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Public Rulings  
Office of the Chief Tax Counsel  
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## Application of schedular payment rules to directors' fees (PUB00267)

The Institute of Directors (IoD) appreciates the opportunity to provide feedback on Inland Revenue's [exposure draft](#) of *Interpretation Statement - Application of schedular payment rules to directors' fees* (the draft interpretation statement). This will update and replace *Interpretation Statement – Tax deductions from directors' fees paid to GST registered person, September 1996* (the 1996 interpretation statement). It is also intended to complement *Public Ruling BR Pub 15/10: Goods and services tax – Directors fees, August 2015*.

Interpretation statements set out Inland Revenue's view of the taxation laws in relation to a particular set of circumstances in cases when a binding public ruling cannot be issued or is considered to be inappropriate. This guidance can provide taxpayers (and their advisors) greater certainty in conducting their affairs.

### About the Institute of Directors

The IoD is a non-partisan voluntary membership organisation committed to driving excellence in governance. We represent a diverse membership of over 8,000 members drawn from NZX-listed corporations, private companies, small to medium enterprises, public sector organisations, not-for-profits and charities.

Our chartered membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

### Summary

The draft interpretation statement relates to income tax (not GST) and covers:

- the situations in which tax must be withheld from payments of directors' fees and
- when and how much tax must be withheld and paid to Inland Revenue (if withholding is required).

Overall, the draft interpretation statement is more comprehensive than the 1996 interpretation statement and provides greater clarity and guidance in relation to the withholding tax treatment of payments of directors' fees. As seen from the title, the draft interpretation statement relates to directors' fees generally and not just to directors' fees paid to GST registered persons (as compared with the 1996 interpretation statement).

The draft interpretation statement is largely the same as the 1996 interpretation statement with respect to the situations when tax must be withheld from payments of directors' fees. Our submission focuses on specific situations in which tax must be withheld. We seek greater clarification from Inland Revenue around the withholding tax treatment of fees paid to employees providing directorship services.

## Background

The 1996 interpretation statement related to the Income Tax Act 1994 and focused on payments of directors' fees to GST registered persons. The Income Tax Act 2007 is now the relevant governing legislation. The draft interpretation statement applies to payments of directors' fees generally and not just directors' fees paid to GST registered persons.

Withholding tax regimes are a common feature of effective tax systems. Such regimes impose an obligation on a party (eg an employer) to withhold an amount of tax from a payment of *income*. "Schedular payments" are a withholding tax in New Zealand.

The payment of directors' fees are generally schedular payments for the purposes of the Income Tax Act 2007. As a consequence of being a schedular payment, tax must be withheld by the payer and paid to Inland Revenue. However, not all payments of directors' fees are schedular payments. Whether a payment of a director's fee is a schedular payment largely depends on *who* has contracted to provide the directorship services (eg whether an employee, independent contractor or a company has contracted to provide the directorship services).

It is noted that the draft interpretation statement provides that whether a person is registered for GST is irrelevant when determining if tax must be withheld from a payment of directors' fees.

## Payments of directors' fees to individuals

### Independent contractors

Directorship services are commonly provided by individuals as *independent contractors* to a company (eg many non-executive directors). The draft interpretation statement provides that directors' fees paid to such persons are schedular payments and tax must be withheld by the payer and paid to Inland Revenue.

### Employees

Directorship services can also be provided by individuals as *employees* of the relevant company (ie executive directors). The draft interpretation statement notes that "An individual will provide directorship services as an employee if directorship duties are included in an employment agreement they have with you". If such duties are set out in an employment agreement, payments for directorship services are not schedular payments, they are "salary or wages" or "extra pay" and PAYE must be withheld.

We note that while some executive directors may have details of their directorship duties set out in their employment agreements, others will not. For instance:

- in some small and medium-sized entities
- where an employee's circumstances change after they have been employed eg they get promoted to the executive team and appointed to the board.

In our view, the reality of the situation should be considered rather than reliance on specification in the employment agreement. This would be consistent with the substance over form relationship of employment law in New Zealand. Given this, Inland Revenue should reconsider whether reliance on specification in the employment agreement is appropriate.

### *Employees appointed to subsidiary companies*

Unlike the 1996 interpretation statement, the draft interpretation statement does not cover situations where an employee is a director of a subsidiary company. Inland Revenue should consider including in the draft interpretation statement coverage of the withholding tax treatment of payments to employees for directorship services in these circumstances.

### *Shareholder-employees exception*

We note that there is an exception for withholding tax from payments to shareholder-employees of a “close company” in certain circumstances and this is discussed in the draft interpretation statement (a close company has 25 or fewer shareholders and is not a “look through company”).

### Payments of directors’ fees to non-individuals

#### **Companies**

Directorship services can be provided through companies and other entities or bodies. It is common for professional directors to provide directorship services through a company. We note that the definition of “company” for the purposes of the Income Tax Act 2007 is broad and includes a listed limited partnership, incorporated societies and other bodies corporate.

As a general rule, under the draft interpretation statement, payments of directors’ fees for directorship services provided by a company will not be schedular payments and therefore tax is not required to be withheld at source. However, there are exceptions for services provided by:

- an agricultural, horticultural, or viticultural company
- a company that is a non-resident contractor or
- a company that is a non-resident entertainer.

#### **Public, local, and Māori authorities**

Payments of directors’ fees for directorship services provided by a public, local or Māori authority are not schedular payments and therefore tax is not required to be withheld at source.

### Conclusion

The IoD generally supports the draft interpretation statement as it provides greater certainty for payers of directors’ fees. We particularly support the flowchart and examples. However, we suggest Inland Revenue consider:

- whether, for payments of directors’ fees to employees, reliance on specification in the employment agreement is appropriate
- including coverage of the withholding tax treatment of payments to employees for directorship services in subsidiary companies
- in addition to the draft interpretation statement which is technical and likely to be used by tax advisors, whether it would be helpful to provide an upfront summary and/or simplified version to provide greater access for directors, payers and others.

We appreciate the opportunity to comment on behalf of our members and would be happy to discuss this submission with you.

Yours sincerely



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