Base Erosion and Profit Shifting (BEPS) Hybrids Disclosure Questionnaire

Year ended DD Month YYYY (to be updated by member)

# BEPS questionnaire

The information is based on legislation current as at 5 December 2022.

The following version control information has been included to assist to you monitor changes to the checklist to ensure you are using the latest version.

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**About the author**

This questionnaire was prepared by Baker Tilly Staples Rodway on behalf of CPA Australia.

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# BEPS questionnaire

**General comments**

This questionnaire relates to Entity Name (referred to in this questionnaire as “you” or “your”) for the year ended DD Month YYYY.

Some of the questions below may require input from your overseas affiliates / advisors as they may specifically relate to the tax treatment in that overseas jurisdiction. The questions also include a number of defined terms, which have been hyperlinked (in blue) to the relevant legislative definition for your reference. The questionnaire isn’t designed to be a comprehensive review of BEPS related matters but rather, assist in identifying areas that may require additional analysis.

|  |  |
| --- | --- |
| Question | YES / NO |
| 1. Are you claiming a deduction under a [financial instrument](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) for a payment to a [related](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) non-resident, where the payment was not taxable income for the non-resident in another country in an accounting period beginning within 24 months of the end of the income year in which you are claiming a deduction?

***Comment:****Any time a deduction is claimed under a* [financial instrument](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) *(generally this will be a loan, derivative, or other financial arrangement, but for this purpose the definition is slightly broader) where the payee is a* [*related*](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) *non-resident, the foreign tax treatment of the payment should be checked.* *Is the* [*related*](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) *party including the payment in its taxable income as interest, or as income taxable at the same rate as interest? If it is, is that inclusion expected to occur in an accounting period beginning within 24 months of the end of the income year in which a deduction is claimed for the payment? If the answer to either question is no, then a deduction may be denied, and a BEPS disclosure may be required to be filed.* |  |
| 1. Do you hold shares in a foreign company where you have treated the dividend on those shares as exempt income and the payment was deductible to the payer in another country, or otherwise gave rise to some form of tax relief?

***Comment*** *A dividend from a foreign country is not exempt from New Zealand income tax if the payment is deductible to the payer or otherwise meets the definition of a* [*deductible foreign equity distribution*](http://www.legislation.govt.nz/act/public/2007/0097/latest/DLM1520575.html)*.* |  |
| 1. Have you received a payment under a [financial instrument](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) with a non-resident [related](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) person where either:
* that person is entitled to a deduction (or equivalent tax relief) for payments under the arrangement in tax periods that end more than two years before the beginning of the income year in which you expect to recognise the income from those payments; or
* that person is entitled to a deduction or equivalent tax relief for payments under the arrangement which will not be included in your income.

***Comment****If a non-resident is entitled to a deduction (or equivalent tax relief) for a payment to a New Zealand* [*related*](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) *party in relation to a* [*financial instrument*](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) *in a tax period ending more than 24 months before the beginning of the income year in which the payment is treated as income in New Zealand, or is not treated as income at all, the income must be recognised at the same time it is deducted by the payer.* |  |
| 1. Are you claiming a deduction for a payment to a non-resident member of your [control group](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) where any of the following applies:
2. under a foreign tax law, the payment is not taxed because you and the payee are treated as the same person;
3. the payee is treated as transparent by the tax law of the country where it is formed; or
4. the payee is not taxable on the income because it is treated by the payee as received in a country where the payee is not resident.

***Comment****Any time a payment is made to a non-resident member of your* [*control group*](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html)*, consideration must be given as to whether or not the payee is treating you as a separate entity for the purposes of its tax law. For example, it may not be treating you as a separate entity if you and the payee are members of the same consolidated group in that country. If it is not treating you as a separate entity, consideration must be given to the hybrid rules before deducting any expenditure that has been incurred. It must also be considered whether the payee is not taxed on the amount because:* * *it is fiscally transparent in the country where it is formed or operates; or*
* *one country (generally the country where the payee is tax resident) exempts the income because it is treated as referable to activities in a third country, but the third country does not tax the income because it does not treat it as referable to such activities.*

*In these two cases, the hybrid rules must be considered before deducting any expenditure that has been incurred.* |  |
| 1. Are you a branch of a non-resident, and claiming a deduction in relation to activities occurring outside New Zealand (e.g. head office activities)?

***Comment****If you are entitled to a deduction in New Zealand for amounts reflecting activities occurring outside New Zealand, and those amounts are more than an allocation of third party costs (e.g. they reflect a profit margin for the offshore activity), the hybrid rules must be considered before taking a deduction for those amounts. Generally, a deduction will be denied if the same profit margin is not income in the other country.* |  |
| 1. Are you a member of a tax consolidated group who has received a payment from another member of the group that relates to the offshore activities of the payer?
 |  |
| 1. If you responded yes to question 6, has the payer claimed a deduction in the other country for that payment?

***Comment:****If you responded yes to both question 6 and 7, you are likely to be required by the hybrid rules to include the payment as income. If the other country has hybrid rules, it may deny a deduction for the payment, so the New Zealand hybrid rules may not apply.* |  |
| 1. Do you have a foreign branch which is entitled under the tax law where it operates to a deduction for activities carried on by you in New Zealand?
 |  |
| 1. If you responded yes to question 8, is the deduction in the other country more than an allocation of your New Zealand costs (i.e. it reflects a profit margin for New Zealand)?

***Comment****If you responded yes to both questions 8 and 9, it will be necessary to consider whether the hybrid rules require you to include the additional amount deducted in your New Zealand income (if you are not already doing so). If the other country has hybrid rules that apply to the payment, it may deny a deduction for any mismatch amount, so the New Zealand hybrid rules may not apply.* |  |
| 1. Do you have a foreign branch, or an interest in an entity in another country which is [related](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) to you and which you treat as fiscally transparent for New Zealand tax (e.g. a foreign partnership)?

***Comment****If the answer is yes, it is necessary to determine whether there is another person in that country who for foreign tax purposes is able to offset your share of any branch or entity loss against its income. If there is, the hybrid rules may deny a deduction for the expenditure incurred through the branch or by the entity.* |  |
| 1. Are you a branch of a non-resident, or is there a non-resident entity in your [control group](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html):
* who is treated under a foreign tax law as paying a pro rata portion of the amounts paid by you?
* whose foreign tax law treatment of your expenditure you are not aware of?

***Comment****If you are a non-resident who is entitled to a tax deduction in New Zealand for some of your expenditure, that expenditure may be deductible in two (or more) countries. This may also be the case if you are a resident who is fiscally transparent under the tax law applying to any of your owners. If the other country does not have a hybrid rule that denies a deduction in the other country, the hybrid rules need to be considered before deducting any expenditure incurred.* |  |
| 1. Are you a dual resident company (i.e. tax resident in one or more countries under the domestic legislation of those countries)?

***Comment****If yes, as well as not being able to offset any losses, maintain an imputation credit account or be a member of a consolidated group, the hybrid rules must also be considered before deducting any expenditure that has been incurred. Note that dual residence can arise very easily and can be unintended. For example, a company that is incorporated in New Zealand and managed and controlled in another country may be dual resident. In particular, we are aware that recent developments in Australian case law have resulted in a number of overseas incorporated companies being tax residents of Australia by virtue of their management and control being exercised from Australia. Given that there may be significant tax consequences to being dual resident, you may wish to confirm your overseas tax residency status with your overseas advisors, where applicable.*  |  |
| 1. Are you claiming a deduction for a payment to a member of your [control group](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) in a country without hybrid rules?
 |  |
| 1. If you responded yes to question 13, is that payment part of an arrangement or flow of funds that involves a [hybrid mismatch](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) within your [control group](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html)?

***Comment****The payment will be part of such an arrangement or flow of funds for these purposes if it funds, directly or indirectly, a hybrid mismatch within your* [control group](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html)*. There is no need for any connection between the payment and the hybrid mismatch. You need to take into account all information within your possession in making this determination. Where the deduction is material, you should make enquiry of your group tax function as to whether the payment is part of a hybrid mismatch arrangement. If there is not a clear “no”, given on the basis of reasonable enquiry, then no deduction should be claimed.* |  |
| 1. Are you claiming a deduction for a payment under an arrangement, other than those identified above, where there are any indications that the arrangement has been undertaken on the basis that it will produce a deduction / no inclusion outcome that would give rise to counteraction under the hybrid rules if the arrangement were entered into with a [related](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) party or a [control group](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html) member?

***Comment****Taxpayers are expected to consider all information within their knowledge and control in order to determine whether a payment is made under a* [*structured arrangement*](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html)*. If you are making a payment under a* [*structured arrangement*](http://www.legislation.govt.nz/act/public/2007/0097/latest/LMS65878.html)*, consideration needs to be given to the possible application of all of the hybrid rules.* |  |