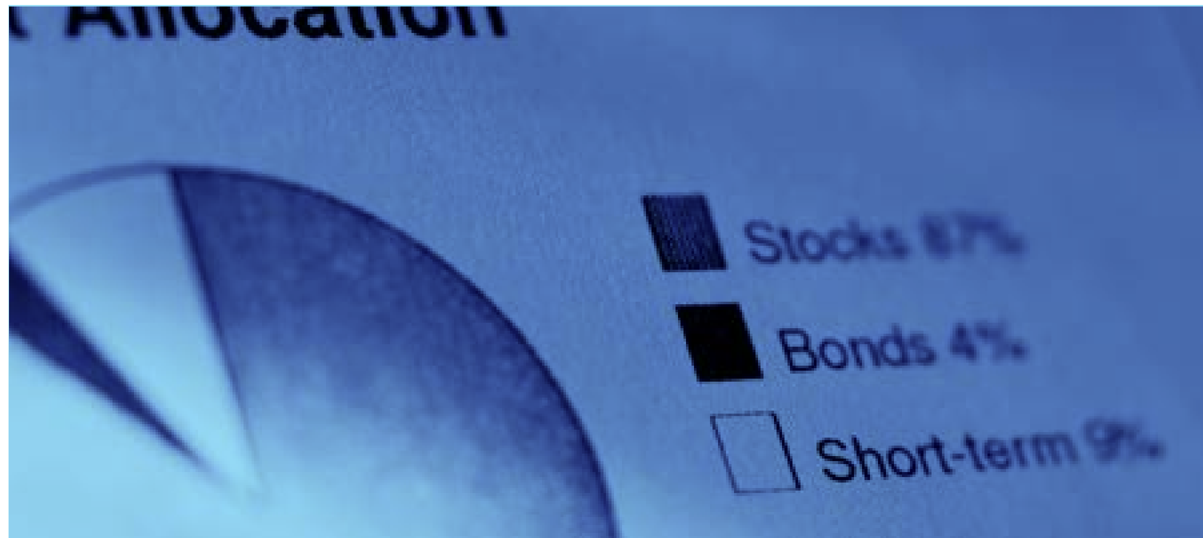
Tax Alert

A focus on topical tax issues– February 2014



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Employee share plans coming under Inland Revenue's tax avoidance spotlight

By Donald Wong and Robyn Walker

As highlighted in our **November 2013 Tax Alert** we have noticed an increase in Inland Revenue investigators asking employers detailed questions about employee share plans, including details of who have participated and what rewards have been received.

Alarmingly we have recently been made aware that these enquiries are not merely to check whether an employee has returned share based income, but to suggest that participating employees may be committing tax avoidance – an employee and employer's worst nightmare.

Despite employee share plans being commonplace and a number of plans receiving the blessing of Inland Revenue through product and private rulings over the years, Inland Revenue have come out all guns blazing against at least one taxpayer, stating that "the world has changed" and what was once acceptable is no longer acceptable under the **latest interpretation of tax avoidance laws.**

So what is the concern, and can you expect a visit from Inland Revenue soon?

As a starting point, if a share plan involves the upfront acquisition of shares (either fully or part paid) which is not accompanied by material benefits of ownership, such as voting and dividend rights, and provides employees with an option to put the shares back to the company if they are "out of the money" come vesting date then Inland Revenue may have some concerns as to whether the shares have truly been acquired at the outset. Inland Revenue consider it is necessary to consider under a section BG 1 tax avoidance analysis whether Parliament would have contemplated the tax outcomes from this type of arrangement.

The 'mischief' that Inland Revenue is seeking to address is that under such arrangements any appreciation in the share price between the acquisition date and the vesting date remains untaxed as a capital gain. Compare this with an option arrangement where employees are given the option to purchase shares at a fixed price once particular hurdles are met. The tax outcomes under an option are clear, being that any difference between the price at exercising the option and the price paid is taxable income.

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...we think it is imperative that Inland Revenue publicly declare their position on employee share plans and what features they do and do not approve of.

While it can be said that an employer choosing between whether to issue shares up front or to issue employees with options is a legitimate structural choice and that the wider purpose of the plan is to encourage employee retention and to align employee rewards with shareholder interests, Inland Revenue is indicating that this is not enough to make any tax avoidance merely incidental.

Considering how commonplace employee share plans are, the fact that Inland Revenue has previously issued rulings about certain share plans, and the fact that in general New Zealand doesn't have a capital gains tax we think it is imperative that Inland Revenue publicly declare their position on employee share plans and what features they do and do not approve of.

Also, considering the fact that individually any tax benefits received from employee share plans may be immaterial (albeit possibly more significant in aggregate), Inland Revenue needs to consider how resources are best deployed. It would seem sensible to let bygones be bygones and focus on the future, including considering what Parliament currently contemplates should be taxed to ensure we have the right tax policy settings in place.

If you would like advice on the features of employee shares plans, please contact your usual Deloitte advisor.

Do you have Foreign Superannuation Entitlements? The window of opportunity to take advantage of the new rules is quickly closing

By Ian Fay and Kirsty Hallet

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In our June 2013 Tax Alert, we outlined new rules to tax interests in foreign superannuation schemes set out in the Taxation (Annual Rates, Foreign Superannuation and Remedial Matters) Bill ("the Bill") that will apply from 1 April 2014.

While the Bill is still working its way through Parliament and is yet to be enacted, the changes to the taxation of Foreign Superannuation include an opportunity to take action before 1 April 2014 that may have significant positive (or negative) implications depending on your personal circumstances.

Specifically, in certain instances you may be able to withdraw a lump sum or transfer your entitlements to a New Zealand or Australian scheme before 1 April 2014 and cap your taxable income at 15% of the amount transferred or withdrawn. Given the window of opportunity to make the transfer before 1 April 2014 is fast running out some key decisions are needed quickly.

Background to the Rules/Overview

While there have been some welcomed tweaks to the rules as a result of further submissions on the proposed legislation such as introducing concessions from the full scope of the rules where entitlements pass on death or marriage breakup, the rules as set out in our **June 2013 Tax Alert** remain unchanged, and as such we do not look to recap the rules in detail here. In summary the new rules will apply from 1 April 2014 and the existing Foreign Investment Fund ("FIF") rules will cease to apply (unless grandfathering provisions apply). From 1 April 2014 any lump sum receipts or transfers made into a New Zealand or Australian superannuation scheme will be taxed using either the schedule method or the formula method. Pensions will be taxed on a cash receipts basis.

Readers may recall that in order to deal with the high levels of prior non-compliance with the existing rules, under the new rules a concession has been included for withdrawals or transfers made prior to 1 April 2014 to allow taxpayers who have not complied with the current rules to treat 15% of amount transferred or withdrawn as deemed income in the 2013-14 or 2014-15 income year.

Under this concession no penalties or interest will be applied from the tax year the withdrawal or transfer was made. The concession will also remain available after the 2015 tax year in respect of transfers made prior to 1 April 2014, however interest and penalties will apply where the income has not already been returned.

If taxpayers choose not to use this concession, the law is applied as at the time of the withdrawal and the original due date for any payment of tax will apply.

Any transfers or lump sum withdrawals made after 1 April 2014 will be taxed under the new rules and depending on the length of time the recipient has been in New Zealand, the transfer or lump sum withdrawal could be taxed in full.

...taxpayers now have a limited window within which to determine their liability under the old rules and under the new concessionary measures...

What does this mean for you?

Already made a transfer or lump sum withdrawal?

The action required for taxpayers who have already transferred their foreign superannuation entitlements to a New Zealand or Australian scheme, or have made a withdrawal, is clear. You will need to consider whether you have complied with the existing rules or not and where there is non-compliance you may need to include 15% of the amount transferred as taxable income in your 2014 or 2015 income tax return. In some cases, however, it may be better to return income under the FIF rules, for example, if under the FIF rules the CV method could have been adopted or an exemption was available, little or no taxable income may have arisen for a number of years such that potentially only one year's income under the FDR method may need to be returned, which could be less than the "concessionary" 15% rule.

It is important not to act too hastily however, and advice should be sought regarding compliance with the existing rules as in some circumstances there may be full compliance with the FIF rules where no income has been required to be returned, and if this is the case you may be able to continue to apply the FIF rules going forward which would mean a lump sum withdrawal or transfer would not be separately taxed.

Do you currently have foreign superannuation entitlements?

Taxpayers who have not previously complied with the FIF rules and still have foreign superannuation entitlements which have been acquired while non resident have a window of opportunity between now and 1 April 2014 to transfer their entitlements or make a lump sum withdrawal from the fund and cap their taxable income at 15% of the amount withdrawn or transferred. For example, if someone has been non-compliant for a number of years and is about to retire in New Zealand, triggering a transfer before 1 April 2014 may result in only 15% of the fund value being taxed whereas if they wait until after 1 April 2014 a significantly higher part of the fund value may be taxable.

While on the face of it this may seem like an attractive opportunity, and for some it will be, there are a number of factors that should be considered prior to making any decisions to withdraw or transfer entitlements and ultimately the best decision for you will be dependent on your personal circumstances.

While not exhaustive we outline some of the relevant factors to consider below:

- Have the FIF rules been correctly applied in the past?

Taxpayers who have previously complied with the existing FIF rules can opt to continue to have their foreign superannuation schemes taxed under the FIF rules. This would mean transfers and withdrawals are not taxed under the new rules, and the taxpayer would continue to pay tax on an accruals basis each period in respect of their investment.

Based on a taxpayer's personal circumstances, remaining in the FIF rules may give rise to the most beneficial outcome from a financial perspective, as income tax paid on FIF income already returned is not factored into the calculations under the formula or schedule method.

By way of example, a taxpayer with a qualifying interest in a foreign superannuation scheme who has been present in New Zealand for a long period of time, who plans to retire here within the next few years and who has complied with the FIF rules to date can opt to continue applying the FIF rules, and therefore would not be taxed on any withdrawals or transfers under the new rules. Should this taxpayer choose to opt out of the FIF rules and apply the new rules, 100% of the amount withdrawn could be taxable here (even though tax has been paid on deemed income).

Importantly, the answer to this question is not a simple one having regard to the nature of the exemptions that could apply, the methodologies used to calculate income and the disclosures required and for this reason professional advice should be sought before either ruling out the FIF rules as a valid option or seeking to continue to apply them.

- Does the beneficiary plan to retire in NZ?

It is worthwhile highlighting that if a migrant taxpayer does not intend to retire in New Zealand, as long as they do not withdraw any lump sums or transfer any amounts to a New Zealand or Australian scheme while New Zealand tax resident, they would not be taxed on their foreign superannuation fund for the duration of their tax residency under the new rules.

For example, a person who plans to retire overseas may decide to stop using the FIF rules on the expectation that they will not make any withdrawals / transfers while New Zealand tax resident and therefore have no further New Zealand tax to pay in relation to the foreign superannuation fund.

- How will the tax liability be funded?

The new rules will allow people who transfer their entitlements to a KiwiSaver scheme to withdraw funds from the KiwiSaver scheme to settle the tax liability arising. In some instances, such as with transfers from some UK schemes, any transfers have to be locked up so any withdrawal from the KiwiSaver account would need to be from other contributions and not the sum

transferred, or else there could be penal tax implications triggered in the other state due to making early withdrawals.

The provisional tax rules may also need to be considered.

Act quickly, but cautiously

In essence, taxpayers now have a limited window within which to determine their liability under the old rules and under the new concessionary measures, and determine which course of action gives rise to the best outcome in their circumstances. Unfortunately there is no single answer to what course of action you should take as the best choice will depend on your personal circumstances, including the financial implications of switching investments.

Given the complexity of some of the matters to consider it is important that professional advice is sought and no decision is made before fully considering the issues and assessing the impact of any decisions. For more guidance or to discuss the application of the new rules in further detail please contact your usual Deloitte advisor.

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Residence storm brewing

By Mike Williams and Conor Gates

For many Kiwi expats there are ominous clouds brewing on the horizon following the recent decision handed down in XXX v The Commissioner of Inland Revenue [2013]. The TRA decision has made it clear that breaking residency ties to New Zealand is going to be harder than previously thought and is set to change the way Inland Revenue views any New Zealand tax resident heading overseas.

This is not entirely breaking news to the tax community after a draft interpretation on residency was released on 7 December 2012 suggesting that Inland Revenue plan to focus more closely on an individual's ties to New Zealand when determining a taxpayer's residency position, and in particular the availability of properties to the taxpayer, including rental property. However, the examples provided by Inland Revenue in the draft

interpretation statement were unclear in themselves as they were muddied by other factors on top of the issue of rental properties indicating closer ties to New Zealand.

The case at hand involved a former soldier who left New Zealand permanently in 2003 to work in overseas hotspots as a security consultant. When he left New Zealand he was separated from his wife who he later divorced while overseas. He had children who remained in New Zealand who he supported financially and also had an investment portfolio (including rental properties) which he financed through a New Zealand bank account. Since leaving New Zealand in 2003 the taxpayer returned with reasonable frequency for an average of 42 days per annum in the tax years concerned.

The decision in the case did not focus on the taxpayer meeting the 325 days of absence test, and instead focused on the issues of the taxpayer maintaining a permanent place of abode in New Zealand. The test for a permanent place of abode broadly contemplates in an objective manner the strength of ties a taxpayer has to New Zealand including social, economic and familial ties.

The TRA concluded that the taxpayer remained a tax resident for the duration of his time overseas on the basis that one of the taxpayer's investment properties constituted a permanent place of abode for residency purposes. This is despite the fact that the taxpayer had never lived at the address. The 'availability' of this rental property was given enormous weighting and the decision departed from the previously held and widely accepted view that a departure from New Zealand of such duration should be enough to sever tax residency, even where property is owned for commercial purposes.

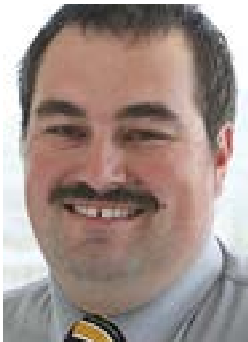
The decision has been received with somewhat considerable concern by the tax community, who are generally of the opinion that the conclusion does not bode well for New Zealand expats with investment

The TRA decision has made it clear that breaking residency ties to New Zealand is going to be harder than previously thought...

property back in New Zealand, even if the property was never purchased with an intention to be occupied by the taxpayer. However, it is perhaps no surprise in this instance that the case is an important one for Inland Revenue as the individual concerned has no protection under a Double Tax Agreement. The decision also creates difficulties in advising regarding residence where an individual is leaving New Zealand to live and work overseas on a long-term basis.

While we are still waiting on the final interpretation statement to be released, this case emphasises the need for tax residents leaving New Zealand to get advice on their likely tax position prior to departure to minimise the chances of their overseas income falling into the sights of Inland Revenue as far as possible. Seeking advice on residency in a timely manner is particularly relevant for any one moving to jurisdictions that do not operate under the web of Double Tax Agreements with New Zealand.

Until the final interpretation statement is issued, a cynical adviser would say that in order to be sure that New Zealand tax residency is broken a person must sever all ties to New Zealand – including investments and close family connections. On the back of submissions following the release of the draft interpretation statement we are expecting Inland Revenue to provide deeper analysis around the examples provided so that a firm and clear position on residency can be established.



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The acquisition date of land – clarity still required

By Aran Bailey

In our **November Special Tax Alert** we reported that the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill had been introduced to Parliament and contained changes to the Income Tax Act 2007 intended to clarify the date that land is acquired for the purposes of the land taxing provisions.

The date that land is acquired is important because the tax implications arising from a subsequent sale or disposal of the land are often determined by the taxpayer's purpose or intention **at the time the land was acquired** or whether land has been sold within 10 years of acquisition.

It is therefore necessary to determine when the land was actually acquired. Until recently it was generally understood that land was acquired when an agreement to purchase the land becomes unconditional. The purchaser acquires an interest in land at this time (the definition of land in the Income Tax Act 2007 includes all estates and interests in land). This is the logical time to assess the purpose or intention given that this is the time when the purchaser commits to purchase the land. This position is supported by case law.

However, in recent years Inland Revenue has adopted a different interpretation of when land was acquired noting that a taxpayer acquires different interests in land at various points in time. Inland Revenue has argued the relevant time to consider the taxpayer's purpose or intention is determined by the interest that is being disposed of.

One of the more common situations where the difference in interpretation has caused issues for taxpayers is where a section is purchased in a subdivision subject to title later being issued. Often a substantial period of time will pass between the agreement to purchase being entered into and the title being available. During this period a taxpayer's purpose or intention can easily change. Take for example a couple who purchase a section with the intention of building a family home on it. Illness, financial pressure, or a job relocation may dictate that when the title becomes available the couple has already on sold the section, or is planning to sell, as they are no longer in a position to build their home.

In the example above most tax practitioners would have determined that the land was acquired after the couple signed the agreement to purchase the land and the agreement became unconditional from their perspective. Inland Revenue's position in recent times has been that the relevant interest in land is only acquired at the time that title becomes available and this is the time that their intention or purpose should be determined. In the example, the couple had decided at this point in time to sell the land. Accordingly, Inland Revenue would say that the gain from any uplift in value during this period is taxable. This is despite the gain only arising because the couple's purchase price for the section is the cost base, a cost base that occurs well before the time that Inland Revenue was arguing that the couple acquired the land.

No doubt, Inland Revenue's interpretation on this point was driven by its, increasingly well-funded, focus on property transactions leading up to and following the most recent peak in the property cycle.

Officials released a discussion document as part of Budget 2013 and the proposed changes follow that consultation. Officials have stated that the intention of the proposed

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new section CB 15B is to clarify the position and confirm that a taxpayer's purpose or intention should be tested at the date a binding agreement is entered into. This provision is to apply to disposals of land occurring from 22 November 2013, being the date the Bill was introduced.

After working through the proposed changes we are of the opinion that section CB 15B fails to clarify anything for taxpayers.

The wording of section CB 15B provides "a person acquires land on the date that begins a period in which the person has an estate or interest in the land, alone or jointly or in common with another person". This does not provide any clarity. One has to turn to the officials' report accompanying the Bill to find out that the intention of the proposed change is to provide that the date the taxpayer's purpose or intention is tested will be the date a binding agreement is entered into. The officials report also contains some guidance on when a binding agreement will be entered into.

We do not consider that a legislative change is actually necessary. All that is required is for Inland Revenue to abandon its previous flawed interpretation and confirm the existing case law. However, given that the Bill proposes to change the legislation, the legislation should itself specifically set out that land is acquired by the purchaser when a binding agreement is entered into and also specify what constitutes a binding agreement rather than leaving this fundamental point to the officials' report which is much less authoritative.

We are also concerned that Inland Revenue has not commented on how section 225 of the Resource Management Act 1991 impacts on when a binding agreement is in place, so that the date of acquisition can be determined. In most of the situations we are aware of where Inland Revenue was adopting their alternative interpretation, its argument centred on agreements for the purchase of land that were subject to title not creating an enforceable interest in land until title was issued. This was founded on section 225 deeming such contracts to be made subject to conditions allowing the purchaser to cancel or rescind the contract if reasonable progress is not made in a reasonable time towards achieving separate title.

In our opinion, Inland Revenue needs to make an explicit comment confirming that an agreement for the purchase of a section that is subject to title being issued creates an interest in land that is acquired when the agreement for purchase is binding on the purchaser irrespective of the later ability to cancel or rescind that binding agreement in accordance with the limited circumstances of section 225.

Land can also be taxable on disposal when it is disposed of by taxpayers carrying on, or associated with, land related business within 10 years of acquiring it or where certain land related activities are undertaken within 10 years of acquisition. In these circumstances determining the actual date of acquisition is also important.

Please contact your usual Deloitte advisor if you would like any assistance to determine when land was acquired due to a change in purpose or intention or due to the 10 year timeframes potentially applying.

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Transfer pricing is still a hot topic

By Diana Maitland and Bart de Gouw

Transfer pricing is a hot topic at present and the OECD's work on Base Erosion and Profit Shifting (BEPS) has developments on Transfer Pricing documentation, country by country reporting and dealing with the challenges of the digital economy. We summarise these developments below.

OECD Discussion Draft on Transfer Pricing Documentation and Country by Country Reporting

The OECD on 30 January 2014 released a discussion draft on transfer pricing documentation and country by country (CbC) reporting as part of its work on BEPS. The discussion draft sets out revised guidance on transfer pricing documentation requirements in the form of a new draft Chapter V of the OECD's transfer pricing guidelines, and includes a common template for reporting detailed global information to tax authorities on a country-by country (CbC) basis, focusing on the global allocation of income, economic activity and taxes paid.

The new documentation requirements will call for significantly more documentation than is normally prepared today by most Multinationals (MNEs). They will also require significant changes in documentation processes and transfer pricing governance.

The discussion draft recommends the preparation of a far-reaching and detailed master file as well as CbC reporting of financial and tax information, The master file will need to include detailed information regarding the MNE's intangibles, intercompany financial activities, and financial and tax positions. It is designed to be shared with each country in which the MNE has an affiliate subject to tax. The discussion draft contains the current draft of the CbC reporting template to be provided as part of the master file. Detailed reporting requirements are prescribed, many of which are not currently included in local country documentation.

An important consideration for the OECD when designing transfer pricing documentation is that tax administrations need to have ready access to relevant information at an early stage. The OECD is thereby questioning whether there should be development of additional standard forms and questionnaires beyond the CbC reporting template. The discussion draft, if adopted, would result in a significant increase in documentation obligations for MNEs and potentially expanded audit activities. The CbC report represents an increase in reporting requirements over the level of information currently reported. The OECD has invited comments by 23 February 2014 from stakeholders.

For a more detailed discussion of the issues refer to our global release **here.**

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OECD Tax Challenges of the Digital Economy

The growing digital economy and associated tax challenges is a hot topic worldwide. New Zealand is part of a multilateral effort to clamp down on income shifting by companies that are based on a digital business model. However the characteristics of the digital economy make this very difficult within the current international tax framework which was established in the bricks and mortar era. The challenges of taxing a digital economy include determining the jurisdiction in which value is created, the reliance on intangible assets, and business models that capture value from externalities generated by free products.

The challenges of the digital economy are specifically dealt with in Action 1 of the OECD's BEPS Action Plan. The aim of Action 1 is to look at what changes need to be made to the existing international tax rules in order to take into account the specific features of the digital economy and to prevent BEPS.

The OECD received comments from stakeholders including law firms, accounting firms and banking entities in relation to the tax challenges of the digital economy. Deloitte commented that three business models are commonly associated with the digital economy – high frequency trading, cloud computing services and advertising models – and each pose different challenges. For example, under the advertising income model there are two transactions: the first where websites and information or tools are provided free to consumers over the internet, and the second where income is received from third parties in the form of advertising. Deloitte noted that there is no meaningful, principled way of taxing the free transaction. However where the entire value chain is dependent on advertising revenues, changes to the permanent establishment rules could ensure that local marketing activity could be sufficient to create a taxable presence for attribution of advertising revenues. In making these comments, Deloitte notes that any new taxation model needs to be sufficiently flexible and open to permit business models to continue to evolve.

The OECD Task Force on the Digital Economy were to meet on 3-4 February 2014 to discuss the comments received and determine how these should be reflected in the draft report on the tax challenges of the digital economy. This draft report is expected to be released in March 2014 and finalised by September 2014.

A link to the comments received by the OECD can be found **here.**

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