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INTERPRETATION STATEMENT: IS XX/XX

INCOME TAX – RESIDENCE

This Interpretation Statement updates the PIB on the residence rules – "Income Tax Amendment Act (No 5) Rules 1989: New Residence Rules" (*Public Information Bulletin* No 180, June 1989) (PIB No 180). Changes have been made to reflect current legislation and to ensure consistency with the latest case law and the Commissioner's views.

Differences of note between this statement and PIB No 180 are as follows:

- *Permanent place of abode:* The statement provides that to have a permanent place of abode in New Zealand a person must have a particular place of abode that is an "available dwelling". In contrast, PIB No 180 considered the availability of a dwelling as just one factor in assessing the durability of a person's connection to New Zealand.
- *Permanent home:* The Commissioner's view, reflected in the statement, is that the term "available" in the context of the permanent home double tax agreement tie-breaker test is not based on mere occupation, or immediate availability for occupation. This is in contrast to the position in PIB No 180 which stated that where a person rents their house to non-related persons while they are overseas, that house will not be a permanent home which is available to them.
- *Habitual abode:* The statement discusses *Case* 12/2011 (2011) 25 NZTC 1-012, [2011] NZTRA 08 and the application of the habitual abode double tax agreement tie-breaker test. Specifically, if the circumstances of a particular case require, periods outside the period of dual residence may need to be considered. Where this is the case, the Commissioner considers that such periods can only be taken into account so far as they assist in, and are relevant to, determining whether the person had an habitual abode in New Zealand during the period of dual residency.
- *Personal and economic relations (centre of vital interests) test – weight to be given to factors*: The statement differs from PIB No 180 in terms of the respective weight it considers appropriate to give to personal and economic relations in the centre of vital interests test in New Zealand's double tax agreements. The position in PIB No 180 is no longer considered to be correct. The "centre of vital interests" concept is a composite one, and does not give preference to either personal or economic relations.
- *Student loans and working for families:* It is noted in the statement that residency under the Income Tax Act 2007 may also be relevant for the purposes of the Student Loan Scheme Act 2011 and working for families tax credits.
- *Double tax agreements and use of OECD commentary:* The statement slightly modifies the reasoning in PIB No 180 as to why undefined terms in the residence article of New Zealand's double tax agreements do not require a domestic law interpretation. Specifically, the statement considers (consistent with PIB No 180) that where a double tax agreement uses the same or very similar wording to the OECD's *Model Tax Convention on Income and on Capital* (1977), it can be inferred that the OECD commentary in that regard reflects the meaning the parties intend the relevant terms to be given. Where this is the case, the Commissioner considers that the context does not require a domestic tax law interpretation. PIB No 180 suggests that the undefined terms not having a domestic tax law meaning is a relevant consideration. However, the

Commissioner no longer considers this to be correct. The statement contains an expanded explanation as to why it is appropriate and permissible to consider the OECD commentary in interpreting the undefined terms in the residence article. In addition, if the meaning of any undefined term needs to be ascertained by reference to the meaning it has for the purposes of the domestic law of a Contracting State, this is not limited to domestic tax law (though any tax law meaning will prevail over any other domestic law meaning).

- *Examples:* PIB No 180 included 34 examples; there have been a number of changes to those examples in the statement. The conclusion in Example 3 in PIB No 180 (now Example 1 in the statement) has been updated so the conclusion is consistent with case law. Example 1 in PIB No 180 has been deleted, as the change to Example 3 (now Example 1) meant they did not cover any different ground. Four new examples (Examples 4, 5, 6 and 7) dealing with the permanent place of abode test have been included. A new example (Example 18) dealing with the habitual abode test has been included. It is emphasised that there are no "bright line" tests, and different results in different examples should not be construed as indicating that there are. Examples 12-22 in PIB No 180 have been deleted, as they were to do with transitional issues in relation to the introduction of the new residence provisions in 1988. For ease of reference and for the purposes of external consultation only, a comparative table of examples in PIB No 180 and examples in the statement is included as an attachment to this draft statement.

This Interpretation Statement will replace the following items:

- PIB No 180;
- "Returning resident's visas – when a person seeking such a visa is resident for tax purposes" (*Tax Information Bulletin* Vol 11, No 11, December 1999);
- "Is a person working overseas while on leave of absence for two years resident for tax purposes?" (*Tax Information Bulletin* Vol 11, No 10, November 1999); and
- "Determining a person's permanent place of abode" (*Tax Information Bulletin* Vol 7, No 1, July 1995).

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

Contents

Introduction

Overview

1. This Interpretation Statement explains the residence rules in the Act. The analysis below is in three parts. The first part (from [11]) deals with the rules governing the residence of natural persons (individuals), and discusses the relationship between those rules and the residence articles contained in New Zealand's double taxation agreements (DTAs). The second part (from [174]) explains the residence rules for companies. It also explains the consequences of a company being a dual resident, and briefly discusses the relationship of the company residence rules to the controlled foreign company (CFC) regime. The final part (from [278]) of this Interpretation Statement deals with residence and the taxation regime for trusts.

2. This Interpretation Statement briefly discusses the transitional resident rules (at [103] – [109]). The tax implications for transitional residents may differ from those noted in this Interpretation Statement. For further information about the transitional resident rules, and examples of how they apply, see "Temporary exemption from tax on foreign income for new migrants and certain returning New Zealanders" *Tax Information Bulletin* Vol 18, No 5 (June 2006) at 103, and "Temporary exemption for transitional residents" *Tax Information Bulletin* Vol 19, No 3 (April 2007) at 83.

3. This Interpretation Statement updates and replaces "Income Tax Amendment Act (No 5) Rules 1989: New Residence Rules" (*Public Information Bulletin* No 180, June 1989). It also replaces the following items:

   - "Returning resident's visas – when a person seeking such a visa is resident for tax purposes" (*Tax Information Bulletin* Vol 11, No 11, December 1999);
   - "Is a person working overseas while on leave of absence for two years resident for tax purposes?" (*Tax Information Bulletin* Vol 11, No 10, November 1999); and
   - "Determining a person's permanent place of abode" (*Tax Information Bulletin* Vol 7, No 1, July 1995).

Relevance of residency

4. The concept of residency is a central feature of the Act and the Goods and Services Tax Act 1985 (the GSTA 1985).

5. Under the Act, residence is relevant for determining whether a person is assessable for tax on worldwide income or only on New Zealand source income. New Zealand residents are assessable on worldwide income, and non-residents are assessable only on New Zealand source income (s BD 1(5)). New Zealand residents may be entitled to a credit for foreign income tax paid on foreign-sourced income (s LJ 2).

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

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

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

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

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

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

Examples

10. Throughout this Interpretation Statement, examples are given to illustrate points made. These examples are merely illustrative; they obviously do not cover the infinite number of factual scenarios that may arise. The relevant legislative provisions must be considered and applied to each case on its particular facts. That is, conclusions should not be drawn by determining whether the facts of a

particular case may be analogous with a particular example, but rather on the basis of applying the correct tests established by the law. There are no "bright line" tests, and different results in different examples should not be construed as indicating that there are. The examples deal with discreet residence tests, as identified by the headings under which they appear. They do not consider other tests – for example the permanent place of abode examples do not consider the day count tests or any potential DTA implications. None of the examples consider the potential application of the transitional resident rules.

Analysis

Part 1 Residence of Natural Persons

Overview

11. The primary rule is that a natural person (an individual) is a New Zealand resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere (s YD 1(2)). Further, a person is New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period (s YD 1(3)) ("the 183-day rule"). The person will then be treated as resident from the first of those 183 days (s YD 1(4)). A person who is resident by virtue only of the 183 day rule will stop being a New Zealand resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period (s YD 1(5)) ("the 325-day rule"). The person will then be treated as not resident from the first of those 325 days (s YD 1(6)).

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

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

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

Permanent Place of Abode

Effect of test

15. Section YD 1(2) states that:

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

16. The primacy of the permanent place of abode test reflects the underlying objective of the residence rules, namely to make it easier for individuals to become resident and more difficult for them to become non-resident. In focusing on permanent place of abode, the legislation makes it harder for an individual to avoid being treated as a New Zealand resident by manipulating the day counting rules.

17. It does not matter if a person also has a permanent place of abode outside New Zealand. If they have a permanent place of abode in New Zealand they will be a New Zealand resident for tax purposes.

Meaning of "permanent place of abode"

18. The term "permanent place of abode" is not defined in the Act. However, case law establishes that the expression means a fixed and habitual place of abode, a place of abode with which the person has an enduring relationship and where the person habitually or normally lives. See, for example, *Case F139* (1984) 6 NZTC 60,245, *Case H97* (1986) 8 NZTC 664, *Case J41* (1987) 9 NZTC 1,240, *Case J98* (1987) 9 NZTC 1,555, *Case Q55* (1993) 15 NZTC 5,313.

19. For a person to have a permanent place of abode in New Zealand:

- the person must have a place of abode in New Zealand. "Place of abode" in the context of s YD 1(2) means a place where a person dwells and sleeps and that is used as a base for their daily activities (*Case F138* (1984) 6 NZTC 60,237, *Case Q55*); and
- that place of abode must be the person's permanent place of abode. "Permanent" in this context means enduring, lasting, indefinite, the opposite of temporary: *Case F138*.

A "place of abode"

20. A "place of abode" is a place where a person dwells and sleeps. The permanent place of abode test therefore requires the availability for use of a dwelling in New Zealand. Such a dwelling does not need to be one that is owned or rented by the person; it could be the home of a parent, friend, or relative. The requirement for a place of abode would be satisfied if it can be established that a person has a place to live that is available to them whenever the person requires it. See *Case Q55*.

21. This requirement does not mean that the place of abode must be "available" (in the sense of vacant or able to be occupied immediately) for the person's use at all times. In *Case Q55* it was irrelevant that the taxpayer's home was rented out under a fixed term tenancy so that the house was not available to the taxpayer if he had wished to reoccupy it earlier. The home would have been available to the taxpayer if he had chosen to remain in New Zealand, and it was available to him on his return to New Zealand.

22. The central issue is not whether a dwelling is available or readily available to the person at all times, but whether the dwelling is a place with which the person has a sufficient connection and from which they could carry on their normal life on a durable basis. In other words, to be a permanent place of abode a dwelling must be available as a place that the person is able to live in on a more than temporary basis.

23. It is the enduring availability of a dwelling which is important, not that a dwelling be available in the sense of being always vacant or able to be occupied immediately by the person should they wish to do so. It will be necessary to consider the facts of any given situation to determine whether the person could occupy (or reoccupy) the dwelling with sufficient immediacy or ease for it to be

considered "available" to them as a place of abode, given their particular circumstances.

24. Whether (or the extent to which) the person has lived in the dwelling will be a relevant factor to take into account in assessing the availability of the dwelling, but it is not essential that they have lived in the particular dwelling before.

25. A person may have multiple places of abode available to them in New Zealand. Where this is the case it is not necessary to definitively identify one of those dwellings as the person's permanent place of abode in New Zealand (*Case Q55*). That said, it will frequently be the case that one particular place of abode is obviously the most likely dwelling in which the person would choose to abide in New Zealand.

26. However, although a person must have an available dwelling (ie accommodation) in New Zealand to have a permanent place of abode here, the existence of an available dwelling is not determinative (*Case Q55*); the person's place of abode in New Zealand must be their permanent place of abode.

A "permanent place of abode"

27. In assessing whether a place of abode is a person's permanent place of abode, it is necessary to consider the nature and quality of the use made by the person of that particular place of abode (*FCT v Applegate* 79 ATC 4,307, *Case Q68* 83 ATC 343, *Case H97*). Material considerations are the continuity of the taxpayer's presence, the duration of their presence, and the durability of their association with New Zealand (*Case H97*, *Case Q55*). All of a person's connections with New Zealand, and with their available dwelling, must be taken into account.

28. A permanent place of abode contrasts with one that is merely temporary or transitory. Thus a person who is normally resident outside New Zealand would not acquire a permanent place of abode here in the course of a short visit or a short-term secondment related to the person's work. However, a permanent place of abode is not necessarily the place in which a person intends to live for the remainder of their life. The permanent place of abode test is different from the test for establishing domicile of choice, where intention is of prime importance.

29. The permanent place of abode test is an objective test (*Case H97*, *Case J98*, *Case Q55*). However, a person's intention can be a relevant factor in determining whether they have a permanent place of abode in New Zealand (*Case F138*, *Case F139*, *Case H97*, *Case Q55*). For example, where a person is absent from New Zealand for a short period of fixed duration, the fact that the person intended to return at the end of that period will be a strong indicator that he or she has a permanent place of abode here. By contrast, where a person is absent from New Zealand for an extended period but intends ultimately to return, that intention alone will not be sufficient to establish that the person has a permanent place of abode here. Also, the weight to be given to a person's stated intention may depend on the degree to which it is reasonably held. It is also necessary to consider not only what was intended, but what in fact occurred.

30. In summary, a permanent place of abode:

- is a dwelling that is available for the person to live in when required (though it does not need to be readily or exclusively available to the person at all times);
- is not necessarily the place of abode in which the person intends to live for the remainder of their life;
- is determined by weighing all material factors, including the continuity and duration of the person's presence in New Zealand and the durability of the person's association with New Zealand;
- contrasts with a temporary or transitory place of abode.

Material factors for determining permanent place of abode

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

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

Relevant period

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

Continuity and duration of presence

34. As a general rule, the longer a person is present in New Zealand the more likely it is they will have a permanent place of abode here. Conversely, the longer a person is absent from New Zealand the less likely it is they will have a permanent place of abode here.

35. This is not to say that periods of presence in, or absence from, New Zealand are the overriding consideration. Rather, in practical terms, where a person is absent from New Zealand for an extended period it is more likely that, on balancing the fact of the extended absence with the fact that the person retains enduring connections with New Zealand, the person does not have a permanent place of abode here. There is no specific length of presence in or absence from New Zealand that will result in a person acquiring or losing a permanent place of abode here. If a person has strong connections with New Zealand it could be expected that a longer period of absence would be required for the person to lose their New Zealand permanent place of abode than would be the case if the person's connections to New Zealand were weaker.

36. The continuity of presence criterion refers to whether the person is present in New Zealand for continuous or interrupted periods. If the periods of presence are

continuous, this may indicate that the person has a permanent place of abode here, because they are actually living here rather than merely visiting for brief periods. The duration of presence criterion focuses on the length of the person's presence in New Zealand.

37. The continuity and duration of presence of the person must be considered in conjunction with the durability of their association with New Zealand. For example, consider the case of an Australian business executive who travels to New Zealand on short business trips on numerous occasions during the year, but who otherwise has few ties with New Zealand. In this situation, the lack of continuity of presence, the limited duration of presence, and the lack of any significant ties with New Zealand indicate the person does not have a permanent place of abode here. However, consider the case of a similar executive who owns a house in New Zealand, who has substantial investments here, and who has long trips to New Zealand in addition to the short business trips. In this situation, the executive's close ties to New Zealand and the fact that not all of the visits are of short duration indicate that they have a permanent place of abode here.

Durability of association

38. In determining whether a person has a durable association with New Zealand it is necessary to weigh up the person's overall connections with New Zealand, and to evaluate the extent to which those connections indicate that the person has an enduring attachment to New Zealand. Consideration of the durability of a person's association therefore involves an examination of the extent and strength of the attachments that the person has established and maintained in New Zealand. See, for example, *Case Q55*, *Case F138*, *Case J98*, and *Case U17* (1999) 19 NZTC 9,174.

39. The above cases establish that some of the material factors to be considered when assessing the durability of a person's association with New Zealand are:

(a) **The nature and use of the person's available dwelling**

The nature and use of a person's available dwelling may be a strong indication that the person has an enduring connection with New Zealand and that they have a permanent place of abode here. The strength of this connection will vary, depending on the circumstances.

If the person owns a house or apartment in New Zealand, for example, this may, depending on the circumstances, be a stronger indication of an enduring connection with New Zealand than, say, the availability of a parent's house. Similarly, if a house or apartment owned by the person has been their home, this would carry more weight than if the house or apartment had been acquired exclusively for investment purposes, and the person has not used it as their residence and has no intention to do so in the future. Of course, the ownership of an investment property may (as with other investments in New Zealand) indicate that the person has an enduring relationship with New Zealand, but this would not be as strong a connection as the ownership of a dwelling that has been, is being, or will be used by the person as their home.

(b) **Intention**

The intention of a person with respect to their presence in New Zealand is an important factor, although it is not the central consideration. It is necessary to consider not only what was intended, but what in fact occurred. In cases where a person is overseas, the intention to return to New Zealand may indicate that the person has an enduring attachment to the country. However, it is important to balance intention with all of the other factors that are present. For example, if a person has departed from New Zealand for an

extended period, but ultimately intends to return, intention alone would not establish that the person has a permanent place of abode here. On the other hand, if a person has departed for a relatively short period of fixed duration, the intention to return will be a strong factor in indicating that the person has a permanent place of abode here.

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

(c) **Family and social ties**

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

Also, the weight to be attached to family ties may vary from individual to individual, and in light of the nature and quality of the relationships. In the case of a person who has no spouse/partner or children, and who has not lived with their parents for some time, the person's family ties to New Zealand will be relevant but should not be given too much weight. By contrast, where the person does have a spouse/partner and children in New Zealand, that will generally provide a strong indication that the person has an enduring attachment to New Zealand.

Other social ties, such as membership of sporting and cultural associations, are also relevant in establishing whether a person has an enduring attachment to New Zealand.

(d) **Employment and business interests and economic ties**

If all or part of the person's employment, business, trade or profession is carried on in New Zealand, that may indicate an enduring association with New Zealand. Also, if the person is absent but retains employment, business, trade or professional ties with New Zealand, the retention of those ties may indicate an enduring association with New Zealand. For example, university lecturers who take sabbatical leave overseas generally continue to be employed and paid by the university during their absence. The continued employment ties in this situation will be important in determining whether the person has a permanent place of abode in New Zealand.

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

Membership of trade and professional associations should also be taken into account.

(e) **Personal property**

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

(f) **Miscellaneous**

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

"A" Permanent Place of Abode

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

41. It should be emphasised that the focus of the permanent place of abode test is on the person's connections with New Zealand, rather than on whether the person's connections are closer with New Zealand or another country. A person may be resident in New Zealand under the permanent place of abode test even if he or she has closer connections with another country.

Acquiring and Losing a Permanent Place of Abode

42. In some circumstances the time at which a person acquires or loses a permanent place of abode in New Zealand must be identified, as this can determine when residency commences or ceases. For instance, a person who does not have a permanent place of abode in New Zealand, and who has not spent more than 183 days in a 12-month period in New Zealand, may become resident from the day on which they acquire a permanent place of abode in New Zealand. Also, a person who has a permanent place of abode in New Zealand, and who is absent from New Zealand for more than 325 days in a 12-month period, does not cease to be resident until they lose their permanent place of abode here.

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

44. It is relevant to consider the time of occurrence of such events as:

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

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

Examples illustrating the concept of permanent place of abode

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

Example 1

45. **Facts:** Cate, who is normally resident in New Zealand, is seconded to Canada in connection with her employment, for a fixed period of three years. Cate intends to return to New Zealand after the period of secondment. Cate's partner and children accompany her to Canada. Cate and her partner own a house in New Zealand, and this is rented out while they are in Canada. Cate retains her New Zealand investments, and her connections with several professional and sporting associations here.

46. **Result:** Cate has a permanent place of abode in New Zealand.

47. **Explanation:** Cate has a place of abode in New Zealand – being the house she owns with her partner. Cate has retained ties with New Zealand – she still has a dwelling available here, maintains membership of several professional and sporting associations, and has investments here. Cate also retains employment ties with New Zealand, as her secondment is in connection with her New Zealand employment. Cate has an intention to return to New Zealand at the end of the three-year secondment.

    Although Cate will be absent from New Zealand for a substantial length of time, this is not inconsistent with having a permanent place of abode in New Zealand. All of the relevant factors must be weighed up. In this case the strength of Cate's enduring connections with New Zealand are sufficient to establish that she has a permanent place of abode here.

Example 2

48. **Facts:** Mike departs from New Zealand on a working holiday of indefinite duration. Before he left New Zealand, Mike had been living in a rented flat in Wellington for a couple of years, prior to which he had lived with his parents (also in Wellington). Mike terminates his lease when he leaves New Zealand. Mike resigns from his job and stores his personal effects with his parents, who are happy to store them and for Mike to return to live with them if he wishes upon his return. Mike leaves his KiwiSaver account in New Zealand, and takes a contributions holiday. Mike ends up returning to New Zealand to live after 18 months.

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

50. **Explanation:** Mike has a place of abode in New Zealand – being his parents' house, where he would be able to live upon his return. He has stored his personal effects here, and retains family ties as his family still live here. However, taken alone these ties are not significant. Mike has largely severed his links with New Zealand and has no definite intention to return to New Zealand.

Mike has not retained his permanent place of abode in New Zealand. He has severed most of his ties with New Zealand for a period of indefinite duration, and New Zealand is no longer his habitual or normal place of abode.

Example 3

51. **Facts:** Jack has business interests in New Zealand and Australia. Jack owns a house in each country, and both houses are continuously available for his use. Jack spends most of his time in Australia, but he regularly travels to New Zealand in connection with his business interests here. In aggregate, Jack spends up to five months of the year in New Zealand. These trips vary in length from two days up to several weeks. Jack has significant investments in New Zealand, and he is a member of a number of cultural and sporting associations here. Jack's family live in Australia.

52. **Result:** Jack has a permanent place of abode in New Zealand.

53. **Explanation:** Jack has a place of abode in New Zealand – being the house he owns here. He has significant connections with New Zealand because of his business interests here, the fact he has available accommodation here, and his connection with sporting and cultural associations here.

    Jack's presence in New Zealand is generally for short periods; that is, his presence here is not of a continuous nature. However, the fact that Jack has substantial connections with New Zealand, and that these connections are maintained through regular trips to New Zealand, indicate he has a permanent place of abode here. Jack may also have a permanent place of abode in Australia, but this is irrelevant in determining if he has a permanent place of abode in New Zealand.

Example 4

54. **Facts:** Ronan is a software developer who has lived in Wellington for 12 years, and has a partner there. He owns 3 residential investment properties in Wellington (1 is let on a 6-month fixed-term tenancy, and the other 2 on periodic tenancies), and has a sizable New Zealand share portfolio. Ronan accepts a 2-year contract in Dublin. For the first year of his contract, Ronan returns to Wellington every few months to see his partner, after which she decides to take a year of unpaid leave and join him in Ireland for the remainder of his contract. They give up the lease on their flat in Wellington at this time, but intend to ultimately return to New Zealand where her family live and where they have many friends.

55. **Result:** Ronan has a permanent place of abode in New Zealand during his absence.

56. **Explanation:** Ronan has a place of abode in New Zealand – in the first year of his absence his and his partner's rented flat, and subsequently the residential investment properties he owns. One of the rental properties could be occupied by Ronan at the end of the fixed-term tenancy, and the other 2 could be occupied by Ronan with 42 days' notice under the Residential Tenancies Act 1986. As such the rental properties may be regarded as sufficiently available to Ronan as potential places of abode were he to need them.

    Ronan has a number of enduring connections with New Zealand – he has lived here for 12 years and intends to return here with his partner after his 2-year contract; he has family ties here (his partner's family); and he has substantial investments here. These connections are sufficient to establish that Ronan has a permanent place of abode in New Zealand.

Example 5

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

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

59. **Explanation:** Cameron has a place of abode in New Zealand – being the new family home in Dunedin. Although Cameron has not previously lived in Dunedin, his family home has been established there during his absence, and he will join his family there upon his return. The home can be considered an available dwelling in this instance, as Cameron has sufficient ties to the new home, and to Dunedin, through his wife and children living there, and his intention to live there upon his return. Cameron has a place of abode in New Zealand and, given his substantial connections to New Zealand, it is clear that it is a permanent place of abode.

Example 6

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

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

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

    Charlie has a permanent place of abode in New Zealand because he has an enduring relationship to New Zealand and to his place of abode here. Although Charlie is out of New Zealand more than he is here, that is solely for work purposes, and he normally or habitually lives at his home in Auckland.

Example 7

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

Malaysia indefinitely. Daniel's employer has sponsored his Malaysian work permit, and will continue to do so as long as Daniel stays with the company.

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

65. **Explanation:** Although Daniel has a place he could stay in New Zealand – his parents' house, it is not a dwelling that is available to him as a place to live on a permanent basis. He stays at his parents' house during some of his time off, when he returns to New Zealand to catch up with friends and family. He would also presumably stay there if and when he ultimately returns to Wellington to live, though it seems, from the fact that Daniel has not lived with his parents for some time, that this would likely only be until he found a new place to live. Daniel's use of his parents' house as a place of abode is temporary in nature, not enduring or indefinite. He does not normally or habitually live at his parents' house.

Even if Daniel's parents' house could be considered a dwelling which is available to him, Daniel has not retained significant connections with New Zealand to retain a permanent place of abode here. Although Daniel periodically visits his parents and friends in Wellington, he has no other significant ties here, and he intends to work and live in Malaysia indefinitely (his employer will continue to sponsor his work permit – which indicates that this intention would seem to be reasonably held).

The Part Day Rule

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

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

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

The 183-Day Rule

Description of the rule

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

> **YD 1 Residence of natural persons**
>
> …
>
> *183 days in New Zealand*
>
> (3) A person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.
>
> *Person treated as resident from first of 183 days*
>
> (4) If subsection (3) applies, the person is treated as resident from the first of the 183 days until the person is treated under subsection (5) as ceasing to be a New Zealand resident.
>
> *Ending residence: 325 days outside New Zealand*

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

Person treated as non-resident from first of 325 days

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

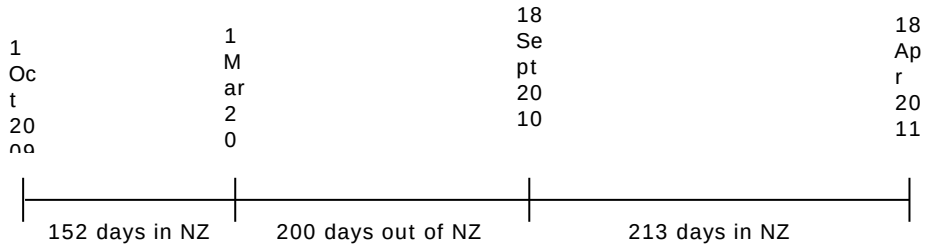
69. It should be noted that the 183-day rule operates in conjunction with the permanent place of abode test in s YD 1(2). The permanent place of abode test applies despite anything else in s YD 1. Therefore, if a person has a permanent place of abode in New Zealand, they will be resident in New Zealand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

70. The 183-day rule does not focus on any particular income year, or indeed any particular 12-month period. It does not need to span the date as at which residency is being assessed. If a person was present in New Zealand for more than 183 days in total in **any** 12-month period, that person will be treated as resident in New Zealand from the first of those days of presence until they lose residency under the 325-day rule (discussed below from [77]) and do not have a permanent place of abode here. The days of presence do not need to be consecutive.

Examples illustrating the 183-day rule

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

Example 8



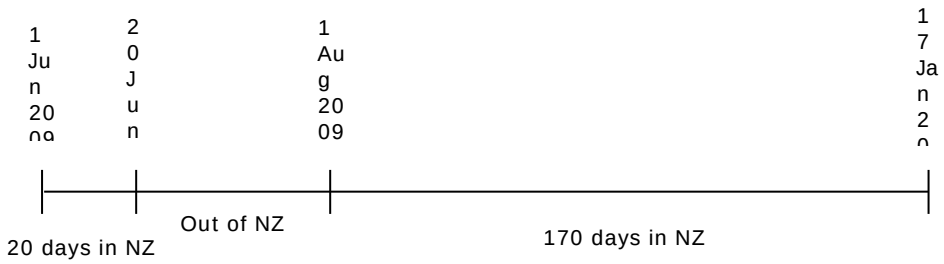
71. **Facts:** Amy arrived in New Zealand on 1 October 2009 and stayed here until 1 March 2010, a total of 152 days of presence in New Zealand. Amy was then absent from New Zealand for 200 days. She then returned to New Zealand on 18 September 2010, and stayed here for a further seven months. It is assumed that Amy was resident outside New Zealand prior to 1 October 2009 and that she has never previously been resident in New Zealand.

72. **Result:** Amy is resident in New Zealand from 18 September 2010.

73. **Explanation:** Amy was not personally present in New Zealand for more than 183 days in any 12-month period commencing prior to 18 September 2010. Because of her absence between 2 March 2010 and 17 September 2010, Amy was only in New Zealand for 165 days in the 12-month period commencing on 1 October 2009.

    However, Amy was present in New Zealand for seven months (213 days), in the 12-month period commencing on 18 September 2010. Therefore, Amy is resident from the first day of presence in that period (ie from 18 September 2010). Amy will continue to be resident in New Zealand until she ceases to be resident under the 325-day rule (presuming she has no permanent place of abode here).

Example 9



74. **Facts:** Ben arrived in New Zealand on 1 June 2009 and stayed here until 20 June 2009, a total of 20 days. Ben returned to New Zealand on 1 August 2009 and stayed here until 17 January 2010, a total of 170 days. It is assumed that Ben was not resident in New Zealand prior to 1 June 2009.

75. **Result:** Ben is resident in New Zealand from 1 June 2009.

76. **Explanation:** Ben was personally present in New Zealand for more than 183 days (190), during the 12-month period commencing on 1 June 2009. Ben will continue to be resident in New Zealand until he ceases to be resident under the 325-day rule (presuming he has no permanent place of abode here).

The 325-Day Rule

Description of the rule

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

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

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

80. A person who is absent from New Zealand for more than 325 days and who does not have a permanent place of abode in New Zealand immediately prior to their departure will have their non-residency back-dated to the first day of the period

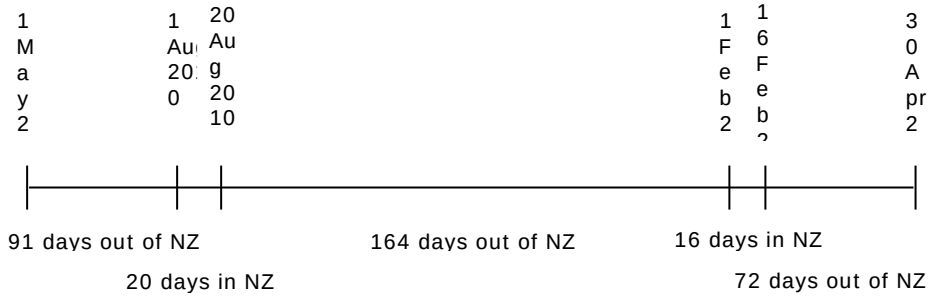
of absence. However, a person who is absent from New Zealand for more than 325 days and who does have a permanent place of abode in New Zealand immediately prior to departure will only have their non-residency back-dated to the day they lose their permanent place of abode in New Zealand. In this situation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

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

Examples illustrating the 325-day rule

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

Example 10



82. **Facts:** Jeremy left New Zealand on 1 May 2010 and returned again on 1 August 2010, a total of 91 days of absence. Jeremy stayed in New Zealand until 20 August 2010, a total of 20 days of presence. Jeremy remained absent until 1 February 2011, a total of 164 days. Jeremy stayed in New Zealand from 1 February 2011 until 16 February 2011, a total of 16 days. After leaving again on 16 February 2011, Jeremy returned to New Zealand on 30 April 2011, after a period of absence of 72 days. It is assumed that Jeremy does not have a permanent place of abode in New Zealand and that Jeremy was resident in New Zealand prior to his departure on 1 May 2010 by virtue of the 183-day rule.

83. **Result:** Jeremy is non-resident from 2 May 2010.

84. **Explanation:** Jeremy was absent for 327 days in total in the 12-month period commencing on 1 May 2010 (91 days commencing on 2 May 2010 and ending on 31 July 2010, 164 days commencing on 21 August 2010 and ending on 31 January 2011, and 72 days commencing on 17 February 2011 and ending on 29 April 2011). Jeremy is therefore non-resident from the first day of absence in

that period (ie 2 May 2010). Jeremy will remain non-resident until he acquires a permanent place of abode here or until he is present here for more than 183 days in any period of 12 months.

Example 11

85. **Facts:** Claire left New Zealand on 1 April 2010 and returned on 1 August 2011. Claire has a permanent place of abode in New Zealand at all times during this period; she owns a house here, has strong economic and personal ties with New Zealand, and remains in the employment of her New Zealand employer.

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

87. **Explanation:** Although Claire was absent from New Zealand for more than 325 days (ie 365 days) in the 12-month period commencing on 2 April 2010, she remains resident here because she has a permanent place of abode in New Zealand at all times during her absence.

Example 12

88. **Facts:** James was seconded to the Australian office of his employer for six months, and left New Zealand on 1 February 2011. James had always lived in New Zealand (with his parents), had a boyfriend here, and intended to return after the six-month period. James left most of his personal property, including his car, with his parents. After he had been in Australia for three months, James was offered a permanent job there, which he accepted. James stayed in Australia, and arranged to have his personal property transported to Australia and his New Zealand bank accounts closed. James asked his parents to sell his car, and he broke things off with his boyfriend. James intends to remain in Australia indefinitely.

89. **Result:** James lost his New Zealand permanent place of abode on 1 May 2011, when he resigned from his substantive position in New Zealand and accepted the permanent job in Australia. Although it was in the following weeks that James made arrangements to have his property transported to Australia, closed his New Zealand bank accounts, and ended his relationship, the decision to resign from his position in New Zealand and accept the permanent position in Australia is the time from which it is apparent that James had formed the intention to remain in Australia indefinitely. Accordingly, James ceased to be resident in New Zealand from this time.

90. **Explanation:** James was personally absent from New Zealand for more than 325 days in the 12-month period commencing on 1 February 2011.

However, James did not lose his New Zealand permanent place of abode when he originally departed on 1 February 2011 because he had a place of abode available to him (his parents' house, where he had lived prior to his departure), he retained close personal and employment ties with New Zealand, and he intended to return after a brief period of absence. James lost his New Zealand permanent place of abode on 1 May 2011 when he severed his enduring connections with New Zealand.

Although James was absent from New Zealand for more than 325 days in a 12-month period commencing on 1 February 2011, he did not cease to be resident in New Zealand until 1 May 2011 when he lost his New Zealand permanent place of abode.

Relationship between the permanent place of abode test and the 183-day and 325-day rules

Overlap of the rules

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

92. The effect of the backdating of both the 183-day and 325-day rules means that where a person has travelled in and out of New Zealand there may be an overlap between those rules. This is because a person who is resident under the 183-day rule may have been temporarily absent from New Zealand at some time before the 183-day rule had been satisfied. If the person then satisfies the 325-day rule, they will cease to be resident in New Zealand from the first of those days of absence (assuming they have no permanent place of abode in New Zealand), even though that day falls before the final day which is taken into account for the purposes of the 183-day rule. In this situation the period of absence taken into account for the purposes of the 325-day rule overlaps with the period of presence taken into account for the purposes of the 183-day rule. This may result in the person being treated as a New Zealand resident for a period of less than 183 days, even though they were present here for more than 183 days in a 12-month period.

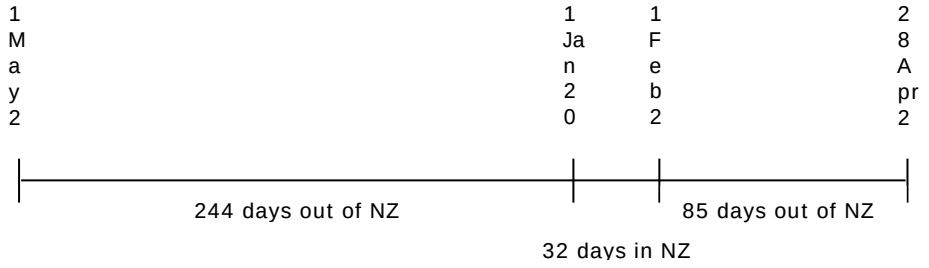
93. The two rules may also overlap in the converse situation. A person who ceases to be resident under the 325-day rule may have been temporarily present in New Zealand at some time before the 325-day rule was satisfied. If the person then satisfies the 183-day rule by being present in New Zealand for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

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

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

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

Example 13



95. **Facts:** Henry left New Zealand on 1 May 2010 and returned on 1 January 2011, after 244 days of absence. Henry left New Zealand again on 1 February 2011, after 32 days of presence here. Henry returned on 28 April 2011, after 85 days of absence, and remained in New Zealand from that point onwards. It is assumed that Henry did not have a permanent place of abode in New Zealand until after he returned on 28 April 2011. It is also assumed that Henry was resident in New Zealand under the 183-day rule prior to his departure on 1 May 2010.

96. **Result:** Henry is treated as non-resident from 2 May 2010 until 31 December 2010. Henry is treated as resident in New Zealand again from 1 January 2011.

97. **Explanation:** Henry was personally absent from New Zealand for 329 days in total in the 12-month period commencing on 2 May 2010 (ie for 244 days from 2 May 2010 to 31 December 2010, and for 85 days from 2 February 2011 to 27 April 2011). Henry is therefore treated as non-resident in New Zealand from the first day of absence, ie 2 May 2010.

Henry was personally present in New Zealand for more than 183 days in the 12-month period commencing on 1 January 2011 (ie for 32 days from 1 January 2011 to 1 February 2011, and 248 days from 28 April 2011 to 31 December 2011 – a total of 280 days). Henry is therefore treated as resident from the first of those days of presence, ie 1 January 2011.

The period taken into account for the purposes of the 183-day rule cuts into the period taken into account for the purposes of the 325-day rule. Therefore, Henry is only treated as non-resident from the commencement of the period of absence (ie 2 May 2010) until the day before the beginning of the period taken into account for the purposes of the 183-day rule (ie 31 December 2011).

Example 14

98. **Facts:** Belinda arrived in New Zealand on 1 November 2009 and stayed here for 150 days, until 30 March 2010. Belinda left New Zealand on 30 March 2010 and returned on 5 May 2010, a period of absence of 35 days (ie from 31 March 2010 to 4 May 2010). Belinda was present in New Zealand from 5 May 2010 to 11 June 2010, a total of 38 days. Belinda left the country again on 12 June 2010 and has remained outside New Zealand since that time. It is assumed that Belinda was resident outside New Zealand before she arrived on 1 November 2009, and that she did not at any time have a permanent place of abode in New Zealand.

99. **Result:** Belinda is treated as resident in New Zealand from 1 November 2009 to 30 March 2010. Belinda is treated as non-resident from 31 March 2010.

100. **Explanation:** Belinda was present in New Zealand for 188 days in the 12-month period commencing on 1 November 2009 (ie for 150 days from 1 November 2009 to 30 March 2010, and for 38 days from 5 May 2010 to 11 June 2010). Belinda is treated as resident from the first of those days of presence, ie 1 November 2009.

Belinda was absent from New Zealand for 327 days in the 12-month period commencing on 31 March 2010 (ie for 35 days from 31 March 2010 until 4 May 2010, and for 292 days from 12 June 2010 to 30 March 2011). Belinda is treated as non-resident from the first of those days of absence, ie 31 March 2010.

The period taken into account for the purposes of the 325-day rule cuts into the period taken into account for the purposes of the 183-day rule. As a result, Belinda is only treated as resident from the commencement of the period of presence (ie 1 November 2009) until the day before the beginning of the period taken into account for the purposes of the 325-day rule (ie 30 March 2010).

Government Service Rule

101. There is a special rule in relation to persons absent from New Zealand in the service of the Government (s YD 1(7)). This rule provides that any person who is absent from New Zealand in the service, in any capacity, of the Government of New Zealand is treated as a New Zealand resident during the period of absence.

102. Section YD 1(7) overrides the 325-day rule. Therefore, a person absent from New Zealand in the service of the Government is resident here irrespective of the length of their absence from New Zealand or whether they have a permanent place of abode in New Zealand. The provision applies to all individuals overseas in the service of the New Zealand Government while they remain in that service. However, it does not apply to the spouse/partner or children of such an individual.

Transitional residents

103. A person who is resident under s YD 1, may be a “transitional resident” for up to four years after arriving in New Zealand.

104. If a person is a transitional resident they are entitled to certain tax exemptions for certain income.

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

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

- they have not previously been a transitional resident; and
- they have not ceased to be a transitional resident.

106. A person meeting the requirements for transitional residency will be a transitional resident (unless they elect not to be) from the first day that they satisfy either the permanent place of abode test or the 183-day rule. They will remain a transitional resident for a period of four years, or until they stop being a New Zealand resident (because they cease to have a permanent place of abode here or stop being resident by virtue of the 183-day rule), or elect (under s HR 8(4) or (5)) not to be a transitional resident.

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

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

108. The transitional resident rules apply to people arriving in New Zealand from 1 April 2006, for the 2005-06 and subsequent income years.

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

Changes in residence

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

- the person acquires a permanent place of abode in New Zealand during the year,
- the first day of a period of presence of more than 183 days in any 12-month period falls within the year,
- the person loses any permanent place of abode they may have in New Zealand, or
- the person satisfies the 325-day rule during the year.

111. When the residence status of a person changes during an income year, some of the more significant income tax considerations that may be relevant are as follows.

(a) Taxation of foreign source income

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

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

113. If the person derived dividends from a New Zealand resident company that has elected under s OC 1 to be a foreign dividend payment account company, any foreign dividend payment (FDP) credits attached to dividends derived by the

person are creditable, whether or not the person was resident when the dividends were derived. If the dividends were derived while the person was non-resident, the FDP credits can be credited against any non-resident withholding tax liability in respect of the dividend. Any excess credits are creditable against any other tax liability of the person to the extent of that liability, with any further excess credits being refundable.

(c) The financial arrangements rules

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

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

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

(d) Provisional tax

117. If the person ceases to be a New Zealand resident during the income year, they may cease to be a provisional taxpayer for the purposes of the provisional tax rules (being the provisions listed in s RC 2). Conversely, if the person becomes a New Zealand resident during the income year, they may become a provisional taxpayer and liable to pay provisional tax in accordance with the provisional tax rules regime (s RC 3).

(e) Trust regime

118. The residence of settlors of trusts is relevant in determining whether a foreign-sourced amount of trustee income is liable to tax in New Zealand. The income derived from property held in trust is taxed as either beneficiary income or trustee income. Only trustees can claim deductions for expenditure or losses incurred in deriving the income. Any income derived by a trustee is trustee income, unless it is beneficiary income (defined in s HC 6). If a settlor becomes resident in New Zealand, a settlor, trustee or beneficiary may be able to make an

election to satisfy the trustee's tax liability in respect of the trustee income they have derived, as described below.

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

(1) becomes a New Zealand resident (and is not a transitional resident), or

(2) stops being a transitional resident and continues to be a New Zealand resident (either of these days is the "transition date"),

provided that the trust would be a foreign trust (defined in s HC 11) in relation to a distribution if a distribution were made immediately before the settlor became resident (ss HC 30 and HC 33).

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

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

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

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

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

123. Distributions of income from the foreign trust portion will be assessable to beneficiaries at their normal rates. Distributions of income (other than beneficiary income) and capital gains from the non-complying trust portion will be assessable at the rate of 45 per cent.

124. There is also a special rule in relation to beneficiaries who cease to be resident in New Zealand and who become resident again within five years of ceasing to be resident. This rule is discussed at [296].

Relevance of double taxation agreements

125. New Zealand is party to DTAs with a number of countries. Where someone is tax resident in both New Zealand and a country with which we have a DTA, the DTA will determine which country has the first or sole right to tax specific types of income.

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

Dual residence

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

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

129. Where there is a DTA between New Zealand and another country, dual residence issues will be resolved by application of the residence article in the DTA. The object of that article is to ensure that taxpayers are precluded from having dual residence for DTA purposes. Where under the domestic laws of New Zealand and the treaty partner a taxpayer is resident in both countries, dual residence is avoided for the purposes of the DTA by applying a series of "tie-breaker" tests to allocate residence to one of the countries. Once residence has been allocated in this manner, the tax liability of the person, in relation to the items covered by the DTA, is determined on the basis of that residency status. Section BH 1(4) stipulates that DTAs override the Inland Revenue Acts (and the Official Information Act 1982 and the Privacy Act 1993) in relation to income tax, any other tax imposed by the Act, or exchanges of information relating to a tax. As noted by the Court of Appeal in *CIR v ER Squibb & Sons (NZ) Ltd* (1992) 14 NZTC 9,146 at 9,154, this means that "wherever and to the extent that there is any difference between the domestic legislation and the double tax agreement provision, the agreement has overriding effect".

130. When a person who would otherwise be resident in New Zealand is deemed to be resident in another country for the purposes of a DTA, the person remains liable to New Zealand income tax on income treated (under s YD 4) as having a source in New Zealand (s BD 1(5)). However, the liability is modified by any restrictions imposed by the DTA on New Zealand's right to tax persons who are deemed to be resident in the other country for the purposes of the DTA. For example, if the person receives dividends from a New Zealand resident company, the dividend NRWT rate of 30 per cent (for dividends to which s RF 8 applies) will be subject to the limitation imposed by the DTA on New Zealand's right to tax dividends derived by residents of the DTA partner. In most cases, the amount of tax that could be levied in New Zealand could not exceed 15 per cent of the gross amount of the dividend.

131. It is emphasised that the DTA residence articles are only relevant for the purposes of the DTAs – that is, in relation to the specific types of income dealt with by the taxing articles in the DTAs. Someone who is resident in two countries under the domestic tax law of those countries remains resident in both countries for other tax purposes – for example, goods and services tax.

Double tax agreements and dual residence

132. The residence article in New Zealand's DTAs closely follows the residence article contained in the OECD's *Model Tax Convention on Income and on Capital* (the OECD Model Convention). Article 4 of New Zealand's DTA with Ireland is an example. It provides that where a person is a resident in both countries (Contracting States) for tax purposes, under the domestic law of each country, the person's residency status for the purposes of the DTA is determined in accordance with the following rules, applying them in order until residency can be determined under one of them:

> (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
>
> (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be solely a resident of the State in which he has an habitual abode;
>
> (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
>
> (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

The term "national" is defined, in relation to New Zealand, to mean an individual who is a New Zealand citizen and any legal person or other entity deriving its status as such from the law in force in New Zealand.

133. The DTA residence "tie-breaker" rules, which allocate residence to one of the DTA countries, only apply where the person concerned is resident in both countries under the domestic tax law of each country. Therefore, if a person comes to New Zealand from, say, Canada, becomes resident in New Zealand and ceases to be resident in Canada, it is clear that the person is resident in New Zealand for both the purposes of the Act and the DTA with Canada. The residence allocation rules will not be relevant in these circumstances. The DTA will still be relevant in terms of allocating taxing rights for any Canadian-sourced income.

Interpretation of terms used in the residence article

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

135. The "general definitions" article of New Zealand's DTAs typically provides that as regards the application of the DTA by a Contracting State, *"unless the context otherwise requires"*, any term not defined in the DTA has the meaning which it has under the laws of that State relating to the taxes to which the DTA applies. This suggests that it may be necessary to interpret the above terms in accordance with New Zealand's domestic tax law (which could not be done in relation to the above terms, as none of them have meanings under New Zealand domestic tax law).

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

by reference to domestic laws generally, not just tax laws (though any tax law meaning will prevail).

137. But, as noted, reference to any meaning that those terms may have under domestic law is only relevant if the context does not require otherwise. One of the general rules of treaty interpretation in art 31 of the *Vienna Convention on the Law of Treaties (1969)*, which New Zealand has ratified, is that a special meaning shall be given to a term if it is established that the parties so intended (para [4] of art 31).

138. If a DTA between New Zealand and another country uses the wording of a particular article in the OECD Model Convention (or very similar wording), the Commissioner considers that it can be inferred that the OECD commentary on that article reflects the meaning the parties intended to be given to any undefined terms in that article.

139. As the OECD commentary on the residence article discusses the meanings to be given to the above undefined terms, the Commissioner considers that the context of New Zealand's DTAs (provided that they follow, or closely follow the wording in the OECD Model Convention) does not require recourse to be had to the domestic law meaning (if any) of the above undefined terms.

Permanent home test

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

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

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

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

144. The home must be available for the person's use. "Availability" in this context is not based on mere occupation, or immediate availability for occupation. If a permanent home is in sufficient "reach" of a person, the test will be satisfied. In *Case* 12/2011 (2011) 25 NZTC 1-012, [2011] NZTRA 08 and *Case J41* Barber DJ referred to dictionary definitions of "available", saying that a home will be available for the purposes of the permanent home test if it "… may be availed of", is "… [c]apable of being employed with advantage or turned to account; hence, capable of being made use of, at one's disposal, within one's reach", or is "capable of being used; … can be got, had or reached …". It is clear from *Case* 12/2011 and *Case J41* that these definitions of "available" do not equate to the home being always vacant or able to be occupied immediately. This is further

supported by the Canadian cases of *Salt v The Queen* 2007 TCC 118 and *Minin v The Queen* 2008 TCC 429.

145. It will be necessary to consider the particular facts of any given situation to determine whether the person could occupy (or reoccupy) something that could be regarded as their permanent home with sufficient immediacy or ease for it to be considered "available" for the purposes of the permanent home DTA tie-breaker test.

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

147. If it is apparent that a person who is dual resident has a permanent home available in New Zealand that will be an end to the matter unless the person can establish that they also have a permanent home available in the other country. Where a person has a permanent home available in both countries, the next test will generally be the personal and economic relations test. [The DTA between New Zealand and Malaysia, signed on 19 March 1976, differs in that if residency cannot be resolved under the permanent home test, the next test is the habitual abode test, followed by the personal and economic relations test.] Where a person does not have a permanent home available to them in either country, the next test for consideration will be the habitual abode test.

Personal and economic relations (centre of vital interests) test

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

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

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

150. It is clear from the commentary that the "personal relations" referred to are wider than immediate family relations. Social relations are also taken into account, as are political, cultural and "other activities". Sporting activities, for example, would fall into this latter category. The fact that a wide range of personal connections is taken into account means that the place where a person's immediate family are located will not necessarily constitute the place with which the person's personal and economic relations are closer.

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

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

152. Assessing the depth of a person's roots requires weighing up the circumstances as a whole to determine which locality is of greater significance to the person. Some commentators have suggested that greater weight is to be given to personal relations. However, the Commissioner considers that the better view is that the "centre of vital interests" concept is a composite one and does not give preference to either personal or economic relations. If a person's economic and personal relations are overall evenly balanced between New Zealand and another country (though personal relations are stronger with one country and economic relations with the other), the person will have no centre of vital interests, as the factors are regarded as being of equal weight. In this situation, the next test will need to be considered. See K Vogel, *Klaus Vogel on Double Taxations Conventions*, (3rd ed, Kluwer Law International Ltd, London, 1997).

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

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

Habitual abode test

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

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

156. The focus of the test is on whether the person has an habitual abode in New Zealand. As stated by the Canadian Federal Court of Appeal in *Lingle v R* 2010 FCA 152, the concept of an habitual abode "involves notions of frequency, duration and regularity of stays of a quality which are more than transient. To put it differently, the concept refers to a stay of some substance in the jurisdiction as a matter of habit, so that the conclusion can be drawn that this is where the taxpayer normally lives". A person will have an habitual abode in a country if they live there habitually or normally. A person may habitually live in more than one country; the enquiry is not about assessing the country in which the person's abode is more habitual, but about whether they have a habitual abode in New Zealand and/or the other country.

157. The OECD commentary on art 4 of the OECD Model Convention indicates that the test is applied by taking into account all of a person's stays in a country, not only those at a home the person owns or rents there. For example, if a person has a

permanent home available in both New Zealand and Australia, all stays in New Zealand, whether at that home or elsewhere, are considered in determining whether the person has an habitual abode here.

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

159. The OECD commentary also indicates that the test is not applied by focusing only on the income year concerned. The OECD commentary states that "[t]he comparison must cover a sufficient length of time for it to be possible to determine whether the residence in each of the two States is habitual and to determine also the intervals at which the stays take place". It is important to note though, that the focus is on where the person normally lives **during the period of dual residency**. In obvious cases there is no need to consider other periods. However, a wider view (ie looking beyond the period of dual residency) may assist in cases where it is unclear, or when determining whether the stays in a particular country are either transient or of substance. The Commissioner considers that the appropriate length of time outside of the period of dual residence to consider will be just the amount that is necessary to determine whether the person had an habitual abode in New Zealand during the period of dual residency. The Commissioner now considers that the period looked at in applying the habitual abode test in the matter that became *Case* 12/2011 was inappropriately long. In any event, it is noted that the Taxation Review Authority's discussion of how the habitual abode test would apply to the facts of that case (which was along the lines of submissions made by counsel) was *obiter*, the TRA having already found the taxpayer to be solely resident in New Zealand at all material times under the earlier tie-breaker tests.

Nationality and mutual agreement

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

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

Examples illustrating the DTA residence tie-breaker tests

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

Example 15

162. **Facts:** Stacey, who is employed as a university lecturer, travels to the United Kingdom for 15 months sabbatical leave at a United Kingdom university. While on leave, Stacey remains in the employment of a New Zealand university, and is required to work for the university on returning to New Zealand. Stacey and her partner let their house in New Zealand out to tenants while they are in the United Kingdom, the tenancy being terminable on short notice. Stacey's partner travels with her to the United Kingdom, but she remains a member of a number of local clubs and organisations in New Zealand, and keeps most of her personal property, including investments, in New Zealand (looked after and managed by family members). While in the United Kingdom, Stacey and her partner rent a house near the university where she spends her sabbatical leave. For the purposes of this example it is assumed that Stacey is resident for tax purposes in the United Kingdom under the relevant legislation.

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

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

The question of Stacey's residence for the purposes of the DTA is not resolved by the permanent home test. Stacey has a permanent home available in New Zealand because she has a house here available for her use – the house she and her partner own in New Zealand. Although let out, Stacey can reoccupy the house with sufficient immediacy and ease for it to be considered "available" for the purposes of the permanent home test. However, Stacey also has a permanent home in the United Kingdom as she has rented a house there for 15 months. Although Stacey's stay in the United Kingdom is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary.

As Stacey has a permanent home in both countries, the question is then whether her personal and economic relations are closer with New Zealand or the United Kingdom. In terms of personal and economic relations with the United Kingdom, it is noted that Stacey's partner has accompanied her to the United Kingdom, however she has few economic relations with the United Kingdom. In terms of personal and economic relations with New Zealand, Stacey has family, most of her personal property (including investments), and her job in New Zealand. As such, overall Stacey has closer personal and economic relations with New Zealand, and is therefore deemed to be a resident of New Zealand for the purposes of the DTA.

Example 16

165. **Facts:** Luke owns a house in New Zealand and one in Malaysia. He has extensive business interests in both New Zealand and Malaysia. Luke regularly spends short periods in New Zealand, and these add up to five months of the year. Luke's visits to New Zealand are primarily for business purposes, but he also spends time catching up with family here. Luke works and lives in Malaysia for the remainder of the time, where he also occupies a number of positions of responsibility in the community. Luke is married, and his wife and children live in Malaysia. For the purposes of this example it is assumed that Luke is resident for tax purposes in Malaysia under the relevant legislation.

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

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

Luke has permanent homes available to him in both New Zealand and Malaysia because his houses in both countries are continuously available to him for use. As Luke has a permanent home available to him in both countries, the next question is whether he has an habitual abode in either country. [As noted at [147], the order of the tie-breaker tests in the DTA between New Zealand and Malaysia, signed on 19 March 1976, differs from that in New Zealand's other DTAs. Under New Zealand's other DTAs, if a person has a permanent home available in both countries, the personal and economic relations test would be applied next.] Luke has an habitual abode in Malaysia because he habitually lives there for seven months of the year. Luke also has an habitual abode in New Zealand because he habitually spends five months of the year here. The reasons for Luke's stays in New Zealand (business and visiting family) suggest that the stays are more than transient in nature.

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

Example 17

168. **Facts:** Megan, who normally resides in Canada, is seconded to New Zealand by her Canadian employer for a period of 18 months. While in New Zealand, Megan works for the New Zealand subsidiary of her Canadian employer. Megan lets her Canadian house for a fixed-term of 18 months while she is in New Zealand, and lives in rented accommodation here. Most of Megan's personal property remains in Canada, and most of her investments are in Canada. For the purposes of this example it is assumed that Megan is resident for tax purposes in Canada under the relevant legislation.

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

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

Megan has a permanent home available to her in New Zealand as she has rented accommodation here for 18 months. Although Megan's stay in New Zealand is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary. Megan does not have a permanent home available to her in Canada as her house there, being rented out for a fixed-term of 18 months, cannot be

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

Example 18

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

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

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

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

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

Part 2 Residence Of Companies

Overview

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

YD 2 Residence of companies

Four bases for residence

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

(a) it is incorporated in New Zealand:

(b) its head office is in New Zealand:

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

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

International tax rules

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

…

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

176. A foreign company is a company not resident in New Zealand and not treated as resident in New Zealand under a DTA. Section YD 3 sets out different tests to determine the country in which a foreign company is treated as resident for the purposes of the international tax rules. This is discussed briefly from [275].

Company definition

177. The relevant definition of "company" in s YA 1 is:

YA 1 Definitions

In this Act, unless the context requires otherwise—

…

company—

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

(ab) does not include a partnership:

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

(ac) includes a listed limited partnership:

(ad) includes a foreign corporate limited partnership:

(b) includes a unit trust:

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

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

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

(d) includes an airport operator:

(e) includes a statutory producer board:

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

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

(h) includes a friendly society:

(i) includes a building society:

…

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

Place of incorporation test

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

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

Head office test

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

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

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

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

184. Weighing up these factors should identify whether a company's head office is in New Zealand. Genuine uncertainty as to the location of a company's head office will be uncommon. If a company is engaged in carrying on business activities, identifying the company's highest office should not be difficult. Any difficult cases are likely to involve a company that is merely a passive investment vehicle. The

passive nature of the company's activities may make identifying its highest office difficult, or the company may simply have no office.

Centre of management test

Description of the test

185. Section YD 2(1)(c) provides that a company is a New Zealand resident if its centre of management is in New Zealand. By concentrating on the centre of management of the company as a whole, the centre of management test focuses on the highest level of management, ie the place where the company as a whole is managed from on a day to day or regular basis (*Koitaki Para Rubber Estates Ltd* v *FC of T* (1941) 64 CLR 241). Lower levels of management are not the centre of management of the company as a whole, as they relate to only a part of its operations.

186. The test is a *de facto* test: that is, the focus is on the location of the company's actual centre of management (*NZ Forest Products Finance NV v CIR* (1995) 17 NZTC 12,073, *Egyptian Delta Land & Investment Co Ltd v Todd* (1929) 14 TC 119). Therefore, if the senior executives of a company established in a foreign country take instructions from persons located in New Zealand, the centre of management of the company will be in New Zealand rather than in the foreign country. This is the case even if the persons giving instructions from New Zealand are not officers of the company under the company's constitution.

Centre of management of the entire company

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

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

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

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

190. There is some overlap between the head office and centre of management tests as the centre of management of a company will usually be located in its head office. However, the focus of the two tests is different. The head office test concentrates on a physical place, ie on an office that constitutes a company's highest office. By contrast, the focus of the centre of management test is not on identifying the quality of a particular office, but rather on the broader question of whether the management of a company is centred in New Zealand. A company does not need to have an office in New Zealand to satisfy the centre of management test. If it does have an office here, it does not need to be the head office.

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

192. The centre of management test focuses on the day-to-day management of the company. This differs from the director control test (discussed below, from [193]), which concentrates on the superior management of the company, ie the place from which the strategic and policy decisions are made. In some cases there may not be a clear distinction between the day-to-day management and the superior management because, for example, the directors are involved in managing the company on a day-to-day basis. However, a clear distinction does not need to be drawn between the company's centre of management and the place from which the directors exercise control of the company. As long as there is sufficient evidence to establish that one of the tests is satisfied, the company will be resident in New Zealand even if the centre of management and the place from which the directors exercise control cannot be clearly distinguished.

Director control test

Description

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

Definition of director

Section YA 1 definition

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

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

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

Persons carrying out director's duties

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

Persons giving instructions or directions to nominated directors

197. A person is treated as a director if they give instructions or directions to the persons occupying the position of directors of a company and those persons are accustomed to act in accordance with such instructions or directions. For example, if the directors of a company incorporated in Hong Kong acted under instructions from a New Zealand resident individual, that individual would be a director of the company. The company would therefore be a New Zealand resident under the director control test, as control of the company by a director is exercised from here.

198. In practical terms, it may often be difficult to discover whether the nominated directors of a company are acting on their own initiative or in accordance with the instructions or directions of another person. However, a pattern of decision-making may suggest that the nominated directors are acting in accordance with instructions from another person. For example, if it was evident that the nominated directors always acted in accordance with suggestions made by another person, without giving those suggestions substantive consideration, this would suggest that the directors were acting in accordance with instructions from that other person. This would be the case even if there were no formal instructions or directions given to the directors.

199. The remuneration provided to the nominated directors should also be considered. If this does not reflect their apparent duties and responsibilities, the nominated directors may not be carrying the burden of decision-making responsibility. It is also appropriate to look closely at who the nominated directors are. In tax havens, for example, directors commonly have several hundred directorships. Directors of this type are unlikely to be actively involved in making decisions, and their directorial functions are probably exercised in accordance with outside instructions. Similarly, if the director is a company (a common situation in tax havens) the company must be looked through to determine who the true director is. Finally, it is necessary to consider whether the nominated directors are involved in making decisions, or if they merely "rubber stamp" decisions that have already been made by others. If the latter is the case, the true decision makers must be identified.

200. In cases where there is a chain of companies that have directors who are not in fact exercising control of the companies, the chain must be traced through to establish on whose directions or instructions the directors are accustomed to act. That person will be considered a director under the Act. For example, if the directors of company X act under instructions from the directors of company Y, and the directors of company Y act under instructions from a New Zealand resident A, then A will be a director of both X and Y under the definition of "director" in s YA 1.

Companies without conventional directors

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

202. Therefore, the manager of a unit trust would be a director because they are involved in making the major decisions in relation to the unit trust: for example, the decisions in relation to the management of the unit trust's investments, the marketing of interests in the unit trust, and the distribution policy of the unit

trust. If the manager exercises control of the unit trust from New Zealand, the unit trust will be a New Zealand resident.

Companies as directors

203. The definition of director in the Act is broad enough to encompass both natural persons and companies that are appointed or that act as directors. This may result in a New Zealand resident company being treated as a director of a company established in another jurisdiction (see Example 18 below).

Control by directors

Superior control

204. The director control test focuses on the superior management of the company. A company will be resident in New Zealand under this test if directors are effectively controlling the company from here, ie if the central and directing mind of the company is here (*Mitchell v Egyptian Hotels Ltd* (1915) AC 1022).

205. The test is only satisfied if directors acting in their capacity as directors exercise control. Therefore, the focus is on management of the company rather than on ownership. If directors control a company from New Zealand in their capacity as shareholders, but not in their capacity as directors, the company will not be resident here under the director control test.

De facto test

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

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

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

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

209. The significance of the location of directors' meetings will vary from case to case. If directors exercise control only in the course of directors' meetings, then the location of the meetings will be of paramount importance. On the other hand, if control is exercised outside the directors' meetings, and the meetings are merely a formality to "rubber stamp" decisions that have already been made, the location of the meetings will be of little significance.

210. The fact that directors of a company exercise directorial functions from New Zealand does not necessarily mean that control of the company by its directors is exercised from New Zealand. For example, if the directors ordinarily exercise their powers in the course of directors' meetings held in Australia, the fact that New Zealand directors occasionally sign resolutions in New Zealand or occasionally participate in telephone conferences from New Zealand does not

mean that the directors are exercising control of the company from New Zealand. See *Case* 11/2011 (2011) 25 NZTC 1-011, [2011] NZTRA 07.

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

Exercise of powers in New Zealand and in another country

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

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

Residence of directors

214. The residence status of a company's directors is not relevant in determining whether the director control test has been satisfied. The focus of the test is on whether the directors exercise control of the company from New Zealand. In cases where the simple majority approach outlined at [212] is appropriate, the question is not whether a simple majority of the directors are resident in New Zealand but rather whether a simple majority of the directors exercise their directorial powers from New Zealand.

Continuing test

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

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

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

company — then that shareholder will not be controlling the company in terms of the director control test.

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

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

Control of the entire company

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

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

220. As noted at [192], although the director control test concentrates on management, it differs from the centre of management test because the emphasis is on superior management. This is the place where the strategic and policy decisions are made; the place where the central and directing mind of the company resides. In contrast, the centre of management test focuses on the place from which the company as a whole is managed on a day-to-day basis.

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

Examples illustrating the company residence tests

Example 19

222. **Facts:** Company A is incorporated in Hong Kong and carries on a business manufacturing clothes there. A's operations are all managed from Hong Kong. A has no office in New Zealand. All meetings of the board of directors are held in

Hong Kong, but the Hong Kong directors act on the instructions of company A's New Zealand parent company.

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

224. **Explanation:** A is incorporated in Hong Kong and therefore is not resident in New Zealand under the incorporation test.

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

The Hong Kong directors of A act on the instructions of the New Zealand parent company. The New Zealand parent is therefore a director of A (under paragraph (a)(ii) of the definition of "director" in s YA (1)), and is exercising control of A. A is resident in New Zealand because control of A is exercised from New Zealand by a director.

Example 20

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

226. **Result:** B is not resident in New Zealand.

227. **Explanation:** B is incorporated in Singapore and is therefore not resident in New Zealand under the incorporation test.

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

B is managed on a day-to-day basis from Singapore and therefore has its centre of management in Singapore rather than in New Zealand.

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

Example 21

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

229. **Result:** C is not resident in New Zealand.

230. **Explanation:** C is incorporated in Australia and therefore is not resident in New Zealand under the incorporation test.

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

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

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

Example 22

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

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

233. **Explanation:** D is not incorporated. The incorporation test is therefore not applicable. The fact that D's manager is incorporated in New Zealand is irrelevant to D's residency status.

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

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

Example 23

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

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

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

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

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

Example 24

237. **Facts:** F is a company incorporated in the Cook Islands, and is used as a financing vehicle for a group of companies based in New Zealand. G, which is also incorporated in the Cook Islands, is the sole nominated director of F. With respect to the affairs of both F and G, the directors of G act on instructions received from a New Zealand resident company that is a member of the group. Both F and G are managed from the Cook Islands. Neither F nor G has an office in New Zealand.

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

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

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

The nominated directors of G act in accordance with instructions from the New Zealand resident company in relation to G's affairs. The New Zealand company is therefore a director of G. As the New Zealand company exercises control of G from New Zealand in its capacity as a director, G is resident here.

The nominated director of F (ie G) acts in accordance with instructions from the nominated directors of G, who in turn act in accordance with instructions from the New Zealand resident company. The nominated director of F is therefore acting in accordance with instructions from the New Zealand company and therefore that company is a director of F. The New Zealand company exercises control of F from New Zealand in its capacity as director. As such, F is resident in New Zealand.

Changes in company residence

Implications of a change in residence

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

241. When the residence of a company changes between New Zealand and another country, some of the more significant income tax consequences that may result are:

(a) Taxation of foreign source income

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

(b) Company imputation

243. A company that is resident in New Zealand (an imputation credit account (ICA) company) will generally be required to establish and maintain an imputation

credit account (s OB 1). A company that is resident in Australia may, in some circumstances, elect to establish and maintain an imputation credit account in New Zealand (s OB 2). Otherwise, companies that are not resident in New Zealand are not permitted to establish an imputation credit account. A company that becomes resident in New Zealand during an imputation year therefore needs to establish and maintain an imputation credit account. Conversely, a company that ceases to be resident in New Zealand during an imputation year loses the right to maintain an imputation credit account (unless it becomes an eligible Australian resident company). When a company becomes a New Zealand resident during an imputation year, it is not entitled to credit to its imputation credit account any income tax paid in respect of income derived when it was resident outside New Zealand (s OB 4(3)(b)).

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

(c) Controlled foreign company regime

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

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

(d) The financial arrangements rules

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

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

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

(e) Grouping of losses

250. A change in residence between New Zealand and another country may also affect the grouping of tax losses under subpart IC of the Act. Section IC 5 stipulates that for a company to be able to make its tax losses available to another company in the group, the company with the losses must (among other things) meet the residence requirements of s IC 7. Section IC 7 requires that, for the commonality period, the company with the available losses must be either incorporated in New Zealand or carrying on business through a fixed establishment here. In addition, the company must not be treated as not being resident in New Zealand under a DTA for the purposes of the DTA, and must not be liable to income tax in another country because of domicile, residence, or place of incorporation. However, losses not available for grouping may be available for carry forward under s IA 3.

(f) Provisional tax

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

Dual resident companies

Dual residence

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

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

254. In the context of the Act, dual residence has implications in the following areas: imputation, the dividend withholding payment regime, the controlled foreign company (CFC) and foreign investment fund (FIF) regimes, and the grouping of losses.

Dual residence and double taxation agreements

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

256. Where a New Zealand resident company (under s YD 2) is deemed to be resident in another country for the purposes of a DTA, New Zealand's right to tax foreign-sourced income may be restricted, and limitations may be imposed on New Zealand's right to tax New Zealand source income. As discussed in relation to individuals at [130] and [131], the company will remain liable to New Zealand income tax on income treated (under s YD 4) as having a source in New Zealand (s BD 1(5)). However, the liability is modified by any restrictions imposed by the DTA on New Zealand's right to tax persons who are deemed to be resident in the other country for the purposes of the DTA. Therefore, the residence rules contained in s YD 2 cannot always be read in isolation. When a company satisfies the domestic tax residence requirements in both New Zealand and another country, the impact of the DTA (if there is one) cannot be overlooked.

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

258. As noted at [138] in relation to individuals, if a DTA between New Zealand and another country uses the wording of a particular article in the OECD Model Convention (or very similar wording), the Commissioner considers that it can be inferred that the OECD commentary on that article reflects the meaning the parties intended to be given to any undefined terms in that article.

259. Article 4, para 3 of the OECD Model Convention allocates residence of a dual resident non-individual person, for DTA purposes, to the State in which its "place of effective management" is situated. Where New Zealand's DTAs adopt this test, the Commissioner considers that reference should be made to the OECD commentary on the meaning of this term, as it reflects the meaning the parties intended it to be given.

260. Where New Zealand's DTAs adopt other residence allocation tests for non-individual persons, it may be necessary for recourse to be had to the domestic law meaning (if any) of any undefined term in that test.

Dual residence and imputation

261. Section OB 1 provides that, subject to a number of special exclusions, a company that is resident in New Zealand must establish and maintain an imputation credit

account for each tax year. Imputation credit account companies (ICA companies) may attach imputation credits to dividends they pay (s OB 60).

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

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

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

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

Dual residence and the grouping of losses

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

Examples illustrating dual residence and the grouping of losses

Example 25

266. **Facts:** H is incorporated in New Zealand and managed from Australia. H is a member of a group of New Zealand and Australian companies. H incurs a loss of $1 million during the income year ending 31 March 2009.

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

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

Example 26

269. **Facts:** I is incorporated in Hong Kong and controlled by its directors from New Zealand. I is a 100 per cent owned subsidiary of a UK company. J is a New Zealand incorporated company that is controlled by its directors from New Zealand and has its centre of management here. J is also a 100 per cent subsidiary of the UK company. During the income year ending 31 March 2009, I incurs a loss of $1 million and J earns assessable income of $2 million.

270. **Result:** I's $1 million loss cannot be grouped with J's $2 million profit.

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

Example 27

272. **Facts:** K is a United States incorporated and managed company. K operates directly in New Zealand through several branch offices, and a significant amount of business is transacted through these offices. L is a New Zealand incorporated company that is controlled by its directors here and has its centre of management here. L is a 100 per cent owned subsidiary of K. During the income year ending 31 March 2009, K's New Zealand branch operations sustain a loss of $1 million and L earns assessable income of $2 million.

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

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

Residence of foreign companies

275. As noted at [176], a foreign company is a company not resident in New Zealand, and not treated as resident in New Zealand under a DTA. Section YD 3 sets out different tests to determine the country in which a foreign company is treated as resident for the purposes of the international tax rules (as defined in s YA 1).

276. Section YD 3 provides:

> **YD 3 Country of residence of foreign companies**
>
> *When this section applies*
>
> (1) This section applies for the purposes of the international tax rules to determine the country in which a foreign company is treated as resident for an accounting period.
>
> *Liability to income tax*

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

(a) its domicile:

(b) its residence:

(c) its place of management:

(d) any other criterion of a similar nature.

Further rule: first application

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

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

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

Applying New Zealand rules

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

(a) it is incorporated:

(b) it has its head office:

(c) it has its centre of management:

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

Further rule: second application

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

Final rule

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

277. Section YD 3(2) provides that a foreign company will be treated as resident in a country if, at any time during the accounting period, it is liable to income tax in the country because its domicile, residence, place of management or any other criterion of a similar nature is located in the country. If subs (2) results in the company being resident in multiple countries, or not in any country, the company will be treated (under subs (4)) as resident in the country in which it is incorporated, has its head office or centre of management, or in which its directors, in their capacity as such, exercise control of the company (even if the directors' decision-making also occurs outside the country). If the application of subs (4) results in no one country of residence being identified, the company will be treated (under subs (5)) as resident in the country in which its centre of management is located for the accounting period. Finally, if the application of subs (5) results in no one country of residence being identified, subs (6) provides that the Commissioner must determine the country of residence.

Part 3 Residence And Trusts

Introduction

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

279. This part provides an overview of the implications of the residence status of settlors, trustees and beneficiaries for the taxation of income derived by trustees of a trust.

Settlor residence

Settlor residence and liability of trustee

280. The residence of the settlor of the trust is relevant in determining whether foreign-sourced trustee income is liable to tax in New Zealand. Trustee income is the income derived by the trustee of a trust, to the extent to which it is not beneficiary income (s HC 7(1)). Certain beneficiary income derived by a minor will also be treated as if it were trustee income for the purposes of determining the relevant tax rate, paying the tax, and providing returns of income (s HC 7(2)).

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

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

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

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

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

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

284. The two exceptions to this are where the trustee is resident outside New Zealand for the entire income year and either:

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

285. Trustees are liable to tax on New Zealand sourced trustee income as if they were an individual beneficially entitled to that income (s HC 24). This is the case whether or not the trustee or any settlor is resident in New Zealand.

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

Settlor residence and liability of settlor

287. Under s HC 29, a settlor may be liable as agent of the trustee for income tax payable by the trustee on trustee income derived in an income year. This will be the case where the settlor has made a settlement to or for the benefit of a trust after 17 December 1987 (whether or not they settled property on the trust on or before that date), and the trustee derives trustee income in an income year in which the settlor is resident in New Zealand. Where there is more than one settlor to whom s HC 29 applies, the liability is joint and several. However, this rule does not apply:

- to income tax that the trustee is liable for under s HC 32 (which relates to the trustee's liability as agent for the tax liability of a beneficiary for their beneficiary income and taxable distributions derived);
- if the trust has a resident trustee for the whole income year, or if the first settlement was made during the income year, from the day of that settlement until the end of the income year;
- where the trust is a charitable trust or a superannuation fund;
- to the extent to which the trustee income is derived from the settlor's remitting an amount under a financial arrangement to which either s EW 31 or s EZ 38 (which relate to base price adjustments) applies;
- if the settlor is a natural person who was not resident at the time of any settlement on the trust, and had not after 17 December 1987 previously been resident in New Zealand (unless they have made an election under s HC 33 to satisfy the income tax liability of the trustee); or
- to the extent to which the settlor can establish to the satisfaction of the Commissioner that, having regard to the settlements made by that settlor and by other settlors, another settlor should be liable.

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

Trustee residence

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

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

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

291. The residence of the trustee is generally not relevant in determining the treatment of trustee income: New Zealand sourced trustee income is always subject to tax, and foreign-sourced trustee income is subject to tax on the basis of the residence of the settlor (see [280] – [286]). As noted at [284], there are two exceptions to this general principle where the trustee is resident outside New Zealand for the entire income year.

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

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

Beneficiary residence

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

295. When the beneficiary is resident in New Zealand the beneficiary will be required to include all beneficiary income in their assessable income (s BD 1). When the beneficiary is resident outside New Zealand, only New Zealand sourced beneficiary income is included in assessable income. In this situation there will be a NRWT liability if the New Zealand sourced income is non-resident passive income. Income derived by a beneficiary from a trust will have a source in New Zealand to the extent to which the income of the trust fund has a source in New Zealand (s YD 4(13)).

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

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

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Subject references

Residence
Permanent place of abode
183-day rule
325-day rule
Double tax agreements
Permanent home
Personal and economic relations
Centre of vital interests
Habitual abode
Head office
Centre of management
Director control
Settlor residence
Trustee residence
Beneficiary residence

Legislative references

Income Tax Act 2007 – ss BD 1, BH 1(4), CV 13, CV 15, CW 27, EW 9, EW 29, EW 30, EW 31, EW 37(2), EX 24, EZ 38, GB 37, HC 2, HC 6, HC 7, HC 10(1)(a), HC 17, HC 24, HC 25, HC 29, HC 30, HC 32, HC 33, HG 26, HR 8(2), HZ 2, IA 3, IC 3, IC 5, IC 6, IC 7, MC 5, MD 7, OB 1, OB 2, OB 4(3)(b), OB 56(1), OB 60, RC 2, RC 3, RF 2, RF 8, RF 9, YD 1, YD 2, and YD 4, subparts HD, and IC, and definitions of "company" and "director" in s YA 1

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Appendix – Legislation

Income Tax Act 2007

1. Section BD 1 provides:

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

2. Section YD 1 provides:

> **YD 1 Residence of natural persons**
>
> *What this section does*
>
> (1) This section contains the rules for determining when a person who is not a company is a New Zealand resident for the purposes of this Act.
>
> *Permanent place of abode in New Zealand*
>
> (2) Despite anything else in this section, a person is a New Zealand resident if they have a permanent place of abode in New Zealand, even if they also have a permanent place of abode elsewhere.
>
> *183 days in New Zealand*
>
> (3) A person is a New Zealand resident if they are personally present in New Zealand for more than 183 days in total in a 12-month period.
>
> *Person treated as resident from first of 183 days*
>
> (4) If subsection (3) applies, the person is treated as resident from the first of the 183 days until the person is treated under subsection (5) as ceasing to be a New Zealand resident.
>
> *Ending residence: 325 days outside New Zealand*
>
> (5) A person treated as a New Zealand resident only under subsection (3) stops being a New Zealand resident if they are personally absent from New Zealand for more than 325 days in total in a 12-month period.

Person treated as non-resident from first of 325 days

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

Government servants

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

Presence for part-days

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

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

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

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

Treatment of non-resident seasonal workers

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

3. Section YD 2 provides:

YD 2 Residence of companies

Four bases for residence

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

(a) it is incorporated in New Zealand:

(b) its head office is in New Zealand:

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

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

International tax rules

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

Cook Islands National Superannuation Fund trustee

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

4. Section YD 3 provides:

YD 3 Country of residence of foreign companies

When this section applies

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

Liability to income tax

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

(a) its domicile:

(b) its residence:

(c) its place of management:

(d) any other criterion of a similar nature.

Further rule: first application

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

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

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

Applying New Zealand rules

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

(a) it is incorporated:

(b) it has its head office:

(c) it has its centre of management:

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

Further rule: second application

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

Final rule

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

5. Section YA 1 provides (relevantly):

YA 1 Definitions

In this Act, unless the context requires otherwise,—

company—

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

(ab) does not include a partnership:

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

(ac) includes a listed limited partnership:

(ad) includes a foreign corporate limited partnership:

(b) includes a unit trust:

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

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

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

(d) includes an airport operator:

(e) includes a statutory producer board:

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

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

(h) includes a friendly society:

(i) includes a building society:

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

...

director—

(a) means—

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

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

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

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

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

Goods and Services Tax Act 1985

6. Section 2 provides (relevantly):

2 Interpretation

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

…

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

provided that, notwithstanding anything in those sections,—

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

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

…

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

Attachment to draft Interpretation Statement INS0117 – Comparison of examples in this item and PIB No 180

PIB No 180 included 34 examples; there have been a number of changes to those examples in INS0117. The conclusion in Example 3 in PIB No 180 (now Example 1 in the statement) has been updated so the conclusion is consistent with case law. Example 1 in PIB No 180 has been deleted, as the change to Example 3 (now Example 1) meant they did not cover any different ground. Four new examples (Examples 4, 5, 6 and 7) dealing with the permanent place of abode test have been included. A new example (Example 18) dealing with the habitual abode test has been included. It is emphasised that there are no "bright line" tests, and different results in different examples should not be construed as indicating that there are. Examples 12-22 in PIB No 180 have been deleted, as they were to do with transitional issues in relation to the introduction of the new residence provisions in 1988.

This attachment is not part of the Interpretation Statement. It is provided for ease of reference.

Examples in PIB No 180	Examples in draft INS0117
Example 1 **Facts:** A, who is a university lecturer, travels to the United Kingdom for 15 months sabbatical leave. This period is spent mainly at a United Kingdom university. While on leave A remains in the employment of a New Zealand university, and A is required to work for that university on returning to New Zealand. A rents a house while she is in the United Kingdom and lives there with her family. A owns a house in New Zealand and this is let to tenants while A is in the United Kingdom. A's personal property and investments remain largely in New Zealand. **Result:** A has a permanent place of abode in New Zealand. **Explanation:** (i) Although A has been absent from New Zealand for 15 months she has retained close links with New Zealand. She has retained employment ties, has a house which is available upon her return and has retained her personal property and investments here. Further, A always intends to return to New Zealand at the end of her sabbatical leave. (ii) A has a permanent place of abode in New Zealand because she has an enduring relationship to her New Zealand place of abode, and because she normally or habitually lives here. Her absence from New Zealand is of a temporary nature and is not for a sufficiently long period to result in her losing her permanent place of abode here.	
Example 2 **Facts:** B departs from New Zealand on a working holiday of indefinite duration. Prior to departure B was living in a flat. She terminates any association with this flat before her departure. B resigns from her job and stores her personal effects with her parents. B returns to New Zealand to live after 18 months.	**Example 2** **Facts:** Mike departs from New Zealand on a working holiday of indefinite duration. Before he left New Zealand, Mike had been living in a rented flat in Wellington for a couple of years, prior to which he had lived with his parents (also in Wellington). Mike terminates his lease when he leaves New Zealand.

Result: B does not have a permanent place of abode in New Zealand while she is overseas. **Explanation:** (i) B has largely severed her links with New Zealand. She has stored her personal effects here and retains family ties in that her family still live here. However, taken alone these ties are not significant. B has no definite intention to return to New Zealand. (ii) B has not retained her permanent place of abode in New Zealand. She has severed most of her ties with New Zealand for a period of indefinite duration and New Zealand no longer remains her habitual or normal place of abode.	Mike resigns from his job and stores his personal effects with his parents, who are happy to store them and for Mike to return to live with them if he wishes upon his return. Mike leaves his KiwiSaver account in New Zealand, and takes a contributions holiday. Mike ends up returning to New Zealand to live after 18 months. **Result:** Mike does not have a permanent place of abode in New Zealand while he is overseas. **Explanation:** Mike has a place of abode in New Zealand – being his parents' house, where he would be able to live upon his return. He has stored his personal effects here, and retains family ties as his family still live here. However, taken alone these ties are not significant. Mike has largely severed his links with New Zealand and has no definite intention to return to New Zealand. Mike has not retained his permanent place of abode in New Zealand. He has severed most of his ties with New Zealand for a period of indefinite duration, and New Zealand is no longer his habitual or normal place of abode.
Example 3 **Facts:** C, who is normally resident in New Zealand, is seconded to Canada in connection with his employment for a fixed period of three years. C intends to return to New Zealand after the period of secondment. C's spouse and children accompany him to Canada. C owns a house in New Zealand and this is let while C is in Canada. The lease on the house is terminable at one month's notice. C retains his New Zealand investments and his connections with several professional and sporting associations here. **Result:** C does not have a permanent place of abode in New Zealand. Explanation: (i) C has retained ties with New Zealand in that he still has a dwelling available here and he still maintains membership of several professional and sporting associations. C also retains employment ties with New Zealand as his secondment is in connection with his New Zealand employment. C has an intention to return to New Zealand at the end of the 3 year secondment. (ii) However, although C has enduring connections with New Zealand it is necessary to balance this with the fact that he was absent for 3 years. Given the protracted period of absence in this case the fact that C has enduring connections with New Zealand is not sufficient to establish that he has a permanent place of abode here.	**Example 1** **Facts:** Cate, who is normally resident in New Zealand, is seconded to Canada in connection with her employment, for a fixed period of three years. Cate intends to return to New Zealand after the period of secondment. Cate's partner and children accompany her to Canada. Cate and her partner own a house in New Zealand, and this is rented out while they are in Canada. Cate retains her New Zealand investments, and her connections with several professional and sporting associations here. **Result:** Cate has a permanent place of abode in New Zealand. **Explanation:** Cate has a place of abode in New Zealand – being the house she owns with her partner. Cate has retained ties with New Zealand – she still has a dwelling available here, maintains membership of several professional and sporting associations, and has investments here. Cate also retains employment ties with New Zealand, as her secondment is in connection with her New Zealand employment. Cate has an intention to return to New Zealand at the end of the three-year secondment. Although Cate will be absent from New Zealand for a substantial length of time, this is not inconsistent with having a permanent place of abode in New Zealand. All of the relevant factors must be weighed up. In this case the strength of Cate's enduring connections with New Zealand are sufficient to establish that she has a permanent place of abode here.
Example 4 **Facts:** D has business interests in New Zealand and Australia. D owns houses in both countries and both houses are continuously available for his use. D spends most of his time in Australia but he regularly travels to New Zealand in connection with his business interests here. In aggregate, D spends up to 5 months of the year in New Zealand. These trips vary in length from two days up to several weeks. D has significant investments in New Zealand and he is a member of a number of cultural and sporting	**Example 3** **Facts:** Jack has business interests in New Zealand and Australia. Jack owns a house in each country, and both houses are continuously available for his use. Jack spends most of his time in Australia, but he regularly travels to New Zealand in connection with his business interests here. In aggregate, Jack spends up to five months of the year in New Zealand. These trips vary in length from two days up to several weeks. Jack has significant investments in New Zealand, and he is a member of a number of cultural

associations here. D's family live in Australia. **Result:** D has a permanent place of abode in New Zealand. **Explanation:** (i) D has significant connections with New Zealand because of his business interests here, the fact that he has available accommodation here, and his connection with sporting and cultural associations here. (ii) D's presence in New Zealand is generally for short periods; that is, his presence here is not of a continuous nature. However, the fact that D has substantial connections with New Zealand, and that these connections are maintained through regular trips to New Zealand, indicate that he has a permanent place of abode here. D may also have a permanent place of abode in Australia, but this is irrelevant in determining if he has a permanent place of abode in New Zealand.	and sporting associations here. Jack's family live in Australia. **Result:** Jack has a permanent place of abode in New Zealand. **Explanation:** Jack has a place of abode in New Zealand – being the house he owns here. He has significant connections with New Zealand because of his business interests here, the fact he has available accommodation here, and his connection with sporting and cultural associations here. Jack's presence in New Zealand is generally for short periods; that is, his presence here is not of a continuous nature. However, the fact that Jack has substantial connections with New Zealand, and that these connections are maintained through regular trips to New Zealand, indicate he has a permanent place of abode here. Jack may also have a permanent place of abode in Australia, but this is irrelevant in determining if he has a permanent place of abode in New Zealand.
	Example 4 **Facts:** Ronan is a software developer who has lived in Wellington for 12 years, and has a partner there. He owns 3 residential investment properties in Wellington (1 is let on a 6-month fixed-term tenancy, and the other 2 on periodic tenancies), and has a sizable New Zealand share portfolio. Ronan accepts a 2-year contract in Dublin. For the first year of his contract, Ronan returns to Wellington every few months to see his partner, after which she decides to take a year of unpaid leave and join him in Ireland for the remainder of his contract. They give up the lease on their flat in Wellington at this time, but intend to ultimately return to New Zealand where her family live and where they have many friends. **Result:** Ronan has a permanent place of abode in New Zealand during his absence. **Explanation:** Ronan has a place of abode in New Zealand – in the first year of his absence his and his partner's rented flat, and subsequently the residential investment properties he owns. One of the rental properties could be occupied by Ronan at the end of the fixed-term tenancy, and the other 2 could be occupied by Ronan with 42 days' notice under the Residential Tenancies Act 1986. As such the rental properties may be regarded as sufficiently available to Ronan as potential places of abode were he to need them. Ronan has a number of enduring connections with New Zealand – he has lived here for 12 years and intends to return here with his partner after his 2-year contract; he has family ties here (his partner's family); and he has substantial investments here. These connections are sufficient to establish that Ronan has a permanent place of abode in New Zealand.
	Example 5 **Facts:** Cameron is a civil engineer who goes to Japan with work for 18 months. Cameron's children are about to start high school, and the family had intended to move to Dunedin soon, to be closer to extended family. Cameron and his wife agree that she and the children will stay in New Zealand for the

	18 months, during which time they will move to Dunedin, so that the children can start high school there. Cameron's wife and children make the move to Dunedin, and he will join them there once he returns from Japan. **Result:** Cameron has a permanent place of abode in New Zealand during his absence. **Explanation:** Cameron has a place of abode in New Zealand – being the new family home in Dunedin. Although Cameron has not previously lived in Dunedin, his family home has been established there during his absence, and he will join his family there upon his return. The home can be considered an available dwelling in this instance, as Cameron has sufficient ties to the new home, and to Dunedin, through his wife and children living there, and his intention to live there upon his return. Cameron has a place of abode in New Zealand and, given his substantial connections to New Zealand, it is clear that it is a permanent place of abode.
	Example 6 **Facts:** Charlie and his wife own a house in Auckland, where they live with their children, and where he is a member of a number of local clubs. Charlie works as a miner in Moranbah in Queensland (Australia) for periods of six weeks at a time, between which he returns to his home in Auckland for four weeks off. Charlie's wages are paid into an Australian bank account, in Australian dollars; though most of his wages are automatically transferred from there into the New Zealand bank account he holds jointly with his wife. Charlie's employer provides him with accommodation at the mine site. On his home visits, Charlie maintains his sporting and social ties. **Result:** Charlie has a permanent place of abode in New Zealand. **Explanation:** Charlie has a place of abode in New Zealand – being the house that he and his wife own. Although Charlie is absent from New Zealand for more than half of each year, his absences are solely because of the nature of his job. Charlie's home, family, and personal property are in New Zealand. Charlie has a permanent place of abode in New Zealand because he has an enduring relationship to New Zealand and to his place of abode here. Although Charlie is out of New Zealand more than he is here, that is solely for work purposes, and he normally or habitually lives at his home in Auckland.
	Example 7 **Facts:** Daniel is an engineer who has lived in Wellington all of his life. He accepts a two-year contract working on an oil rig in Malaysia for periods of four weeks at a time. When he takes up the job, Daniel terminates the lease on the flat he has lived in for the last couple of years. Between his stints on the rig, Daniel has two weeks off. He has a monthly periodic lease on an apartment in Malaysia, and for most of his weeks off he stays there. At other times he travels elsewhere, sometimes returning to New Zealand to visit family and friends here. When he is back in New Zealand, Daniel stays at his parents' house in Wellington. Daniel's wages are paid into his Malaysian bank account, in American dollars. He has no plans to return to New Zealand permanently – his

	intention is to work and live in Malaysia indefinitely. Daniel's employer has sponsored his Malaysian work permit, and will continue to do so as long as Daniel stays with the company. **Result:** Daniel does not have a permanent place of abode in New Zealand. **Explanation:** Although Daniel has a place he could stay in New Zealand – his parents' house, it is not a dwelling that is available to him as a place to live on a permanent basis. He stays at his parents' house during some of his time off, when he returns to New Zealand to catch up with friends and family. He would also presumably stay there if and when he ultimately returns to Wellington to live, though it seems, from the fact that Daniel has not lived with his parents for some time, that this would likely only be until he found a new place to live. Daniel's use of his parents' house as a place of abode is temporary in nature, not enduring or indefinite. He does not normally or habitually live at his parents' house. Even if Daniel's parents' house could be considered a dwelling which is available to him, Daniel has not retained significant connections with New Zealand to retain a permanent place of abode here. Although Daniel periodically visits his parents and friends in Wellington, he has no other significant ties here, and he intends to work and live in Malaysia indefinitely (his employer will continue to sponsor his work permit – which indicates that this intention would seem to be reasonably held).
Example 5 **Facts:** A arrives in New Zealand on 1 October 1989 and remains until 1 March 1990, a total of 152 days of presence. A returns to New Zealand on 18 September 1990 after 200 days of absence and remains here for a further 7 months. It is assumed that A is resident outside New Zealand prior to 1 October 1989 and that A has never previously been resident in New Zealand. **Result:** A is resident in New Zealand from 18 September 1990. **Explanation:** (i) A is not personally present in New Zealand for more than 183 days in aggregate in any 12 month period commencing prior to 18 September 1990. The effect of the period of absence between 2 March 1990 and 17 September 1990 is that A is only present in New Zealand for 165 days in the 12 month period commencing on 1 October 1989. (ii) However, A is present in New Zealand for 7 months, i.e. more than 183 days, in the 12 month period commencing on 18 September 1990. Therefore, A is resident from the first day of presence in that period: i.e. from 18 September 1990.	**Example 8** ***[See draft IS for timeline]*** **Facts:** Amy arrived in New Zealand on 1 October 2009 and stayed here until 1 March 2010, a total of 152 days of presence in New Zealand. Amy was then absent from New Zealand for 200 days. She then returned to New Zealand on 18 September 2010, and stayed here for a further seven months. It is assumed that Amy was resident outside New Zealand prior to 1 October 2009 and that she has never previously been resident in New Zealand. **Result:** Amy is resident in New Zealand from 18 September 2010. **Explanation:** Amy was not personally present in New Zealand for more than 183 days in any 12-month period commencing prior to 18 September 2010. Because of her absence between 2 March 2010 and 17 September 2010, Amy was only in New Zealand for 165 days in the 12-month period commencing on 1 October 2009. However, Amy was present in New Zealand for seven months (213 days), in the 12-month period commencing on 18 September 2010. Therefore, Amy is resident from the first day of presence in that period (ie from 18 September 2010). Amy will continue to be resident in New Zealand until she ceases to be resident under the 325-day rule (presuming she has no permanent place of abode here).
Example 6 **Facts:** B arrives in New Zealand on 1 June 1989 and remains until 20 June 1989, a total of 20 days of	**Example 9** ***[See draft IS for timeline]***

presence. B returns to New Zealand on 1 August 1989 and remains until 17 January 1990, a total of 170 days of presence. It is assumed that B was not resident in New Zealand prior to 1 June 1989. **Result:** B is resident in New Zealand from 1 June 1989. **Explanation:** B has been personally present in New Zealand for 190 days in aggregate, i.e. for more than 183 days, during the 12 month period commencing on 1 June 1989. B will continue to be resident in New Zealand after that day until he ceases to be resident under the 325 day rule. B may cease to be resident on 18 January 1990 depending upon how long he is absent from New Zealand after that date.	**Facts:** Ben arrived in New Zealand on 1 June 2009 and stayed here until 20 June 2009, a total of 20 days. Ben returned to New Zealand on 1 August 2009 and stayed here until 17 January 2010, a total of 170 days. It is assumed that Ben was not resident in New Zealand prior to 1 June 2009. **Result:** Ben is resident in New Zealand from 1 June 2009. **Explanation:** Ben was personally present in New Zealand for more than 183 days (190), during the 12-month period commencing on 1 June 2009. Ben will continue to be resident in New Zealand until he ceases to be resident under the 325-day rule (presuming he has no permanent place of abode here).
Example 7 **Facts:** A departs from New Zealand on 1 May 1990 and returns again on 1 August 1990, a total of 91 days of absence. A remains until 20 August 1990, a total of 20 days of presence. A remains absent until 1 February 1991, a total of 164 days of absence. A remains here until 16 February 1991, a total of 16 days of presence. After departing again on 16 February 1991, A returns to New Zealand on 30 April 1991 after a period of absence of 72 days. It is assumed that A does not have a permanent place of abode in New Zealand and that A was resident in New Zealand prior to her departure on 1 May 1990 by virtue of the 183 day rule. **Result:** A is non-resident from 2 May 1990. **Explanation:** A was absent for 327 days in total in the 12 month period commencing on 1 May 1990 (i.e. 91 days from 2 May 1990 to 31 July 1990; 164 days from 21 August 1990 to 31 January 1991; 72 days from 17 February 1991 to 29 April 1991). A is therefore non-resident from the first day of absence in that period: i.e. 2 May 1990. A will remain non-resident until she obtains a permanent place of abode here or until she is present here for more than 183 days in any period of 12 months.	**Example 10** ***[See draft IS for timeline]*** **Facts:** Jeremy left New Zealand on 1 May 2010 and returned again on 1 August 2010, a total of 91 days of absence. Jeremy stayed in New Zealand until 20 August 2010, a total of 20 days of presence. Jeremy remained absent until 1 February 2011, a total of 164 days. Jeremy stayed in New Zealand from 1 February 2011 until 16 February 2011, a total of 16 days. After leaving again on 16 February 2011, Jeremy returned to New Zealand on 30 April 2011, after a period of absence of 72 days. It is assumed that Jeremy does not have a permanent place of abode in New Zealand and that Jeremy was resident in New Zealand prior to his departure on 1 May 2010 by virtue of the 183-day rule. **Result:** Jeremy is non-resident from 2 May 2010. **Explanation:** Jeremy was absent for 327 days in total in the 12-month period commencing on 1 May 2010 (91 days commencing on 2 May 2010 and ending on 31 July 2010, 164 days commencing on 21 August 2010 and ending on 31 January 2011, and 72 days commencing on 17 February 2011 and ending on 29 April 2011). Jeremy is therefore non-resident from the first day of absence in that period (ie 2 May 2010). Jeremy will remain non-resident until he acquires a permanent place of abode here or until he is present here for more than 183 days in any period of 12 months.
Example 8 **Facts:** B departs from New Zealand on 1 April 1990 and returns on 1 August 1991. B has a permanent place of abode in New Zealand at all times during this period, i.e. he owns a home which remains vacant, has strong economic ties with New Zealand, remains in the employment of a New Zealand employer etc. **Result:** B remains resident in New Zealand at all times during his absence. **Explanation:** Although B was absent from New Zealand for a period exceeding 325 days, i.e. 365 days, in the 12 month period commencing on 2 April 1990, B remains resident here because he has a permanent place of abode in New Zealand at all times during his absence.	**Example 11** **Facts:** Claire left New Zealand on 1 April 2010 and returned on 1 August 2011. Claire has a permanent place of abode in New Zealand at all times during this period; she owns a house here, has strong economic and personal ties with New Zealand, and remains in the employment of her New Zealand employer. **Result:** Claire remains resident in New Zealand at all times during her absence. **Explanation:** Although Claire was absent from New Zealand for more than 325 days (ie 365 days) in the 12-month period commencing on 2 April 2010, she remains resident here because she has a permanent place of abode in New Zealand at all times during her absence.
Example 9 **Facts:** C is seconded to the Australian office of her	**Example 12** **Facts:** James was seconded to the Australian office of

employer for 6 months, departing from New Zealand on 1 February 1991. C has always lived in New Zealand and intends to return after the 6 month period. C leaves most of her personal property, including her car, with her parents. After she has been absent for 3 months C is offered a permanent job in Australia. C accepts the job and arranges to have her personal property and bank accounts transferred from New Zealand, and instructs her parents to sell her car. C remains in Australia indefinitely. **Result:** Closes her New Zealand permanent place of abode on 1 May 1991 when she accepts the permanent job in Australia and makes arrangements to have her property and bank accounts transferred from New Zealand. C ceases to be resident in New Zealand from 1 May 1991. **Explanation:** (i) C is personally absent from New Zealand for more than 325 days in the 12 month period commencing on 1 February 1991. (ii) However, C did not lose her New Zealand permanent place of abode when she originally departed on 1 February 1991 because she retained close personal and employment ties with New Zealand and intended to return after a brief period of absence. C lost her New Zealand permanent place of abode on 1 May 1991 because at that time she effectively severed her enduring connections with New Zealand. (iii) Although C is absent from New Zealand for more than 325 days in a 12 month period commencing on 1 February 1991, C does not cease to be resident in New Zealand until 1 May 1991 because she did not lose her New Zealand permanent place of abode until that day.	his employer for six months, and left New Zealand on 1 February 2011. James had always lived in New Zealand (with his parents), had a boyfriend here, and intended to return after the six-month period. James left most of his personal property, including his car, with his parents. After he had been in Australia for three months, James was offered a permanent job there, which he accepted. James stayed in Australia, and arranged to have his personal property transported to Australia and his New Zealand bank accounts closed. James asked his parents to sell his car, and he broke things off with his boyfriend. James intends to remain in Australia indefinitely. **Result:** James lost his New Zealand permanent place of abode on 1 May 2011, when he resigned from his substantive position in New Zealand and accepted the permanent job in Australia. Although it was in the following weeks that James made arrangements to have his property transported to Australia, closed his New Zealand bank accounts, and ended his relationship, the decision to resign from his position in New Zealand and accept the permanent position in Australia is the time from which it is apparent that James had formed the intention to remain in Australia indefinitely. Accordingly, James ceased to be resident in New Zealand from this time. **Explanation:** James was personally absent from New Zealand for more than 325 days in the 12-month period commencing on 1 February 2011. However, James did not lose his New Zealand permanent place of abode when he originally departed on 1 February 2011 because he had a place of abode available to him (his parents' house, where he had lived prior to his departure), he retained close personal and employment ties with New Zealand, and he intended to return after a brief period of absence. James lost his New Zealand permanent place of abode on 1 May 2011 when he severed his enduring connections with New Zealand. Although James was absent from New Zealand for more than 325 days in a 12-month period commencing on 1 February 2011, he did not cease to be resident in New Zealand until 1 May 2011 when he lost his New Zealand permanent place of abode.
Example 10 **Facts:** A departs from New Zealand on 1 May 1990 returning on 1 January 1991 after 244 days of absence. A departs from New Zealand on 1 February 1991 after 32 days of presence here. A returns on 28 April 1991 after 85 days of absence and remains in New Zealand thereafter. It is assumed that A does not have a permanent place of abode in New Zealand until he returns on 28 April 1991. It is also assumed that A was resident in New Zealand under the 183 day rule prior to his departure on 1 May 1990. **Result:** A ceases to be resident in New Zealand from 2 May 1990 until 31 December 1990. A becomes resident in New Zealand again on 1 January 1991. **Explanation:** (i) A is personally absent from New Zealand for 329 days in aggregate in the 12 month period commencing on 2 May 1990 (i.e. for 244 days from 2 May 1990 to 31 December 1990, and for 85 days from 2 February 1991 to 27 April 1991). A therefore ceases to be resident in New Zealand from	**Example 13** ***[See draft IS for timeline]*** **Facts:** Henry left New Zealand on 1 May 2010 and returned on 1 January 2011, after 244 days of absence. Henry left New Zealand again on 1 February 2011, after 32 days of presence here. Henry returned on 28 April 2011, after 85 days of absence, and remained in New Zealand from that point onwards. It is assumed that Henry did not have a permanent place of abode in New Zealand until after he returned on 28 April 2011. It is also assumed that Henry was resident in New Zealand under the 183-day rule prior to his departure on 1 May 2010. **Result:** Henry is treated as non-resident from 2 May 2010 until 31 December 2010. Henry is treated as resident in New Zealand again from 1 January 2011. **Explanation:** Henry was personally absent from New Zealand for 329 days in total in the 12-month period commencing on 2 May 2010 (ie for 244 days from 2

the first day of absence, i.e. 2 May 1990. (ii) A is personally present in New Zealand for 280 days, i.e. more than 183 days, in the 12 month period commencing on 1 January 1991 (i.e. for 32 days from 1 January 1991 to 1 February 1991, and 248 days from 28 April 1991 to 31 December 1991). A is resident from the first day of presence in that 12 month period: i.e. 1 January 1991. (iii) The period taken into account for the purpose of the 183 day rule cuts into the period taken into account for the purpose of the 325 day rule. Thus, A is only non-resident from the commencement of the period of absence, i.e. 2 May 1990, until the day before the beginning of the period taken into account for the purpose of the 183 day rule, i.e. 31 December 1991.	May 2010 to 31 December 2010, and for 85 days from 2 February 2011 to 27 April 2011). Henry is therefore treated as non-resident in New Zealand from the first day of absence, ie 2 May 2010. Henry was personally present in New Zealand for more than 183 days in the 12-month period commencing on 1 January 2011 (ie for 32 days from 1 January 2011 to 1 February 2011, and 248 days from 28 April 2011 to 31 December 2011 – a total of 280 days). Henry is therefore treated as resident from the first of those days of presence, ie 1 January 2011. The period taken into account for the purposes of the 183-day rule cuts into the period taken into account for the purposes of the 325-day rule. Therefore, Henry is only treated as non-resident from the commencement of the period of absence (ie 2 May 2010) until the day before the beginning of the period taken into account for the purposes of the 183-day rule (ie 31 December 2011).
Example 11 **Facts:** B arrives in New Zealand on 1 November 1989 and remains for 150 days until 30 March 1990. B departs on 30 March 1990 returning on 5 May 1990, a period of absence of 35 days (i.e. from 31 March to 4 May inclusive). B is present in New Zealand from 5 May 1990 to 13 June 1990, a total of 40 days. B departs again on 13 June 1990 and remains outside New Zealand indefinitely. It is assumed that B is resident outside New Zealand before she arrives on 1 November 1989 and that she does not at any time have a permanent place of abode in New Zealand. **Result:** B is resident in New Zealand from 1 November 1989 to 30 March 1990. B ceases to be resident in New Zealand on 31 March 1990. **Explanation:** (i) B is present in New Zealand for 190 days in aggregate in the 12 month period commencing on 1 November 1989 (i.e. for 150 days from 1 November 1989 to 30 March 1990, and for 40 days from 5 May 1990 to 13 June 1990). B is resident from the first day of presence, i.e. 1 November 1989. (ii) B is absent from New Zealand for 327 days in aggregate in the 12 month period commencing on 31 March 1990 (i.e. for 35 days from 31 March 1990 until 4 May 1990, and for 292 days from 12 June 1990 to 30 March 1991). A ceases to be resident in New Zealand from the first day of absence, i.e. 31 March 1990. (iii) The period taken into account for the purpose of the 325 day rule cuts into the period taken into account for the purpose of the 183 day rule. Consequently, B is only resident from the commencement of the period of presence, i.e. 1 November 1989, until the day before the beginning of the period taken into account for the purpose of the 325 day rule, i.e. 30 March 1990.	**Example 14** ***[See draft IS for timeline]*** **Facts:** Belinda arrived in New Zealand on 1 November 2009 and stayed here for 150 days, until 30 March 2010. Belinda left New Zealand on 30 March 2010 and returned on 5 May 2010, a period of absence of 35 days (ie from 31 March 2010 to 4 May 2010). Belinda was present in New Zealand from 5 May 2010 to 11 June 2010, a total of 38 days. Belinda left the country again on 12 June 2010 and has remained outside New Zealand since that time. It is assumed that Belinda was resident outside New Zealand before she arrived on 1 November 2009, and that she did not at any time have a permanent place of abode in New Zealand. **Result:** Belinda is treated as resident in New Zealand from 1 November 2009 to 30 March 2010. Belinda is treated as non-resident from 31 March 2010. **Explanation:** Belinda was present in New Zealand for 188 days in the 12-month period commencing on 1 November 2009 (ie for 150 days from 1 November 2009 to 30 March 2010, and for 38 days from 5 May 2010 to 11 June 2010). Belinda is treated as resident from the first of those days of presence, ie 1 November 2009. Belinda was absent from New Zealand for 327 days in the 12-month period commencing on 31 March 2010 (ie for 35 days from 31 March 2010 until 4 May 2010, and for 292 days from 12 June 2010 to 30 March 2011). Belinda is treated as non-resident from the first of those days of absence, ie 31 March 2010. The period taken into account for the purposes of the 325-day rule cuts into the period taken into account for the purposes of the 183-day rule. As a result, Belinda is only treated as resident from the commencement of the period of presence (ie 1 November 2009) until the day before the beginning of the period taken into account for the purposes of the 325-day rule (ie 30 March 2010).
Examples 12-22 in PIB No 180 have been deleted, as they were to do with transitional issues in relation to the introduction of the new residence provisions in 1988.	

Example 23 **Facts:** A, who is employed as a university teacher, travels to the United Kingdom for 15 months sabbatical leave at a United Kingdom university. While on leave A remains in the employment of a New Zealand university, and A is required to work for the university on returning to New Zealand. A's house in New Zealand is let to tenants while A is in the United Kingdom, the tenancy being terminable on short notice. A's family travel with him to the United Kingdom, but most of his personal property remains in New Zealand. While in the United Kingdom, A rents a house near the university where he spends his sabbatical leave. **Result:** A is resident in both New Zealand and the United Kingdom under the respective income tax legislation of each country. However, for the purpose of the DTA between New Zealand and the United Kingdom, A is treated as being resident solely in New Zealand. **Explanation:** (i) A is resident in New Zealand in terms of s241 of the Income Tax Act because he has a permanent place of abode here. A is also resident in the United Kingdom because he is present there for a period of longer than 6 months in the year of assessment: Income and Corporation Taxes Act 1988 (United Kingdom), s336. (ii) The question of A's residence for the purpose of the DTA is not resolved under the permanent home test. A does not have a permanent home available in New Zealand because his house, having been let to tenants, is not continuously available for his use. A does not have a permanent home in the United Kingdom because his home in the United Kingdom is of a temporary character. (iii) As A does not have a permanent home in either country, the question is whether A has an habitual abode in New Zealand or the United Kingdom. A does have an habitual abode in New Zealand because he usually lives here. On the other hand, A does not have an habitual abode in the United Kingdom because he does not usually live there.	**Example 15** **Facts:** Stacey, who is employed as a university lecturer, travels to the United Kingdom for 15 months sabbatical leave at a United Kingdom university. While on leave, Stacey remains in the employment of a New Zealand university, and is required to work for the university on returning to New Zealand. Stacey and her partner let their house in New Zealand out to tenants while they are in the United Kingdom, the tenancy being terminable on short notice. Stacey's partner travels with her to the United Kingdom, but she remains a member of a number of local clubs and organisations in New Zealand, and keeps most of her personal property, including investments, in New Zealand (looked after and managed by family members). While in the United Kingdom, Stacey and her partner rent a house near the university where she spends her sabbatical leave. For the purposes of this example it is assumed that Stacey is resident for tax purposes in the United Kingdom under the relevant legislation. **Result:** Stacey is resident in both New Zealand and the United Kingdom under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and the United Kingdom, she is deemed to be a resident of New Zealand. **Explanation:** Stacey is resident in New Zealand under s YD 1 of the Act because she has a permanent place of abode here. As noted above, it is assumed that she is also resident for tax purposes in the United Kingdom under the relevant UK legislation. The question of Stacey's residence for the purposes of the DTA is not resolved by the permanent home test. Stacey has a permanent home available in New Zealand because she has a house here available for her use – the house she and her partner own in New Zealand. Although let out, Stacey can reoccupy the house with sufficient immediacy and ease for it to be considered "available" for the purposes of the permanent home test. However, Stacey also has a permanent home in the United Kingdom as she has rented a house there for 15 months. Although Stacey's stay in the United Kingdom is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary. As Stacey has a permanent home in both countries, the question is then whether her personal and economic relations are closer with New Zealand or the United Kingdom. In terms of personal and economic relations with the United Kingdom, it is noted that Stacey's partner has accompanied her to the United Kingdom, however she has few economic relations with the United Kingdom. In terms of personal and economic relations with New Zealand, Stacey has family, most of her personal property (including investments), and her job in New Zealand. As such, overall Stacey has closer personal and economic relations with New Zealand, and is therefore deemed to be a resident of New Zealand for the purposes of the DTA.
Example 24 **Facts:** B owns a house in New Zealand and in Australia. B spends short regular periods in New Zealand of 5 months in aggregate during the year. B works and lives in Australia for the remainder of the	**Example 16** **Facts:** Luke owns a house in New Zealand and one in Malaysia. He has extensive business interests in both New Zealand and Malaysia. Luke regularly spends short periods in New Zealand, and these add up to

time. B has extensive business interests in New Zealand and Australia and occupies a number of positions of responsibility in the community in both countries. B is married and his family live in Australia. **Result:** B is resident in New Zealand as he has a permanent place of abode here. B is also resident in Australia because he is present there for more than half of the year and his usual place of abode is not outside Australia: s6(1) Income Tax Assessment Act 1936 (Australia). For the purposes of the DTA between Australia and New Zealand, B is treated as resident in Australia. **Explanation:** (i) B has a permanent home available to him in New Zealand because his home here is continuously available to him for use. B also has a permanent home available to him in Australia because his home there is available to him continuously. (ii) As B has a permanent home available to him in both countries the next question is whether he has an habitual abode in either country. (The DTA with Australia differs from most of New Zealand's other DTAs in that where a person has a permanent home available in both countries the habitual abode test is applied next. In relation to most of the other DTAs, if a person has a permanent home available in both countries the personal and economic relations test would be applied). B has an habitual abode in Australia because he habitually lives there for 7 months of the year. B also has an habitual abode in New Zealand because he habitually spends 5 months of the year here. (iii) As B has an habitual abode in both New Zealand and Australia, it is necessary to determine whether his personal and economic relations are closer with Australia or with New Zealand. B has close economic relations with both countries due to his extensive business interests in both countries. B also has personal relations with both countries. However, these are closer with Australia because although B has personal relations with New Zealand his personal relations are closer with Australia because his family is located there. B is therefore resident in Australia for the purposes of the DTA because he has closer personal and economic relations with Australia.	five months of the year. Luke's visits to New Zealand are primarily for business purposes, but he also spends time catching up with family here. Luke works and lives in Malaysia for the remainder of the time, where he also occupies a number of positions of responsibility in the community. Luke is married, and his wife and children live in Malaysia. For the purposes of this example it is assumed that Luke is resident for tax purposes in Malaysia under the relevant legislation. **Result:** Luke is resident in both New Zealand and Malaysia under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Malaysia, Luke is treated solely as a Malaysian resident. **Explanation:** Luke is resident in New Zealand under s YD 1 of the Act as he has a permanent place of abode here. As noted above, it is assumed that he is also resident for tax purposes in Malaysia under the relevant Malaysian legislation. Luke has permanent homes available to him in both New Zealand and Malaysia because his houses in both countries are continuously available to him for use. As Luke has a permanent home available to him in both countries, the next question is whether he has an habitual abode in either country. [As noted at [148], the order of the tie-breaker tests in the DTA between New Zealand and Malaysia, signed on 19 March 1976, differs from that in New Zealand's other DTAs. Under New Zealand's other DTAs, if a person has a permanent home available in both countries, the personal and economic relations test would be applied next.] Luke has an habitual abode in Malaysia because he habitually lives there for seven months of the year. Luke also has an habitual abode in New Zealand because he habitually spends five months of the year here. The reasons for Luke's stays in New Zealand (business and visiting family) suggest that the stays are more than transient in nature. As Luke has an habitual abode in both New Zealand and Malaysia, it is necessary to determine whether his personal and economic relations are closer with Malaysia or with New Zealand. [Again, note the difference in the order of the tie-breaker tests in the DTA between New Zealand and Malaysia, signed on 19 March 1976, compared to New Zealand's other DTAs.] Luke has close economic relations with both countries due to his extensive business interests in both countries. Luke also has personal relations with both countries. These personal relations are considered to be stronger with Malaysia, given that Luke's wife and children live there, and also that he is involved in the community there. As such, weighing up the circumstances as a whole, Luke's personal and economic relations are closer with Malaysia. Luke is therefore treated solely as a Malaysian resident for the purposes of the DTA.
Example 25 **Facts:** C, who normally resides in Canada, is seconded to New Zealand by her Canadian employer for a period of 18 months. While in New Zealand C works for the New Zealand subsidiary of her Canadian employer. C lets her Canadian house while she is in New Zealand and while here lives in rented accommodation. Most of C's personal property remains in Canada and most of her investments are in	**Example 17** **Facts:** Megan, who normally resides in Canada, is seconded to New Zealand by her Canadian employer for a period of 18 months. While in New Zealand, Megan works for the New Zealand subsidiary of her Canadian employer. Megan lets her Canadian house for a fixed-term of 18 months while she is in New Zealand, and lives in rented accommodation here. Most of Megan's personal property remains in Canada,

Canada. **Result:** C is resident in New Zealand as she is present here for more than 183 days in a 12 month period. C is also resident in Canada because she has not been absent from Canada for a period of more than 2 years: Revenue Canada Interpretation Bulletin IT-221R2, February 1983. For the purposes of the DTA between New Zealand and Canada, C is treated as resident in Canada. **Explanation:** (i) C does not have a permanent home available to her in Canada because her home there is not continuously available for her use. C does not have a permanent home available in New Zealand because her home here is temporary. (ii) As C does not have a permanent home available in either country the question is whether she has an habitual abode in either country. C has an habitual abode in Canada because she habitually lives there. C's place of abode in New Zealand is not an habitual one: rather it is one where she is living for a temporary period of short duration. Consequently, C is resident in Canada for the purposes of the DTA.	and most of her investments are in Canada. For the purposes of this example it is assumed that Megan is resident for tax purposes in Canada under the relevant legislation. **Result:** Megan is resident in both New Zealand and Canada under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Canada, Megan is deemed to be a resident only of New Zealand. **Explanation:** Megan is resident in New Zealand under s YD 1 as she is present here for more than 183 days in a 12-month period. As noted above, it is assumed that she is also resident in Canada under the relevant Canadian legislation. Megan has a permanent home available to her in New Zealand as she has rented accommodation here for 18 months. Although Megan's stay in New Zealand is for a known and fixed duration, it is sufficiently long that it cannot be regarded as temporary. Megan does not have a permanent home available to her in Canada as her house there, being rented out for a fixed-term of 18 months, cannot be reoccupied with sufficient immediacy to be considered "available" for the purposes of the permanent home test. As Megan has a permanent home available to her in New Zealand but not in Canada, she is deemed to be a resident only of New Zealand for the purposes of the DTA.
	Example 18 **Facts:** Jonty grew up in South Africa, and moved to Canada with his parents when he was 16 years old (when his father was temporarily transferred there for work). After three years, his parents moved back to South Africa. By this time, Jonty had started university in Canada and decided to stay there. Jonty graduated and had been working in Canada for two years when he was offered a two-year secondment to New Zealand by his Canadian employer. While in New Zealand, Jonty is employed by the New Zealand subsidiary of his Canadian employer. Jonty retains his bank accounts in Canada and opens new ones in New Zealand. He does not transfer his Canadian superannuation into his New Zealand superannuation fund, as he may well return to Canada at the end of his secondment. Jonty has a Canadian passport and drivers' licence. Jonty lived in a rented flat in Canada, which he gave up when he moved to New Zealand. Jonty has to travel between Auckland and Wellington, on a roughly week-about basis, for work, and he lives in his employer's serviced apartments in both cities. Jonty has very little personal property, some of which he brings with him to New Zealand and the rest of which he sells before leaving Canada. At the end of the two-year secondment, Jonty's position in New Zealand is extended for another 18 months. During the three and a half years that Jonty lives in New Zealand, he returns to Canada once, for a three-week holiday. For the purposes of this example it is assumed that Jonty is resident for tax purposes in Canada under the relevant legislation. **Result:** Jonty is resident in both New Zealand and Canada under the tax legislation of each country. However, for the purposes of the DTA between New Zealand and Canada, Jonty is deemed to be a resident only of New Zealand.

	Explanation: Jonty is resident in New Zealand under s YD 1 of the Act as he is personally present here for more than 183 days in a 12-month period. As noted above, it is assumed that he is also resident for tax purposes in Canada under the relevant Canadian legislation. Jonty does not have a permanent home available to him in Canada because he gave up his rented flat there. Jonty does not have a permanent home available in New Zealand because his homes here (a series of serviced apartments) are not permanent. As Jonty does not have a permanent home available in either country, the question is whether Jonty has an habitual abode in either country. Jonty has an habitual abode in New Zealand because he habitually or normally lives here during the period of dual residency. The period of dual residency is sufficiently long that it is not necessary to look beyond that period to determine whether Jonty's time in New Zealand is transient or of substance. It is apparent that for the three and a half years of dual residency Jonty has an habitual abode in New Zealand. Jonty clearly does not have an habitual abode in Canada during the period of dual residency – he returned there only once in that time, for a holiday of short duration. Consequently, Jonty is deemed to be a resident only of New Zealand for the purposes of the DTA.
Example 26 **Facts:** Company X carries on in Hong Kong a business of manufacturing clothes. X is incorporated in Hong Kong and its operations are managed from Hong Kong. X has no office in New Zealand. All meetings of the board of directors are held in Hong Kong, but the Hong Kong directors act under instructions from company X's New Zealand parent company. **Result:** Company X is resident in New Zealand by virtue of the director control test. **Explanation:** (i) X is incorporated in Hong Kong and therefore is not resident in New Zealand by reason of the incorporation test. (ii) The centre of X's operations is in Hong Kong and X has its centre of management there. X has no office in New Zealand. Consequently, X is not resident in New Zealand pursuant to the head office or the centre of management tests. (ii) The Hong Kong directors of X act under instructions from the New Zealand parent company. The New Zealand parent is therefore a director of X (para. (b) of the definition of director) and is exercising control of X. X is resident in New Zealand because control of X is exercised from New Zealand by a director.	**Example 19** **Facts:** Company A is incorporated in Hong Kong and carries on a business manufacturing clothes there. A's operations are all managed from Hong Kong. A has no office in New Zealand. All meetings of the board of directors are held in Hong Kong, but the Hong Kong directors act on the instructions of company A's New Zealand parent company. **Result:** Company A is resident in New Zealand under the director control test. **Explanation:** A is incorporated in Hong Kong and therefore is not resident in New Zealand under the incorporation test. The centre of A's operations is in Hong Kong, and A has its centre of management there. A has no office in New Zealand. As such, A is not resident in New Zealand under either the head office or the centre of management tests. The Hong Kong directors of A act on the instructions of the New Zealand parent company. The New Zealand parent is therefore a director of A (under paragraph (a)(ii) of the definition of "director" in s YA (1)), and is exercising control of A. A is resident in New Zealand because control of A is exercised from New Zealand by a director.
Example 27 **Facts:** X is a holding company incorporated in Singapore. X has an office in Singapore and the day to day operations of X are managed from this office. X has no office in New Zealand. X has five directors: three of whom are resident in Australia, the other two being resident in New Zealand. The powers of the directors are equal. The board of directors meets six monthly in Singapore to review decisions made by its	**Example 20** **Facts:** B is a holding company incorporated in Singapore. B has an office in Singapore and the day-to-day operations of B are managed from this office. B has no office in New Zealand. B has five directors: three are resident in Australia, and two in New Zealand. The powers of the directors are equal. The board of directors meets six-monthly in Singapore to review decisions made by its subsidiaries. The

subsidiaries and to ratify seal affixings which have occurred in the preceding six months. The directors regularly hold telephone conferences to discuss particular issues, and investment decisions are made in the course of these conferences. **Result:** X is not resident in New Zealand. **Explanation:** (i) X is incorporated in Singapore and is therefore not resident in New Zealand by virtue of the incorporation test. (ii) X has no office in New Zealand and is therefore not resident here by virtue of the head office test. (iii) X is managed on a day to day basis from Singapore and therefore has its centre of management in Singapore rather than in New Zealand. (iv) Although the board of directors meet only in Singapore, control of the company is also exercised outside the board meetings in the course of the telephone conferences between the New Zealand and Australian directors. The New Zealand directors therefore occasionally exercise their directorial functions from New Zealand. However, as the powers of each director are equal, X is not controlled by its directors from New Zealand. X is therefore not resident in New Zealand by virtue of the director control test.	directors regularly hold Skype conferences to discuss particular issues, and investment decisions are made in the course of these conferences. **Result:** B is not resident in New Zealand. **Explanation:** B is incorporated in Singapore and is therefore not resident in New Zealand under the incorporation test. B has no office in New Zealand and is therefore not resident here under the head office test. B is managed on a day-to-day basis from Singapore and therefore has its centre of management in Singapore rather than in New Zealand. Although the board of directors meets only in Singapore, control of the company is also exercised outside the board meetings during the Skype conferences between the New Zealand and Australian directors. The New Zealand directors therefore occasionally exercise their directorial functions from New Zealand. However, as the powers of each director are equal, B is not controlled by its directors from New Zealand, as the majority of directors are in Australia. B is therefore not resident in New Zealand under the director control test.
Example 28 **Facts:** X is an Australian incorporated bank. X conducts business in New Zealand through a branch. The New Zealand branch has its own executives and board of directors who operate from the bank's Wellington office. The worldwide operations of X are conducted from the Australian office, and all of the major decisions concerning X are made by the Australian directors in Australia. The New Zealand executives and board are only responsible for managing X's New Zealand operations. **Result:** X is not resident in New Zealand. **Explanation:** (i) X is incorporated in Australia and therefore is not resident in New Zealand by virtue of the incorporation test. (ii) X's head office is not in New Zealand. The Wellington office is the company's highest New Zealand office but it is not the highest office of the company as a whole. X's Australian office is its head office. (iii) The centre of X's management is in Australia. The New Zealand branch management is only responsible for managing X's New Zealand operations. Therefore, X does not have its centre of management in New Zealand. (iv) Control of X is exercised by the Australian directors from Australia. The director control test is only satisfied if control of the company as a whole is exercised in New Zealand by its directors. However, in this case the control exercised by the New Zealand directors relates only to X's New Zealand branch. Therefore, X is not resident by virtue of the director control test.	**Example 21** **Facts:** C is an Australian incorporated bank. C conducts business in New Zealand through a branch. The New Zealand branch has its own executives and board of directors who operate from the bank's Wellington office. The worldwide operations of C are conducted from the Australian office, and all of the major decisions concerning C are made by the Australian directors in Australia. The New Zealand executives and board are only responsible for managing C's New Zealand operations. **Result:** C is not resident in New Zealand. **Explanation:** C is incorporated in Australia and therefore is not resident in New Zealand under the incorporation test. C's head office is not in New Zealand. The Wellington office is the company's highest New Zealand office but it is not the highest office of the company as a whole. C's Australian office is its head office. The centre of C's management is in Australia. The New Zealand branch management is only responsible for managing C's New Zealand operations. Therefore, C does not have its centre of management in New Zealand. The Australian directors exercise control of C from Australia. The director control test is only satisfied if the directors exercise control of the company as a whole in New Zealand. However, in this case the control exercised by the New Zealand directors relates only to C's New Zealand branch. Therefore, C is not resident by virtue of the director control test.

Example 29 **Facts:** X is a unit trust which has been established in terms of the Unit Trusts Act 1960 (NZ). X invests primarily in shares issued by New Zealand and overseas public companies. The manager of X is a New Zealand incorporated company. The manager makes all of the major decisions relating to marketing interests in X, investments, distributions, etc. These decisions are all made from New Zealand. **Result:** X is a company in terms of the extended company definition. Further, X is resident in New Zealand by virtue of the director control test. **Explanation:** (i) X is not incorporated. Its residence can therefore not be determined under the incorporation test. The fact that X's manager is incorporated in New Zealand does not mean that X is resident here. (ii) X's manager is a director of X in terms of paragraph (d) of the extended definition of director in s2 of the Income Tax Act because it acts in the same fashion as a director of a company incorporated under the Companies Act would act: i.e. it makes all the major decisions in relation to investments etc. (iii) The manager exercises control from New Zealand. Therefore, X is resident in New Zealand because a director exercises control of X from New Zealand.	**Example 22** **Facts:** D is a unit trust that has been established under the Unit Trusts Act 1960 (NZ). D invests primarily in shares issued by New Zealand and overseas publicly listed companies. The manager of D is a New Zealand incorporated company. The manager makes all of the major decisions relating to marketing interests in D, investments, distributions, etc. These decisions are all made from New Zealand. **Result:** D is a company under the extended definition of "company" in the Act. D is resident in New Zealand under the director control test. **Explanation:** D is not incorporated. The incorporation test is therefore not applicable. The fact that D's manager is incorporated in New Zealand is irrelevant to D's residency status. D's manager is a director of D under para (a)(iv) of the extended definition of "director" in s YA 1 of the Act because D's manager acts in the same way a director of a company incorporated under the Companies Act 1993 would act, ie it makes all the major decisions in relation to investments. The manager exercises control from New Zealand. Therefore, D is resident in New Zealand because a director exercises control of D from New Zealand.
Example 30 **Facts:** X is a 100 percent owned subsidiary of an Australian company. X's business mainly involves marketing in New Zealand the products manufactured by its parent company. The day to day management of X takes place from its Auckland office. X does not have an office in Australia, but it has several branch offices in New Zealand outside Auckland. The overall strategic control of the company by its directors is exercised from Australia. **Result:** X is resident in New Zealand by virtue of the head office and centre of management tests. **Explanation:** (i) X is not resident in New Zealand by virtue of the director control test because its directors exercise control from Australia. (ii) X's Auckland office constitutes its head office because it is the office from which the business of the company is managed and carried on. X is therefore resident in New Zealand by virtue of the head office test. (iii) The day to day management of X takes place from the Auckland office. X is therefore also resident in New Zealand by virtue of having its centre of management here.	**Example 23** **Facts:** E is incorporated in Australia and is a 100 per cent owned subsidiary of an Australian company. The Australian parent is in the business of manufacturing a number of products. E's business mainly involves the marketing of those products in New Zealand. The day-to-day management of E takes place from its Auckland office. E does not have an office in Australia, but it has several branch offices in New Zealand outside Auckland. The overall strategic control of the company by its directors is exercised from Australia. **Result:** E is resident in New Zealand under the head office and centre of management tests. **Explanation:** E is not resident in New Zealand under the director control test because its directors exercise control from Australia. E's Auckland office constitutes its head office because it is the office from which the business of the company is managed and carried on. E is therefore resident in New Zealand under the head office test. The day-to-day management of E takes place from the Auckland office. E is therefore also resident in New Zealand because its centre of management is here.
Example 31 **Facts:** X is a Cook Islands incorporated company which is used as a financing vehicle for a group of companies which is based in New Zealand. Y, which is also a Cook Islands incorporated company, is the sole nominated director of X. With respect to the affairs of both X and Y, the directors of Y act on instructions received from a New Zealand resident company which is a member of the group. Both X	**Example 24** **Facts:** F is a company incorporated in the Cook Islands, and is used as a financing vehicle for a group of companies based in New Zealand. G, which is also incorporated in the Cook Islands, is the sole nominated director of F. With respect to the affairs of both F and G, the directors of G act on instructions received from a New Zealand resident company that is a member of the group. Both F and G are managed

and Y are managed from the Cook Islands. Neither X nor Y have an office in New Zealand. **Result:** Both X and Y are resident in New Zealand by virtue of the director control test. **Explanation:** (i) X and Y are both incorporated in the Cook Islands. Therefore, they are not resident in New Zealand under the incorporation test. (ii) X and Y are both managed from the Cook Islands. Therefore, they are not resident in New Zealand by virtue of the centre of management test. Further, as neither X nor Y has an office in New Zealand they are not resident here by virtue of the head office test. (iii) The nominated directors of Y act in accordance with instructions from the New Zealand resident company in relation to Y's affairs. The New Zealand company is therefore a director of Y and, as the New Zealand company exercises control of Y from New Zealand in its capacity as a director, Y is resident here. (iv) The nominated director of X (i.e. Y) acts in accordance with instructions from the nominated directors of Y, who in turn act in accordance with instructions from the New Zealand company. The nominated director of X is therefore acting in accordance with instructions from the New Zealand company, and that company is thus a director of X. The New Zealand company exercises control of X from New Zealand in its capacity as director. Consequently, X is resident in New Zealand.	from the Cook Islands. Neither F nor G has an office in New Zealand. **Result:** Both F and G are resident in New Zealand under the director control test. **Explanation:** F and G are both incorporated in the Cook Islands. Therefore, they are not resident in New Zealand under the incorporation test. F and G are both managed from the Cook Islands. Therefore, they are not resident in New Zealand under the centre of management test. Further, as neither F nor G has an office in New Zealand, they are not resident here under the head office test. The nominated directors of G act in accordance with instructions from the New Zealand resident company in relation to G's affairs. The New Zealand company is therefore a director of G. As the New Zealand company exercises control of G from New Zealand in its capacity as a director, G is resident here. The nominated director of F (ie G) acts in accordance with instructions from the nominated directors of G, who in turn act in accordance with instructions from the New Zealand resident company. The nominated director of F is therefore acting in accordance with instructions from the New Zealand company and therefore that company is a director of F. The New Zealand company exercises control of F from New Zealand in its capacity as director. As such, F is resident in New Zealand.
Example 32 **Facts:** X co is incorporated in New Zealand and managed from Australia. X co is a member of a group of New Zealand and Australian companies. X co incurs a loss of $1 million during the income year ending 31 March 1989. **Result:** X Co's loss cannot be grouped with income earned by other New Zealand resident companies in the group. **Explanation:** (i) X co is a dual resident company as defined in section 191(1)(f) of the Income Tax Act because it is resident in New Zealand by virtue of its incorporation here (s.241(6)(a)), it is also resident in Australia because it has its central management and control there (s.6(1) Income Tax Assessment Act 1936 (Australia)) and it would be liable to tax in Australia if it derived any income or profits. (ii) As X co is a dual resident company, its losses cannot be grouped under s191: s191(7E). The losses are available for carry forward under s188 if the requirements of that section are met.	**Example 25** **Facts:** H is incorporated in New Zealand and managed from Australia. H is a member of a group of New Zealand and Australian companies. H incurs a loss of $1 million during the income year ending 31 March 2009. **Result:** H's loss cannot be grouped with income earned by other New Zealand resident companies in the group. **Explanation:** H is resident in both New Zealand and Australia under the domestic law of both countries. However, under the DTA between New Zealand and Australia, H is treated as a resident only of Australia, as its place of effective management is Australia. As such, the requirements of s IC 7 are not satisfied, and H cannot make its tax losses available to other New Zealand companies in the group.
Example 33 **Facts:** X co is controlled by its directors from New Zealand and is incorporated in Hong Kong. X co is a 100 percent owned subsidiary of a UK company. Y co is a New Zealand incorporated company which is controlled by its directors from New Zealand and which has its centre of management here. Y co is also a 100 percent subsidiary of the UK company. During the income year ending 31 March 1989 X co incurs a loss of $1 million and Y co earns assessable income of $2 million.	**Example 26** **Facts:** I is incorporated in Hong Kong and controlled by its directors from New Zealand. I is a 100 per cent owned subsidiary of a UK company. J is a New Zealand incorporated company that is controlled by its directors from New Zealand and has its centre of management here. J is also a 100 per cent subsidiary of the UK company. During the income year ending 31 March 2009, I incurs a loss of $1 million and J earns assessable income of $2 million.

Result: X Co's $1 million loss cannot be grouped with Y Co's $2 million profit. **Explanation:** (i) X co is resident in New Zealand because control by its directors is exercised from New Zealand. However, X co is not a dual resident company because although it is controlled by its directors from New Zealand and incorporated in Hong Kong it is not liable to tax in Hong Kong by virtue of its incorporation there. Section 191(7E) therefore does not prevent X Co's losses from being grouped. (ii) X co is not incorporated in New Zealand. Therefore, notwithstanding the fact that X co is resident in New Zealand by virtue of s241, s191(7F) prevents X Co's loss from being grouped with Y Co's profit. X Co's loss can be carried forward if the requirements of s188 are satisfied.	**Result:** I's $1 million loss cannot be grouped with J's $2 million profit. **Explanation:** I is resident in New Zealand because control by its directors is exercised from New Zealand. However, it is not incorporated in New Zealand or carrying on business in New Zealand through a fixed establishment here. As such, s IC 7(1) prevents I's losses from being grouped.
Example 34 **Facts:** X co is a United States incorporated and managed company. X co operates directly in New Zealand through several branch offices and a significant amount of business is transacted through these offices. Y co is a New Zealand incorporated company which is controlled by its directors here and which has its centre of management here. Y co is a 100 percent owned subsidiary of X co. During the income year ending 31 March 1989 X Co's New Zealand branch operations sustain a loss of $1 million and Y co earns assessable income of $2 million. **Result:** The $1 million loss incurred by X Co's New Zealand branch operations can be grouped with Y Co's $2 million income. **Explanation:** (i) X co is not a dual resident company because it is not resident in New Zealand. Section 191(7E) therefore does not prevent its loss from being grouped. (ii) X co is not incorporated in New Zealand. However, s191(7F) does not prevent its New Zealand losses from being grouped because X is carrying on business in New Zealand through a fixed establishment here (i.e. it has a fixed place of business here through which substantial business is transacted), and if its branch operations had been profitable those profits would have been liable to tax here. (iii) X Co's New Zealand loss of $1 million can be grouped with Y Co's $2 million income as the other requirements of s191 have been satisfied.	**Example 27** **Facts:** K is a United States incorporated and managed company. K operates directly in New Zealand through several branch offices, and a significant amount of business is transacted through these offices. L is a New Zealand incorporated company that is controlled by its directors here and has its centre of management here. L is a 100 per cent owned subsidiary of K. During the income year ending 31 March 2009, K's New Zealand branch operations sustain a loss of $1 million and L earns assessable income of $2 million. **Result:** The $1 million loss incurred by K's New Zealand branch operations can be grouped with L's $2 million income provided the other requirements of subpart IC are satisfied. **Explanation:** Though it is not incorporated in New Zealand, K is carrying on a business in New Zealand through a fixed establishment here (ie it has a fixed place of business here through which substantial business is carried on). Section IC 7(1) therefore does not prevent its New Zealand losses from being grouped. If K's New Zealand branch operations had been profitable, those profits would have been liable to tax here under the DTA between New Zealand and the United States, as profits of an enterprise attributable to a permanent establishment.