Reprint
as at 18 March 2019

Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018

Public Act	2018 No 16
Date of assent	27 June 2018
Commencement	see section 2

Contents

Note

Changes authorised by subpart 2 of Part 2 of the Legislation Act 2012 have been made in this official reprint.

Note 4 at the end of this reprint provides a list of the amendments incorporated.

This Act is administered by the Inland Revenue Department.

Part 2
Amendments to Tax Administration Act 1994

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018.

2 Commencement

(1) This Act comes into force on 1 July 2018, except as provided in this section.

(2) Sections 4(1) and (3) and 47 come into force on 1 April 2008.

(3) Sections 43, 49(15), 56, 57, 58, 59, 54, and 55 come into force on the day on which this Act receives the Royal assent.

Part 1
Amendments to Income Tax Act 2007

3 Income Tax Act 2007

This Part amends the Income Tax Act 2007.

4 Section BH 1 amended (Double tax agreements)

(1) In section BH 1(4), words before paragraph (a), replace “subsection (5)” with “subsection (5), or section RF 11C (Interest paid by non-resident companies to non-residents)”.

(2) In section BH 1(4), words before paragraph (a), replace “section BG 1 (Tax avoidance),” with “section BG 1 or GB 54 (which relate to tax avoidance) or”.

(3) Subsection (1) applies for a person for the 2008–09 and later income years except for a payment of non-resident passive income made before the date of introduction of the Taxation (Neutralising Base Erosion and Profit Shifting) Bill, for which the person has adopted a tax position that is inconsistent with the amendment made by subsection (1).

(4) Subsection (2) applies for income years beginning on or after 1 July 2018.

5 New section CH 10B inserted (Interest apportionment: public project debt)

(1) After section CH 10, insert:

CH 10B Interest apportionment: public project debt

When this section applies

(1) This section applies when an excess debt entity is required under section FE 7B (Interest on public project debt for certain excess debt entities) to apportion its interest expenditure arising from public project debt.

Income

(2) The amount calculated under section FE 7B(3) is income of the excess debt entity for the income year.

Defined in this Act: amount, excess debt entity, income, income year, interest, public project debt

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

6 New heading and section CH 12 inserted

(1) After section CH 11, insert:

Financial instruments and hybrid mismatches

CH 12 Income from hybrid mismatch arrangement

An amount is assessable income if it is treated as assessable income under subpart FH (Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements).

Defined in this Act: amount, assessable income

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

7 Section CW 59C amended (Life reinsurance outside New Zealand)

(1) In section CW 59C, replace the heading with "**Life reinsurance claims from reinsurer outside New Zealand**".

(2) In section CW 59C, replace "(Life reinsurance outside New Zealand)" with "(Life reinsurance premiums to reinsurer outside New Zealand)".

8 New heading and section CX 64 inserted

(1) After section CX 63, insert:

Financial instruments and hybrid mismatches

CX 64 Income from financial instrument

An amount is excluded income if it is treated as excluded income under subpart FH (Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements).

Defined in this Act: amount, excluded income

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

9 Section DB 7 amended (Interest: most companies need no nexus with income)

In section DB 7(3)(bb), replace "(Life reinsurance outside New Zealand)" with "(Life reinsurance claims from reinsurer outside New Zealand)".

10 New heading and section DB 57B inserted

(1) After section DB 57, insert:

Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements

DB 57B Matching of deductions and income from multi-jurisdictional arrangements

Deduction denied

(1) An amount is not a deduction of a person if the deduction is denied under subpart FH (Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements).

Deduction

(2) An amount treated as a deduction of a person under subpart FH is a deduction of the person.

Link with subpart DA

(3) Subsection (1) overrides, and subsection (2) supplements, the general permission. The general limitations still apply.

Defined in this Act: amount, deduction, general limitation, general permission

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

11 Section DR 3 amended (Life reinsurance outside New Zealand)

(1) In section DR 3, replace the heading with "**Life reinsurance premiums to reinsurer outside New Zealand**".

(2) In section DR 3, replace the subsection heading with "*No deduction for premiums under certain policies*".

(3) In section DR 3, as subsection (2), insert:

No deduction for premiums to certain life reinsurers

(2) A life insurer is denied a deduction for a life reinsurance premium incurred under a life reinsurance policy with a life reinsurer who is resident in a country or territory outside New Zealand if the life reinsurance premium is excluded from taxation by New Zealand under a double tax agreement between New Zealand and the country or territory.

(4) In section DR 3, list of defined terms,—

(a) delete "amount", "general permission", and "income year":

(b) insert "double tax agreement" and "life reinsurer".

(5) Subsection (3) applies for income years beginning on or after 1 July 2018 except for a life reinsurance premium incurred by a life insurer—

(a) under a life reinsurance policy entered before 1 July 2018; and

(b) before 1 July 2019.

12 Section EX 20D amended (Adjustment of cost fraction for excessively debt funded CFC)

(1) In section EX 20D(4), formula, after "assets", insert "− total CFC's non-debt liabilities".

(2) In section EX 20D(5), replace "subsections (6) to (8)" with "subsections (6) to (8B)".

(3) After section EX 20D(8), insert:

Total CFC's non-debt liabilities

(8B) **Total CFC's non-debt liabilities** is the total value of the CFC's non-debt liabilities determined under generally accepted accounting practice.

(4) In section EX 20D, list of defined terms, insert "generally accepted accounting practice".

13 Section EX 20E amended (Relative debt-asset ratio for CFC)

(1) In section EX 20E(3), formula, replace "total group assets" with "(total group assets − total group non-debt liabilities)".

(2) In section EX 20E(4), replace "subsections (5) and (6)" with "subsections (5), (6), and (6B)".

(3) After section EX 20E(6), insert:

Total group non-debt liabilities

(6B) **Total group non-debt liabilities** is the total value of the group's non-debt liabilities determined under generally accepted accounting practice.

(4) In section EX 20E, list of defined terms, insert "generally accepted accounting practice".

14 Section EX 44 amended (Five calculation methods)

(1) In section EX 44(2), after "EX 47,", insert "EX 47B,".

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

15 Section EX 46 amended (Limits on choice of calculation methods)

(1) After section EX 46(6)(d), insert:

(e) the person is the share user of the share under a returning share transfer to which section EX 47B applies.

(2) After section EX 46(10)(d), insert:

(db) an interest in a non-resident if—

(i) the non-resident is related to the person holding the interest, or the interest is or is part of a structured arrangement; and

(ii) the non-resident is not a foreign PIE equivalent; and

(iii) the non-resident is allowed a deduction against income or an equivalent tax relief, under the taxation law of a country or territory outside New Zealand, for the payment of a dividend arising from the interest:

(3) In section EX 46, list of defined terms, insert "dividend", "non-resident", "pay", "related", "returning share transfer", "share supplier", "share user", and "structured arrangement".

(4) Subsections (1) and (2) apply for income years beginning on or after 1 July 2018.

16 New section EX 47B inserted (Method required for shares subject to certain returning share transfers)

(1) After section EX 47, insert:

EX 47B Method required for shares subject to certain returning share transfers

A person must use the comparative value method to calculate FIF income or FIF loss for an income year from an attributing interest that is a share subject to a returning share transfer if—

(a) the person is the share user; and

(b) the share supplier is resident in a country or territory outside New Zealand (the **foreign jurisdiction**); and

(c) the person is related to the share supplier or the returning share transfer is or is part of a structured arrangement; and

(d) the taxation law of the foreign jurisdiction treats the share supplier as owning the shares subject to the returning share transfer.

Defined in this Act: attributing interest, comparative value method, FIF income, FIF loss, income year, New Zealand, related, returning share transfer, share, share supplier, share user, structured arrangement

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

17 Section EX 52 amended (Fair dividend rate annual method)

(1) Replace section EX 52(14C), other than the heading, with:

(14C) For a person using the fair dividend rate annual method to calculate FIF income for an attributing interest in a FIF that is an original share subject to a returning share transfer, the attributing interest is treated as being held by the share supplier, except if—

(a) the share user is related to the share supplier:

(b) the returning share transfer is or is part of a structured arrangement.

(2) In section EX 52, list of defined terms, insert “related”, “share user”, and “structured arrangement”.

(3) Subsection (1) applies for income years beginning on or after 1 July 2018.

18 Section EX 53 amended (Fair dividend rate periodic method)

(1) Replace section EX 53(16C), other than the heading, with:

(16C) For a person using the fair dividend rate annual method to calculate FIF income for an attributing interest in a FIF that is an original share subject to a returning share transfer, the attributing interest is treated as being held by the share supplier, except if—

(a) the share user is related to the share supplier:

(b) the returning share transfer is or is part of a structured arrangement.

(2) In section EX 53, list of defined terms, insert “fair dividend rate annual method”, “related”, “share user”, and “structured arrangement”.

(3) Subsection (1) applies for income years beginning on or after 1 July 2018.

19 New section FE 4B inserted (Meaning of public project asset, public project debt, and public project participant debt)

(1) After section FE 4, insert:

FE 4B Meaning of public project asset, public project debt, and public project participant debt

Meaning of public project asset

(1) **Public project asset** means an interest in an asset in New Zealand—

(a) arising from a project performed under a contract—

(i) with the Sovereign in right of New Zealand or a public authority; and

(ii) for which borrowing by the Crown or public authority is approved by the Minister of Finance under the Public Finance Act 1989 or the Crown Entities Act 2004; and

(iii) for a period of 10 years or more; and

(iv) requiring the persons performing the project to provide, upgrade, or create assets in New Zealand and to operate or maintain the assets in New Zealand; and

(v) requiring that, after completion of the contract, the assets be owned by the Sovereign in right of New Zealand or the public authority; and

(b) that each person performing the contract is not permitted under the terms of the contract to dispose of within 10 years from the beginning of the project, except to the Sovereign in right of New Zealand or a public authority, as provided by the contract, or to another person performing the project; and

(c) the income from which has a source in New Zealand for each person performing the contract.

Meaning of public project debt

(2) **Public project debt**, for an excess debt entity and a project, means a total amount of debt, each part of which is for a loan to the excess debt entity, that—

(a) is applied by the excess debt entity to—

(i) the project to give rise to public project assets or income derived from public project assets:

(ii) refinance a loan that has been applied in a way satisfying this paragraph; and

(b) does not provide funds, exceeding a minor or incidental amount, that the excess debt entity lends—

(i) to a person who is not an associated person performing the project; and

(ii) for a period that is not a delay in the application of the funds to the project; and

(c) gives rise to interest expenditure that the excess debt entity incurs in New Zealand.

Meaning of public project participant debt

(3) **Public project participant debt**, for an excess debt entity and a project, means an amount of a loan that is—

(a) public project debt for the project; and

(b) if the excess debt entity is the sole person performing the contract, is made or refinanced—

(i) by 1 of the persons (the **owners**) who holds ownership interests in the excess debt entity; and

(ii) under an arrangement between the owners with a purpose or effect that each owner provide funding in proportion to the ownership interest in the excess debt entity held by the owner; and

(c) if the excess debt entity is 1 of the persons performing the contract (the **project participants**), made or refinanced—

(i) by 1 of the project participants, or by a person associated with a project participant; and

(ii) under an arrangement between the project participants with a purpose or effect that each project participant, or a person associated with the project participant, provide funding in proportion to the interest in the project held by the project participant.

Defined in this Act: amount, associated person, company, dispose, excess debt entity, income, interest, loan, New Zealand, non-resident, non-resident owning body, ownership interest, public authority, public project asset, public project debt, public project participant debt, source in New Zealand

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

20 Section FE 5 amended (Thresholds for application of interest apportionment rules)

(1) In section FE 5(1)(a), replace the words before subparagraph (i) with "the excess debt entity is none of an excess debt outbound company, an excess debt entity with a worldwide group given by section FE 31D, and a trustee who is described in section FE 2(1)(g), and—".

(2) After section FE 5(1)(a), insert:

(ab) the excess debt entity has a worldwide group given by section FE 31D, and—

(i) the debt percentage of its New Zealand group for the income year is more than 60%; and

(ii) the debt percentage of its New Zealand group for the income year is more than 100% of the debt percentage of the worldwide group; or

(3) Replace section FE 5(1B)(a) with:

(a) a ratio of 90% or greater is obtained by dividing the amount for its New Zealand group of the total group assets measured under section FE 16 and reduced by the total group non-debt liabilities, measured under section FE 16B, by the amount for its worldwide group of the total group assets measured under section FE 18 and reduced by the total group non-debt liabilities, measured under section FE 18:

(4) In section FE 5(1BB)(d), replace "goodwill" with "goodwill and reduced by total group non-debt liabilities".

(5) In section FE 5(1C), words before paragraph (a), replace "assets" with "assets and total group non-debt liabilities".

(6) After section FE 5(5), insert:

Group acting in concert

(6) A group of persons meets the requirements of this subsection if the members of the group act in concert and each is described in section FE 2(1)(a) to (db).

(7) In section FE 5, list of defined terms, insert "total group non-debt liabilities".

(8) Subsections (1), (2), and (6) apply for income years beginning on or after 1 July 2018, except as provided in section FZ 8 (Transition period for amendments to interest apportionment rules).

21 Section FE 6 amended (Apportionment of interest by excess debt entity)

(1) In section FE 6(2), formula, after "total deduction" insert "− mismatch".

(2) In section FE 6(3)(a), words before subparagraph (i), replace "allowed under" with "that would be allowed, in the absence of subpart FH (Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements), under".

(3) After section FE 6(3)(a), insert:

(aba) **mismatch** is the total of amounts denied as deductions in the income year under section FH 3 (Payments under financial instruments producing deduction without income) as unrecognised amounts under section FH 3(2) and as interest under sections FH 7 and FH 11 (which provide for the matching of deductions and income from multi-jurisdictional arrangements):

(4) Replace section FE 6(3)(ac)(i) with:

(i) zero, if the excess debt entity is not an excess debt outbound company or a natural person or trustee described in section FE 2(1)(g) and is a party to a financial arrangement that is removed under section FE 18(3B) from the measurement of total group debt for the excess debt entity; or

(5) Replace section FE 6(3)(e)(i) with:

(i) if the excess debt entity is none of an excess debt outbound company, an excess debt entity with a worldwide group given by section FE 31D, and a trustee who is described in section FE 2(1)(g), the greater of 60% and 110% of the debt percentage of their worldwide group:

(6) After section FE 6(3)(e)(iii), insert:

(iiib) if the excess debt entity has a worldwide group given by section FE 31D, the greater of 60% and 100% of the debt percentage of their worldwide group:

(7) Subsections (1) to (4) apply for income years beginning on or after 1 July 2018.

(8) Subsections (5) and (6) apply for income years beginning on or after 1 July 2018, except as provided in section FZ 8.

22 Section FE 7 amended (Apportionment of interest by reporting bank)

(1) In section FE 7(3)(b), before subparagraph (i), replace "is incurred" with "is".

(2) In section FE 7(3)(b)(i), replace "by" with "incurred by".

(3) In section FE 7(3)(b)(ii),—

(a) replace "other" with "incurred other":

(b) replace "section:" with "section; and".

(4) After section FE 7(3)(b)(ii), insert:

(iii) not denied as a deduction under section FH 3 (Payments under financial instruments producing deduction without income) as an unrecognised amount under section FH 3(2) or under section FH 7 or FH 11 (which provide for the matching of deductions and income from multi-jurisdictional arrangements):

(5) Subsections (1) to (4) apply for income years beginning on or after 1 July 2018.

23 New section FE 7B inserted (Interest on public project debt for certain excess debt entities)

(1) After section FE 7, insert:

FE 7B Interest on public project debt for certain excess debt entities

Who this section applies to

(1) This section applies for a project to an excess debt entity that—

(a) is a person meeting the requirements of section FE 2(1)(b), (c), (e), or (f); and

(b) has an amount of public project debt for the project; and

(c) elects to apply the section to the first calculation for the excess debt entity under this subpart that includes the public project debt for the project and to which the section may apply.

Debt percentages for public project debt

(2) Debt percentages relating to the excess debt entity and the public project debt are determined under this subpart as if—

(a) the excess debt entity has no debt other than the public project debt for the project, no assets other than the public project assets for the project and assets used in performing the project, and no non-debt liabilities other than non-debt liabilities that relate to the project; and

(b) the New Zealand group of the excess debt entity is the excess debt entity.

Income

(3) If the debt percentage of the excess debt entity's New Zealand group exceeds the threshold debt percentage given by section FE 5(1), the excess debt entity is treated as deriving an amount of income under section CH 10B (Interest apportionment: public project debt) that is calculated, treating the value of a fraction with a zero denominator as being zero, using the formula—

(unrestricted interest × unrestricted excess ÷ unrestricted debt) + (member interest × member excess ÷ member debt).

Definition of items in formula

(4) In the formula,—

(a) **unrestricted interest** is the amount of interest expenditure incurred by the excess debt entity from the amount of public project debt referred to in the item unrestricted debt:

(b) **unrestricted excess** is—

(i) zero, if the amount of public project debt that is not public project participant debt does not exceed the amount (the **threshold debt amount**) obtained by multiplying the value of the public project assets and assets used in performing the project by the threshold debt percentage given by section FE 5(1) for the excess debt entity's New Zealand group:

(ii) the amount of the item unrestricted debt, if the amount of public project debt that is not public project participant debt and not included in the item unrestricted debt equals or exceeds the threshold debt amount:

(iii) the amount by which the amount of public project debt that is not public project participant debt exceeds the threshold debt amount, if subparagraphs (i) and (ii) do not apply:

(c) **unrestricted debt** is the amount of public project debt that is not public project participant debt and for which the creditor has security for repayment that is not restricted to the project:

(d) **member interest** is the amount of interest expenditure incurred by the excess debt entity from public project participant debt:

(e) **member excess** is—

(i) zero, if the amount of public project debt does not exceed the threshold debt amount:

(ii) the amount of public project participant debt, if the amount of public project debt that is not public project participant debt equals or exceeds the threshold debt amount:

(iii) the amount by which the amount of public project debt exceeds the threshold debt amount, if subparagraphs (i) and (ii) do not apply:

(f) **member debt** is the amount of public project participant debt.

Public projects treated separately

(5) This section applies separately to each project of an excess debt entity for which the excess debt entity has public project debt.

Public project debt, interest, assets, and non-debt liabilities, excluded for other applications

(6) Public project debt, interest on public project debt, public project assets and other assets, and non-debt liabilities, taken into account in the application of this section to an excess debt entity for a project are excluded from the debt, interest, assets, and non-debt liabilities, of the excess debt entity taken into account in the apportionment of interest expenditure for another project or under another section of this subpart.

Defined in this Act: amount, company, excess debt entity, excess debt outbound company, income, income year, interest, public project asset, public project debt, public project participant debt

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

24 Section FE 8 amended (Measurement dates)

(1) In section FE 8(1), words before paragraph (a), replace "debt and total group assets" with "debt, total group assets, and total group non-debt liabilities".

(2) In section FE 8, list of defined terms, insert "total group non-debt liabilities".

(3) Subsection (1) applies for income years beginning on or after 1 July 2018.

25 Section FE 10 amended (Currency)

(1) In section FE 10(1)(a), replace "debt and an amount of total group assets" with "debt, an amount of total group assets, and an amount of total group non-debt liabilities".

(2) In section FE 10, list of defined terms, insert "total group non-debt liabilities".

(3) Subsection (1) applies for income years beginning on or after 1 July 2018.

26 Section FE 11 replaced (Temporary increases or decreases in value)

(1) Replace section FE 11 with:

FE 11 Disregarded increases or decreases in value

When this section applies

(1) This section applies when the effect of an increase or decrease in a value on a calculation under this subpart (the **affected calculation**) is disregarded under section GB 51B (Increases or decreases in value).

Increase or decrease excluded from calculation

(2) The affected calculation is made excluding the effect of the increase or decrease.

Defined in this Act: income year

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

27 Section FE 12 amended (Calculation of debt percentages)

(1) Replace section FE 12(3) with:

Debt percentage of group

(3) A debt percentage of a group is the amount calculated, on a consolidated basis and for an income year or accounting year as applicable, using the formula—

$$\text{group debt} \div (\text{group assets} - \text{non-debt liabilities}).$$

Definition of items in formula

(3B) In the formula,—

(a) **group debt** is the amount of the total group debt defined in section FE 15 for a New Zealand group and section FE 18 for a worldwide group:

(b) **group assets** is the amount of the total group assets defined in section FE 16 for a New Zealand group and section FE 18 for a worldwide group:

(c) **non-debt liabilities** is the amount of the total group non-debt liabilities defined in section FE 16B for a New Zealand group and section FE 18 for a worldwide group.

(2) In section FE 12, list of defined words, insert “total group non-debt liabilities”.

(3) Subsection (1) applies for income years beginning on or after 1 July 2018.

28 Section FE 14 amended (Consolidation of debts and assets)

(1) In section FE 14(3B),—

(a) replace “debts and assets” with “liabilities and assets”:

(b) replace "total group debt and total group assets" with "total group debt, total group assets, and total group non-debt liabilities".

(2) In section FE 14(4), words before paragraph (a), replace "total group debt and total group assets and" with "total group debt, total group assets, and total group non-debt liabilities and in".

(3) In section FE 14, list of defined words, insert "total group non-debt liabilities".

(4) Subsections (1) and (2) apply for income years beginning on or after 1 July 2018.

29 Section FE 15 amended (Total group debt)

(1) In section FE 15(1)(a)(ii), replace "deduction:" with "deduction; and".

(2) After section FE 15(1)(a)(ii), insert:

(iii) the deduction is not denied under section FH 3 (Payments under financial instruments producing deduction without income) as an unrecognised amount under section FH 3(2) or under section FH 7 or FH 11 (which provide for the matching of deductions and income from multi-jurisdictional arrangements):

(3) Subsections (1) and (2) apply for income years beginning on or after 1 July 2018.

30 Section FE 16 amended (Total group assets)

(1) After section FE 16(1), insert:

Determining net current value of asset

(1BAA) For the purpose of subsection (1)(b) and (e), a net current value of an asset must be determined by a valuation of the asset by—

(a) an independent person who is an expert in the valuation of such assets:

(b) an employee, or other person associated with the excess debt entity, with experience in the valuation of assets and using a methodology, assumptions, and data, approved by a person qualified to give a valuation of the asset under paragraph (a).

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

31 New section FE 16B inserted (Total group non-debt liabilities)

(1) After section FE 16, insert:

FE 16B Total group non-debt liabilities

Meaning for New Zealand group

(1) In this subpart, for a New Zealand group, **total group non-debt liabilities** for an income year means the total of the outstanding balances of liabilities shown in the financial statements of a natural person, or an excess debt entity, or

another member of the New Zealand group, reduced by the total of liabilities shown in the financial statements, each of which is—

(a) included in the calculation of total group debt under section FE 15:

(b) under a financial arrangement, other than an agreement for the sale and purchase of property or services, entered into by a company that is a member of the group with a shareholder that is a member of the group, if the financial arrangement provides funds to the company and—

(i) the funding is provided under an arrangement between shareholders and the amount of the funds provided by each shareholder is proportional to the shareholding of each shareholder at the time:

(ii) the shareholder and associated persons hold 10% or more of the voting interests in the company:

(c) a share in a company that is a member of the group held by a shareholder, if—

(i) the share was issued as part of a share issue to shareholders and the number of shares issued to each shareholder was proportional to the shareholding of each shareholder at the time:

(ii) the shareholder and associated persons hold 10% or more of the voting interests in the company:

(d) a provision for dividends:

(e) a deferred liability of a person for tax if—

(i) the deferred liability arises from a difference between the value shown in the financial statements of the person for an asset and the amount of depreciation loss remaining available to the person for the asset; and

(ii) the deferred liability is for an amount of tax that would not arise if the asset were sold for the value shown in the financial statements; and

(iii) the value shown in the financial statements for the asset is calculated by reference to the amount that the person is allowed as a deduction or depreciation loss for the asset, or on the basis that the asset is non-depreciable or depreciable at a rate of zero.

Meaning for worldwide group

(2) In this subpart, for a worldwide group, **total group non-debt liabilities** for an income year means the total of the outstanding balances of liabilities shown in the financial statements of the worldwide group, reduced by the total of liabilities that are included in the total group debt and the total of liabilities under financial arrangements that are removed under section FE 18(3B) from the measurement of total group debt.

Defined in this Act: adjusted tax value, agreement for the sale and purchase of property or services, associated person, company, deduction, depreciation loss, dividend, excess debt entity, financial arrangement, financial statements, income year, share, shareholder, tax, total group debt, total group non-debt liabilities, voting interest

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

32 Section FE 18 amended (Measurement of debts and assets of worldwide group)

(1) In section FE 18(1), words before paragraph (a),—

(a) replace “total group debt and the amount of total group assets” with “total group debt, the amount of total group assets, and the amount of total group non-debt liabilities”:

(b) replace “is calculated” with “are calculated”.

(2) In section FE 18(2), words before paragraph (a), replace “total group debt and the amount of total group assets” with “total group debt, the amount of total group assets, and the amount of total group non-debt liabilities”.

(3) Replace section FE 18(3B)(c) with:

(c) the owner—

(i) has direct ownership interests in a member of the group of 5% or more:

(ii) has made a settlement on a trust, having a trustee who is a member of the group, of 5% or more of the value of total settlements on the trust; and

(4) After section FE 18(3B), insert:

Apportioning residual debt and assets after reduction under section FE 13

(3C) If the amounts of the total group debt and total group assets are reduced under section FE 13 for the New Zealand group and worldwide group of an excess debt entity, the parts of the reduced amounts that relate to financial arrangements with members of the excess debt entity’s groups and the parts that relate to financial arrangements with persons outside the excess debt entity’s groups are treated as being in the same proportion as the parts of the total group debt and total group assets would be in without the reduction.

(5) In section FE 18, list of defined words, insert “total group non-debt liabilities”.

(6) Subsections (1) to (3) apply for income years beginning on or after 1 July 2018.

33 Section FE 21 amended (Banking group’s New Zealand net equity)

(1) In section FE 21(3)(e), replace “value.” with “value; and”.

(2) After section FE 21(3)(e), insert:

(f) the same proportion of the financial value of any arrangement not included in paragraphs (a) to (e) as the proportion of the total interest expenditure under the arrangement in the income year that is denied as a deduction in the income year under section FH 3 (Payments under financial instruments producing deduction without income) as an unrecognised amount under section FH 3(2) or under section FH 7 or FH 11 (which provide for the matching of deductions and income from multi-jurisdictional arrangements).

(3) Subsections (1) and (2) apply for income years beginning on or after 1 July 2018.

34 Section FE 23 amended (Banking group's funding debt)

(1) In section FE 23(1), formula, after "shares", insert " − mismatch".

(2) After section FE 23(2)(c), insert:

(cb) **mismatch** is the same proportion of the financial value of a debt or financial arrangement included in paragraph (a) or (b) as the proportion of the total interest expenditure under the debt or financial arrangement in the income year that is denied as a deduction in the income year under section FH 3 (Payments under financial instruments producing deduction without income) as an unrecognised amount under section FH 3(2) or under section FH 7 or FH 11 (which provide for the matching of deductions and income from multi-jurisdictional arrangements):

(3) Subsections (1) and (2) apply for income years beginning on or after 1 July 2018.

35 New subpart FH inserted (Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements)

(1) After subpart FG, insert:

Subpart FH—Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements

FH 1 Subpart implements OECD recommendations for domestic law

Background, scheme, and effect of subpart

(1) This section and section FH 2 are intended to be a guide to the background and general scheme and effect of this subpart.

OECD recommendations

(2) This subpart implements recommendations, for the domestic law of countries and territories, that are made by the OECD in the hybrid mismatch report and the branch mismatch report (the **reports**) and are intended to be implemented as rules neutralising certain mismatches—

(a) arising from arrangements called hybrid mismatch arrangements and branch mismatch arrangements in the reports; and

(b) between income assessed and deductions against income or equivalent tax relief allowed for parties to international transactions; and

(c) resulting from differences, between the taxation laws of different countries and territories having rights to tax the parties, in the classification of financial arrangements or the tax treatment of entities or branches.

Recommendations for primary and defensive rules

(3) If 2 rules are recommended by a report for a situation, the recommended rules are called primary and defensive by the report, which states that the defensive rule should not apply to the situation except if the country or territory in the position to apply the recommended primary rule has not implemented the recommendation.

Implementation of individual recommendations

(4) In this subpart,—

(a) section FH 3 implements the primary version of the rule for recommendation 1 of the hybrid mismatch report, called the hybrid financial instrument rule in the report:

(b) section FH 4 implements the defensive version of the rule for recommendation 1 of the hybrid mismatch report:

(c) section FH 5 implements the primary version of the rule for recommendation 3 of the hybrid mismatch report, called the disregarded hybrid payments rule in the report, and the rule for recommendation 3 of the branch mismatch report:

(d) section FH 6 implements the defensive version of the rule for recommendation 3 of the hybrid mismatch report, and a defensive version of the rule for recommendation 3 of the branch mismatch report:

(e) section FH 7 implements recommendation 4 of the hybrid mismatch report, called the reverse hybrid rule in the report, and recommendation 2 of the branch mismatch report:

(f) section FH 8 implements the primary version of the rule for recommendation 6 of the hybrid mismatch report, called the deductible hybrid payments rule in the report, and the rule for recommendation 4 of the branch mismatch report:

(g) section FH 9 implements the defensive version of the rule for recommendation 6 of the hybrid mismatch report, and a defensive version of the rule for recommendation 4 of the branch mismatch report:

(h) section FH 10 implements recommendation 7 of the hybrid mismatch report, called the dual-resident payer rule in the report:

(i) section FH 11 implements recommendation 8 of the hybrid mismatch report, called the imported mismatch rule in the report, and recommendation 5 of the branch mismatch report.

Additional rules

(5) In addition to the recommended rules,—

(a) section FH 12 provides for the setting off, against amounts called surplus assessable income, of amounts called mismatch amounts that arise under several of the sections and, until set off, represent deductions denied or assessable income derived:

(b) section FH 13 provides for an election, by a borrower under a financial arrangement to which the section applies, that the financial arrangement be treated as a share issued by the borrower to the lender:

(c) section FH 14 provides for an irrevocable election, by an owner of a hybrid entity, that the hybrid entity be treated as a company.

Definitions

(6) Section FH 15 contains definitions for the purpose of the Act of some terms used in the reports and of terms used in the Act that differ from terms used in the reports, including—

(a) "deducting branch", which refers to the activities to which the recommendations of the branch mismatch report are intended to apply:

(b) "mismatch amount", which is the amount of a hybrid mismatch or branch mismatch:

(c) "mismatch situation", which is the situation giving rise to a hybrid mismatch or branch mismatch:

(d) "surplus assessable income", which performs the same function as "dual inclusion income" but is defined in a different way.

Variations of recommendations

(7) Variations of the implementing provisions from details of the recommendations in the report are intended to assist in the implementation and application of the recommendations.

Defined in this Act: arrangement, assessable income, deducting branch, deduction, financial arrangement, hybrid entity, hybrid mismatch report, income, mismatch amount, mismatch situation, share, surplus assessable income

FH 2 Order of application of provisions

Order of application for sections disallowing deductions

(1) If more than 1 provision in this subpart may deny an amount of expenditure or loss as a deduction or identify the amount as a mismatch amount in a situation, the provisions are applied in the order given by the sections, which is—

(a) section FH 3:

(b) section FH 5:

(c) section FH 7:

(d) section FH 11:

(e) section FH 8:

(f) section FH 9:

(g) section FH 10.

Order of application for sections treating receipts as assessable income

(2) If more than 1 provision in this subpart may identify an amount received as a mismatch amount in a situation, the provisions are applied in the order given by the sections, which is—

(a) section FH 4:

(b) section FH 6.

Defined in this Act: amount, loss

FH 3 Payments under financial instruments producing deduction without income

When this section applies

(1) This section applies when a person (the **payer**) is a party to a financial instrument (the **payment instrument**) under which the person makes a payment and—

(a) the person incurs in an income year an amount that relates to the payment instrument and does not arise from a fluctuation in the value of a currency; and

(b) the amount of expenditure incurred in the income year (the **incurred amount**) relating to the payment instrument is allowed as a deduction for the payer in the absence of this section and sections FH 5 and FH 7 to FH 11; and

(c) the taxation law of a country or territory outside New Zealand (the **payee jurisdiction**) treats the payment, when made, as being received by a person or other entity (the **payee**) in the payee jurisdiction; and

(d) the payment instrument is or is part of a structured arrangement or the payer is related to the payee when the expenditure is incurred; and

(e) the tax treatment by the payee jurisdiction of the payment meets the requirements of subsection (2) or (3).

Amount not recognised

(2) The tax treatment of a payment under the payment instrument meets the requirements of this subsection if—

(a) no country or territory outside New Zealand recognises an amount of the payment (the **unrecognised amount**) as giving rise to ordinary income of the payee under subsection (9); and

(b) the unrecognised amount would be recognised by the tax law of the payee jurisdiction as giving rise to ordinary income of the payee under subsection (9) if the classification of the payment or payment instrument were varied and the payee had the usual tax status for a person or entity of the payee's class.

Delayed recognition of amount

(3) The tax treatment of a payment under the payment instrument meets the requirements of this subsection if—

(a) an amount of the payment is recognised as giving rise to ordinary income of the payee under subsection (9); and

(b) the amount is recognised with a timing that does not meet the requirements of subsection (6); and

(c) the duration of the financial instrument, including extensions contemplated by the financial instrument, may be more than 3 years.

Amount of deduction denied

(4) The payer is denied a deduction for expenditure incurred under the financial instrument equal to the greater of zero and the amount calculated using the formula—

$$\text{incurred amount} \times (1 - \text{payee tax} \div \text{ordinary tax}).$$

Definition of items in formula

(5) In the formula in subsection (4),—

(a) **incurred amount** is the amount of the expenditure incurred by the payer relating to the payment instrument and the payee:

(b) **payee tax** is the total of amounts—

(i) calculated by multiplying the amount of the payment that is recognised by the payee jurisdiction as income arising from the payment received by the payee with a timing that meets the requirements of subsection (6) by the rate of tax imposed by the taxation law of the payee jurisdiction on the class of income that the payee is recognised as receiving:

(ii) of income tax imposed by a country or territory outside New Zealand on a person (the **CFC payee**) other than the payee, on an amount of income corresponding to attributed CFC income relating to the payment and attributed to the CFC payee with a timing that meets the requirements of subsection (6) plus the amount of any credit for withholding tax on the payment taken into account in determining the amount of income tax imposed:

(c) **ordinary tax** is the amount calculated by multiplying the amount of the income arising from the payment received by the payee by the rate of tax imposed by the taxation law of the payee jurisdiction on ordinary income under subsection (9) received by the payee.

Timing of recognised income

(6) The timing of the recognition by a tax jurisdiction of an amount meets the requirements of this subsection if the amount is, or is reasonably expected to be, recognised as being derived—

(a) over a period of time during which the amount can reasonably be treated as accruing:

(b) in an accounting period beginning within 24 months of the end of the income year to which a deduction of the payer for the incurred expenditure would be attributed.

Effect of delayed recognition

(7) If an amount of the payment for which a deduction has been denied under subsection (4) is recognised as income of the payee derived at a time not meeting the requirements of subsection (6), the payer is allowed a deduction, when the amount is recognised, equal to the denied deduction.

Payer deriving income from financial instrument: excluded income

(8) If a payer that derives income (the **affected income**) in an income year from a financial instrument would, as a consequence of unrecognised amounts under subsection (2) of payments, be denied by subsection (4) a deduction for a fraction (the **affected fraction**) of expenditure incurred by the payer in the income year under the financial instrument, an amount of the payer's affected income, calculated by multiplying the affected income by the affected fraction, is excluded income of the payer.

Ordinary income

(9) An amount of income is ordinary income under this subsection for a country or territory and a person or entity if the income is—

(a) taxed by the country or territory at the full marginal rate of the person or other entity for the income from financial instruments; and

(b) not eligible for an exemption, exclusion, credit, or tax relief, under the laws of the country or territory, other than a credit or tax relief for a withholding tax or similar tax imposed on the amount of the income by the laws of another country or territory.

Defined in this Act: accounting period, amount, CFC, deduction, excluded income, financial instrument, income, income tax, income year, New Zealand, pay, related, structured arrangement, tax

FH 4 Receipts under financial instruments producing deduction without income

When this section applies

(1) This section applies when a person (the **payee**) receives a payment under a financial instrument (the **payment instrument**) of an amount and—

(a) the payment would not give rise to assessable income of the payee in the absence of this section and section FH 6 or gives rise to assessable income of the payee that would not be allocated to a period meeting the requirements of subsection (7); and

(b) the taxation law of a country or territory outside New Zealand (the **payer jurisdiction**) treats the payment as being made under the payment instrument by a person or other entity (the **payer**); and

(c) the payer jurisdiction allows the payer or other person or entity to deduct the amount from income or allows an equivalent tax relief for the payment; and

(d) the payer jurisdiction does not have hybrid mismatch legislation corresponding to section FH 3 and applying to the payment; and

(e) the payment instrument is or is part of a structured arrangement or the payer is related to the payee when the expenditure is incurred; and

(f) the payment meets the requirements of subsection (2) or (3).

Amount not recognised

(2) A payment received by the payee meets the requirements of this subsection if—

(a) an amount of the payment does not give rise to assessable income of the payee; and

(b) the amount would give rise to assessable income of the payee if the classification of the payment or payment instrument were varied.

Delayed recognition of amount

(3) A payment received by the payee under a financial instrument meets the requirements of this subsection if—

(a) the payment gives rise to assessable income of the payee that, in the absence of this section, would be allocated to a period that does not meet the requirements of subsection (7); and

(b) the duration of the financial instrument, including extensions contemplated by the financial instrument, may be more than 3 years.

Assessable income

(4) The payee derives assessable income from the payment—

(a) equal to the amount that would be assessable income of the payee if the classification of the payment or payment instrument were varied, for a payment meeting the requirements of subsection (2):

(b) allocated under subsection (6).

Imputation credit not included and not available

(5) If the payment received by the payee is a replacement payment under a returning share transfer, the amount of an imputation credit attached to the replacement payment is not included in the assessable income under subsection (4) and is not available as a tax credit under section LE 1 (Tax credits for imputation credits).

Timing of derivation under subsection (4)

(6) The assessable income under subsection (4) is allocated to the income year in which—

(a) income from the payment would be derived if the classification of the payment or payment instrument were varied, for a payment meeting the requirements of subsection (2):

(b) the payment is received, for a payment meeting the requirements of subsection (3).

Timing of recognised income

(7) The period to which an amount of income is allocated meets the requirements of this subsection if the income is, or is reasonably expected to be, derived in an accounting period beginning within 24 months of the end of the accounting period to which a deduction or tax credit of the payer for the incurred expenditure is attributed.

Defined in this Act: accounting period, amount, assessable income, financial instrument, hybrid mismatch legislation, imputation credit, income, income year, pay, related, replacement payment, returning share transfer, structured arrangement, tax credit

FH 5 Payments by New Zealand resident or New Zealand deducting branch producing deduction without income

When this section applies

(1) This section applies when a person or entity (the **payer**) incurs an amount of expenditure in an income year relating to a payment to another person and meeting the requirements of subsection (2), or incurs in an income year a charge meeting the requirements of subsection (3), and—

(a) the payment or charge is not assessable income of the person who receives the payment or benefits from the charge; and

(b) the amount or charge would be allowed as a deduction in the income year for the payer in the absence of this section and sections FH 7 to FH 11; and

(c) the taxation law of a country or territory outside New Zealand (the **payee jurisdiction**)—

(i) treats the payment or charge as not being received by a person or entity in the payee jurisdiction, because of the tax status of the payer; and

(ii) would treat the payment or charge as being received by a person or other entity (the **payee**) in the payee jurisdiction, if the tax status of the payer were different; and

(d) no country or territory outside New Zealand and the payee jurisdiction imposes tax on the payment or charge under taxation law that includes rules corresponding to the CFC rules and recognises the payment as the equivalent of attributed CFC income of a person in the same control group as the payee.

Expenditure relating to payment made under structured arrangement or to member of payer's control group

(2) Expenditure relating to a payment by a payer that is a New Zealand resident, or a New Zealand deducting branch of a non-resident, to a payee meets the requirement of this subsection if—

(a) the payee is a non-resident; and

(b) the payment is made under a structured arrangement or, when the expenditure is incurred, the payer is in a control group with the payee or is the same person as the payee.

Charge by non-resident to New Zealand deducting branch

(3) A charge of an amount meets the requirements of this subsection if the amount—

(a) is charged by a non-resident to a New Zealand deducting branch of the non-resident; and

(b) represents amounts, relating to the activities outside New Zealand of the non-resident, allocated to the deducting branch; and

(c) is not determined by reference to the amount of a payment by the non-resident, or a member of the same control group as the non-resident, to a person other than the non-resident and the members of the control group; and

(d) exceeds expenditure or loss, incurred by the non-resident or a member of the same control group as the non-resident, that—

(i) belongs to a category of expenditure or loss equivalent to the category to which the charge belongs; and

(ii) is the reference by which the amount of the charge is determined.

Mismatch amount

(4) The payer is denied a deduction for the expenditure or for the amount of the charge that exceeds the expenditure or loss referred to in subsection (3)(d).

Deductions denied for mismatch amounts until offset

(5) The expenditure or loss for which a deduction is denied under subsection (4) is a mismatch amount from a mismatch situation until the mismatch amount is set off under section FH 12 against surplus assessable income under that section from the mismatch situation.

Defined in this Act: amount, attributed CFC income, CFC, control group, deducting branch, deduction, financial instrument, loss, mismatch amount, New Zealand, New Zealand resident, non-resident, pay, structured arrangement

FH 6 Receipts from non-resident or foreign deducting branch producing deduction without income

When this section applies

(1) This section applies when a non-resident, or foreign deducting branch of a New Zealand resident, (the **payer**) is treated by the taxation law of a country or territory outside New Zealand (the **payer jurisdiction**) as making a payment in an income year to a person or other entity (the **payee**) in New Zealand and meeting the requirements of subsection (2), or incurring a charge in the income year meeting the requirements of subsection (3), and—

(a) the payment or charge would not give rise to assessable income of the payee in the income year in the absence of this section; and

(b) the payer jurisdiction allows the payer or other person or entity to deduct an amount of the payment or charge against income or allows an equivalent tax relief for the payment; and

(c) the payer jurisdiction does not have hybrid mismatch legislation corresponding to section FH 5 that applies to the payment or charge and to the payer at any time in the income year; and

(d) the payment or charge would give rise to assessable income of the payee in the income year if the payer and payee were persons and separate or if the tax status of the payer were different.

Expenditure relating to payment made under structured arrangement or to member of payer's control group

(2) Expenditure relating to a payment by a payer that is not a New Zealand resident, or is a foreign deducting branch of a New Zealand resident, to a payee meets the requirement of this subsection if—

(a) the payee is a New Zealand resident; and

(b) the payment is made under a structured arrangement or, when the expenditure is incurred, the payer is in a control group with the payee or is the same person as the payee.

Charge by New Zealand resident to a foreign deducting branch

(3) For the purposes of subsection (1), the amount of a charge treated by the payer jurisdiction as being required by a New Zealand resident from a foreign deducting branch of the New Zealand resident is equal to the amount that—

(a) represents amounts, relating to the activities of the New Zealand resident in New Zealand, allocated to the deducting branch; and

(b) is not determined by reference to the amount of a payment by the New Zealand resident, or a member of the same control group as the New Zealand resident, to a person other than the New Zealand resident and the members of the control group; and

(c) exceeds expenditure or loss incurred by the New Zealand resident, or a member of the same control group as the New Zealand resident, that—

(i) belongs to a category of expenditure or loss equivalent to the category to which the charge belongs; and

(ii) is the reference by which the amount of the charge is determined.

Assessable income

(4) The payee derives assessable income from the payment or charge equal to the greater of zero and the amount that would be assessable income of the payee, if the payer and payee were persons and separate or if the tax status of the payer were different.

Timing of derivation under subsection (4)

(5) The assessable income under subsection (4) is allocated to the income year in which the payment would be derived if the payer and payee were persons and separate or if the tax status of the payer were different.

Mismatch amounts

(6) An amount that is treated as assessable income under subsection (4) for a payee and a tax year is a mismatch amount of the payee for the tax year and the mismatch situation until the mismatch amount is set off under section FH 12 against surplus assessable income under that section from the mismatch situation.

New Zealand resident becoming affected

(7) A mismatch amount under subsection (6) is not available to be carried forward beyond a time (the **transition time**) if the payer jurisdiction introduces from the transition time hybrid mismatch legislation corresponding to section FH 5 and applying to expenditure of the hybrid entity or foreign resident to which this section applies.

Defined in this Act: amount, arrangement, assessable income, company, control group, deducting branch, deduction, hybrid mismatch legislation, income, mismatch amount, New Zealand, New Zealand resident, non-resident, structured arrangement

FH 7 Payments to person outside New Zealand producing deduction without income

When this section applies

(1) This section applies when a person (the **payer**) incurs an amount of expenditure (the **incurred amount**) in an income year relating to an amount of a payment to a person (the **payee**) that exists under the law of a country or territory outside New Zealand (the **payee jurisdiction**) and—

(a) the incurred amount would be allowed as a deduction for the payer in the absence of this section and sections FH 8 to FH 11; and

(b) under the taxation law of the payee jurisdiction, the amount is treated as being—

(i) received in a country or territory outside the payee jurisdiction:

(ii) income of a person who is in the same control group as the payer; and

(c) the payment is made under a structured arrangement or the payer is in the same control group as the payee when the expenditure is incurred; and

(d) under the taxation law of the countries and territories outside New Zealand, the amount received by the payee is not subject to taxation as income and is not recognised as CFC attributed income, or the equivalent of attributed CFC income, of a person in the same control group as the payee; and

(e) an equivalent payment by the payer would have been subject to taxation—

(i) as income of the payee, under the taxation law of the payee jurisdiction if the equivalent payment were treated as being received by the payee in the payee jurisdiction:

(ii) as income of a person who is in the same control group as the payer, under the taxation law of a country or territory, outside New Zealand and the payee jurisdiction, if the equivalent payment were treated as being received by the person in that country or territory.

Amount of deduction denied

(2) The payer is denied a deduction for the incurred amount and, if the payment is made under a financial instrument denominated in the currency of a country or territory other than New Zealand, for amounts arising from a fluctuation in the value of the currency in relation to New Zealand currency.

Defined in this Act: amount, CFC, control group, deduction, financial instrument, income, New Zealand, pay, structured arrangement

FH 8 Expenditure or loss through hybrid entity or foreign deducting branch producing double deduction without double income

When this section applies

(1) This section applies for a New Zealand resident and an income year when the New Zealand resident is related to a hybrid entity existing under the law of a country or territory outside New Zealand, or has a deducting branch in such a country or territory, and—

(a) the taxation law of the country or territory allows expenditure or loss of the hybrid entity, or of the New Zealand resident attributed to the deducting branch, in the income year to be set off against income of another person or entity; and

(b) the income of the other person or entity, other than from a source in New Zealand, is not assessable income.

Deduction denied for expenditure or loss

(2) The New Zealand resident is denied a deduction for the amount of expenditure or loss incurred for the income year that—

(a) is attributed to the hybrid entity or deducting branch; and

(b) would, in the absence of this section and sections FH 9 and FH 10, be allowed as a deduction in the income year corresponding to the tax year.

Mismatch amounts

(3) A deduction denied under subsection (2) is a mismatch amount from a mismatch situation until the mismatch amount is set off under section FH 12 against surplus assessable income under that section from the mismatch situation.

New Zealand resident becoming affected

(4) Subsection (5) applies to a person who is a New Zealand resident and becomes liable to be denied deductions under subsection (1) at a time (the **transition time**) when—

(a) in a period ending with the transition time (the **unaffected period**), the person is related to a hybrid entity, or has a deducting branch, that exists under the law of a country or territory outside New Zealand but the person is not liable to be denied deductions under subsections (1) and (2); and

(b) the taxation law of the country or territory allows expenditure or loss of the hybrid entity, or of the New Zealand resident attributed to the deducting branch, during the unaffected period to be set off against income that is not assessable income and arises at or after the transition time.

Assessable income

(5) The person derives, at the transition time, assessable income equal to the amount of net loss, calculated for the person and the hybrid entity or deducting branch and the unaffected period as if the person's income from the hybrid entity or deducting branch were schedular income.

Mismatch amounts

(6) An amount that is treated as assessable income under subsection (5) for a person and a tax year is a mismatch amount of the person for the tax year and the mismatch situation until the mismatch amount is set off under section FH 12 against surplus assessable income under that section from the mismatch situation.

Defined in this Act: amount, assessable income, deducting branch, deduction, hybrid entity, income, income year, loss, mismatch amount, mismatch situation, New Zealand, New Zealand resident, ring-fenced tax loss, source in New Zealand, surplus assessable income, tax year

FH 9 Expenditure or loss of hybrid entity, or non-resident through deducting branch, producing double deduction without double income

When this section applies

(1) This section applies when a resident (the **foreign resident**) in a country or territory outside New Zealand (the **foreign jurisdiction**) is in the same control group as a hybrid entity resident in New Zealand, or has a deducting branch in New Zealand, if—

(a) expenditure or loss of the hybrid entity, or of the foreign resident attributed to the deducting branch, would be allowed as a deduction in an income year in the absence of this section and section FH 10; and

(b) the taxation law of a country or territory outside New Zealand allows expenditure of the hybrid entity or attributed to the deducting branch to be deducted in the income year against income of the foreign resident; and

(c) the foreign jurisdiction does not have hybrid mismatch legislation corresponding to section FH 8 and applying at any time in the income year to expenditure of the hybrid entity or foreign resident referred to in paragraph (b).

Deductions denied

(2) The hybrid entity or foreign resident is denied a deduction for the amount of expenditure or loss that—

(a) is incurred by the hybrid entity or attributed to the deducting branch in the income year corresponding to the tax year; and

(b) would, in the absence of this section, be allowed as a deduction.

Mismatch amounts

(3) The amount of a deduction denied under subsection (2) is a mismatch amount for the hybrid entity or foreign resident until the mismatch amount is set off under section FH 12 against surplus assessable income under that section for the hybrid entity or foreign resident.

New Zealand resident becoming affected

(4) A mismatch amount under subsection (3) is not available to be carried forward beyond a time (the **transition time**) if the foreign jurisdiction introduces from the transition time hybrid mismatch legislation corresponding to section FH 8 and applying to expenditure of the hybrid entity or foreign resident to which this section applies.

Defined in this Act: amount, control group, deducting branch, deduction, hybrid entity, income, income year, hybrid mismatch legislation, loss, mismatch amount, New Zealand, resident in New Zealand, surplus assessable income, tax year

FH 10 Expenditure or loss of dual resident company producing double deduction without double income

When this section applies

(1) This section applies for a company that is a New Zealand resident (the **dual resident**) and under the taxation law of another country or territory outside New Zealand (the **dual tax jurisdiction**) is liable to income tax in the dual tax jurisdiction through domicile, residence, or place of incorporation.

Deduction denied for expenditure

(2) The dual resident is denied a deduction for the amount of expenditure that would, in the absence of this section, be allowed as a deduction in the income year.

Mismatch amount

(3) A deduction that is denied under subsection (2) is a mismatch amount from a mismatch situation until the mismatch amount is set off under section FH 12 against surplus assessable income under that section from the mismatch situation.

Defined in this Act: amount, assessable income, company, deduction, hybrid entity, income, income tax, income year, New Zealand, New Zealand resident, ring-fenced tax loss, tax year

FH 11 Residents, or non-residents with deducting branches, having expenditure funding overseas hybrid mismatches

When this section applies

(1) This section applies for a New Zealand resident, or a non-resident with a deducting branch in New Zealand (the **funder**), and an income year when the funder makes a payment to a person in a country or territory outside New Zealand that does not have hybrid mismatch legislation corresponding to this subpart and—

(a) the payment provides funds, directly or indirectly, for a payment (the **funded payment**) from a person or other entity (the **payer**) in a country or territory outside New Zealand (the **payer jurisdiction**) to a person or other entity (the **payee**), in the same or another country or territory outside New Zealand (the **payee jurisdiction**); and

(b) the expenditure on the payment would be allowed as a deduction for the funder in the absence of this section and sections FH 8 to FH 10; and

(c) the payment is made under a structured arrangement giving rise to the hybrid mismatch referred to in paragraph (d) or the funder and the payer, when the expenditure is incurred, are members of a control group; and

(d) the funded payment gives rise to a hybrid mismatch; and

(e) the payer jurisdiction and the payee jurisdiction do not have hybrid mismatch legislation that counteracts the hybrid mismatch.

Deduction denied for expenditure funding hybrid mismatch

(2) The funder is denied a deduction in a tax year for an amount that is given by—

(a) subsection (3), if the payment is made under a structured arrangement giving rise to the hybrid mismatch; or

(b) subsection (4), if paragraph (a) does not apply.

Amount denied for payment under structured arrangement

(3) Under this subsection, the amount of the denial is the lesser of—

(a) the amount of the deduction that would be allowed for the payment in the absence of this section and sections FH 8 to FH 10:

(b) the amount of the funded payment that, if hybrid mismatch legislation were applied by the payer jurisdiction, would be disallowed as a deduction against income or equivalent tax relief.

Amount denied for other payment

(4) Under this subsection, the amount of the denial is the amount of the payment that can fairly and reasonably be treated as providing funds for the funded payment.

Identifying resulting payment

(5) The amount described in subsection (4) is determined consistently with the approach described in chapter 8 of the hybrid mismatch report.

Defined in this Act: amount, control group, deducting branch, deduction, hybrid mismatch, hybrid mismatch legislation, hybrid mismatch report, New Zealand, New Zealand resident, non-resident, pay, structured arrangement, tax year

FH 12 Offset of mismatch amounts against surplus assessable income

When this section applies

(1) This section applies when a person has a mismatch amount under sections FH 5, FH 6, and FH 8 to FH 10 from a mismatch situation for an income year.

Offset against surplus assessable income

(2) The total of mismatch amounts from the mismatch situation for the income year are set off against the person's total surplus assessable income from the mismatch situation under subsection (3).

Surplus assessable income

(3) The person has an amount of surplus assessable income, for the mismatch situation and the income year, equal to the greater of zero and the amount calculated using the formula—

$$\text{earlier} + \text{assessable} + \text{exempt} - \text{unrecognised} - \text{protected} - \text{deductions} + \text{status}.$$

Definition of items in formula

(4) In the formula,—

(a) **earlier** is the amount of surplus assessable income for the person from the mismatch situation carried forward to the tax year corresponding to the income year from earlier tax years:

(b) **assessable** is the amount of assessable income derived from the mismatch situation by the person in the income year:

(c) **exempt** is zero, except for a person that is a hybrid entity resident in New Zealand and owned by a non-resident, for which it is the amount of income of the hybrid entity that—

(i) is exempt income under section CW 10 (Dividend within New Zealand wholly-owned group); and

(ii) for an owner of the hybrid entity, is income subject to tax under the taxation law of another country or territory without a credit for tax, other than a withholding tax on the dividend, paid by the person paying the dividend:

(d) **unrecognised** is the amount of the assessable income of the person from the mismatch situation for the income year that is not subject to tax under the taxation law of the foreign jurisdiction because of the residence of another person, who is not another owner, or because of the source of the income:

(e) **protected** is the amount of taxable income for which the income tax liability of the person would equal foreign tax credits under subpart LJ (Tax credits for foreign income tax) allowed for the assessable income from the mismatch situation for the income year:

(f) **deductions** is the amount of deductions allowed for expenditure incurred by the person in the income year in deriving assessable income from the mismatch situation, not including expenditure giving rise to mismatch amounts:

(g) **status** is the amount of expenditure on a payment by the person to a payee in New Zealand that is a mismatch amount under section FH 9 and that is not allowed to be deducted against income by the tax law of a country or territory outside New Zealand because of the tax status of the person and the payee.

Mismatch receipt set off against surplus assessable income from later tax year

(5) If a mismatch amount from a mismatch situation for a person is set off under subsection (2) or (10) in the tax year corresponding to an income year against an amount of surplus assessable income of the person from the mismatch situation, the person has a deduction for the income year equal to the amount of the offset.

Mismatch amounts carried forward

(6) If a mismatch amount from a mismatch situation is not an offset in the tax year corresponding to an income year, the remaining amount is carried forward to the next tax year if it meets the requirements of subsection (8) for that tax year.

Surplus assessable income carried forward

(7) If an amount of surplus assessable income from a mismatch situation is not an offset under subsection (2) or (10) in an income year,—

(a) the amount is reduced by the amount of corresponding income, that is recognised and taxed as income arising from the mismatch situation by the taxation law of a foreign country or territory, for which the income tax liability of the person would equal credits, equivalent to foreign tax credits under subpart LJ, allowed by the foreign country or territory for the income from the mismatch situation for the income year; and

(b) the amount remaining is carried forward to the next income year if it meets the requirements of subsection (8) for that income year.

Continuity requirement for carrying forward amounts

(8) A mismatch amount, or surplus assessable income, from a mismatch situation may be carried forward to a tax year corresponding to an income year (the **carry year**) if, for the tax year in which the amount arises (the **initial year**) and the carry year, a tax loss of the person could be carried forward under Part I (Treatment of tax losses) from the initial year to the carry year in the absence of offsets.

Mismatch amounts under section FH 8(3)

(9) A mismatch amount under section FH 8(3) that is available to be carried forward from a tax year corresponding to an income year is included as a tax loss component of the New Zealand resident for the next tax year (the **release year**) if—

(a) the hybrid entity, or the New Zealand resident with the deducting branch to which the mismatch amount is attributed, ceases to exist before the end of the income year corresponding to the release year; and

(b) expenditure or loss of the hybrid entity, or of the New Zealand resident attributed to the deducting branch, has not been set off under the taxation law of a country or territory outside New Zealand against income, for the income year in which the mismatch amount arose or for a later income year, that is not assessable income of a person or entity.

Offset of mismatch amount against surplus assessable income of group company

(10) A company (the **offset company**) resident in New Zealand may set off in an income year a mismatch amount from a mismatch situation against surplus assessable income of another company (the **group company**) resident in New Zealand from another mismatch situation (the **income situation**) if—

(a) the companies are in the same wholly-owned group when the mismatch amount and the surplus assessable income arise; and

(b) the mismatch amount and the surplus assessable income are available after each of the companies has all offsets permitted for the income year of amounts arising from the mismatch situation in which the company is involved; and

(c) the offset would be permitted if the offset company were substituted for the group company in the income situation.

Defined in this Act: amount, assessable income, deducting branch, deductions, exempt income, foreign tax, hybrid entity, income year, loss, mismatch amount, mismatch situation, New Zealand resident, non-resident, resident in New Zealand, surplus assessable income, tax, tax loss, tax loss component, tax year, taxable income

FH 13 Election by borrower under financial arrangement

Who may make election

(1) A person who is a borrower under a financial arrangement may make an election under this section if a payment by the person to the lender under the financial arrangement would be an unrecognised amount under section FH 3(2) and denied as a deduction under section FH 3.

Treatment of financial arrangement after election

(2) The result of an election by the person is that, while the person is eligible to make an election, the financial arrangement is, for all purposes of the Act, a share held by the lender in the person.

Notification of election

(3) The person must notify the Commissioner of the election, specifying the date on which the election is effective, which must be on or after the date of the notice.

Transitional treatment of financial arrangement

(4) On the date on which the election is effective, the person is treated as—

(a) paying the lender under the financial arrangement the amount owing under the loan (the **repayment amount**); and

(b) receiving the repayment amount, reduced by any withholding tax, from the lender as the subscription for a non-participating redeemable share.

Expiry of election

(5) When the person ceases to be eligible to make an election for the financial arrangement because a deduction would not be denied under section FH 3 for a payment of interest under the financial arrangement, the person is treated as—

(a) paying to the lender the amount owing under the loan as a payment for cancellation of a non-participating redeemable share; and

(b) receiving, as a loan under the financial arrangement, from the lender the amount referred to in paragraph (a), reduced by any withholding tax.

NRWT rules

(6) The NRWT rules apply to the amount of the payment under subsections (4)(a) and (5)(a).

Defined in this Act: amount, deduction, financial arrangement, loan, non-participating redeemable share, notify, NRWT rules, pay, share

FH 14 Irrevocable election by owner of hybrid entity

Who may make election

(1) A New Zealand resident (the **owner**) who has, or is a member of a wholly-owned group that has, all the ownership interests in a hybrid entity may make an election under this section if the hybrid entity—

(a) is treated by the taxation law of a country or territory outside New Zealand (the **foreign jurisdiction**) as being resident in the foreign jurisdiction; and

(b) is wholly owned by the owner or the owner's wholly-owned group on the date on which the Taxation (Neutralising Base Erosion and Profit Shifting) Bill is introduced.

Treatment of hybrid entity after election

(2) The result of an election by the owner is that the hybrid entity is, for all purposes of the Act for the owner, a company immediately after the sale referred to in subsection (5)(a)(i).

Notification of election

(3) The owner must notify the Commissioner of the election before the due date for the return of income for the first income year in which the hybrid mismatch legislation applies to the owner.

When election effective

(4) The election is effective for the period consisting of the first income year in which the hybrid mismatch legislation applies to an owner and later income years.

Transitional treatment of hybrid entity

(5) For the period for which the election is effective, the hybrid entity is treated as—

(a) at the beginning of the period,—

(i) selling the undertaking of the hybrid entity at market value; and

(ii) buying the undertaking as a company (the **new subsidiary**), in which the owner has ownership interests, that is resident in the foreign jurisdiction; and

(b) during the period, making as a company each distribution to the owner.

Total available subscribed capital

(6) The total available subscribed capital of the new subsidiary is the amount by which the market value of the assets acquired by the new subsidiary exceeds the market value of the liabilities assumed by the new subsidiary.

Election irrevocable

(7) An election under this section for a hybrid entity is irrevocable.

Defined in this Act: available subscribed capital, company, hybrid entity, hybrid mismatch legislation, income year, market value, New Zealand, New Zealand resident, notify, return of income, wholly-owned group

FH 15 Definitions

Definitions

(1) In this Act,—

act together, for 2 persons (the **holders**) that each have rights or interests (the **rights and interests**) in a person or other entity and for the ownership or control of the rights and interests, means—

(a) the holders are associated under section YB 4 (Two relatives):

(b) a holder typically acts in the way preferred by the other holder, because of the other holder's preference:

(c) the holders have entered into an arrangement that has an effect on the value or control of the rights or interests that is more than incidental and does not arise from a restriction on the sale of the rights or interests:

(d) the actions of the holders relating to the interests are legally controlled, are typically controlled, or are expected to be controlled, by a third person or group of persons (the **co-ordinator**) that does not meet the requirements of subsection (2):

(e) the holders and a co-ordinator that does not meet the requirements of subsection (2) enter an arrangement affecting the ownership or control of the rights and interests and having an effect on the value or control of the rights and interests that is more than incidental:

(f) the holders agree with a co-ordinator that does not meet the requirements of subsection (2) that the co-ordinator can act on behalf of the holders in relation to the rights and interests

branch mismatch report means the report OECD (2017), *Neutralising the Effects of Branch Mismatch Arrangements, Action 2: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris

control group means a group of persons in which, for each member and each other member,—

(a) the members are—

(i) consolidated, or required to be consolidated, for accounting purposes:

(ii) members of a group of companies for which an applicable financial reporting standard requires the preparation of group financial statements for an accounting period:

(b) the members are companies that are associated under section YB 2 (Two companies):

(c) 1 of the members is a company and the other person has, or is a member of a group of persons acting together that has,—

(i) a voting interest in the company of 50% or more, applying the general aggregation rule in section YB 3(3):

(ii) if a market value circumstance exists for the company, a market value interest in the company of 50% or more, applying the general aggregation rule in section YB 3(3):

(d) the members are associated under section YB 4 (Two relatives):

(e) the members are associated under sections YB 5 to YB 11 (which relate to a trustee or settlor of a trust):

(f) 1 of the members is a partnership, or is a limited partnership, and the other member,—

(i) if the partnership is a limited partnership, is a general partner or is a limited partner that has a partnership share of more than 50% in a right, obligation, or other property, status, or thing of the limited partnership, applying the general aggregation rule in section YB 12(3) (Partnership and partner):

(ii) if the partnership is not a limited partnership, is a partner that has a partnership share of more than 50% in a right, obligation, or other property, status, or thing of the partnership, applying the general aggregation rule in section YB 12(3):

(g) 1 of the members, or a group consisting of 1 of the members and persons that are related to or act together with that member, effectively controls the other member:

(h) a person or group of persons, together with persons who are related to or act together with the person or a person in the group, effectively controls each of the 2 members

deducting branch, for a person, means a branch, permanent establishment, or other activity, of the person in a country or territory, such that expenditure or loss attributed by the person to the branch, permanent establishment, or activity is recognised by the tax law of the country or territory as giving rise to a deduction against income of the person or other tax relief

entity means a person, or a relationship that is treated as a person by the tax law of a country or territory outside New Zealand

financial instrument means—

(a) a financial arrangement:

(b) a share:

(c) an annuity:

(d) a farm-out arrangement:

(e) a share-lending arrangement:

(f) a loan in New Zealand currency described in section EW 5(10) (What is an excepted financial arrangement?)

hybrid entity, for 2 countries or territories, means a person or other entity that is—

(a) recognised in 1 of the countries or territories (the **resident jurisdiction**) as being a resident of the resident jurisdiction and subject to taxation under the taxation law of the resident jurisdiction; and

(b) not recognised in the other country or territory (the **overseas jurisdiction**) as being a person, or other entity, subject to taxation under the taxation law of the overseas jurisdiction in relation to income with a source in the overseas jurisdiction

hybrid mismatch, for a payment by a payer in a country or territory (the **payer jurisdiction**) to a payee in another country or territory (the **payee jurisdiction**), means a deduction for an amount of the payment if, in the absence of hybrid mismatch legislation,—

(a) under the taxation law of—

  (i) the payer jurisdiction, the amount is taken into account as a deduction against income or equivalent tax relief in calculating the income of the payer subject to tax; and

  (ii) the payee jurisdiction, the amount is not recognised as ordinary income of a person or other entity within a reasonable period of time:

(b) under the taxation law of—

  (i) the payer jurisdiction, the amount is taken into account as a deduction against income or equivalent tax relief in calculating the income of the payer subject to tax; and

  (ii) a jurisdiction other than the payer jurisdiction, the amount is taken into account as a deduction against income or equivalent tax relief in calculating the income of the payer subject to tax

hybrid mismatch legislation means—

(a) this subpart:

(b) legislation of a country or territory outside New Zealand having an intended effect corresponding to the effect of a provision in this subpart

hybrid mismatch report means the publication OECD (2015), *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris

mismatch amount means an amount, arising from a mismatch situation under a provision of this subpart, for which a deduction is allowed under section FH 12 when the amount is set off in a tax year against an amount of surplus assessable income

mismatch situation means a situation in which differences between the taxation law of New Zealand and the taxation law of another country or territory in the tax treatment of entities or deducting branches give rise to adjustments to deductions or income under sections FH 5, FH 6, FH 8, FH 9, or FH 10

related, for 2 persons, means a relationship under which—

(a) the 2 persons are companies—

(i) that are associated under section YB 2 (Two companies):

(ii) for which a group of persons exists whose total voting interests in each company, determined under section YB 2, are 25% or more:

(iii) if a market value circumstance exists for either company, for which a group of persons exists whose total market value interests in each company, determined under section YB 2, are 25% or more:

(b) 1 of the persons is a company and the other person is not a company and the 2 persons are associated under section YB 3 (Company and person other than company):

(c) the 2 persons are associated under section YB 4 (Two relatives):

(d) the 2 persons are associated under sections YB 5 to YB 11 (which relate to a trustee or settlor of a trust):

(e) 1 of the persons is a limited partnership and the other person is a general partner, or is a limited partner and the 2 persons are associated under section YB 12 (Partnership and partner):

(f) 1 of the persons is a partnership and the other person is a partner and the 2 persons would be associated under section YB 12(2) if the partnership were a limited partnership and the partner were a limited partner:

(g) 1 of the persons, or a group consisting of the person and persons who act together with the person, controls the other person:

(h) a person or group of persons, together with persons who are related to or act together with the person or a person in the group, controls each of the persons

structured arrangement, for a person, means an arrangement to which the person or a member of the person's control group is a party—

(a) for which—

(i) a transaction under or involving the arrangement has a price that assumes the existence of a hybrid mismatch:

(ii) the facts or circumstances indicate that the arrangement is intended to rely on or produce a hybrid mismatch; and

(b) under which the person, or a member of the person's control group, can reasonably be expected to be aware of—

(i) a tax benefit for the person that arises from the hybrid mismatch:

(ii) the existence of the hybrid mismatch

surplus assessable income means an amount, arising from a mismatch situation and determined under section FH 12, against which a mismatch amount from the mismatch situation may be set off under section FH 12.

Exception to test for acting together

(2) A co-ordinator meets the requirements of this subsection for rights or interests in a person or entity held separately by 2 holders if—

(a) the co-ordinator manages an investment fund through which 1 of the holders has the holder's rights or interests in the person or entity; and

(b) the co-ordinator manages another investment fund through which the other holder has the holder's rights or interests in the person or entity; and

(c) the 2 funds do not act together in relation to the rights and interests of the holders.

Defined in this Act: accounting period, act together, arrangement, associated, branch mismatch report, company, control group, deducting branch, financial instrument, general partner, group of companies, hybrid entity, hybrid mismatch, hybrid mismatch legislation, hybrid mismatch report, limited partner, limited partnership, market value circumstance, market value interest, mismatch amount, mismatch situation, partner, partnership, related, relative, structured arrangement, surplus assessable income, voting interest

(2) Subsection (1) applies for income years beginning on or after 1 July 2018, subject to subsections (3) and (4).

(3) Sections FH 3 and FH 4, as inserted by subsection (1), do not apply for a payment—

(a) under a financial instrument entered, on or before 6 September 2016, by a person who is—

(i) a member of the New Zealand banking group of a registered bank, or a person who has a fixed establishment that is a member of the New Zealand banking group of a registered bank, on terms intended to allow the financial instrument to qualify as capital for the purposes of the regulatory capital requirements imposed by the

Reserve Bank of New Zealand under the Reserve Bank of New Zealand Act 1989, or imposed under corresponding legislation of a country or territory outside New Zealand:

(ii) a licensed insurer, or a person associated with a licensed insurer, for the direct or indirect purpose of complying with regulatory capital requirements imposed as a condition of licence under the Insurance (Prudential Supervision) Act 2010, or imposed under corresponding legislation of a country or territory outside New Zealand; and

(b) before the first date on which the person has an unconditional right to call or otherwise cancel the financial instrument without penalty.

(4) Section FH 11(2)(b) and (4), as inserted by subsection (1), apply for a payment in an income year beginning on or after 1 January 2020.

Section 35(3)(a)(i): amended (with effect on 1 July 2018), on 18 March 2019, by section 355 of the Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019 (2019 No 5).

36 New heading and section FZ 8 inserted

After section FZ 7, insert:

Interest apportionment rules

FZ 8 Transition period for amendments to interest apportionment rules

What this section does

(1) This section gives the effect, for an excess debt entity meeting the requirements of subsection (2), of the amendments (the **affected amendments**) to section FE 5 (Thresholds for application of interest apportionment rules) made by section 20(1), (2), and (6) of the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018 and to section FE 6 (Apportionment of interest by excess debt entity) made by section 21(5) and (6) of that Act.

Requirements for section to apply

(2) An excess debt entity meets the requirements of this subsection if, using the method of calculating debt percentages as amended by the provisions referred to in subsection (1),—

(a) the excess debt entity is a company described in section FE 2(1)(cb) (When this subpart applies) or is controlled by a group of persons that act in concert and are each described in section FE 2(a) to (db); and

(b) the debt percentage of the excess debt entity's New Zealand group is greater than 60% on the date given by subsection (5) (the **transition date**); and

(c) the debt percentage of the excess debt entity's New Zealand group on the transition date is greater than 100% of the debt percentage of the excess debt entity's worldwide group on the transition date.

Transition period

(3) For an excess debt entity meeting the requirements of subsection (2), the affected amendments apply as varied by subsection (4) for a period of 5 income years (the **transition period**) consisting of the first income year beginning on or after 1 July 2018 and the 4 following income years.

Method and threshold values for calculations

(4) For the period from the transition date to the end of the transition period, in determining whether the excess debt entity is required to apportion its interest expenditure under subpart FE (Interest apportionment on thin capitalisation) and in determining the apportionment of the excess debt entity's interest expenditure under section FE 6,—

(a) the method of calculating debt percentages is applied as amended; and

(b) the threshold value for the debt percentage of the excess debt entity's New Zealand group for the income year is 60%; and

(c) the threshold value for the ratio of the debt percentage of the excess debt entity's New Zealand group for the income year to the debt percentage of the excess debt entity's worldwide group is the lesser of 110% and the corresponding ratio calculated for the transition date.

Transition date

(5) For the purposes of this section, the transition date is whichever the excess debt entity elects, in a return of income for the first income year beginning on or after 1 July 2018, of—

(a) the date (the **introduction date**) on which the Taxation (Neutralising Base Erosion and Profit Shifting) Bill is introduced:

(b) the date that is the last measurement date under section FE 8 (Measurement dates) preceding the introduction date.

Defined in this Act: company, excess debt entity, income year, return of income

37 Section GB 2 amended (Arrangements involving transfer pricing)

In section GB 2(3), replace "Purpose of rules and nature of arrangements" with "Purpose and application of rules and nature of arrangements".

38 New section GB 51B inserted (Increases or decreases in value)

(1) After section GB 51, insert:

GB 51B Increases or decreases in value

When this section applies

(1) This section applies when there is an increase or decrease in a value that affects, or would affect, the result of a calculation (the **affected calculation**) under subpart FE (Interest apportionment on thin capitalisation) and the increase or decrease is—

(a) caused by an action or omission that has, or would have, a purpose or effect of defeating the intent and application of subpart FE:

(b) produced by an arrangement that has an effect of defeating the intent and application of subpart FE.

Increase or decrease excluded from calculation

(2) The effect on the affected calculation of the increase or decrease in the value is disregarded for the purposes of subpart FE.

Defined in this Act: arrangement, income year

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

39 New heading and section GB 54 inserted

(1) After section GB 53, insert:

Arrangements involving establishments and non-resident businesses

GB 54 Arrangements involving establishments

When this section applies

(1) This section applies when—

(a) a non-resident makes, under an arrangement, a supply, as defined in section 5 of the Goods and Services Tax Act 1985, (the **facilitated supply**) that is of goods or services to—

(i) a person in New Zealand (the **recipient**); or

(ii) a person in New Zealand (the **intermediary**), who makes under the arrangement a supply of the goods or services to another person in New Zealand (the **recipient**) whose existence is known to the facilitator referred to in paragraph (b), at the time of the facilitated supply; and

(b) a person (the **facilitator**), who is not an intermediary for the facilitated supply, carries out in New Zealand under the arrangement an activity for the purpose of bringing about the facilitated supply to the recipient; and

(c) the facilitator—

(i) is associated with the non-resident or is an employee of the non-resident:

(ii) derives 80% or more of the facilitator's assessable income in the income year of the activity, and in the previous income year, from services provided to the non-resident or to persons associated with the non-resident; and

(d) the activity is more than preparatory for or auxiliary to the facilitated supply; and

(e) income of the non-resident from the facilitated supply is not within the scope of a double tax agreement that—

(i) incorporates article 12(1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting:

(ii) includes a provision having a scope equal to or greater than the scope of the article referred to in subparagraph (i) and enters into force after 7 June 2017; and

(f) section YD 4B(3) (Meaning of permanent establishment) does not determine whether the non-resident has a permanent establishment in New Zealand; and

(g) income of the non-resident from the supply is not attributable, other than under this section, to a permanent establishment in New Zealand of the non-resident; and

(h) the arrangement has a purpose or effect of affecting the imposition on the non-resident of income tax, or of income tax and the income tax of a country or territory other than New Zealand, by directly or indirectly—

(i) altering the incidence of income tax:

(ii) relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax:

(iii) avoiding, postponing, or reducing a liability to income tax or a potential or prospective liability to future income tax; and

(i) the purpose is more than merely incidental; and

(j) the non-resident, or a group of persons that include the non-resident, is a large multinational group.

Activities attributed to permanent establishment

(2) The non-resident is treated as having a permanent establishment in New Zealand—

(a) through which the non-resident makes the facilitated supply in the course of a business carried on in New Zealand; and

(b) to which activities of the facilitator referred to in subsection (1)(b) are attributed.

Defined in this Act: arrangement, assessable income, associated, business, double tax agreement, goods, income, income tax, large multinational group, New Zealand, non-resident, permanent establishment, services

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

40 Section GC 6 amended (Purpose of rules and nature of arrangements)

(1) In section GC 6, heading, after "**Purpose**", insert "**and application**".

(2) Replace section GC 6(1), other than the heading, with:

(1) The purpose of this section and sections GC 7 to GC 14 is to substitute an arm's length consideration in the calculation of a person's net income if the person's net income is reduced by the conditions of a cross-border arrangement—

(a) with an associated person or with a party to a financial arrangement that is a cross-border related borrowing of the person under subsection (3B); and

(b) for the acquisition or supply of goods, services, or anything else, or that includes a financial arrangement that is a cross-border related borrowing.

(3) After section GC 6(1), insert:

Rules apply consistently with OECD transfer pricing guidelines

(1B) This section and sections GC 7 to GC 14 apply consistently with the OECD transfer pricing guidelines.

(4) Replace section GC 6(2)(b) with:

(b) the arrangement—

(i) is between a supplier and acquirer who are associated persons or are a company and a person who is a member of a non-resident owning body that has an ownership interest in the company of 50% or more:

(ii) includes a financial arrangement that is a cross-border related borrowing; and

(5) After section GC 6(3), insert:

When financial arrangement is cross-border related borrowing

(3B) A financial arrangement is a **cross-border related borrowing** under this subsection if, under the financial arrangement,—

(a) a non-resident person (the **lender**) provides funds to another person (the **borrower**) when—

(i) the lender and borrower are associated persons:

(ii) a person or group of persons has a total ownership interest, determined under sections FE 38 to FE 41 (which give the measurement of ownership interests in companies), of 50% or more in each of the lender and borrower:

(iii) the funding is provided through an indirect associated funding arrangement described in subsection (3C):

(iv) the lender is a member of a non-resident owning body, or of a group of non-residents who act in concert and are each described in section FE 2(1)(a) to (db) (When this subpart applies), and the members of the non-resident owning body or of the group have a total ownership interest, determined under sections FE 38 to FE 41, of 50% or more in the borrower; and

(b) expenditure arises for the borrower for which the borrower is allowed a deduction.

When indirect associated funding arrangement exists

(3C) An indirect associated funding arrangement exists under this subsection when,—

(a) under an arrangement, a non-resident person (the **indirect lender**) provides funds or pays money, directly or indirectly, to another person (the **direct lender**) who provides funds to a third person (the **borrower**)—

(i) in order for the funds to be provided to the borrower, or to reimburse the direct lender or compensate them, for providing the funds to the borrower; and

(ii) with the purpose or effect that this section and sections GC 6 to GC 14 and GC 16 to GC 19 do not apply to the arrangement; and

(b) the indirect lender is associated with the borrower, or a person or group of persons has a total ownership interest, determined under sections FE 38 to FE 41, of 50% or more in each of the indirect lender and borrower; and

(c) the direct lender is not associated with the borrower and is not described in subsection (3B)(a)(iv).

Application of sections to cross-border related borrowing

(3D) If a transfer pricing arrangement includes a financial arrangement that is a cross-border related borrowing, sections GC 7 to GC 14 are applied to the transfer pricing arrangement as if the adjustments required by sections GC 15 to GC 19 had been made to the credit rating of the borrower and the conditions of the financial arrangement.

Certain preference shares excluded from calculation of ownership interest

(3E) In calculating the ownership interests in a lender or borrower (the **issuer**) for the purposes of subsection (3B), a preference share is not included in the calculation if the preference share—

(a) is held by a person (the **creditor**) who is not associated with the issuer; and

(b) was issued to the creditor with the intention of satisfying or replacing debt provided by the creditor to the issuer in the ordinary course of business.

(6) In section GC 6, list of defined terms, insert "cross-border related borrowing", "financial arrangement", "non-resident owning body", "OECD transfer pricing guidelines", and "ownership interest".

(7) Subsections (2), (3), and (4) apply for an arrangement and income years beginning on or after 1 July 2018, other than for an arrangement that complies with an advance pricing agreement issued before 1 July 2018 by the Commissioner.

41 Section GC 13 amended (Calculation of arm's length amounts)

(1) Replace section GC 13(1) with:

Determining arm's length amounts

(1) An arm's length amount of consideration for a supply and acquisition under a transfer pricing arrangement must be determined by—

(a) identifying, as required by subsections (1B) and (1C), a transaction reproducing the supply and acquisition (the **identified transaction**) or the absence of such a transaction; and

(b) identifying the conditions (the **arm's length conditions**) that independent parties after real and independent bargaining might be expected to agree upon for the identified transaction; and

(c) applying whichever 1 or a combination of the methods listed in subsection (2) produces the most reliable measure of the arm's length amount of consideration (the **arm's length amount**) that independent parties after real and independent bargaining would have agreed upon as the price for the identified transaction as part of the arm's length conditions.

Determination of identified transaction

(1B) A transaction reproducing a supply and acquisition under a transfer pricing arrangement is determined by—

(a) accurately delineating the transfer pricing arrangement using the approach given in the OECD transfer pricing guidelines, chapter I, section D.1; and

(b) identifying a transaction of supply and acquisition under the transfer pricing arrangement as delineated under paragraph (a).

No transaction or differing transaction

(1C) If the requirements of the OECD transfer pricing guidelines, paragraph 1.122, are met, the approach described in the OECD transfer pricing guidelines, chapter I, section D.2 must be used to treat a transfer pricing arrangement involving a supply and acquisition as instead involving—

(a) no supply and acquisition; or

(b) an identified transaction that differs from the supply and acquisition under the accurately delineated transfer pricing arrangement.

(2) Replace section GC 13(2) with:

Available methods for calculating arm's length amount

(2) The arm's length amount of consideration for a supply and acquisition under a transfer pricing arrangement is zero, if there is no supply and acquisition under subsection (1C)(a), or is the amount calculated for the identified transaction under arm's length conditions by performing a comparability analysis as required by the OECD transfer pricing guidelines, chapter III, using any 1 or a combination of—

(a) the comparable uncontrolled price method:

(b) the resale price method:

(c) the cost plus method:

(d) the transactional profit split method:

(e) the transactional net margin method.

(3) Replace section GC 13(3)(a) with:

(a) the degree of comparability between the transactions used for comparison and the transactions of the taxpayer under the transfer pricing arrangement:

(4) Repeal section GC 13(4) and (5).

(5) In section GC 13, before the list of defined terms, insert:

Amendment of assessment

(6) Despite the time bar, the Commissioner may amend an assessment for a tax year (the **assessed year**) in order to give effect to this section and to sections GC 6 to GC 12 and GC 14 to GC 19 at any time in the period of 7 tax years after the tax year (the **return year**) in which a return of income is made for the assessed year if, at any time in the period of 4 tax years after the return year, the Commissioner notifies the taxpayer that a tax audit or investigation has commenced and this subsection applies.

(6) In section GC 13, list of defined terms, insert "arm's length amount", "assessment", "associated person", "OECD transfer pricing guidelines", "return of income", "tax year", "time bar", "transfer pricing arrangement".

(7) Subsections (1) to (5) apply for an arrangement and income years beginning on or after 1 July 2018, other than for an arrangement that complies with an advance pricing agreement issued by the Commissioner before 1 July 2018.

42 New heading and sections GC 15 to GC 19 inserted

(1) After section GC 14, insert:

Cross-border related borrowing

GC 15 Aspects of loan adjusted for application of sections

Adjustment of aspects of loan

(1) If a transfer pricing arrangement includes a financial arrangement that is a cross-border related borrowing under which a non-resident (the **lender**) provides funds to a person (the **borrower**), sections GC 7 to GC 14 are applied to the transfer pricing arrangement as if—

(a) the borrower had the credit rating required by—

(i) section GC 16, if the borrower is not an insuring or lending person under subsection (2):

(ii) section GC 17, if the borrower is an insuring or lending person under subsection (2); and

(b) conditions of the cross-border related borrowing were disregarded, as required by section GC 18.

Insuring or lending person

(2) A borrower is an insuring or lending person under this subsection if the borrower is—

(a) a member of the New Zealand banking group of a registered bank for the purposes of subpart FE (Interest apportionment on thin capitalisation):

(b) a licensed insurer under the Insurance (Prudential Supervision) Act 2010 or an associated person under that Act of a licensed insurer:

(c) a non-bank deposit taker under the Non-bank Deposit Takers Act 2013 or an associated person or related person under that Act of a non-bank deposit taker:

(d) a member of a group of persons that has a main business activity of providing funds to persons who are not associated persons of the members of the group:

(e) a person that—

(i) is a member of a group of persons (the **business group**) that has a main business activity other than the main business activity of a group of persons referred to in paragraphs (a) to (d); and

(ii) has a main business activity of providing funds to persons who are not associated persons of the members of the business group.

Defined in this Act: associated person, cross-border related borrowing, financial arrangement, non-resident, transfer pricing arrangement

GC 16 Credit rating of borrower: other than insuring or lending person

Adjustment of long-term issuer credit rating

(1) For the purposes of sections GC 7 to GC 14, a borrower that is not referred to as an insuring or lending person in section GC 15(2) has a long-term issuer credit rating for a loan given by this section.

Borrowers with default credit rating

(2) A borrower has for a loan the default credit rating given by subsection (8) if, on the most recent calculation date given for the loan by subsection (6), the borrower—

(a) does not elect to use a credit rating given by 1 of subsections (9) to (11) for the loan, in the first return of income that includes the loan; and

(b) is not required to use a credit rating given by subsection (9) or (10).

Borrowers with restricted credit rating

(3) A borrower has the restricted credit rating given by subsection (9) if the borrower, or a non-resident that controls the borrower and has no other business activity, is controlled by a group of persons (a **co-ordinated group**) that is a non-resident owning body or is a group of persons that act in concert and are each described in section FE 2(1)(a) to (db) (When this subpart applies) and—

(a) on the most recent calculation date given for the loan by subsection (6) (the **latest calculation date**), the co-ordinated group does not include a person who has an ownership interest in the borrower, determined under sections FE 38 to FE 41 (which give the measurement of ownership interests in companies), of 50% or more; and

(b) the borrower has debt under cross-border related borrowings including the loan, of $10 million or more; and

(c) the borrower's New Zealand group under subpart FE (Interest apportionment on thin capitalisation) has a debt percentage under section FE 12(3) (Calculation of debt percentages) of 40% or more, or, for each lender on the latest calculation date,—

(i) there is no ultimate owner having an ownership interest in the lender, determined under sections FE 38 to FE 41, of 50% or more that is resident in the same country or territory as the lender; and

(ii) under the tax law of the country or territory in which the lender is resident, income from the borrower's cross-border related borrowings is, and would be for a company having the usual tax status of a company, subject to taxation at a rate of less than 15%; and

(d) the borrower does not elect to use the optional credit rating given by subsection (11) for the loan, in the first return of income that includes the loan.

Borrowers with group credit rating

(4) A borrower has the group credit rating given by subsection (10) if the borrower is not controlled by a co-ordinated group referred to in subsection (3) or, on the most recent calculation date given for the loan by subsection (6) (the **latest calculation date**), is controlled by a co-ordinated group that includes a person who has an ownership interest in the borrower, determined under sections FE 38 to FE 41, of 50% or more, and—

(a) the borrower has debt under cross-border related borrowings including the loan, of $10 million or more; and

(b) the borrower's New Zealand group under subpart FE has a debt percentage under section FE 12(3) that is 40% or more and the borrower does not show that the debt percentage is less than 110% of the debt percentage of the borrower's worldwide group under subpart FE, or, for each lender on the latest calculation date,—

(i) there is no ultimate owner having an ownership interest in the lender, determined under sections FE 38 to FE 41, of 50% or more that is resident in the same country or territory as the lender; and

(ii) under the tax law of the country or territory in which the lender is resident, income from the borrower's cross-border related borrowings is, and would be for a company having the usual tax status of a company, subject to taxation at a rate of less than 15%; and

(c) the borrower does not elect to use the optional credit rating given by subsection (11), for the loan, in the first return of income that includes the loan.

Borrowers with optional credit rating for some loans

(5) A borrower has for a loan the optional credit rating given by subsection (11) if the borrower chooses to use the rate given by that subsection in the first return of income that includes the loan and uses the rate for an amount of related-party debt that is less than or equal to 4 times the total value of the long-term senior unsecured debt, that is not related-party debt, for which the borrower or a member of the borrower's New Zealand group has the credit rating.

Calculation dates for loan

(6) A calculation date under subsections (2) to (4) for a borrower for a loan is a date—

(a) that is the day before the first income year of the borrower beginning on or after 1 July 2018, if the borrower enters the loan before that income year and does not use an earlier date under paragraph (d):

(b) that is the day on which the borrower enters the loan, if that day is on or after the beginning of the first income year of the borrower beginning on or after 1 July 2018:

(c) on or after the beginning of the first income year of the borrower beginning on or after 1 July 2018, on which the loan is renewed, extended, or renegotiated:

(d) that is the last day before 1 July 2018 on which the loan is entered, renewed, extended, or renegotiated, if the borrower treats the date as a calculation date in the return of income provided for the first income year beginning on or after 1 July 2018.

Approximate calculation if calculation date not balance date

(7) If a calculation date under subsection (6) is not a measurement date under section FE 8 (Measurement dates) for which the borrower measures the amounts of total group debt and total group assets, and follows a measurement date for which the borrower has made such measurements, the debt percentage may be calculated by making appropriate adjustments to the debt percentage calculated for the most recent measurement date.

Default credit rating

(8) The credit rating of a borrower under this subsection is the credit rating that the borrower has for long-term senior unsecured debt or, if the borrower does not have such a credit rating, the credit rating for long-term senior unsecured debt that the borrower would have under section GC 13 in the absence of this section and section GC 15.

Restricted credit rating

(9) The credit rating of a borrower under this subsection is the higher of—

(a) BBB−, or an equivalent rating, given for the borrower by a rating agency approved by the Reserve Bank of New Zealand under section 86 of the Non-bank Deposit Takers Act 2013:

(b) the credit rating that the borrower would have if the borrower's New Zealand group under subpart FE had a debt percentage equal to the lesser of 40% and the debt percentage of the New Zealand group.

Group credit rating

(10) The credit rating of a borrower under this subsection is the higher of—

(a) the credit rating for long-term senior unsecured debt of the member, of the borrower's worldwide group under subpart FE, that has the most such debt, reduced by,—

(i) if the member has a credit rating lower than BBB+, the division (the **notch**) that is the smallest division within the credit rating category or is the division between credit rating categories:

(ii) if the member has a credit rating of BBB+ or higher, 2 notches:

(b) the credit rating for long-term senior unsecured debt that the borrower would have under section GC 13 in the absence of this section and section GC 15.

Optional credit rating

(11) The credit rating of a borrower under this subsection is—

(a) the credit rating of the borrower, or a member of the borrower's New Zealand group, for existing long-term senior unsecured debt that is not related-party debt, if the borrower or member has such a credit rating; or

(b) the credit rating corresponding to the rate of interest incurred by the borrower, or a member of the borrower's New Zealand group, for existing long-term senior unsecured debt that is not related-party debt.

Defined in this Act: cross-border related borrowing, financial arrangement, generally accepted accounting practice, loan, net loss, non-resident owning body, ownership interest, quarter, related-party debt, return of income, ultimate owner

GC 17 Credit rating of borrower: insuring or lending person

For the purposes of sections GC 7 to GC 14, a borrower that is referred to as an insuring or lending person in section GC 15(2) has a credit rating for a cross-border related borrowing that is equal to—

(a) the credit rating for long-term senior unsecured debt of the member of the borrower's worldwide group, under subpart FE (Interest apportionment on thin capitalisation), having the greatest long-term senior unsecured debt, if the borrower has debt under cross-border related borrowings including the loan of $10 million or more on the most recent calculation date given for the loan by section GC 16(4); or

(b) the credit rating for long-term senior unsecured debt that the borrower would have under section GC 13 in the absence of this section and section GC 15, if the borrower has debt under cross-border related borrowings including the loan of less than $10 million on the most recent calculation date; or

(c) the optional credit rating given for the borrower by section GC 16(11), if the borrower chooses to use the rate given by that subsection and uses the rate for an amount of related-party debt that is less than or equal to 4 times the total value of the long-term senior unsecured debt, that is not related-party debt, for which the borrower or a member of the borrower's New Zealand group has the credit rating.

Defined in this Act: cross-border related borrowing, loan

GC 18 Loan features disregarded by rules for transfer pricing arrangements

When this section applies

(1) This section applies when sections GC 7 to GC 14 are applied to a borrower and a transfer pricing arrangement including a financial arrangement (the **loan**) that is a cross-border related borrowing, as referred to in section GC 15(1).

General rule

(2) A feature of the loan is disregarded, or adjusted as required by this section, for the purposes of applying sections GC 7 to GC 14 if—

(a) the borrower has debt under cross-border related borrowings, including the loan, of $10 million or more on the most recent calculation date given for the loan by section GC 16(4); and

(b) the feature may increase the rate of interest payable by the borrower under the loan and—

(i) is referred to in subsection (3); and

(ii) is not included in an exception under subsections (9) and (10).

Loan features disregarded or adjusted if no exception

(3) A feature of a financial arrangement that is a cross-border related borrowing may be disregarded or adjusted under this section if the feature—

(a) allows the reduction of a liability for interest or principal by a provision of value other than payment of an amount of money:

(b) allows a liability to pay interest to be deferred for a period of more than 12 months:

(c) provides for a change in the rate of interest payable that is contingent on an event within the control of the borrower or the lender:

(d) excludes the exercise of a lender's usual rights to enforce the payment of interest or repayment of principal:

(e) provides that a liability to pay interest or repay principal is contingent on an event within the control of the borrower or the lender:

(f) provides that the term of the loan from when the financial arrangement is entered is more than 5 years:

(g) provides that the borrower's obligations under the loan are subordinate to other financial arrangements of the borrower.

Term of loan

(4) A term of more than 5 years for a cross-border related borrowing may be adjusted under subsection (8) if the exception in subsection (10) does not apply.

Quantities affecting adjustment to term

(5) Whether an adjustment is required under subsection (8), and the amount of a required adjustment, is found for the date (the **calculation date**) on which the loan is entered or renewed or extended using—

(a) the figure (the **threshold term**) calculated using the formula in subsection (6) for financial arrangements having a term of more than 5 years—

(i) included in the total group debt of the borrower's worldwide group under subpart FE (Interest apportionment on thin capitalisation); or

(ii) between members of the borrower's New Zealand group under subpart FE and persons other than associated persons:

(b) the value of the financial arrangements used in calculating the threshold term, expressed as a fraction (the **threshold fraction**) of—

(i) the total group debt of the borrower's worldwide group, if the threshold term is calculated under paragraph (a)(i); or

(ii) the total value of loans to members of the borrower's New Zealand group by persons other than associated persons, if the threshold term is calculated under paragraph (a)(ii).

Threshold term

(6) The threshold term for the purposes of subsection (5)(a) is the total of amounts, each of which is calculated using the formula—

term × term debt ÷ long-term debt.

Definition of items in formula

(7) In the formula,—

(a) **term** is the period of the loan term, calculated from the most recent date on which each loan is entered or renewed or extended:

(b) **term debt** is the total value on the calculation date of the principal amounts of loans with the loan term:

(c) **long-term debt** is—

(i) the total group debt having a term of more than 5 years of the borrower's worldwide group, if the threshold term is calculated for financial arrangements described in subsection (5)(a)(i); or

(ii) the total value of loans having a term of more than 5 years to members of the borrower's New Zealand group by persons other than associated persons, if the threshold term is calculated for financial arrangements described in subsection (5)(a)(ii).

Term of loan: adjustment

(8) The term of a loan is adjusted to equal—

(a) the threshold term under subsection (5)(a), if—

(i) the term of the loan exceeds the threshold term; and

(ii) the total value of loans to members of the borrower's New Zealand group by associated persons and having a term of more than 5 years, expressed as a proportion of the total value of loans to members of the borrower's New Zealand group by associated persons, does not exceed the threshold fraction under subsection (5)(b); or

(b) 5 years, if when the loan is included, the total value of loans to members of the borrower's New Zealand group by associated persons and having a term of more than 5 years,—

(i) expressed as a proportion of the total value of loans to members of the borrower's New Zealand group by associated persons, exceeds the threshold fraction under subsection (5)(b):

(ii) is more than 4 times the total value of financial arrangements with the feature that are included in total group debt of the borrower's worldwide group, when the threshold fraction is determined under subsection (5)(b)(i):

(iii) is more than 4 times the total value of financial arrangements with the feature that are included in the debt that is financial arrangements between members of the borrower's New Zealand group and persons other than associated persons, when the threshold fraction is determined under subsection (5)(b)(ii).

Exceptions for features reflecting other borrowing

(9) For a borrower that is not referred to as an insuring or lending person in section GC 15(2)(a), (b), or (c) and a feature of a financial arrangement other than the term of a loan, the feature is not disregarded or adjusted if—

(a) the feature corresponds to a feature of financial arrangements with a total value that is a fraction (the **feature fraction**) of the total value of financial arrangements—

(i) included in the total group debt of the borrower's worldwide group under subpart FE; or

(ii) between members of the borrower's New Zealand group under subpart FE and persons other than associated persons; and

(b) the feature is included in financial arrangements, between members of the borrower's New Zealand group under subpart FE and associated persons, having a total value when the loan is included that,—

(i) as a fraction of the total value of financial arrangements between the members of the borrower's New Zealand group and associated persons, is less than or equal to the feature fraction; and

(ii) if the feature fraction is determined under paragraph (a)(i), is less than or equal to 4 times the total value of financial arrangements with the feature that are included in total group debt of the borrower's worldwide group; and

(iii) if the feature fraction is determined under paragraph (a)(ii), is less than or equal to 4 times the total value of financial arrangements with the feature that are included in the debt that is financial arrangements between members of the borrower's New Zealand group and persons other than associated persons.

Exceptions for borrowing required for some insuring or lending persons

(10) For a borrower that is referred to as an insuring or lending person in section GC 15(2)(a), (b), or (c) or is associated with such a person, a feature of a financial arrangement is not disregarded or adjusted if,—

(a) for a borrower referred to in section GC 15(2)(a), the feature reflects a requirement, applicable when the financial arrangement is entered, for an arrangement to be recognised by the Reserve Bank of New Zealand as regulatory capital for a member of the New Zealand banking group of a registered bank:

(b) for a borrower who is associated with a person (the **banking associate**) referred to in section GC 15(2)(a),—

(i) the financial arrangement (the **funding arrangement**) is entered for the purpose of providing funds for a financial arrangement or excepted financial arrangement (the **funded arrangement**), to be entered by the banking associate to satisfy regulatory capital requirements; and

(ii) the features of the funding arrangement reflect the features of the funded arrangement; and

(iii) the feature reflects a feature of the funded arrangement that meets the requirements of paragraph (a):

(c) for a borrower referred to in section GC 15(2)(b), the feature reflects solvency capital requirements that relate to features of loans and are imposed, when the financial arrangement is entered, on a licensed insurer as a condition of licence under the Insurance (Prudential Supervision) Act 2010:

(d) for a borrower who is associated with a person (the **insuring associate**) referred to in section GC 15(2)(b),—

(i) the financial arrangement (the **funding arrangement**) is entered for the purpose of providing funds for a financial arrangement (the **funded arrangement**), to be entered by the insuring associate to satisfy solvency capital requirements; and

(ii) the features of the funding arrangement reflect the features of the funded arrangement; and

(iii) the feature reflects a feature of the funded arrangement that meets the requirements of paragraph (c):

(e) for a borrower referred to in section GC 15(2)(c), the feature reflects minimum capital ratio requirements that relate to features of loans and are imposed, when the financial arrangement is entered, on a non-bank deposit taker by the non-bank deposit taker's trust deed and regulations 8 and 10 of the Deposit Takers (Credit Ratings, Capital Ratios, and Related Party Exposures) Regulations 2010:

(f) for a borrower who is associated with a person (the **deposit taker associate**) referred to in section GC 15(2)(c),—

(i) the financial arrangement (the **funding arrangement**) is entered for the purpose of providing funds for a financial arrangement (the **funded arrangement**), to be entered by the deposit taker associate to satisfy minimum capital ratio requirements; and

(ii) the features of the funding arrangement reflect the features of the funded arrangement; and

(iii) the feature reflects a feature of the funded arrangement that meets the requirements of paragraph (e).

Defined in this Act: associated, associated person, cross-border related borrowing, financial arrangement, interest, loan, New Zealand banking group, payment, transfer pricing arrangement

GC 19 Sections GC 15 to GC 18 and financial arrangements entered before application period

If a person enters a financial arrangement before the first income year of the person beginning on or after 1 July 2018, this subpart applies to the person and the financial arrangement for the income years beginning on or after 1 July 2018 as if the aspects of the financial arrangement were adjusted by sections GC 15 to GC 18 as at the date that is the last day before 1 July 2018 on which the loan is entered, renewed, extended, or renegotiated.

Defined in this Act: financial arrangement, income year, loan, return of income

(2) Subsection (1) applies to a person and a financial arrangement, other than an arrangement that complies with an advance pricing agreement issued before 1 July 2018 by the Commissioner, for income years beginning on or after 1 July 2018.

43 New section HD 30 inserted (Members of wholly-owned large multinational group)

After section HD 29, insert:

HD 30 Members of wholly-owned large multinational group

A member of a wholly-owned large multinational group who is a New Zealand resident or has a permanent establishment in New Zealand is treated as an agent of a member of the large multinational group (the **principal member**) who is a non-resident in relation to unpaid tax of the principal member if—

(a) the principal member fails to pay the unpaid tax; and

(b) the Commissioner notifies the member that the member has the obligations of an agent for the principal member and the unpaid tax.

Defined in this Act: agent, large multinational group, New Zealand resident, permanent establishment, tax

44 Section IA 2 amended (Tax losses)

(1) After section IA 2(4)(g), insert:

(h) a person who has a mismatch amount under section FH 8 (Expenditure or loss through hybrid entity or foreign deducting branch producing double deduction without double income) that is not set off under section FH 12 (Offset of mismatch amounts against surplus assessable income), the amount given by section FH 12(8) for the tax year.

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

45 Section LE 1 amended (Tax credits for imputation credits)

(1) In section LE 1(2), after "section LE 7", insert "except if the person is related to the share user or the returning share transfer is a structured arrangement, *see* section FH 4(5) (Receipts under financial instruments producing deduction without income)".

(2) In section LE 1, list of defined terms, insert "related" and "structured arrangement".

(3) Subsection (1) applies for income years beginning on or after 1 July 2018.

46 Section RF 2C amended (Meaning of non-resident financial arrangement income)

(1) In section RF 2C(4), formula, replace "accumulated accruals" with "(accumulated accruals − hybrid deductions)".

(2) After section RF 2C(5)(b), insert:

(c) **hybrid deductions** is an amount equal to the part of the expenditure that the borrower incurs under the arrangement in the period given by paragraph (b) that has been denied as a deduction under subpart FH (Hybrid and branch mismatches of deductions and income from multi-jurisdictional arrangements) when the expenditure is incurred and is not allowed as a deduction under the subpart in that period, on the date referred to in paragraph (b)(ii).

(3) In section RF 2C, list of defined terms, insert "arrangement" and "ring-fenced tax loss".

(4) Subsections (1) and (2) apply for income years beginning on or after 1 July 2018.

47 New section RF 11C inserted (Interest paid by non-resident companies to non-residents)

(1) After section RF 11B, insert:

RF 11C Interest paid by non-resident companies to non-residents

When this section applies

(1) This section applies in relation to an amount of non-resident passive income that consists of interest and is paid—

(a) by a company that is resident in a country or territory outside New Zealand for the purposes of a double tax agreement; and

(b) to a person that is resident in a country or territory outside New Zealand for the purposes of the double tax agreement.

Application of double tax agreement and NRWT rules to amount

(2) The double tax agreement and the NRWT rules apply to the amount as being interest, despite any provision in the double tax agreement that would otherwise require the amount to be treated as being a dividend.

Defined in this Act: amount, company, dividend, double tax agreement, interest, New Zealand, non-resident passive income, NRWT rules, pay, tax

(2) Subsection (1) applies for a person for the 2008–09 and later income years except for a payment of non-resident passive income made before the date of introduction of the Taxation (Neutralising Base Erosion and Profit Shifting) Bill, for which the person has adopted a tax position that is inconsistent with the amendment made by subsection (1).

48 Section RM 2 amended (Refunds for overpaid tax)

(1) In section RM 2(1)(b)(i), replace "subparagraph (ii) does" with "subparagraphs (ib) and (ii) do".

(2) After section RM 2(1)(b)(i), insert:

(ib) the 7-year period under section GC 13(6) (Calculation of arm's length amounts) for amendment of assessments, if that subsection applies; or

(3) Subsections (1) and (2) apply for an arrangement and income years beginning on or after 1 July 2018, other than for an arrangement that complies with an advance pricing agreement issued by the Commissioner before 1 July 2018.

49 Section YA 1 amended (Definitions)

(1) This section amends section YA 1.

(2) Insert, in appropriate alphabetical order:

act together is defined in section FH 15(1) (Definitions)

(3) In the definition of **arm's length amount**, replace "Purpose of rules and nature of arrangements" with "Purpose and application of rules and nature of arrangements".

(4) Insert, in appropriate alphabetical order:

branch mismatch report is defined in section FH 15(1) (Definitions)

(5) Insert, in appropriate alphabetical order:

control group is defined in section FH 15(1) (Definitions)

(6) Insert, in appropriate alphabetical order:

country-by-country report is the report that must be provided to the Commissioner under section 78G of the Tax Administration Act 1994

(7) Insert, in appropriate alphabetical order:

cross-border related borrowing is defined in section GC 6(3B) (Purpose and application of rules and nature of arrangements)

(8) In the definition of **deductible foreign equity distribution**,—

(a) in paragraph (a), replace "a deduction is allowed" with "a deduction against income or equivalent tax relief or tax benefit is allowed, or would be allowed in the absence of hybrid mismatch legislation,":

(b) in paragraph (b)(ii), replace "allowed a deduction" with "allowed, or would be allowed in the absence of hybrid mismatch legislation, a deduction against income or equivalent tax relief or tax benefit".

(9) Insert, in appropriate alphabetical order:

deducting branch is defined in section FH 15(1) (Definitions)

(10) Insert, in appropriate alphabetical order:

entity is defined in section FH 15(1) (Definitions)

(11) Insert, in appropriate alphabetical order:

financial instrument is defined in section FH 15(1) (Definitions)

(12) In the definition of **goods**, replace "and EA 3 (Prepayments)" with "EA 3 (Prepayments), GB 54 (Arrangements involving establishments), and YD 4B (Meaning of permanent establishment)".

(13) Insert, in appropriate alphabetical order:

hybrid mismatch legislation is defined in section FH 15(1) (Definitions)

(14) Insert, in appropriate alphabetical order:

hybrid mismatch report is defined in section FH 15(1) (Definitions)

(15) Insert, in appropriate alphabetical order:

large multinational group, for an income year or a period set by the Commissioner under section 78G of the Tax Administration Act 1994, means a consolidated accounting group that, in the income year or period,—

(a) has a member resident in New Zealand or income with a source in New Zealand; and

(b) has a member resident in a country or territory other than New Zealand; and

(c) in the preceding income year or period, has annual consolidated group revenue equal to or exceeding the exemption threshold referred to in paragraph 5.53 of the OECD transfer pricing guidelines

(16) In the definition of **life reinsurer**, replace “sections EY 12(4)” with “sections EY 12(5)”.

(17) Insert, in appropriate alphabetical order:

mismatch amount is defined in section FH 15(1) (Definitions)

(18) Insert, in appropriate alphabetical order:

mismatch situation is defined in section FH 15(1) (Definitions)

(19) Insert, in appropriate alphabetical order:

OECD transfer pricing guidelines means guidelines published by the Organisation for Economic Co-operation and Development as *OECD 2017, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* 2017, OECD Publishing, Paris

(20) Insert, in appropriate alphabetical order:

permanent establishment is defined in section YD 4B (Meaning of permanent establishment)

(21) Insert, in appropriate alphabetical order:

public project asset is defined in section FE 4B (Meaning of public project asset, public project debt, and public project participant debt)

public project debt is defined in section FE 4B (Meaning of public project asset, public project debt, and public project participant debt)

public project participant debt is defined in section FE 4B (Meaning of public project asset, public project debt, and public project participant debt)

(22) Insert, in appropriate alphabetical order:

related is defined in section FH 15(1) (Definitions)

(23) Replace the definition of **related-party debt** with:

related-party debt is defined in—

(a) section RF 12H (Meaning of related-party debt) for the purposes of the NRWT rules:

(b) section RF 12H(1), otherwise

(24) In the definition of **returning share transfer**, paragraph (a)(i), delete “listed on an official list of a recognised exchange”.

(25) In the definition of **services**, paragraph (b), replace “subpart MX, and in” with “and GB 54 (Arrangements involving establishments), in subpart MX, in section YD 4B (Meaning of permanent establishment), and in”.

(26) Insert, in appropriate alphabetical order:

structured arrangement is defined in section FH 15(1) (Definitions)

(27) Insert, in appropriate alphabetical order:

surplus assessable income is defined in section FH 15(1) (Definitions)

(28) Insert, in appropriate alphabetical order:

total group non-debt liabilities is defined in section FE 16B (Total group non-debt liabilities) for the purposes of subpart FE (Interest apportionment on thin capitalisation)

(29) In the definition of **transfer pricing arrangement**, replace “Purpose of rules and nature of arrangements” with “Purpose and application of rules and nature of arrangements”.

(30) Insert, in appropriate alphabetical order:

wholly-owned large multinational group means a large multinational group for which a group of persons holds all the ownership interests in each member

(31) Subsections (2) to (5), (8), (11) to (14), and (16) to (30) apply for income years beginning on or after 1 July 2018.

50 Section YD 4 amended (Classes of income treated as having New Zealand source)

(1) After section YD 4(17B), insert:

Income through permanent establishment

(17C) Income attributable to a permanent establishment in New Zealand of a non-resident has a source in New Zealand, except if—

(a) subsections (15) to (17) provide otherwise:

(b) the income is a dividend from a share in a foreign company that is not revenue account property.

Income taxable under double tax agreement

(17D) Income of a non-resident that may be taxed in New Zealand under a double tax agreement has a source in New Zealand, except if the income is a dividend from a share in a foreign company that is not revenue account property.

(2) In section YD 4, list of defined terms, insert “dividend”, “double tax agreement”, “foreign company”, “permanent establishment”, and “revenue account property”.

(3) Subsection (1) applies for income years beginning on or after 1 July 2018, other than for an arrangement that complies with an advance pricing agreement issued before 1 July 2018 by the Commissioner.

51 New section YD 4B inserted (Meaning of permanent establishment)

(1) After section YD 4, insert:

YD 4B Meaning of permanent establishment

What this section does

(1) This section gives the meaning of **permanent establishment** for a person or other enterprise (the **enterprise**) that makes in New Zealand a supply of goods or services.

Double tax agreement with applicable definition

(2) **Permanent establishment**, for an enterprise that is resident in a country or territory with which New Zealand has a double tax agreement that includes a definition of permanent establishment, has the meaning given by—

(a) the double tax agreement:

(b) section GB 54 (Arrangements involving establishments), if the enterprise meets the requirements of the section.

No double tax agreement with applicable definition

(3) **Permanent establishment**, for an enterprise that is resident in New Zealand or in a country or territory with which New Zealand does not have a double tax agreement that includes a definition of permanent establishment, has the meaning given by schedule 23 (Meaning of permanent establishment).

Interpretation of schedule 23

(4) Schedule 23 is treated as applying consistently with the guidance relevant to the schedule that is provided by the Commentary on Article 5 of the Model Tax Convention on Income and on Capital, in *Model Tax Convention on Income and on Capital* published by the Organisation for Economic Co-operation and Development, as amended at the beginning of the income year in which the enterprise makes the supply.

Defined in this Act: business, double tax agreement, goods, New Zealand, non-resident, permanent establishment, resident in New Zealand, services

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

52 Section YD 5 amended (Apportionment of income derived partly in New Zealand)

(1) After section YD 5(1), insert:

Exception when permanent establishment

(1BA) This section does not apply to business activities that a person carries on through a permanent establishment in New Zealand.

(2) Subsection (1) applies for income years beginning on or after 1 July 2018, other than for an arrangement that complies with an advance pricing agreement issued before 1 July 2018 by the Commissioner.

53 New section YD 5B inserted (Attribution of income and expenditure to permanent establishment in New Zealand)

(1) After section YD 5, insert:

YD 5B Attribution of income and expenditure to permanent establishment in New Zealand

When this section applies

(1) This section applies when a person carries on business activities through a permanent establishment in New Zealand.

Apportionment

(2) The amounts of income and expenditure of the person that must be attributed to the permanent establishment are the amounts of income and expenditure that the permanent establishment might be expected to derive and incur if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the person.

Defined in this Act: amount, income, New Zealand, permanent establishment

(2) Subsection (1) applies for income years beginning on or after 1 July 2018, other than for an arrangement that complies with an advance pricing agreement issued before 1 July 2018 by the Commissioner.

54 New schedule 23 inserted (Meaning of permanent establishment)

(1) After schedule 22, insert the schedule 23 in the schedule.

(2) Subsection (1) applies for income years beginning on or after 1 July 2018.

Part 2
Amendments to Tax Administration Act 1994

55 Tax Administration Act 1994

This Part amends the Tax Administration Act 1994.

56 Section 17 amended (Information to be furnished on request of Commissioner)

After section 17(1C), insert:

(1CB) For the purpose of subsection (1) and sections 139AB, 143(2) and 143A(2), information or a document is treated as being in the knowledge, possession, or control of a member of a large multinational group in an income year, disregarding any law of a foreign country relating to the secrecy of information, if the information or document is relevant to the taxation of the large multinational group and is in the knowledge, possession, or control of the member or another member of the large multinational group.

57 New section 21BA inserted (Information required to be provided by large multinational group)

After section 21, insert:

21BA Information required to be provided by large multinational group

(1) This section applies if the Commissioner notifies a member of a large multinational group by a notice (the **information demand**) that the member is required under section 17 to provide information relating to the large multinational group or to a member of the large multinational group, and the member—

(a) fails to provide, by the date that is 3 months after the information demand (the **demand date**), a response to the information demand:

(b) provides, by the demand date, a response that the Commissioner considers to be misleading because it contains misleading information or omits relevant information:

(c) provides, by the demand date, a response that the Commissioner considers omits information, whether or not in the knowledge, possession, or control of the member, required by the information demand for the calculation of—

(i) an arm's length amount for a cross-border transaction:

(ii) an amount of profit attributable to a permanent establishment in New Zealand of the member or another member of the large multinational group:

(d) provides, by the demand date, a response that the Commissioner considers does not fulfil the requirements of the information demand.

(2) The Commissioner must notify the member by a further notice that if the member does not provide a satisfactory response to the information demand before the date (the **information deadline**) that is 1 month after the date of the further notice,—

(a) the Commissioner may rely on the information held by the Commissioner in exercising the Commissioner's powers to prosecute, penalise, assess, or reassess the member or other members of the large multinational group for a tax year to which the information required by the information demand relates; and

(b) information required by the information demand and not provided to the Commissioner by the information deadline will not be allowed as evidence for use by the member or other member of the large multinational group in a dispute concerning an action of the Commissioner referred to in paragraph (a).

(3) If a member of a large multinational group disputes a prosecution, imposition of a penalty, assessment, or reassessment, relating to a tax year, and information that is required by an information demand and relates to the tax year is not provided to the Commissioner before the information deadline, the information that is not the subject of a court order under subsection (4) is not—

(a) allowed as evidence for use by the member in a disputes procedure under Part 4A:

(b) admissible as evidence for the member in proceedings under Part 8 or Part 8A, or other proceedings.

(4) A member of a large multinational group is allowed to use information in a way that would otherwise be prevented by subsection (3) if a court or Authority—

(a) determines that obtaining the information in response to the information demand would have required an investment by the member of time and resources that would have been unreasonable in relation to the relevance of the information to the tax issues involved; and

(b) determines that admission of the evidence is necessary to avoid manifest injustice to the member; and

(c) orders that the information be allowed or admissible as evidence in the proceedings.

58 New section 78G inserted (Country-by-country report from large multinational group)

Before section 79, insert:

78G Country-by-country report from large multinational group

(1) A large multinational group with an ultimate owner that is a New Zealand resident must provide to the Commissioner a report, for each period set by the Commissioner, that includes—

(a) the information described in the OECD transfer pricing guidelines, Chapter V, Annex III; and

(b) other information that is required by the Commissioner.

(2) The report for a period must be provided to the Commissioner by the date that is 12 months after the end of the period.

59 New section 139AB inserted (Penalty for member of large multinational group failing to provide information)

After section 139AA, insert:

139AB Penalty for member of large multinational group failing to provide information

(1) A member of a large multinational group is liable to pay a penalty under this section if—

(a) the Commissioner requires the member under section 17 to provide information or a document that is treated under section 17(1CB) as being in the knowledge, possession, or control of the company; and

(b) the member fails to provide the information or document within the time allowed by the Commissioner.

(2) The penalty under this section is the amount specified by the Commissioner, which must not exceed $100,000.

60 New section 142GB inserted (Due date for payment of penalty by member of large multinational group)

After section 142G, insert:

142GB Due date for payment of penalty by member of large multinational group

The due date for payment, by a member of a large multinational group, of a penalty under section 139AB is the date that the Commissioner specifies in the notice of assessment for the penalty, which must be 30 days or more after the date on which the notice of assessment is issued.

Schedule
New schedule 23

s 54

Schedule 23
Meaning of permanent establishment

s YD 4B(3)

Permanent establishment

1 The term **permanent establishment** means a fixed place of business through which the business of a person or other entity (an **enterprise**) is wholly or partly carried on.

2 The term **permanent establishment** includes especially—

(a) a place of management; and

(b) a branch; and

(c) an office; and

(d) a factory; and

(e) a workshop; and

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3 A building site, or a construction, installation or assembly project, or supervisory activities in connection with that building site or construction, installation or assembly project, constitutes a permanent establishment if it lasts more than 6 months.

4 An enterprise shall be deemed to have a permanent establishment in a country or territory (the **State**) and to carry on business through that permanent establishment if for more than 183 days in any 12-month period—

(a) it carries on activities in that State which consist of, or which are connected with, the exploration for or exploitation of natural resources, including standing timber, situated in that State; or

(b) it operates substantial equipment in that State.

5 Notwithstanding the provisions of clauses 1 and 2 where an enterprise of a State performs services in another State (the **other State**)—

(a) through an individual who is present in that other State for a period or periods exceeding in the aggregate 183 days in any 12-month period, and more than 50% of the gross revenues attributable to active business activities of the enterprise during this period or periods are derived from the services performed in that other State through that individual; or

(b) for a period or periods exceeding in the aggregate 183 days in any 12-month period, and these services are performed for the same project or for connected projects through 1 or more individuals who are present and performing such services in that other State—

the activities carried on in that other State in performing these services shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State, unless these services are limited to those mentioned in clause 7 which, if performed through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that clause. For the purposes of this clause, services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual.

6 For the sole purpose of determining whether the time period referred to in clauses 3, 4, and 5 has been exceeded,—

(a) where an enterprise of a State carries on activities referred to in clause 3, 4, or 5 for a period of more than 30 days and these activities are carried on during periods of time that do not last more than the period stipulated in those clauses; and

(b) connected activities are carried on in that other State during different periods of time, each exceeding 30 days, by 1 or more enterprises closely related to the first-mentioned enterprise.

These different periods of time shall be added to the period of time during which the first-mentioned enterprise has carried on the activities referred to in clause 3, 4, or 5.

7 Notwithstanding the preceding provisions of this section, the term **permanent establishment** shall be deemed not to include—

(a) the use of facilities solely for the purpose of storage, display, or delivery of goods or merchandise belonging to the enterprise:

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display, or delivery:

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise:

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise:

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity:

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subclauses (a) to (e)—

Provided that such activity, or in the case of subclause (f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

7.1 Clause 7 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same State and—

(a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Schedule; or

(b) the overall activity resulting from the combination of the activities carried on by the 2 enterprises at the same place, or by the same enterprise or closely related enterprises at the 2 places, is not of a preparatory or auxiliary character—

Provided that the business activities carried on by the 2 enterprises at the same place, or by the same enterprise or closely related enterprises at the 2 places, constitute complementary functions that are part of a cohesive business operation.

8 Notwithstanding the provisions of clauses 1 and 2 but subject to the provisions of clause 9, where a person is acting in a State on behalf of an enterprise and, in doing so,—

(a) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are—

(i) in the name of the enterprise; or

(ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use; or

(iii) for the provision of services by that enterprise; or

(b) manufactures or processes in a State for the enterprise goods or merchandise belonging to the enterprise,—

that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in clause 7 which, if exercised through a fixed place of business (other than a fixed place of business to which clause 7.1 would apply), would not make this fixed place of business a permanent establishment under the provisions of that subsection.

9 Clause 8 shall not apply where the person acting in a State on behalf of an enterprise of the other State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of 1 or more enterprises to which it is closely related, that person shall

not be considered to be an independent agent within the meaning of this clause with respect to any such enterprise.

10 The fact that a company which is a resident of a State controls or is controlled by a company which is a resident of the other State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

11 For the purposes of this clause, a person or enterprise is closely related to an enterprise if, based on all the relevant facts and circumstances, 1 has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if 1 possesses directly or indirectly more than 50% of the beneficial interest in the other (or, in the case of a company, more than 50% of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person or enterprise possesses directly or indirectly more than 50% of the beneficial interest (or, in the case of a company, more than 50% of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise or in the 2 enterprises.

Reprints notes

1 General

This is a reprint of the Taxation (Neutralising Base Erosion and Profit Shifting) Act 2018 that incorporates all the amendments to that Act as at the date of the last amendment to it.

2 Legal status

Reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by any amendments to that enactment. Section 18 of the Legislation Act 2012 provides that this reprint, published in electronic form, has the status of an official version under section 17 of that Act. A printed version of the reprint produced directly from this official electronic version also has official status.

3 Editorial and format changes

Editorial and format changes to reprints are made using the powers under sections 24 to 26 of the Legislation Act 2012. See also http://www.pco.parliament.govt.nz/editorial-conventions/.

4 Amendments incorporated in this reprint

Taxation (Annual Rates for 2018–19, Modernising Tax Administration, and Remedial Matters) Act 2019 (2019 No 5): section 355

Wellington, New Zealand:

Published under the authority of the New Zealand Government—2019