a double tax agreement (DTA).
2. Class A shares had voting rights which were held by individuals X and Y who were close relatives. Class B shares had the distribution rights and were held by another company (Holding Co) which, in turn, was wholly owned by a family trust settled by X and Y, who were also trustees (the Family Trust). X and Y wished to make individual Z (a close relative of X and Y) the business operator. When the licensor was approached for approval to do so, it advised that the existing structure did not comply with its ownership rules and needed to do so before approval could be given. The Arrangement was undertaken to achieve both outcomes.
3. The following steps were taken:
    a. Company A declared a fully imputed dividend using its available imputation credits to Holding Co. Under a Deed of Acknowledgement of Debt and Indemnity between Company A and Holding Co the dividend was left as an interest-bearing loan from Holding Co to Company A.
    b. The licensor approved Z as the business operator on the condition that a compliant ownership structure was put in place before a certain date.
    c. A percentage of the Class A shares in Company A were transferred (at a formula-based value) to Z, comprising all X's shares and a portion of Y's shares.
    d. The Family Trust deed was varied to appoint Z as a trustee, and to make it otherwise compliant with the licensor's ownership requirements.
    e. Company B was incorporated and had the same shareholding structure as Company A. The Class A voting shares were held by Y and Z in the same proportions as in Company A. The Class B non-voting shares with distribution rights were held by the Family Trust. Company B was a New Zealand (NZ) tax resident and was not treated as tax resident of any other jurisdiction under a DTA.
    f. Company A and Company B were then amalgamated and continued as Company B (referred to as Company B - pre amalgamation, and the Amalgamated Company - post amalgamation) with the relevant shareholdings in Company B "converting" to shares of the same class and proportion in the Amalgamated Company. As part of the amalgamation, both Class A and Class B shares in Company A were cancelled for no consideration.

Issues | Take

4. The main issues considered in this ruling were whether entering and performing the Arrangement:
   - resulted in income under s CD 1 for Holding Co with respect to the cancellation of Class B shares in Company A for no consideration;
   - resulted in income under s CD 1 for Y and Z with respect to the cancellation of Class A shares in Company A for no consideration;
   - resulted in income under s CD 1 for Holding Co or the Amalgamated Company with respect to the amalgamation of Company A and Company B.
5. In addition, the Tax Counsel Office (TCO) considered whether the Arrangement was a "tax avoidance arrangement" under s BG 1, and whether s GB 1 applied to it.

Decisions | Whakatau

6. TCO decided that entering and performing the Arrangement did not:
   - result in income under s CD 1 for Holding Co with respect to the cancellation of Class B shares in Company A for no consideration;
   - result in income under s CD 1 for Y and Z with respect to the cancellation of Class A shares in Company A;
   - result in income under s CD 1 for Holding Co or the Amalgamated Company with respect to the amalgamation of Company A and Company B.
7. TCO also decided that ss BG 1 and GB 1 did not apply to the Arrangement.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Income for Holding Co from share cancellation

8. The issue was whether the cancellation of Holding Co's Class B shares in Company A, for no consideration, resulted in income under s CD 1.
9. Section CD 1 relevantly states a dividend derived by a taxpayer is income where:
   - there is a transfer of value from a company to a person where the cause of the transfer is a shareholding in the company (s CD 4);
   - no exceptions apply.
10. Under s CD 6, a transfer of value from a company to a person will be caused by a shareholding in a company if:
    - the recipient holds shares in the company or is associated with a shareholder;
    - the company makes the transfer because of that shareholding;
    - certain exceptions do not apply.
11. TCO considered the description of the Arrangement (see above at [1]-[3]) and concluded Holding Co did not derive any income from the cancellation of its Class B shares for no consideration. There was no "transfer of value" and as such, no dividend received by Holding Co when its shares were cancelled for no consideration.

Issue 2 | Take tuarua: Income for Persons Y and Z from share cancellation

12. The issue was whether the cancellation of Y and Z's Class A shares in Company A, for no consideration, resulted in income under s CD 1.
13. TCO considered that for the same reasons as outlined in [11] above, Y and Z did not derive any income from the cancellation of their Class A shares for no consideration.
14. TCO considered whether it was possible that a "transfer of value" did occur in relation to Y and Z's shares in Company A by virtue of their Company B shares "converting" to shares in the Amalgamated Company.

15. Z's shareholdings in Company A meant that they were an associated person of that company. Y was also an associated person of Company A under the Tripartite test (s YB 4) by virtue of being a close relative of Z. TCO noted that if a "transfer of value" from Company A does arise in relation to Y or Z's Company B shares converting to shares in the Amalgamated company, this may be a dividend to Y or Z (being caused by their shareholding in Company A).
16. However, from an economic viewpoint, Y and Z neither gained or lost value from the conversion of their Company B shares to shares in the Amalgamated company. They held the voting rights in relation to the business assets before the transfer, and they hold the voting rights in relation to the business assets after the transfer (Company A continuing within the Amalgamated company).
17. On this basis, TCO concluded that that there was no transfer of value giving rise to income under s CD 1 for Y or Z in respect of the cancellation of Class A shares in Company A for no consideration or the conversion of Company B shares to shares in the Amalgamated company.

Issue 3 | Take tuatoru: Income for Holding Co or the Amalgamated Company from amalgamation

18. The issue was whether income was derived under s CD 1 by Holding Co or the Amalgamated Company as a result of the amalgamation of Company A and Company B.
19. For Holding Co, TCO considered that the reasons for concluding that Holding Co did not derive income under s CD 1 upon the cancellation of its shares in Company A applied equally here.
20. The Amalgamated Company did receive a transfer of value from the amalgamating Company A in the form of its assets.
21. However, s CD 35 provides a limited exemption from certain amounts being a dividend when derived by an amalgamated company where the amalgamation is a "resident's restricted amalgamation". Specifically, it provides that where an amalgamated company derives an amount from an amalgamating company in a resident's restricted amalgamation, it is not a dividend where each of the amalgamating and amalgamated companies are, at the time of the amalgamation:
    - resident in NZ;
    - not treated as resident in another country under a DTA; and
    - did not derive only exempt income (other than in very limited circumstances).
22. TCO considered the following facts when determining whether s CD 35 applied to the amalgamation:
    - Company A was an NZ incorporated company and an NZ resident.
    - Company A was not treated as tax resident in any other jurisdiction under a DTA.
    - Tax records showed that Company A did not derive only exempt income.
    - Company B was to be incorporated in NZ, an NZ resident, and not treated as tax resident in any other jurisdictions.
23. On this basis, TCO concluded that the amalgamation of Companies A and B was a resident's restricted amalgamation. As a result, TCO concluded the amount derived by the Amalgamated Company from Company A upon amalgamation was exempted from being a dividend under s CD 35.

Issue 6 | Take tuaono: Section BG 1

24. The issue was whether s BG 1 applied to the Arrangement.
25. Section BG 1(1) provides that a "tax avoidance arrangement" is void as against the Commissioner. Section GA 1 enables the Commissioner to make an adjustment to counteract a tax advantage obtained from or under a tax avoidance arrangement.
26. The Supreme Court in *Ben Nevis Forestry Ventures Ltd v CIR* [2008] NZSC 115, [2009] 2 NZLR 289 considered it desirable to settle the approach to applying s BG 1. This approach is referred to as the Parliamentary contemplation test, which is an intensely fact-based inquiry. *Ben Nevis* has been followed in subsequent judicial decisions.

27. TCO's approach in making this decision is consistent with Interpretation Statement: *IS 23/01 Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007* (3 February 2023) (IS 23/01). IS 23/01 is not replicated in this TDS but in summary the steps are as follows:
    - Understanding the legal form of the arrangement. This involves identifying and understanding the steps and transactions that make up the arrangement, the commercial or private purposes of the arrangement and the arrangement's tax effects.
    - Determining whether the arrangement has a tax avoidance purpose or effect. This involves:
        - Identifying and understanding Parliament's purpose for the specific provisions that are used or circumvented by the arrangement.
        - Understanding the commercial and economic reality of the arrangement as a whole by using the factors identified by the courts.
        - Considering the implications of the preceding two steps and answering the ultimate question under the Parliamentary contemplation test: Does the arrangement, when viewed in a commercially and economically realistic way, make use of or circumvent the specific provisions in a manner consistent with Parliament's purpose?
    - If the arrangement does have a tax avoidance purpose or effect, consider the merely incidental test.
28. Considering all the relevant facts and circumstances (noting that as this is a summary it may not contain all the facts or assumptions relevant to the decision and, therefore, cannot be relied on) TCO concluded as follows.

The "arrangement"

29. An arrangement is defined widely and includes enforceable contracts, unenforceable understandings, and all steps and transactions carrying the arrangement into effect.[1] TCO considered this involved the steps outlined above at [1]-[3], which included:
    - Company A declaring a fully imputed dividend, left outstanding as a debt to Holding Co;
    - Z being approved by the licensor and appointed director of Company A;
    - X and Y transferring Class A shares in Company A to Z;
    - variation of the Family Trust deed;
    - incorporation of Company B; and
    - amalgamation of Company A and Company B.

Tax Effects

30. TCO considered the Arrangement would give rise to the following tax effects:
    - Holding Co as shareholder of Company A would derive a fully imputed taxable dividend.
    - Holding Co would be owed a debt by Company A on which interest was payable (at Inland Revenue's prescribed rate for interest on low value loans to employees) by Company A. The interest would be taxable to Holding Co and deductible to first Company A (pre amalgamation), then the Amalgamated Company (post amalgamation).
    - X and Y would make gains when they sell Class A shares to Z but based on the circumstances of their holding of those shares the gains may be expected to be treated as on capital account.
    - There would be no dividend arising to the Amalgamated company or its shareholders in relation to the transfer of assets.
    - There would be a new ASC position for the Amalgamated company, equal to the ASC of Company A and Company B combined.

1 Section YA 1 of the Act.

Whether the arrangement has a tax avoidance purpose or effect

31. TCO concluded that s BG 1 did not apply to the arrangement because it did not have a tax avoidance purpose or effect. TCO considered that the specific features of the arrangement made use of the relevant provisions in a manner that was consistent with Parliament's purpose for those provisions, including:
    - the circumstances of the fully imputed dividend which suggested it was from retained earnings that have already been subject to tax at the company level;
    - interest charged on the dividend held as debt, was set at a realistic level, and was to be treated as income to Holding Co and deductible to Company A (then the Amalgamated Company post amalgamation);
    - the disposal of capital items, being the shares X and Y sold to Z not giving rise to income (under ss CA 1(2), CB 1, CB 3, CB 4, or CB 5);
    - the exclusion of the transfer of value between Company A and the Amalgamated Company from being a dividend because it occurred within a resident's restricted amalgamation; and
    - the absence of an uplift of the ASC of the Amalgamated company post amalgamation.
32. Further, the Arrangement achieved its intended outcomes, and the transactions undertaken were commercially and economically realistic, including:
    - The familial relationships between the parties provided a background as to why the parties chose to transfer control without any consideration passing as would ordinarily be expected in a transaction between third parties.
    - It is within ordinary commercial practice for a business anticipating a substantial change in shareholding to pay out a fully imputed dividend to clear retained earnings into the shareholder's possession before shareholder continuity is lost.
    - An amalgamation achieved the required structure without the necessity of novating contracts (or terminating and entering new contracts), or the sale or other transfer of assets, as would be required if instead assets were sold.
33. Given these conclusions it was not necessary for TCO to consider the merely incidental test.

Issue 6 | Take tuaono: Section GB 1

34. The issue was whether s GB 1 applied to the Arrangement.
35. Section GB 1(1) is a specific anti-avoidance rule relating to dividend stripping or dividend substitution. The section requires three things:
    - a disposal of shares;
    - the disposal is part of a tax avoidance arrangement;
    - some or all the consideration derived from the disposal is in substitution for a dividend.
36. All three requirements must be satisfied for the provision to apply and where it does the amount derived in substitution for a dividend is treated as a dividend.
37. TCO considered that s GB 1 did not apply as the disposal of shares in the arrangement was not part of a tax avoidance arrangement. Further, TCO noted there was a genuine commercial and personal rationale for the transfer of shares reflecting the parties' desire that Z take over the business.

REGULAR CONTRIBUTORS TO THE TIB

Tax Counsel Office

The Tax Counsel Office (TCO) produces a number of statements and rulings, such as interpretation statements, binding public rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The TCO also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal Services

Legal Services manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

Technical Standards

Technical Standards sits within Legal Services and contributes the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters. Technical Standards also contributes to the "Your opportunity to comment" section.

Policy

Policy advises the Government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as Orders in Council.