Tax Alert

A focus on topical tax issues – February 2016

In this issue

Collective agreements and employee allowances – are they taxable or exempt?

By Christel Townley

Many companies pay a variety of allowances to employees, often to reflect the conditions the employees are required to work in or to reflect costs they incur in their role. These may be administered through an employee's independent employment agreement or through a union collective employment agreement. There are circumstances when these allowances can be treated as exempt from tax and circumstances when they should have PAYE withheld.

Union collective agreements in particular are constantly being renegotiated with the relevant union, usually every two years, and in many cases this involves an update of the rates for allowances specified in the collective agreement and little else. As a result the corresponding pay types in the payroll system are rolled forward without a review of the tax treatment of these allowances and the payments continue to be processed as they have been historically.

We have found that many agreements are silent on whether the allowances are to be treated as taxable or tax-free. Or in the situation where tax-related clauses are included in the agreements, they can be at odds with the legal requirements under the Income Tax Act.

There may be opportunities to consider how to structure these payments in a tax efficient manner and equally, as

Continued on page 2...

the tax legislation develops over time, some allowances that have been treated as non-taxable in the past may need to have PAYE withheld due to changes in the income tax legislation over time.

The two most common types of allowances paid under collective agreements are shift allowances and meal allowances. We have seen a number of cases where meal allowances in particular have been treated as non-taxable for a number of years. However there are specific rules which govern when meal allowances can be treated this way. These apply after an employee has worked two hours of overtime on the day of the payment, which in turn then requires consideration of what shift pattern the employees are working, particularly if the allowance is specified as being paid after a certain number of hours of work. This is not to say that allowances cannot be paid when they do not meet the overtime meal allowance requirements, it is just that they should be taxed if the payment is made before two hours of overtime has been worked.

There could also be opportunities for shift allowances to be paid tax-free to reflect a reimbursement to employees for additional transport costs, depending on the time of day the shifts operate and an absence of adequate public transport for the employees' commute between home and work.

Often a myriad of other allowances are also paid and consideration should also be given to the tax treatment of these as they can include a range of taxable and non-taxable payments.

The tax treatment of allowances can lead to flow-on effects on other income-tested schemes such as child support deductions, student loan deductions or Working for Families Tax Credits. Consequently, it is important to ensure the correct tax treatment is applied when the payroll is processed.

We recommend reviewing the tax treatment of allowances that are paid to employees and if you have any questions in relation to the above or wish to explore the details further, please do not hesitate to contact your usual Deloitte advisor.

Christel Townley
Manager
+64 (9) 306 4455
ctownley@deloitte.co.nz

Implementing changes to transfer pricing documentation arising from BEPS Actions

Anu Chavali
Manager
+64 (9) 303 0702
achavali@deloitte.co.nz

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

By Anu Chavali and Bart de Gouw

Introduction
Following the November 2015 release of the various BEPS Actions, taxpayers are starting to turn to their implementation. Transfer pricing documentation is an area where the requirements are now settled, and implementation work should commence for all taxpayers with cross border related party transactions.

Recap on the changes to transfer pricing documentation
The revised Chapter V of the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations contains new standards for transfer pricing documentation. The guidelines recommend that jurisdictions adopt a three-tiered approach to transfer pricing documentation:

- A master file with global information about a multinational corporation group, including specific information on intangibles and financial activities that is to be made available to all relevant country tax administrations;
- A local file with detailed information on all relevant material intercompany transactions of the particular group entity in each country; and
- A country-by-country (CbC) report of income, earnings, taxes paid, and certain measures of economic activity. This is applicable to companies with revenue in excess of 750 million Euros, or approximately 1,200 million New Zealand Dollars.

The transfer pricing guidelines have also been expanded in the area of how risks are dealt with. Risk allocation is a common issue, and one where taxpayers can act now by reviewing and updating the transfer pricing documentation and the relevant intercompany agreements.

Implications of greater information and transparency
Tax authorities have not had access to master file information in the past except in the cases where it had a direct impact on a local entity's activities. Therefore, an increase in global transparency may result in tax authorities focusing on broader aspects and structure. For example, the additional information could result in inquiries about the development of intangibles by one group member, funding or ownership of the intangibles by another group member, and their exploitation by another group member.

Interestingly, with the increased scrutiny resulting from BEPS, we have already seen a broadening of questions that tax authorities are asking of Multinational Enterprises (MNEs) under review or audit including expanded functional analyses which describe the contributions to value creation by individual entities in a group and questioning of how risks are managed and controlled.

Process for preparing the information
The new guidance will change the documentation process fundamentally and increase the transfer pricing compliance burden for MNEs in New Zealand. Most MNEs will have to gather and provide to the tax authorities substantially more information on their global operations than in previous years. From a New Zealand point of view, the master file and local file requirements have a broader application, while the requirements for the CbC report will apply to only a limited number of MNEs headquartered in New Zealand. Inland Revenue has directly contacted those New Zealand headquartered groups which will be subject to CbC reporting guidelines going forward.

The CbC report and the master file will most likely be prepared and maintained by the MNE's head office as they will have access to all of the required information. It is expected that the new guidance will pose a substantial change for MNEs that do not currently prepare their documentation on a global basis. Going forward, MNEs will have to ensure that their master file, local file, and CbC report all provide consistent information about the company's global operations and transfer pricing policies. For MNEs that took a decentralised approach to transfer pricing documentation, the additional preparation or coordination requirements will likely necessitate the allocation of additional resources.

It should be noted that the updated requirements will require more than just a straightforward rollover of the previous year's transfer pricing documentation. Therefore, each MNE needs to determine the appropriate level of compliance with the revised transfer pricing documentation requirements. A risk based approach will need to be adopted to balance the MNE's tolerance for risk and its available resources.

In particular, tax executives will need to identify the impact of the revised guidance on their processes, measure the impact, prioritise the actions needed, develop an approach to centralise control over transfer pricing, communicate with key stakeholders, and develop restructuring options, if necessary. A prudent action is to meet with your tax advisor to begin the process for the preparation of the master file, the local file, and the CbC report (if applicable) for the most recent year to identify gaps, and to begin to make decisions about what information will be included in each report.

The new requirements for master file and local documentation are relatively prescriptive and will require MNEs to collect a considerable amount of information that has not been collected by either the headquarters or the group members in the past. Furthermore, the new information required will likely necessitate new processes to obtain, collect, validate, analyse, and refresh data.

Master File Requirements
The Master File should contain the following information:

- The MNE's organisational structure
- A description of the MNE's business or businesses
- Intangibles
- Intercompany financial activities
- Financial and tax positions

It should be noted that the updated requirements will require more than just a straightforward rollover of the previous year's transfer pricing documentation

MNEs could present the information for the group as a whole, or by line of business, as long as centralised group functions and transactions between business lines are properly described. In addition, if the master file is prepared by line of business, all product groups will have to be submitted to tax authorities, even if the local entity is part of only one line of business.

The new requirements include the following:

- A supply chain chart for the five largest products and service offerings, plus other products or services amounting to more than 5 percent of an MNE's sales;
- A list and brief description of important service arrangements between members of the MNE group, including a description of the capabilities of the principal locations providing important services and transfer pricing policies for allocating services costs and determining prices to be paid for intragroup services;
- A description of the main geographic markets for the group's products and services that are referred to in the bullet point immediately above;
- A brief written functional analysis describing the principal contributions to value creation by individual entities within the group, such as key functions performed, important risks assumed, and assets used;
- A description of important business restructuring transactions, acquisitions, and divestitures occurring during the fiscal year;
- Important intangibles or groups of intangibles and which entities own them;
- A general description of how the group is financed, including important financing arrangements with unrelated lenders;
- The MNE's annual consolidated financial statement for the fiscal year in question, if otherwise prepared for financial reporting, regulatory, internal management, tax, or other purposes; and
- Advance pricing agreements (APAs) and other tax rulings relating to the allocation of income among countries.

Most companies in New Zealand will not have had to prepare a master file in the past. Therefore, this is expected to be a substantial change for most MNEs in New Zealand in future.

Local File Requirements

The revised guidance requires that the local file contain much of the same information that was traditionally found in transfer pricing documentation related to the local entity, including its controlled transactions, and financial data. While the master file provides a high level overview, the local file should provide more detailed information relating to specific material intercompany transactions.

One of the major concerns for MNEs may be the varying thresholds of what constitutes a material transaction that must be documented. Some countries require that all transactions be documented, whereas other countries are more concerned with major transactions that have a significant impact on the local entity's tax liability. The guidelines recommend that individual country transfer pricing documentation requirements include specific materiality thresholds.

For more information please contact one of our transfer pricing specialists.

Joanne McCrae
Partner
+64 (9) 303 0939
jmccrae@deloitte.co.nz

Veronica Harley
Associate Director
+64 (9) 303 0968
vharley@deloitte.co.nz

Taxpayer wins important residency case against Inland Revenue

By Joanne McCrae and Veronica Harley

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The Court of Appeal has dismissed an appeal by Inland Revenue against a High Court judgment, finding that the taxpayer, Mr Diamond, did not have a permanent place of abode in New Zealand and was therefore not tax resident during the income years ending 31 March 2004 to 31 March 2007. We have reported on the earlier High Court ("**Residency cloud clears**") and Taxation Review Authority ("**Residence storm brewing**") cases. It seems with this Court of Appeal decision, the sun is shining brightly.

In dismissing the Commissioner of Inland Revenue's appeal, the Court of Appeal has also set out clear guidance for how to correctly interpret the residency rules in the Income Tax Act. Essentially the dispute centred on the interpretation and correct approach to determining a person's "permanent place of abode".

A person will be deemed tax resident in New Zealand if they are personally present for 183 days in total in a 12-month period (also referred to as a bright line test). However, a person can also be tax resident in New Zealand if they have a permanent place of abode in New Zealand even if they do not meet the personal presence test. A person will be deemed not tax resident once they are personally absent for a period of 325 days in a 12-month period (provided there is no permanent place of abode).

Background to this decision

Mr Diamond 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. Upon leaving New Zealand in 2003, Mr Diamond returned with reasonable frequency. However it was accepted that in each of the relevant tax years, Mr Diamond was absent from New Zealand for a period or periods exceeding in aggregate 325 days and was not resident under the personal presence bright line test. In the first case, the Taxation Review Authority agreed with the Commissioner's argument that one particular investment property (the "Waikato Esplanade property"), constituted Mr Diamond's permanent place of abode, despite the fact that Mr Diamond had never actually lived in the property. The High court disagreed with the Taxation Review Authority decision and found that the Waikato Esplanade property had never been Mr Diamond's home and therefore could not be a permanent place of abode. It had never been lived in by him and besides owning it, he had no connection to it.

The Court of Appeal has dismissed the Comissioner's two-step process

Key issue on appeal

The key issue on appeal was to determine which of the following approaches to the interpretation of a permanent place of abode is correct.

The Commissioner of Inland Revenue contended that if a taxpayer owns a dwelling in New Zealand, which is not his or her place of abode before leaving New Zealand, but is a place in which he or she could abide on a permanent basis, then that dwelling can then be assessed on the basis of the totality of the circumstances to ascertain its status as the permanent place of abode.

This is referred to as a "two-step process" and is the basis adopted in the Inland Revenue's interpretation statement released in March 2014.

In the alternative, the phrase permanent place of abode means having a home in New Zealand in which the taxpayer usually abides on a permanent basis.

Analysis and key findings

The Court of Appeal started with analysing the legislative history of the relevant sections, and reviewed various government reports to determine parliamentary intention. The Court concludes that this analysis "does not convincingly demonstrate any parliamentary intention to depart from the concept of a "home" in order to achieve a broader tax base". The Court of Appeal goes on to say "It also supports a desire to retain the nuanced and contextual approach captured in the same phrase as used (albeit in a different statutory context) in Australian cases such as *Federal Commissioner of Taxation v Applegate*. This includes the "concept" of home in its broader sense, namely a dwelling being the subject of enduring and clear ties on the part of the taxpayer."

In finding that Mr Diamond did not have a permanent place of abode in New Zealand, the Court of Appeal makes the following important points:

- *Case 55* does not support the Commissioner's approach that the mere availability of a dwelling is sufficient, even if it has not been used by the taxpayer as a dwelling previously. Case 55's authority is limited to cases where the taxpayer who is temporarily absent from a property with which there had been an enduring connection has a clear intention to return to it when the period of absence is finished.

- In examining the plain meaning of the statutory language, the word "permanent" is important. It is the opposite of temporary and means "continuing or designed to continue indefinitely without change". The word "abode" means "habitual residence, house or home or place in which the person stays, remains or dwells". The plain ordinary meaning coupled

with an analysis of legislative history demonstrates the phrase means more than the mere availability of a place to stay and implies actual usage of the property by the taxpayer for residential purposes.

- The scheme of the sections, whereby the bright line test can be overridden by the permanent place of abode test, supports the interpretation of the permanent place of abode in New Zealand as a place where the taxpayer habitually resides from time to time even if the taxpayer spend periods of time overseas. Further, the implications of applying a permanent place of abode test (being that a taxpayer is taxed on their worldwide income) suggests that an interpretation beyond the ordinary and natural meaning of the term ought not to be adopted unless plainly indicated by the statutory language or the context.

- The Court of Appeal has dismissed the Commissioner's two-step approach. The view expressed by the Court of Appeal is quite strong on this stating "the key issue with the Commissioner's preferred interpretation is that, once a dwelling that is merely available is identified extraneous factors establishing a connection or remote ties to New Zealand can then be invoked to artificially assign to that dwelling the status of a permanent place of abode."

The Court of Appeal explains that the correct approach calls for "an integrated fact assessment directed to determining the nature and quality of the use the taxpayer habitually makes of a particular abode". The Court of Appeal then goes on to set out various (non-exhaustive) factors to consider, such as continuity of the taxpayer's presence, the duration of that presence, the durability of the taxpayer with the particular place, the closeness of the taxpayer's connections with the dwelling, and so forth. The Court also makes the point that the evidence of the relevant circumstances of a taxpayer before and after the years in question may be taken into account in this inquiry. Also that the focus is on whether the taxpayer has a permanent place of abode and not members of the taxpayer's family.

This is a welcome and sensible approach to the interpretation of the rules. It is a return to the normality of yesteryear in some respects and will go a long way towards providing taxpayers with more certainty on their tax residency status. It remains to be seen whether the Commissioner of Inland Revenue will seek leave to appeal to the Supreme Court. The Supreme Court will only grant leave if "it is necessary in the interests of justice". The Court of Appeal has gone out of its way to provide clear guidance and it hard to see on what grounds an appeal may be laid. If leave to appeal is not sought or is not granted, then a new Inland Revenue interpretation statement should be forthcoming to incorporate the guidance provided by this case.

If you wish to discuss these issues further, don't hesitate to contact your usual Deloitte tax advisor.

Proposed deduction denial for detailed seismic assessments

On 11 December 2015 Inland Revenue released draft Question We've Been Asked **PUB00223**: Income Tax – Deductibility of Seismic Assessment Costs ("draft QWBA") for public consultation.

The draft QWBA considers whether the capital limitation denies a deduction for expenditure incurred in obtaining a Detailed Seismic Assessment ("DSA") on an "earthquake-prone building". The draft QWBA concludes that the capital limitation applies to deny a deduction for expenditure incurred in obtaining a DSA.

Where a building is identified as being earthquake-prone, a DSA is undertaken to identify specific vulnerabilities and possible ways to mitigate them. The DSA is part of a four step process that seeks to ascertain the nature and scale of seismic strengthening required on certain types of earthquake-prone buildings as a result of city and district councils policies.

Inland Revenue considers that under "*general [tax] principles and from a practical and business point of view, the expenditure on obtaining a DSA is calculated to determine the nature, scale and, possibly, an estimate of the costs of the seismic strengthening required on an earthquake-prone building, so it informs the owner's decision about the best option for the building. It is, therefore, directed to the future preservation or otherwise of an important capital asset, so is capital in nature.*"

The draft QWBA then concludes that expenditure on a DSA is not deductible for tax purposes. Given that most buildings cannot be depreciated, the consequence of DSA expenditure being capital expenditure is that no deduction is available. That is, it is blackhole expenditure.

The draft QWBA will have relevance to landlords, owners of buildings which are used for their own business and possibly some tenants that may undertake their own DSAs. It will also be relevant for large commercial property owners, insurers, councils and the engineering industry.

A DSA is about determining and assessing options in respect of a building (i.e. whether to strengthen, demolish, sell or do nothing) and may be more akin to being feasibility expenditure (under **IS 08/02**) and therefore there is an argument this expenditure should be deductible. The draft QWBA puts forward the position that IS 08/02 relates only to the acquisition or development of a new asset, whereas a DSA relates to an existing asset. This is a subtle distinction and on an initial review of IS 08/02 there are arguments to suggest that the scope of IS 08/02 is wider.

Please contact your usual Deloitte adviser for further information.

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

Patrick McCalman
Partner
+64 (4) 495 3918
pmccalman@deloitte.co.nz

Tax treatment of lump sum settlement payments – draft released

By Emma Marr and Patrick McCalman

Taxpayers who enter into settlement agreements without specifically apportioning payments between capital and revenue amounts may face an uphill battle if they seek to treat receipts as non-taxable, following the release by Inland Revenue of a draft interpretation statement on the tax treatment of lump sum settlement payments.

In PUB00246 *Income Tax – Treatment of Lump Sum Settlement Payments*, the Commissioner concludes that if there is no reasonable and objective basis for apportioning a sum received under a settlement agreement, the entire amount will be treated as revenue and will therefore be taxable.

This position reflects the Commissioner's view that two Australian decisions to the contrary would not be followed in New Zealand. The two cases in question (*McLaurin v FCT*[1] and *Allsop v FCT*[2]), which held that a settlement payment that cannot be apportioned should be treated as capital, are decisions by the highest Australian court, and have stood unchallenged for 50 years. Inland Revenue take the view that *McLaurin* and *Allsop* contradict two decisions from the United Kingdom (*Wales v Tilley*[3] and *Carter v Wadman*[4]), on the tax treatment of settlement payments, that the UK decisions are more consistent with New Zealand case law on apportionment, and accordingly *McLaurin* and *Allsop* are not good law in New Zealand.

We are disappointed with this conclusion. While *McLaurin* and *Allsop* have not been applied in New Zealand, their application was considered in *Sayer v CIR (1999) 19 NZTC*. The High Court, presented with the principles in *McLaurin* and *Allsop*, considered that the principles in those cases could be applicable in the appropriate circumstances. In contrast, we are not aware of (and the Inland Revenue does not cite) any New Zealand authority which favours the United Kingdom over Australian authorities. Further, we do not actually consider that the Australian and United Kingdom authorities are inconsistent with each other. All the cases have a central principle that a settlement payment should be apportioned between its capital and revenue elements where there is a reasonable basis for doing so – it is just that in the United Kingdom cases cited, the Courts were able to find that basis. The United Kingdom cases do not, therefore, in our opinion contradict the principle in *McLaurin* and *Allsop* that a sum that cannot be apportioned should be treated as capital.

In our view the Commissioner's approach is unprincipled and it is unfortunate that important matters of tax law are subject to what appears to be an arbitrary (and revenue-friendly) conclusion by the Commissioner on the precedential value of Australian case law. We are even more persuaded in this view when one considers that the Australian cases are decisions of Australia's highest court and have stood unchallenged for over 50 years. In this regard, as the Commissioner has done elsewhere where there are capital receipts that she wishes to assess (cf *Wattie* and lease inducements) we feel she might be better served to advance law change to address this issue than adopt an interpretation which stands in direct conflict with existing Australian authority and is equally as arbitrary in seeking to fully assess non-apportioned sums as the position she seeks to criticise.

That said, the reality is that taxpayers faced with the receipt of such sums will find little joy in arguing the position on the application of the Australian authority with Inland Revenue. Although some may be willing to test the position through the New Zealand courts, for those who are not we recommend that, where possible, settlement agreements include an apportionment of settlement payments. If it is not practicable to include this formally in the settlement agreement,

1 (1961) 12 ATD 273 (HCA)
2 (1965) 14 ATD 62 (HCA)
3 [1943] 1 All ER 280 (HL)
4 (1946) 28 TC 41 (UKCA)

taxpayers should try to retain contemporaneous supporting documents that will support their claim to apportionment.

This does not resolve the common situation of lump sum payments that reflect a compromise arising from the negotiations of the parties, and that genuinely cannot be apportioned between capital and revenue components. If the draft interpretation statement is finalised in its current form, taxpayers should be prepared for the Commissioner to challenge taxpayers that treat un-apportioned settlement payments as capital receipts.

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

Business Transformation: Inland Revenue needs you!

We wish to remind readers that submissions on two important Business Transformation consultation papers, "***Towards a new Tax Administration Act***" and "***Better administration of PAYE and GST***" are closing soon on 12 February 2016. These papers are actually the third and fourth papers released as part of the project to modernise and overhaul the tax system.

The paper "Towards a new Tax Administration Act" considers how the tax administration system can be improved, specifically the role of the Commissioner of Inland Revenue, information collection, tax secrecy and the role of taxpayers (and their agents).

Key proposals from the other paper, "Better administration of PAYE and GST" are focussed on modernising the PAYE and GST administration and collection rules. For example proposals include:

- Submitting PAYE information and payment to Inland Revenue in real time (i.e. as a business runs their PAYE process); and
- Allowing businesses to submit GST returns directly from their accounting software. Inland Revenue is already undertaking testing and working with MYOB and Xero to trial a new service to file GST returns directly through accounting software to Inland Revenue.

There is no doubt change is coming whether we like it or not. For more information on these proposals, please refer to our **November 2015** Tax Alert where we covered the papers in some detail. It is important that businesses engage in the process and have their say about the changes proposed. The next piece in the business transformation puzzle will be the business taxation discussion document, which will consider provisional tax, use of money interest rules, the provision of information and the taxation of micro and small businesses. This is expected to be released in the next couple of months.

In keeping up with technology, the Government has made it super easy for everyone to comment on these proposals. There is a **website** covering the PAYE and GST proposals with specific sections targeted at

employers, employees and those that deal with GST processes. Anyone is free to post / reply to comments on the various questions posed. There are also a number of technical questions posed covering secondary tax issues, holiday and extra pays. There is a separate **website** for posting comments on the "Towards a new Tax Administration Act" paper.

If you have any comments in relation to these papers, wish to discuss the potential effect on your business or would prefer to make a formal written submission, please contact your usual Deloitte tax advisor.

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@DeloitteNZTax

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

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