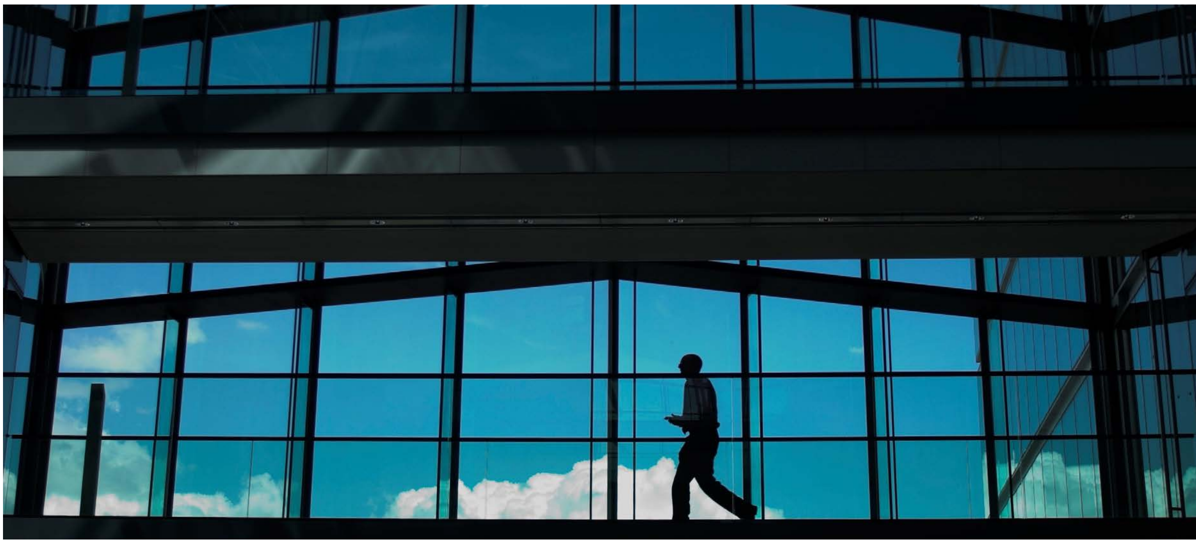
Tax Alert

A focus on topical tax issues – August 2014



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Important changes affecting directors and general partners

By Iain Bradley and Veronica Harley

Last month, an Act was finally passed which makes significant amendments to the Companies Act in order to strengthen the governance, registration, and reconstruction of companies. Underlying these changes was the concern that offshore interests were misusing the New Zealand companies regime to engage in criminal activities overseas.

The high profile case that no doubt contributed to these changes was the case of *SP Trading Ltd*. A cargo plane on its way to Iran stopped to refuel in Bangkok and was found to have 35 tonnes of North Korean weapons and explosives on board. It turned out that the plane was registered to *SP Trading Ltd*, which was a "shell" New Zealand incorporated company controlled by offshore interests.

A director must live in New Zealand

The most significant change is a new requirement that all New Zealand incorporated companies will be required to have at least one director that:

- Lives in New Zealand or
- Lives in an enforcement country **and** is a director of a company that is registered in that enforcement country

An enforcement country will be a country that has an agreement with New Zealand that allows for the recognition and enforcement there of New Zealand judgments imposing regulatory regime criminal fines. Australia will be prescribed as the first enforcement country so that Australian owned New Zealand companies are not impacted greatly as they currently make up the majority of companies without a New Zealand director. Note however, that it will not be enough that the director merely lives in Australia – they will also need to be a director of a company that is registered in Australia.

Rules also change for general partners of limited partnerships

At the same time, another Act was passed which changes the rules regarding general partners of limited partnerships. Since the inception of the limited partnership regime in 2008, there has been a high uptake by offshore partnerships which have no >>

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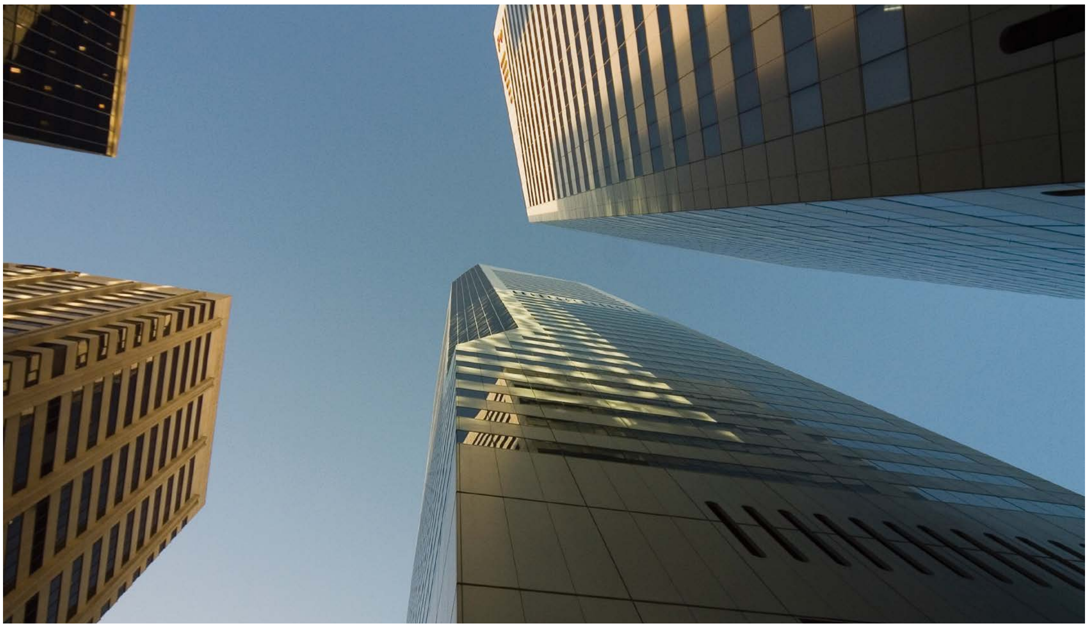

presence in New Zealand and carry out all their business offshore. In line with the changes for companies, limited partnerships will also have to have a general partner[1] who lives in New Zealand; or lives in an enforcement country and is a director of a company that is registered in that enforcement country.

In addition, the rules around who can qualify to be a general partner have been tightened.

When will the rules apply?

These changes will come into effect either on 2 July 2015 or on a date as set by Order in Council. We understand that Government Officials are working towards finalising an Order in Council that will provide for earlier application of the rules with a further 6 month grace period to allow existing companies and limited partnerships to comply.

All companies with an ultimate holding company will now need to disclose certain information.

Other changes

- Directors of existing and new companies will now be required to provide their date and place of birth to the Registrar. Note that this information will remain confidential and not on public record.
- Further all companies with an ultimate holding company will need to disclose the following information (which will be on public record):
  - The name of the ultimate holding company
  - The country of registration
  - The registration number or code (if any)
  - The registered office
  - Any "other prescribed information"

Conclusion

Now these changes are law, it is now time for companies and limited partnerships which will not comply with the changes, to consider options for appointing a New Zealand resident director or general partner in order to maintain legal registration of the entity. For further advice on the options available, please contact your usual Deloitte advisor.

[1] The rules provide for general partners which are natural persons, limited partnerships, partnerships, companies and overseas companies but are more complex. Advice should be sought on the rules that apply for the different types of "general partners" that qualify.

Tax function – positive return on sensible investment

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By Campbell Rose and Virag Singh

New Zealand is currently experiencing an increase in M&A activity, and one outcome of this is the corresponding uplift in our tax due diligence (TDD) work. The aim of TDD is to provide an effective picture of a business's tax profile. Issues we uncover differ from one TDD to another – as no one business is ever the same as another. However, in recent times we have more frequently encountered an issue common across various businesses, of various sizes, in various industries: lack of a robust tax function.

By "tax function" we mean the person or team responsible for managing a business's tax compliance obligations and tax profile (including risk profile), as well as (where applicable) the processes, protocols and procedures employed to do so. The tax function will usually interact with other divisions of a business, including other parts of the accounting/finance team, marketing, legal, acquisitions/strategy and others.

Tax function not performing?

A business's tax function can be ineffective for a number of reasons, and it is not always due to being under-resourced. Although sufficient resourcing can help, often it is the simple, easy-to-do things that make all the difference, like having best practice procedures in place or having a clear "tax mission" for the business. For example, the risk of missing return or payment due dates can be virtually eliminated by developing and maintaining a tax management plan (we touch on these considerations further below).

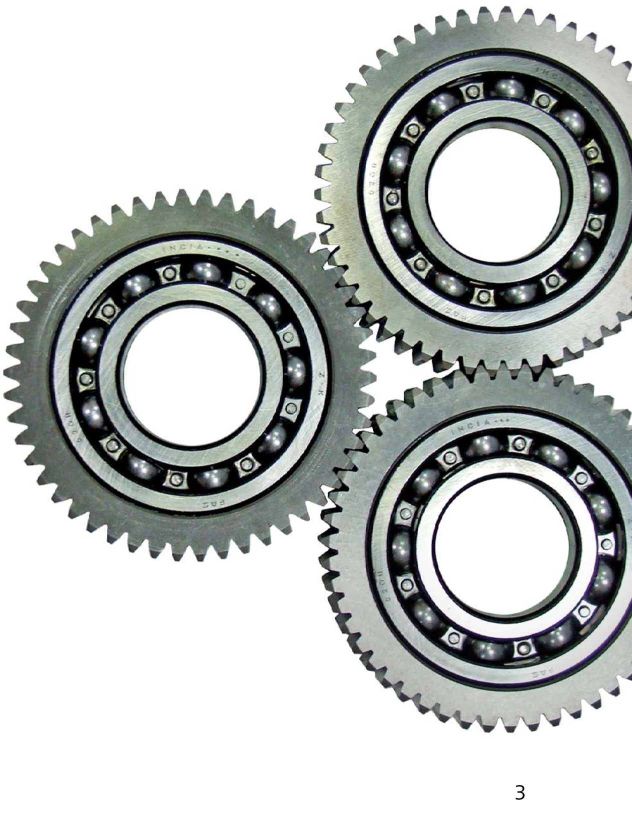
Our TDDs often reveal numerous and varying issues with a business's tax profile. What we have been finding is that a large number of these are ultimately symptoms of an ineffective tax function. This reflects the fact that the tax function affects all areas of businesses' tax profiles. If these issues are left unresolved, or are not discovered, for a number of years, then they can snowball and result in significant tax risks.

Recent examples of simple issues we have come across are as follows (all arose from an inefficient tax function):

- Tax documentation not being prepared and filed – e.g. CFC disclosures, and dividend and subvention payment documentation.
- Late filing of returns and rudimentary errors in returns, often leading to increased scrutiny from Inland Revenue into prior years or other tax types.
- Failing to make appropriate elections to use spreading methods under the financial arrangements rules.
- Failing to carry out basic checks on compliance with tax laws, e.g. overlooking the outbound thin capitalisation rules.

Why is the tax function important?

So, what can a well performing tax function do for your business? Most importantly, it will appropriately manage tax risk. It should also add real value to the business – the days of tax being a back-office cost >>



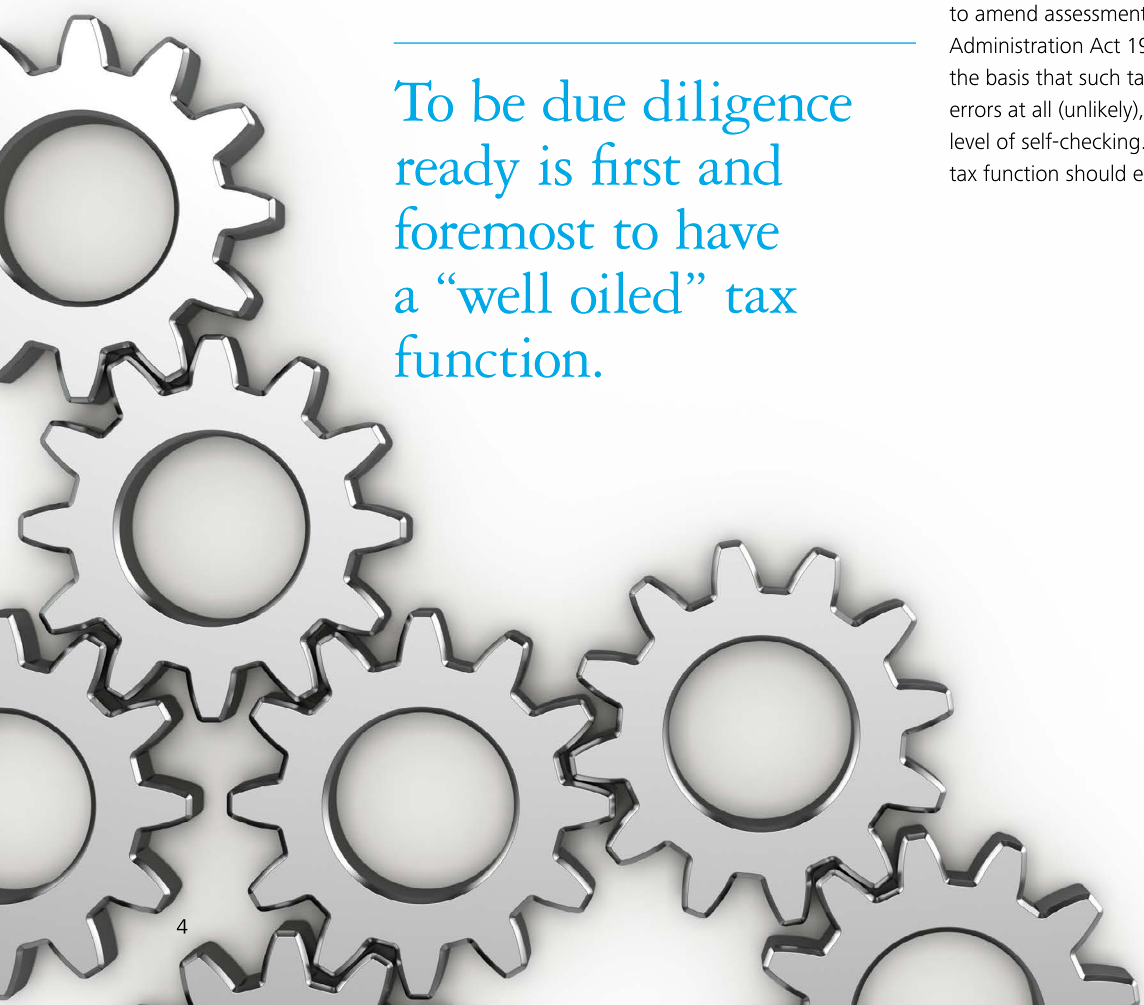
centre are long gone. There will always be pressure on senior management to achieve commercial objectives. To ensure all measures are taken to achieve those objectives, proactive management of the tax function is vital – it can have a substantial impact, for example, in maximising shareholder value. In the light of the current global tax environment – where, among other things, the OECD's Base Erosion and Profit Shifting initiatives are ramping up - proactive tax functions have become even more important. Efficient, dynamic (in the sense of adapting to change) and transparent are key characteristics of a proactive tax function in today's environment.

From an M&A perspective an effective tax function is important, regardless of whether you are buying or selling. In carrying out a TDD we will always look to form a picture of a business's tax function. To be due diligence ready is first and foremost to have a "well oiled" tax function. From a purchaser's perspective, even a small business can carry significant tax risk, and so an appropriately managed tax function can provide a good deal of comfort. From a seller's perspective, sale and purchase negotiations (including with any warranty and indemnity insurer) can also become problematic where the target business has inherent tax risk due to a deficient tax function.

To be due diligence ready is first and foremost to have a "well oiled" tax function.

Dealings with Inland Revenue also assume greater risk in the absence of an appropriate tax function. Not having best practice procedures in place can lead to hurried decisions in respect of tax positions. Where errors are made, quite apart from the technical issue in question, a lack of appropriate policies and procedures can virtually guarantee the imposition of a 20% tax shortfall penalty for failing to take reasonable care in adopting a tax position. It is therefore best practice to ensure that risks are being mitigated by giving tax issues an appropriate level of attention. Real costs can be borne by businesses that fail to do this.

Finally, we have recently seen Inland Revenue select taxpayers for risk review and/or audit on the basis that a low number of voluntary disclosures, or requests to amend assessments under section 113 of the Tax Administration Act 1994, have been made. This is on the basis that such taxpayers either have made no errors at all (unlikely), or are not undertaking a sufficient level of self-checking. Putting in place an effective tax function should ensure that "health checks" are



part of a business's annual compliance risk mitigation strategy. PAYE and GST are usually areas that we have found are neglected in this sense; and these are often areas that will be targeted first by Inland Revenue in an investigation.

What can be done?

Taking a few small, well thought out steps can make a big difference in getting the best out of your tax function. It is important to start with a direction, a "tax mission", which sets out the objective of the tax function, and aligns it with commercial objectives and the board's appetite for risk. Once this has been given some thought, an effective tax management plan can be developed. This is a regularly reviewed, living document that contains details around recurring and one-off tax obligations, the allocation of resources, and opportunities for areas where value can be added. Tax management plans vary in their degree of detail, but at a minimum will ensure that best practice procedures are put in place. The "tax mission" and tax management plan go hand-in-hand in establishing and giving real meaning to the tax function, and providing direction going forward. They are also positive evidence that reasonable care is being taken in the management of tax obligations.

As noted above, a tax management plan will generally detail the allocation of resources – broadly, should a business have a full in house tax function, or should it be outsourcing all of the tax compliance responsibilities? Or some combination of both? There is no one size fits all in this regard. There will be advantages and disadvantages of each approach and, ultimately, what is most effective will depend upon the size and nature of the business, the "tax mission" and appetite for risk. The requirements of each business will differ and a tax management plan is often the best starting point in terms of analysing the most efficient allocation of resource for a particular business.

In summary

While we have recently come across a number of issues with the tax function in some businesses, in most cases small tweaks could have produced sizeable improvements. Whether you are gearing up to buy or sell, or simply looking at minimising your current and on-going risk, turning your mind to the management of your tax function can provide tangible benefits. Regardless of what you are looking at achieving, we would be happy to assist by carrying out an external review of your in-house tax function.

For more guidance, contact your usual Deloitte advisor – we look forward to discussing your tax function with you.

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Company administration costs – deductible or not?

By Robyn Walker and Nigel Jemson

Inland Revenue has recently issued Interpretation Statement 14/04 *Deductibility of Company Administration Costs*. Expenditure covered by the finalised Interpretation Statement includes costs such as those relating to meetings of shareholders, listing fees and costs relating to the payment of dividends.

The Interpretation Statement has a long history, stemming back to a draft version released in 2005 and an updated draft released in September 2011 (refer to this **Tax Alert article** for further information on the 2011 draft statement). At the time, the Interpretation Statement was put on hold awaiting legislative guidance on the tax treatment of certain types of company administration expenditure.

Further clarification in this area was provided in the recently enacted Taxation (Annual Rates, Employee Allowances and Remedial Matters) Act 2014. Newly introduced amendments provide that:

- A company is allowed a deduction for expenditure incurred in relation to authorising, allocating, or processing, the payment of a dividend or in relation to resolving a dispute concerning these matters.
- A listed company is allowed a deduction for expenditure for periodic listing fees paid to a recognised exchange for the purpose of maintaining the registration of the company on the exchange.
- A company is allowed a deduction for expenditure incurred in holding an annual meeting of shareholders but is denied a deduction for expenditure incurred in holding a special or extraordinary meeting of shareholders.

With the enactment of the legislation, Inland Revenue was able to release the long-awaited Interpretation Statement incorporating these new rules. The tax treatment of most items included in the finalised Interpretation Statement is not substantially different from the draft version released in 2011 aside from being updated to reflect legislative changes. The Statement provides some much needed certainty in clarifying the tax treatment of various kinds of company administration expenditure. Readers will also breathe a sigh of relief that the final Interpretation Statement has been culled from 93 to 37 pages.

In relation to meeting costs, the Interpretation Statement is particularly useful in that it clarifies that only the **direct costs** of holding shareholder meetings will be covered by the legislation. This interpretation is helpful for special shareholder meetings as it should ensure that a relatively narrow set of costs are legislatively non-deductible.

The Interpretation Statement provides that direct expenditure incurred in holding a meeting includes expenditure such as:

- Venue hire and any other costs related to preparation of the venue.
- Equipment hire (e.g. audiovisual equipment).
- Refreshments provided to those attending the meeting.
- Printing, publishing, postage and advertising of notices of the meeting.
- Preparation of resolutions.
- Travel costs for directors and other persons required to attend the meeting.
- Any other costs directly related to physically holding or conducting the meeting.

Indirect expenditure for a meeting is any other expenditure incurred in relation to a meeting that is not a direct cost of physically holding or conducting the meeting. For example indirect costs would include costs relating to determining the contents of meeting agendas, reports and advice about shareholder resolution requirements.

The tax treatment of indirect meeting expenditure will depend on the purpose for which the expenditure is incurred. In this regard, the Interpretation Statement goes into greater detail on the deductibility of various types of meetings purposes. For example, a meeting held by shareholders to appoint a liquidator by special resolution is considered not deductible. In contrast to the draft Interpretation Statement, the deductibility of costs incurred in relation to special meetings held for the purpose of shareholder approval for a major transaction is now considered to be dependent on the facts and will not be deductible when the company has already committed to the major transaction. In these instances taxpayers should refer to Inland Revenue's guidance on the deductibility of feasibility expenditure (**Interpretation Statement IS 08/02**).

Below is a table setting out the tax treatment of various types of company administration costs covered in the Interpretation Statement.

Company administration cost	Deductibility
Accounting fees	Depends on the purpose of the services. Follows treatment of the underlying cost.
Audit fees	Deductible for companies carrying on a business.
Dividends	Deductible. No need to meet general permission and capital limitation overridden: section DB 63.
Legal fees	Depends on the purpose of the services. Follows treatment of the underlying cost unless section DB 62 applies.
Listing fees	*Initial listing fees and any additional listing fees:* Not deductible: capital limitation applies unless fees relate to debt markets and section DB 5 or financial arrangements rules apply. *Periodic listing fees:* Deductible. No need to meet general permission and capital limitation overridden: section DB 63B.
Share registry costs	Deductible where company is carrying on a business (capital limitation may apply if for mergers, acquisitions or migrations).
Shareholder meetings	Direct costs incurred in holding meetings: • *Annual Meetings*: Deductible. No need to meet general permission and capital limitation overridden: section DB 63C (1). • *Special/extraordinary meetings*: Not deductible. Section DB 63C (2). Indirect costs incurred for meetings of shareholders for: • *Ordinary business of annual meeting:* Deductible where company is carrying on a business. • *Alteration of constitution:* Generally not deductible but may be deductible when the alterations facilitate business operations. • *Alteration of shareholders' rights:* Generally not deductible - general permission not met and capital limitation applies. May be deductible where inseparable from, or ancillary or incidental to, business objectives that meet the general permission. • *Arrangements with creditors:* Deductible where the company carries on a business. • *Liquidation:* Not deductible, capital limitation applies. • *Major transactions under the Companies Act 1993:* Depends on the facts. Not deductible if incurred after commitment to major transaction when the capital limitation applies. • *Ratifying directors' actions or breaches of their duty to the company:* • *Ratification under section 177 Companies Act 1993:* depends on action being ratified. • *Ratification of breach of directors' duty:* generally deductible where the company is carrying on a business. • *Takeovers (target company):* Not deductible where incurred to preserve position of existing shareholders or to obtain a benefit of a capital nature.
Statutory return fees	Deductible where company is carrying on a business.

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Does having a property in New Zealand constitute tax residency?

By Belinda Hagstrom

In our June 2014 Tax Alert, we discussed the implications of the Commissioner of Inland Revenue's Interpretation Statement on residence and the supporting transitional operational statement, which has been effective since 1 April 2014.

This has led to several long-term absentees raising concerns about their tax residence in light of the most recent Interpretation Statement. In particular, individuals who have previously taken a position that they are non-residents for tax purposes are receiving advice from various sources which concludes that, regardless of an individual's overall enduring ties with New Zealand, the retention or acquisition of any property in New Zealand will automatically mean they are considered a tax resident.

In our view, this is not an accurate conclusion to draw from the commentary within the Interpretation Statement. Whilst illustrating that access to a residential property can be a substantial part of considering whether an individual has retained a permanent place of abode (PPOA), the Interpretation Statement also confirms that other facts and circumstances should be considered before concluding that a person is a tax resident.

A PPOA is not defined in legislation, however the Interpretation Statement makes reference to other ties that should be considered when determining whether an individual has retained a PPOA in New Zealand.

These are:

- The location of immediate family;
- Availability of property;
- Availability of employment;
- Existence of substantial assets (cars, boats, furniture) in New Zealand
- The extent of any financial connection to New Zealand;
- The continuing membership of any trade, sporting, social or cultural associations; and
- The period of any absence from New Zealand.

This is not an exhaustive list of factors although it is an indication of relevant factors to consider when determining whether a person has retained or lost their PPOA in New Zealand. Accordingly, the continuity and duration of the person's presence in New Zealand and the durability of the person's association with their place of abode in New Zealand must be considered holistically. For example, the interpretation statement clarifies that the retention of a holiday home will generally not in itself constitute a PPOA, provided time spent in New Zealand is minimal and there are no other significant associations here. This is on the basis that a holiday home is merely a temporary dwelling rather than a permanent one. A similar view can also often be taken of a property that has always been owned as a commercial rental and never occupied as an individual's private home.

To illustrate that a PPOA is fact specific, we have outlined some examples to compare and contrast:

Example 1

Fiona has been seconded to the United Kingdom in connection with her employment for a fixed period of three years, with an expectation to return to New Zealand at the end of her secondment. The terms of the secondment state that her New Zealand role will be available when she returns to New Zealand. Her family moves with her to the United Kingdom and their family home in New Zealand is rented out to a third party. Fiona and her family leave their furniture and personal belongings in storage in New Zealand during their absence.

Under New Zealand domestic legislation, Fiona would likely be considered to remain a tax resident of New Zealand as she has retained a PPOA in New Zealand during the period of her absence. The factors that weigh in favour of retaining a PPOA include the retention of their family home, availability of employment, existence of substantial assets in New Zealand and an intention to return to New Zealand. However, the retention of the family home, coupled with the intention to return are strong indicators of a continuing PPOA, even without the other influencing factors.

Example 2

John permanently relocates to Singapore with his family with no intention to return to New Zealand. The permanent relocation contract states that his role in New Zealand no longer exists. The family home in New Zealand is rented to a third party. John does not want to sell the family home as he is familiar with the New Zealand property market and, as it stands, he will not be able to invest in property in Singapore. John and his family move their furniture and personal belongings to Singapore.

Under New Zealand domestic legislation, we believe John would likely be considered a tax non-resident from the date of his departure as he loses his PPOA in New Zealand. The Interpretation Statement discusses that a family home that has been rented out would still carry substantial weight in favour of a PPOA having been retained when considering tax residence in New Zealand. However, this should be weighed against other factors such as his family relocating with him, no available employment in New Zealand, no substantial assets in New Zealand and an indefinite intention to remain outside New Zealand. This is in contrast to Fiona's situation as John's clear intention is to remain outside of New Zealand indefinitely.

Example 3

Rebecca permanently relocates to Australia with her family and they have no intention to return to New Zealand. The family home is sold just before their departure from New Zealand. Rebecca also has an investment property in New Zealand, which she intends to retain when she leaves as she understands the property market in New Zealand and sees this as a long term capital investment. Rebecca and her family move their furniture and personal belongings to Australia.

Under New Zealand domestic legislation, Rebecca would likely be considered a tax non-resident from the date of her departure. The Interpretation Statement states that an investment property is unlikely to be regarded as an individual's PPOA if they have never lived in the property. Nevertheless, the investment property cannot be completely disregarded if it is of a similar nature and in a similar location to the property that was once their home. In this case, the other factors should also be considered such as her family relocating with her, no available employment in New Zealand, no substantial assets in New Zealand and an indefinite intention to remain in Australia. The retention of an investment property does not in itself constitute a PPOA as the other factors indicate that Rebecca will cease to have an enduring association with New Zealand when she moves to Australia.

In circumstances where an individual retains their New Zealand tax residency and they are also considered a tax resident of another country by virtue of local rules in that jurisdiction, a double tax agreement (DTA) may be available to arbitrate over tax residence and prevent double taxation. The DTA provisions will rely on a series of tie breaker tests to determine where a person is regarded as a resident under the treaty.

Whilst the determination of tax residence is by no means a simple matter, careful consideration of the facts and a close reading of the Commissioner's Interpretation Statement will often give a relatively logical outcome. If you have any concerns about your resident status under the new rules, please contact your Deloitte tax advisor.

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Taxation for deregistered charities and a new tax exemption for the community housing sector

By Steve Thompson and Aran Bailey

The Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014 ("the Act") introduced changes to deal with charities that are removed from the Charities Register by the Department of Internal Affairs – Charities Services (formerly the Charities Commission). It also introduced a new income tax exemption for the community housing sector.

Both changes have come about due to the turmoil arising from the deregistration of the Queenstown Lakes Community Housing Trust ("QLCHT") by the Charities Commission (which was upheld on appeal to the High Court). The High Court determined that the purposes of the QLCHT were not in fact charitable; essentially the assistance provided by QLCHT to help people into home ownership went beyond the relief of poverty and also provided an element of private benefit.

As a result, QLCHT was faced with taxation liabilities dating back to when the trust was first formed on the basis that if QLCHT never had a charitable purpose then the income tax exemption for charitable organisations was never available. Following the High Court decision, we have been closely connected to the policy work undertaken by Charities Services, Inland Revenue and the community housing sector. The policy work has included considering solutions to overcome the retrospective taxation liabilities and also to provide a framework for a new tax exemption for the community housing sector.

Deregistered charities

The Act has removed the retrospective income tax liability for charities deregistered after 14 April 2014, where the entity was registered in good faith and was compliant with their constitution, deed or other documents supplied to Charities Services.

Deregistered charities will find themselves paying tax on income derived from the date of deregistration unless another income tax exemption can be applied. The Act provides details for setting the initial tax base of assets and financial arrangements on the transition to being a taxpayer.

All charities that are deregistered on or after 1 April 2015 will be "encouraged" to distribute their assets for charitable purposes (or for purposes within its rules contained on the Charities Register) within 12 months. The encouragement comes in the form of a tax on the net assets of the charity not distributed within the 12 month window. The 12 month period starts on the day that a charity ceases to be compliant (with its constitution or other documents supplied to Charities Services) or the "day of final decision" (date of deregistration or in some cases the date no further disputes or appeals can be made against a decision by Charities Services to deregister the charity).

The amount of the net assets to be treated as taxable income after the 12 month period is further reduced by certain amounts from the Crown and any non monetary assets that had been gifted to the entity whilst it was tax exempt.

If you are involved with a registered charity and you are not sure whether the organisation's purposes will be held to be charitable, you might be thinking that there is an opportunity to voluntarily deregister before 1 April 2015 and avoid the new taxation on the accumulated net assets. Officials have thought of this possibility too and the application date of these new provisions will be 14 April 2014 for any charities that voluntarily deregister.

Registered Charities in this sector need to be on top of these issues quickly.

Charitable Housing Sector

New section CW 42B of the Income Tax Act 2007 provides a tax exemption for income derived by a "Community Housing Entity". A "Community Housing Entity" is a trust or a company that is a registered community housing provider under the Housing Restructuring and Tenancy Matters Act 1992 and:

- carries on a business that is not for the private pecuniary profit of any individual, and
- all profit is either retained by the entity or distributed, or applied, to other Community Housing Entities, beneficiaries or clients of the entity, tax charities, or persons to whom distributions would be in accordance with charitable purposes.

An entity is **not** a "Community Housing Entity" if less than 85% of beneficiaries or clients (when first becoming beneficiaries or clients) are persons, or classes of persons, described in the relevant regulations. Unfortunately, the regulations have not been issued yet, leaving the community housing sector still facing a lot of uncertainty with their tax obligations. The regulations are due to be issued by early August 2014.

Charities Services is reviewing all of the 110+ community housing providers that are currently registered charities with the intention of deregistering those that do not have a charitable purpose, by 31 March 2015. The intention of this review is that the retrospective income tax liabilities will be addressed by the changes discussed above and the new taxation on the net assets retained will not apply where deregistration occurs before 1 April 2015 (refer above).

Steve Thompson, a tax partner based in our Dunedin office was invited to address the recent Community Housing Conference about these tax changes. Some of the key points discussed were:

- The need for the regulations to be issued as soon as possible.
- Entities need to quickly understand whether the new exemption will be available (based on the regulations) and if not whether the entity can and should be restructured to take advantage of the new exemption.
- If a restructure is required, entities will need to understand and manage the tax liabilities that could arise on the restructure, particularly the transfer of any revenue account property. The timing of any restructure in relation the date of deregistration will be very important.

Registered Charities in this sector need to be on top of these issues quickly and, if you have not already done so, we recommend that you talk to your advisor sooner rather than later.

Who's next?

Charities Services is actively reviewing charities on the register on an ongoing basis as part of its monitoring responsibilities. Where an issue is identified in a particular sector, Charities Services takes the next logical step and considers the charitable status of other similar organisations. In our opinion, there are a number of sectors where a little bit of scrutiny from Charities Services could set the cat amongst the pigeons.

Guidance on transitional rules for tax positions on residence updated

In our June Tax Alert we considered the transitional arrangements announced for individuals who had previously relied on the Inland Revenue's guidance under PIB 180 to determine their tax residence position. From the transitional guidance provided, it is clear that anyone relying on the previous guidance to take a non-residence position should now reassess their position by reference to the latest Interpretation Statement, and that this reassessment should be done with effect from 1 April 2014. The Inland Revenue has now further updated the transitional guidance by inserting a new Question 11 with effect from July 2014.

Question 11 deals with a situation where a taxpayer had previously relied on a non-resident ruling issued by the Inland Revenue. This newly inserted question now makes clear that, whilst the prior ruling can be relied upon historically, individuals must still reassess their position with effect from 1 April 2014 based on the newly released Interpretation Statement – effectively, taxpayers are indemnified for prior years but can no longer rely on the Inland Revenue's ruling after 31 March 2014.

It is clear that anyone relying on the previous guidance to take a non-residence position should now reassess their position by reference to the latest Interpretation Statement.

Refunds available for employer provided accommodation

By Mike Williams

In our **July 2014 Tax Alert** we outlined the new rules regarding the treatment of employer provided accommodation and other allowances introduced as part of the Taxation (Annual Rates, Employee Allowances and Remedial Matters) Act ("the Act"). As noted last month, these provisions generally apply from 1 April 2015; however the Act affords employers the option to apply the accommodation rules to periods before this date in certain circumstances.

The accommodation rules can be backdated for accommodation provided or expenditure incurred from 1 January 2011 as long as the employer has not taken a tax position before 6 December 2012 that the accommodation was taxable. Regular Tax Alert readers may remember that this is the date Inland Revenue released Commissioner's Statement 12/01 (CS 12/01), a controversial document which proclaimed Inland Revenue's stance that employer provided accommodation is taxable in all but a small number of situations.

The Act now partially reverses the treatment of accommodation under CS 12/01 and, to acknowledge this, refunds will be available where employers treated accommodation that would not be taxable under the new rules as taxable as a result of CS 12/01.

Below are two examples which demonstrate differences in how these backdating rules apply.

Julie lives and works in Invercargill. In February 2011 her employer sent her on secondment to New Plymouth to assist with setting up a new site. The secondment was expected to last 18 months, but in fact lasted 20 months as the new site progressed slightly behind schedule. Julie's employer provided her with an accommodation allowance which was treated as taxable, with PAYE deducted.

Under the new accommodation rules the provision of accommodation in New Plymouth would not be taxable as it falls within the "out of town secondment" provisions. However, because Julie's employer treated the accommodation as taxable before 6 December 2012 the rules cannot be backdated and no refund would be available.

Kevin is employed in and lives in Hamilton. In January 2013 he was sent on secondment to Queenstown by his employer on an 18 month contract. In addition to his regular salary, Kevin was provided with a cash allowance every week to cover the costs of an apartment in downtown Queenstown. His employer, aware of Inland Revenue's position on accommodation in CS 12/01, treated the accommodation allowance as taxable. >>

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The allowance provided by Kevin's employer would be exempt from tax under the new accommodation rules as Kevin's assignment falls under the "out of town secondment" provisions. Because Kevin's employer took a tax position after 6 December 2012, a refund would be available for any tax paid in accordance with the accommodation provided to him[1].

In a special report released in conjunction with the Act, Inland Revenue has outlined the procedures necessary to receive these refunds.

Employers must first notify Inland Revenue of the employees and income years for which they wish to backdate the application of these rules and also provide the new gross earnings and tax exempt amounts for these employees. Following this, the *employees* will need to request an amended IR3 or personal tax summary, which will then lead to a refund of tax. In many cases, employers would have grossed up the allowances paid to employees for tax to ensure employees received sufficient net cash to meet their accommodation requirements. In these cases the refunds should eventually flow back to the employer.

However, applying for these refunds is not as clear cut as amending assessments for amounts of overpaid tax. The initially increased earnings figures as a result of employer provided accommodation may have had flow on effects on social assistance entitlements and other obligations, such as Working for Families, child support and student loans and that may take some unravelling.

Inland Revenue has also indicated that any refunds will be applied against outstanding tax obligations the employees might have before cash amounts will be repaid, which could cause issues when employers are expecting refunds to ultimately flow back to them.

If you believe your business and/or its employees may be due refunds as a result of these rules please contact your usual Deloitte tax advisor.

Applying for these refunds may not be clear cut.

[1] Please note that employers do not need to have been aware of CS 12/01 to qualify for refunds, the only requirement is that they took a tax position after 6 December 2012 treating the accommodation allowance as taxable.

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United Kingdom pensions – foreign tax credits

By Jayesh Dayha

Following on from the recent changes in relation to the taxation of foreign superannuation, Inland Revenue has issued an exposure draft to outline the position on whether foreign tax credits can be claimed by New Zealand tax residents on pensions from the United Kingdom.

The short answer to this is "no".

The rationale for this is that under the New Zealand/United Kingdom double tax agreement, the United Kingdom does not have the right to tax a pension payment. If the pension provider in the United Kingdom has deducted tax, the taxpayer needs to seek a refund from the tax authorities in the United Kingdom by completing the following form (**Application for Relief**). Once completed, the United Kingdom tax authorities will also instruct the pension provider to cease deducting tax in the United Kingdom.

It would be fair to say that in practice, there will be taxpayers who have simply claimed a credit for the taxes deducted on the United Kingdom pension not being aware of the requirement to seek relief from tax in the United Kingdom. While it has been acknowledged by Inland Revenue that there are arguments that exist that may allow a foreign tax credit, Inland Revenue does not agree with these arguments.

While the exposure draft has not yet been finalised, Inland Revenue has signalled that voluntary disclosures may be required if taxpayers have claimed tax credits in New Zealand on United Kingdom pensions. While the operational statement requires some fine tuning, those who make disclosures and correct their position going forward will be offered concessions from penalties and will be provided a deferral to pay the shortfall of tax until the refunds are received from the United Kingdom.

If you believe that you may be impacted we recommend you talk to your advisor for further guidance.

Update on IR position regarding when tax payments are received in time

On 30 July 2014, Inland Revenue released a finalised standard practice statement ("SPS") regarding when payments are considered to be received in time[1] following consultation on a draft issued earlier this year (see our comments in our **May Tax Alert**). The finalised SPS makes some changes to Inland Revenue's practice. The most significant change introduced by the SPS is that payments made by post must be **received** on or before the due date, rather than simply being posted before the due date.

The draft SPS had proposed to introduce a change whereby provincial anniversary days would be treated as working days, which would have meant that payments would need to have been received on or before the provisional anniversary day. However, the finalised SPS notes that provincial anniversary days **will not** be treated as working days (they will be treated in the same way as weekends and public holidays) therefore there will be no change in practice regarding payments on these dates.

These changes will take effect from 1 October 2014.

[1] SPS 14/01 Tax Payments – when received in time

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