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Ref	Draft type	Title	Comment deadline
PUB00478	Interpretation statement	Income tax – business activity	5 September 2025
PUB00476	Interpretation statement	GST – taxable activity	8 September 2025
PUB00520	Interpretation statement	GST – Meaning of payment	10 September 2025
PUB00514	Interpretation statement	GST – Secondhand goods input tax deduction	10 September 2025
PUB00491	Question we've been asked	Do the purchase price allocation rules alter the tax book values of Farmland Improvements and listed horticultural plants under subpart DO?	15 September 2025
PUB00492	Question we've been asked	Do the purchase price allocation rules alter the tax book values of Farmland Improvements and listed horticultural plants under subpart DO?	15 September 2025
PUB00521	Question we've been asked	Income tax – Public private partnership projects and business continuity test for losses	19 September 2025

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IN SUMMARY

LEGISLATION AND DETERMINATION

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.

FDR 2025/05: Determination the fair dividend rate method may not be used to calculate FIF income by investors in the iShares Global Aggregate Bond ESG SRI UCITS ETF – EUR hedged (Accumulating) share class

Any investment by a New Zealand resident investor in the EUR hedged (Accumulating) share class of the iShares Global Aggregate Bond ESG SRI UCITS ETF (ISIN IE000APK27S2), a sub-fund of iShares III Public Limited Company (iShares III), to which none of the exemptions in sections EX 29 to 43 of the Income Tax Act 2007 apply, is a type of attributing interest for which the investor may not use the fair dividend rate ("FDR") method to calculate foreign investment fund income for the interest when the investment is hedged to NZD by the New Zealand resident investor.

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. This power has been delegated by the Commissioner of Inland Revenue to the position of Technical Specialist under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Shares in the EUR hedged (Accumulating) class ("EUR Class") of iShares Global Aggregate Bond ESG SRI UCITS ETF ("the Fund"), are an attributing interest in a foreign investment fund ("FIF") for New Zealand resident investors when none of the exemptions in sections EX 29 to EX 43 of the Income Tax Act 2007 apply.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in the EUR Class of the Fund each year.

The Fund is a sub-fund of iShares III incorporated under the laws of Ireland. iShares III is structured as an umbrella fund with segregated liability between sub-funds. These sub-funds do not have a separate legal personality.

The Fund invests in a portfolio of global fixed interest securities. The Fund has on issue several share classes that provide holders of that class with an interest in the pool of securities held by the Fund. The EUR Class of the Fund is denominated in euros. Foreign currency hedging arrangements are in place which, to the extent possible, seek to provide investors in the EUR hedged class with a euro denominated return on the financial arrangements held by the Fund.

Additionally, foreign currency hedging arrangements are in place at the New Zealand resident investor level which effectively provide those investors in the EUR Class of the Fund with a New Zealand dollar denominated return on the financial arrangements held by the Fund.

Section EX 46(10)(cb) of the Income Tax Act 2007 does not apply to prevent the use of the FDR method for interests in the EUR Class of the Fund given that the Fund does not have a distinct legal personality separate from iShares III. As such, the entire portfolio of iShares III is taken into consideration when examining whether the 80% test is satisfied. However, Section EX 46(10)(cb) would apply to prevent the use of the FDR method if the Fund represented a separate foreign company and the EUR Class was the only class of share on issue.

The policy intention is that the FDR method of calculating FIF income should not be applied to investments that provide a New Zealand resident investor with a return similar to a New Zealand dollar denominated debt investment. It is appropriate for the Commissioner to take into account the whole of the arrangement including any interposed entities or financial arrangements in ascertaining whether an investment in a FIF provides the New Zealand resident investor with a return akin to a New Zealand dollar denominated debt investment.

On that basis, where a New Zealand resident invests in the EUR Class of the Fund, and hedging to NZD is undertaken by the New Zealand resident investor, I consider that it is appropriate for them to be excluded from using the FDR method.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination. It applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

- This non-resident issuer:
  - is incorporated in Ireland and issues multiple classes of shares; and
  - is known at the date of this determination as iShares III; and
  - is structured as an umbrella fund with segregated liability between sub-funds.
- The attributing interest consists of the EUR hedged (Accumulating) class of share, issued in iShares Global Aggregate Bond ESG SRI UCITS ETF, a sub-fund of iShares III. This class of shares provides exposure solely to a portfolio predominantly of fixed interest securities and other financial arrangements;
- The investment assets attributable to the EUR hedged (Accumulating) class of share are subject to foreign currency hedging arrangements undertaken by the non-resident issuer for the purpose of eliminating to the extent possible any exchange rate risk for investors between the euro and the underlying portfolio currencies; and
- The New Zealand resident investor maintains a facility to hedge their interest in the EUR Class of the Fund to NZD. The facility will remove 80% to 125% of the foreign currency risk for the attributing interest and be entered with the sole purpose and net effect of offsetting exposure to the foreign currency exchange movements.

Conditions

It is a condition that the investment in the Fund and hedging undertaken by the New Zealand resident investor are part of an overall arrangement that seeks to provide the New Zealand resident investor with a return that is economically equivalent to a debt instrument denominated in New Zealand dollars.

Interpretation

In this determination, unless the context otherwise requires:

"Fair dividend rate method" means the fair dividend rate method under section YA 1 of the Income Tax Act 2007;

"Financial arrangement" means financial arrangement under section EW 3 of the Income Tax Act 2007;

"Foreign investment fund" means foreign investment fund under section YA 1 of the Income Tax Act 2007;

"New Zealand resident" means a person that is resident in New Zealand for the purposes of the Income Tax Act 2007;

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Income Tax Act 2007;

"The Fund" means the iShares Global Aggregate Bond ESG SRI UCITS ETF, a sub-fund of iShares III Public Limited Company.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the fair dividend rate method to calculate FIF income from the interest.

Application Date

This determination applies for the 2025-2026 income year and subsequent income years.

Under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Dated on this 17th day of July 2025.

Iain McConville
Technical Specialist

INTERPRETATION STATEMENT

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 25/18: Income tax – Whether money or property received by New Zealand tax residents from overseas is income from a foreign trust

Issued | Tukuna: 7 August 2025

This interpretation statement considers the income tax treatment of amounts of money or property that New Zealand tax residents receive from a person overseas, including through inheritance. It addresses how to determine whether the person who transfers the money or property is a trustee of a trust and when the resident taxpayer has derived beneficiary income or a taxable distribution from a foreign trust.

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

REPLACES | WHAKAKAPIA

- **IS 19/04**: Income tax – distributions from foreign trusts

Key terms | Kīanga tau tāpua

1. The discussion in this interpretation statement uses terms that may be unfamiliar to some readers. To improve understanding, this section describes these terms in a non-technical way.

Table | Tūtohi 1 – Key terms

Term	Description
Administrators	People appointed by the court to administer an estate.
Assent	Describes what occurs at the point of administration of an estate when, either expressly or by implication, personal representatives accept that estate property can be distributed or should be held on trust.
Bare trust	A trust where the trustee's only duties are to guard trust property and transfer it to a beneficiary when required to do so. A bare trust is treated in the same way as a nominee for tax purposes.
Beneficiary income	Income a trustee derives but is vested in a beneficiary or paid to a beneficiary within prescribed timeframes.
Civil law countries	Countries that have legal systems based on Roman civil law or law other than English common law, such as France and Germany.
Common law countries	Countries that have legal systems based on English common law, such as Australia and New Zealand, rather than Roman civil law or other law.

Complying trust	A trust in which the trustee has paid tax on worldwide income and can distribute amounts other than beneficiary income tax free.
Corpus	The value (at the time of settlement) of property settled on a trust.
Executors	Executors are people the testator appoints to carry out the instructions in a will.
Foreign trust	A trust that has had no New Zealand tax resident settlor.
Non-complying trust	A trust that is neither a complying trust nor a foreign trust.
Non-discretionary trust	A trust where trustees have no discretion to determine the source, nature and amount of distributions to beneficiaries.
Ordering rules	Rules in s HC 16 that specify the components of a distribution to determine whether they are a taxable distribution from a foreign trust or non-complying trust.
Personal representatives	Executors or administrators.
Settlors	Persons who transfer value to a trustee for the benefit of beneficiaries.
Taxable distributions from a foreign trust	Transfers of value that trustees of foreign trusts make to beneficiaries, other than transfers of value that are in any of the categories listed in s HC 15 (eg, beneficiary income, certain capital gains and corpus).
Testators	People who make wills disposing of their property after death.
Trustee income	In general, income a trustee derives that is not beneficiary income.
Trust	A trust is not an entity but a fiduciary obligation on someone to hold property for beneficiaries or charitable purposes.

Summary | Whakarāpopoto

Trusts

2. New Zealand tax residents who are not transitional residents[1] are generally liable to pay income tax on income they derive from sources in New Zealand and worldwide. Their assessable income includes money or property someone offshore transfers to them as "beneficiary income" or a "taxable distribution from a foreign trust"[2].
3. The concepts of beneficiary income and taxable distributions require that the money or property comes from a "trust" as that term is interpreted under New Zealand tax law. When determining the application of New Zealand tax legislation to an arrangement to which the laws of a foreign jurisdiction apply, the Commissioner considers that a two-step approach is required:
    - The first step is to determine the legal rights and obligations that exist between the parties. The contractual arrangements and foreign law are used to determine those legal rights and obligations.
    - The second step is to consider the application of the New Zealand law contained in the Act to those legal rights and obligations. The foreign law is irrelevant at this stage.
4. It follows that the person transferring the money or property must have held it according to arrangements where the essential features of a trust under New Zealand law are present. This means the person must have held the money or property as trust property with an equitable obligation to deal with it for the benefit of a person or charitable object.

1 Transitional residents are, in general, taxpayers who have become tax resident in New Zealand for the first time or previous residents returning to New Zealand after an absence of 10 or more years. They generally do not pay tax in New Zealand on income from foreign sources for approximately 4 years.

2 The distribution could also come from a foreign trust with a New Zealand tax resident trustee but this scenario is not the focus of the statement.

5. Whether such an obligation exists depends on whether the circumstances give rise to something that would be within the concept of a trust if the issue were to be decided under New Zealand law. No matter where in the world property is situated, if the legal basis on which it is owned or controlled and the surrounding circumstances involve obligations that New Zealand law would recognise as trust obligations, then a trust exists. The trust exists whether or not the law of another country would recognise the situation as a trust and whether or not the trust law of another country is the same as trust law here.
6. Where a trust exists (unless it is a "bare trust" – see [138]), a distribution from it will be beneficiary income if it:
   - is current-year income that trustees derive but that vests absolutely in interest in a beneficiary in the income year; or
   - is paid to a beneficiary in the income year (or within the extended time period provided by s HC 6(1B)).
7. For an amount that is not beneficiary income to be a "taxable distribution from a foreign trust", the trust must have had no New Zealand tax resident settlor. In addition, the transfer must amount to a "taxable distribution".
8. A transfer of money or property to a New Zealand resident taxpayer as a beneficiary of a foreign trust is a taxable distribution if it is not excluded by s HC 15(4) (eg, beneficiary income, certain capital gains and corpus[3]). However, the ordering rules in s HC 16 (see from [84]) may apply and may override what would normally be the character of the components of the distribution based on the terms of the trust deed or the trustee's description of the distribution. Applying the ordering rules requires the trust to keep good financial records. The onus is on the beneficiary to obtain that information; otherwise, the entire amount they receive will generally be treated as a taxable distribution.
9. An important exception to the requirement to apply the ordering rules is for distributions from non-discretionary trusts created by will or arising after intestacy (see [90]).
10. A New Zealand tax resident pays tax on beneficiary income and taxable distributions from a foreign trust at their marginal tax rate. Beneficiary income that a minor or a close company derives is excluded income and taxed to the trustee at 39%[4].
11. If a bare trust exists instead of a foreign trust, a New Zealand tax resident may have income from property they hold overseas. Such income may include interest, dividends, financial arrangement income, foreign investment fund (FIF) income, controlled foreign company (CFC) income and rental income.

Estates

12. Where the money or property transferred to a New Zealand tax resident is an inheritance, it may be subject to tax if a foreign trust arises following administration of the deceased's estate. This is unlikely to be the case (although it is possible) where the deceased was a tax resident in a country that does not have the concept of a trust as part of its law. Where an inheritance does not come from a trust because the law in the country concerned provides for immediate succession to the heirs on the person's death, the New Zealand resident taxpayer may need to account for income in New Zealand that they derive from the property inherited as described at [11].
13. To administer an estate in a country with a legal system like that in New Zealand, personal representatives identify the property available for distribution, pay expenses owed by the deceased and then either transfer the property to beneficiaries or vest it in someone acting in the capacity of trustee. Until they have assented to such transfers or vesting, the personal representatives have the legal and beneficial interests in the property which comprises the estate and no trust arises.
14. Where personal representatives are also trustees of a testamentary trust, the residue (or part of it) will vest in those representatives following assent and they will hold it on trust and in their capacity as trustees. Where separate trustees are named, the equitable interest in the property vests following assent but personal representatives must do what is necessary to transfer legal title to the trustees.
15. A bare trust may mark the interval between assent and the time when any beneficiary under the will takes legal title. Where a trust following assent is a bare trust, there is effectively no trust for tax purposes. As described at [11], a New Zealand tax resident may need to account for income they have derived from the property overseas.
16. In contrast, testamentary trusts can take the form of express trusts, life interests and minority interests (see [121]). They will not be bare trusts.

3 Distributions that are a foreign superannuation withdrawal or a pension are also excluded as these are taxed under other parts of the Act.

4 See ss HC 7(2) and HC 7(2B).

17. Like other foreign trusts outside the context of deceased estates, when a foreign trust arises from a deceased estate offshore, amounts distributed to beneficiaries in New Zealand may be beneficiary income or taxable distributions. Any foreign-sourced amounts that an individual derives will not be "reportable income". This means the amounts will not have been pre-populated in the individual's return. Unless the total of income other than reportable income is under $200[5] or the income is beneficiary income of a minor or close company taxable to the trustee, the individual will need to include it separately as "other income" in their tax return. Tax is payable at marginal tax rates.

Tax rules for distributions from foreign trusts

18. This section contains detailed analysis about the tax rules that apply when a New Zealand tax resident who is not a transitional resident inherits or receives a distribution of money or property from someone overseas. If the money or property comes from a foreign trust, the tax resident may have a tax liability.

Tax for New Zealand residents generally

19. This interpretation statement is concerned with the tax rules that apply to a New Zealand tax resident who is not a transitional resident. For the Commissioner's views on the tests for whether somebody is a tax resident in New Zealand, see **IS 25/16**: Tax residence.

20. A New Zealand tax resident is generally liable to income tax in New Zealand on income they derive from sources in New Zealand and worldwide. Exceptions exist for exempt income and excluded income (although excluded income can be taxable under other provisions such as taxable distributions from non-complying trusts: s BF 1(b)). However, for a New Zealand tax resident, if an amount is income, whether it comes from New Zealand or overseas will not generally make a difference to its taxability.

21. Further, an amount may be income that a New Zealand tax resident derives regardless of whether the amount itself ever comes to New Zealand.

22. This principle of taxing the worldwide income of New Zealand tax residents includes income from trusts established overseas. If tax is also paid overseas on current-year income, New Zealand will generally allow a foreign tax credit if the tax is provided for in a double tax agreement or is of substantially the same nature as income tax imposed in the Act.[6]

Taxation of income from trusts – overview

23. The laws dealing with trust taxation[7] (referred to here, for convenience, as the "trust rules") generally tax amounts derived through trusts as "trustee income", "beneficiary income" or "taxable distributions".

24. Trustees are liable for tax on trustee income. Beneficiaries are generally liable for tax on beneficiary income and taxable distributions.

25. Trustee income is generally income trustees derive that is not beneficiary income. Whether an amount a trustee derives is trustee income or beneficiary income depends (broadly) on whether the amount is income that the trustees retain (trustee income), or that is transferred to beneficiaries (beneficiary income) either because:
    - it vests absolutely in the beneficiary; or
    - it is paid within prescribed timeframes.

26. New Zealand tax residents (other than transitional residents) are generally taxable on beneficiary income from all trusts, whether the trustees derived the income from New Zealand or offshore and whether or not it is repatriated. Some beneficiary income is taxed at the trustee level rather than to the beneficiary as noted at [10]. For transitional residents, foreign-sourced beneficiary income is exempt income[8] – that is, it is not taxable.

27. The trust rules classify trusts as complying trusts, foreign trusts or non-complying trusts. These classifications are relevant to determining whether distributions of amounts other than beneficiary income are taxable to New Zealand tax residents. A trust may be both a complying trust and a foreign trust. For the purposes of distributions, a "dual-status trust" is treated as a complying trust.

5 Section 22K(1) of the Tax Administration Act 1994.

6 For more information, see **IS 21/09: Income tax – foreign tax credits – how to calculate a foreign tax credit** *Tax Information Bulletin* Vol 34, No 1 (February 2022): 27.

7 For more information, see **IS 24/01: Taxation of trusts** *Tax Information Bulletin* Vol 36, No 2 (March 2024): 8.

8 See ss HR 8 and CW 27 of the Act.

28. Distributions from complying trusts to beneficiaries are not taxable income to a beneficiary unless they are distributions of beneficiary income.
29. Distributions from foreign trusts to beneficiaries are called "taxable distributions", unless they are distributions of beneficiary income, corpus or certain capital profits. They are taxable to New Zealand tax resident beneficiaries when those beneficiaries derive them.
30. Distributions from foreign trusts with non-resident trustees of beneficiary income and taxable distributions to New Zealand tax resident beneficiaries are the focus of this statement.
31. In most cases, a trust is a foreign trust where no settlor has been a tax resident in New Zealand at any time since a settlement was first made on the trust.
32. Any trust other than a complying trust or a foreign trust is a non-complying trust. Beneficiary income from non-complying trusts is taxable to New Zealand tax residents. Distributions to New Zealand tax residents from non-complying trusts that are not distributions of beneficiary income or corpus are taxable distributions. These are taxed at a rate of 45%. Distributions from non-complying trusts are not the main focus of this statement.
33. With some exceptions (see [90]), "ordering rules" override the nature of distributions from a foreign trust (or a non-complying trust) that would otherwise apply based on the trust deed or the exercise of the trustee's discretion. Broadly (for more detail, see from [84]), these rules determine whether a distribution is treated, for tax purposes, as a distribution of beneficiary income, accumulated trustee income, capital gains of current or previous years, or of corpus. This in turn helps determine whether a distribution is a taxable distribution or not under s HC 15. The ordering rules require current income to be distributed first, then accumulated trustee income, then capital gains and, lastly, corpus. This order applies regardless of what the minutes or records of the trust state.
34. If it is not possible to determine the elements of a distribution accurately from the records of a foreign trust or a non-complying trust, the entire distribution is treated as taxable. The onus is on the beneficiary to obtain information to establish the nature of the components of distributions made to them and to apply New Zealand tax law when determining the character of those components under the ordering rules. This characterisation includes the nature of the income and gains that have been derived by the trustee. Note that if the trustee is non-resident and the trust is a foreign trust, then neither the international tax regime (eg FIF/CFC regimes) or the financial arrangements rules apply when calculating income derived by the trustee under the ordering rules.
35. Table 2 summarises the taxation of distributions from different types of trusts for New Zealand tax residents. It assumes sufficient records exist to apply the ordering rules and identify non-taxable components.

Table | Tūtohi 2 – Summary of the taxation of distributions to New Zealand tax residents

Type of distribution from the trust	Complying trust	Foreign trust	Non-complying trust
Beneficiary income	Taxed at the beneficiary's marginal tax rate	Taxed at the beneficiary's marginal tax rate	Taxed at the beneficiary's marginal tax rate
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

36. A New Zealand tax resident beneficiary who receives beneficiary income or a taxable distribution from a foreign trust or non-complying trust is required to complete a disclosure for the income year in which they derive the distribution. To do so, they complete the form **Schedule of beneficiary's estate or trust income – IR307**.

Taxation of beneficiary income and taxable distributions

37. This statement is concerned with money or property that is distributed or transferred to a New Zealand tax resident except where that money or property is distributed or transferred through a sale or purchase or other transaction and the resident gives market value in return.

38. As noted above, the money or property does not have to be in New Zealand. It can be located offshore – for example, in a bank account in the United Kingdom or a holiday home in Australia.

39. Under ss CV 13, HC 6, HC 17 and HC 18, beneficiary income and taxable distributions that a person derives through foreign trusts are "income".

> CV 13 Amounts derived from trusts
>
> An amount derived by a person is income of the person if it is—
>
> (a) beneficiary income to which **sections HC 6** (Beneficiary income) and **HC 17** (Amounts derived as beneficiary income) apply; or
>
> (b) a settlement on trust of property of the kind described in **section HC 7(3)** (Trustee income); or
>
> (c) a taxable distribution from a foreign trust to which **section HC 18** (Taxable distributions from foreign trusts) applies.

40. Money or property therefore will not be taxable as beneficiary income or a taxable distribution from a foreign trust (or from a non-complying trust) if it does not come from a trust. For income or a distribution to come from a trust, it must be established that the transfer is from something that amounts to a "trust" in terms of the use of that word in the Act.

Whether an arrangement is a "trust"

41. The Act does not define "trust" (other than in a limited definition that relates to superannuation schemes and unit trusts).

42. Section 10(1) of the Legislation Act 2019 sets out how statutes are to be interpreted:

> The meaning of an enactment must be ascertained from its text and in the light of its purpose and its context.

43. In *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22], the Supreme Court commented as follows on this requirement in relation to the Interpretation Act 1999 (which was the predecessor to the Legislation Act 2019 and in place at that time):

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

44. In relation to the text, an important consideration is the natural and ordinary meaning of "trust". Although the *Oxford English Dictionary* gives several meanings, the only one that seems apt is the meaning focused on "law":

> A legal arrangement whereby assets, property, etc., are put in the possession of a trustee or trustees to be held or administered for the benefit of another; assets, property, etc., held in this way.

45. The Trusts Act 2019 (the Trusts Act), which came into force for most purposes from 30 January 2021, has a definition of "express trust". This definition is regarded as consistent with current common law but is not a codification of it.

46. Section 12 of the Trusts Act specifies that, among other things, an "express trust" is a "trust" that must have each of the characteristics set out in s 13:

> 13 Characteristics of express trust
>
> The characteristics of an express trust are as follows:
>
> (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
>
> (b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.

47. To be covered by s 12, an arrangement must be a "trust", which the Trusts Act does not define. Also, although s 12 defines an "express trust", it is only "for the purposes of [the Trusts Act]". As a consequence, the provisions in the rest of the Trusts Act will not generally apply to arrangements that are outside the definition of "express trust". Therefore, such arrangements may still be trusts if law other than the Trusts Act would recognise them as trusts. In s 5(8) and (9), the Trusts Act makes it clear that it does not codify trust law relating to express trusts and that common law and equity rules can still apply if they are consistent with the Trusts Act and other enactments do not require otherwise.

48. For present purposes, the tax laws do not specify that it is necessary to adopt the definition of "express trust" in the Trusts Act. This means that although it is likely that considering the definition of "express trust" will assist with and influence determining what is or is not a "trust" for tax purposes, the meaning to be given to the word "trust" in tax legislation is not limited to the meaning that the Trusts Act gives to "express trust". It is still necessary to consider other possible meanings and descriptions of a trust.

49. *Garrow and Kelly Law of Trusts and Trustees*[9] contains the following definition (at para 1.1):

> A trust is an equitable obligation under which a person (the "trustee") has control of property but is bound to deal with that property either:
>
> a) for the benefit of definite persons (that trustee may be one of them) and any one of them may enforce the obligation; or
>
> b) for some object or purpose permitted by law.

50. Trusts can arise in the following ways:

> • **An express trust**
>
> A person (the settlor) creates an obligation during his or her lifetime. This is often done by the execution of a deed which names the settlor, trustees and beneficiaries and directs how the trust is to be administered.
>
> • **An implied or presumed trust**
>
> The intention to create a trust has not been expressed but is implied or presumed from the circumstances. This includes resulting trusts where property is transferred to trustees for a specific purpose and when the purpose is fulfilled there is a surplus left over. The trustees then hold this surplus for the creator of the trust.
>
> • **The operation of law**
>
> Examples include constructive trusts, or in the case of an intestacy under the Administration Act 1969. In this case an intention to create a trust is imposed by the Court despite the fact that the person in whom the property is vested at the time had neither expressly nor impliedly undertaken any trust.

51. Three certainties must exist for a valid trust:
    - certainty of intention;
    - certainty of subject matter; and
    - certainty of objects.[10]

52. The following points are described as "essential requirements for a valid trust" (*Garrow and Kelly* at para 1.31):
    - There must be a trustee, who is the nominal owner of the trust property. However, a trust will not lapse or fail simply because no trustee has been appointed, nor because there is no trustee living, or willing or able to act. It is a maxim of equity that no trust will be allowed to fail for want of a trustee. So, if it happens that no trustee has been appointed (or a trustee was duly appointed but later dies or refuses or is unable to act) then the court will appoint someone to fill that office. The requirements for legal capacity to be a trustee are generally the same as the requirements for legal capacity to hold property, but there are exceptions.
    - There must be property of a nature capable of being settled on a trust. This would exclude all property that by law cannot be transferred or given away. The property may be real or personal. The legal title to the property is usually, but not necessarily, vested in the trustee. There may be a valid trust in respect of a purely equitable interest; for example, an interest as purchaser under an agreement for sale and purchase of land may be held on trust, or an interest created by another trust may in turn be held on trust.
    - There must be a beneficiary or beneficiaries. A trustee may also be one of the beneficiaries, but cannot be the sole beneficiary, that is, a person cannot hold property on trust for himself or herself alone. This is because there would then be no separation of the nominal from the real ownership of the property. A beneficiary, who is of full age and is absolutely entitled to the property, can call on the trustees to transfer the property to that beneficiary and thus put an end to the trust.
    - There must be an obligation on the trustee to deal with the trust property for the benefit of the beneficiaries. This obligation is purely an equitable one, which means: —it is enforceable only in a court which has equitable jurisdiction; —it gives rise to defences applicable only to equitable rights; and —purely equitable remedies are available.

9 C Kelly and G Kelly *Garrow and Kelly Law of Trusts and Trustees* (online 8th ed, LexisNexis, Wellington, 2022).

10 See s 15(1)(b) of the Trusts Act and *Knight v Knight* (1840) 3 Beav 148.

53. Note that these descriptions of the legal concept of a trust appear materially similar to the definition of "express trust" in the Trusts Act. It could therefore generally be expected that an arrangement that meets the Trusts Act definition of "express trust" would also be a trust for tax purposes, while an arrangement that does not have the characteristics listed in s 13 of the Trusts Act would be highly unlikely to be a trust for tax purposes. However, while it may reflect the current state of equity and common law on the concept of a trust and therefore be influential, it is possible that court decisions in the future may move from the position in the Trusts Act so it should not be taken as **determining** whether an arrangement is a trust for tax purposes.

54. *New Zealand Trusts and Asset Planning Guide*[11] notes (at para [120-201]) that the question of whether a trust arises is to be determined objectively:

> It is not necessary that at the creation of a trust, the settlor or testator should appreciate that their acts or words have the legal consequences inherent in a trust, for it to be valid. The assessment has been held to be an objective one, so that **where a transaction objectively appears to be a trust, it will be held to be a trust**, even if it is unclear whether the settlor actually intended for there to be a trust, and the settlor's ignorance of the law of trusts would not necessarily be determinative: *Ochi v Trustees Executors Ltd* (2009) 2 NZTR ¶19-044 (HC) at [30]. [Emphasis added]

55. The position under New Zealand law (both generally and under the Trusts Act) is, therefore, that a trust is not an entity but a description of an equitable obligation the law imposes on a person holding property to deal with that property in a certain way; namely, for the benefit of beneficiaries or a charitable purpose. The circumstances required to give rise to a trust are that there is such a person (the trustee), as well as property that can be the subject of the trust and someone (a beneficiary) for whose benefit the property is held, and the law imposes the required obligation. It is an objective exercise to determine whether a trust exists.

56. The legal concept of a trust is consistent with dictionary meanings for present purposes. No other concept would be commonly understood to be a "trust", in New Zealand at least. Other countries that have the concept of a trust have similar requirements for identifying arrangements as trusts. These circumstances suggest that the legal concept of a trust is likely to be what is intended generally in the trust rules in the Act when the word "trust" appears.

57. These circumstances also suggest that the natural and ordinary meaning of "trust" in the tax legislation is along the lines of what would be held to be a trust under New Zealand law. That is, a trust is not an entity but a description of the obligations and duties on persons who hold property for the benefit of other persons.

58. The trust rules include, relevantly, subpart HC, which contains most of the provisions concerning taxing trusts and distributions from trusts. Section HC 1(1) describes what these provisions do:

> **HC 1 What this subpart does**
>
> *What this subpart does*
>
> (1) This subpart, together with the trust rules, —
>
> (a) provides for the taxation of distributions from trusts, for this purpose defining—
>
> (i) beneficiary income:
>
> (ii) a taxable distribution:
>
> (b) provides for the taxation of trustee income:
>
> (c) classifies trusts into the following 3 categories for the purposes of determining the treatment of distributions that are not beneficiary income:
>
> (i) complying trusts:
>
> (ii) foreign trusts:
>
> (iii) non-complying trusts:
>
> (d) determines who is a settlor, and sets out their income tax liability:
>
> (e) sets out the treatment of trusts settled by persons becoming resident in New Zealand.
>
> …

11 *New Zealand Trusts and Asset Planning Guide* (online looseleaf ed, CCH New Zealand).

59. Section HC 1(1)(c) states that trusts are to be classified into three categories for the purposes of deciding the tax treatment of distributions that are not of beneficiary income. Section HC 9 provides that:

> **HC 9 Classifying trusts**
>
> A trust is classified at the time it makes a distribution as—
>
> (a) a complying trust under section HC 10:
>
> (b) a foreign trust under section HC 11:
>
> (c) a non-complying trust under section HC 12.

60. As mentioned at [27], a dual-status trust is both a complying trust and a foreign trust. Each category is a classification of a trust, so belonging to two such categories does not address the question of whether something that would not be a trust according to New Zealand trust law should be a trust for the purposes of the trust rules.

61. However, nothing in the legislative context suggests that the word "trust" is intended to have a special meaning when it is used in the sections dealing with "foreign trusts" or that something needs to expressly describe an arrangement as a trust for a trust to exist. If the surrounding circumstances, considered objectively, show that an arrangement has the essential features of a trust under New Zealand law, the property should be seen as held on trust for the purposes of the trust rules.

62. One way of illustrating this intention as to meaning is to consider what the trust rules would clearly apply to and why. It is uncontroversial, for instance, that the trust rules apply to real estate situated in New Zealand that a New Zealand resident trustee holds on the terms of a conventional trust deed for the benefit of someone else. This status applies whether the beneficiaries of the property are resident or are not. The property would be regarded as held in trust for the beneficiaries under New Zealand law, and there could be no argument about treating the arrangement as a trust that is subject to the trust rules. If the arrangement has a New Zealand settlor, then it would not be a foreign trust, but it would still be a trust.

63. The same applies to foreign property that a foreign trustee holds. Distributions to New Zealand tax resident beneficiaries can be taxable if they satisfy the criteria in the relevant provisions of the Act. The location of the property, the settlor or the trustee need not make a difference to identifying whether a trust exists although the tax residency of the settlor, trustee and beneficiaries can affect the tax treatment.

64. Many of the provisions in the Act that apply to "foreign trusts" can be taken to assume that property in foreign jurisdictions can be subject to a "trust" or that persons (trustees) can owe duties in relation to a New Zealand–situated property, wherever those persons might be resident (although the settlor must not be a New Zealand tax resident). For these provisions to have meaningful effect, it must have been intended that the "trust" concept is not limited simply because another jurisdiction might not have the same rules as to what a trust is or how a trust operates or might not have any such rules for that matter.

65. It is New Zealand tax law that is being applied to a "taxable distribution from a foreign trust" and New Zealand tax law (the trust rules) that is being interpreted. It is therefore appropriate that it should be the New Zealand law concept of a trust that applies; that is, what a trust is according to the law of this country. Otherwise, in any situation that would clearly be a trust under the law here, it would be possible to argue that it is not subject to the trust rules because the laws of another country would not recognise the situation as a trust.

66. A proposition in *Bennion, Bailey and Norbury on Statutory Interpretation*[12] is consistent with this position. At 22.9, it states that a "term is presumed to have its ordinary meaning in the territory to which an enactment extends, even if it applies in relation to a foreign context". A comment then discusses the proposition:

> Difficulties may arise where an enactment refers or applies to something outside the territory to which it extends, and uses words which have a different meaning outside the territory from the meaning they have within it. The presumption is that the words should be given 'their ordinary meaning in the English language as applied to such a subject-matter' (*Clerical, Medical and General Life Assurance Society v Carter (Surveyor of Taxes)* (1889) 22 QBD 444 per Lord Esher MR at 448). Here the reference to the English language means that language as understood in the territory to which the enactment extends.

12 D Feldman, D Bailey and L Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020).

67. Identifying whether a distribution comes from a trust would seem to involve a similar question to the question of whether an enterprise is a body corporate so as to be a "company", a defined term for New Zealand tax purposes. Professor John Prebble[13] summarised what he considered should be the analytical steps to determine whether an entity organised under foreign laws met the requirements to be a company:

> That is New Zealand would refer to the foreign law to determine the nature of the entity, but would characterise the entity according to its own notion of what is, and of what is not, a body corporate. The question as to whether the participators were shareholders or partners, and, if the former, whether they had derived a dividend, would follow, more or less automatically, being determined in the same manner, by reference to rights and duties established pursuant to the foreign law, but characterised according to New Zealand law.

68. *C L Dreyfus v IRC* (1929) 14 TC 560 (CA) and *Ryall v The DuBois Company Ltd* (1933) 18 TC 431 (CA) are examples of cases in which the courts, for English revenue law purposes, have given significance to the way the law applies in a foreign jurisdiction. In *Dreyfus*, the separate legal personality of an entity in France meant it was not a "partnership" for the purposes of the Income Tax Act 1918 (UK). In *Ryall*, the court considered the German entity in question had similar attributes and was the same in nature as an English limited company. The decision was, therefore, that amounts the taxpayer received in England were income from "stocks" or "shares" even though they came from an entity that was incorporated in a different jurisdiction.

69. In the Canadian case of *Sommerer v The Queen* (2011) TCC 212, the Tax Court of Canada considered that, to determine whether a foreign arrangement (an Austrian "foundation") should be treated as a trust, it was necessary to identify the essential elements of a trust under Canadian law and compare them with the elements of the foreign arrangement. On appeal (*Sommerer v The Queen* (2012) DTC 5,126), the Federal Court of Appeal reached a conclusion in the case on different grounds but did not disagree substantively with the lower court's approach on this point. It preferred to express the test in terms of the property in question being subject to conditions that are "analogous to the legal and equitable obligations of a trustee in a common law jurisdiction".

70. Conflict of laws principles may also offer some guidance. *Dicey, Morris & Collins* on the *Conflict of Laws*[14] suggests that academic opinion favours a "domestic law of the forum" (or *lex fori*) approach as a solution to the problem of characterising the question to be decided and which law to apply. At [2.0011], it states:

> If the forum has to characterise a rule or institution of foreign law, it should inquire how the corresponding or most closely analogous rule or institution of its own law is characterised and apply that characterisation to the foreign institution or rule.

71. Unless an anti-avoidance provision applies, it is the true nature of the legal arrangements actually entered into and carried out that will determine the tax consequences. It is not their substance or what name the parties give to an arrangement: *Marac Life Assurance Ltd v CIR* [1986] 1 NZLR 694 (CA).

72. The legal arrangements can include the rights and obligations arising for the parties under the laws of a foreign jurisdiction. It does not follow, however, that all arrangements treated as valid trusts in a foreign jurisdiction will be trusts for New Zealand tax purposes, or vice versa. Moreover, New Zealand is not a signatory to the Hague Convention and consequently is not obliged to recognise the existence of a trust on the basis that it is seen as such in a foreign jurisdiction.

73. Each situation requires analysis to determine whether it would give rise to a trust for New Zealand law purposes taking into account the rights and obligations arising under foreign law. For example, it may be appropriate to conclude that an arrangement is not a trust because of the degree of control the settlor retains over trust property, including having it returned to the settlor or where a settlor/trustee has no accountability for what would otherwise be considered a breach of trust. As another example, a foundation in a civil law country might equate to a purpose trust in a common law country but would be treated as a company under New Zealand law.

13 J Prebble, Recognition of foreign enterprises as taxable entities, *Cahiers de Droit Fiscal International* Vol LXXIIIa (1988): 493, at 496.

14 Lord Collins of Mapesbury, J Harris (Eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012).

74. Case law illustrates occasions where arguments have successfully established that arrangements, described as trusts in documents, may not be treated as effective trusts. In *Re the AQ Revocable Trust, BQ v DQ* [2010] 13 ITELR 260, a Bermudan court did not recognise an arrangement as a trust where it was a valid trust under United States trust law. In the United Kingdom, *Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch) considered "trust" deeds which established New Zealand foreign trusts that allowed a former Russian oligarch to retain his beneficial ownership of assets. The court concluded these "trusts" were either bare trusts for his benefit or were a sham. In *Webb v Webb* [2020] UKPC 22, the Privy Council found that as the New Zealand settlor had the power at any time to secure the benefit of all of the trust property for himself and could do so regardless of the interests of other beneficiaries, the trust was invalid. In such circumstances, the rights of the settlor in the trust assets were indistinguishable from ownership.

75. On this basis, the Commissioner considers that the Act uses the word "trust" to refer to the situation where the true nature of the arrangement is that someone who holds property for the benefit of a person or object is under a legal obligation of a particular type. Whether such an obligation exists depends on whether circumstances exist that give rise to something that has the essential features of a trust under New Zealand law. Namely, those circumstances are that a person (trustee) holds trust property and has a fiduciary obligation to deal with the property for the benefit of the beneficiaries or for a charitable purpose. Wherever in the world property is situated, if the legal basis on which it is owned or controlled and the surrounding circumstances are such that there are obligations that New Zealand law would recognise as trust obligations, then a trust exists for tax legislation purposes.

76. In other words, when considering whether an arrangement overseas is a trust for New Zealand tax purposes, the first step is to determine the legal rights and obligations of the parties under the foreign law. The second step is to apply New Zealand law to those rights and obligations.

Beneficiary income and taxable distributions from foreign trusts

77. Once it is established that money or property comes from a trust, the next question is whether anything is taxable in the hands of the recipient. The answer will depend on whether anything is "beneficiary income" or a "taxable distribution" from a "foreign trust".

78. Beneficiary income is defined in s HC 6(1) as:

> **HC 6 Beneficiary income**
>
> *Meaning*
>
> (1) An amount of income derived in an income year by a trustee of a trust is beneficiary income to the extent to which—
>
> (a) it vests absolutely in interest in a beneficiary of the trust in the income year; or
>
> (b) it is paid to a beneficiary of the trust in the income year or by the date after the end of the income year referred to in subsection (1B).
>
> ...

79. A "distribution" is defined broadly in the Act and in terms of a transfer of value to a person because they are a beneficiary of a trust (s HC 14). Section YA 1 defines "transfer of value". It is a net concept in the sense that it takes into account the market value of what the trustee, in this context, provides and the market value of what (if anything) the beneficiary provides in return.

80. Under s HC 11, a trust will be a "foreign trust at a moment in time if no settlor is resident in New Zealand at any time in the period that starts on the later of 17 December 1987 and the date on which a settlement was first made on the trust; and ends with the moment in time". In general terms, a "settlor" is anybody who has transferred value to a trust, such as money or property, without getting something (of at least equivalent value) in return. Therefore, in determining whether a foreign trust is involved, it will be important to know the residence of each person that has transferred value and when these transfers occurred.

81. An amount of beneficiary income will be taxable to a New Zealand tax resident no matter what the classification of the trust is, with two exceptions. The exceptions are where it is minor or close company beneficiary income. This income is taxed to the trustee.

82. Amounts that are distributions from a foreign trust will be taxable if they are a "taxable distribution" as defined in s HC 15(4) to the extent that the distribution does not fall within any of the categories identified in subs (4)(a) to (4)(d):

> **HC 15 Taxable distributions from non-complying and foreign trusts**
>
> ...
>
> *Taxable distributions: foreign trusts*
>
> (4) The distribution is a taxable distribution to the extent to which it is not a distribution of—
>
> (a) beneficiary income; or
>
> (b) a part of the corpus of the trust; or
>
> (c) a profit from the realisation of a capital asset or another capital gain; or
>
> (cb) a foreign superannuation withdrawal; or
>
> (cc) a pension; or
>
> (d) a payment or a transaction that represents a distribution of either the corpus of the trust referred to in paragraph (b) or a capital gain referred to in paragraph (c).
>
> ...

83. This legislative framework makes it important to identify the components of a distribution. For this exercise, the ordering rules in s HC 16 need to be applied to every distribution from a foreign trust unless an exclusion exists.

Ordering rules (section HC 16)

84. Because some distributions are taxable and others are not, opportunities to avoid or defer paying tax on income accumulated in trusts could arise by distributing otherwise taxable amounts to non-resident beneficiaries or by distributing non-taxable amounts before taxable amounts. The ordering rules for distributions in s HC 16 limit such opportunities for manipulating distributions from foreign trusts and non-complying trusts. These rules determine the order in which amounts are treated as having been distributed from such trusts.

85. The rules override the treatment of the distributions that would otherwise apply based on the terms of the trust or the exercise of the trustee's discretion. The rules can affect whether a distribution is treated as a distribution of income, a capital gain or corpus, in turn determining whether it is a taxable distribution or not. For this reason, it is necessary to interpret the definition of taxable distribution and the ordering rules together.

86. The ordering rules in s HC 16 apply when a trustee of a foreign trust or non-complying trust makes a distribution to a beneficiary. The rules treat a distribution as being made up of elements in a certain order as follows (s HC 16(2)):

> HC 16 Ordering rule for distributions from non-complying and foreign trusts
>
> ...
>
> Order of elements of distribution
>
> (1) The distribution is treated as consisting of the following elements in the following order:
>
> (aa) first, an amount derived by the trustee that is beneficiary income of the beneficiary in the previous income year:
>
> (a) second, an amount of income that the trustee derives in the income year:
>
> (b) third, an amount of income, other than beneficiary income, that the trustee has derived in an earlier income year:
>
> (c) fourth, an amount that the trustee derives in the income year from the realisation of a capital asset of the trust or another capital gain and that is not income under section HC 15(5B) for the purposes of this section:
>
> (d) fifth, an amount that the trustee has derived in an earlier income year from the realisation of a capital asset of the trust or another capital gain:
>
> (e) last, the corpus of the trust.
>
> ...

87. The ordering rules apply on an end-of-year basis. That is, a distribution is not characterised at the time it is made. Rather, distributions are characterised at the end of the income year in which they are made by reference to the total income and capital gains the trustee derived in that income year (and previous income years). The ordering rules are generally applied individually to each distribution the trustee makes in the order in which they make the distributions.

88. The amount of each element (eg, current-year income) is finite. Once an amount of an element has been treated under s HC 16 as included in a distribution, that amount is no longer available to be treated as included in another distribution (s HC 16(3)(a)). This means the order in which the distributions are made can have a significant impact on tax payable.

89. For each distribution, the elements must be applied in the order that s HC 16(2) sets out. The next element is relevant only to the extent that the total of the available amounts in the elements so far considered is less than the amount of the distribution (s HC 16(3)(b)).

90. The ordering rules have four exceptions. The most important for present purposes is the exception for "non-discretionary trusts" arising on death in s HC 16(6)(b):

> **HC 16 Ordering rule for distributions from non-complying and foreign trusts**
>
> ...
>
> (6) Exclusions: terms of trust
>
> ...
>
> (b) a distribution from a non-discretionary trust—
>
> (i) created by will or codicil, or by an order of court varying or modifying the provisions of a will or codicil; or
>
> (ii) created on an intestacy or partial intestacy; or
>
> (iii) on which no settlement has been made after 17 December 1987; or
>
> ...

91. A "non-discretionary trust" is a trust where the trustee has no discretion to determine the source, nature and amount of distributions to beneficiaries. This means, among other things, that the trustee has no discretion to classify trust property as capital or income. Where s HC 16(6)(b) applies in respect of a non-discretionary trust, it is the terms of the trust that determines the source of a distribution. These terms should be referenced in the corresponding trustee resolution.

92. If no exception to the ordering rules is relevant, to apply the ordering rules a beneficiary needs information on the trust's circumstances and history. Ideally, this information will take the form of good financial records (modified as necessary to show current-year income, accumulated income, capital gains and corpus according to New Zealand income tax law). It should include details of all settlements on the trust, gains in value of trust property and distributions that the trust has made, in the year in question and in previous years. In the absence of financial statements, other material and evidence are potentially relevant but the onus is on the beneficiary to prove the elements of a distribution to a satisfactory level of accuracy. If adequate records are available relating to corpus but not to income or capital gains, it is still possible for a final distribution not to be taxable to the extent the amount does not exceed the corpus.

93. Therefore, where s HC 16 and the ordering rules apply, the recipient of a distribution must point to evidence that allows them to apply the rules. If this is not possible, the distribution will be deemed to be taxable under s HC 15(7).

94. Given the consequences if a distribution is taxable in this way, a beneficiary may often consider it is worthwhile to make a concerted effort to locate the required information. Finding the information may be difficult, but the onus is on the beneficiary to demonstrate that the ordering rules apply in the way they contend.

95. Note that non-discretionary trusts created by a will may still give rise to taxable distributions when distributing accumulated income and certain capital gains, but the records requirement is less likely to be an issue than it is for other trusts. This is because the ordering rules will not apply and it is potentially less complex to determine what has been distributed.

Beneficiary income and taxable distributions from non-complying trusts

96. For completeness, an amount of money or property a person receives from overseas may have come from a non-complying trust. Under s HC 12, a non-complying trust in relation to a distribution is neither a complying trust nor a foreign trust. It could arise, for example, when a New Zealand tax resident settles property on trust with a non-resident trustee, the non-resident derives non-resident passive income that is not distributed as beneficiary income and no election is made to pay New Zealand income tax on that amount at the trustee tax rate.[15]

15 Due to the absence of a New Zealand tax resident trustee, the New Zealand tax resident settlor must disclose the existence of the trust to Inland Revenue on **Settlors of trusts disclosure – IR462**. Penalties may apply if they do not make this disclosure.

97. A taxable distribution from a non-complying trust is broader than one from a complying trust. Section HC 15(2) provides:

> **HC 15 Taxable distributions from non-complying and foreign trusts**
>
> ...
>
> *Taxable distributions: non-complying trusts*
>
> (2) The distribution is a taxable distribution to the extent to which it is not a distribution of—
>
> (a) beneficiary income; or
>
> (b) a part of the corpus of the trust; or
>
> (c) a payment or a transaction that represents a distribution of the corpus of the trust.
>
> ...

98. The ordering rules apply in the same way as they do to foreign trusts to determine the components of a distribution. Beneficiary income is taxed at the marginal rate of the New Zealand tax resident beneficiary. However, s HC 19(1) provides that a taxable distribution is excluded income under s CX 59 but taxed under ss BF 1(b) and HC 34 at a rate of 45%. Section HC 19(2) provides that the amount of income may be reduced by losses calculated under s HC 22.

Administration of estates

99. Different countries have different laws for the administration of estates. It follows that the legal basis on which property is owned or controlled may be different too and could lead to a different conclusion on whether a trust arises. However, many other countries, especially common law countries, have laws like those in New Zealand. Therefore, some discussion of the law here in New Zealand relating to the administration of estates is useful to illustrate the situations in which a trust (that is not a "bare trust" and is ignored for tax purposes – see [138]) might arise when a deceased estate is being administered overseas.

New Zealand estate administration and trusts

100. When a person dies, the law determines what happens to the money and property that they owned (their estate) at the date of death. If the deceased died without a will (intestate), the law provides for the appointment of an administrator and succession to the estate (that is, who inherits) after a process of identifying and collecting assets, satisfying liabilities and distributing what is left (the residue). If the deceased made a will, the named executors administer the estate following the instructions of the deceased.

101. The instructions in a will may include paying out or distributing legacies or gifts of specific amounts or specific property to named people. These legacies or gifts may be referred to as "specific legacies".

102. The instructions in a will may also expressly provide for testamentary trusts. A will might direct executors to hold property on trust for specified beneficiaries or to establish a trust to hold property for specified beneficiaries (for which a trust deed is usually formalised). If executors make a distribution from a trust established under such instructions, the Act generally applies in the same way as it would for any distribution from a trust that a person established during their lifetime.

103. Whether the deceased left a will or not, and even where a will does not expressly instruct executors to establish a trust, a trust may still arise at some point. This may be because, for example, heirs are not yet of an age to inherit or there is a life interest[16].

104. However, a trust does not arise immediately on the death of the deceased. **Tax implications of certain asset transfers – an officials' issues paper**[17] describes the legal process in New Zealand for property moving from a deceased person to beneficiaries (at pages 11 and 12):

> 4.4 On the death of a taxpayer, the estate can be dealt with in several ways, depending on whether a will exists and, when a will does exist, the taxpayer's intentions as set out in the will (for example, whether there are to be a trust, legacies, and so on). Normally, it takes one to two years to wind up an estate and distribute the assets to the beneficiaries. There are several discrete points in this process at which a property disposition could be deemed to have occurred – on death, on transfer from executor to trustee, or on distribution to legatees and beneficiaries.

16 A common example of a life interest is when someone is permitted to remain living in a family home after the death of the owner,

17 Tax implications of certain asset transfers – an officials' issues paper (Policy Advice, Inland Revenue, 2003).

> 4.5 A will usually provides for the appointment of one or more executors. In the absence of a will, a court will appoint someone to administer the deceased's estate. **Legal and beneficial ownership of the deceased's property vests in the executors or administrators from the time of death through to the end of the period of executorship or administration. The beneficiaries have a right to have the deceased's estate administered properly during this period but do not, with the exception of specific legacies, have more than an inchoate right in the assets.**[18]
>
> 4.6 The duties of the executor or administrator are to collect the assets of the deceased, pay all debts, testamentary expenses and taxes and to distribute the legacies. **At the end of the period of executorship or administration, the executor or administrator becomes a trustee of the residual assets on behalf of the beneficiaries.**
>
> 4.7 Property that has been bequeathed or devised under a will may be gifted as a specific legacy, general legacy or residuary gift. Under the "doctrine of relation back", specific legacies take effect from the date of death, whereas general and residuary legacies vest in the beneficiary(ies) at the time of distribution. [Emphasis added]

105. Other commentaries (and cases, eg, *Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston* [1965] AC 694) confirm that, although executors and administrators are subject to fiduciary duties during the period of their executorship or administration, neither the beneficial nor the legal interest in the estate assets (that are not the subject of specific legacies) moves to those who stand to inherit. For instance, *Laws of New Zealand: Trusts*,[19] in Part 1(3) states:

> **8. Personal representatives and trustees**. In a loose sense, a legal personal representative (while acting as such) is a trustee for the creditors and beneficiaries claiming under the deceased estate since the personal representative holds and administers the real and personal estate of the deceased, not for their own benefit, but for the benefit of the deceased and others.
>
> However, **during the administration of the estate of the deceased, whether the deceased died testate (with a will) or intestate (without a will), neither a legatee (someone who is left a gift under a will) or the next of kin (someone who may succeed to an intestate estate) have any beneficial interest in the assets being administered;** he or she has merely an equitable right to have the estate administered properly. This right is enforced by means of a devastavit action. [Emphasis added]

106. In England, the position is similar. *Williams on Wills*[20] notes at [1.8]:

> Although the title to the assets vests in the personal representative and the will is said to take effect in equity only, the property comprised in residue is not held on trust for the beneficiary under the will so as to vest any equitable interest in him. It is in fact a fallacy to seek for the separate existence of the equitable beneficiary interest in the assets during the period of administration. … Thus the legatee of a share of the residue has no interest in any of the property of the testator until the residue has been ascertained. … It has been held that this right is in the nature of a chose in action. … Likewise, persons entitled on intestacy have no interest in the deceased's assets during administration.

107. Being an executor is not the same as being a trustee: *In re Jane Davis, In re T H Davis, Evans v Moore* [1891] 3 Ch 119. *New Zealand Trusts and Asset Planning Guide* notes (at para 123-40) the difference between the two roles of executor and trustee and refers to authority as to the time at which an executor becomes a trustee:

> An executor carries into effect a deceased's will. The duties of an executor include to collect and get in the assets of the deceased, pay expenses and debts and discharge legacies under the will (*Re Branson (Deceased)* (1911) 31 NZLR 79, at p 82). In comparison, the essential duties of a trustee of a trust created under the will are to obtain possession or control of the trust property, get in funds due to the trust estate, preserve the trust property and to secure it from loss or risk of loss and to conform to and carry out the terms of the trust.
>
> > "The change in character from personal representative (executor) to trusteeship occurs when the estate has been fully administered, in the sense that all the debts and liabilities have been discharged and the residue ascertained …" (*Hansen v Young* [2004] 1 NZLR 37 (CA), at para [29]).

108. These comments suggest that, strictly, any trust from which distributions are made to beneficiaries will arise only once the personal representatives are ready to distribute. This is because, under the law of estate administration in New Zealand, personal representatives have the legal and beneficial interest in property passing on the death of a person, but they do not hold the legal interest on a trust under which those ultimately entitled to the property have a beneficial interest (or under which they might receive a distribution as a beneficiary of a trust). Such a beneficial interest does not arise, whether for particular property or the residual estate, until the personal representatives have completed their duties in the administration of the estate and transition to the role of trustee.

18 This comment is not consistent with the view expressed at [112] which states that specific legacies are also an inchoate right until assent. That is, the right is not fully established or complete until the specific legacy is recognised by way of assent. However, often specific legacies are immediately recognised.

19 *Laws of New Zealand: Trusts* (online ed, LexisNexis, Wellington).

20 R Barlow, R Wallington, S Meadway, J MacDougald and J Kirby, *Williams on Wills* (online ed, LexisNexis, London, 20 November 2021).

109. This position is not altered by the fact that, under the Act, an executor or administrator is treated as a trustee (specifically, s YA 1 defines "trustee" to include an executor or administrator). Although a personal representative is to be considered a trustee for tax purposes, it does not follow that a trust arises on death or during administration. It just means that provisions referring to "trustee" may have a broader application than they otherwise would. In interpreting a section that refers to "trust" but not "trustee", it is necessary to consider what meaning to give to the word "trust". A trust would not generally include an estate during administration.

110. A personal representative will become a trustee at the point at which they have identified the residue of the estate and assent to the property in the estate becoming subject to a trust: *Re McGregor (deceased)* [1960] NZLR 220 at 229 (CA). The dispositions in the will become operative on such assent: *George Attenborough & Son v Solomon* [1913] AC 76 (HL).

111. Such assent can happen for property outside of residue and at different times for different property. The commentary in *Laws of New Zealand: Trusts* Part 1(3) (set out at [105] above) continues:

> Once a personal representative realises that property left on trust is not going to be used to pay debts and expenses, or discharge liabilities, he or she may assent to that property being held on trust in the strict sense. It is often important to determine when a personal representative has completed his or her functions in relation to the estate, and holds trust property solely as a trustee. Not only are there differences in the powers of personal representatives and trustees, but the period of limitation applicable to an action may depend in certain cases upon whether the defendant holds property as a personal representative or as a trustee. Moreover, since the duty of personal representatives is owed to the estate as a whole, they, unlike trustees, do not have to hold the balance evenly between those interested in income and those interested in capital.

112. *Laws of New Zealand*: *Administration of Estates* Vol II[21] further explains "assent" in Part IV Assents:

> *457. Necessity for assent.* **The bequest of a legacy, whether general or specific, or of real estate transfers only an inchoate property to the legatee: the executor's assent is necessary to render it complete and perfect**. The right is one which devolves on the legatee's personal representatives should the legatee die before the assent is given. In the case of a release of a debt by will, the executor's assent is necessary, as the release in effect amounts to a legacy of the debt.
>
> **The necessity for assent by an executor applies to residuary bequests and to interests arising under a partial intestacy. An executor may assent to part of a residuary gift without assenting to the whole**. The assent of one of several representatives to a bequest of pure personalty is sufficient; even though the bequest is to that representative. An executor may assent before probate. The assent will not be affected by their dying without having obtained probate, provided the will is subsequently proved. An executor may be compelled by the legatee to assent should they refuse to do so without just cause. [Emphasis added]

113. The assent need not take any particular form, and it is a question of fact whether assent has occurred:

> *459. Assent by implication.* **An assent to the vesting of real or personal estate may be express or implied; it need not be in writing nor need it be given in any particular form. Informal expressions, if sufficiently clear to indicate intention, may amount to an assent**. The assent may also be implied from the executor's conduct: thus, the application in the maintenance of minors, of rents of leaseholds bequeathed to the executor in trust for maintaining them during minority, and afterwards in trust for the legatee on attaining their majority; allowing a legatee of a term to receive the income; the payment by the executor of rent, coupled with the charging of the legatee with the payments in account; or the payment of a charge subject to which a legacy is given; would amount to an assent to the bequest. However, an executor may, and often does, make general payments to a legatee without binding themselves to an assent; and the Court will not infer an assent in such circumstances unless there is evidence that the executor intended to assent as, for instance, by representations to that effect or by special payments out of or on account of rents to which the legatee would be entitled after assent.
>
> In case of dispute, **the question whether there has been an assent or not is generally one of fact**. An expression which is ambiguous and applies equally to either view is no evidence of an assent.
>
> An assent to a life interest is an assent to the interest in remainder and, conversely, an assent to an interest in remainder enures for the benefit of the tenant for life. [Emphasis added]

114. The assent, once given in respect of property, vests title to a legacy immediately:

> *461. Irrevocability and relation back.* The assent once given is irrevocable. **The title to a legacy vests immediately upon the assent in the legatee**; so as to enable them to bring an action at law against the executor or any other person in possession of the bequest. The legatee of a specific legacy has the right to recover the intermediate profits of the thing bequeathed. **Where executors who are also trustees under the will have assented, they cease to hold the property as executors and from then on hold it as trustees**. [Emphasis added].

21 *Laws of New Zealand: Administration of Estates* Vol II (online ed, LexisNexis, Wellington).

115. The power to assent belongs to a personal representative:

> *462. Assents in relation to trusteeship.* The power to assent is confined to personal representatives. Difficulties can arise as to whether a personal representative who may have fully administered and become a trustee still has power to assent and whether they need to assent in their own favour as trustee. The capacities of personal representative and trustee are not mutually exclusive, and a personal representative who has fully administered the estate and holds the residue as a trustee is not thereby necessarily and automatically discharged from their obligations as personal representative. A personal representative retains their character as such (as distinct from their statutory powers of management) for all time; or, in the case of a grant of administration for a limited period, until the termination of the period of the grant.

116. One of the ways in which a personal representative becomes a trustee is when they have assented:

> *463. When a personal representative becomes a trustee.* If property is specifically devised or bequeathed to an executor upon trust they become trustee of it when they have assented; or when they have severed the property from the rest of the estate; or when they have executed a declaration of trust. **As regards residue, the major change in character from representation to trusteeship occurs when the estate has been fully administered in the sense that all debts and liabilities have been discharged and the residue ascertained. When the trusts affecting the residue are designed to continue after completion of the administration, the executor should thereupon execute an assent to the vesting of the residue in themselves as trustee.** [Emphasis added]

117. For further discussion on testamentary trusts, "assent" and related aspects of administration of estates in New Zealand, see the cases of *Re Estate Eagle; Barbalich v Kennedy* (1997) 1 NZTR 7-003 (HC Auckland M721/97), *Sullivan v Brett* [1981] 2 NZLR 202 and *Re Maguire (deceased)* [2010] 2 NZLR 845.

118. The cases confirm the following interpretation of the law:

- Until assent, beneficiaries do not have any proprietary interest in the residue and the executors do not hold the residue on trust in a relevant sense.
- An executor, at some point, either transfers the residue to beneficiaries or assents to the vesting of that property in someone, who can be the executor, acting in the capacity of a trustee.
- Assent is evidence that an executor is ready to end their interest in the property in question and it can pass according to the terms of the will.
- Assent can be for particular estate property before the residue is ascertained. (It is possible to infer from the fact of distribution that assent has occurred.)
- An express or formal assent is possible although not common in New Zealand.
- Where no formal assent has occurred, it is possible to infer assent once administration has got to the point that all debts and legacies have been paid and the residue has been "ascertained".
- The only action remaining following assent is for the personal representative to pass legal title to the beneficiaries of the will (or to a trustee to hold for beneficiaries, who is someone other than the personal representative).
- The question of whether there has been assent does not depend on what the personal representative believes or intends. It rests on what the facts demonstrate.
- If vested in a trustee, the trustee either holds the property on the trusts specified in the will (ie, testamentary trusts) or, if no trusts are specified, on trust according to the beneficiaries' rights and interests under the will (ie, on a bare trust).

119. It seems reasonable to conclude that the certainties required before a trust arises will be present on assent. At this stage, the existence and identity of property will have been established, as will the beneficiaries. Assent will provide certainty of intention to create a trust.

120. An equitable obligation amounting to a trust, therefore, arises only after the personal representatives have given assent to a trustee or trustees holding the property in question on trust. Such assent can be express or alternatively inferred from the circumstances.

121. If laws similar to the laws of administration of estates in New Zealand apply, where a testamentary trust or a life interest or a minority arises from a non-resident deceased's estate, then following assent, a person (trustee) subject to that trust from assent will hold the property. This may mean an executor changes their role or "hat" (from assent) if they are going to be that ongoing trustee. Such a trust will be a foreign trust because the settlor is the deceased who is not a New Zealand tax resident and has executors carrying out their intentions to create a will trust (an indirect transfer of value as provided for in s HC 27(4)). To determine the tax treatment of property or amounts transferred to a New Zealand beneficiary, it is necessary to consider the possibility that what is transferred to a New Zealand tax resident is a taxable distribution. However, in many cases the trust will not be discretionary so that the ordering rules do not apply (see from [84]).

122. Where a New Zealand beneficiary of a foreign deceased estate has a vested interest after assent, a "bare trust" will arise as a matter of law. As discussed from [138], this situation can be ignored for tax purposes. Although the personal representative will be a trustee according to trust law, they will be a bare trustee. They now hold the property subject to the direction and control of the beneficiary and, for New Zealand tax purposes, the beneficiary is treated as the owner of the property and needs to account for income generated from it.

Estate administration and trusts in other countries

123. The position outlined above for New Zealand estate administration and trust law is likely to be similar to the position in other common law jurisdictions such as Australia, the United Kingdom and the United States. However, some countries may have materially different laws of succession and administration of estates. Many countries do not have the concept of a trust and have laws different to New Zealand's law governing devolution of property on death. In Switzerland (a civil law country like France and Germany), for example, the entire estate of a person passes automatically by way of direct succession to the heirs on the person's death. This happens whether the deceased dies testate or intestate. Switzerland does not recognise trusts as a legal arrangement, although it does recognise the existence of trusts in other countries.

124. Because of their substantially different laws, the position in such civil law countries is materially different from common law jurisdictions like New Zealand. In civil law countries, a trust will not arise on death or following estate administration as the heirs have a vested legal interest immediately on death. Unlike common law countries, they have no "interregnum" when the executor has the legal interest. In addition, transfers by personal representatives in civil law jurisdictions will not be a "distribution" for New Zealand tax purposes because they do not transfer value to heirs. The heirs already own what they inherit and will need to account for income it generates if they are New Zealand tax residents.

125. Further, the test for determining whether a "trust" exists is whether in all the circumstances a trust can be said to arise under New Zealand law. The facts relevant to concluding on that issue under the two-step approach mentioned at [76] will include what legal obligations a person has in relation to property. In that case, the rules of another country as to what happens on death will affect those legal obligations. The fact that no property vests in a personal representative is critically relevant to the question of the existence or otherwise of a trust under New Zealand law.

126. As noted, a trust is an equitable obligation or set of obligations in respect of property under which a person holds property for the benefit of a person or object. One person holds the legal interest and another holds the beneficial interest. However, where the legal and beneficial interests in property move straight from a deceased to an inheritor, nobody will be holding the legal interest in property other than the people who stand to inherit it. There will also be nothing that would expressly create a trust, such as a will or trust deed.

127. New Zealand law would not recognise a "trust" where the arrangement involves property that is not owned by someone with obligations to deal with it for the benefit of someone else. This kind of arrangement in civil law countries will not meet the requirements under New Zealand law to be a "trust".

128. Depending on the situation in the particular country (and this must always be reviewed), it follows that an amount distributed to a New Zealand tax resident heir from an estate administered in a civil law country, either during or following administration, would not be a "taxable distribution from a foreign trust". The reason is that it is not a transfer of value made because the recipient is a beneficiary of a trust.

129. For example, suppose person A acts as administrator of person B's estate on B's death in Switzerland, a civil law jurisdiction. After several years, A carries out the instruction in B's will and transfers the proceeds of the sale of shares in a Swiss company that B owned at his death to person C, who lives in New Zealand. The process of administering and maintaining the estate may have taken several years but a trust will not arise because A did not own the shares, and the shares vested in C on B's death. Therefore, the question of a taxable distribution from a foreign trust does not arise.

130. Likewise, no distribution from a trust will occur when A transfers to C the dividends that have accumulated on the shares during the administration. They will be treated as taxable income C has derived from date of death, while A is a bare trustee, as discussed from [138]. Tax paid in Switzerland may be available as a credit against liability for tax in New Zealand. If C has not returned the dividends or CFC/FIF income (if applicable) for tax in New Zealand, they will need to make an adjustment to their assessments. Penalties and use of money interest may apply.

131. The situation is likely to be different where a New Zealand tax resident receives a transfer from an estate being administered according to laws materially like the succession and administration laws in New Zealand (eg, the laws in a common law jurisdiction). The transfer may be properly characterised as being "from a foreign trust" because the transferor is someone who has the legal interest in the property and has been holding it for the recipient who has the beneficial interest in it.

132. The outcome would be different if the situation were similar to the example at [129] and [130], but B died leaving a will with instructions to establish a trust for C and the shares, and A and B were both in Australia. The Australian laws on trusts and estate administration are like those in New Zealand, so a trust will have arisen once A assented to the shares vesting in a trust (which will not be a bare trust). Then, when a subsequent transfer of the sale proceeds for the shares and of the dividends to C occurs, the transfer would be a "distribution".

133. In short, in some countries, the legal interest in property devolves directly to inheritors. In others, like New Zealand, the legal interest is vested in someone other than the inheritors for a while. It follows that in the context of inheritance, to determine whether an amount is a distribution from a trust, one relevant circumstance that needs to be considered is the effect of applicable laws of other countries. This is part of the first step in the two-step approach.

Effect on tax status of deceased's estate during administration

134. In New Zealand, a trust will arise only once personal representatives are ready to distribute and have assented. From that point, the beneficiaries have an equitable interest in property subject to a trust, either a bare trust (ignored for tax) or an express or implied trust.

135. Before then, although it seems personal representatives are sometimes described as holding property "on trust", the legal position is that they hold both the legal and the beneficial interests in the estate property "in right of the deceased".[22] They do not hold interests in the estate as trustee for beneficiaries. Heirs do not have any beneficial interest and can rely on only their right to force the representatives to carry out their duties. It therefore seems more appropriate to consider the representatives as not (yet) trustees. This position is likely to apply to deceased estates in common law countries in general but is unlikely to apply in civil law countries.

136. As a result, a New Zealand tax resident will not derive anything that will be beneficiary income or a taxable distribution from a foreign trust unless either:

- for common law countries, administration of an estate has at least reached the stage that personal representatives have assented to holding the property on trust; or
- for civil law countries, something has happened to the property before transfer to the resident that New Zealand law would consider gives rise to a trust. (For instance, the property was transferred to someone in another common law country to hold on trust for the resident in New Zealand.)

137. Even if a New Zealand tax resident does not derive beneficiary income or a taxable distribution from a foreign trust, it is necessary to consider whether they have derived other types of income from property held overseas.

Bare trusts

138. Commentary in *Laws of New Zealand: Trusts* Part 1 (see [111] above) suggests that a trust can still arise by assent even though the personal representative has not got to the point of identifying the residuary estate. For instance, an executor may choose to distribute a specific legacy to the person named in the will as entitled to that legacy. Assent in relation to the property or amount forming that specific legacy would be inferred once the executor makes that distribution and, technically, there might be a brief time when what is distributed is subject to a trust under general law. This situation would not give rise to a taxable distribution, however, for two reasons.

139. The first reason is that if it were a distribution from a foreign trust, it would be a distribution of corpus. That is, it is a specific legacy distributed from a specific non-discretionary trust created by will (and so s HC 16(6)(b) excludes it from the ordering rules).

22 See L Breach, *Nevill's Law of Trusts, Wills and Administration* (14th ed, LexisNexis, Wellington, 2023) at [20.12.6].

140. The second reason is that not every distribution that would otherwise meet the legislative definition of "taxable distribution" will necessarily be a "taxable distribution from a foreign trust". If the property is held on a "bare trust", s YB 21 would have the effect of establishing that the person holding the property has not made a distribution. Section YB 21 provides:

> **YB 21 Transparency of nominees**
>
> *Treatment of nominee*
>
> (1) In this Act, unless the context otherwise requires, **if a person holds something or does something as a nominee for another person, the other person holds or does that thing and the nominee is ignored.**
>
> *Who is a nominee?*
>
> (2) A person holds or does something as a nominee for another person if the person acts on the other person's behalf. **However, a trustee is a nominee only if the trustee is a bare trustee.**
>
> *Nominal settlements*
>
> (3) A person making a nominal settlement at the request of another person is treated for the purposes of this Act as a nominee in relation to the settlement.
>
> [Emphasis added]

141. In practical terms, and in the context of trusts arising in the administration of estates, the consequence of a trust being "bare" is that inheritors do not derive beneficiary income or taxable distributions, but they do derive any income from the property in question. This income could include, for example, interest income, dividends, financial arrangement income and/or FIF income.

142. **IS 12/01: Income tax – Timing of share transfers for the purposes of the continuity provisions**[23] summarises the principles developed through the courts on what amounts to a "bare trust":

> 112. Three principles can be distilled from these authorities:
>
> - A "bare trustee" is a person who holds property on trust for the absolute benefit and at the absolute disposal of other persons, and has no beneficial interest in the property.
> - A "bare trustee" does not have any duties to perform in regard to the property, except to convey or transfer it to a person entitled to hold it when required to do so.
> - For a bare trust relationship to exist, the three certainties of a trust must be satisfied.

143. **QB 16/03: Goods and Services Tax – GST treatment of bare trusts**[24] describes a "bare trust" in this way:

> 5. A bare trust is a type of trust under which the trustee holds property on trust without any duties to perform other than to convey the trust property to the beneficiary or as the beneficiary directs. The reference to "duties" in this definition is to duties that the settlor has specified. For example, the trustee may have been appointed to hold the property as nominee, or the settlor may have required that the beneficiary be maintained until becoming entitled to call for capital and income on reaching the age of majority. Once the beneficiary reaches the age of majority, the trustee no longer has a duty to maintain the beneficiary. In both situations, the trustee is "bare" of any duties specified by the settlor. However, so long as a trustee holds property on trust, they always retain their legal duty to take reasonable care of the trust property. The trustee cannot escape this duty: *Herdegen v FCT* 88 ATC 4995 (FCA); *Waters' Law of Trusts in Canada* (4th ed, Carswell, Toronto, 2012) at 33–34.
>
> 6. Therefore, a bare trustee has not only a duty to transfer the trust property to the beneficiary (or as directed by the beneficiary), but also a legal duty to take reasonable care of the trust property in the meantime: *Herdegen; CGU Insurance Ltd v One Tel Ltd (in liquidation)* [2010] HCA 26; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 (CA); *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697.
>
> 7. What a bare trustee must do to fulfil their duty to protect trust property depends on the nature of the trust property and any threats to the trust property. However, a bare trustee must refrain from active management that does not fall within the duty to maintain the trust property: *Bruton Holdings Pty Ltd (in liquidation) v FCT* (2011) 193 FCR 442 (FCAFC).

144. The question, for s YB 21 purposes, is whether a bare trustee (assuming that is the appropriate legal characterisation of someone's capacity) "acts on behalf of" the beneficiary. The answer will depend on the circumstances, but it would be unusual for someone holding property on a bare trust not to be acting on behalf of the person for whom they are holding the property.

23 IS 12/01: Income tax – Timing of share transfers for the purposes of the continuity provisions *Tax Information Bulletin* Vol 24, No 7 (August 2012): 20.

24 QB 16/03: Goods and Services Tax – GST treatment of bare trusts *Tax Information Bulletin* Vol 28, No 5 (June 2016): 16.

145. In the context of estates, a trust will therefore arise only when the personal representative completes their role in relation to property and assents in relation to that property. Then it will depend on the facts as to what is being distributed, and whether any transfer of the property to an heir is a transfer by a bare trustee. In that case, the trust rules will not apply because, for tax purposes, there is no trust. Section YB 21 treats the beneficiary, not the trustee, as holding the property from the date of assent and as liable to any income generated from it if they are a New Zealand tax resident. If, on the other hand, the personal representative is more than a bare trustee, the transfer (or part of it) might be of beneficiary income or a taxable distribution to the extent that the application of s HC 15 does not exclude it.

Consequences of an arrangement being a trust

146. A trust technically arises under the general law of many common law countries on assent.

147. The trust that arises following assent and before distribution is often a bare trust that will not be recognised as a trust for tax purposes. In many instances, therefore, a transfer of property to a New Zealand tax resident will not be a taxable distribution. This would be the case if a personal representative continued to hold the property for a time because of practical difficulties in locating the beneficiary or transferring the property to them. During that time, the representative would have held the property for the absolute benefit of the beneficiary, who has the right to call for the property at any time, and the trustee must act on that direction.

148. Following payment of all debts, an administrative delay in selling property in order to distribute the proceeds of sale to heirs would not follow assent so would not give rise to a taxable distribution. Another situation that might hold up assent is where the will is contested or there is a claim on the estate. That would cause a delay in sorting out who is entitled to the property, but the personal representatives would be dealing with that in their capacity as representatives, not as trustees. They would not give assent for property that the contest or claim affected until the contest or claim were sorted.

149. However, if an executor continues to hold property in the capacity of trustee on a trust, expressly or impliedly, provided for in a will, and the trust is not a bare trust, then any transfer to beneficiaries may be a taxable distribution. Assuming an assent is express or can be inferred from the circumstances, a distribution when it is made might then give rise to a taxable distribution. This would occur where, for instance, heirs of an intestate deceased are not of age or where a will provides for a life interest before the property goes to the heirs. In these situations, there will be contingencies and more than protection of the property before distribution, so the trust will not be a bare trust.

150. In the example discussed at [132], where an executor in Australia distributed the proceeds of sale of Australian shares to a New Zealand tax resident heir of a deceased Australian, the distribution was from a foreign trust. This is because the proceeds were part of the residuary estate that the executor held undistributed for a time. The deceased had died with a will that expressly provided for establishing a trust for the heir so a trust arose following assent. The ordering rules in s HC 16(2) would need to be considered, unless the trust was a non-discretionary trust covered by s HC 16(6)(b).

151. Assuming it was a discretionary trust, if the trust records were not good enough to allow the ordering rules to be applied, the transfer of the proceeds of sale of the shares and the accumulated dividends would together be a taxable distribution: s HC 15(7). If the records showed that only the accumulated dividends represented income derived since the trust started, then s HC 15(4) would not exclude them from being a taxable distribution, but any capital gains the trust made on the shares and their value when the trust started (corpus) would be excluded and would not form part of a taxable distribution from a foreign trust.

Summary

152. Other common law countries are likely to have estate administration laws that are similar to those in New Zealand. This means that personal representatives, in that capacity, do not hold the property of a deceased person on trust for the heirs. Property will be subject to a trust only when personal representatives hold legal title subject to the terms of a trust, express or implied. This can happen only after they have given assent in relation to that property. Assent can be inferred from the circumstances and can be for individual items of property and before the residuary estate has been determined. Before such assent, the legal position is that the personal representatives hold both the legal and the beneficial interest in the estate property "in right of the deceased" rather than as trustee for beneficiaries.

153. A trust under general law and following assent can still arise for property distributed following administration. However, in a straightforward will disposition, such a trust is likely to be a bare trust for tax purposes and any distribution will not be a taxable distribution. Alternatively, where there is a testamentary trust or a will providing for life interests or no distributions to heirs who are minors, the property may continue to be held in trust and may be a taxable distribution when transferred to beneficiaries. A distribution in these circumstances could comprise more than corpus and could be subject to the ordering rules in s HC 16, as well as comprising current-year beneficiary income.

154. Distributions from estates of residents of civil law countries are less likely to be from trusts because heirs have a legal interest from the date of death. Even if there is no trust, New Zealand tax residents should consider whether they have derived income from the property held overseas.

Examples

155. The following seven examples help to explain how the law applies.

Example | Tauira 1 – Whether a trust exists – United States "trustee" sends money to a New Zealand tax resident

Facts

- Adam is a wealthy United States (US) citizen. Five years ago, he set up a "living trust", which is a common estate planning method in the US. He appointed himself as trustee. The trust deed recorded that the trust was revocable during his lifetime (a "revocable living trust") but would become irrevocable on his death (an "irrevocable living trust"). Until then, income from the property, if distributed, must be paid to him and nobody else. He can direct the trustee to pay the corpus of the trust to him or on his behalf at any time. Further, one provision in the trust deed allows Adam to absolve himself as trustee from any breaches of trust.
- As settlor he instructs himself as trustee to send some money from the trust's assets to his son Orson who lives in New Zealand. His intention is for Orson to use the money to set up a business here.

Question

- Orson wonders if the money is taxable in New Zealand.

Discussion

- Orson is a New Zealand tax resident and has received a transfer of value without providing anything in return. Whether the amount is a taxable distribution from a foreign trust depends in part on the money coming from a trust.
- The first step under the two-step approach is to identify the legal rights and obligations of Adam's revocable living trust under foreign law. Adam is able to occupy the roles of settlor, trustee and beneficiary of his trust under US law. He can require all the property held in trust to be returned to himself at any time and he cannot be called to account as trustee under the law in his state. The second step is to apply New Zealand law to these rights and obligations.
- The likely conclusion is that the essential features of a trust are not present. This is not because the arrangement is revocable by Adam while he is alive. A valid trust can exist in New Zealand where the trust is revocable. However, in this case Adam can reclaim the trust's assets at any time, which indicates a lack of intention to establish a trust.
- In addition, a valid trust does not result because a sole trustee cannot be the sole beneficiary. The lack of accountability by Adam for the way he carries out his duties as trustee is another factor that points to no valid trust existing under New Zealand law - see ss 14 and 13(b) of the Trusts Act respectively.
- The amount Orson received would be treated for New Zealand tax purposes as a gift from his father in the US, rather than as a taxable distribution from a foreign trust. Further, nothing in the facts suggests the amount is of an income character and subject to New Zealand tax in Orson's hands.
- On the death of Adam, a bare trust or foreign trust might arise depending on the terms of the irrevocable living trust. If, for example, the sole duty of the trustee was to transfer the assets of the trust to Orson it is likely a bare trust would exist and s YB 21 would apply. If the duties were more extensive, a foreign trust might arise and a distribution to Orson might be a taxable distribution.

Example | Tauira 2 – Whether a trust exists – property held in Switzerland transferred to a New Zealand tax resident

Facts

- Carl has lived in Switzerland for all of his life and has accumulated several properties that he decides to dispose of. One is an apartment in Zurich that he wants to keep in the family. He transfers legal title to his brother Roger, who is also resident in Switzerland. They sign an agreement that Roger is responsible for maintaining the apartment and meeting outgoings. The agreement also provides that Roger can live in the apartment or rent it out but will transfer it and any accumulated rental income to Carl's daughter Ursula when she turns 25. If Ursula dies before she turns 25, Roger is to give the apartment and accumulated rental income (if any) to his own children.
- Ursula moves to New Zealand as a 20-year-old. Five years later (after she has lost her transitional tax resident status), on the day she turns 25, Roger transfers title in the apartment to her. He also deposits net rental income for 3 years into her New Zealand bank account.

Question

- Ursula wonders whether she has any tax obligations in New Zealand.

Discussion

- The tax treatment of this for Ursula will depend on whether the arrangement between Carl and Roger has the essential features of a trust under the law of trusts in New Zealand. The first step would involve an examination of the rights and obligations of the parties under the contract in the context of Swiss law. It seems Roger can benefit under the contract by living in the apartment but ultimately he has to pass it and any rental income to Carl's daughter or his own children. It is not known if Carl can cancel the contract and reclaim the apartment. Without further information it is not possible to proceed to the second step and apply New Zealand law to the legal rights and responsibilities. However, it can be observed that even though Roger appears to have some duties resembling fiduciary obligations he can use the property for his own benefit in the interim. This aspect points to the arrangement not being a trust in New Zealand as a trustee must not exercise a power for their own benefit – see s 31 of the Trusts Act.
- Assuming though the arrangement is a trust for New Zealand tax purposes, it would be a foreign trust for the purposes of any distribution as the trust has not had a settlor who is a New Zealand tax resident. The ordering rules in s HC 16 would apply because it was not a non-discretionary trust created by will or on intestacy. Roger has kept very good records of his time owning the apartment, so it is possible to apply the ordering rules to treat:
  - any current-year rental income as beneficiary income (because it is income the trustee derived and paid to Ursula);
  - the accumulated rental income as a taxable distribution (because it is income Roger, as trustee, derived in earlier income years); and
  - the apartment itself as corpus or capital gains (and so excluded by s HC 15(4) from being a taxable distribution).

  Roger must calculate rental income and other amounts applying New Zealand's tax laws, not those in Switzerland.
- Tax credits are potentially available for tax Roger paid (if he paid it by deduction at source rather than as legal owner) in Switzerland to reduce Ursula's tax liability on current-year income. Article 22(1) of the double tax agreement (DTA) with Switzerland would seem to permit a credit for Swiss tax paid by deduction or by Ursula against New Zealand tax payable on the rental income distributed as beneficiary income or derived after title is transferred to her. The mechanism is via the domestic provisions such as ss LJ 1 and LJ 2. The DTA with Switzerland, however, does not expressly recognise fiscally transparent vehicles so if Roger was assessed for Swiss tax, then arguably it would not be treated as Ursula's tax liability under that DTA.
- No tax credits would be available for tax paid on Roger's accumulation of rental income for previous years as a trustee. This would be treated as a taxable distribution if it was distributed in a lump sum to Ursula after her transitional resident status had ended. Under s LJ 6, only any tax equivalent to non-resident withholding tax deducted in Switzerland from a taxable distribution would be available as a credit in New Zealand.

- If the arrangement is not a trust, the transfer of the apartment and any rental income Roger accumulated before Ursula turned 25 are unlikely to be treated as income in New Zealand. These two items would essentially be treated in the same manner as gifts. Because the facts do not suggest Roger is an agent for Ursula at any stage, current-year rental income derived before Ursula was 25 would also not be taxable in New Zealand.
- Ursula would have an ongoing obligation as a New Zealand tax resident to account for any income generated from the apartment. She could refer to **IS 20/06**: **Income tax – Tax issues arising from owning foreign residential rental property**[25] to help her understand these obligations or she could seek advice from a tax advisor.

Example | Tauira 3 – Ordering rules

Facts

- In 2008, Charles, a celebrity chef, and Joanna, a successful banker, in the City of London settle an investment portfolio and a house in the Cotswolds on a trust for their two children, Mary and Elizabeth. Charles and Joanna are trustees along with the family's lawyer in London. They are all tax residents in the United Kingdom.
- In 2010, Mary moves to Australia. In 2012, Elizabeth moves to New Zealand, becoming a tax resident here. Using the discretion given in the trust deed, in 2024 the trustees transfer the investment portfolio and accumulated income to Mary in Australia and the house to Elizabeth in New Zealand. Until that time, the trustees had retained all the income that the portfolio had generated.

Question

- Elizabeth wonders whether she has any tax obligations in New Zealand.

Discussion

- Under the law in United Kingdom, which is a common law country, Charles, Joanna and the family lawyer hold assets for the benefit of Mary and Elizabeth. These are features New Zealand is likely to recognise as creating a valid trust. The settlors have never been New Zealand tax residents, so the trust is a foreign trust. The exclusions in s HC 16(6) do not apply so the tax treatment of the distribution for Elizabeth in New Zealand is going to depend on the application of the ordering rules.
- This means that Elizabeth will not be able to treat the entire distribution of the house to her as corpus and capital gains. Instead, she must take account of the components of the investment portfolio. Under s HC 16(2), a proportion of the accumulated income in the portfolio needs to be treated as income that the trustee derived and is a taxable distribution under s HC 15(4). This amount is calculated according to New Zealand tax law. Because the trustees are non-resident and the trust has not had a New Zealand settlor, there is no need to calculate FIF income or financial arrangement income.
- **IS 24/01 Taxation of trusts** discusses taxable distributions (from [8.58]) and the ordering rules (from [8.113]).

25 IS 20/06: Income tax – Tax issues arising from owning foreign residential rental property *Tax Information Bulletin* Vol 32, No 7 (August 2020): 98.

Example | Tauira 4 – Testamentary trust settled overseas

Facts

- David moved to New Zealand from Australia with his mother when he was 12 years old. His parents had separated, and David was their only child. Later, when David was 18, his father Joe was killed in a mining accident. Joe's will left a direction to create a trust with the balance of his residuary estate (mostly comprising commercial properties in Perth). The trustee, a resident in Australia, was to hold that on trust, accumulating rents and reinvesting, until David turned 21.
- David has now turned 21. The trustee has sold the properties and sent the proceeds of the trust to David in New Zealand.

Question

- David wonders whether he has any tax obligations in New Zealand.

Discussion

- Assuming the law of administration of estates in Australia is not materially different to the law in New Zealand, no trust arises in the period between Joe's death and assent because the executor had the legal and beneficial ownership of the property. Income derived during this period on the estate's assets is likely to be taxable in Australia to the executor.
- At the point of assent, a testamentary trust is created from the residuary estate. The trust will be a foreign trust because Joe was never a New Zealand tax resident and he is the only person who settled anything on the trust.
- In the year of distribution, the trustee's current-year investment income paid to David will be beneficiary income. As the trust was created by a will, the ordering rules in s HC 16 do not apply as long as the trust meets the requirements for being a non-discretionary trust. If so, the terms of the trust deed will determine the income tax treatment. Accumulated rental and investment returns will be a taxable distribution, but the proceeds of sale of the properties will not, because s HC 15(4) excludes them as either corpus or capital gains. The amounts need to be calculated according to New Zealand's laws. This may involve recalculating rental income in a different way from how it is calculated in Australia.

Example | Tauira 5 – Deceased in a civil law country but New Zealand tax resident heir later settles trust overseas

Facts

- Thomas lived in Germany for most of his life. His only child Joseph moved from there with his family to New Zealand in 2005. When Thomas's wife died in 2010, he made a will leaving all his property to Joseph.
- When Thomas passed away in 2022, Joseph travelled to Germany and discussed his father's estate with the executor, Erich, a professional financial advisor in Berlin. Erich's advice was to appoint a company in the Cayman Islands to hold the estate on trust for Joseph until the funds were required due to the absence of local tax and for asset protection. Joseph follows Erich's advice without considering the tax laws in New Zealand.
- Circumstances change. In 2025 Joseph's family is short of money. The trust is wound up and everything from it is distributed to Joseph.
- The trustee does not file any IR6 returns nor pay any tax in New Zealand on the income generated from the estate's assets invested in the United States and Europe. Joseph did not disclose the existence of the trust to Inland Revenue.

Question

- Joseph wonders if he has any tax obligations in New Zealand.

Discussion

- As Germany is a civil law country, it is likely no trust arose when Thomas died. The inheritance to Joseph would not have been taxable. However, he would have needed to account for any income derived on the property from when Thomas died until the arrangement in the Cayman Islands was established.
- Under Cayman Islands' law, the company is holding assets for the benefit of Joseph. It is assumed its obligations are fiduciary in nature. New Zealand law would likely recognise the arrangement in the Cayman Islands as a trust. As Joseph was a New Zealand tax resident and no resident trustee existed, he had an obligation to disclose the particulars of the trust under s 59(1) of the Tax Administration Act 1994 within 3 months of settling the trust.
- The income that the non-resident trustee derived was subject to tax in New Zealand as Joseph was a New Zealand tax resident under s HC 25. For the purposes of calculating the trustee's taxable income, the trustee would be treated as being a tax resident in New Zealand in relation to the rules for foreign-sourced income listed in s HC 25(6). For example, the trustee would need to calculate FIF income if they held any attributing interests.
- As there was no New Zealand tax resident trustee, Joseph also had an obligation to meet the trustee company's New Zealand tax obligations on trustee income (s HC 29(2)).
- The trust was not a complying trust under s HC 10(1) because the trustee did not meet their tax obligations in relation to the trustee's income tax liability for every tax year. It was not a foreign trust because Joseph was a tax resident in New Zealand. It was therefore a non-complying trust.
- Taxable distributions from a non-complying trust include all amounts other than beneficiary income and corpus under s HC 15(2). Further, the amounts are treated as excluded income and taxed at 45%. Joseph has an obligation to report these amounts in his return.
- Joseph should make a voluntary disclosure about the non-compliance. If he does so, shortfall penalties may be reduced.

Example | Tauira 6 – Non-discretionary testamentary trust turns off ordering rules

Facts

- Cindy moves from Canada to New Zealand in 2005. Her parents die in a car accident in 2012. Their wills instruct their executors to establish a single non-discretionary trust for their three children in the event of both dying at the same time. The terms of the trust require that the trustees distribute 100% of the annual income in equal proportions to the beneficiaries and lump sum amounts totalling 50% of corpus to each beneficiary in equal proportions when the first one reaches the age of 50. Upon the last beneficiary reaching 50, the balance of assets is divided amongst the beneficiaries then living and distributed in equal proportions and the trust is to be wound up.
- In 2024, Cindy receives a substantial payment from the trustees in accordance with the terms of the trust on her eldest sibling reaching the age of 50.

Question

- Cindy wonders whether she has any tax obligations in New Zealand.

Discussion

- The wills instruct the creation of a non-discretionary trust. As Canada is a common law country, it is likely that the rights and obligations are those that New Zealand law would recognise as being a trust. As no settlor has been a tax resident in New Zealand, it is a foreign trust.
- The annual distributions (and any part-year final income distributions when the trust is wound up) are beneficiary income and taxed to Cindy at her marginal tax rate.
- Because the trust is a non-discretionary trust created by a will, the ordering rules in s HC 16 do not apply, and the terms of the trust will determine the tax effect for Cindy. Because the lump sum proceeds are from corpus, Cindy does not receive a taxable distribution.

Example | Tauira 7 – Discretionary testamentary trust – ordering rules and the importance of records

Facts

- As in Example | Tauira 6, Cindy's parents die and leave wills. In this situation, however, the wills instruct the executors to establish a single discretionary trust.
- In 2024, Cindy asks the trustees for funds to support her daughter, who is about to go to university. The trustees agree to the request and sell some shares at a profit. They sign a resolution to the effect that they are distributing corpus and capital gains.

Question

- Cindy wonders whether she has any tax obligations in New Zealand.

Discussion

- In this situation, it is necessary to apply the ordering rules in s HC 16(2). This may mean that Cindy has received a taxable distribution from a foreign trust.
- To establish that Cindy has not received a taxable distribution from a foreign trust, the records of the trust would need to show that all income the trustees derived in the current or earlier years, as calculated according to New Zealand's tax laws, had been distributed to the beneficiaries earlier or at the same time. This requirement applies even though the intention is for the trustees' distribution to be of corpus and capital gains.
- Further, if Cindy cannot obtain adequate records to be able to determine the elements of the distribution under s HC 16(2), s HC 15(7) will apply to treat the entire distribution to her as a taxable distribution from a foreign trust.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Income Tax Act 1918 (UK)

Income Tax Act 2007, ss BD 1, BF 1, CV 13, CW 27, CX 59, subpart HC, HR 8, LJ 1, LJ 2, LJ 6, YA 1 ("transfer of value", "trustee"), YB 21

Interpretation Act 1999, s 5

Legislation Act 2019, s 10

Tax Administration Act 1994, ss 22, 59

Trusts Act 2019, ss 5, 12, 13, 15

Case references | Tohutoro kēhi

C L Dreyfus v IRC (1929) 14 TC 560 (CA)

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767 (SC)

Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston [1965] AC 694

George Attenborough & Son v Solomon [1913] AC 76 (HL)

In re Jane Davis, In re T H Davis, Evans v Moore [1891] 3 Ch 119 39

Knight v Knight (1840) 3 Beav 148

Marac Life Assurance Ltd v CIR [1986] 1 NZLR 694 (CA)

Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426 (Ch)

Re Estate Eagle; Barbalich v Kennedy (1997) 1 NZTR 7-003 (HC Auckland M721/97)

Re Maguire (deceased) [2010] 2 NZLR 845

Re McGregor (deceased) [1960] NZLR 220 (CA)

Re the AQ Revocable Trust, BQ v DQ [2010] 13 ITELR 260

Ryall v The DuBois Company Ltd (1933) 18 TC 431 (CA)

Sommerer v The Queen (2011) TCC 212

Sommerer v The Queen (2012) DTC 5,126 (FCA)

Sullivan v Brett [1981] 2 NZLR 202

Webb v Webb [2020] UKPC 22

Other references | Tohutoro anō

C Kelly and G Kelly, *Garrow and Kelly Law of Trusts and Trustees* (online 8th ed, LexisNexis, Wellington, 2022)

D Feldman, D Bailey and L Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020)

IS 12/01: Income tax – Timing of share transfers for the purposes of the continuity provisions *Tax Information Bulletin* Vol 24, No 7 (August 2012): 20
taxtechnical.ird.govt.nz/tib/volume-24---2012/tib-vol24-no7
taxtechnical.ird.govt.nz/interpretation-statements/is-1201-income-tax-timing-of-share-transfers-for-the-purposes-of-the-continuity-provisions

IS 20/06: Income tax – Tax issues arising from owning foreign residential rental property *Tax Information Bulletin* Vol 32, No 7 (August 2020): 98
taxtechnical.ird.govt.nz/tib/volume-32---2020/tib-vol32-no7
taxtechnical.ird.govt.nz/interpretation-statements/is-20-06

IS 21/09: Income tax – foreign tax credits – how to calculate a foreign tax credit *Tax Information Bulletin* Vol 34, No 1 (February 2022): 27
taxtechnical.ird.govt.nz/tib/volume-34---2022/tib-vol-34-no1
taxtechnical.ird.govt.nz/interpretation-statements/2021/is-21-09

IS 24/01: Taxation of trusts *Tax Information Bulletin* Vol 36, No 2 (March 2024): 8
taxtechnical.ird.govt.nz/tib/volume-36---2024/tib-vol36-no2
taxtechnical.ird.govt.nz/interpretation-statements/2024/is-24-01

IS 25/16: Tax residence *Tax Information Bulletin* Vol 37, No 6 (July 2025): 22
taxtechnical.ird.govt.nz/tib/volume-37---2025/tib-vol37-no6
taxtechnical.ird.govt.nz/interpretation-statements/2025/is-25-16

J Prebble, Recognition of foreign enterprises as taxable entities, *Cahiers de Droit Fiscal International* Vol LXXIIIa (1988): 493

L Breach, *Nevill's Law of Trusts, Wills and Administration* (14th ed, LexisNexis, Wellington, 2023)

Law of New Zealand: Trusts (online ed, LexisNexis, Wellington)

Laws of New Zealand: Administration of Estates Vol II (online ed, LexisNexis, Wellington)

Laws of New Zealand: Trusts (online ed, LexisNexis, Wellington)

Lord Collins of Mapesbury, J Harris (Eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012)

New Zealand Trusts and Asset Planning Guide (online looseleaf ed, CCH New Zealand)

Oxford English Dictionary (online version, Oxford University Press 2023, accessed 4 March 2025)

QB 16/03: Goods and Services Tax – GST treatment of bare trusts *Tax Information Bulletin* Vol 28, No 5 (June 2016): 16
taxtechnical.ird.govt.nz/tib/volume-28---2016/tib-vol28-no5
taxtechnical.ird.govt.nz/questions-we-ve-been-asked/2016/qb-1603-goods-and-services-tax-gst-treatment-of-bare-trusts

R Barlow, R Wallington, S Meadway, J MacDougald and J Kirby, *Williams on Wills* (online ed, LexisNexis, London, 20 November 2021)

Schedule of beneficiary's estate or trust income – IR307 (form, Inland Revenue, 2014)
ird.govt.nz/-/media/project/ir/home/documents/forms-and-guides/ir300---ir399/ir307/ir307-2014.pdf (PDF 54KB)

Settlors of trusts disclosure – IR462 (form, Inland Revenue, 2019)
ird.govt.nz/-/media/project/ir/home/documents/forms-and-guides/ir400---ir499/ir462/ir462-2019.pdf (PDF 75KB)

Tax implications of certain asset transfers – an officials' issues paper (Policy Advice, Inland Revenue, 2003)
taxpolicy.ird.govt.nz/publications/2003/2003-ip-asset-transfers

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 25/18: Does GST apply to a deposit the seller retains in a cancelled land sale agreement?

Issued | Tukuna: 15 July 2025

This question we've been asked explains the GST consequences when a land sale agreement is cancelled and the seller retains the deposit.

Key provisions | Whakaratonga tāpua

Goods and Services Tax Act 1985 (GST Act) – s 25

All legislative references are to the GST Act unless otherwise stated.

REPLACES | WHAKAKAPIA

- **GST consequences of a cancelled contract *Tax Information Bulletin* Vol 17, No 4 (May 2005): 26**

Question | Pātai

Does GST apply to a deposit the seller retains in a cancelled land sale agreement?

Answer | Whakautu

No, GST does not apply to the deposit because the seller makes no supply of land or any other supply in return for the deposit.

If the seller has paid GST output tax or the buyer has claimed a GST input tax credit before the agreement was cancelled, then any amounts returned or claimed will need to be reversed in the period in which the agreement is cancelled.[1]

Introduction

1. This question we've been asked (QWBA) explains the GST consequences when a land sale agreement is cancelled and the seller retains the deposit.[2]
2. When parties enter into a land sale agreement, the buyer usually agrees to pay a deposit. In New Zealand, a deposit is typically 10% of the purchase price but sometimes can be more. Only reasonable deposits are subject to forfeiture.
3. The main function of a deposit is to guarantee performance.[3] A deposit is particularly important in land sale agreements as there is often a delay between the date when the parties sign the agreement and the settlement date.
4. If the sale goes ahead, the deposit is credited to the buyer on settlement as part payment of the purchase price. If the sale falls through due to the buyer's default the deposit is liable to be forfeited. This means the seller can retain the deposit for their own use. If the seller also claims damages, they need to give credit for the amount of the forfeited deposit.[4]

1 For the seller this would be subject to the application of time limits for refunds.

2 For income tax consequences of forfeited deposits see **QB 23/09: Income tax – Forfeited deposits from cancelled land sale agreements** *Tax Information Bulletin* Vol 36, No 1 (February 2024): 75

3 *Howe v Smith* (1884) 27 Ch D 89 (UKCA); *Soper v Arnold* (1889) 14 App Cas 429 (HL); *Garratt v Ikeda* [2002] 1 NZLR 577 (CA).

4 *Ng v Ashley King (Developments) Ltd* [2010] EWHC 456 (Ch), [2010] 4 All ER 914; *Shuttleworth v Clews* [1910] 1 Ch 176.

5. If the sale falls through due to the seller's default, the seller is required to refund the deposit to the buyer. However, situations do arise where the seller should have refunded the deposit to the buyer but, for whatever reason, they have not and have kept the deposit.
6. Two key questions are relevant when considering whether GST applies to a deposit when a land sale agreement is cancelled and the seller retains the deposit:
   - Is there a supply of goods or services (from the seller to the buyer)?
   - If so, is the deposit payment for that supply?
7. This QWBA considers those questions. It also sets out the GST consequences when a land sale agreement is cancelled and the seller retains the deposit.

Is there a supply of goods or services if a land sale agreement is cancelled?

8. GST is a tax on transactions, not a tax on receipts or turnover.[5] It can only be charged if a supply of goods or services exists (or is deemed to exist). The first step, therefore, is to identify the supply.
9. The Goods and Services Tax Act 1985 (GST Act) defines "supply" broadly as including "all forms of supply". "Goods" includes most forms of personal or real property. "Services" is defined as anything that is not goods or money or cryptocurrency.
10. Although the definitions of goods and services are together very wide, for GST to be charged it is still necessary for a supply of something to have occurred.
11. In analysing the nature of a supply, it is important to carefully consider the legal arrangements actually entered into and carried out, in light of the factual background.[6]

Is there a supply of land?

12. In a land sale agreement, the intended supply is land.
13. If a land sale agreement is cancelled due to the buyer's or seller's default, then settlement and registration do not take place. Without registration, no transfer of legal ownership occurs. In this situation, there is no supply of the legal interest in the land as intended under the contract.
14. New Zealand case law establishes that a contract for the sale of land is not divisible into equitable and legal estates for GST purposes.[7] There is only one "supply" and that supply is for all the rights in the land contracted for.
15. In addition, the deposit is not a payment for the equitable interest in the land. It is intended to be part payment of the whole purchase price and a guarantee that the buyer will pay the balance of the purchase price on settlement.
16. In summary, the intended supply in a land sale agreement is the supply of the land. When the agreement is cancelled, no supply of land has occurred. A supply of land cannot be divided into the supply of legal and equitable interests for GST purposes. The deposit is not a payment for the equitable interest in the land.

Is there any other supply?

17. It has been suggested that *Case N24* supports the view that GST applies to a deposit that a seller retains when a land sale agreement is cancelled.[8] *Case N24* concerned a land sale agreement where the buyer defaulted, the contract was cancelled and the deposits were forfeited to the seller.
18. In that case, Judge Barber found that when the buyer first paid the deposit, the seller made "a supply of some type" to the buyer. Later in the judgment, Judge Barber said that a supply of some type remained when the contract was cancelled.
19. The Commissioner's view is that the most evident supply that the parties contemplated was the transfer of the land that was the subject of the now cancelled contract. Any other obligations under the contract (eg, to maintain the property in good condition and insure the property) are ancillary to the supply of the land.

5 *CIR v Databank Systems Ltd* [1989] 1 NZLR 422 (CA).

6 *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5,086 at 5,098 per Richardson J.

7 *Case L67* (1989) 11 NZTC 1,391; *Nicholls v CIR* (1997) 18 NZTC 13,265, *Case W11* (2003) 21 NZTC 11,100, *Case W22* (2003) 21 NZTC 11,212 (upheld on appeal: *Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618).

8 *Case N24* (1991) 13 NZTC 3,199.

20. As discussed above, subsequent case law has held the supply of land cannot be separated into a supply of legal and equitable interests for GST purposes. Judge Barber does not state in *Case N24* that the supply is a supply of an equitable interest in land merely that there is "some type" of supply which must have been a service. In the Commissioner's view, it is necessary to identify the supply if GST is to attach to that supply. It is also noted that the later case of *Case W11* questioned the comments in *Case N24*.
21. For there to be a supply of services to the buyer in return for the deposit, the seller must have done something for the buyer rather than against the buyer.[9]
22. Because the seller retains the deposit only after the contract is cancelled, it is difficult to identify any particular rights the seller might be supplying to the buyer in terms of the now cancelled contract. The buyer could be liable for damages if the seller's losses were more than the deposit they retained.
23. In summary, the Commissioner has been unable to identify any other type of supply that the deposit could be payment for when a land sale agreement is cancelled and the seller retains the deposit.

Is the deposit payment for a supply if the agreement is cancelled?

24. The deposit must be made "in respect of, in response to, or for the inducement of" the supply. In other words, a link between the payment and the supply must exist.[10]
25. As discussed from [8] to [23], where a land sale agreement is cancelled and the seller retains the deposit, they have made no supply of land and make no other supply in return for the deposit. As the seller makes no supply of goods or services for which the deposit is consideration, GST does not apply.
26. In this section, we make additional comments on the nature of the deposit depending on whether it is the buyer or the seller who cancels the agreement. The relevance of the Australian case of *FCT v Reliance Carpet Co Pty Ltd* [2008] HCA 22 is also considered.

The contract is cancelled due to the buyer's default and the seller retains the deposit

27. If the buyer defaults and the deposit is forfeited, the character of the deposit changes. In the Commissioner's view, the forfeited deposit is compensation for the buyer's failure to pay the balance of the purchase price on settlement as promised.[11]
28. A forfeited deposit does not replace a claim for breach of contract. The seller can retain a deposit and also make a claim for damages. However, the seller must give credit for the amount of the deposit and can only claim damages in excess of this amount. In the Commissioner's view, the fact that the seller gives credit for the amount of the deposit in a claim for damages supports the view that a deposit is compensatory in nature.
29. A payment that is compensatory in nature does not generally involve a supply and is not subject to GST. In this situation, the buyer has agreed that if they fail to pay the balance of the purchase price the deposit may be forfeited. The seller does not make any supply in return for retaining the deposit. It relates to compensation for the buyer's breach and not to any supply under the contract.

The contract is cancelled due to the seller's default and the seller retains the deposit

30. Where a contract for the sale of land is cancelled because of the seller's default, the seller is required to refund the deposit to the buyer.
31. In the situation where the seller does not refund the deposit (eg, where the seller is a company that goes into liquidation and no funds are available), the seller has still made no supply of land or any other supply to which GST can attach. The fact that the buyer is unable to recover the deposit does not change the conclusion that no supply exists for which the deposit is consideration.[12]

9 *Case S65* (1996) 17 NZTC 7,408.

10 *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).

11 *Coumat Ltd v Whitford Properties Ltd* [2018] NZCA 15 supports this view.

12 *Case W9* (2003) 21 NZTC 11,083 and *Case W11*.

What is the relevance of the *Reliance Carpet* case?

32. It has been suggested that the 2008 decision of the High Court of Australia (HCA) in *Reliance Carpet* could be relevant to the question of whether a forfeited deposit is consideration for a supply in New Zealand.[13]
33. The issue in *Reliance Carpet* was whether the seller was liable to pay GST on a forfeited deposit. The answer depended on whether the seller had made a "taxable supply" – that is, a "supply for consideration". The HCA found that the seller made a supply to the buyer on the making of the contract and the deposit the buyer paid was consideration for that supply where the deposit was forfeited.
34. While the factual scenario and the key issues are similar to those considered in this QWBA, the decision in *Reliance Carpet* must be considered in light of the fact that Australia has specific legislation governing the treatment of forfeited deposits (Division 99 of A New Tax System (Goods and Services Tax) Act 1999). New Zealand does not have equivalent provisions.
35. When presented with New Zealand (and Canadian) materials about the treatment of deposits in *Reliance Carpet*, the HCA said "these systems appear to lack any sufficiently close analogue to Div 99 of the Act for assistance to be derived from them in the present case".
36. For this reason, the Commissioner considers that the HCA's decision in *Reliance Carpet* is not applicable in New Zealand.

GST consequences when a land sale agreement is cancelled and the seller retains the deposit

37. Where a land sale agreement is cancelled, the seller will not make a supply of land or any other supply in return for the deposit. As the seller has made no supply of goods or services for which the deposit is consideration, GST does not apply.

Situations where GST has already been paid or claimed

38. In limited situations before a land sale agreement has been cancelled, the seller may have paid GST or the buyer may have claimed GST in relation to the intended supply of land. This can happen if the supply of land is deemed to take place before the agreement is cancelled and the transaction is not treated as zero-rated.
39. In this situation, a GST adjustment is required under s 25. It is expected that most cancellations would happen within a reasonably short period after time of supply. But for situations where the cancellation happens after an extended period, the rules relating to time limits for refunds would need to be considered.

When is a supply deemed to take place?

40. The time of supply rules determine when a supply is treated as being made for GST purposes. The general rule is that time of supply is treated as the earlier of:
    - The time an invoice is issued by the supplier
    - The time any payment is received by the supplier.
41. Entering into a land sale agreement does not trigger the time of supply because a land sale agreement is not an "invoice" for GST purposes (even if the agreement is unconditional).[14]
42. Payment of a deposit will trigger the time of supply unless the recipient holds the deposit as a stakeholder.[15] If the deposit is held by a stakeholder, it has not been "received" by the seller. It will be received for time of supply purposes when the stakeholder arrangement ends and the seller (or their agent) holds the deposit for the seller's own benefit.

What happens if the transaction is zero-rated?

43. Most transactions between registered persons involving supplies of land are zero-rated.[16] If a supply is zero-rated it means GST is charged at the rate of 0%.

13 *FCT v Reliance Carpet Co Pty Ltd* [2008] HCA 22.

14 See **IS 07/02: Is an agreement for the sale and purchase of property an "invoice" for GST purposes?** *Tax Information Bulletin* Vol 19, No 7 (August 2007): 7.

15 See **IS 10/03: GST: Time of supply – payments of deposits, including to a stakeholder** *Tax Information Bulletin* Vol 22, No 6 (July 2010): 7.

16 See **IS 17/08: Goods and Services Tax – Compulsory zero-rating of land rules (general application)**, *Tax Information Bulletin* Vol 29, No 10 (November 2017):17 including the flowchart in Appendix 1.

44. For a supply to be zero-rated, the conditions for zero-rating must be satisfied at the time of settlement. However, under the time of supply rules often a seller needs to determine whether the supply is standard-rated or zero-rated before settlement. The seller's decision whether to treat the supply as zero-rated is based on their knowledge of their own GST-registration status and the information provided in the buyer's notice to them.
45. If time of supply was triggered before the agreement was cancelled (eg, if the seller received the deposit) and the transaction was expected to be zero-rated, the seller will not have paid GST and the buyer will not have been able to claim GST. In this situation, neither the seller nor the buyer is required to make an adjustment when the agreement is cancelled.

What if the transaction is not zero-rated?

46. If time of supply was triggered before the agreement was cancelled (eg, if the seller received the deposit) and the transaction was not expected to be zero-rated, GST may have been paid or claimed before the agreement was cancelled. The following scenarios illustrate this point:
    - The seller is GST-registered and the land is supplied as part of the seller's taxable activity but the buyer is not GST-registered. In this situation, if time of supply was triggered, the seller may have paid GST before the agreement was cancelled.
    - The seller is not GST-registered but the buyer is GST-registered and the land is purchased in the course of the buyer's taxable activity. In this situation, if time of supply was triggered, the buyer may have claimed a second-hand goods input tax credit (to the extent payment has been made) before the agreement was cancelled.
47. For the seller, whether GST was paid on the full amount of the sale price or only on the amount of the deposit will depend on whether the seller accounts for GST on an invoice basis (full sale price) or payments basis (amount of the deposit).
48. The same general rule applies to the buyer when they claim GST. However, a second-hand goods input tax credit is only available to the extent payment has been made (even if the buyer accounts for GST on an invoice basis).

What to do if GST has already been paid or claimed

49. If the seller has already paid output tax or the buyer has claimed input tax in relation to the intended supply of land and the contract is cancelled, a GST adjustment under s 25 will need to be made.[17]
50. Section 25 requires an adjustment if a return or taxable supply information contains an inaccuracy because the supply was cancelled.
51. If a land sale agreement has been cancelled and the seller retains the deposit there is no supply of land or any other supply for the deposit. Therefore, GST does not apply. This means any GST the seller has paid will need to be reversed in the period in which it has become apparent that the GST paid was incorrect. This will generally be the period in which the agreement was cancelled.
52. If a buyer has claimed GST in relation to the intended supply of land, then this will need to be reversed in the period in which the seller issues supply correction information or the buyer becomes aware that the taxable supply information they have is incorrect. This will generally be the period in which the agreement is cancelled.

17 For the seller this would be subject to the application of time limits for refunds.

Example | Tauira

Example | Tauira 1 – Property developer sells land to an unregistered person who defaults

Build Co Ltd is a GST-registered property developer that accounts for GST on an invoice basis.

On 1 December 2023, Build Co Ltd agrees to sell land to Mr Smith, who is not registered for GST, for $1,150,000 including GST (if any). The agreement is unconditional and Mr Smith pays a 10% deposit of $115,000 to Build Co Ltd on the same day. Build Co Ltd holds the deposit for its own benefit, not as a stakeholder. Possession and settlement are on 20 February 2024.

Time of supply is triggered on 1 December 2023 when Build Co Ltd receives the deposit. Build Co Ltd treats the transaction as standard-rated (because Mr Smith is not GST registered) and pays GST output tax of $150,000 on the full sale price.

Mr Smith decides he doesn't want to go ahead with the purchase and fails to pay the balance of the purchase price on settlement date. Build Co Ltd issues a settlement notice with a new completion date but Mr Smith does not comply. Build Co Ltd cancels the contract and retains the deposit.

GST does not apply to the deposit Build Co Ltd retains as it has made no supply of land or any other supply in return for the deposit. The deposit is compensation for Mr Smith's failure to pay the balance of the purchase price as agreed.

Build Co Ltd makes a GST adjustment under s 25 and claims a GST input tax credit of $150,000 in the period in which the agreement was cancelled (ie, when Build Co Ltd knew Mr Smith was not going through with the purchase and that the amount of output tax it had previously paid was incorrect).

References | Tohutoro

Legislative references | Tohutoro whakatureture

A New Tax System (Goods and Services Tax) Act 1999 (Cth), Division 99

Goods and Services Tax Act 1985, ss 2 ("goods", "services"), 5 ("supply"), 25

Case references | Tohutoro kēhi

Case L67 (1989) 11 NZTC 1,391

Case N24 (1991) 13 NZTC 3,199

Case S65 (1996) 17 NZTC 7,408

Case W9 (2003) 21 NZTC 11,083

Case W11 (2003) 21 NZTC 11,100

Case W22 (2003) 21 NZTC 11,212

Ch'elle Properties (NZ) Ltd v CIR (2004) 21 NZTC 18,618 (HC)

CIR v Databank Systems Ltd [1989] 1 NZLR 422 (CA)

CIR v New Zealand Refining Co Ltd (1997) 18 NZTC 13,187 (CA)

Coumat Ltd v Whitford Properties Ltd [2018] NZCA 15

FCT v Reliance Carpet Co Pty Ltd [2008] HCA 22

Garratt v Ikeda [2002] 1 NZLR 577 (CA)

Howe v Smith (1884) 27 Ch D 89 (UKCA)

Marac Life Assurance Ltd v CIR (1986) 8 NZTC 5,086 (CA)

Ng v Ashley King (Developments) Ltd [2010] EWHC 456 (Ch), [2010] 4 All ER 914

Nicholls v CIR (1997) 18 NZTC 13,265 (HC)

Shuttleworth v Clews [1910] 1 Ch 176

Soper v Arnold (1889) 14 App Cas 429 (HL)

Other references | Tohutoro anō

IS 07/02: Is an agreement for the sale and purchase of property an "invoice" for GST purposes? *Tax Information Bulletin* Vol 19, No 7 (August 2007): 7
taxtechnical.ird.govt.nz/tib/volume-19---2007/tib-vol19-no7
taxtechnical.ird.govt.nz/interpretation-statements/is0702-is-an-agreement-for-sale-and-purchase-of-property-an-invoice-for-gst-purposes

IS 10/03: GST: Time of supply – payments of deposits, including to a stakeholder *Tax Information Bulletin* Vol 22, No 6 (July 2010): 7
taxtechnical.ird.govt.nz/tib/volume-22---2010/tib-vol22-no6
taxtechnical.ird.govt.nz/interpretation-statements/is1003-gst-time-of-supply-payments-of-deposits-including-to-a-stakeholder

IS 17/08: Goods and services tax – Compulsory zero-rating of land rules (general application) *Tax Information Bulletin* Vol 29, No 10 (November 2017): 1
taxtechnical.ird.govt.nz/tib/volume-29---2017/tib-vol29-no107
taxtechnical.ird.govt.nz/interpretation-statements/is-1708-gst-compulsory-zero-rating-of-land-rules-general-application-

QB 25/19: GST listed services rules: When is a supply of listed services made through an electronic marketplace?

Issued | Tukuna: 28 July 2025

This question we've been asked (QWBA) discusses one of the key requirements for when the GST listed services rules apply. That is, the supply must be made by an underlying supplier to a recipient through an electronic marketplace operator. It explains that this requirement is satisfied when the marketplace is involved in, and facilitates, supplies between underlying suppliers and recipients.

For information on how the GST listed services rules apply generally, see:

- GST on listed services Inland Revenue's web guidance on the listed services rules, including fact sheets applicable to underlying suppliers, listing intermediaries and electronic marketplaces.
- Inland Revenue's special report: **GST on accommodation and transportation services supplied through online marketplaces**.

Question | Pātai

When is a supply of listed services made "through" an electronic marketplace?

Answer | Whakautu

An underlying supplier supplies listed services to a recipient "through" an electronic marketplace operator when the marketplace is involved in, and facilitates, supplies between underlying suppliers and recipients. Supplies of listed services are not made through an electronic marketplace when a platform advertises on behalf, redirects customers to the underlying suppliers' own websites or makes its own supplies to customers.

Key terms | Kīanga tau tāpua

Electronic marketplace means a marketplace operated by electronic means, by which the underlying supplier makes a supply of listed services through the marketplace operator to the recipient.

Listed services means a supply performed, provided or received in New Zealand of either:

- accommodation services, other than an exempt supply under s 14(1); or
- transport services in the form of ride-sharing or ride-hailing services, or delivery services for food, beverages or both.

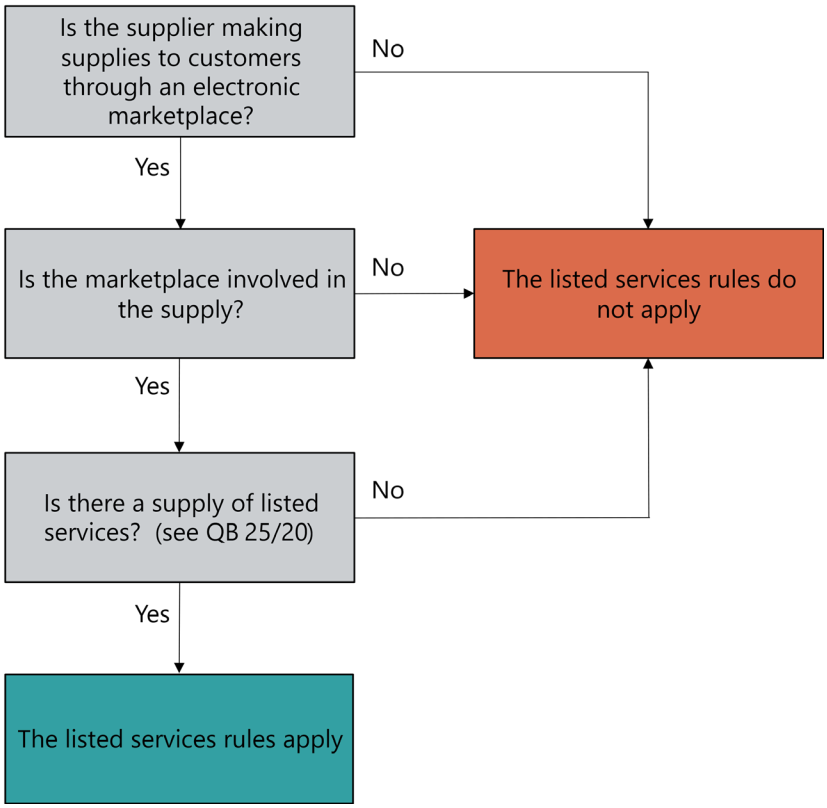
Listing intermediary means a person (eg, a property manager) that lists accommodation services on an electronic marketplace on behalf of underlying suppliers.

Underlying supplier means the person supplying the listed services, such as the accommodation owner or the driver or deliverer.

Explanation | Whakamāramatanga

1. All legislative references are to the Goods and Services Tax Act 1985.
2. This QWBA explains when a supply is made "through" an electronic marketplace. It explains when an electronic marketplace exists, when the marketplace is involved in a supply, and what happens when multiple marketplaces or listing intermediaries are involved.
3. A related QWBA (**QB 25/20: GST listed services: How do the listed services rules apply when there is a supply of listed services and other goods or services?**) explains how the rules apply when there is a supply of both listed services and other goods or services.
4. Figure | Hoahoa 1 illustrates when the listed services rules apply.

Figure | Hoahoa 1 – When the listed services rules apply



5. The GST listed services rules apply when underlying suppliers (eg, drivers and accommodation owners) supply listed services to a recipient through an electronic marketplace operator.
6. When the rules apply, a supply of listed services is generally treated as being two supplies. The first supply is from the underlying supplier to the marketplace (which is zero-rated if the underlying supplier is GST-registered), and the second supply is from the marketplace to the recipient. The marketplace must account for GST on the supply it is treated as making to the recipient and pay a flat-rate credit to any underlying suppliers that are not GST-registered.
7. When a listing intermediary is involved, the supply of listed services is generally treated as being three supplies. The first supply is from the underlying supplier to the listing intermediary (which is zero-rated if the underlying supplier is GST-registered), the second supply is from the listing intermediary to the marketplace (which is also zero-rated), and the third supply is from the marketplace to the recipient. The marketplace must account for GST on the supply it is treated as making to the recipient. The listing intermediary pays a flat-rate credit to any underlying suppliers that are not GST-registered.
8. Therefore, electronic marketplaces, underlying suppliers (eg, drivers and accommodation owners) and listing intermediaries (property managers or agents) need to know whether a supply will be subject to the listed services rules, as this affects who is liable to account for GST on the supply.

The supply must be made through the marketplace

9. For a supply of listed services to be subject to the listed services rules, it needs to be made through an electronic marketplace. There are various websites, apps or platforms that form part of the wider platform economy that may not meet the definition of an electronic marketplace.
10. An electronic marketplace is a marketplace that is operated by electronic means, by which the underlying supplier makes a supply of listed services through the marketplace operator to the recipient. It includes a website, internet portal, gateway, store, distribution platform, or other similar marketplace (which this QWBA refers to collectively as a "platform" for convenience). It does not include a marketplace that solely processes payments.[1]

1 Definition of "electronic marketplace" in s 2.

11. A marketplace is a space where people gather for the purchase and sale of goods and services or conducting of commercial dealings.[2] The underlying supplier must make supplies "through" the marketplace operator to the recipient of the supply. This means that the underlying supplier must make the supply to the recipient "by means of" the marketplace operator.[3] That is, the marketplace is involved in facilitating the supplies between underlying suppliers and customers.
12. Supplies are made through an electronic marketplace where:
    - there is a marketplace connecting buyers and sellers;
    - the marketplace is operated electronically, through a website, internet portal, gateway, store, distribution platform or other similar type of marketplace; and
    - underlying suppliers make supplies to recipients through the marketplace - that is, recipients access the relevant goods and services using the marketplace, rather than through the underlying suppliers' own websites.
13. Supplies are not made through an electronic marketplace where:
    - the customer directly purchases goods or services through a physical store or by phone or email;
    - the platform makes its own supplies (eg, by employing or contracting its own drivers) rather than connecting underlying suppliers to customers;
    - the platform only advertises on behalf of underlying suppliers, or directs customers back to the underlying supplier's own website to make the purchase; or
    - the marketplace solely processes payments with no other involvement in the supply of services to customers.
14. Example | Tauira 1, Example | Tauira 2 and Example | Tauira 3 illustrate situations where the requirements of an electronic marketplace are not satisfied and the listed services rules do not apply.

Example | Tauira 1 – Platform redirecting to underlying supplier's website is not an electronic marketplace

EcoExplorer is a website that showcases different eco-friendly accommodation options throughout New Zealand. EcoExplorer advertises holiday homes provided by accommodation owners that meet relevant credentials.

Eli has off-grid tiny homes that he advertises on EcoExplorer.

When customers access EcoExplorer, the platform redirects them to Eli's own website. Customers do not make bookings through EcoExplorer. Therefore, Eli is not supplying accommodation through an electronic marketplace.

Example | Tauira 2 – Platform providing its own services is not an electronic marketplace

Deli-veries is a platform that provides delivery services for delis across New Zealand. A customer uses the platform to place an order for food or beverages from a particular deli, and Deli-veries arranges the delivery to the customer. Deli-veries hires its own drivers, so the drivers have a contractual arrangement with Deli-veries rather than the customers.

The relevant listed service is the delivery service for the food and beverages. While food and beverages are supplied by delis to customers through Deli-veries, the relevant supply for these purposes is the delivery services. Deli-veries is making the supplies of delivery services to customers because it has the relevant contractual arrangements with both the customers and the drivers. Deli-veries is not connecting the delivery drivers with customers. Therefore, Deli-veries is not subject to the listed services rules.

2 *Concise Oxford English Dictionary* (12th edition, 2011) definitions of "market" and "marketplace".

3 *Concise Oxford English Dictionary* definition of "through".

Example | Tauira 3 – Use of a booking system is not an electronic marketplace

Eli from Example | Tauira 1 has his own website where customers book to stay in his off-grid tiny homes.

His listings become popular after a social media post about one of his off-grid tiny homes goes viral. To help keep on top of all the bookings, Eli uses booking management software provided by BookMyTinyHome.

BookMyTinyHome is an inventory management tool, and is supplying software services to Eli. It is not making supplies to Eli's customers and is not connecting underlying suppliers and customers together. The customers make the booking directly with Eli through his website using the online booking system.

Neither Eli's website, nor BookMyTinyHome, is an electronic marketplace as they are not platforms through which supplies are made between underlying suppliers and customers.

The marketplace needs to be involved in the supply

15. Even if a supply is made through an electronic marketplace, the listed services rules may not apply if the marketplace has no involvement in the supply.[4] For these purposes, a marketplace is involved in the supply if it:
    - authorises the charge for the supply to the recipient (eg, it communicates to the recipient that they have a liability to pay for the supply);
    - makes or authorises the delivery of the supply to the recipient; or
    - directly or indirectly sets a term or condition under which the supply is made (eg, the marketplace has listing policies that an underlying supplier must satisfy).[5]
16. For the listed services rules to not apply, the documentation also needs to identify the supply as being made by the underlying supplier, and the underlying supplier and marketplace need to agree that the underlying supplier is liable for GST.

What happens when multiple marketplaces are involved in a supply

17. When a supply is made through multiple marketplaces, sometimes it might not be clear which marketplace operator is involved in the supply. In this situation, there is an ordering rule to work out which marketplace operator is treated as the supplier and liable to return the GST.[6] Under this rule, it is the first marketplace operator that authorises the charge or receives the consideration for the supply that is treated as the supplier for GST purposes.
18. It should be clear which marketplace first receives consideration for the supply. Inland Revenue's special report: **GST on accommodation and transportation services supplied through online marketplaces** gives an explanation of the intended meaning of "authorise the charge" from page 16. In summary, this involves communicating the liability to pay for the services to the customer.
19. This ordering rule only applies where multiple marketplaces are involved. If listing intermediaries are involved, they do not count as multiple marketplaces.

Whether a property manager is a listing intermediary or a marketplace

20. There are different rules for how to treat supplies when a listing intermediary is involved.[7] A property manager or agent is a listing intermediary if they list accommodation services on behalf of underlying suppliers on an electronic marketplace. A listing intermediary is not an electronic marketplace.
21. For a detailed explanation of the rules that apply to listing intermediaries see Inland Revenue's special report from page 43 and IR's web guidance for listing intermediaries: **listing intermediary rules**. In summary, as noted at [7], there are deemed to be three supplies when a listing intermediary is involved (a supply from the underlying supplier to the listing intermediary; a supply from the listing intermediary to the marketplace; and a supply from the marketplace to the customer). The main difference is that where an underlying supplier is not registered for GST, the listing intermediary (rather than the marketplace) is responsible for claiming input tax and paying flat rate credits to those underlying suppliers.

4 Section 60C(2B).

5 For more explanation of these phrases, see Inland Revenue's special report GST on accommodation and transportation services supplied through online marketplaces from 16.

6 Section 60C(3).

7 Section 60CB(2).

22. Some property managers have their own websites through which they take bookings for supplies of accommodation listed by their clients. For these supplies, a property manager will be an electronic marketplace rather than a listing intermediary.
23. Property managers who are listing intermediaries and also have an electronic marketplace need to keep track of the different types of supplies and work out, for each supply, whether they are acting as an electronic marketplace or a listing intermediary. When they are acting as an electronic marketplace, they need to return GST for those supplies. Example | Tauira 4 illustrates when a property manager is a listing intermediary and when it is an electronic marketplace.

Example | Tauira 4 - A property manager that is a listing intermediary for some supplies and an electronic marketplace for other supplies

BachBooking is a property manager with a large number of clients that own properties used for short stay accommodation. BachBooking undertakes a variety of services for its clients including cleaning, property management and booking services.

BachBooking has its own website through which the underlying suppliers can list their properties and customers can book the properties. BachBooking also lists all of its clients' properties on a New Zealand based marketplace, Shortstaycations.

When properties are listed and booked through Shortstaycations, BachBooking is operating as a listing intermediary. Shortstaycations is the relevant electronic marketplace and must return GST.

When properties are booked directly through BachBooking, BachBooking is operating as an electronic marketplace and must return GST.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Goods and Services Tax Act 1985 – ss 2 ("electronic marketplace"), 60C, 60CB.

Other references | Tohutoro anō

Concise Oxford English Dictionary (12th ed, Oxford University Press, 2011)

GST on accommodation and transportation services supplied through online marketplace (special report, Inland Revenue, 2025) **taxpolicy.ird.govt.nz/publications/2025/sr-marketplace-rules-listed-services**

GST on listed services (webpage, Inland Revenue, 2025) **ird.govt.nz/sharing-economy/online-marketplaces/gst-on-listed-services**

QB 25/20: GST listed services rules: How do the rules apply when there is a supply of listed services and other goods or services?

Issued | Tukuna: 28 July 2025

This question we've been asked (QWBA) discusses some issues with identifying the relevant supplies for the GST listed services rules. It explains what listed services are and how to apply the GST listed services rules if a supply includes listed services with other goods or services.

For information on how the GST listed services rules apply generally, see:

- GST on listed services, Inland Revenue's web guidance on the listed services rules, including fact sheets applicable to underlying suppliers, listing intermediaries and electronic marketplaces.
- Inland Revenue's special report: **GST on accommodation and transportation services supplied through online marketplaces**

Question | Pātai

How do the GST listed services rules apply when there is a supply of listed services and other goods or services?

Answer | Whakautu

The GST listed services rules apply only when an underlying supplier supplies "listed services" to a recipient through an electronic marketplace operator.

A supply of listed services includes some transport services (ride-sharing and ride-hailing services and delivery services for food and beverages) and accommodation services (excluding exempt accommodation). Accommodation services do not include supplies of assets such as caravans.

When a supply includes listed services and other goods or services, standard GST principles apply to determine whether there is a single supply or multiple supplies. The listed services rules apply only to any supplies of listed services that are separate from other supplies.

Key terms | Kīanga tau tāpua

Electronic marketplace means a marketplace operated by electronic means, by which the underlying supplier makes a supply of listed services through the marketplace operator to the recipient.

Listed services means a supply performed, provided or received in New Zealand of either:

- accommodation services, other than an exempt supply under s 14(1); or
- transport services in the form of ride-sharing or ride-hailing services, or delivery services for food, beverages or both.

Listing intermediary means a person (eg, a property manager) that lists accommodation services on an electronic marketplace on behalf of underlying suppliers.

Underlying supplier means the person supplying the listed services, such as the accommodation owner or the driver or deliverer.

Explanation | Whakamāramatanga

1. All legislative references are to the Goods and Services Tax Act 1985.
2. The GST listed services rules apply when underlying suppliers (eg, drivers and accommodation owners) supply "listed services" to a recipient through an electronic marketplace operator.

3. When the rules apply, a supply of listed services is generally treated as being two supplies. The first supply is from the underlying supplier to the marketplace (which is zero-rated if the underlying supplier is GST-registered), and the second supply is from the marketplace to the recipient. The marketplace must account for GST on the supply it is treated as making to the recipient and pay a flat-rate credit to any underlying suppliers that are not GST-registered.
4. When a listing intermediary is involved, the supply of listed services is generally treated as being three supplies. The first supply is from the underlying supplier to the listing intermediary (which is zero-rated if the underlying supplier is GST-registered), the second supply is from the listing intermediary to the marketplace (which is also zero-rated), and the third supply is from the marketplace to the recipient. The marketplace must account for GST on the supply it is treated as making to the recipient. The listing intermediary pays a flat-rate credit to any underlying suppliers that are not GST-registered.
5. Therefore, electronic marketplaces, underlying suppliers (eg, drivers and accommodation owners) and listing intermediaries (property managers or agents) need to know whether a supply will be subject to the listed services rules, as this affects who is liable to account for GST on the supply.
6. This QWBA explains how the GST listed services rules apply when there is a supply of both listed services and other goods or services. To set the context for that issue, this QWBA first explains what services are included as listed services.
7. A related QWBA (**QB 25/19: GST listed services rules: When is a supply made through an electronic marketplace?**) explains when a supply is made through an electronic marketplace.

What services are included as listed services?

8. Listed services are:
    - a supply of accommodation services in New Zealand, other than an exempt supply under s 14(1)(c); and
    - a supply of transport services in New Zealand in the form of:
        - ride-sharing or ride-hailing services; and
        - delivery services for food, beverages or both.

What are accommodation services?

9. Listed services do not include accommodation that is exempt under s 14(1)(c). This exemption applies to accommodation in a dwelling the person uses as their principal place of residence and for which they have quiet enjoyment rights. Generally, the provision of short-stay accommodation to a guest will not be exempt as it would not be the guest's principal place of residence. All other accommodation is generally subject to GST.[1]
10. "Accommodation services" are not defined for these purposes. Accommodation can have a broad meaning and takes its meaning from the statutory context in which it is used.[2] In the context of the GST listed services rules, "accommodation services" does not describe the physical nature of a place, but instead describes a service the underlying supplier provides.
11. Supplies of assets (eg, a caravan, campervan, boat or tent) are not the supply of accommodation services.[3] The asset by itself, without a site on which it is placed and connected to facilities, would not be a space in which someone may live or stay.[4] However, there will be a supply of accommodation services when the supply of the asset is on a site, where the asset is configured for accommodation and is connected to utilities such as electricity and water.
12. Example | Tauira 1 illustrates supplies that are not listed services, and Example | Tauira 2 illustrates supplies that are listed services.

1 For completeness, the reduced GST rate that can apply under s 10(6) for some accommodation supplies in commercial dwellings does not apply to supplies made through an electronic marketplace.

2 *Urdd Gobaith Cymru v Commissioner of Customs and Excise* [1997] V & DR 273 at 279, *Rawlings v Pilcher* [2014] NZ NZEnvC 49.

3 *Revenue and Customs Commissioners v C Jenkin & Son Ltd* [2017] UKUT 239 (TCC); *Case T44* (1998) 18 NZTC 8,295.

4 *Concise Oxford English Dictionary* (12th ed, Oxford University press, 2011) definition of "accommodation".

Example | Tauira 1 – Supplies that are not listed services

Brian owns a beachfront section and takes his caravan there over the summer. Brian decides to hire the caravan out during winter to help fund maintenance costs.

Brian uses Camperconnect, a platform that connects owners of caravans and campervans with customers, where customers collect the caravans and drive them away. Although Camperconnect is an electronic marketplace, it does not provide listed services, as supplies of caravans without a site and connection to facilities are not supplies of accommodation services.

Brian is not GST-registered, so he does not need to account for GST on his supplies made through Camperconnect.

Example | Tauira 2 – Supplies that are listed services

Camperconnect from Example | Tauira 1 extends its offerings to include holiday homes.

Brian realises he could earn a higher nightly fee if he hired out the caravan on the beachfront section. The section has a small unit with cooking and bathroom facilities and is connected to a power supply and water. The supply of the caravan on the site connected to facilities is the supply of accommodation services and is a listed service.

Camperconnect will need to account for the supplies of accommodation services under the GST listed services rules. As Brian is not GST-registered, Camperconnect will need to pay him a flat-rate credit.

What are the relevant types of transportation services?

13. Ride-sharing or ride-hailing services are defined as services provided through an electronic marketplace that involve engaging a personal driver to transport a person to their chosen destination.
14. Delivery services are limited to deliveries of food, beverages or both. The rules do not apply to deliveries of other goods. The relevant service for these purposes is the delivery service, not the supply of the food or beverage.

What happens when supplies of listed services are made along with other goods or services?

15. A supply of listed services may sometimes be made along with supplies of other goods or services. There has been some uncertainty with how the GST listed services rules apply. The following questions arise:
    - When are other services included as "closely connected services"?
    - How do the listed services rules apply when listed services are supplied with other goods or services?
    - How do the parties work out GST obligations when some supplies are in the listed services rules and other supplies are under standard GST rules?

When are other services included as closely connected services?

16. Listed services include other closely connected services. These are services that are ancillary to the listed service, supplied by the same underlying supplier and advertised, listed or made available through the marketplace to recipients.[5] An example is cleaning services provided by an underlying supplier along with the supply of accommodation services.
17. Closely connected services do not include any direct supplies the underlying supplier or the marketplace makes to the recipient. For example, they do not include:
    - services provided by the marketplace to the recipient or underlying supplier in consideration for service fees; or
    - property management services a property manager provides to an underlying supplier in consideration for a property management fee.
18. Closely connected services also do not extend to the provision of other services that may form part of a wider supply along with listed services.

5 Section 8C(7).

19. A closely connected service is provided by the same underlying supplier to the recipient through the marketplace. When other services such as cleaning services are provided by a listing intermediary through the electronic marketplace to the recipient, these other services are a zero-rated supply along with the supply of accommodation services.[6] However, these other services are not closely connected services so are not included in the calculation of the flat-rate credit paid to non-registered underlying suppliers.[7]

How do the listed services rules apply when listed services are supplied with other goods or services?

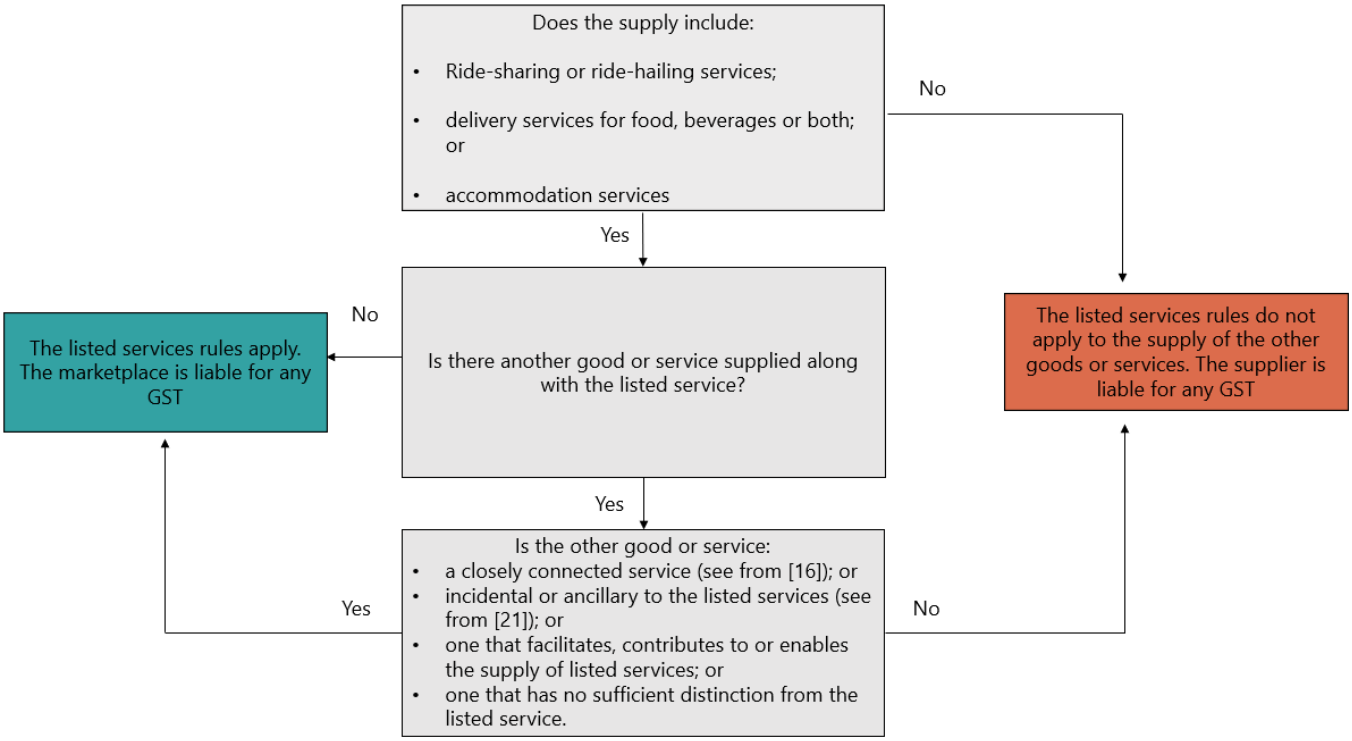
20. Issues arise when a supply includes listed services and other goods or services. In these cases, the question is whether the recipient has acquired a supply of listed services and a separate supply of the other goods or services, or whether there is a single supply. Once that has been determined, the nature of the relevant supply or supplies needs to be considered (ie, whether the supply is of listed services or something else).
21. Standard GST principles apply for determining how many supplies there are. For a detailed explanation, see **IS 18/04: Goods and Services Tax – Single supply or multiple supplies**. In summary, to determine whether there is a single supply or multiple supplies, the following questions are relevant:
    - What is the true and substantial nature of what is supplied to the recipient for the payment?
    - What is the relationship between the different goods or services supplied? Is it reasonable to sever the supply into separate supplies?
22. The true and substantial nature of what is supplied to the recipient is examined from the recipient's perspective. The fact that different parts of a supply could have been supplied separately does not mean those parts should be severed from the rest of the supply. Also, the fact a single price is charged does not determine how many supplies are made.
23. Determining the relationships between the different goods or services supplied requires considering whether one part of the supply is either ancillary or incidental to, another part of the supply, or a necessary part of it. This includes considering whether part of the supply is an aim in itself, or whether it facilitates, contributes to or enables the supply of the dominant part. Also relevant is whether part of the supply is an optional extra and is not in any real or substantial sense part of the consideration for which the payment is made. Further, when different elements are contractually supplied to the recipient by different suppliers, they are separate supplies.
24. It is reasonable to sever a supply into separate supplies if a sufficient distinction exists between the different parts of the transaction. Determining this requires taking an overall view and looking for the essential purpose of the transaction rather than artificially splitting what, from an economic point of view, is a single supply.
25. Once the number of supplies is established through applying these principles it is necessary to determine whether the relevant supply satisfies the meaning of "listed services" discussed above and falls within the listed services rules.

6 Section 60CB(3).

7 Section 8C(7B).

26. Figure | Hoahoa 1 and Example | Tauira 3 illustrate these concepts.

Figure | Hoahoa 1 – How the rules apply when listed services are supplied with other goods or services



Example | Tauira 3 – Supplies of multiple services

Nights&Flights is an electronic marketplace that lists accommodation and flight packages for trips within New Zealand. Customers can book one of two deals:

- With a "combo deal" for flights and accommodation listed by an underlying supplier, the customer pays a set price and cannot customise any part of the deal. Nights&Flights lists a limited number of these deals the relevant underlying suppliers offer.
- With a "custom deal" the customer books the flight and accommodation separately with different underlying suppliers. The customer selects and pays for each service separately (the flight and accommodation) using Nights&Flights' booking system.

The combo deal is not a supply of listed services. The supply is of a holiday package with a single supplier, and the parts of the supply cannot be reasonably separated.

The custom deal involves separate supplies of listed services (accommodation) and other services (flights) offered by different underlying suppliers. The supplies of listed services are subject to the listed services rules, and the flights are subject to ordinary GST rules.

How do the parties work out GST obligations when some supplies are in the listed services rules and other supplies are under standard GST rules?

27. Where multiple supplies are made, the parties need to work out which supplies are subject to GST, which supplies are zero-rated and which are ignored for GST purposes. This will impact on whether output tax is payable (and who must pay it) and whether it is possible to claim input tax deductions.

28. Various arrangements may be in place for a supply of listed services, and different amounts may be paid by, or payable to, different parties depending on the arrangement in place. What is important is that only supplies of listed services made by an underlying supplier through the marketplace to a recipient are subject to these rules. If the parties have made other payments for direct supplies, then those supplies and payments are not subject to the listed services rules (but would be subject to standard GST rules). The following examples illustrate some different arrangements:

- If the underlying supplier includes cleaning services as part of the supply made through the electronic marketplace to the recipient, the cleaning service is a closely connected service and is a listed service subject to the listed services rules.
- If a listing intermediary provides cleaning services as part of the supply made through the electronic marketplace to the recipient, this is not a closely connected service and is not a listed service. However, under the listing intermediary rules the supply of cleaning services is treated as a zero-rated supply by the listing intermediary to the marketplace (along with the supply of the accommodation services). The marketplace is treated as making a standard rated supply of the cleaning services to the recipient.[8]
- If a listing intermediary provides cleaning services directly to the underlying supplier (and not through the electronic marketplace), the cleaning service is not a closely connected service and is not a listed service. It will instead be subject to standard GST rules for supplies made in New Zealand.
- If a marketplace operator charges a service fee to the recipient and/or the underlying supplier, these fees are not subject to the listed services rules. However, these types of fees charged by a non-resident marketplace operator may be subject to other rules, such as the GST remote services rules.

29. Example | Tauira 4 illustrates how to work out GST obligations when some supplies are subject to the listed services rules and other supplies are not within the rules.

Example | Tauira 4 – Working out GST obligations

Maria is GST-registered and owns several properties used for short stay accommodation. Maria uses BachBooking as a property manager.

BachBooking undertakes a variety of services for its clients, including cleaning, property management and booking services. It charges property management fees for its services, as well as cleaning fees. BachBooking lists all of its clients' properties on a New Zealand-based marketplace, Shortstaycations.

Walter books one of Maria's properties through Shortstaycations. He pays a nightly price, including the cleaning fee charged by BachBooking. Shortstaycations separately charges a service fee to both Maria and Walter.

Under the listed services rules:

- Maria is treated as making a zero-rated supply of the accommodation to BachBooking;
- BachBooking is treated as making a zero-rated supply of the accommodation to Shortstaycations;
- Shortstaycations is treated as making a supply of the accommodation to Walter, which is subject to GST;
- the supply of cleaning services that BachBooking charges Walter through the marketplace is zero-rated to BachBooking; and
- Shortstaycations needs to include the cleaning services as part of its taxable supply to Walter, along with the accommodation services.

Under standard GST rules:

- Maria can claim input tax deductions for goods or services she acquired in making supplies of accommodation services (eg, the property management fees she pays to BachBooking); and
- The property management fee BachBooking receives, and service fees Shortstaycations receives, are subject to GST.

8 Section 60CB(3).

References | Tohutoro

Legislative references | Tohutoro whakatureture

Goods and Services Tax Act 1985 – ss 2 ("electronic marketplace"), 8C, 10(6), 14(1), 60CB.

Case references | Tohutoro kēhi

Case T44 (1998) 18 NZTC 8,295 (TRA)

Rawlings v Pilcher [2014] NZEnvC 49

Revenue and Customs Commissioners v C Jenkin & Son Ltd [2017] UKUT 239 (TCC)

Urdd Gobaith Cymru v Commissioner of Customs and Excise [1997] V & DR 273

Other references | Tohutoro anō

Concise Oxford English Dictionary (12th edition, Oxford University Press, 2011)

IS 18/04 GST – Single supply or multiple supplies *Tax Information Bulletin volume 30, number 10 (November 2018)*

taxtechnical.ird.govt.nz/interpretation-statements/is-1804-goods-and-services-tax-single-supply-or-multiple-supplies

taxtechnical.ird.govt.nz/tib/volume-30---2018/tib-vol30-no10

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 25/17: Application of schedular payment rules

Decision date | Rā o te Whakatau: 24 March 2025

Issue date | Rā Tuku: 11 July 2025

Subjects | Kaupapa

Directors fees; non-residents; schedular payments

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The application concerned the procurement of board directorship services by Company A from non-resident individuals through contractual arrangements with Company A's offshore subsidiaries (Subsidiaries).
2. The Arrangement was that the Subsidiaries would procure and supply directorship services of offshore individuals to Company A. The Subsidiaries would also enter into services agreements with offshore individuals to acquire the directorship services of the individuals.
3. Company A's board of directors included non-executive directors (Directors) whose role was to contribute their jurisdictional experience and local market knowledge to the decision-making of Company A.
4. Company A entered into formal agreements for directorship services with the Subsidiaries. The Subsidiaries were remunerated by Company A for directorship services at an arm's length amount (Directorship Services Payments).
5. None of the Subsidiaries:
   - were tax resident in New Zealand;
   - had a permanent establishment in New Zealand under a double tax agreement (DTA);
   - had any person physically present in New Zealand acting on their behalf for more than 92 days in any 12-month period; or
   - were a "non-resident entertainer" as defined in ss CW 20 and YA 1.
6. Each Subsidiary entered into an agreement for services with each Director under the Letter of Appointment. Each Director was engaged as an independent contractor of the Subsidiary.
7. Consequently, the Directors contracted directly with the relevant Subsidiaries rather than with Company A. The roles and responsibilities of the Directors included serving as non-executive directors on the Board of Company A.

8. None of the Directors:
   - were tax resident in New Zealand;
   - had a permanent establishment or fixed base in New Zealand under a DTA;
   - were physically present in New Zealand for more than 92 days in any 12-month period;
   - were a "non-resident entertainer" as defined in ss CW 20 and YA 1;
   - were associated with Company A under the Act; or
   - were associated with a Subsidiary under the Act.

Issues | Take

9. The main issues considered in this ruling were whether:
   - the Directorship Services Payments made by Company A to the Subsidiaries were subject to withholding tax under the PAYE rules;
   - the Director Remuneration Payments made from the Subsidiaries to the Directors were subject to withholding tax under the PAYE rules; and
   - s BG 1 applied to the Arrangement.

Decisions | Whakatau

10. It was concluded that:
    - The PAYE rules (as defined in s RD 2) did not apply to the Directorship Services Payments under ss RD 2 and RD 3.
    - The PAYE rules (as defined in s RD 2) did not apply to the Director Remuneration Payments under ss RD 2 and RD 3.
    - Section BG 1 did not apply to the Arrangement.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Whether Directorship Services Payments were schedular payments

11. The PAYE withholding tax rules (as defined in s RD 2) apply to a PAYE income payment which includes a "schedular payment" under s RD 8.
12. To be a "schedular payment" under s RD 8, the Directorship Services Payments from Company A to the Subsidiaries must meet all of the following:
    - be New Zealand sourced income under s YD 4;
    - fall within schedule 4 of the Act under s RD 8(1)(a)(i); and
    - not be excluded under s RD 8(1)(b)(v).

New Zealand sourced

13. The Directorship Services Payments were partly sourced in New Zealand based on at least one of the meetings being physically held in New Zealand under s YD 4(2) (business in New Zealand) or s YD 4(3) (contracts made or performed in New Zealand).
14. To the extent the Directorship Services Payments were not sourced in New Zealand, the PAYE rules did not apply.

Schedule 4

15. The Directorship Services Payments (to the extent they were New Zealand sourced) fell within schedule 4 of the Act as either a contract payment to a non-resident contractor under part A or as directors' fees or as a payment for services performed by a member of a board under part B.

Section RD 8(1)(b)(v) exclusion

16. Section RD 8(1)(b)(v) states that a payment is not a schedular payment if all of the following are met:
    - It is for services provided by a non-resident contractor.
    - The non-resident contractor has full relief from tax under a DTA.
    - The non-resident contractor is present in New Zealand for 92 days or fewer in a 12-month period.
17. The above requirements were met because:
    - The Directorship Services Payments (to the extent they were New Zealand sourced) were for directorial services provided by the Subsidiaries. The Subsidiaries were each a non-resident contractor because they were each a non-resident performing services in New Zealand through the Directors attending Company A Board meetings in New Zealand.
    - The Subsidiaries had full tax relief under the relevant DTA. The directors' fee article of the relevant DTA did not apply to give New Zealand taxing rights because only individuals can derive directors' fees in their capacity as a board member.
    - The Subsidiaries were not present in New Zealand for more than 92 days in a 12-month period.

Conclusion

18. In conclusion, the Directorship Services Payments from Company A to the Subsidiaries were not subject to the PAYE rules under ss RD 2 and RD 3 because either:
    - They were foreign sourced income.
    - S RD 8(1)(b)(v) applied to exclude the amounts attributable to New Zealand sourced income.

Issue 2 | Take tuarua: Whether Director Remuneration Payments were schedular payments

19. To be a "schedular payment" that is subject to the PAYE rules, the Director Remuneration Payments from the Subsidiaries to the Directors must meet all of the following:
    - be New Zealand sourced income;
    - fall within schedule 4 of the Act;
    - not be excluded under s RD 8(1)(b)(v); and
    - be within New Zealand's territorial jurisdiction if paid by a non-resident.

New Zealand sourced

20. The Directors were physically present in New Zealand for at least one board meeting a year. Therefore, the payments made to the Directors were partly sourced in New Zealand under s YD 4(2) (business in New Zealand) or YD 4(3) (contracts in New Zealand).
21. As the Director Remuneration Payments were partially sourced in New Zealand (when the Directors attend board meetings in New Zealand) they met the first "schedular payment" requirement.
22. To the extent the Director Remuneration Payments were not sourced in New Zealand, the PAYE rules did not apply.

Schedule 4

23. The Director Remuneration Payments (to the extent they were New Zealand sourced) fell within schedule 4 of the Act as either a contract payment to a non-resident contractor under part A or as directors' fees or as a payment for services performed by a member of a board under part B.

Section RD 8(1)(b)(v) exclusion

24. Section RD 8(1)(b)(v) states that a payment is not a schedular payment if all of the following are met:
    - It is for services provided by a non-resident contractor.
    - The non-resident contractor has full relief from tax under a DTA.
    - The non-resident contractor is present in New Zealand for 92 days or fewer in a 12-month period.

25. The above requirements were met because:
    - The Director Remuneration Payments (to the extent they were New Zealand sourced) were for directorial services provided by the Directors. The Directors were a non-resident contractor because they were a non-resident performing services in New Zealand through the Directors attending Board meetings in New Zealand.
    - If s CW 19 (exemption for short term visits) did not apply, the Directors had full tax relief under the relevant DTA because:
        - The directors' fee article did not apply to give New Zealand taxing rights because it was not a payment made by a New Zealand resident company to a non-resident individual (rather it was a payment from a non-resident company to a non-resident individual).
        - The Directors did not have a permanent establishment or fixed base in New Zealand so qualified for tax relief under either business profits or independent personal services articles.
    - The Directors were not present in New Zealand for more than 92 days in a 12-month period.

Territorial limitation

26. If the s CW 19 exemption applied to the New Zealand sourced payments, then the exclusion in s RD 8(1)(b)(v) from the PAYE rules did not apply because the Directors did not have "full relief from tax under a DTA." However, the territorial limitation prevented New Zealand imposing a PAYE obligation on the Local Entities. This is because the Local Entities did not have a sufficient presence in New Zealand.

Conclusion

27. In conclusion, the Directorship Remuneration Payments were not subject to the PAYE rules under ss RD 2 and RD 3 because one of the following applied:
    - They were foreign sourced income.
    - S RD 8(1)(b)(v) applied to exclude the amounts attributable to New Zealand sourced income.
    - The territorial limitation prevented New Zealand imposing a PAYE obligation on the Local Entities.

Issue 3 | Take tuatoru: Whether s BG 1 applied to the Arrangement

28. 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.
29. 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.
30. The Tax Counsel Office'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.

31. Taking into account all of 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) the Tax Counsel Office concluded as follows.

The legal form of the arrangement

32. The arrangement for s BG 1 purposes was that the Subsidiaries would procure and supply directorship services of offshore individuals to Company A. The Subsidiaries would also enter into services agreements with offshore individuals to acquire the directorship services of the individuals. This was the same as the Arrangement described in the ruling.
33. According to the taxpayer, the commercial or private purposes of the Arrangement were:
    - Having directors with local market expertise on the Company A board. This helped ensure that the decision-making process underpinning the strategic direction of the group incorporated a thorough understanding of the local markets where the group had a significant presence.
    - Having the contracting and payroll managed by the Subsidiaries made commercial sense to Company A. The Directors already held positions, relating to the local markets, with a significant portion of their responsibilities and tasks centred around these local roles. Aligning the contracting and payment arrangements for the Directors with where the majority of their work lay was commercially and administratively more efficient.
34. The Arrangement gave rise to the following tax effects:
    - The PAYE rules (as defined in s RD 2) did not apply to the Directorship Services Payments under ss RD 2 and RD 3.
    - The PAYE rules (as defined in s RD 2) did not apply to the Director Remuneration Payments under ss RD 2 and RD 3.

Determining whether the arrangement has a tax avoidance purpose or effect

Identifying Parliament's purpose

35. Parliament's purpose is that New Zealand retains taxing rights on directors' fee payments from New Zealand resident companies to foreign directors regardless of where the services are performed. However, if a payment is made from a non-resident entity to a non-resident director, New Zealand has no taxing rights under the directors' fee article, nor can New Zealand impose a withholding tax obligation on a non-resident entity that does not have a sufficient presence in New Zealand.

The commercial and economic reality of the Arrangement

36. In relation to the commercial and economic reality of the Arrangement:
    - There was no artificiality, contrivance or pretence in the Arrangement.
    - It is common or orthodox that entities such as companies or partnerships can contract to provide the services of an individual as a director. This is consistent with Inland Revenue's position in:
        - IS 17/06: Application of schedular payment rules to directors' fees (2017);
        - IS 19/01: Application of schedular payment rules to non-resident directors' fees (2019); and
        - GA 21/01: Tax on any fees paid to a member of a board, committee, panel review group or task force (2021)).
    - The Directors were neither associated with the Subsidiaries nor Company A.
    - The Subsidiaries were remunerated by Company A for directorship services at an arm's length amount.
    - The Subsidiaries had real economic substance. They were not shell companies controlled by the Directors to avoid the imposition of withholding tax.
    - The commercial and economic effects of the Arrangement were consistent with the legal form.

Answering the ultimate question

37. The Arrangement, when viewed in a commercially and economically realistic way, made use of the specific provisions in a manner consistent with Parliament's purpose. Therefore, the Arrangement did not have a tax avoidance purpose or effect.
38. As it was concluded that there was no tax avoidance purpose or effect of the Arrangement, it was not necessary to consider the merely incidental test. Accordingly, it was concluded that s BG 1 did not apply to the Arrangement.

TDS 25/18: Sale of intellectual property, shares and ongoing provision of services

Decision date | Rā o te Whakatau: 5 November 2024

Issue date | Rā Tuku: 25 July 2025

Subjects | Kaupapa

Residence, double tax agreements, income, expenditure, and zero-rating

Taxation laws | Ture tāke

All legislative references are to the Income Tax Act 2007 (ITA), the Goods and Services Tax Act 1985 (GSTA), and double tax agreements (DTA).

Summary of facts | Whakarāpopoto o Meka

1. NZ Co, a New Zealand company, had developed assets and marketed them overseas through Overseas Subsidiaries. The Arrangement involved Overseas Holdco acquiring all the assets and shares in the Overseas Subsidiaries as well as intellectual property (IP) rights (within the meaning in s 11A(1)(n)(i) of the GSTA). NZ Sub acquired all the assets located in New Zealand (eg, office equipment and leases).
2. NZ Sub also provided services to Overseas Holdco in exchange for payment of arms-length service fees but would not work on Overseas Holdco's infrastructure hardware that was located in New Zealand. The only amounts that NZ Sub derived under the Arrangement were the service fees.
3. Overseas Holdco was outside New Zealand at the time the services were performed by NZ Sub. It did not derive any income in or from New Zealand under the Arrangement, other than dividends paid to it by NZ Sub (if any).
4. Overseas Holdco owned the Overseas Subsidiaries and NZ Sub. Overseas Holdco, the Overseas Subsidiaries and NZ Sub were ultimately in the same group of companies.
5. Overseas Holdco and the Overseas Subsidiaries had similar characteristics as they:
    - were not in or incorporated in New Zealand,
    - had offshore directors or decision makers, and
    - did not carry on any activities in New Zealand while having a fixed or permanent place in New Zealand.

Issues | Take

6. The main issues considered in this ruling were:
    - Whether NZ Sub, Overseas Holdco, and the Overseas Subsidiaries were resident in New Zealand for income tax and GST purposes, and where relevant under a DTA.
    - Whether the sale of the IP to Overseas Holdco was zero-rated under the GSTA.
    - Whether the services provided by NZ Sub to Overseas Holdco were zero-rated under the GSTA.
    - Whether NZ Sub had income from the Arrangement (other than the service fees) under Part C of the ITA.
    - Whether Overseas Holdco had any income from the Arrangement under Part C of the ITA, other than any dividends (if any) that NZ Sub declares and pays from time to time.-
    - Whether expenditure incurred by NZ Sub in the course of carrying on its business to derive service fees was deductible under s DA 1, and whether ss DA 2(2) to DA 2(6) of the ITA applied to deny a deduction.

Decisions | Whakatau

7. In respect of residence:
   - NZ Sub was a New Zealand resident under section YD 2 of the ITA, art 4(1) of the relevant DTA and "resident" under s 2 of the GSTA.
   - Overseas Holdco and the Overseas Subsidiaries were not New Zealand residents under s YD 2 of the ITA, under the relevant DTA, and not "resident" under s 2 of the GSTA.
8. The sale of the IP to Overseas Holdco was zero-rated under s 11A(1)(n) of the GSTA.
9. The service fees were zero-rated under either s 11A(1)(k) or s 11A(1)(n) of the GSTA.
10. NZ Sub had no income from the Arrangement under Part C of the ITA, other than the service fees.
11. Overseas Holdco had no income from the Arrangement under Part C of the ITA, other than dividends (if any) that NZ Co declared and paid from time to time.
12. Subject to s GB 33 and the other provisions of Part D of the ITA, expenditure incurred by NZ Sub to derive the services fees was deductible under s DA 1, and ss DA 2(2) to DA 2(6) did not apply to deny a deduction.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Residence of the companies

13. "New Zealand resident" is defined in s YA 1 of the ITA and includes a person resident in New Zealand under ss YD 1 to YD 3B of the ITA. Section YD 2(1) provides that a company is a New Zealand resident for the ITA if one of the following bases is satisfied:
    - It is incorporated in New Zealand.
    - Its head office is in New Zealand.[1]
    - Its centre of management is in New Zealand.
    - Its directors, in their capacity as directors, exercise control of the company in New Zealand, even if the directors' decision making also occurs outside of New Zealand.
14. For the purposes of the GSTA a person will be "resident" if they are resident under s YD 1 or YD 2 (excluding s YD 2(2)) of the ITA.[2] This is subject to three provisos ((a) to (c)) with (a) being the most relevant. A person is deemed to be a resident in New Zealand to the extent they carry on any taxable or other activity in New Zealand and have a fixed or permanent place in New Zealand related to that activity.
15. Under article 4(1) of the relevant DTA, whether a person is resident of a contracting state includes consideration of their place of management, place of incorporation or other similar criterion, and does not include a person who is only liable for tax in that state in respect of income sourced in that state or is resident under the domestic law of either country.

Residence of NZ Sub

16. TCO concluded that NZ Sub was a resident of New Zealand under s YD 2(1) of the ITA having been incorporated in New Zealand.
17. As NZ Sub was a resident of New Zealand under s YD 2(1), TCO concluded that it was "resident" under s 2 of the GSTA.
18. TCO concluded that NZ Sub was resident in New Zealand under s 4(1) of the relevant DTA having been incorporated in New Zealand and liable for New Zealand tax on its worldwide income.

1 For this and the following two bullet points see IS 16/03: Tax residence (20 September 2016), *Tax Information Bulletin* Vol 25, No 10 (October 2016).

2 Definition of "resident" in s 2 of the GSTA.

Residence of Overseas Holdco and Overseas Subsidiaries

19. TCO considered the description of the Arrangement (see para [5]) and concluded that Overseas Holdco and the Overseas Subsidiaries were not New Zealand resident under s YD 2 of the ITA because none of the four bases were satisfied:
    - They were not incorporated in New Zealand.
    - Their head office was not in New Zealand.
    - Their centre of management was not in New Zealand.
    - The directors or decision makers did not exercise any control in New Zealand.
20. As Overseas Holdco and the Overseas Subsidiaries were not New Zealand resident under s YD 2 of the ITA, TCO concluded that they were not a resident of New Zealand under art 4(1) of the relevant DTA.
21. Whether Overseas Holdco and the Overseas Subsidiaries were resident in respect of the GSTA relied on them being resident in New Zealand under s YD 2 (ITA) or carrying on a taxable or other activity to the extent that they had a fixed or permanent place in New Zealand. TCO concluded that they were not New Zealand resident under the GSTA as:
    - They were not resident under s YD 2 of the ITA.
    - They did not carry on any activities in New Zealand while having a fixed or permanent place in New Zealand.

Issues 2 and 3| Take tuarua and tuatoru: Zero-rating the IP and service fees

22. Legislative references in this part are to the GSTA unless otherwise stated.
23. Section 11A specifies that a supply of services that is chargeable with tax under s 8 must be charged with 0% in certain situations, including the transfer of intellectual property rights (s 11A(1)(n)). Section 11A(1)(n) only applies to the extent that:
    - the rights are for use outside of New Zealand (s 11A(4)(a)); or
    - the services are supplied to a non-resident who is outside of New Zealand at the time they are performed (s 11A(4)(b)).
24. Section 11A(1)(k) zero-rates the supply of services if both of the following requirements are met:[3]
    - The services are supplied to a non-resident who is outside of New Zealand at the time the services are performed.
    - The services are not supplied in connection with land, moveable personal property in New Zealand or are the acceptance of an obligation to refrain from carrying on a taxable activity.
25. Section 11A(1)(k) is subject to s 11A(2) which deals with situations where services are provided to non-residents but persons in New Zealand receive the performance of those services. If s 11A(2) applies the services cannot be zero-rated. TCO concluded that s 11A(2) did not apply.
26. The issues were whether the sale of the IP to Overseas Holdco and the services provided by NZ Sub to Overseas Holdco were zero-rated.
27. TCO considered the description of the Arrangement (at para [1] and para [3]) and the conclusion at [21] that Overseas Holdco was not "resident" in New Zealand under s 2 and concluded that the sale of the IP was zero-rated under s 11A(1)(n). This was because what was supplied was intellectual property rights within the meaning in s 11A(1)(n)(i) and to a non-resident who was outside of New Zealand.
28. TCO considered the description of the Arrangement (at para [1] and para [3]) and concluded that the services provided by NZ Co to Overseas Holdco could be zero-rated under s11A(1)(k) or (n). This was because the services:
    - were supplied to Overseas Holdco who was non-resident (para [21]) and outside New Zealand when the services were performed, and
    - were not supplied in connection with land, moveable personal property in New Zealand, or
    - were not the acceptance of an obligation to refrain from carrying on a taxable activity within New Zealand.

3 TCO were satisfied that the services provided by NZ Sub under the arrangement were "services" as defined in s 2.

Issue 4 | Take tuawhā: Income of NZ Sub

29. TCO considered the description of the Arrangement (para [2]) and concluded that NZ Sub had no income from the Arrangement under Part C of the ITA, other than the service fees. The Arrangement, described in the documents supplied to TCO, only allowed for the provision of certain services by NZ Sub to Overseas Holdco and receiving only the service fees in respect of that supply.

Issue 5 | Take tuarima: Income of Overseas Holdco

30. TCO considered the description of the Arrangement (para [3]) and concluded that Overseas Holdco had no income from the Arrangement under Part C of the ITA, other than any dividends (if any) that NZ Co declared and paid from time to time. The description of the Arrangement (para [3]) included a statement that Overseas Holdco would not derive any income in or from the Arrangement other than any dividends that NZ Sub might pay from time to time (if any).

Issue 6 | Take tuaono: Deductibility of expenditure incurred by NZ Sub

31. The issue was whether expenditure NZ Sub incurred that had the required nexus with its business to derive the services fees:
    - was deductible under s DA 1; and
    - the limitations in ss DA 2(2) to (6) did not apply.

The general permission

32. Section DA 1(1)(b) of the ITA provides for the deductibility of expenditure incurred in the course of carrying on a business for the purpose of deriving assessable income (or excluded income, or a combination thereof). Section DA 1(3) provides that s GB 33 may apply to override the general permission.
33. It is a matter of degree, and so a question of fact, to determine whether there is a sufficient relationship between the expenditure and the derivation of income, or the carrying on of a business for the purpose of deriving income. The phrase "the occasion of the loss or outgoing should be found in whatever is productive of the assessable income" is a helpful way both of characterising the factual inquiry that the application of the statutory language requires and of describing the nexus that is the focus of that inquiry.[4]
34. TCO was not asked to rule on the nexus test. TCO concluded that subject to the application of s GB 33 and the other provisions of Part D, expenditure incurred by NZ Sub in the course of carrying on its business to derive service fees was deductible under s DA 1 (effectively a restatement of the test in s DA 1(1)(b)).

The general limitation

35. If an amount of expenditure or loss satisfies the general permission, to be deductible it must also not be subject to any of the general limitations in s DA 2 of the ITA (which override the general permission).
36. TCO was not asked to rule on s DA 2(1) (capital limitation). TCO concluded that none of the limitations in ss DA 2(2) to (6) of the ITA applied as:
    - The private limitation did not apply to companies (DA 2(2)).
    - The exempt income limitation did not apply as the expenditure was incurred in deriving assessable income (the service fees) (s DA 2(3)).
    - The employment income limitation did not apply as the service fees were not employment income (s DA 2(4)).
    - The withholding tax limitation did not apply as the expenditure was not incurred in deriving non-resident passive income (s DA 2(5)).
    - The non-residents' foreign-sourced income limitation did not apply as the expenditure was not incurred in deriving non-residents' foreign-sourced income (s DA 2(6)).

4 *CIR v Banks* (1978) 3 NZTC 61,236 (CA), *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA)), *NRS Media Holdings Ltd v Commissioner of Inland Revenue* [2018] NZCA 472, and *Ronpibon Tin NL v FCT* (1949) 78 CLR 47

TDS 25/19: Company restructure for commercial and estate planning

Decision date | Rā o te Whakatau: 22 May 2025

Issue date | Rā Tuku: 4 August 2025

Subjects | Kaupapa

This item summarises a private ruling that considered whether a company restructure for commercial and estate planning is tax avoidance.

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. The Arrangement in this ruling is the restructure of a family business (the Company) as part of commercial and estate planning given the advancing years of the founding family members. The Arrangement involves several other companies that have been left out of this summary for simplicity.
2. The Company has issued classes of voting and non-voting shares. Three family members (a parent and two siblings) hold the voting shares. The majority of the non-voting shares are held by the family trusts of each of the three family members (Family Trusts A, B and C), with the spouse of each sibling holding a minority interest.
3. The stated commercial or private purposes of the Arrangement are to:
    - implement a commercial and estate plan to ensure the Company is effectively controlled and governed going forward by a holding company with a board of directors (including independent commercial directors) and for the benefit of the two siblings' family trusts, following the founding family members' deaths; and
    - preserve the imputation credits that have accumulated for future use by the Company's original trust shareholders.
4. To implement the commercial and estate plan, the following steps were proposed:
    - The spouses gift their minority interests in the non-voting shares to the relevant sibling's family trust.
    - Each of the three family trusts incorporates a separate company (NewCos A, B and C) and sells its non-voting shares to its respective NewCo for market value in a share-for-share exchange. All non-voting shares in the Company are then held by the three NewCos.
    - The Company pays a fully imputed dividend to the holders of the non-voting shares (that is, NewCos A, B and C), paid either as a credit to the shareholders with the shareholders simultaneously reinvesting that amount as additional share equity into the Company or as a fully imputed taxable bonus issue.
    - The voting shares the three family members hold are gifted to Family Trusts A and B (being the two siblings' family trusts). This results in all voting shares being held by the two siblings' family trusts.
    - Family Trusts A and B then sell these voting shares to NewCos A and B for market value in a share-for-share exchange.
    - NewCos A and B incorporate HoldCo and sell all the shares they hold in the Company for market value to HoldCo in a share-for-share exchange.
5. The result of the above transactions is that the two siblings' family trusts each owns 50% of a newly incorporated holding company that has a commercial board of directors and the holding company, in turn, holds all the voting shares and a majority of the non-voting shares in the Company. Some non-voting shares remain held by the parent's NewCo for now, and these are expected to transfer to the HoldCo structure following the parent's death. The Company's imputation credits pass to the three NewCos held by the original family trust shareholders, where they remain for future use.

6. The Agent stated (and it is conditioned in the ruling) that:
   - no share-for-share transaction in the Arrangement will result in the issuing company recognising or claiming available subscribed capital (ASC) (as defined in s YA 1) in excess of the existing ASC of the shares acquired, whether by operation of s CD 43 or otherwise; and
   - no share disposal under the Arrangement that is on revenue account will result in the person disposing of those shares recognising or claiming a material loss for tax purposes.

Issue | Take

7. The issue considered in the ruling was whether s BG 1 applied to the payment by the Company of a fully imputed dividend to the NewCos and the use of HoldCo to acquire shares in the Company.

Decision | Whakatau

8. The Tax Counsel Office (TCO) concluded that s BG 1 did not apply to the payment by the Company of a fully imputed dividend to the NewCos and the use of HoldCo to acquire shares in the Company.

Reasons for decisions | Pūnga o ngā whakatau

Issue | Take: Application of s BG 1

9. 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.
10. 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.
11. TCO's approach in making this decision is consistent with Interpretation Statement: 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.
12. Taking into account all of 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

13. The Arrangement, for s BG 1 purposes, and the commercial or private purposes of the Arrangement are as set out in the summary of facts in [4] above.

The tax effects of the Arrangement

14. TCO was not asked to rule on the black letter tax effects. However, taking into account the Arrangement's description and the conditions to the ruling, TCO considered the tax effects of the Arrangement to be as follows.

15. The various share-for-share exchanges should not result in any uplift in ASC being recognised. Generally, any ASC created by the issue of shares in consideration for receiving shares under the Arrangement is limited by s CD 43(9) and (10). A technical question exists about whether s CD 43(9) and (10) applies to limit ASC created by the issue of shares by the NewCos in consideration for the non-voting shares in the Company. However, the Agent proposed (and it is conditioned in the ruling) that the share-for-share exchanges do not result in any uplift in ASC being recognised by the issuing company.

16. Several share disposals are assumed to be on capital account. To the extent a disposal is on revenue account under s CB 4 (that is, if shares are acquired and then disposed of under the Arrangement), the transactions occur immediately after each other and most transfers are for either market value or deemed market value (due to being a gift and the application of s FC 1(1)(e) and (2)), meaning any income should be offset against the related revenue account property deduction under s DB 23. A different revenue account outcome may occur if the imputed dividend is paid by way of a taxable bonus issue. However, the Agent proposed (and it is conditioned in the ruling) that no share disposal under the Arrangement on revenue account results in the person disposing of those shares recognising or claiming a material loss for tax purposes.

17. The fully imputed dividend paid to the three NewCos, whether by way of taxable bonus issue under s CD 8 or by credit and reinvestment in share capital, effectively result in:

    - the Company's imputation credit account being debited by the amount of imputation credits attached to the dividends and each NewCo's imputation credit account being credited by the relevant amount (ss OB 30 and OB 9);
    - each NewCo deriving dividend income under s CD 1 that is able to be offset against the tax credit arising for imputation credits under s LE 1; and
    - the Company having an increase in ASC, either for the amount of dividend arising from the bonus issue not including the amount of attached imputation credits (s CD 43(6)(b) and (7)(ab)) or as the reinvested consideration gives rise to a "subscriptions" amount in the formula (s CD 43(2)(b)).

18. The only transaction that should affect the Company's shareholder continuity is the transfer of voting shares by the three family members to the two family trusts. The Company will already have distributed its imputation credits by then. None of the other share transfers changes who ultimately holds the voting interests in the Company.

19. No additional cashflow is created, or loan left outstanding, that can be used to transfer value from the Company outside the dividend regime. The only uplift in ASC arises by virtue of the taxable bonus issue, or credit that is reinvested, to pay the imputed dividend.

Parliamentary contemplation

20. TCO considered that the above tax effects are the legislation working as intended and do not cause any concern from a s BG 1 perspective for the reasons below.

21. The imputation regime operates on the basis that tax on a company's profits should eventually be paid at the relevant shareholder's correct rate. Tax paid at the company level generates imputation credits that can be attached to distributions by the company, meaning the company's income is taxed at the shareholders' marginal tax rates. The purpose of the imputation credits regime is to allow a company to pass on credits for tax it has paid on its profits to its shareholders when it pays them dividends to avoid double taxation.

22. In respect of a taxable bonus issue, Parliament intended that it could be a dividend if it met the requirements of s CD 8. It follows that Parliament would also have intended that imputation credits should be attached to the dividend. This suggests Parliament would intend that a taxable bonus issue could be used to transfer imputation credits from a company to its shareholders without requiring a transfer of value to have taken place.

23. While the Company's imputation credits are not forfeited when the Company's shareholder continuity is breached (due to having passed to the NewCos), and new ASC is created in respect of this amount, these outcomes are permitted tax advantages that are within Parliament's contemplation. The imputation credits remain in the NewCo imputation credit accounts, underneath the Company's original trust shareholders. Accordingly, the imputation credits are still held for the same ultimate shareholders that economically bore the cost of the Company paying the tax.

24. While shares are being transferred within a group structure under the Arrangement, the usual dividend avoidance concerns do not arise. This is because the transfers do not generate any ability to remove funds from the Company outside the dividend regime under the guise of a capital receipt. This is due to share-for-share exchanges being used, which means no cash flows and no uplift in ASC are created. Any future funds the Company distributes will be subject to the dividend rules in the usual manner. Therefore, the transfers implement the Applicants' commercial and estate planning objectives and do not create any material tax advantage.

Conclusion

25. TCO concluded that Parliament would consider the Arrangement makes use of the relevant provisions in a manner that is consistent with Parliament's purpose for those provisions.

26. Therefore, the Arrangement does not have a tax avoidance purpose or effect.

TDS 25/20: Transfer of property between charitable trusts

Decision date | Rā o te Whakatau: 12 November 2024

Issue date | Rā Tuku: 7 August 2025

Subjects | Kaupapa

This item summarises a private ruling about whether the market value of properties and chattels transferred between charitable trusts is taxable when the transferors deregister as charitable entities.

Taxation laws | Ture tāke

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

Summary of facts | Whakarāpopoto o Meka

1. Charity B was set up as a charitable trust under the Charitable Trusts Act 1957.
2. Charity B was to be registered with Charities Services as a charitable entity under the Charities Act 2005 and qualified as a tax charity under s CW 41(5).
3. Charity B was set up to consolidate the ownership of facilities and related chattels (the Facilities) that resided in several charitable trusts incorporated under the Charitable Trusts Act 1957 and registered with Charities Services (the Large Charities).
4. The purpose of consolidating the Facilities' ownership into Charity B was to simplify administration and accounting for the Large Charities and several unincorporated associations (UAs) that were also registered as charitable entities under the Charities Act 2005 (the Small Charities). This simplification would be achieved by eliminating the administration and accounting required for the UAs and concentrating that work in a single entity with the appropriate skilled resource available.
5. The Large Charities were to transfer all Facilities to Charity B. Following the transfer, the Large Charities would adopt new rules to operate as unincorporated associations (New UAs). After the transfer, the remaining net assets (including funds) the Large Charities held would be donated to the New UAs.
6. Both the Large Charities and Small Charities would be removed from the Charities Register.

Issues | Take

7. The main issues considered in the ruling were whether:
    - the exception in s HR 12(3)(a) applied so that the individual Large Charities did not derive income under s HR 12, for the purposes of s CV 17, on the transfer of the Facilities to Charity B;
    - donations, bequests or gifts received by UAs not registered as charitable entities under the Charities Act 2005 were taxable income; and
    - the donation of funds held by the Large Charities to their members organised as New UAs for use in their charitable activities in accordance with their rules gave rise to taxable income for the donee or donor.

Decisions | Whakatau

8. The Tax Counsel Office concluded the following:
    - The Large Charites do not have income under s HR 12(3) for:
        - the Facilities, if they were transferred to Charity B before or within 1 year of the Large Charity's end date; and
        - their remaining net assets (including funds), if the:
            - remaining assets were transferred to the New UAs before the Large Charity's end date; or
            - Facilities were transferred to Charity B before the Large Charity's end date with the effect that the Large Charity's net assets on the end date were $10,000 or less.
    - Donations, bequests or gifts the UAs received are not income under s CA 1(2), s CB 1, s CB 3 or s CO 1 derived by the:
        - Small Charities once they have been removed from the register of charitable entities under the Charities Act 2005; and
        - New UAs.
    - The funds the Large Charities transferred to the New UAs for use in the New UAs' charitable activities in accordance with their rules did not give rise to income for the New UAs under s CA 1(2), s CB 1 or s CB 3.

Reasons for decisions | Pūnga o ngā whakatau

Issue 1 | Take tuatahi: Whether the exception in s HR 12(3)(a) applies

9. Broadly, s HR 12 applies in certain circumstances to a deregistered charity that derived exempt income under s CW 41 or s CW 42 (which relate to charities) while it was registered and held net assets with a market value of more than $10,000 on its end date as defined in s HR 12(7).
10. Where s HR 12 applies, the charity (on the facts of the Arrangement) is deemed to have derived an amount of income on the day that is 1 year after the date it was deregistered from the charities register. The amount of deemed income is equal to the market value of the net assets the charity held on the day it was deregistered from the charities register, ignoring the assets disposed of or transferred with any rights and obligations to an applicable tax charity within 1 year of being deregistered.
11. The Tax Counsel Office concluded that a Large Charity has income under s HR 12(3) only if it has:
    - assets on its end date that are valued (net of liabilities) at more than $10,000; and
    - not disposed of or transferred those assets within 1 year of its end date to an applicable tax charity or a New Zealand–resident person, other than a natural person, that derived exempt income under any of ss CW 38 to CW 52, CW 55BA, and CW 64.
12. For this purpose:
    - Charity B was a tax charity for the purposes of s HR 12(3)(a)(i);
    - the donation of assets (including funds) by the Large Charites to the New UAs was a valid transfer of assets to the New UAs; and
    - although the New UAs' activities would continue to be charitable in nature, they were not tax charities for the purposes of s HR 12(3)(a)(i) and neither are they persons that derive the kinds of exempt income to which s HR 12(3)(a)(ii) applies.
13. The proposed steps in the Arrangement aimed to result in the Large Charities transferring the Facilities to Charity B and the remaining assets (including the funds) to the New UAs, before their end date. If this eventuated, the Large Charities would not have the Facilities or remaining assets on their end date. Therefore, the Large Charities would have no income under s HR 12(3) for the Facilities or remaining assets. This is because the safe harbour in s HR 12(2)(c) applies (so that s HR 12 does not apply) because the Large Charity's net assets on the end date are $10,000 or less.

14. Alternatively, if it turned out that a Large Charity with net assets of more than $10,000 on its end date had been removed from the Charities Register before it had transferred the Facilities (to Charity B) or remaining assets (including the funds) to the New UAs, that Large Charity would, under s HR 12(3):
    - not have income for the Facilities, if the Facilities were transferred to the Charity B within 1 year of the end date (in which case the Facilities could be ignored in formulating the income under s HR 12(3) in accordance with s HR 12(3)(a)(i)); and
    - have income for the remaining assets net of liabilities, as it would not be able to ignore the remaining assets when formulating that income as the New UAs would not be tax charities for the purpose of s HR 12(3)(a)(i) or persons to which s HR 12(3)(a)(ii) would apply.

Issue 2 | Take tuarua: Whether donations, bequests or gifts UAs receive are taxable income

Income under ordinary concepts

15. The Tax Counsel Office concluded that gifts received by the UAs as unregistered charities does not constitute income under s CA 1(2), even if they might expect to receive those gifts regularly, recurrently or periodically.
16. This is because gifts are generally a non-taxable capital receipt unless a specific provision in part C makes them taxable (for example, s CB 1 might apply if the UAs were considered to be carrying on a business that generated the gift). Even so, gifts the UAs received, although not as of right, may still be their income under ordinary concepts if the UAs expected to receive them and it was reasonable to presume they depended on the gifts for their operating costs. However, the Tax Counsel Office considered this to be unlikely. In addition, the UAs were unlikely to depend on those receipts because the UAs could adjust the intensity with which they supported their charitable objects and, therefore, their expenses in line with the amount of gifts received.
17. Also, the gifts were arguably insufficiently connected to the UAs' charitable activities so they could not be considered to be gains from carrying on an organised activity. Those gifts are given voluntarily, non-contractual and likely to be non-refundable. Also, although gifts might be expected, they are given freely and without compulsion, and the UAs do not solicit them.
18. Additionally, donors do not derive a material benefit from providing the gifts; instead, their benefit is incidental, being the satisfaction derived from supporting the UAs' charitable objects. This suggests donors do not provide gifts in response to a service they receive from the UAs.
19. Finally, any benefit a donor receives from participating in the charitable activities the UA provides is received by the donor as a member of the UA and not personally or directly as an individual.
20. Overall, the Tax Counsel Office concluded that the UAs receive those gifts as a capital receipt and not income.

Amounts derived from business and profit-making undertaking or scheme

21. The Tax Counsel Office considered the UAs do not have income under s CB 1 because they do not carry on a business with regard to their charitable activities.
22. Whether a person is in business involves a two-fold inquiry, first into the nature of the activities carried on and second into the person's intention in carrying on those activities. If the person is to be in business, the person must carry on their activities with the intention to make a pecuniary profit.
23. The Tax Counsel Office acknowledged that the UAs arguably carry on activities that are supported by gifts with the dual intention of making a surplus and pursuing charitable objects. However, the UAs do not depend on the gifts to meet their operating costs. The office considered, based on the case law it reviewed, that where an activity is undertaken with different intentions (equating purpose with intention), the courts will look to the dominant intention. The office considered that the dominant intention was not to make a surplus on gifts received over expenditure. The UAs' activities were more significantly carried on in pursuit of their charitable objects but not with the dominant intention to make a profit. The office accepted that voluntary and unsolicited donations would be received and accepted by the UAs and fully reinvested in pursuit of their charitable objects where they would be used to meet the costs of providing the charitable activities so the UAs could continue in existence. However, that was not the reason for determining s CB 1 did not apply. The office considered the UAs did not have a dominant profit-making purpose or intention.
24. The gifts would also be capital receipts for the purpose of the exclusion in s CB 1(2).

25. Therefore, the Tax Counsel Office concluded the charitable activities the UAs carried on did not amount to a business.
26. This conclusion that the UAs did not have a dominant intention or purpose of making a pecuniary profit from their charitable activities also disposed of the question under s CB 3. There was no dominant profit-making intention or purpose in carrying on their activities.
27. In addition, the gifts were arguably unconnected to the charitable activities to be carried on by the UAs.

Income from voluntary activities

28. Under s CO 1, an amount a person derives in undertaking a voluntary activity is income of the person. Section CO 1 is overridden by s CW 62B.
29. The UAs are "persons", and the gifts received are an "amount". Their pursuit of their charitable objects is a "voluntary activity". However, the Tax Counsel Office concluded the gifts are not derived as a result of undertaking the UAs' charitable activities.
30. This conclusion is because the gifts the UAs receive are freely given (that is, donors make them voluntarily). Also, the gifting is motivated by the satisfaction the donor gains from supporting a UA's charitable objects. Those gifts are not received as a result of some act, exertion or commitment the UA makes in undertaking its charitable activities, which it continues to undertake as much as possible whether a person makes a gift or not.
31. Consequently, the causal connection required by s CO 1 between the derivation of the gifts by the UAs and their undertaking of their voluntary (charitable) activities is not satisfied.
32. Therefore, s CO 1 does not apply to include the gifts received by the UAs in their income after they have been removed from the Charities Register.

Issue 3 | Take tuatoru: Donation of funds held by the Large Charities to members organised as New UAs

33. The Tax Counsel Office concluded that the New UAs did not have income for their receipt of the funds under s CA 1(2). This conclusion was because the:
    - transfer of the funds by the deregistered Large Charities is charitable (and non-contractual) and a true one-off payment;
    - New UAs are carrying on the same charitable activities as the deregistered Large Charites, and the deregistered Large Charities donate the funds to the New UAs as an accumulated capital fund used exclusively for that purpose; and
    - New UAs do not depend on the funds in the sense that they can curtail their charitable activities and related expenses to match the amount of funding they have.
34. Additionally, the New UAs do not have income under s CB 1 or s CB 3. This is because each New UA, according to its rules, does not have a dominant intention or purpose to make a profit (as required by ss CB 1 and CB 3) from its exclusively charitable activities.

REGULAR CONTRIBUTORS TO THE TIB

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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.

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