Inland Revenue
Te Tari Taake

INTERPRETATION STATEMENT | PUTANGA WHAKAMĀORI

Income tax – Share investments

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This interpretation statement provides guidance for individuals who invest in shares, so they are aware of their tax obligations. The statement covers when an investor will have a tax liability for dividends, share sales and attributing interests in foreign investment funds. The statement focuses on investors who use online investment platforms, although the principles in the statement apply more widely to other forms of share investment by individuals (such as through brokers and financial advisors).

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

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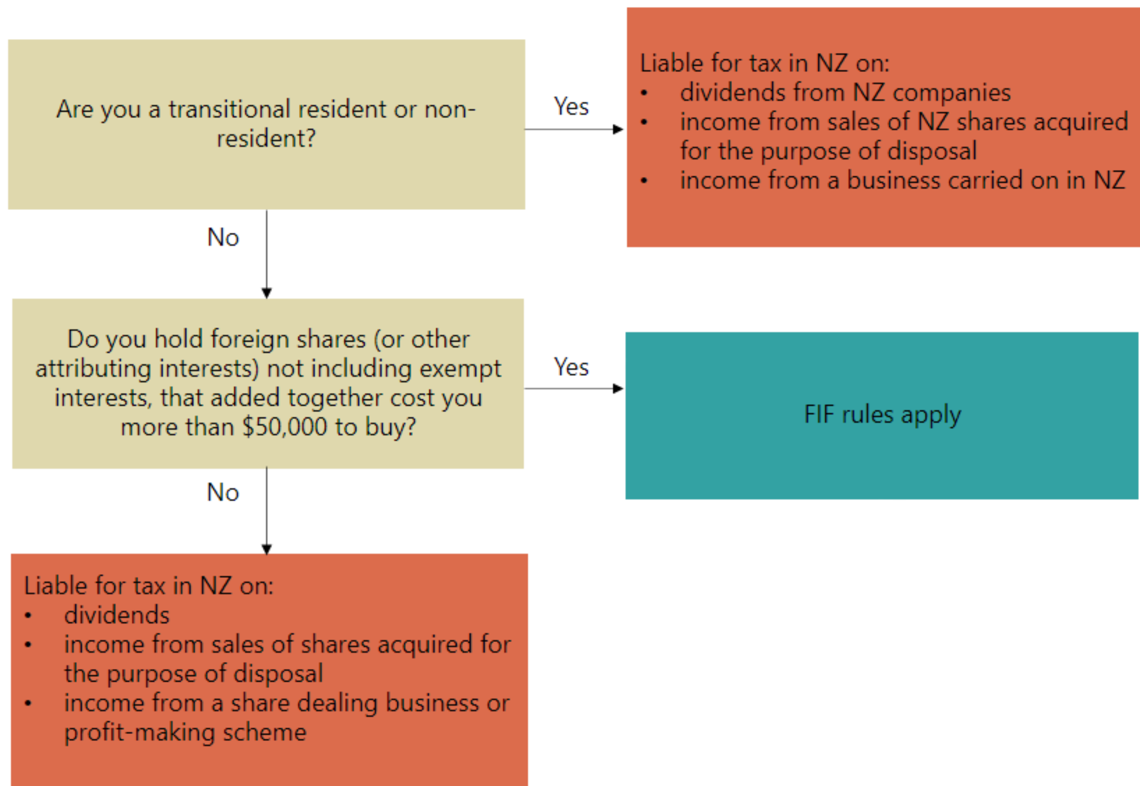
Summary | Whakarāpopoto

1. This interpretation statement applies to New Zealand tax resident individuals who invest in shares. The statement does not apply to investors who acquire interests in managed funds, KiwiSaver or portfolio investment entities (PIEs). Those investors will generally not have further tax liabilities, provided they have given correct information to the provider (such as their prescribed investor rate (PIR)). This statement also does not apply to investments in controlled foreign companies or illiquid investments in closely held companies. Unless otherwise stated, all monetary amounts and thresholds referred to in this statement are in New Zealand dollars.

2. This statement explains when individual share investors are subject to:

   - the ordinary tax rules, including when they have to return income from dividends and taxable share sales;[1] or
   - the Foreign Investment Fund (FIF) rules and must (or choose to) apply those rules instead of the ordinary tax rules.

3. Use the following diagram to decide which rules apply:



[1] In this statement, a reference to "ordinary tax rules" is a reference to the provisions in the Act other than the foreign investment fund rules in ss CQ 4 to CQ 6 and ss EX 28 to EX 73.

Part one – Application of the ordinary tax rules to share investments

4. The ordinary tax rules apply to individual share investors who hold shares in:
   - New Zealand companies;
   - Australian companies that are exempt from the FIF rules; or
   - foreign companies (that are not exempt from the FIF rules) that added together with all the investor's other attributing interests cost $50,000 or less to buy.[2]
5. These investors have a tax liability in New Zealand when they receive:
   - dividends paid by New Zealand or foreign companies, to the extent that tax has not been withheld on their behalf in New Zealand by a New Zealand company or custodian; or
   - amounts from selling shares, where the shares were acquired for the dominant purpose of disposal or were part of a share dealing business or profit-making undertaking or scheme.
6. However, investors only have to include the above amounts in an IR 3 individual income tax return if the total amount of all their income that is not reportable income is more than $200 in an income year.[3]
7. There may be other tax consequences relating to investing in shares that fall outside the scope of this statement. For example, investors who participate in share lending have a tax liability for any fees earned and may have further tax liabilities for other amounts if the share lending rules do not apply. Investors may also need to account for foreign exchange gains or losses on foreign currency accounts where the total amount of all their variable principal debt instruments exceeds $50,000.[4]

Dividend income

8. A dividend received by an investor is taxable income in New Zealand. This includes dividends from both New Zealand and foreign companies (including where the investor uses an offshore platform to buy foreign shares).
9. Where a New Zealand resident company pays a dividend, tax will generally have been withheld and paid on behalf of investors. Investors need to check that the amounts

[2] Although these investors may choose to apply the FIF rules instead.

[3] Reportable income is defined in s 22D of the Tax Administration Act 1994. Essentially, it is income where tax is withheld by the payer, such as PAYE income payments and a payment of resident passive income (eg, interest or dividends).

[4] These include credit cards, bank accounts, revolving credit facilities and foreign exchange accounts.

pre-populated in their individual income tax assessments or IR 3 individual income tax returns are correct. They will need to include any missing amounts or pay an additional amount if their marginal tax rate is higher than the rate at which RWT was withheld.

10. Where a foreign company pays a dividend, tax will not have been withheld in New Zealand unless the shares are held by a New Zealand resident custodian on behalf of investors. Investors need to check whether tax has been withheld and paid in New Zealand. The investor needs to include the New Zealand dollar value of the dividend in an IR 3 individual income tax return. Investors with foreign dividends need to file an IR 1261 overseas income summary which assists with claiming any available foreign tax credits.

Income from taxable share sales

11. Amounts received from the sale of shares are taxable when an investor acquired the shares for the dominant purpose of disposal, has a share dealing business or the shares are part of a profit-making undertaking or scheme.

12. An investor who acquires shares for the dominant purpose of disposal is subject to tax when the shares are sold. For sales to be taxable, disposal must be the investor's dominant purpose at the time the shares were bought. There are two steps for applying this test:

    - consider what the investor says their dominant purpose was for buying shares; and
    - test that statement against objective factors identified by the courts. This includes the nature of the asset (that is, the type of shares purchased and what rights they give the holder), the length of time the shares were held, the circumstances of the purchase and disposal of the shares, and whether there is a pattern of purchases and sales suggesting there was a dominant purpose of sale.

13. An investor may have one purpose, more than one purpose, or no particular purpose for buying shares. The onus is on the investor to prove whether their dominant purpose for buying shares was to dispose of them. An investor only has to prove that disposal was not their dominant purpose; they do not have to prove an alternative dominant purpose. However, share sales will not be taxable if an investor can show (both through their stated purpose and tested objectively) that shares were bought for the dominant purpose of:

    - receiving dividend income;
    - receiving voting interests or other rights provided by shares; or

- a long-term investment, growth in assets or portfolio diversification (other than situations where, at the time of acquisition, this is planned to be achieved through sale).

14. There is no bright-line test for share sales, so there is no set amount of time shares are held or number of trades required for sales to be taxable. It is advisable for investors to keep records to support their stated purpose at the time they bought shares. Types of records that may support a stated purpose at the time of acquisition may include:
    - information obtained from companies, platforms or brokers when deciding what shares to buy;
    - a record of their purpose at the time of acquisition (eg, contemporaneous file notes or emails);
    - where applicable, their investment plan and any notes from financial advisors;
    - where relevant, information on expected dividend yields; and
    - lending records if funds were borrowed to invest.
15. Also, records of reasons for sales may help show that sales are consistent with the stated purpose, for example:
    - where sales are made as part of rebalancing a portfolio, an explanation of what the rebalancing is achieving and how this relates to their investment plan; or
    - where there is a change of circumstances (such as the investor's personal or financial circumstances, they no longer support the company's policies, or the investment is not performing to their expectation).
16. Contemporaneous records as set out above can be helpful but not determinative, and the particular circumstances still need to be tested objectively. For more information on when there is a purpose of disposal, see from [51] and the appendix from [133].
17. An investor may also have taxable income from share sales if they have a business of share dealing. An investor will be in business if the scale of their buying and selling activity is large, with regular trading activity, there is a significant amount of time and money invested, and they have an intention to make a profit. They may also have a share dealing business which is usually demonstrated through a large scale of activity, even if they do not have an intention to make a profit. Finally, an investor may also potentially have income from share sales if this is done in the course of carrying on a profit-making undertaking or scheme.

Expenses

18. Where shares are bought for sale or as part of a share dealing business, expenses incurred in acquiring, holding and selling the shares are generally deductible. This

includes the cost of the shares, transaction or advisory fees and any interest on borrowed funds. If the shares are sold for less than the expenses, the investor can claim this as a loss.

19. Where shares are not bought for sale or as part of a business or share trading activity, but there is a reasonable expectation of dividends, deductions can be claimed for interest on borrowed funds and potentially some financial planning fees.

20. Where shares are not bought for sale or as part of a business or share trading activity, and there is not a reasonable expectation of dividends, no expenses are deductible.

Part two – Application of the foreign investment fund rules to share investments

21. Individual investors are subject to the FIF rules where, at any time during the income year, they hold foreign shares and other attributing interests (other than exempt interests) that added together cost the investor more than $50,000 to buy.

22. The FIF rules do not apply to transitional residents or non-residents. Investors who hold attributing interests (other than exempt interests) that added together cost $50,000 or less to buy may choose to apply these rules.

23. Investors subject to the FIF rules must apply the FIF rules and not the ordinary tax rules in relation to their attributing interests. This means they do not apply the rules discussed above for dividends and taxable share sales. However, if investors hold some shares that are subject to the FIF rules and some that are not (because the shares are exempt from the rules), they still apply the ordinary tax rules to the exempt shares.

24. Individual investors may choose a FIF method to calculate their income in each year, but they must use the same method for all their FIF interests. Depending on the FIF method used, investors who are subject to the FIF rules may be deemed to derive a return in each year (that may be more or less than any returns actually received). See from [105] for more information.

25. Applying the FIF rules can be complex, and it is recommended that investors who are subject to the FIF rules seek advice. Inland Revenue also has resources available on its website to assist with calculations.

Guidance for applying the FIF rules can be found in the following resources:

Inland Revenue's Guide to Foreign Investment Funds (IR 461) - Foreign investment funds (FIFs)

To work out whether interests in Australian shares are exempt, use Inland Revenue's FIF exemption tool Foreign Investment Fund Australian listed share exemption tool

To work out FDR and CV income, use Inland Revenue's FIF calculation tool Calculate my foreign investment fund income

For information on filing an IR1261 overseas income summary see Reporting your overseas income (ird.govt.nz).

To find out what to do if you didn't return FIF income when you should have, see QB 23/10 **Foreign investment fund (FIF) calculation methods in cases of non-compliance**

Introduction | Whakataki

26. This interpretation statement provides guidance for individuals who invest in shares, so they are aware of their tax obligations. The statement focuses on the income tax consequences of individuals using online investment platforms (whether the platforms are based in New Zealand or offshore). The principles in the statement also apply more widely to other forms of direct share investment by individuals (such as using brokers or financial advisors).

27. Different rules may apply to investments made using other entities such as companies and trusts, which are outside the scope of this statement. Also, different rules may apply to investments in other assets, managed funds and PIEs. For information on how PIE investments are taxed, see Inland Revenue's website: Portfolio investment entities (PIEs) for New Zealand residents.

28. Part one of this statement applies to investors who hold:

- shares in New Zealand companies;
- shares in Australian companies that are exempt from the FIF rules; or
- foreign shares that are not subject to the FIF rules (because when added together all the investor's attributing interests cost $50,000 or less to buy).[5]

29. The FIF rules in part two apply to investors when at any time in an income year they hold foreign shares (and other attributing interests) that:

[5] Although an investor in this situation may choose to use the FIF rules (discussed in part two).

- are not exempt from the FIF rules; and
- when added together, cost the investor more than $50,000 to buy. This cost is calculated in New Zealand dollars at the time the shares and other attributing interests are purchased.

30. Investors who meet the above criteria (or who choose to apply the FIF rules) do not apply the ordinary tax rules in part one to their FIF interests. However, if these investors also hold New Zealand shares or shares that are exempt from the FIF rules, they apply the ordinary tax rules in part one to those shares.

31. An investor who is a transitional tax resident pays tax in New Zealand only on their New Zealand sourced income and does not have FIF income. Those investors should go to [102] to see which rules apply to them.

Part one – Application of the ordinary tax rules to share investments

32. This part explains when investors will have a tax liability under ordinary tax rules from investing in shares. This part considers when an investor will have a tax liability for dividend income and from taxable share sales.

Dividend income

33. A dividend is any transfer of value from a company to a shareholder. Usually, this is a cash payment (but not always). A dividend received by an investor is taxable income, including when dividends are received from foreign companies.[6]

34. The way in which investors hold shares using online investment platforms or brokers may differ. In many cases the platform or a custodian may hold the shares on behalf of investors as a bare trustee or nominee. New Zealand custodians that hold investments as a bare trustee must ensure resident withholding tax (RWT) has been deducted when it receives investment income that is passed on to an investor. However, the investor still has income tax obligations, as explained below.

Dividends received from a New Zealand company

35. When an investor receives a dividend from a New Zealand resident company, an amount of RWT should be withheld and paid to Inland Revenue on the investor's behalf. A dividend paid by a New Zealand company may include imputation credits,

[6] The dividend tax rules are contained in subpart CD, in particular see ss CD 1, CD 3 and CD 4.

which are credits for tax the company has already paid in New Zealand. These credits are taken into account when RWT is being withheld and paid to Inland Revenue.

36. Where investors have provided their IRD number, the relevant information will be pre-populated in the investor's automatic income tax assessment or IR 3 individual income tax return.

37. Investors will need to check that pre-populated amounts are correct (and if not, they will need to self-report any dividends that have been omitted). Investors may also need to pay an additional amount if their marginal tax rate is higher than the rate at which RWT was withheld. The withholding of dividend income on an investor's behalf is illustrated in Example | Tauira 1.

Example | Tauira 1 – Dividends from a New Zealand company

Ari uses a New Zealand based online investment platform to buy shares in NZ Co. In the 2024 income year, Ari was entitled to a gross dividend of $100 which included an imputation credit. The platform sent Ari a tax statement showing the following information:

Tax statement	**31 March 2024**
NZ Co dividend	$72
Imputation credit	$28
Taxable gross dividend	$100
RWT	$5
Net dividend	$67

Scenario one

If Ari has a 33% marginal tax rate, Ari's tax liability for the dividend is $33, satisfied through a combination of the imputation credit and RWT withheld. This information is pre-populated in Ari's automatic income tax assessment for the year. Ari's other income in the 2024 income year was salary and interest from bank deposits (all of which have also had tax withheld and were pre-populated). Ari checks that the amounts are correct and does not need to amend the assessment or file an IR 3 individual income tax return for the 2024 income year.

Scenario two

Ari recently moved to the 39% marginal tax rate, but RWT was still withheld at 33%. Ari's tax liability for the dividend is $39, but this is only partially satisfied through the imputation credit and RWT withheld which total $33. Ari will need to pay the difference of $6.

Dividends received from a foreign company

38. Dividends received from a foreign company are usually taxable in that other country and in New Zealand. However, the investor may be able to claim a foreign tax credit in New Zealand for tax paid overseas, so they are not taxed twice on that income.

Tax paid overseas and foreign tax credits

39. When an investor receives a dividend from a foreign company, it is likely that tax will have been withheld in that other country. Platforms or custodians may apply a lower withholding tax rate if a double tax agreement (DTA) applies. For a DTA rate to be available, investors need to provide the platforms or custodians with the relevant information they require to show entitlement to the DTA rate, which may include details such as their IRD number and tax residence status.

40. For example, if a New Zealand tax resident earns a dividend from a United States company, they would be entitled to the DTA tax rate of 15% in the United States. If the platform or custodian does not have the relevant information, then tax may be incorrectly withheld at the United States' higher domestic withholding rate instead. However, even if the higher rate is incorrectly withheld, the amount of foreign tax credit available to the investor is limited to the DTA amount.[7]

41. For information on claiming foreign tax credits, see IS 21/09 - **Income tax – foreign tax credits – how to calculate a foreign tax credit.**

42. Therefore, investors should make sure their platforms or custodians have the information they require to be able to correctly apply the DTA rate. Otherwise, the investor will end up paying more tax overseas than they need to, and they cannot claim that back against their New Zealand tax liability.

New Zealand tax obligations

43. Platforms deal with New Zealand tax obligations for foreign dividends in different ways:

    - Where a New Zealand resident custodian holds shares, the custodian withholds and pays RWT in New Zealand on the investor's behalf and that information is pre-populated into the investor's IR 3 individual income tax return.
    - Where a non-resident custodian holds shares, they do not withhold and pay New Zealand tax. Investors need to self-report this information in an IR 3 individual income tax return.

[7] The amount of foreign tax credit available is also generally limited to the amount of New Zealand tax payable on that income.

44. Investors with foreign dividends need to file an IR 1261 overseas income summary to declare their overseas income sources and claim foreign tax credits. Information on the IR1261 overseas income summary can be found here: Reporting your overseas income.

45. When required to self-report dividend income in a return, investors need to include the New Zealand dollar value of the dividends received, calculated at the time they received the dividend. Assistance for finding out the New Zealand dollar amount is on Inland Revenue's website, see Overseas currency - conversion to NZ dollars.

46. Investors cannot usually claim credits similar to imputation credits from a foreign company (such as franking credits paid by an Australian company) against their New Zealand income, but as noted above they can claim a foreign tax credit for foreign withholding tax that was paid.

47. An investor does not need to file an IR 3 individual income tax return if the total amount of their income (other than reportable income) is less than $200. Essentially, reportable income is where tax is withheld by the payer, such as PAYE income payments and a payment of resident passive income (for example, interest or dividends from New Zealand companies).[8] The $200 threshold includes all amounts that are not reportable income (such as from any taxable share sales), not just income from foreign dividends.

48. In summary, investors who receive dividends from foreign companies need to:

- ensure they have provided platforms and custodians with the information required to qualify for DTA tax rates, such as their IRD number and tax residency status;
- find out whether they need to file an IR 3 individual income tax return for the dividend income in New Zealand;
- carefully check any amounts of tax that have been withheld on their behalf; and
- include any missing amounts, pay any additional tax required and file an IR 1261 overseas income summary to claim their foreign tax credits.

49. The requirement to return a foreign dividend in New Zealand is illustrated in Example | Tauira 2.

[8] Section 22D of the Tax Administration Act 1994

Example | Tauira 2 - Dividends from a foreign company

Bob uses an online investment platform to buy shares in US Co. Bob provided his IRD number and tax residency information to the platform to make sure he qualifies for the DTA withholding rate. The platform uses US Broker, a United States based custodian service.

In March 2023 Bob was entitled to a dividend of US$100. US Broker withheld tax in the United States at the DTA rate of 15%. The platform provided Bob with the following information:

US dividends	31 March 2023
US Co gross dividend	US$100
US withholding tax paid	US$15
US net dividend received	US$85

The platform is not a New Zealand custodian. Bob uses an approved foreign exchange source and works out he has a gross dividend of NZ$160.51 and a foreign tax credit of NZ$24.08.

In the 2023 income year, Bob also earned $5,000 from taxable sales of New Zealand shares and Bitcoin. Bob needs to file an IR 3 individual income tax return and include the dividend in his total overseas income (as well as the Bitcoin and share sale income as other income). Bob needs to file an IR 1261 overseas income summary to account for his foreign dividend and claim the foreign tax credit.

If the platform was a New Zealand custodian, it must withhold RWT on Bob's behalf. The dividend information is pre-populated in Bob's IR 3 individual income tax return, and Bob needs to file an IR 1261 overseas income summary to claim the foreign tax credit.

Income from taxable share sales

50. Amounts an investor receives from selling shares are taxable where the shares were:
    - acquired for the dominant purpose of disposal;
    - part of a business of share dealing; or
    - part of a profit-making undertaking or scheme.

Shares acquired for the purpose of disposal

51. An amount a person receives from selling assets such as shares is their income if they acquired the shares for the purpose of disposal.[9]

52. The leading case is *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA). That case established that the purpose of sale needs to be the person's dominant purpose. What is relevant is what was most important to the person at the time of acquisition.

53. An investor may have one purpose, several purposes, or no particular purpose for buying shares. The onus is on the investor to show whether or not they had a dominant purpose of disposal. An investor only has to prove that disposal was not their dominant purpose; they do not have to prove an alternative dominant purpose.

54. The first step that Inland Revenue takes is to consider what the person says their purpose was for acquiring shares. Then, that statement is tested against the following objective factors identified by the courts:

    - the nature of the asset;
    - the length of time the shares are held;
    - circumstances of the purchase, use and disposal of shares; and
    - the number of similar transactions.

55. The nature of the asset refers to the particular assets that were acquired.[10] This could involve considering the type of asset and what rights the asset confers on the holders. For example, this may include whether shares pay or are expected to pay dividends or whether the person receives voting interests. Whether or not shares pay dividends (or are expected to pay future dividends) is one factor to consider, but it is not determinative and is to be weighed against the person's stated purpose and the other objective factors.

56. The length of time shares are held is also important. As was stated in *National Distributors*, if shares are held for only a few months, then in the absence of any special reasons for the sale, they are likely to be viewed as being purchased for resale and taxable. If shares are held for several years, during which time the market moves upwards and downwards, then it is more likely the dominant purpose is not one of resale. However, there is no particular time period that applies to determine whether shares were acquired for disposal or not. The answer depends on the particular facts of each case.

[9] Section CB 4.

[10] The Commissioner considers that generally shares differ in nature to other investment assets (such as gold bullion and cryptoassets). While the same general principles apply, the nature of the asset is given particular weight.

57. The circumstances of purchase, use and disposal of shares and the number of similar transactions involves considering what the person actually did, why the shares were sold, and whether there is a pattern of activity. There is no particular number of trades required for share sales to be taxable, and as above, the answer depends on the particular facts of each case.

58. There is no requirement that the person be in business or have a purpose of making a profit. One-off sales are still taxable if the shares were bought for the dominant purpose of disposal.

59. A situation where the objective factors indicate there is a purpose of disposal is illustrated in Example | Tauira 3.

Example | Tauira 3 – Shares bought for profit on sale

In early 2024, Charlie used an online investment platform regularly. Charlie bought and sold a few shares in New Zealand companies every now and again with an eye on sales profits. He didn't consider dividend policies, and preferred shares in companies that reinvested profits. Charlie was prepared to take risks and searched for companies on the platform by applying a "highest price change" filter. Charlie would sell shares when he considered the price was high.

The nature of the shares acquired, the length of time held, and the pattern of activity indicate that Charlie acquired shares for the dominant purpose of disposal. Charlie did not have any evidence to show that he did not have a dominant purpose of selling these shares, and he also did not have any other explanations for the sales. The amounts Charlie receives from these sales will be taxable.

Change of purpose

60. It is relevant that it is the person's purpose at the time of acquiring the shares that is important. If a person acquired shares for the dominant purpose of selling them, then later changes their mind, any subsequent sale will still be taxable.

61. Similarly, a person who acquires shares for a different dominant purpose (such as receiving dividends or a long-term investment) will not be subject to tax if they later change their mind and sell those shares. For example, an investor may no longer support a company's policies, may sell shares due to a change in their circumstances, or may sell shares to assist a family member. An investor in this situation would need to have records of what their original purpose was for buying the shares, and an explanation of why the shares were sold (which is supported by the objective factors discussed above).

62. Changes of purpose are illustrated in Example | Tauira 4 and Example | Tauira 5.

Example | Tauira 4 – Change of purpose from sale to long-term investment

In 2021, Olive started using an online investment platform. She used a filter to sort various New Zealand companies by the highest price change, as she was looking to earn extra money by selling shares for profit.

After a few months Olive changed her mind and decided to hold on to her shares for a long-term investment.

Two years later, Olive had a change of circumstances and had to sell the shares. Because Olive bought her shares for the purpose of selling them, the amount she receives from the later sale of the shares is taxable. It is Olive's purpose at the time she bought the shares that determines whether sales are taxable.

Example | Tauira 5 – Change of purpose from long-term investment to sale

In 2023, Jin bought shares in a tech company because he was interested in the products the company made, and also thought the shares would be a good long-term investment to add to his portfolio. Jin had discussed this with his financial advisor, and Jin's advisor had kept notes of Jin's investment plan, including for the tech company shares.

The following year the tech company's leadership changed, and Jin did not support the direction the company was moving in. Jin decided to sell his shares and invest his funds elsewhere.

The amount Jin receives from selling these shares is not taxable. Jin's purpose at the time he bought the shares determines whether the share sales are taxable. Jin's investment plan, recorded reasons discussed with his investment advisor for the initial purchase, and reasons for the sale of these shares support his position.

Several purposes for acquiring shares

63. A person may have one purpose for acquiring shares, several purposes for acquiring shares, or they may acquire shares without any particular purpose in mind (eg, they have a general hope that the shares will be a good investment in some way). For sales to be taxable, sale must have been the dominant purpose for acquiring the shares.

64. If a person receives shares passively, such as from a gift or inheritance, they will not have a purpose for that acquisition (so will not have a purpose of disposal). However, the tax treatment may sometimes depend on the purpose of the original holder. If shares were acquired by the original holder for the purpose of disposal or as part of a business of share dealing, but they transfer, gift or bequeath the shares, there may be

tax consequences under subpart FB (which applies to transfers of relationship property) and subpart FC (which applies to gifts and transfers on death).

65. A person who acquired shares for several purposes, where disposal is not the dominant purpose, is illustrated in Example | Tauira 6.

Example | Tauira 6 – Sale not dominant purpose

Steve started using an online investment platform to invest in shares. He wanted to invest in ethical companies to support those companies, but also still provide a good return in some way.

He undertakes research before purchasing shares, focusing on the companies' ethical and sustainability policies as well as dividend history and the growth in share prices over the last few years. Steve keeps records of this research.

At the time of purchase, Steve is not certain about how long he will hold the shares for. Two years later, he decides to sell his portfolio and sells the shares for a profit.

The sale of these shares is not taxable. While two years is not a long-term investment, Steve had several purposes for buying the shares, including that he wanted to support an ethical and sustainable company, was seeking dividends and also growth in value of the shares. While sale was a possibility, his dominant purpose at the time he bought the shares was not to sell them. Steve can show this through his research and his stated purpose is consistent with the shares that he bought.

66. An investor may also have different purposes for different types of shares that they acquire. Different purposes can be attributed to different acquisitions of shares, although the investor will need to be able to show this. For example, if possible (such as where brokers or financial advisors are used), it would be advisable for investors to hold shares acquired for long-term investment and shares acquired for sale in separate accounts. Different purposes for different shares is illustrated in Example | Tauira 7.

Example | Tauira 7 – Different purposes for different shares

Megan started buying shares using an online investment platform during lockdown in 2020. In April 2020, Megan purchased:

$1,000 shares in A Co; and

$1,000 shares in B Co

Megan bought the shares in A Co because they paid a dividend yield of 6.5%. She wanted an investment that earned a regular income. Megan bought the shares in B Co, a pharmaceutical company, because she heard from her neighbour (a fund manager) that

pharmaceutical companies would be good short-term investments. When she bought them, Megan recorded her research and reasons for purchasing each type of share.

In March 2021, Megan's neighbour thought the market was close to peak and Megan sold the shares in B Co for $1,800 - a gain of $800. Later that month, Megan decided to invest into a managed fund instead, so she sold her remaining shares (A Co) for $1,100 and made a gain of $100. Megan invested all proceeds into a managed fund.

Megan made an overall gain of $900 from share sales in A Co and B Co (the amount received less the cost of the shares sold). However, she needs to return income only on the gain of $800 from selling the shares in B Co. The amount she received from the sale of shares in A Co is not taxable because she acquired those shares for the purpose of earning dividends (even though she later changed her mind). Megan's research of companies with high dividend yields is supported by the type of shares in A Co she acquired.

Other purposes for buying shares

67. A person can acquire shares for the dominant purpose of disposal, even if they have a wider aim in mind. As Richardson J said in *National Distributors*, if resale is proposed it does not matter that it is only the means to an end. For example, an investor may claim that shares are acquired as a store of value outside the monetary system, as a hedge against inflation, or for portfolio diversification. This explanation does not by itself answer the question of whether the investor had a dominant purpose of disposal. There may be situations where these explanations still involve a dominant purpose of disposal that means s CB 4 applies. For more information, see the appendix from [153].

68. Also, if shares were bought for the dominant purpose of funding or achieving something through a future sale, then they were acquired for the dominant purpose of disposal. This is illustrated in Example | Tauira 8.

Example | Tauira 8 – Purpose of sale to achieve a particular goal

Sally had funds in a term deposit that paid a low interest rate and was looking to increase the value of her investment to help fund a house deposit. She discussed her financial situation with her bank and was told the amount of deposit she would need for the home loan she required.

Sally was concerned that high inflation and low interest rates would mean she would be worse off once she was ready to purchase a house. When her term deposit matured, despite realising the risks involved in share investment, Sally decided to invest her deposit with an

online investment platform in a combination of high growth and high dividend earning shares.

Two years later, the value of Sally's investment was sufficient for a house deposit, and Sally sold all her shares.

Sally's dominant purpose for buying the shares was to raise funds to increase the value of her house deposit. She could achieve that only by selling the shares. Therefore, selling the shares is her dominant purpose. The gains made on the share sales are taxable.

69. Share sales will not be taxable if an investor can show that shares were bought not for sale, but for the dominant purpose of:

- receiving dividend income;
- receiving voting interests or other rights provided by shares; or
- a long-term investment, growth in assets or portfolio diversification (other than situations where, at the time of acquisition, this is planned to be achieved through sale).

70. Where an investor has acquired shares as a long-term investment, they will not have a dominant purpose of disposal if they only have a vague or general hope that the shares will increase in value and there is a possibility the shares may be sold in the future. These concepts are illustrated in Example | Tauira 9.

Example | Tauira 9 - Shares acquired for long-term investment

Logan owned a large share portfolio that he had been adding to over the years. Some shares paid regular dividends that were re-invested, but most investments were in high growth shares that had not paid dividends. He had recently retired and was living off superannuation and the occasional maturity of term deposits. He thought he may also sell some investments depending on his financial needs. However, ultimately Logan wanted to build up his asset profile so he would have an inheritance he could eventually pass on to his children and grandchildren.

Logan did not think of his share portfolio as something he would necessarily sell, but he thought sale may be needed in the future depending on his financial position.

Logan had unexpected medical issues and sold some of his shares to fund expenses. The sale of those shares is not taxable. Logan bought the shares with the purpose of building up a portfolio that may, but would not necessarily, be sold. His change of circumstances does not alter that purpose on acquisition. The possibility that shares will be sold does not mean he has a dominant purpose of disposal.

Rebalancing portfolios

71. Investors may have investment plans. These may be prepared by the investor or a financial advisor. Such investment plans will generally be based on the investor's profile and requirements such as their investment objectives, risk appetite, types of investments and gains sought. The investment plan may include target asset allocations for each asset class (as a percentage of the overall portfolio), and risk limits. The plan may anticipate the ongoing assessment of the relative value of asset classes, or of securities within an asset class, with a view to reallocating investments from time to time.

72. If an investor has a long-term investment plan, this plan would be able to help show that shares were generally acquired for a purpose of long-term investment. However, the tax rules do not apply to a portfolio, but to each acquisition and disposal of shares. If any particular shares within the portfolio are acquired for a purpose of sale, such as to realise some short-term gains as part of the investment plan, then those shares need to be treated differently.

73. Where there is an investment portfolio that is being managed and reviewed in accordance with a long-term investment plan, sales of shares made to rebalance the portfolio to ensure it is consistent with that long-term investment plan will generally not be taxable. However, whether any particular sales are taxable will be fact specific, as there could be shares within a portfolio that were acquired for a short-term gain. Relevant factors that would assist showing that rebalancing is part of a long-term investment plan include that the reasons given for the rebalancing or a sale of a particular holding are consistent with the investment plan, long-term investment and risk management objectives.

74. Portfolio rebalancing is illustrated in Example | Tauira 10 and Example | Tauira 11. Example | Tauira 11 provides an example of an investor who uses an investment advisor. The same conclusion would be reached in that example whether the investor prepared their own investment plan or used an advisor or discretionary investment management service.

Example | Tauira 10 – Sales to ensure high dividend yield

Frankie holds a portfolio of shares on an online investment platform, with dividend yields ranging from 4 to 6%. She wants to maintain a steady income from her portfolio.

Frankie researched shares with high dividend yields on the platform she uses. Frankie discovered A Co which paid regular dividends of 6.5%.

Frankie sold shares in Y Co, which had paid dividends at the lower end of her target range. She used the funds from that sale to buy the shares in A Co.

Frankie said she originally acquired the shares in Y Co for the dominant purpose of receiving dividends, without planning to sell those shares. Her actions in selling shares in Y Co to buy shares in A Co with a higher dividend yield support that purpose. The amount she receives from the sale of Y Co shares is not taxable.

If Frankie later sells the shares in A Co, the amount she receives from this sale will also not be taxable as she bought those shares for the dominant purpose of deriving dividend income.

Example | Tauira 11 – Sales to rebalance portfolio

Marama's financial advisor manages her investment portfolio according to an investment plan. Marama's plan aims to build a long-term investment portfolio, allowing her to draw down funds if required. She has a moderate risk appetite, with a smaller portion of her investment being in US and Australian stocks and the balance spread across fixed interest, property, cash and New Zealand dividend shares.

As part of this portfolio, Marama held shares in Aus Co. Aus Co significantly out-performed expectations, and Marama's portfolio became more heavily weighted toward US and Australian stocks, increasing the risk beyond what the investment plan specified. To bring the portfolio back within target ranges, Marama's advisor sold 25% of the shares in Aus Co. The proceeds were reinvested into lower risk investment assets, aligning with her long-term investment plan.

The sales of shares in Aus Co are not taxable because they were acquired as part of a long-term investment portfolio. The sales were made to adhere to the investment plan, and to maintain required levels of risk and asset allocations. This remains the case even if sales of investment assets occur regularly as part of the overall management and review of Marama's portfolio.

However, if some shares within Marama's portfolio were acquired for the dominant purpose of disposal, such as for a quick gain for reinvestment into other assets, sales of those shares would be taxable.

Record keeping

75. It can be difficult for investors to prove what their purpose was at the time they acquired assets such as shares. As noted earlier, a combination of factors is considered (including the type of asset, the investor's other activities, and how long shares are held), that can support or not support what the investor says their purpose is.

76. Where an investor says that disposal was not their dominant purpose for buying shares (for example, their dominant purpose was to receive dividends or to hold the shares for a long-term investment), they need to be able to support this. It is advisable for investors to keep records to support their stated purpose for buying particular shares, such as:

- information obtained from companies, platforms or brokers when deciding what shares to buy;
- a record of their purpose at the time of acquisition (eg, contemporaneous file notes or emails);
- where applicable, an investment plan and any notes from financial advisors if they have one;
- where relevant, information on expected dividend yields; and
- lending records if funds were borrowed to invest.

77. Recording reasons for sales can also help explain whether sales are consistent with the investor's stated purpose, for example:

- where sales are made as part of rebalancing a portfolio, an explanation of what the rebalancing is achieving and how this relates to their investment plan; or
- where there is a change of circumstances (such as the investor's personal or financial circumstances, they no longer support the company's policies, or the investment is not performing to their expectation).

78. As noted above, any record of purpose is not determinative; this still needs to be objectively tested against the factors set out by the courts.

> To obtain certainty about the tax treatment of particular sales where there is a large amount of tax at stake, investors may want to consider applying for a short-process ruling. For information on this process and to find out whether the process applies to a particular situation, see Short-process rulings.

Summary

79. In summary, the Commissioner considers that the following principles apply when determining whether sales of shares will be taxable:

- The person needs to have the dominant purpose of disposal at the time shares are acquired.
- A person's stated purpose for acquiring shares is relevant, but it will be weighed against objective factors to determine the dominant purpose of acquiring the shares.

- The objective factors considered are the nature of the asset, the length of time the shares are held, reasons why the shares were sold and other activities undertaken by the person (such as whether there is a pattern of buying and selling activity).
- Where these factors indicate that a person acquired shares with the dominant purpose of disposing of them, then those sales will be taxable. This includes a person looking for a short-term gain and also a person who bought shares with the dominant purpose of sale where the sale is planned in the longer term.
- Where shares are acquired for no particular purpose or a dominant purpose other than sale (for example, receiving dividends, a long-term investment or receiving voting interests) the sale of those shares is not taxable.
- Where a person has acquired shares as a long-term investment, they will not have a dominant purpose of disposal if they have only a vague or general hope that the shares will increase in value and there is a possibility they may be sold in the future.
- Where a person acquired shares for more than one purpose (for example, dividends and gains on sale), the objective factors can be applied to determine which purpose is dominant (see [54] to [57]).

80. For more information, including a detailed discussion of the relevant case law, see the Appendix from [132].

Business of share dealing

81. An investor who buys and sells shares is in a business of share dealing for the purposes of s CB 1 where there is a combination (or all) of the following factors:
    - a high scale of regular activity (buying and selling);
    - an intention to profit from share sales;
    - regular or continuous monitoring of the share portfolio;
    - a system according to which shares are bought and sold;
    - frequent sales which are part of the person's normal operations in the course of making profits;
    - large amounts are invested; and
    - a significant amount of time is spent in the dealing activity.

82. The courts have noted that there is a high bar to be in a business of share dealing – there needs to be a sufficient amount of activity, time and money invested and the requisite intention to profit. The courts have also considered that a person in full time employment is unlikely to have a business of share dealing.

83. To summarise, the following factors have been relevant to a finding by the courts that there was a business of share dealing:

- share sales were an integral part of the business, and part of the normal operations of the business;
- there was regular or continuous monitoring of the share portfolio, and a system according to which shares were sold;
- sales were frequent, and both sales and purchases are made on a large scale; and
- a large amount of money was invested.

84. More information on whether an investor has a share dealing business is from [170].

85. An investor with a large-scale dealing activity may alternatively have a share dealing business for the purposes of s CB 5. Under this provision, the main difference is that the person does not need to have a profit-making intention. They still need a large scale of buying and selling activity and a significant amount of time and money invested.

86. Where sales are made to rebalance an individual investor's long-term investment portfolio in accordance with an investment plan, this is unlikely to comprise the carrying on of a business of share dealing. The courts have said this is a matter of fact and degree, looked at in the context of the particular taxpayer. It is a combination of factors that are relevant for determining when a share dealing business exists, including that the scale of the buying and selling activity generally needs to be large but also taking into account the reasons for sales and the relativities between the size of the investment and turnover.

Profit-making undertaking or scheme

87. Share dealing activity that is part of an organised plan to derive profit from a scheme of dealing in shares may be a profit-making undertaking or scheme for the purposes of s CB 3. There must be a sufficiently formulated plan in existence. Although potentially applicable to investments in widely held shares acquired through platforms or brokers, this would be unusual. However, if applicable, any profits are only taxable from the time of entering the scheme.

88. Relevantly, and as previously discussed, even if there is not a business or a profit-making scheme in existence, investors will be taxable on their share sales when they are undertaking dealing activities, where the shares were acquired for the purpose of disposal.

89. Example | Tauira 12 illustrates a situation where an investor is not in a share dealing business but has the relevant purpose of disposal.

Example | Tauira 12 – Insufficient scale to be a business but dominant purpose of disposal

Hone started using an online investment platform in November 2020. Over the next few months he enjoyed making trades and started investing more time and money into buying shares.

Hone was employed for 30 hours a week and spent his free time making trades. Hone had invested around $20,000 in the share market and used the profits from sales to supplement his living costs and re-invest in more shares.

Hone typically didn't hold shares for more than a few months, unless he thought that they would peak in value at a later time. He didn't plan to hold any shares long-term and didn't consider dividends when purchasing shares.

Hone has an intention to profit from share sales, but his level of activity, and amount of time and money spent on the share market does not indicate that he is in a business of share dealing. His level of activity does not indicate that he has an organised plan that amounts to a profit-making undertaking or scheme.

While he may not be in a business of share dealing, the amounts Hone receives from his share sales are still taxable because the facts indicate that he acquired shares for the dominant purpose of disposal.

Expenses

90. There are various expenses that may be incurred when a person invests in shares:
    - the cost of acquiring the shares (ie, the purchase price and transaction fees);
    - fees charged by platforms, brokers or financial advisors; and
    - interest on funds borrowed to buy shares.
91. Deductibility of these expenses depends on whether there is a relevant nexus with income and also whether the expenses are capital in nature.
92. If an investor with a large portfolio cannot trace the cost of specific shares sold, they can apply either the first in first out or weighted average cost methods for determining cost (s ED 1(5)). They cannot use other methods for determining the cost of shares.
93. Where an investor has taxable share sales, the investor can claim a deduction for the cost of acquiring the shares (including transaction fees for the acquisition), as the cost of revenue account property. This deduction is available in the income year in which the shares are sold.

94. If share sales are not taxable (for example, the shares are acquired for dividends or a long-term investment) then the cost of acquiring the shares is not deductible (even if the shares pay dividends) as the shares are held on capital account.

95. Investors may be able to claim some fees such as for financial planning services. There are a range of circumstances in which financial planning fees are or are not deductible (although the shares need to be income earning either by way of being purchased for sale, or for obtaining dividends). For more information, see IS0044 **Financial planning fees – income tax deductibility.**[11]

96. There are different rules for interest. Interest incurred on funds borrowed to buy shares is deductible to an investor provided that there is a nexus with income (that is, the capital limitation does not apply). Interest is deductible on borrowed funds where the funds are used to purchase:

- shares acquired for the purpose of sale, a share dealing business, or a profit-making undertaking or scheme; or
- shares that earn income through dividends. Dividends do not have to be earned every year that interest is payable, but there must be a reasonable expectation that the shares will pay dividends.

97. The investor will need to keep records to show that the borrowed funds were used to purchase the shares. This could include a contemporaneous bank statement showing the funds leaving the loan account and a buy order for shares of the same amount. The investor will also need to be able to show that the shares are held on revenue account or there is an expectation of dividends.

98. Investors who use the same facility for buying shares and for other investments or expenses need to be able to prove the amount of interest that relates to the shares. This can be difficult where a facility is used for multiple uses and where there are repayments and new drawdowns. The onus is on investors to prove their interest is deductible. To ensure investors can prove that interest is deductible, if possible, it would be advisable to keep borrowings for shares and for other investments or expenses separate.

Losses

99. Where share sales are taxable but the shares are sold for less than what they cost, the investor can claim that loss. However, the amount of loss relates to the difference between the sale price and the cost of the shares. It does not apply to any unrealised

[11] Although note that the table in the summary of IS0044 is overly simplified and does not take into account the deferral of deductions for the cost of shares until disposal.

losses (for example, if the shares had gone down in value but the investor still owns the shares).

100. In some cases, where an investor has claimed a loss relating to share sales, the Commissioner may seek information to show that shares were held on revenue account. Depending on the circumstances, this could include ensuring investors had consistently treated any profitable sales as being taxable.

101. Example | Tauira 13 explains when losses are available.

Example | Tauira 13 – Realised and unrealised losses

In November 2021, Jimi bought $1,000 of shares in B Co using an online investment platform. He bought the B Co shares hoping to make a quick profit and kept records of this purpose.

However, by the time Jimi bought the shares the market had turned. In January 2022 the shares were worth $800.

Scenario one

Jimi sold the shares to limit the loss. Because Jimi had bought the shares in B Co for the purpose of sale, the amount received of $800 is income. However, this is offset by the deduction he receives for the cost of the shares and transaction fees totalling $1,020. Therefore, Jimi made a $220 loss. He can claim this loss against his other income.

Scenario two

Jimi holds onto his shares in B Co. By 31 March 2022, the share value had decreased further to $700. Jimi was calculating his taxable income for the year ended 31 March 2022. However, in doing so, Jimi cannot claim the unrealised loss for the cost of the shares in B Co because he still has them. He can claim a loss only if he sold (or otherwise disposed of) his shares.

Transitional residents

102. Special rules apply to transitional residents. These are people who have moved to New Zealand for the first time or who have returned after being resident elsewhere for 10 years or more and were not previously a transitional resident. There are some exceptions, for example a person who applies for Working for Families tax credits ceases eligibility for being a transitional resident.[12]

[12] A person can also choose to opt out of the transitional resident rules.

103. The period that a person is a transitional resident is essentially four years from when they become resident in New Zealand. During that time, transitional residents are generally liable for tax in New Zealand only on their income that is sourced here. Income that would be sourced in New Zealand in relation to share investments using online investment platforms could include:

- dividend income from shares in New Zealand companies;
- income from taxable sales of shares in New Zealand companies; and
- income from a business of share dealing carried on in New Zealand.

104. This means transitional residents have no tax liability in New Zealand for any dividend income received from a foreign company, or sales of shares in foreign companies (unless the person is carrying on a business in New Zealand). This is illustrated in Example | Tauira 14.

Example | Tauira 14 – Transitional resident

Mikah moved to New Zealand three years ago and is a transitional resident for tax purposes. Mikah had a United States share portfolio worth NZ$60,000. He also used an online investment platform to buy shares in NZCo and earned regular dividends.

During his transitional residency period, Mikah is subject to tax in New Zealand on the dividends received from NZCo, as dividends from a New Zealand resident company are sourced here. Mikah is not subject to tax in New Zealand on any dividends received from foreign shares. He also does not have FIF income (as the FIF rules do not apply to transitional residents until their transitional residency period ends).

Before he reaches the end of his transitional residency period, Mikah should discuss the implications of his share portfolio with a tax advisor. In particular, he will need to consider the application of the FIF rules to his portfolio, as discussed next.

Part two – Application of the foreign investment fund rules to share investments

105. This part applies to New Zealand resident individual investors that are subject to the FIF rules. This part does not apply to transitional tax residents (who do not have FIF income during their transitional tax residency period).

106. The discussion in part one about the ordinary tax rules does not apply to an investor if their share investments are subject to the FIF rules. This means that, when the FIF rules apply, an investor does not have a tax liability for dividends or taxable share sales. Instead, they apply the calculations set out in the FIF rules.

107. The FIF rules are a special set of rules that apply to particular investment interests, including foreign shares.[13] It is important for investors to be aware that this regime exists. It is also important to note that the FIF rules apply across all relevant investments that are subject to the FIF rules and not just to foreign shares, so investors will need to consider all their interests that are subject to these rules (and across all platforms or brokers that they use).

108. If an investor holds foreign shares that are subject to the FIF rules as well as foreign shares that are exempt from the FIF rules, the exempt foreign shares are still subject to the ordinary rules in part one of this statement.

109. The FIF rules can be complex and applying them is fact specific. This statement provides a summary of when the FIF rules apply where the investment is in foreign shares. If an investor thinks they may fall within these rules, more information on applying the FIF rules can be found in the resources at [25].

When the FIF rules apply to investors who hold foreign shares

110. The FIF rules apply where a person holds an attributing interest in a FIF that is not exempt. An attributing interest in a FIF is an investment that includes:

- direct income interests in a foreign company;
- an interest in a foreign superannuation scheme (other than Australian regulated superannuation schemes as explained in s EX 33); and
- rights to benefit under a life insurance policy issued by a FIF.

111. A person has a direct income interest in a foreign company if they hold:

- shares in a foreign company;
- shareholder decision-making rights for a foreign company;
- a right to receive or apply a foreign company's income for the relevant period; or
- a right to receive or apply any of the value of a foreign company's net assets if they are distributed.

112. However, the FIF rules do not apply to interests that are exempt. Exempt interests relevantly include shares in New Zealand companies and in certain Australian ASX listed companies and Australian unit trusts.[14] To find out if an Australian company is

[13] See ss CQ 4 to CQ 6 and ss EX 28 to EX 73.

[14] A share in an Australian company is exempt if it is not stapled to another share, the company is Australian resident and is not also resident in another country, is included on the official list of ASX

exempt from the FIF rules, see Inland Revenue's FIF exemption tool at [25]. There are also other exemptions listed in ss EX 31 to EX 43.

113. Exempt interests are not included as attributing interests in a FIF. The ordinary tax rules discussed in part one of this statement would apply to shares that are exempt from the FIF rules. To find out more about exempt interests see the table at page 6 of Inland Revenue's Guide to FIFs.

114. Therefore, when an investor buys shares in foreign companies (other than exempt interests), they will hold a direct income interest in a foreign company. This means that they hold an attributing interest in a FIF.

115. An individual has FIF income in a year if the total cost of all their attributing interests in FIFs (that are not exempt) that they hold at any time during the year when added together, is more than $50,000. An investor who holds attributing interests (other than exempt interests) that cost them $50,000 or less to buy may still choose to opt in to the FIF rules.

116. The test for this threshold to apply is generally the New Zealand dollar amount of what the shares cost the investor to buy, not their market value on any day.

> For example, an investor buys US$100 on 1 April, uses those funds to buy US$100 of shares on 1 May, and on 31 March the value of the shares is US$200. The investor needs to work out what the New Zealand dollar cost of those shares was on 1 May (using an applicable foreign exchange conversion rate at that time), **not** the New Zealand dollar cost when they bought US$100, and **not** the value of the shares on 31 March.

117. If an investor jointly owns attributing interests with a partner or spouse, their share of the cost of those interests is included in the calculation. The cost of the investor's share of the joint holdings is added to the cost of any attributing interests they may separately hold.

118. An investor who is in the FIF rules will need to include FIF income in their IR 3 individual income tax return and file an IR 1261 overseas income summary to declare their overseas income sources and claim any available foreign tax credits. For information on claiming foreign tax credits, see IS 21/09.

119. In some situations, investors need to file a FIF disclosure. However, generally, individuals who hold less than 10% of the interests in a foreign company that is incorporated in a country that has a double tax agreement with New Zealand (for

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Limited, and maintains a franking account. An Australian unit trust is exempt if it is an Australian resident and not also resident in another country, has a RWT proxy and the trust meets a certain amount of share turnover and distributions. Where these requirements are not met, the relevant company or unit trust will be a FIF. See ss EX 31 and EX 32 for more information.

example, the United States) and who use the FDR or CV methods (discussed below) are exempt from needing to file a FIF disclosure.[15] This would apply to the majority of investors who use online investment platforms.

How tax is calculated when the FIF rules apply

120. The FIF rules apply to attribute income to an investor – so even if an investor has not received any returns or gains, they may be treated as if they had. Also, foreign currency changes may potentially result in the investor being treated as if they had a gain. Similarly, any actual returns or gains the investor received may be ignored, depending on the FIF method applied.

121. FIF income for an investment is calculated using one of five methods chosen by the investor (subject to some limitations). These methods are the:

- fair dividend rate (FDR) method;
- comparative value (CV) method;
- cost method;
- attributable FIF income method; or
- the deemed rate of return method.

122. A method is chosen by the investor returning in their tax return a relevant amount of income using one of the methods. Each year the investor may choose a different applicable FIF method, but they must consistently use the same FIF method across all their attributing interests for that year.

123. There are restrictions on the method that can be chosen in certain situations. For an explanation of the methods that may be used and how to calculate an investor's FIF income, see the table at page 11 of Inland Revenue's Guide to FIFs and the explanation from page 14 (as referred to at [25]).

124. In brief summary, the method most commonly used is the FDR method. A person who uses the FDR method is generally taxed on 5% of the opening market value of their shares (or other attributing interests). The opening market value is the value on 1 April of each year. Dividends and gains from the sales of shares are usually not taxed under this method. However, when there is a "quick sale" (that is, shares are bought and sold within a year) then a quick sale adjustment is required. This is explained in more detail in Inland Revenue's Guide to FIFs at page 15.

125. Another option for an individual investing in ordinary shares is the CV method. Under this method, the investor calculates the closing market value of the shares plus any

[15] See the relevant International Tax Disclosure Exemptions issued for each income year.

gains (including dividends and gains from sales) and subtracts the opening market value plus costs.

126. Individuals can do the calculations under either of these methods and choose which one they would prefer to use, in each income year. A calculation tool is provided on Inland Revenue's website to do this.

127. The application of the FIF rules to an investor using an online investment platform is illustrated in Example | Tauira 15.

Example | Tauira 15 – FIF attributing interests' cost value exceeds $50,000 in a year

Jax came into a windfall when their uncle left them $55,000 in a will. On 31 March 2022, Jax decided to invest this amount in ordinary shares in a variety of United States companies using an online investment platform.

2022 income year

Jax will be subject to the FIF rules because at a point in time in the 2022 income year Jax held attributing interests that added together cost over $50,000 to buy. However, under the FDR method no income will arise as the opening value on 1 April 2021 was zero and there were no quick sales.

2023 income year

For the 2023 income year, Jax had not sold any shares, and uses Inland Revenue's calculation tool to work out their FIF income. Jax works out that under the FDR method they have deemed income of $2,750 (opening market value of $55,000 multiplied by 5% with no quick sale adjustments).

As a natural person, Jax can compare the result under the FDR method with the CV method and choose which method to use.

As at 31 March 2023, the value of Jax's shares had increased to NZ$59,125. Jax had received no dividends and made no sales. Under the CV method, Jax's FIF income would be $4,125 ($59,125 - $55,000). Jax chooses to use the FDR method (and must use the same method across all FIF investments).

Jax will need to complete the IR 1261 overseas income summary but does not need to file a FIF disclosure.

2024 income year

In January 2024, the shares had increased in value further to $64,300 and Jax decided to sell half the interests and invest those funds into exempt Australian shares. Jax is still subject to the FIF rules in the 2024 income year because at a point in time, they held attributing interests that cost more than $50,000.

Jax will need to undertake the same calculations as for the previous year and complete the IR 1261 overseas income summary.

2025 income year

If Jax did not acquire any further attributing interests, the FIF rules do not apply.

Expenses related to attributing interests in FIFs

128. As noted at [90] there are various expenses that may be incurred when a person invests in shares, such as the cost of acquiring the shares, fees and interest on funds borrowed to buy shares. Deductibility of these expenses depends on whether there is a relevant nexus with income and also whether the expenses are capital in nature.

129. Where an investor is subject to the FIF rules, they derive FIF income. This means that expenses related to their attributing interests will have the relevant nexus with income. However, deductions for the cost of shares, including brokerage or platform fees incurred to acquire the shares, cannot be claimed when the FIF rules apply (except where the amount is taken into account in the relevant FIF calculation method).[16]

130. As with shares subject to the ordinary rules, investors can claim fees such as for financial planning services, as explained in IS0044. They will also be able to deduct interest on borrowed funds used to acquire FIF interests.

131. The investor will need to keep records to show that the borrowed funds were used to purchase the shares. This could include a contemporaneous bank statement showing the funds leaving the loan account and a buy order for shares of the same amount. Investors who use the same facility for buying shares and for other investments or expenses need to be able to prove the amount of interest that relates to the shares. This can be difficult where a facility is used for multiple uses and where there are repayments and new drawdowns. The onus is on investors to prove their interest is deductible. To ensure investors can prove that interest is deductible, if possible, it would be advisable to keep borrowings for shares and for other investments or expenses separate.

[16] Section EX 59(3).

Appendix – Further analysis and case law

132. This appendix provides further analysis and case law that explains why the Commissioner has reached the views expressed in part one. The following analysis provides a detailed explanation of the case law on when an investor has:

- acquired shares for the purpose of disposal; and
- a share dealing business or profit-making scheme.

Shares acquired for the purpose of disposal

133. As noted in part one, the leading case on when shares are acquired for the purpose of disposal is *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 (CA). In that case, Richardson J said at 6,350:

> … It is well settled that the test of purpose is subjective requiring consideration of the state of mind of the purchaser as at the time of acquisition of the property. … Where there is more than one purpose present taxability turns on whether the dominant purpose was one of sale or other disposition… The analysis may become more complicated where different purposes may be more significant depending on whether the focus is on the short term, the medium term or the ultimate object. Adoption of a dominant purpose test in relation to the particular property purchased allows a sensible focus as a practical matter on what was truly important to the taxpayer at the time of acquisition.

134. What is relevant is what was truly important to the taxpayer at the time of acquisition.

135. Richardson J referred to investment assets (such as shares) and said that generally speaking, a person buying such an asset does so either with a view to investment for the income it will return or with a view to realising a profit on disposal. He noted that although these purposes are not mutually exclusive "it will generally be possible to say that the one or the other is predominant at the time when the purchase is made". His Honour went on to say at 6,352:

> If the investment policy is to provide and enlarge the dividend income and to buy (and sell) with that as the dominant consideration, there can be no basis for invoking [s CB 4]. It is proper then to distinguish between sales made in the course of the review of an investment portfolio held primarily for its potential income yield on the one hand, and sales of shares acquired primarily with the object of eventually realising gains on resale on the other. Many ordinary investors acquire shares for the purpose of securing not only income from dividends, but also growth in the value of the shares. In those cases where there is not a clear dominant purpose of resale at the time of purchase, any profits on the ultimate sale of the shares are not within [s CB 4].

136. However, where property is acquired with no particular purpose, but the taxpayer has a vague or general hope that the property will increase in value, that does not amount to a purpose of disposal. Richardson J stated at 6,352:

> Up to this point I have been discussing the identification of the purpose or purposes of the purchase. However assets may be acquired by a taxpayer who has no clear purpose in mind. There may be no more than an intention to buy with the expectation of benefiting the taxpayer's financial position in some unformulated way, and without any clear consideration of the advantages of either retention or resale sooner or later. If that state of affairs is established the statutory onus on the taxpayer to prove that the shares were not purchased for the dominant purpose of sale will have been satisfied. To put it another way, to discharge the onus it is not necessary to establish some other specific purpose.

137. Similarly, Casey J stated at 6,355:

> The taxpayer will also succeed if property is acquired without any definite purpose in view at all, or merely in a vague general hope that it would be a good investment — see *Williams Property Developments* at NZTC pp 61,541-61,542; NZLR pp 283-284.

138. Similar comments were also made in *G Williams v FCT* 74 ATC 4237 and *Case V3* (2001) 20 NZTC 10,021.

139. Dobson J in *CIR v Boanas* (2008) 23 NZTC 22,046 (HC) draws a distinction between a formulated purpose to do something at a future time, and a mere prospect, option or aspiration regarding something that may happen in the future (which is not enough to amount to a purpose of disposal). This decision concerned the land provisions rather than s CB 4 (which has a different test for when a person has a purpose of disposal) but highlights that for a person to have a "purpose", it must be sufficiently formulated.

140. The above comments indicate that a person may acquire property without any particular purpose in mind. In such a case, the person will still need to be able to show that disposal was not their dominant purpose (and, for instance, the objective factors referred to in part one may support their statement or indicate otherwise).

141. The above comments also show that a person may have a dominant purpose of disposal if it is sufficiently formulated, even if that purpose will not be actioned until a future time.

142. In *National Distributors*, the taxpayer made eight purchases and sales of shares over a two-year period. The shares were held between eight months and three years, with an average of 19 months before sale. The dividend yields were inconsistent and ranged from less than 3% to over 11% per year depending on the shares. Overall, the dividend yield was 6.5% per year compared with 25% per year from gains on sale.

143. Richardson J found the shares fell into two categories. Some were purchased for family or other reasons and not the usual commercial reasons of obtaining a return

from dividends or proceeds of sale. However, Richardson J found the taxpayer did not establish that the shares in the second category "were not acquired for the dominant purpose of sooner or later reselling them". Richardson J's reasons on the facts of that case were:

- Despite the taxpayer contending that its dominant purpose was dividend yield, no consideration was given to the dividend potential at the time of purchase and there was no policy for a particular level of dividend return.
- The shareholdings could not fairly be described as being held long term (between 8 months and 3 years).
- The taxpayer's practice was to sell shares when it appeared they had reached their peak prices (which was indicative of a focus on achieving the maximum market price rather than on enlarging the dividend potential).
- While there may have been a purpose of obtaining a dividend return, the dominant purpose was to realise a profit on disposal sooner or later when the shares reached their full market potential.

144. The objective factors discussed in part one at [50] can be applied in the context of the above facts the court referred to when concluding the dominant purpose of acquiring the shares was disposal:

- the nature of the asset – there was no consideration of dividend yield when acquiring shares;
- the length of time the shares were held – could not be described as long term (being 8 months to 3 years);
- the circumstances of sale - the taxpayer sold shares when they appeared to reach peak prices; and
- the number of transactions - there was a pattern of activity of selling shares when they were judged to have met their full market potential.

Purpose means the object the person has in mind

145. Several cases have considered the difference between a person's purpose (which is relevant for s CB 4) or their motive or intention (which is not relevant).

146. In *Plimmer v CIR* [1958] NZLR 147 (SC) Barrowclough CJ said a person's purpose is usually the object that they have in mind. In *Plimmer,* the taxpayer sought to acquire control of a company, by purchasing all of the company's issued ordinary shares. A condition of the purchase was that they had to buy all the company's preference shares. The unwanted preference shares were purchased, and the taxpayer then on-sold the preference shares, making a profit. This sale was found not to be taxable

because the purpose or object of acquiring the preference shares was to acquire the ordinary shares (and control of the company).

147. In *CIR v Walker* [1963] NZLR 339 (CA) the taxpayer purchased land adjacent to his farm. At the time of purchase the taxpayer did not want three acres of the land that had a long road frontage and wanted to subdivide those three acres off while adding the rest of the land to his farm. Although the taxpayer wanted to sell three acres of the acquired land, the Court accepted that the dominant purpose had been to purchase the 60 acres to increase the size of farmland.[17]

148. *In CIR v Hunter* [1970] NZLR 116 and *Holden v CIR; Menneer v CIR* [1974] 1 NZTC 61,146 (PC), the taxpayers received United Kingdom currency and wanted to convert it into New Zealand dollars. The taxpayers purchased shares and sold the shares for New Zealand dollars. This way, the taxpayers received more New Zealand dollars than they would have received through transfers in the banking system. The courts held the taxpayers' dominant purpose in acquiring the shares was to immediately sell them (even though there was a reason for doing this – to receive more New Zealand dollars than through the banking system).

149. In relation to this issue, Richardson J in *National Distributors* said at 6,351:

> **In short, if resale is proposed it matters not that it is only the means to an end**. … To describe a purchase as a hedge against inflation or as providing an accretion in capital value, or as a good investment, is not a substitute for embarking on the enquiry required under … [s CB 4]. Such expressions do not provide a cloak of tax immunity. In its ordinary meaning to make an investment is to outlay money in the purchase of anything from which profit is expected, whatever form it takes; and to provide a hedge against inflation or an accretion in capital value are the underlying motives for engaging in transactions. **It is still necessary to determine whether the dominant purpose of the taxpayer in acquiring the property was to sell it at a future date.** As *Holden* and *Hunter* demonstrate, the reason why the taxpayer decided to buy with a view to selling in due course is not relevant to the statutory enquiry. If the taxpayer's dominant purpose in acquiring the property is to sell it in the future at a price which, allowing for inflation, corresponds with or is better than its price at the time of purchase, his statutory purpose is to sell the property even though his motive is to protect his savings from inflation. [Emphasis added]

150. Specifically, Richardson J commented that it did not matter whether resale is only the means to some wider aim. Richardson J commented that reasons for purchasing shares such as hedging against inflation, or being a good investment, are not relevant to the enquiry into a person's purpose. These are broad expressions and do not reflect the underlying purpose of the person in acquiring those assets. What is relevant is

[17] This case concerned a legislative provision that had previously included land and personal property in the same provision. These are now separate provisions with different tests, and so cases on land are now of less relevance to s CB 4.

whether the property had to be sold to give effect to the relevant aim. The reasons why that may occur are not relevant.

151. Where a person passively acquires something (for example, by inheritance or gift), they will not have a purpose for that acquisition. In *McClelland v FCT* (1970) 120 CLR 487 the Privy Council held that a taxpayer who had acquired property under a will had not acquired the property for the purpose of profit making by sale. Rather, the taxpayer had merely acquired the land through the bounty of the testator. *McClelland* was followed in *FCT v NF Williams* (1972) 3 ATR 283 (HCA) where the High Court of Australia held that the equivalent to s CB 4 could not apply where property was obtained as an unsolicited gift. However, where the initial holder had acquired the property for the purpose of disposal and subsequently gifts it, subparts FB and FC may apply.

Examples of reasons investors may have for buying shares

152. A person may acquire shares for a variety of reasons, such as:

- dividend income;
- a long-term investment;
- a hedge against inflation;
- a store of value outside the banking system;
- portfolio diversification;
- to obtain voting interests or other rights arising from being a shareholder; or
- other reasons (eg, family reasons or for no particular purpose).

Long-term investment, hedge against inflation and portfolio diversification

153. As is noted above in *National Distributors*, many of the motives that an investor may have for buying shares do not explain whether their dominant purpose is to dispose of them. Richardson J noted there may be cases where a person's purpose is the retention of an asset for reasons such as building up a large estate or securing the real value of the person's money for the long term. What is relevant is whether their motive is given effect by disposing of the shares. Richardson J indicated that descriptions such as acquiring property as a long-term investment or hedge against inflation will not negate a dominant purpose of disposal if disposing of the property is required to give effect to that motive. As noted above he said:

> **To describe a purchase as a hedge against inflation or as providing an accretion in capital value, or as a good investment, is not a substitute for embarking on the enquiry required** under … [s CB 4]. **Such expressions do not provide a cloak of tax**

> **immunity.** In its ordinary meaning to make an investment is to outlay money in the purchase of anything from which profit is expected, whatever form it takes; and to provide a hedge against inflation or an accretion in capital value are the underlying motives for engaging in transactions. [Emphasis added]

154. Therefore, where an investor says they bought shares because it was a good investment, a hedge against inflation or for portfolio diversification, it is still necessary to determine whether their dominant purpose was to sell at a future date (and the reasons for such a sale are not relevant).

155. As *Holden* and *Hunter* demonstrate, the reason the taxpayer decided to buy with a view to selling in due course is not relevant. If a person's dominant purpose in acquiring shares is to sell them in the future at a price that, allowing for inflation, corresponds with or is better than the price at the time of purchase, the purpose is still to sell the shares even though the motive might be to protect savings from inflation.

156. Several Australian cases have looked at whether property purchased as a hedge against inflation was purchased for a purpose of profit-making by sale. It is important to note that many of these cases turn on whether the taxpayer had a profit-making purpose, which is relevant to the Australian test that applied at the time. A profit-making purpose is not needed for s CB 4 to apply.

157. In *FCT v Firstenberg* 76 ATC 4141 (SC of Vic) the court considered that investing in an appreciating asset does not of itself mean it was acquired for the purpose of profit-making by sale. For instance, the taxpayer could acquire an appreciating asset to secure the value of their money so as to have that asset fall part of their estate.

158. *Firstenberg* highlights that merely describing property as being acquired as a hedge against inflation does not determine what the person's purpose was. The purpose may be to retain an asset for a long-term investment or to pass on to heirs, or it may be to sell the asset.

159. In another Australian case, *Case P27* 82 ATC 117 the Board of Review held that while the taxpayer's motive in acquiring bullion was a hedge against inflation, his dominant purpose was to sell it at a profit when he reached age 55. Member Harrowell stated at 122:

> … It seems to me that where the property was acquired "for the purpose of profit-making by sale" that fact cannot be obscured by a throw-away phrase such as "a hedge against inflation". In fact I believe that that phrase is actually detrimental to this taxpayer's case as it clearly indicates an intention or purpose to make a profit. Such a phrase may not be detrimental where a taxpayer can show that when he purchased the property he had no intention of later reselling it at a profit. Naturally to become involved with sec. 26(a) he must later sell that property or part of it so that the facts surrounding the sale will become most relevant to his case. This situation can also arise where a taxpayer claims that the sale is part of a transposition of investments. The word "transposition" is no tax cure-all and if called upon, the taxpayer must show in terms of sec. 190(b) that the investments were not acquired for the purpose of profit-making by sale or from the carrying out of

any profit-making undertaking or scheme. *London Australia Investment Co. Ltd. v. F.C. of T.* 77 ATC 4398.

160. Therefore, there may be circumstances where assets acquired as a hedge against inflation are not purchased with the dominant purpose of disposal. However merely describing property as being acquired as a hedge against inflation is not sufficient to negate a dominant purpose of disposal.

161. Similar arguments to the above may also be made that shares are acquired as a store of value outside the monetary system or for portfolio diversification. Again, as with the above discussion, there may be situations where this stated reason involves no dominant purpose of disposal. But there may also be situations where there is still a dominant purpose of disposal that means s CB 4 applies.

Other reasons for buying shares

162. People may buy shares for other reasons. For example, there may be private or family reasons for a purchase, shares may be acquired for voting rights, or a person may not have any particular reason in mind.

163. *Rangatira Ltd v CIR* (1994) 16 NZTC 11,197 (HC) involved an investment company that administered the assets of charitable trusts. The taxpayer's investment policy involved considering capital maintenance and regular dividends and, from time to time, investments changed in accordance with that policy. During the relevant years substantial gains were made on the sale of shares. The higher court decisions concerned whether sales were income from a business, but the High Court decision touched on whether the equivalent to s CB 4 applied.

164. The High Court noted there was no purpose of disposal where shares were acquired:

- because of an association with another company (the taxpayer had been a long-term shareholder of such a company and acquired further shares during a rights issue);
- because a member of the taxpayer had joined the board of the company;
- for long-term holding consistent with the taxpayer's investment pattern (eg, shares in particular industries were acquired in line with the investment policy); or
- with evidence the taxpayer had obtained advice about long-term investments.

165. In *CIR v National Insurance Company of New Zealand Ltd* (1999) 19 NZTC 15,135 the Court of Appeal noted the fact that at the time of purchase a taxpayer did not expect to hold the property forever and contemplated the possibility of sale is not enough to fall within s CB 4. The Commissioner had submitted that because the known dividend yield was small, resale to reap the true benefits of the purchase must have been intended. Although this was a factor to be given weight, the court considered this was

not enough of itself. The shares in question were a large shareholding in a company with only one other shareholder, so gave the taxpayer representation on the board. Nothing indicated that sale was a predominant consideration in acquiring those shares.

166. Shares may be acquired for the dominant purpose of receiving voting rights. Where shares are bought using platforms, the scale of investment may generally be too low or relevant voting rights may not pass through to the investors. However, an investor may be able to show otherwise.

167. A person may also have no dominant purpose in mind for buying shares. This was seen in *Case P24* (1992) 14 NZTC 4,174 (TRA) where the taxpayer owned a portfolio of shares and made profits from the sale of some of the shares. The taxpayer stated the shares were a form of investment for her retirement, to make provision for her grandchildren, and to hedge against inflation which had been eroding the value of her savings. When she sold shares, this was generally to meet expenditure as it arose. Judge Willy noted that she had disparate and competing purposes. They included, on the evidence, that she was investing for the future; that she wished to conserve the value of her money; that she was saving for her retirement in the expectation of receiving a small income; and that she wanted security for her future, for example, for emergencies around the house or the possibility of an overseas trip. Judge Willy was satisfied on the totality of the evidence that she had no single dominant purpose and in particular no dominant purpose of sale.

168. It is relevant that the treatment of investment assets such as shares differs to other assets that a person can use and enjoy, such as land, fine art or collectors' pieces. Land is subject to different provisions, which do not require disposal to be the dominant purpose. However, the test for land sales being taxable under s CB 6 can be difficult to apply as land can have many uses and purposes to which it may be put by an owner. For example, land can be lived on, farmed, rented, leased, or used for a business or other activity. In comparison, as Richardson J noted in *National Distributors,* investment assets (such as shares) generally have two purposes - gain on sale or income from dividends (although other purposes may also exist).

169. For completeness, a purpose of disposal requires a purpose by way of sale or similar and does not include a purpose of gifting (for example by way of inheritance).[18]

Business of dealing in shares

170. Section CB 1 provides that an amount that a person derives from a business is their income. Section YA 1 defines a business as including any profession, trade, or undertaking carried on for profit.

[18] See QB17/08 **Are proceeds from the sale of gold bullion taxable?**

171. The leading New Zealand case on whether a business is being carried on is *Grieve v CIR* (1984) 6 NZTC 61,682 (CA). In *Grieve*, Richardson J concluded that both the nature of the activities and the intention of the person in engaging in these activities are important in determining whether they are carrying on a business. Richardson J set out matters that are relevant for deciding whether a business is being carried on:

- whether the person has a profit-making intention;
- the nature of the activity;
- the period over which the activity is carried on;
- the scale of the operations;
- the volume of transactions;
- the commitment of time, money and effort;
- the pattern of activity;
- financial results; and
- whether the activities are carried on in a similar manner to other similar businesses.

172. There is a difference between carrying on a business and simply realising an investment (*Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes*) (1904) 5 TC 159).

173. Several cases specifically consider whether investors who are buying and selling shares are carrying on a business of dealing in shares. In *National Distributors Ltd v CIR* (1987) 9 NZTC 6,135 the High Court considered the taxpayer was not in a share dealing business (this issue was not challenged on appeal, and the Court of Appeal decision is discussed in relation to s CB 4 above). Relevant factors included whether:

- share sales were an integral part of the business;
- there was regular or continuous monitoring of the share portfolio;
- there was any system according to which shares were sold;
- sales were frequent and part of the person's normal operations in the course of making profits; and
- the sales and purchases were made on a large scale.

174. In *National Distributors*, the share sales were intermittent, unsystematic and made in relation to inflationary trends. However, most of the share sales still ended up being taxable for a different reason (as discussed in relation to s CB 4 above).

175. In *Estate of King v CIR* [2007] NZCA 474, a New Zealand resident family used an agent in England to manage their share portfolio. The agent was tasked with earning a

specific income on the portfolio each month. The Court of Appeal found the taxpayers were not carrying on a business of trading in shares because:

- the nature of the activity was investment;
- the scale of the activity was not large enough (131 transactions made during a three-year period);
- specific reasons were provided for some transactions, which suggested they were not part of a plan or a regular pattern of share trading; and
- the intention was not to conduct a business.

176. In *Rangatira Ltd v CIR* [1997] 1 NZLR 129 (PC) a company invested on a long-term basis in shares in established well performing companies. Over time, shares were sold and often profits were made on the sales. The Privy Council decided sales were not carried out in the ordinary course of the taxpayer's business. The number and frequency of the transactions (41 sales) during a seven-year period were not, by themselves, sufficient to conclude the company was a share trader.

177. *CIR v Stockwell* (1992) 14 NZTC 9,190 (CA) concerned the deductibility of losses made on share sales. The court agreed with submissions that there is likely a business where a person:

- spends a significant part of each day pursuing share trading activities;
- has some tens of thousands of dollars at risk; and
- engages in around 10 transactions per month.

178. Similarly, the court thought there is likely not a business where a person invested a significant amount (for the time) in the shares of only two or three companies and did not engage in active trading.

179. The taxpayer in *Stockwell* had spent $70,000 on the shares of six companies. Thirteen parcels of shares were purchased, and nine parcels were sold over nine months. This was considered to be a borderline fact situation. The court leaned against finding a business. Cooke P said at 9,194:

> When a taxpayer has a full-time occupation and devotes some of his spare time to stock exchange speculation, one should be slow, I think, to find that he has gone as far as to embark on a business. Usually it would be an artificial use of language. The same applies to a retired or unemployed person who engages in a modest amount of buying and selling shares. In such cases the presumption should be against a business.

180. Hardie Boys J similarly said at 9,194:

> The buying and selling of shares is typical of many activities that may or may not be a business according to the individual circumstances. Carried on merely to supplement an adequate income from other sources or to provide interest or excitement, it is unlikely to

> be a business. That the person may regard himself as a "trader" is of little assistance. One would **normally expect to find a considerable number of purchases and sales over an appreciable period of time before he could be regarded as dealing in shares and a substantial capital investment before one would take the next step of regarding him as in the business of dealing in shares**. [Emphasis added]

181. In *London Australia Investment Company Ltd v FCT* (1974) 4 ALR 44 (HCA) a company invested in shares for the purpose of earning dividend income and had a specific policy of maintaining a consistent dividend yield. It regularly reviewed the portfolio and sold shares that were not paying sufficient dividends, and then reinvested the sale proceeds. These sales would often produce a profit.

182. In the High Court of Australia, Gibbs and Jacobs JJ found the income was taxable as it resulted from carrying on a business. This was because:
    - during the three years in question, it was considered an integral part of the taxpayer's business to deal in shares;
    - switching investments was desirable to produce the best dividend returns and was necessary if the taxpayer's policy of investing in shares with growth potential was to be adhered to;
    - the share portfolio was given regular consideration; and
    - the taxpayer systematically sold its shares at a profit for the purpose of increasing the dividend yield of its investments.

183. The cases considered above provide guidance for determining whether an investor's share sales could be considered part of a business of share dealing.

184. To summarise, the following factors were relevant to a finding by the courts that there was a business of share dealing:
    - share sales were an integral part of the business, and part of the normal operations of the business;
    - there was regular or continuous monitoring of the share portfolio, and a system according to which shares were sold;
    - sales were frequent, and both sales and purchases are made on a large scale; and
    - a large amount of money was invested.

A business of share dealing

185. Section CB 5 also applies to tax income from a share dealing business. This section appears similar to s CB 1 because it taxes sales of personal property (such as shares) when that person's "business" is to deal in property of that kind. However, distinctions exist between the provisions.

186. In *Piers v CIR* (1995) 17 NZTC 12,283 (HC) the trustees of a pension fund held investments that were managed by a financial institution. The institution operated a computer model that prescribed certain ratios of different risk weightings for share investments. As the values of shares changed, so did the required ratios and weightings. This meant shares had to be bought and sold to remain within the limits of the model.

187. Temm J held that the trustees were not in business under s CB 1 because they were merely discharging their statutory and fiduciary obligations as trustees of the fund. There was no profit-making intention underlying the share sales. However, Temm J observed that the frequency of share dealing transactions is often decisive in deciding whether profits are taxable under s CB 5, and that the purpose or motive of the business enterprise is of less relevance than the extent of it. Temm J held that the fund was dealing in shares within the meaning of s CB 5.

188. In *Estate of King*, the Court of Appeal referred to case authorities on when a share dealing business exists and said at [42]:

> The issue grappled with in these authorities is as to which side of the line a particular set of transactions falls. The essence of the test is as set out in *Californian Copper*. Where the line is to be drawn can be a difficult question and it is ultimately one of fact and degree. The matter must be looked at in context and so, while the frequency of transactions and continuity of effort are primary considerations, those matters cannot be viewed in isolation. Relevant contextual matters may include the taxpayer's circumstances, for example, the extent of the taxpayer's investment, the relativities between the size of the investment and the turnover, and the circumstances in which the transactions take place. Any explanations as to particular transactions will also be pertinent and whether or not dealings involved rights and bonus issues or matters of that kind will be part of the assessment.

189. There is a distinction between a business under s CB 1 and a business of dealing under s CB 5. While they will often coincide, it is possible that a business of dealing may exist where there is no business for the purpose of s CB 1. The frequency of transactions is a key determinant in this respect, and a person's subjective intention is less important.

Profit-making undertaking or scheme

190. Section CB 3 provides that an amount is income if it is derived from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit.

191. The undertaking or scheme must be carried on or carried out. The Australian equivalent of s CB 3 was considered in *Premier Automatic Ticket Issuers Ltd v FCT* (1933) 50 CLR 268 (HCA). Dixon J observed that the terms carried on or carried out cover both the habitual pursuit of a course of conduct, as well as the execution of a

plan or venture that does not involve repetition or a system. This was cited with approval in New Zealand in *Duff v CIR* (1982) 5 TRNZ 343 (CA).

192. Several cases have considered what is an undertaking or scheme under s CB 3. Essentially:

- a scheme involves a series of steps directed to an end result;
- an undertaking is an enterprise directed to an end result;
- there needs to be a plan or purpose that is coherent and has some unity of conception, but does not need to be precise;
- the assessment of any profit-making purpose is made at the time the scheme is entered into;
- property that is already held can become part of a later formulated scheme;
- the profit-making purpose must be the person's dominant purpose;
- a nexus (or connection) must exist between the undertaking or scheme and any gain derived; and
- the scheme must produce a revenue gain - capital gains are not included.

193. For completeness, if a person acquired shares as part of a share dealing profit making scheme involving sales, it is likely that the person acquired shares for the purpose of disposal and s CB 4 would apply to the sales of those shares in any event. The Commissioner accepts it would be unusual for s CB 3 to apply to investments in widely held shares acquired through a platform or broker.

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