Tax Alert

A focus on topical tax issues– April 2014

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Tax residence – clearing the muddy waters

By Mike Williams and Mike Bellingham

Tax practitioners have been in uncertain territory for more than a year following the release of the Inland Revenue's draft statement on tax residence which put "a cat among the pigeons" as it proposed a change in interpretation on long-standing tax residence issues for individuals. Then, late last year came a worrying Taxation Review Authority (TRA) decision[1] on the concept of when a permanent place of abode arises, adding fuel to the fire.

The finalised Commissioner's interpretation statement on residence was released in March 2014. It is pleasing the see that feedback from tax practitioners has clearly been acknowledged by the Commissioner, with a common sense approach taken in the end that focusses on real life issues. This is a marked improvement on the draft statement released in late 2012.

The Commissioner's initial view that ownership of a commercially rented dwelling house would be a significant factor in assessing an individual's permanent place of abode (PPOA) left many New Zealand expatriates uneasy, particularly in light of the subsequent TRA decision concerning the long-term absentee ex-soldier. However, the final interpretation statement now issued acknowledges that the TRA decision was borne from an exceptional set of circumstances that, when viewed holistically, indicated that the individual may never have lost his PPOA in New Zealand. Coupled with the fact that the individual was operating in countries with which New Zealand does not have a double tax agreement, and the fact that presumably little tax was paid elsewhere, the writing was perhaps on the wall.

The statement makes clear that long-term investment properties and holiday homes will generally not constitute a PPOA in isolation unless other circumstances suggest otherwise. The Commissioner backs this up by breaking the PPOA test into two parts, firstly a test for whether a place of abode exists and then whether this place is permanent.

The place of abode test focuses on the physical dwelling and its ownership. Investment properties will, in the most part, be caught by this test. The more interesting and detailed test is whether the place of abode is a permanent one, which centres on a wider, more holistic assessment of the durability of their association. This takes into account family ties, employment, personal property and so on. Under this test foreign investors are unlikely to have an enduring association with New Zealand, and therefore any investment property will not be seen as a PPOA in the first instance. However,

[1] TRA 43/11[2013]

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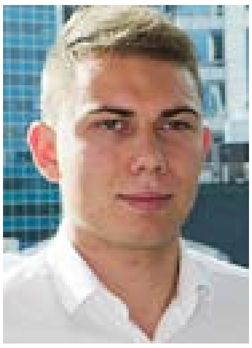

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durability of association may be the tipping point for deciding whether New Zealanders who move overseas are still resident.

The statement goes to great lengths to outline how association with New Zealand is established, and more importantly how it can be lost. When laying the interpretation statement over the TRA decision, it becomes apparent that the case was decided mostly on the enduring relationship the taxpayer had with his children. The Commissioner goes further by adding her views on the case, stating that the regular contact with his children, coupled with the majority of his foreign income finding its way to New Zealand were key factors in considering the taxpayer was still a resident.

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This is not to say that determining residence is clear cut, and a number of detailed, real world examples included in the Interpretation Statement help establish that the durability of association test is one where we must look at the picture as a whole and, most importantly, be applied on a case by case basis.

What is most pleasing to see is that the Commissioner has recognised the general unease that the TRA decision created, and has sought to put this into context when considering the various and variable factors that go towards assessing an individual's tax residence status.

The statement also provides guidance on how the PPOA rules interplay with the day-count rules, with helpful examples explaining the exact dates when a taxpayer acquires or loses tax residence.

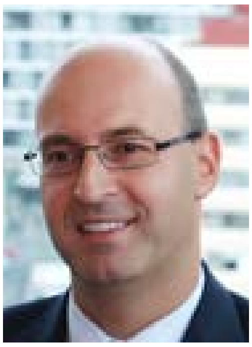
We also have greater clarity that the absence of a dwelling will mean that individuals are able to become non-resident regardless of the duration in most cases, but forewarning that duration of absence itself is not in itself a determinative factor.

A further silver lining is a common sense approach to dealing with the concept of a "permanent home" for the purposes of determining residence under double tax agreements. The statement concedes that the rules for individuals make it "relatively easy to become a resident here, and more difficult to lose residence", but makes up for this by relaxing the view on what is considered a permanent home for double tax agreement purposes.

When the draft statement was released over a year ago, it was alarming to read the Commissioner believed that letting out your home under a short term tenancy did not absolve a taxpayer of having a permanent home available to him or her in New Zealand. This was based on a tenuous view that tenants could be cast out at a moment's notice. The final statement presents a much more palatable notion that any arm's-length rental agreements will suffice to make the home unavailable to the landlord, and thus cannot be considered an available permanent home. This means that, for those unable to cease tax residence under domestic law, there is still the comfort that reference to a double tax agreement may remove some complexity in their tax affairs. Of course, it would be difficult to dispute that a permanent home would still exist if you had relatives or close friends keeping the house warm whilst you were overseas.

All in all, the final Interpretation Statement is a welcome announcement and common sense has prevailed.

If you would like to discuss this article or have any concerns around your own residence position, please contact your Deloitte advisor



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Inland Revenue's Minimum Financial Reporting Requirements for SMEs are now finalised: What does this mean for taxpayers?

By: Iain Bradley

The amendments contained in the Financial Reporting Act 2013 eliminate the need for many small-to-medium enterprises (SMEs) to prepare general-purpose financial statements. The intention is to reduce compliance costs for most New Zealand SMEs (approximately 95% of all New Zealand enterprises) by excluding them from the requirement to produce complex financial statements under the Financial Reporting Act.

Instead they will be required to prepare special-purpose financial statements to the minimum requirements specified by Inland Revenue. On 13 March 2014 Inland Revenue released an **Order in Council** that specifies for tax purposes the minimum financial reporting requirements for companies. The taxpayers that are affected by these minimum requirements are all active companies that do not have a statutory obligation to prepare general-purpose financial statements except certain small companies that are not part of a group of companies and that do not derive income or incur expenditure in excess of $30,000.

The original minimum requirements proposed by Inland Revenue would have actually increased compliance costs for many SMEs. A number of the more "onerous" requirements that were originally proposed have been excluded from the finalised minimum requirements. However, there are still some aspects of the finalised minimum requirements that will increase compliance costs for many companies.

The new minimum financial reporting requirements apply for periods commencing on or after 1 April 2014.

Currently under the Financial Reporting Act 1993, New Zealand companies that are not issuers, overseas companies or are a subsidiary or have subsidiaries, must prepare general-purpose financial statements if they

meet two or more of the following criteria:

- Total assets more than $1 million; or
- Annual turnover greater than $2 million; or
- More than 5 full-time equivalent employees.

Under the Financial Reporting Act 2013, New Zealand private companies will not have to produce general-purpose financial statements unless they are "large", defined as:

- Total assets more than $60 million; or
- Total revenue more than $30 million.

However, overseas companies conducting business in New Zealand (including their branches), and subsidiaries of overseas companies, have a lower threshold of:

- Total assets more than $20 million; or
- Total revenue more than $10 million.

Those overseas companies and subsidiaries of overseas companies that exceed the threshold will still be required to prepare audited general-purpose financial statements and make those financial statements public by filing them with the New Zealand Companies Office.

Non-large private companies with ten or more shareholders are required to prepare general-purpose financial statements (and have them audited) unless they opt out via an appropriate shareholder resolution.

Inland Revenue, as the largest user of financial statements in New Zealand, has had to give careful consideration to the level of information it needs now that the requirement for many SMEs to prepare general-purpose financial reports is being removed. The purpose of the minimum financial reporting requirements is to ensure companies accurately determine their tax positions and complete IR 10s on the basis of appropriate financial statements.

What are the new minimum financial reporting requirements for SMEs?

The minimum financial reporting requirements are as follows:

- The financial statements must consist of a balance sheet setting out the assets, liabilities and net assets of the company as at the end of the income year and a profit and loss statement showing income derived and expenditure incurred by the company during the income year.
- They must be prepared applying double-entry and accrual accounting principles.
- The financial statements may disclose amounts using the following valuation principles:
    1. Tax values, when those values are consistent with double-entry and accrual accounting;
    2. Historical cost, when tax values are not consistent with double-entry or accrual accounting or when historical cost provides a better basis of valuation;
    3. Market values when market values provide a better basis of valuation than those in 1 and 2 above.
- A statement of accounting policies and changes thereto that is sufficiently detailed that a user can understand the material policies that have been applied or changed in the preparation of the financial statements.
- The financial statements must disclose whether they have been prepared on a GST inclusive or exclusive basis.
- A reconciliation of the company's financial statements and taxable income for the income year.
- An appropriately detailed taxation-based fixed asset and depreciation schedule.
- If a forester, a statement of cost of timber as at balance date and a reconciliation of movements.
- If a specified livestock owner, detail of livestock valuation methods, valuations and calculations for taxation purposes
- Comparable figures for the last year should be disclosed.
- All relevant amounts that the IR 10 form requires to be copied from the company's financial statements.
- Sufficient notes to support amounts required to be disclosed as an exceptional item on the IR 10 form.
- Interest should always be grossed up for resident withholding tax.

- Dividends should be grossed up for imputation credits to the extent that the dividend is taxable and the credits are usable to reduce the taxpayer's tax liability for that year.

- For income years commencing on or after 1 April 2015, certain associated party transactions between the company and associated persons that are either (1) shareholders who are not companies, including individuals (including non-residents) and trusts or (2) non-resident companies, must be disclosed in the company's financial statements. This will include interest paid, loans advanced, payments for services, leases and payments for the acquisition or use of intangible property. There is also a requirement to include a reconciliation of movements in shareholders' equity and certain loans and current accounts.

These are *minimum* financial reporting requirements. Hence, financial statements can still be prepared to any level above the minimum requirements. Taxpayers will be free to include additional disclosures if they choose and to produce partially or fully GAAP-compliant financial statements in addition to complying with the minimum requirements.

Deloitte comment

The minimum financial reporting requirements released this month have removed a number of disclosure requirements that were originally proposed. The requirements removed include the requirement to track available subscribed capital and realised capital gains.

That said, there are still a number of elements of the finalised minimum financial reporting requirements that will increase compliance costs for many companies. Although the associated party transaction requirements are much reduced from the original proposals they will still give rise to additional work for many companies. This may include subsidiary companies of large corporates. If those subsidiaries are not required to prepare general-purpose financial statements then the minimum financial reporting requirements will apply to them including the associated party transaction requirements where they have, for example, transacted with non-resident companies within their wider group. Some of the information required to be disclosed will not only be an increase over what is currently required but it will repeat information that may have been included in other tax returns such as Resident Withholding Tax returns and Non-Resident Withholding Tax returns. The Inland Revenue has acknowledged the potential complexity of associated party transaction information that will be required. The associated person rules are complicated and there are likely to be errors made despite the best efforts of taxpayers and their advisors. As a consequence, this disclosure requirement has been delayed 12 months and will apply from the 2015/16 income year. The delayed application date will give software developers more time to update their accounting software for this significant change in disclosure requirements. It also recognises the additional work that will likely be required by businesses and their advisors to provide this information. A couple of questions that must be asked are: Will the Inland Revenue actually look at all this additional information they are mandating? Will they use technology to enable them to effectively review and analyse this information? If the answer to either of these questions is no then why not simply require this information to be provided on request rather than put taxpayers to all this extra work preparing information that may go nowhere. If the answer is "yes" to both these questions, then it is probably simply a sign of the times with the increased focus on both tax avoidance and transfer pricing.

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Taxpayers should also be aware that the income tax treatment of certain expenditure (such as the deductibility of research and development expenditure and the deferral of deductions for research and development expenditure) refers to the accounting treatment prescribed by financial reporting standards. If the relevant financial reporting standards are not followed in the taxpayer's financial statements then this may give rise to adverse tax consequences. When this was raised with an Inland Revenue official at the time the proposal was being debated the response was that the proposal outlines *minimum* financial reporting requirements and taxpayers are welcome to adopt specific financial reporting standards (either partially or fully) in their financial statements. Therefore, if SMEs wish to fall within certain aspects of the income tax legislation they will need to adopt certain financial reporting standards and/or disclosures over and above the minimum requirements prescribed by the Inland Revenue.

Inland Revenue officials have been participating in the New Zealand Institute of Chartered Accountants' SME Working Group which is recommending an accounting framework for special-purpose financial statements for SMEs. We understand the framework is scheduled for release shortly and that compliance with the new accounting framework should meet Inland Revenue's minimum requirements.

Clearly the minimum requirement special-purpose financial statements prescribed by Inland Revenue are not intended to satisfy all users of financial information. Businesses with loans and overdrafts from banks and other financial institutions will likely have additional financial reporting obligations. Similarly, the proposed minimum requirements are no substitute for high quality appropriately detailed financial information which gives owners and managers of businesses the tools they need to make informed decisions about the future direction of their business.

If you would like to discuss Inland Revenue's minimum financial reporting requirements for SMEs in more detail please contact your Deloitte advisor.

BEPS project ramps up

The Organization for Economic Cooperation and Development's (OECD) project regarding how much and where tax is paid by multinationals is ramping up. The release of the OECD's Base Erosion and Profit Shifting (BEPS) 15 point Action Plan in July 2013 was also accompanied by an ambitious timeline with phase 1 actions to be completed by September of this year. The ball has certainly started rolling in this regard with the release of several discussion drafts on three of the actions this month. We have summarised the key points from each discussion draft below.

<table>
<tr><th colspan="2">Action 6: Treaty Abuse
(released on 14 March 2014)</th></tr>
<tr><td>Issue</td><td>Treaty abuse, in particular treaty shopping, is one of the main concerns.</td></tr>
<tr><td>Proposals</td><td>(A) Develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances

Limitation on benefits clause: A specific anti-abuse rule is proposed based on the limitation on benefits provision already included in many US treaties. The rule is designed to limit treaty benefits to companies (and individuals and others) with sufficient presence in the relevant country.

Purpose rule: In addition to the limitation on benefits clause, the Discussion Draft proposes a broadly drafted general purpose rule aimed at removing treaty benefits from income where one of the main purposes of the arrangements or transaction was to obtain treaty benefits.

Determining treaty residence: The Discussion Draft proposes removing the place of effective management tie-breaker clause for determining treaty residence (where different domestic rules would treat an entity as resident in two countries). This will be replaced by a requirement that the competent authorities of the two countries endeavour to determine residence, by reference to place of effective management, place of incorporation/constitution and any other relevant factors.

Minimum shareholding period re dividends: It is proposed that the reduced rates of withholding tax applicable to non-portfolio dividends are restricted to shareholdings that are owned throughout a period of months that includes the dividend payment. Comments are sought on what the number of months should be.

Withholding taxes on payments to permanent establishments (PE): A new clause is proposed to restrict relief from withholding taxes on payments to a third country PE, to apply where the combined rate of tax paid by the recipient in the PE and residence countries is less than 60% of the tax rate of the residence country.

(B) Clarification that tax treaties are not intended to be used to generate double non-taxation
The title and preamble to the OECD Model Tax Convention will be amended to clarify that the prevention of tax evasion and avoidance, specifically including but not limited to treaty shopping, is a purpose of tax treaties; countries that enter into a treaty intend to eliminate double taxation without creating opportunities for tax avoidance and evasion. This title and preamble will be relevant to the treaty's interpretation.

(C) Tax policy considerations that countries should consider before deciding to enter into a tax treaty with another country
It is proposed that the model tax treaty include key points for countries to consider in relation to the conclusion, modification (or termination) of a tax treaty. The avoidance of double taxation remains a main objective of tax treaties in order to reduce tax obstacles to cross-border services, trade and investment. However, other considerations include the ability to eliminate double taxation domestically, increased risk of non-taxation, excessive taxation from high withholding tax rates, increased certainty and cross-border dispute resolution for taxpayers and the ability of prospective treaty partners to provide assistance in the collection of taxes and exchange of information.</td></tr>
<tr><td>Deloitte Comment</td><td>One of the concerns with the wide-ranging proposals is the degree of uncertainty that will exist in applying a purpose test. It will also likely be difficult to apply such a test on a consistent basis. This uncertainty will create practical issues for businesses seeking to understand whether the benefits of a treaty will apply to their transactions. Comments on this draft are due on 9 April 2014.</td></tr>
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Action 2:Hybrid Mismatch Arrangements (Two documents released on 19 March 2014)	
Issue	**Hybrid mismatch arrangements can be used to achieve unintended double non-taxation or long-term tax deferral by creating two tax deductions for one borrowing, generating deductions without corresponding income inclusions or misusing foreign tax credit and participation regimes.**
Proposals	The discussion draft recommends neutralising hybrid mismatches on a standalone basis without reliance on counterparty jurisdictions. The draft recommends countries include "linking rules" within domestic legislation: a primary rule would apply whenever a mismatch arises and a secondary or defensive rule to apply in circumstances where the primary rule does not apply. Two approaches are being considered – either identify transactions which are of most concern and specifically include them within the scope of the rules (e.g. hybrid instruments held by related parties), or, define exceptions from a broad rule (e.g. widely held hybrid financial instruments). Further changes to domestic law are recommended for hybrid financial instruments (restrict dividend exemptions for deductible payments and proportionate limitation of withholding tax credits) and for reverse hybrid and imported mismatches (intermediate jurisdiction tax filing and information requirements). The Discussion Draft includes a proposal for a new model treaty provision which sets out that an entity that is fiscally transparent under the tax laws of either country will be treated as if it is resident in the recipient country for the purpose of accessing the treaty, but only to the extent that the recipient country, in its domestic law, treats the entity as a resident in respect of the income concerned (and therefore taxes it). Reference is made to the work undertaken in respect of BEPS Action 6: Preventing the granting of treaty benefits in inappropriate circumstances.
Deloitte Comment	• One of the challenges with hybrids has always been – which country is being disadvantaged? The OECD has tackled this head-on with its view that a hybrid should be countered without asking the question at all. • The proposals are likely to impact many hybrid financing arrangements between a number of jurisdictions. • Given that the changes are mainly effected through changing domestic law, it can be expected that once final proposals have been agreed in September, 2014, some countries may start to legislate soon thereafter. Comments are due by 2 May 2014.

Action 1: Tax Challenges of the Digital Economy (released on 24 March 2014)	
Issue	**The Action Plan identifies changes in business as a result of the digital economy as one of the main threats to base erosion. The main issue is the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under the current international rules.**
Discussion points	Unlike the previous discussion drafts – there are no recommendations as there is no current consensus view at this stage. This is the most controversial issue to date because some countries want a minimalist approach whereas other countries do not. Therefore, this document is intended to provide stakeholders with substantive proposals for comment. The document states that BEPS tax planning in the digital economy will be significantly limited by the other actions of the BEPS project in any event. However there is more that could be done to restrict tax planning in the digital economy. The additional suggestions here include: 1. Amendments to the permanent establishment definition, 2. Withholdings taxes on digital transactions, and 3. Consumption tax (VAT) options.
Deloitte Comment	Tackling the fast-moving digital economy presents an enormous challenge to tax authorities around the world, making it probably the hardest issue faced by the OECD. The OECD is clear that 'structures aimed at artificially shifting profits to locations where they are taxed at more favourable rates, or not taxed at all, will be rendered ineffective by ongoing work in the context of the BEPS project'. There are no proposals for new digital taxes, however the draft seems to imply that unilateral approaches may be considered should the preferred multilateral solutions fail to reach consensus.
	Comments on this draft are requested by 14 April 2014.

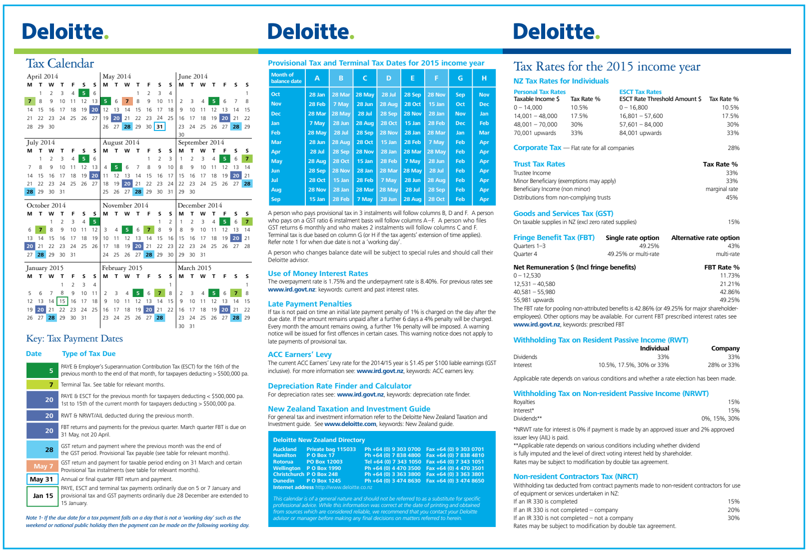
As to what this means for New Zealand, our tax rules are fairly robust already in comparison to some other jurisdictions and are continually finessed. Still, we can expect more domestic changes in light of these discussion draft once finalised. Common sense will be required so that New Zealand maintains an appropriate tax setting balance. In this regard the Minister of Revenue Todd McClay is obviously conscious of this concern recently stating "Countering BEPS helps to level the playing field. Moreover, if New Zealand suffers base-erosion due to BEPS, other taxes must increase to make up the difference, which can reduce the efficiency and competitiveness of the New Zealand economy."

The discussion documents and further Deloitte commentary is available on **BEPS Central** which is Deloitte's one stop shop for information on the BEPS project. Deloitte has also held recent Dbrief presentations on these discussion drafts which can be accessed **here** from the Dbrief archive.

Next month: Look out for an update on Action 13: Transfer Pricing Documentation and Country-by-Country Reporting.

Deloitte Tax Calendar

Our tax calendar has now been posted out to those who ordered this via our link in previous issues. If you missed this, please contact your usual Deloitte advisor for a copy of the tax calendar. Alternatively you can download a PDF version **here.**



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