Tax Alert

A focus on topical tax issues – December 2015

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The danger of washing up FBT in the final quarter

By Mike Williams and Conor Gates

With Christmas coming and some leave periods extending late into January it is a timely reminder to consider your fringe benefit tax return for the quarter ending 31 December 2015 (due by 20 January 2016) to make sure someone is around to prepare the return accurately and correctly.

We also have a cautionary tale to tell relating to the preparation of FBT returns, and the accuracy of the benefits declared. Many taxpayers make adjustments in later returns or rely on the final return of the year to wash up any discrepancies arising in previous quarters. It is important to bear in mind that Inland Revenue's view is that each FBT return should be correct in its own right and that the final quarter attribution calculation is only a means to determine the appropriate rate of FBT for each employee based on their level of earnings and benefits received throughout the year. Whilst it is acceptable to use the final FBT return of the year to pick up any earlier discrepancies, such revisions are only allowable up to a level of $500.

When the final quarter calculation is used to recoup tax on benefits over-declared in previous quarters or to report benefits under-declared (or omitted entirely) from previous quarters there is an exposure to shortfall penalties that can have implications extending further than the year in question.

A shortfall in tax arises where benefits are initially omitted and subsequently included in the final quarter wash up, as tax was underpaid in the quarter the benefits were omitted from. Similarly a shortfall arises in the final quarter where benefits are backed out in

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Mike Williams
Associate Director
+64 (9) 303 0747
michaelswilliams@
deloitte.co.nz

Conor Gates
Senior Consultant
+64 (9) 303 0759
cgates@deloitte.co.nz

the wash up calculation as tax is underpaid in the final quarter (despite having effectively been pre-paid when initially over-declared). Penalties equal to 20% of the tax shortfall can be imposed on the basis that reasonable care was not taken in preparing and submitting the FBT returns if Inland Revenue identifies a shortfall - even if the shortfall is disclosed by the taxpayer as part of a voluntary disclosure.

It should be noted that penalties can be reduced by 50% for a taxpayer's previous good behaviour or entirely if a voluntary disclosure is made before notification of any audit.

Inland Revenue's view is that if a taxpayer identifies any errors in previous returns, that they should be amended by issuing a Notice of Proposed Adjustment (NOPA) which can be filed up to 4 months from the date that the quarter is assessed. Where a NOPA is not issued in time, the taxpayer is potentially exposed to shortfall penalties.

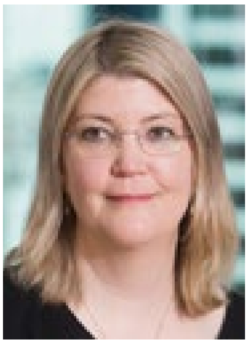
While 20% is not necessarily a significant penalty (which may be fully remitted where a voluntary disclosure is filed), if Inland Revenue identifies and imposes such penalties, a black mark is put against the taxpayer's record for the next two years. If the taxpayer is then found to have not taken reasonable care again and has a shortfall on the same tax type, the ability to reduce future penalties is significantly impacted (though voluntary pre-notification disclosures can still be made). We understand that Inland Revenue has a budget and a mandate to look more closely at FBT compliance and we are increasingly seeing more and more questions relating to FBT and other employment taxes in Inland Revenue's investigations or audits.

The best way to avoid running into problems with Inland Revenue is to develop robust processes around collecting and reporting details of fringe benefits provided to employees – prevention is better than cure!

If you have any questions or concerns regarding FBT or other employment taxes we recommend you contact one of the authors or your usual Deloitte tax advisor.

Inland Revenue has a budget and a mandate to look more closely at FBT compliance

Amending assessments – Commissioner's revised statement



Emma Marr
Associate Director
+64 (9) 303 0726
emarr@deloitte.co.nz

By Emma Marr

Inland Revenue has released a new version of draft standard practice statement "SPS ED0162: Standard practice – Requests to amend assessments" (draft SPS). The new draft takes into account submissions on the original draft released in March 2014, and recent Court decisions on section 113 of the Tax Administration Act 1994, in particular the High Court decision in *Westpac*[1]. For more analysis, refer to our earlier Tax Alert article on the **original statement** and the **Westpac decision**.

The Commissioner of Inland Revenue (Commissioner) has a discretion under section 113 (s. 113) to amend assessments to ensure their correctness. The draft SPS sets out the process the Commissioner will follow when considering s. 113 requests.

The overarching principle is that the Commissioner will evaluate each request in the light of her care and management obligations in sections 6 and 6A of the Tax Administration Act. This will include considering the compliance history of the taxpayer making the request and, if this is viewed as poor by the Commissioner, the Commissioner may consider that granting the request would not promote taxpayer perceptions of the integrity of the tax system. (An example of this principle in action is the more recent decision in *Charter Holdings*[2] which appeared to hinge on the fact that the taxpayer had a very poor compliance history and was therefore denied the opportunity to re-open returns in order to carry forward losses that otherwise would have been available to them).

The draft SPS outlines a two-step process that the Commissioner will follow when assessing a s. 113 request. The first step is to confirm that the assessment will be correct after it has been amended as requested. Notably, in light of the decision in *Westpac*, the Commissioner has (generally speaking) abandoned the concepts of "genuine error" or "regretted choice", meaning that the focus has moved to whether the assessment will be correct once amended, rather than whether it is already correct or the reason for the error. However, some remnants of "genuine error" and "regretted choice" remain, as discussed below. If the Commissioner is satisfied that the amended assessment will be correct, the second step is for the Commissioner to consider whether to exercise her discretion to amend the assessment. This involves four phases.

Phase 1: The Commissioner will consider whether the error is clear and obvious, and would require only minimal resources to resolve. If so, it will be dealt with immediately and without further consideration, provided all information has been provided. If the taxpayer is in dispute or under investigation, the period is time-barred, the amendment is contrary to the Commissioner's view of the law, or the amendment can be made by the

The Commissioner has (generally speaking) abandoned the concepts of "genuine error" and "regretted choice"

1 *Westpac Securities NZ Ltd v Commissioner of Inland Revenue* (2014) 26 NZTC 21-118
2 *Charter Holdings Limited v Commissioner of Inland Revenue (No.2)* (2015) 27 NZTC 22-022

taxpayer in a later period, the Commissioner is unlikely to consider the request further.

Phase 2: If the request is not dealt with at Phase 1, the Commissioner will consider whether to apply her limited resources to consider the request further. If the facts or legal position are not clear, or the Commissioner believes the taxpayer is using the s. 113 process to circumvent the disputes process, the request will be declined.

At this point in the process the Commissioner acknowledges that, following the decision in *Westpac*, she can amend an assessment from one correct position to another correct position. However, on the basis of certain comments in *Westpac* regarding whether a "well resourced", "sophisticated" and "well advised" taxpayer in that case had "erred", the Commissioner concludes that in deciding whether to grant a request under s. 113 she can consider:

- the "class" of the taxpayer and how well equipped they are to comply with their obligations to correctly self-assess;
- whether the taxpayer erred through an "oversight" or simply changed their mind. If it is the latter, the Commissioner is less likely to amend the assessment. Clearly although the concepts of "genuine error" and "regretted choice" are no longer explicitly included in the draft SPS, in effect these appear to remain a consideration for the Commissioner.

We comment on this approach further below.

Phase 3: The Commissioner will consider whether a correct assessment will result from the amended assessment. This step appears to be superfluous, as it simply repeats step one, which must be satisfied before the Commissioner even considers embarking on the four phase process.

Phase 4: Finally, the Commissioner will consider whether there is any residual reason not to exercise her discretion to amend the assessment and, if she believes granting the request will undermine the integrity of the tax system, she will not grant the request. This gives the Commissioner considerable discretion to deny amendment requests.

Process

In a welcome nod to practicality, the Commissioner will accept requests to amend obvious arithmetical, transposition or keying errors either in writing or by telephone, and requests with a tax effect of $10,000 or less may also be made by telephone. More complex requests or those having a tax effect over $10,000 must be made in writing.

Following the decision in *Westpac*, the Commissioner acknowledges that she can amend an assessment from one correct position to another correct position

Comment

A key message for large corporates arising from the revised draft SPS appears to be that a higher standard of care is required than that applied to smaller taxpayers, to support an amendment request – i.e. the nature of and resources available to a taxpayer will be an important factor taken into account by the Commissioner when considering s. 113 requests.

In our view, the draft SPS has elevated the comments in Westpac regarding the "sophistication" of a taxpayer beyond their intended meaning, to almost acquire the status of a rule or test. The comments arguably did not form the core of the judge's decision, and it is not clear what weight ought to be given to this factor (or the implications either way, in relation to whether the Commissioner's discretion should be exercised).

In the context of an otherwise compliant taxpayer with multiple and complex tax obligations, we do not think it is fair to deny a taxpayer's amendment request simply because they are, relative to other taxpayers, more "sophisticated". Every taxpayer operates under constrained resources, just as the Commissioner does. It is relevant in this respect that taxpayers only have four months to amend an assessment themselves (i.e. outside the s. 113 process), whereas the Commissioner has four years to adjust a taxpayer's position.
Unsurprisingly, the draft SPS states that the Commissioner will always apply resources to consider a voluntary disclosure – i.e., if a taxpayer's request is going to result in additional tax payable, it will always be considered. The tightly prescribed regime for considering s. 113 requests, when compared with a blanket "willingness" to consider every voluntary disclosure, seems at odds with the Commissioner's stated aim that she will consider all s. 113 requests in light of her obligation to encourage voluntary compliance and bearing in mind perceptions of integrity of the tax system.

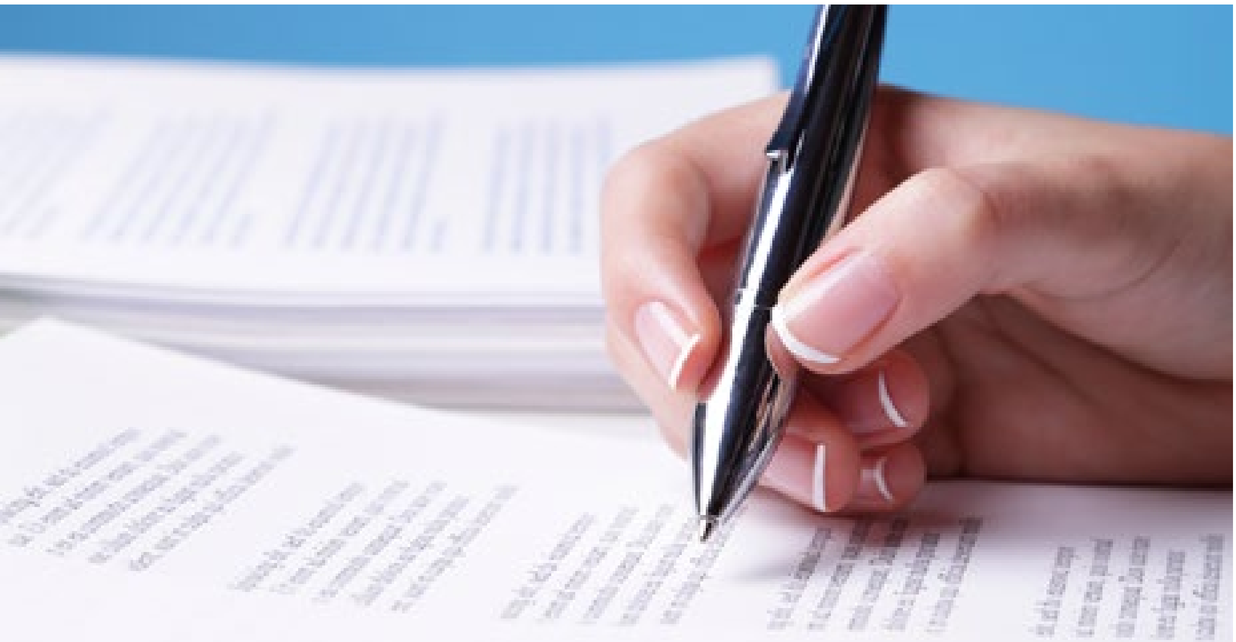
As Richardson P stated in *Wilson*[3]:

"…the purpose of [the late objection mechanism – analogous to section 113] is to allow consideration of a challenge to the adjustment on the ground that the income tax liability has been overstated. That is particularly important in a system which attaches so much significance to voluntary compliance by all taxpayers with the Inland Revenue Acts and which, **to maintain goodwill, has to be seen to be operating fairly.**"

In the interests of maintaining the perception of fairness and encouraging voluntary compliance, we would welcome a draft SPS that offered a more clearly balanced approach to considering taxpayers' requests to amend assessments, regardless of whether the economic benefit of that amendment lies with the taxpayer or the Commissioner.

Please contact your usual Deloitte adviser if you would like to discuss the draft SPS further.

3 *Commissioner of Inland Revenue v Wilson* (1996) 17 NZTC 12,512



Bill introduces GST on online services and a new residential land withholding tax

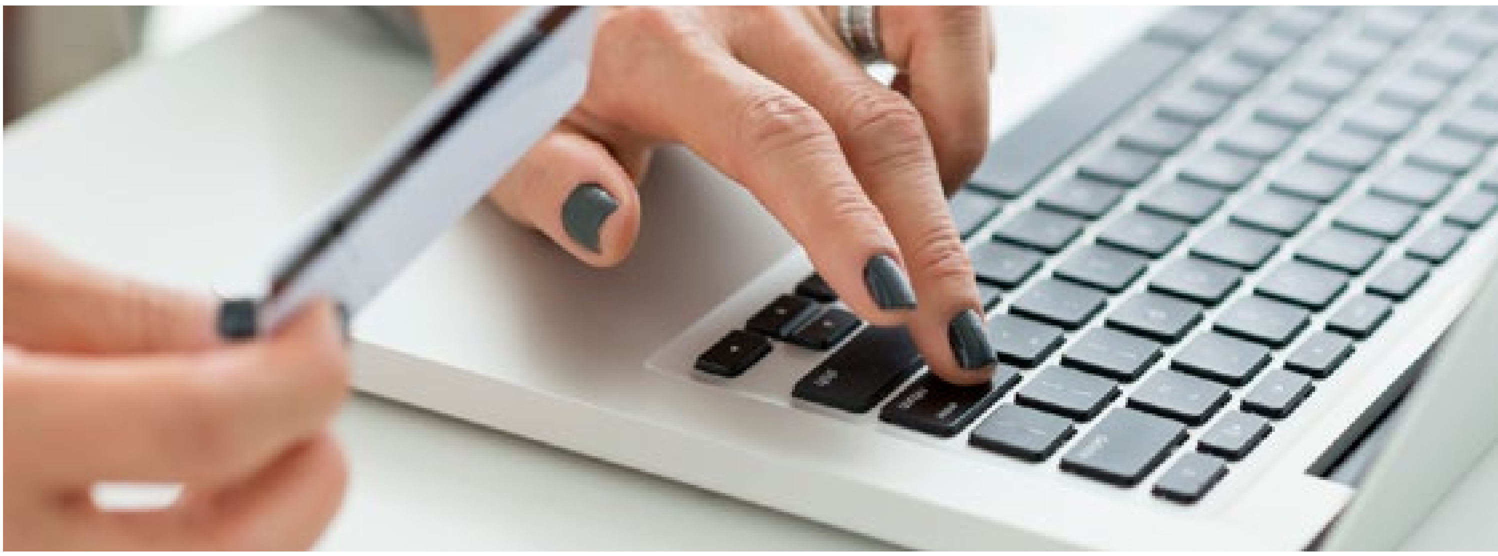
The Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Bill was introduced on 16 November 2015. The **bill** includes proposals to apply GST on cross-border intangibles and services in order to bring New Zealand into line with other OECD nations. The amendments are intended to maintain New Zealand's broad based GST system and to create a level playing field between domestic and offshore suppliers of services and intangibles. The amendments broadly follow OECD guidelines which establish an international set of principles for determining when countries have the right to tax these supplies. New Zealand is the latest to follow other countries in implementing similar rules (for example, Australia, South Africa, members of the European Union, Norway, Japan, South Korea and Switzerland). The proposals largely follow those outlined in the discussion document released in August 2015.

The key points are:

- The new rules will come into force on 1 October 2016. Offshore suppliers will be required to register and return GST if their supplies of services to New Zealand resident consumers exceed NZ $60,000 in a 12-month period;

- Services and intangibles supplied remotely by an offshore supplier to New Zealand-resident consumers will be treated as performed in New Zealand and therefore subject to GST;

- To ensure compliance costs are minimised, the new rules will only apply to "Business to Consumer" transactions and not to "Business to Business" transactions (but offshore sellers of services to businesses will be able to zero-rate these supplied so that offshore sellers can then recover any New Zealand GST);



- A broad definition of "remote" services is proposed. This includes both digital services (such as video, music and software downloads) and more traditional services (such as legal and accounting services received remotely);

- The offshore sellers will be required to pay GST on a quarterly basis and the first return will be a transitional return covering the period of 6 months from 1 October 2016 to 31 March 2017; and

- In some situations, an operator of an electronic marketplace (such as an app store) may be required to register instead of the principal offshore supplier.

The second main measure of the bill concerns a new Residential Land Withholding Tax (RLWT). The new rules are designed to support the collection of tax imposed on offshore persons as part of the 'bright-line' residential property sales rules recently enacted. RLWT is a method for collection of tax on sales of residential property by offshore persons who sell the property within two years of acquisition. No exception for the vendor's main home will be available, because it is unlikely that an offshore person has their main home in New Zealand. The Bill proposes that the primary obligation to withhold RLWT will fall on the vendor's conveyancing agent, with a secondary obligation on the purchaser's conveyancing agent. In the absence of either, the obligation will fall on the purchaser themselves. The proposed RLWT will come into force on July 1 2016.

The last measure included in the bill concerns the student loan scheme. Specifically it is proposed to allow the sharing of certain information on New Zealand student loan borrowers living in Australia between Inland Revenue and the Australian Taxation Office. The bill also proposes a small number of technical measures designed to keep the student loan scheme rules clear and current.

For more information on these new rules, please contact your usual Deloitte tax advisor.

The amendments are intended to maintain New Zealand's broad based GST system and to create a level playing field between domestic and offshore suppliers of services and intangibles

Revenue Alert issued on certain employee share purchase agreements

The following item was first published as a special alert on tax@hand and on our website on 13 November 2015 and is republished here for inclusion in the December Tax Alert.

Inland Revenue has issued a Revenue Alert RA 15/01 on Employee Share Purchase Agreements, specifically arrangements which have the effect of reducing the taxable benefit to employees under a share purchase agreement. The purpose of Inland Revenue issuing a Revenue Alert (RA) is to provide information about a "significant and/or emerging tax planning issue" that is of concern to it. An RA outlines the Inland Revenue's current view of how the law should be applied to particular arrangements. In our view, this RA is likely to be viewed as contentious and raises a number of issues/questions.

By way of background, the current law taxes the difference between the amount an employee paid to purchase the shares, either directly or after the exercise of an option, and the market value of the shares at acquisition. Employees are currently responsible for paying any tax on any benefit received in their own tax return.

There are a myriad of different employee share schemes and features for structuring such agreements. Different tax rules apply depending upon whether the shares are subject to an option to purchase or have been acquired at the outset (with or without any constraints or conditions).

Inland Revenue has issued this RA because it has some concerns about some schemes with certain features which could be seen as altering the benefit that is taxed. Specifically there is concern about arrangements which seek to accelerate the point in time at which the employee can be said to have acquired the shares, in this way eliminating the tax liability on any subsequent increase in value of the shares. According to Inland Revenue, this usually involves treating what are rights or options, in commercial and economic reality, as acquisitions. The RA contains the following example to highlight one area of concern regarding in-substance options:

Example 1 – An in-substance option

Corp Limited enters into a share purchase agreement with its employee, Mr Wright. Under the share purchase agreement Mr Wright acquires 100 shares in Corp Limited that are held for his benefit by Hold Trust (this occurs in Year 1). Hold Trust is a trust established for the benefit of employees of Corp Limited. Mr Wright does not receive any voting, dividend or other participation rights in the shares while they are held by Hold Trust; these rights are instead held on trust for Corp Limited. Subject to certain performance criteria being satisfied, the shares will vest in Mr Wright after 3 years. However, Mr Wright has a right to reject the transfer of the shares on vesting. The shares are acquired for $2 per share (i.e. $200), which is funded by way of a loan from Corp Limited to Mr Wright. If the performance criteria are not satisfied, or Mr Wright exercises his right to reject the transfer

There is concern about arrangements which seek to accelerate the point in time at which the employee can be said to have acquired the shares *of shares on vesting, Mr Wright must transfer his beneficial ownership in the shares to Corp Limited in full satisfaction of the loan amount outstanding. If the shares vest and are transferred to Mr Wright, he must repay the loan in cash.*

The shares have a value of $2 per share when acquired, so Mr Wright does not return any income. This is on the basis he paid market value for the shares and therefore there is no benefit to him under the share purchase agreement.

Three years later the shares vest and are transferred to Mr Wright. At this time the shares have a value of $4 per share. The shares are sold for $400 by Mr Wright and the $200 loan from Corp Limited (for the purchase of the shares) is repaid, resulting in a gain of $200 to Mr Wright. Mr Wright does not return this $200 gain as income on the basis that the shares were acquired from Corp Limited when they were legally acquired by Hold Trust (for Mr Wright's benefit) and had a value of $2 per share. Thus, Mr Wright had already acquired the shares when the trust subsequently transferred legal title in the shares to him, when the shares had a value of $4 per share. Accordingly, Mr Wright treats the $200 gain as a capital gain that accrued while he owned the shares.

In this example, while the shares are acquired by Hold Trust in Year 1 for the benefit of Mr Wright, Mr Wright does not possess the rights normally associated with ownership of shares until legal ownership has passed in Year 3. In addition, Mr Wright has the choice as to whether or not to retain ownership of the shares or reject the transfer of shares on vesting. The increase in value of the shares from when they were "purportedly" acquired in Year 1 to when they legally vest in Year 3 is not assessable income to the employee. The facts, features and attributes may give the appearance of share ownership by Mr Wright in Year 1, however Inland Revenue considers that in economic and commercial reality, this is an option.

According to Inland Revenue, the real economic and commercial acquisition of the share occurs in Year 3 when legal title passes. The RA states that Parliament intended that the rules tax the difference between the value of the shares acquired under an option at the time the option is exercised and the shares are acquired. Inland Revenue therefore considers this example to be a tax avoidance arrangement. Accordingly, it can reconstruct the arrangement so that the $200 gain in value of the shares is treated as assessable income to Mr Wright.

Of concern is that the RA doesn't stop at saying it is concerned with Example 1. In its analysis of the arrangement it goes on to state (emphasis added):

> "There are many different employee share purchase scheme arrangements. Some arrangements will exhibit some, but not all, of the features found in Example 1. For example, an arrangement may allow the employee to exercise the rights associated with shares (e.g. voting and dividend) pending vesting of the shares and transfer of legal title to the employee. Alternatively, an arrangement may not allow the employee an option as to whether the shares vest at the end of a vesting period. Such arrangements may still be tax avoidance. Each case will need to be considered on its own facts, and the various attributes weighed against Parliament's intention for the employee share purchase scheme provisions."

The other area of concern for Inland Revenue is arrangements involving a reclassification of shares. The following example is provided to illustrate this issue:

Example 2 – Reclassification of shares

Liability Limited enters into a share purchase agreement with its employee, Mrs Jones, for her to purchase 100 Class B shares that are non-transferrable and have no voting or dividend rights in Liability Limited. The only right the Class B shares have is to reclassify to ordinary shares in two years if certain qualifying criteria (e.g. increased sales of Liability Limited) are met. The Class B shares were valued by the Company at $1 per share and Mrs Jones paid $100 to purchase them, although at the time the market value of ordinary shares in Liability Limited was much higher.

Mrs Jones does not return any income on the acquisition of the Class B shares on the basis she paid market value for their purchase and therefore there is no benefit to her under the share purchase agreement (i.e. she paid $100 to buy $100 worth of Class B shares).

The criteria for reclassification is met two years later and the 100 Class B shares held by Mrs Jones are reclassified as ordinary shares of Liability Limited, which have a market value of $9 per share at that time.

Under the arrangement Mrs Jones has received ordinary shares worth $900 (100 ordinary shares with a value of $9 per share) and has only had to pay $100 (paid $1 per share for 100 Class B shares). Despite an $800 gain, Mrs Jones returns no income. This is on the basis she purchased the shares (i.e. the Class B shares) at their value and that the reclassification of the Class B shares to ordinary shares is not taxable.

In this example, Inland Revenue considers that the real benefit is derived when the Class B shares reclassify to ordinary shares. However, instead what is valued is a highly contingent right to those shares at a significantly reduced value given the uncertainty that the qualifying criteria will be met. Inland Revenue considers that this example, when viewed in a commercially and economically realistic way, does not make use of the legislation that is consistent with Parliament's intention and is therefore a tax avoidance arrangement. Inland Revenue would seek to tax the employee on the real benefit of $800.

Inland Revenue views arrangements in the nature of Example 1 and 2 as tax avoidance arrangements and subject to reconstruction. It recommends that those affected discuss this RA with their tax advisor or Inland Revenue and consider making a voluntary disclosure.

Inland Revenue may initially approach employers who have implemented employee share schemes for more details about the schemes and, if there are concerns, perhaps request details of employees who have participated.

Our thoughts

This RA is likely to create considerable uncertainty as it is not exactly clear just where Inland Revenue are drawing the line. It is not clear what combination of features (or lack of) might be determinative for a particular arrangement. As noted above, there are a multiple of varying forms with different features, and the RA says that other schemes may constitute tax avoidance subject to weighing up all the different attributes of the scheme. The RA attempts to assist taxpayers by providing a number of factors to consider at paragraph 7, but falls short of providing any meaningful guidance:

> "Arrangements of this sort vary a good deal, and we will look at a number of criteria in combination when deciding whether to investigate a case. These include, for example:
>
> a) The level of control the employee has over the shares while they are part of the share purchase agreement. (It is accepted that restrictive covenants over disposition of the shares are a very common element of employee share plans).
>
> b) Whether during any restrictive covenant period the employee can exercise rights attaching to the shares (such as voting rights), and whether the benefit of dividends, if any, is passed to the employee in commercial and economic reality.
>
> c) Whether the employee has any direct or indirect rights to dispose of the shares in a way that negates the original acquisition or otherwise means the employee is not exposed to real commercial risk on ownership of the shares.
>
> d) Whether the nature of the arrangements put in place (which often include the shares being held by trustees for an interim period) means that benefits attaching to the shares during the restrictive period are enjoyed more by the employer (or someone else) than the employee.

e) Whether, as a matter of commercial and economic reality, the arrangement is more likely to be categorised as an option rather than a full acquisition of the shares."

Each situation will require careful consideration.

Inland Revenue has previously issued favourable binding rulings on arrangements that are very similar to Example 1, however it is now clear that they have a different view on these arrangements. Inland Revenue has a duty of care to manage the integrity of the tax system and in our view there are strong grounds for a prospective approach to be adopted in relation to the enforcement of Inland Revenue's current interpretation.

The RA does state that, if possible, Inland Revenue will have discussions with the company and its tax advisors before formally commencing an investigation into a share scheme, putting them on notice and providing an intermediate step before employees are contacted. But this will be of little comfort to employees who have participated in share schemes because it is the employees that are responsible for paying any tax on the benefit derived, those at most risk are employees who have already taken a tax position in their tax return that any benefit derived is a capital gain. Worst case, Inland Revenue could reconstruct past positions taken and impose interest and penalties. There is no guidance in this RA on how far Inland Revenue intends to go back to assess earlier periods.

The RA notes that those affected should consider whether to make a voluntary disclosure (which would have the effect of reducing any penalties). We see a number of issues with this. In a lot of cases employees will have moved on to new employers and employers may not be in a position to notify former employees of Inland Revenue's enquiries. We recommend employees who have participated in employee share schemes make contact with their former employers to ensure that they are notified of any Inland Revenue concerns and can consider whether they wish to make a voluntary disclosure.

There is no indication whether Inland Revenue will further reduce any shortfall penalties to encourage taxpayers to come forward. For example, it could be useful if Inland Revenue were to take a similar approach to the Penny & Hooper position a few years back and provide an amnesty or window within which to make a voluntary disclosure (preferably with assurance of no penalties) to encourage this. That situation was similar in a number of respects and also had the backing of a Supreme Court decision.

Way forward

Ultimately the RA puts everyone in an uncomfortable position until such time as Inland Revenue has questioned and "blessed" an employer's scheme. In our experience, Inland Revenue are very good at asking questions but often do not close the loop and advise taxpayers of the outcome of their review. Also when tax avoidance is in the mix, in our experience it can be difficult to have anyone at Inland Revenue commit to either a binding or non-binding view. Given the release of this RA, the onus is on Inland Revenue to provide employers with the certainty that isn't received from this RA.

There will be some employees that are currently participating in a scheme that may have similar features as described, but who have not yet taken a tax position in a tax return because a benefit has not yet arisen. In this case there is nothing to disclose as yet, but they will need to consider what tax position they take if they receive a benefit of the type as described in the two examples outlined above. Simply continuing to treat such benefits as non-taxable may expose a taxpayer to additional penalties if the treatment of the scheme is successfully challenged.

Another factor to consider is that the Tax Policy Work Programme states that Inland Revenue is to undertake a review of employee share schemes. We understand that this work is underway and public consultation is expected to take place in early 2016. Until the policy position is known, we are now in a place where it is very difficult for an employer to develop and implement a new employee share scheme given the effort that can be involved in setting up these arrangements and the question marks over the resulting tax treatment. It is unfortunate that tax may be hindering commercial decision making.

The bottom line is that all employers with schemes in place and all employees participating in such schemes should seek tax advice on their specific circumstances and employers and employees (including former employees) will need to keep in contact over any Inland Revenue communication.

For more information, please contact your usual Deloitte tax advisor.

New country-by-country reporting requirements for New Zealand headquartered groups

Bart de Gouw
Director
+64 (9) 303 0889
bdegouw@deloitte.co.nz

By Bart de Gouw

In October, the OECD published 13 papers and an explanatory statement outlining consensus actions under the base erosion and profit shifting (BEPS) project. Included is a final report on action 13 in relation to transfer pricing documentation and country-by-country (CbC) reporting to tax authorities. The CbC report will provide tax authorities with global information for the purposes of risk assessment.

The New Zealand Inland Revenue is currently considering if a law change is required or if the current law is sufficient to implement these new requirements. Inland Revenue has recently released a statement advising that the new requirements will apply to corporate groups headquartered in New Zealand with annual consolidated group revenue of EUR750 million (approximately NZ$1.2 billion) and above.

Initial analysis suggests around 20 New Zealand-headquartered corporate groups will be affected. The first groups impacted are those with 31 December balance dates. Data will be collected for this group for the 12 months beginning 1 January 2016. For 31 March balance date and 30 June balance date groups, data will need to be collected for the 12 months beginning 1 April 2016 and 1 July 2016 respectively.

Although the first CbC data reporting won't take place until the 2017 calendar year, the following aggregate information will need to be collected in 2016 and subsequent years for each jurisdiction where impacted groups operate:

- Gross revenues (broken down into related party and unrelated party categories)
- Profit (loss) before income tax
- Income tax paid (on cash basis)
- Income tax accrued (current year)
- Stated capital
- Accumulated earnings
- Number of employees
- Tangible assets other than cash and cash equivalents.

Affected groups will also need to list all their entities resident in each jurisdiction, noting the main business activity of each entity.

Inland Revenue has advised that it will contact each impacted corporate group individually to ensure they're prepared for these new reporting requirements. For more information please contact one of our transfer pricing specialists.

Have you missed our other articles on BEPS? Please refer to Tax@hand for more content.

Ruling on FBT and car parks finalised

On 18 November 2015, Inland Revenue released the following public rulings:

- **BR Pub 15/11**: "FBT – exclusion for car parks provided on an employer's premises" which states that car parks provided by an employer to an employee will be exempt from FBT where the car park is on premises that the employer owns or leases; and
- **BR Pub 15/12**: "FBT – exclusion for car parks provided on the premises of a company that is part of the same group of companies as an employer" which sets out the rule where the car parking is on the premises of a company that is part of the same group of companies as an employer.

The public rulings address the on-premises exclusion from FBT for car parking provided to employees in car parks that are owned or leased by an employer and will apply indefinitely from 17 November 2015. The rulings provide that the premises of an employer will not usually include a car park that an employer is merely licensed to use, unless the employer can show they have a right to use the car park that is in fact or effect substantially exclusive. For more background information refer to our **August 2015 Tax Alert article** on the draft item.

This position is different from the previously published ruling BR Pub 99/6 on FBT and car parks which expired in 2005 and since then the legislation has changed. That public ruling determined that licensed car parks could never be an employer's premises, and so the provision of licensed car parks by employers to employees was always subject to FBT. Because the new public rulings produce a different FBT outcome from the expired ruling, Inland Revenue has prepared an operational position explaining the process for employers who consider they may have overpaid FBT which allows employers to request that Inland Revenue applies the analysis in the recent public rulings to tax positions taken in earlier years. The Commissioner will apply the principles set out in the Standard Practice Statement on s 113 of the Tax Administration Act 1994 to determine whether to amend past assessments subject to the statutory time limits for refunds.

Employers that have overpaid FBT as a result of a tax position taken in previous years may apply for a refund

Every request made under s 113 will be considered by the Commissioner on a case by case basis taking into account all of the relevant individual circumstances of the employer and their parking arrangements. Relevant supporting documents need to accompany any request.

Troy Andrews
Director
+64 (9) 303 0729
tandrews@deloitte.co.nz

Vinay Mahant
Consultant
+64 (9) 303 0807
vmahant@deloitte.co.nz

CRS - The next FATCA

By Troy Andrews and Vinay Mahant

FATCA's under control - what next? CRS (Common Reporting Standard) is the latest initiative to promote the global automatic exchange of information (AEOI) and improve cross-border tax compliance. CRS aims to build on the revolutionary US Foreign Account Tax Compliance Act (FATCA) that was enacted to combat offshore tax evasion by US persons. Financial Institutions should hopefully be able to leverage off investment they have already made for FATCA to make CRS an easier transition.

A key element to the successful implementation of CRS requires the creation of an international framework to allow the exchange of information between jurisdictions, which is well underway. Currently, 74 jurisdictions, including New Zealand, have committed to the exchange of information by entering into Multilateral Competent Authority Agreements.

CRS is intended to apply to financial institutions that would otherwise fall within the ambit of FATCA. The definition of a "Financial Institution" is therefore very wide. There are essentially four types of financial institution:

- depository institution
- custodial institution
- specified insurance company and
- investment entity.

A particular focus for many New Zealand taxpayers has been to understand when various New Zealand trusts fall within the definitions above. Inland Revenue has now issued its formal guidance that helps clarify its application (which we recommend all trustees should understand in detail). We expect CRS to also follow similar guidance.

Each type of financial institution has a wide definition and a number of exemptions that can apply. However, there are differences between CRS and FATCA (due to the global dimension of CRS). Financial institutions are expected to be able to maintain one system and approach for both. Among the differences between CRS and FATCA are the removal of US specific requirements, as it is OECD driven.

New Zealand had initially planned to implement CRS in two phases. The first phase was to apply from January 2017 with Financial Institutions commencing due diligence procedures on account holders to report in 2018. This phase was intended to be a voluntary initiative for financial institutions to be early adopters.

The second phase set out the mandatory timeline for implementing CRS and would apply from the beginning of 2018 with a view of reporting information from 2019.

After recent discussions, the New Zealand government has decided to withdraw the above voluntary phase.

This should allow more time to process the necessary legislation and provide Financial Institutions more time to digest its impact. In our view, it is unlikely many organisations would elect to be early adopters in any event.

Discussions are currently taking place around the drafting of domestic legislation. The legislation is now planned to be set out in a Bill in September 2016 with the aim of being enacted by mid-2017. Financial Institutions should expect to commence due diligence procedures from the beginning of 2018 and reporting is expected to start from early 2019.

The method of reporting CRS information is expected to follow a similar approach to FATCA reporting, with information being reported to Inland Revenue, who will then exchange information with other jurisdictions. This reporting infrastructure will be crucial for Financial Institutions to understand. For FATCA, there have been a number of system changes and reporting uncertainty which is continuing to evolve. For some, this means refiling is required.

Many financial institutions are aware that failure to comply with FATCA may result in a 30% penalty on US withholdable payments. However, it is also important to understand that failing to register and comply with obligations under FATCA could result in a knowledge offence under New Zealand tax law. The penalty for non-compliance can be substantial and therefore if you have not already taken appropriate steps towards ensuring you are in compliance with FATCA, it is important to do so as soon as possible. We expect CRS domestic legislation will include similar offences for non-compliance to ensure it is applied strictly.

The method of reporting CRS information is expected to follow a similar approach to FATCA reporting

CRS is getting closer and is evidence that FATCA only formed the first step towards combatting tax evasion and revolutionising a new information reporting system on taxpayers. CRS will enhance the reporting phenomenon that FATCA introduced. This will inevitably create another compliance burden for financial institutions that aren't well prepared.

As a closing note, our anecdotal experience is that FATCA is starting to 'work'. Many "US" account holders are increasingly trying to understand how to deal with US tax liabilities they may have ignored in the past. CRS will only enhance this impact and expats around the world should be on notice.

Merry Christmas

This is the last Tax Alert issue for 2015, a year that has been extremely busy on the tax policy front with 14 consultation papers on policy released, plus the introduction or passing of seven bills. Next year is likely to be just as busy, particularly as the Business Transformation project gathers momentum. In the meantime we wish all our readers a merry Christmas and hope you have a relaxing holiday break over the new year. Tax Alert will return in February 2016.

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Queries or comments regarding Alert can be directed to the editor, Veronica Harley, ph +64 (9) 303 0968, email address: vharley@deloitte.co.nz.

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The Editor, Private Bag 115033, Shortland Street, Auckland, 1140.
Ph +64 (0) 9 303 0700.
Fax +64 (0) 9 303 0701.

New Zealand Directory

Auckland Private Bag 115033, Shortland Street, Ph +64 (0) 9 303 0700, Fax +64 (0) 9 303 0701
Hamilton PO Box 17, Ph +64 (0) 7 838 4800, Fax +64 (0) 7 838 4810
Rotorua PO Box 12003, Rotorua, 3045, Ph +64 (0) 7 343 1050, Fax +64 (0) 7 343 1051
Wellington PO Box 1990, Ph +64 (0) 4 472 1677, Fax +64 (0) 4 472 8023
Christchurch PO Box 248, Ph +64 (0) 3 379 7010, Fax +64 (0) 3 366 6539
Dunedin PO Box 1245, Ph +64 (0) 3 474 8630, Fax +64 (0) 3 474 8650
Internet address http://www.deloitte.co.nz