
Future information requirements for foreign trusts with New Zealand-resident trustees: amended proposal

1. On behalf of the New Zealand government, tax policy officials are conducting a second round of consultation on proposed changes that would require foreign trusts with New Zealand-resident trustees to provide certain information to New Zealand's Inland Revenue Department.
2. The amended proposal outlined here is intended to strike the correct balance between ensuring that New Zealand is in a position to meet its commitments under its double tax agreements, and ensuring that the obligations imposed on foreign trusts are not onerous and do not give rise to legitimate privacy concerns.
3. The amended proposal differs from the previous proposal in that New Zealand-resident trustees of foreign trusts will be required to provide only limited information to Inland Revenue upon appointment and to maintain records in New Zealand so information can be provided to Inland Revenue *if requested*. Under the previous proposal, trustees would have been required to provide Inland Revenue with an annual disclosure statement, including a full set of financial accounts.

Background

4. In June 2004 Dr Michael Cullen, the Minister of Finance and the Minister of Revenue, agreed, in principle, to introduce certain record-keeping and filing requirements for foreign trusts with New Zealand-resident trustees. The reason for proposing such requirements was to enable New Zealand to provide information on such foreign trusts when other tax authorities request it – as many are entitled to do under double tax agreements signed with New Zealand. Officials were directed to undertake consultation on the proposal.
5. A number of submissions we received in response to the first round of consultation suggested the development of a system to regulate New Zealand-resident trustees who provide trustee services to foreign trusts. From a tax policy perspective, the tax rules should not regulate who can provide or offer trustee services.
6. Although we do not favour regulating who can provide trustee services, there is a case for requiring at least one New Zealand-resident trustee of each foreign trust to be a member of an acceptable professional body whose members are subject to a code of conduct, ethics and disciplinary measures. Under the amended proposal, the onus will be on the New Zealand-resident trustee to maintain and provide the necessary records. Given this, requiring at least one New Zealand-resident trustee to be a member of an accepted professional body will provide assurance to Inland Revenue

that a trustee has the necessary expertise to maintain records of the required standard and will comply with the law.

7. Once consultation on the amended proposal is complete, the Minister will make final policy decisions based on officials' recommendations and feedback received from the second round of consultation.

Summary of the proposal

8. The proposal will require New Zealand-resident trustees to:

- provide limited information to Inland Revenue upon appointment as trustee of a foreign trust;
- maintain certain information relating to the trust in New Zealand and provide this information to Inland Revenue if requested; and
- at least one New Zealand-resident trustee of a foreign trust to be a member of an acceptable professional body such as an accounting or legal body.

9. New Zealand-resident trustees who fail to disclose the requested information to Inland Revenue and to maintain records in New Zealand for New Zealand tax purposes will be subject to sanctions. They may be liable to New Zealand tax and criminal penalties for failing to keep records or provide the information requested.

10. The proposal is intended to ensure that New Zealand is in a position to meet its commitments, under its double tax agreements, to co-operate with other tax jurisdictions. We want to achieve this in a way that minimises any impact on legitimate transactions and commerce, as well as legitimate privacy concerns.

11. There is no intention to change the current New Zealand income tax treatment of foreign trusts that meet the necessary requirements under this proposal.

12. Under New Zealand law, a foreign trust is one that has had no New Zealand-resident settlor from the later of 17 December 1987 or the date upon which the first settlement was made to the trust. The income of a foreign trust is not liable to New Zealand income tax as long as the settlor remains a non-resident, no trust income is earned in New Zealand and no beneficiary of the trust is a New Zealand resident.

Information to be disclosed to Inland Revenue

13. New Zealand-resident trustees of foreign trusts will be required to provide the following information to Inland Revenue upon their appointment, or the enactment of the proposal in relation to existing appointments:

- the name of the trust or other identifying feature(s) such as the trust number and/or the date of settlement of the trust;

- the name and contact details of the trustee(s); and
- the country of residence of the settlor(s) if the country is specified in the law or by way of Regulation (see paragraph 16-18).

14. If any of this information changes and a trustee is aware of the change, the trustee will be obliged to inform Inland Revenue so the information can be updated.

15. A specific statutory disclosure requirement similar to section 59 of the Tax Administration Act 1994 will be required.

16. The New Zealand-resident trustee will be required to disclose the country of residence of the settlor to Inland Revenue only if the country requesting it is explicitly specified in New Zealand law.

17. Inland Revenue has agreed to provide automatically to the Australian Taxation Office, information relating to foreign trusts that have a New Zealand-resident trustee and an Australian-resident settlor. To ensure that Inland Revenue is in a position to provide this information automatically, New Zealand-resident trustees will be required to inform Inland Revenue if a trust has an Australian-resident settlor. Australia is the only country to which New Zealand is currently proposing to provide information on an automatic basis.

18. Trustees will be expected to take reasonable care to determine if a settlor is resident in Australia, based on the information that is available to them. If, for lack of information, a trustee fails to inform Inland Revenue that a settlor is resident in Australia, it will not result in the trustee being penalised for non-compliance. If a trustee does not take reasonable care to determine that a settlor is an Australian resident or they do not provide that information to Inland Revenue, the trustee may be subject to penalties for failure to disclose the required information.

Record-keeping requirements

19. Trustees will be required to keep certain business records in New Zealand for at least seven years after the end of the income year to which they relate. If a trust ceases to have a New Zealand-resident trustee, the requirement to keep records for seven years will remain.

20. The records should:

- correctly explain the transactions of the trust;
- enable the trust's financial position to be accurately determined at any time;
- allow financial statements to be prepared;
- include source documentation relating to sales, purchases and other transactions, and the assets and liabilities of the trust;

- provide details of settlements on the trust and distributions to beneficiaries (including their name and address); and
- include a copy of the trust deed.

21. Section 22 of the Tax Administration Act 1994 will be amended accordingly.

Determining the residence of the trustee

22. The rules for determining if a person (an individual or a company) is a New Zealand resident are set out in sections OE 1 and OE 2 of the Income Tax Act 1994 and 2004.

Individuals

23. Trustees of foreign trusts who are individuals (as opposed to trustee companies) will be treated as New Zealand residents if:

- they maintain a 'permanent place of abode' in New Zealand, whether or not they also have a permanent place of abode outside New Zealand; or
- they have been present in New Zealand for more than 183 days in any 12-month period.

24. To cease New Zealand residence, they must be absent from New Zealand for at least 325 days in any 12-month period.

25. The 'permanent place of abode' test takes precedence over the others. For instance, individuals who maintain a permanent place of abode but have been absent from New Zealand for more than 325 days in a 12-month period remain New Zealand residents.

Companies

26. A trustee of a foreign trust that is a company will be treated as a New Zealand resident if the company:

- is incorporated in New Zealand; or
- has a head office in New Zealand; or
- has its centre of management in New Zealand; or
- the control of the company by its directors, acting in their capacity as directors, is exercised in New Zealand, whether or not decision-making by directors is confined to New Zealand.

Additional requirements for a trustee to be treated as a New Zealand-resident trustee

27. To be treated as a New Zealand-resident trustee, at least one trustee of a foreign trust will also be required to be a member of a professional body that is acceptable to Inland Revenue. In the case of a trustee company, a New Zealand-resident director of the company will be required to be a member of such a professional body.

28. Under the amended proposal, the onus will be on the New Zealand-resident trustee to maintain and provide the necessary records. Given this, requiring at least one New Zealand-resident trustee to be a member of an accepted professional body will provide assurance to Inland Revenue that a trustee has the necessary expertise to maintain records of the required standard and will comply with the law.

29. Acceptable professional bodies are likely to include, but will not necessarily be limited to, certain accounting and legal professional institutes or societies. Membership of these types of professional bodies is usually restricted to individuals who hold relevant qualifications. We would be interested in readers' views on the types of professional bodies that should be included as acceptable.

30. Once legislation is enacted, Inland Revenue will develop administrative guidelines to assist in determining which professional bodies will be acceptable. Acceptable professional bodies are likely to be those that require their members to comply with the following requirements as a condition of membership:

- adhere to the professional code of conduct and ethics;
- be subject to a disciplinary process that enforces compliance with the code of conduct and ethics; and
- follow certain 'best practice' guidelines.

31. In addition, members of such professional bodies would provide, or could provide, trustee services as part of being a member of that professional body.

Requests for information about trusts from other countries

Australia

32. When information provided by a trustee indicates that a settlor of the trust is an Australian resident, Inland Revenue will:

- request further information from the trustee (such as financial records, distributions to beneficiaries and the identity of the settlor); and
- automatically release the information to the relevant Australian Taxation Office on an annual basis.

Other signatory countries to double tax agreements

33. Information will be provided to other signatory countries to double tax agreements on a case-by-case request basis, when Inland Revenue considers that there are valid grounds for requesting the information. In accordance with the OECD Model Treaty and Commentary on Article 26, Inland Revenue will not entertain general ‘fishing expeditions’ from tax treaty partners for information on foreign trusts.

Rules governing information collected

34. Any information provided to Inland Revenue by the New Zealand-resident trustees of foreign trusts will be subject to the existing tax secrecy laws. Section 81 of the Tax Administration Act 1994 prevents Inland Revenue from providing information to a foreign jurisdiction except as permitted by section 81(4)(k) – [reciprocal law or concession or reciprocal arrangement].

Ensuring compliance

35. To ensure compliance with the proposed disclosure rules, a foreign trust with a New Zealand-resident trustee will be subject to New Zealand tax on its worldwide income if a trustee fails to disclose the required information to Inland Revenue (see paragraph 13). Trustees that do not maintain or provide information when requested may be subject to prosecution and criminal penalties.

Non-compliant foreign trusts subject to New Zealand tax on their worldwide income

36. If a New Zealand-resident trustee of a foreign trust fails to disclose the required information to Inland Revenue, the taxation of the trust will be based on the residence of the trustee rather than the settlor. The worldwide income of the trust will be treated as trustee income, and taxed at 33%.

37. Failure to disclose the required information will create a tax liability against trustees. Trustees who expose their trusts to such a liability may also be breaching their fiduciary obligation to the beneficiaries of the trust, and therefore may be personally liable to the beneficiaries. Disclosure of the required information removes this liability.

38. If a New Zealand-resident trustee takes reasonable care in determining that a trust is not a foreign trust and it is later found to be one, there will be no retrospective liability for tax on the worldwide income of the trust if the trustee provides the required information as soon as possible upon determining that it is a foreign trust. Tax will be imposed prospectively if the trustee fails to provide the required information once the foreign trust status of the trust is established.

39. Taxing non-compliant foreign trusts on their worldwide income is intended to encourage trustees to comply with the disclosure requirements, not to impose tax on such foreign trusts.

Imposing a criminal penalty for failure to keep records or provide information

40. Trustees who fail to keep records or disclose information to Inland Revenue, as required under this proposal, will be subject to existing penalties under the Tax Administration Act 1994. Under this Act, a fine of up to \$50,000 can be imposed, on conviction, for failure to provide information.

41. The penalty for non-compliance is imposed upon conviction. This requires the non-compliance to be detected, proceedings begun and conviction entered.

How to make a submission on the proposal

42. We would appreciate receiving any comments you have on the proposal by 23 December 2004.

43. Any written comments should be forwarded to:

Foreign trusts proposal
C/- Deputy Commissioner, Policy
Policy Advice Division
Inland Revenue Department
P O Box 2198
Wellington
New Zealand

44. If making a submission in electronic form please put 'Foreign trusts proposal' in the subject line. The electronic address is:

policy.webmaster@ird.govt.nz

45. Please note that submissions may be the subject of a request under New Zealand's Official Information Act 1982. The withholding of particular submissions on the grounds of privacy, or for any other reason, will be determined in accordance with that Act. If there is any part of your submission which you consider could be properly withheld under that Act (for example, for reasons of privacy), please indicate this clearly in your submission.