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Public Consultation
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XPB0052: Income tax – Australian source income earned by Australian limited partnership and foreign tax credits

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the draft public ruling *XPB0052: Income tax – Australian source income earned by Australian limited partnership and foreign tax credits*.

Third Draft Ruling: *Income Tax – Distributions made by Australian Unit Trust to Australian Limited Partnership and Foreign Tax Credits*

2. The third Draft Ruling should also address circumstance where a dividend paid by a company is not fully franked.
3. The third Draft Ruling provides that New Zealand partners in an Australian Limited Partnership (ALP) are allowed a foreign tax credit for income tax paid by an ALP in respect of a dividend paid by an Australian unit trust to the ALP. Neither the Draft Ruling nor the commentary address the scenario in which an unfranked dividend is paid by an Australian company to the ALP. The analysis in the third Draft Ruling appears to apply equally to that scenario, so there seems to be no reason why it should be limited to dividends paid by a unit trust.
4. We submit that either the ruling, or the commentary should be amended to clarify that, to the extent a dividend paid by a company is not fully franked (and so Australian tax is paid by the ALP on the dividend), a foreign tax credit is available to the New Zealand limited partner to the extent of the Australian tax paid.

Fourth Draft Ruling: *Income Tax – Franked dividend received by Australian Limited Partnership and Foreign Tax Credits*

5. The third and fourth Draft Rulings should address attributing interests in Foreign Investment Funds (FIFs) held through an ALP.
6. The third and fourth Draft Rulings (which relate to distributions made by unit trusts to ALPs and franked dividends paid by companies to ALPs) apply only where the distribution is a dividend under section CD 1.

7. That means the drafting rulings will not apply where the New Zealand limited partner's interest in the unit trust or company making the distribution is for tax purposes an attributing interest in a FIF (for example, because the New Zealand limited partner holds less than 10% of the ALP; or because the ALP holds less than 10% of the unit trust or company). In that circumstance, the distribution would:¹
 - (a) not be a dividend under section CD 1 (see section CD 36); and
 - (b) not be assessable income of the limited partner (see section EX 59).
8. A foreign tax credit would however still be available to the New Zealand limited partner in respect of Australian tax paid on the distribution, albeit that the relevant "segment" of income would be the amount of FIF income from the limited partner's attributing income in the FIF, rather than the actual amount of the dividend paid by the FIF (see sections LJ 2(6) and LJ 2(7)).
9. Accordingly, we submit that the third and fourth Draft Rulings, or the commentary to those rulings, should be amended to explicitly recognise that a foreign tax credit is available under subpart LJ where the New Zealand limited partner holds an attributing interest in a FIF.
10. The third and fourth Draft Rulings should also acknowledge the exceptions to section CW 9(1).
11. The third and fourth Draft Rulings do not apply where the partners in the ALP are not natural persons. That is on the basis that if the partners were companies, any dividend paid to the ALP would be exempt income of the partner under section CW 9(1) (paragraph 41 of the commentary).
12. We submit that the third and fourth Draft Rulings, or the commentary, should expressly recognise that, if the limited partner is a company but one of the exceptions in section CW 9(2) or CW 9(3) applies (for example, because the ALP has a less than 10% interest in a ASX-listed Australian company, or because the limited partner is a PIE), the dividend received by the ALP may be assessable income to the limited partner, in which case a foreign tax credit would be available.

Conclusion

13. This submission was prepared with assistance from the Law Society's Tax Law Committee. If you wish to discuss this further please do not hesitate to contact the committee convenor Neil Russ, through the committee secretary Rhyn Visser (04 463 2962, rhyn.visser@lawsociety.org.nz).

Yours sincerely



Chris Moore
President

¹ Subject to certain exceptions, for example, if the limited partner applied the attributable FIF income method.